THE
GEORGE WASHINGTON
UNDERGRADUATE
LAW REVIEW
# THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

## Foreword

*Abigail H. Shriver*

## Introduction

*Arjang Asadi*

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Foreword

The Pre-Law Student Association is the prominent student organization for students at The George Washington University with an interest in the legal field. The organization aims to enhance the foundation of legal scholarship on campus by providing resources to develop students’ interest in the law, and a means for our community to examine current legal issues. Furthermore, the organization facilitates the opportunity for students to simultaneously develop their legal writing skills while networking with legal professionals, through our professional editing process. Additionally, the organization develops students’ skill set necessary for a future in law, including information regarding the law school admission process, LSAT test prep workshops, legal professional speaker events, and networking events.

*The George Washington Undergraduate Law Review* is a student-managed and published legal journal that analyzes current legal issues across a variety of specialties, including environmental, criminal, immigration, civil, and international law. The *Undergraduate Law Review* offers students the opportunity to explore legal research enrich their writing and critical thinking skills, and make a valuable contribution to legal discussion during their undergraduate studies.

The writings published in the *Undergraduate Law Review* conform to the 20th Edition of The Bluebook legal citation system, while adhering to the academic integrity of The George Washington University. The Pre Law Student Association is proud of the work of these student authors and editors and their efforts in producing this journal.

Sincerely,

Abigail Shriver
President
Introduction

For six years now, the George Washington University’s Undergraduate Law Review has provided an outlet for the Pre-Law Student Association’s brightest minds to take part in a prestigious scholastic endeavor that spans the entire academic year, giving them the ability to cultivate their most advanced piece of collegiate writing and be published as an undergraduate. During GW’s 2015-2016 Student Organization Fair, the ULR drew an unprecedented number of students from a variety of academic backgrounds, freshmen through seniors, all wanting to be a part of one of less than twenty undergraduate law journals in the nation. This publication’s most selective application process to date netted almost 100 qualified applicants, from which only 19 of the most outstanding students were given the opportunity to join the ULR writing team and have their work bound and stored in the Library of Congress, the GW Library, and a consortium loan community. This was no small feat, as the ULR’s rigorous writing process included the approval of legal proposals, two outlining and research stages, three rounds of peer editing, one round of review by legal professionals, and strict adherence to Bluebook legal citation.

Through it all, 12 writers emerged victorious, demonstrating extraordinary levels of intellect, attention to detail, and devotion to their work and this organization. An editing staff that included myself, three editors-in-chief, six student editors, and nine professional editors, worked tirelessly to develop the writers and their articles, and maintain the high standards of the ULR at every stage of the process. I am so proud of the entire ULR staff, and astounded by how far they have come, how much they have grown, and how hard they have worked. Countless hours and sleepless nights spent writing, editing, and fine-tuning—only to do it all over again and again—has produced a work that we can all be proud of. Most importantly, our writers and editors have shattered boundaries, going above and beyond anyone’s expectations in fulfilling the ULR’s tradition of making each volume better than the last.

I am forever grateful for my editors-in-chief—Andrew Costello, Zach Sanders, and Zoe Goldstein—without whom this publication would be nowhere near where it is today. I would like to give special thanks to President Abby Shriver, whose mature governance made publication possible, and Vice-President Aleyson Huesgen, whose extracurricular involvement and amazing article made this year’s ULR that much stronger. Lastly, I would like to say that I am indebted to the Directors that came before me, particularly Max Lesser and Adam Schilt, whose guidance and mentorship shaped my own leadership and ensured the continued success of the ULR. The immense responsibilities entrusted to me this year were the culmination of four years of my involvement with the ULR. I know that I owe a huge part of my collegiate education and love of law to the profound lessons I have learned during my time here, and the inspirational students who have been with me the whole way.

Sincerely,

Arjang Asadi
Law Review Director
ARTICLES
Sanctioning Tax Evasion Vis-À-Vis Offshore Accounts in Switzerland: An Examination of the Swiss Bank Program and The United States’ Failure to Halt Tax Fraud in Swiss Banks

Aleyson J. Huesgen

Introduction

Switzerland, the epicenter of many of the world’s largest and most affluent banks and the global destination for offshore wealth management, has led the global banking community for decades in sophisticated private banking and prudent asset management. Switzerland’s banks currently hold over $2 trillion dollars in disclosed offshore wealth, making the nation the global core for cross-border wealth management.1 Switzerland’s largest 80 banks alone manage over 34,000 disclosed accounts for U.S. taxpaying individuals, at a value totaling more than $48 billion in private U.S. offshore wealth.2 However, with strict banker-client confidentiality laws in place, Switzerland is also a safe haven for U.S. taxpaying individuals who wish to hide their wealth from the Internal Revenue Service (IRS) in order to evade taxes.3 With the assurance of confidentiality in Switzerland, the action of defrauding the United States is virtually effortless. Due to the banker-client confidentiality laws of the country, Switzerland’s financial institutions have fostered both tax noncompliance and the defrauding of the United States since the country opened its banks to U.S. taxpaying individuals. At Credit Suisse AG, one of Switzerland’s most illustrious

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banks, executives have kept over $12 billion in unpaid taxes from undisclosed accounts concealed from the IRS to appease their U.S. clients and defraud the United States.\textsuperscript{4} Swiss banking executives claim they cannot release client or account information to U.S. authorities without facing criminal indictments in their own country, but with the United States losing billions of dollars in evaded taxes annually, it has become clear that the United States must take drastic steps to halt and sanction tax evasion established by wealthy U.S. taxpaying individuals with offshore assets in the world’s most prominent tax haven.\textsuperscript{5}

Marked with the commencement of the Offshore Compliance Initiative, the United States Department of Justice has, in the past four years, taken drastic steps to crack down on tax evasion carried out by U.S. taxpayers with undeclared offshore accounts in banks throughout Switzerland.\textsuperscript{6} However, the Department of Justice has failed to collect the value equaling the amount of evaded taxes held offshore in Switzerland through restitutions and fines, and has failed to indict and prosecute the executives and wealth managers of Swiss banks who do not ensure that their U.S. taxpaying clients annually report their offshore assets. The Department of Justice’s Swiss Bank Program and the IRS’s Foreign Account Tax Compliance Act were implemented to eliminate tax evasion, but both institutions have instead fostered leniency on restitution payments and the collection of the total maximum value of taxes evaded through the use of offshore accounts. Estimates of evaded taxes by noncompliant U.S. taxpayers fall upwards of $100 billion at the United States Department of the Treasury.\textsuperscript{7} The Department of Justice and IRS have additionally failed to sanction U.S. taxpayers - who have evaded taxes through the maintenance of undeclared accounts under sham entities in Switzerland - to the full extent to which these taxpayers should be sanctioned, fined, and prosecuted.\textsuperscript{8} The Department of Justice should instead expect restitution payments totaling 50% of the account’s maximum value for each year the account was not in compliance with the IRS’s reporting standards, in contrast to the current inconsistent lesser amounts based upon the year of the account’s establishment, as pre-established by the IRS and Department of Justice.\textsuperscript{9} In addition to requiring larger

\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{7} Id.
compensating restitution payments, the Department of Justice should indict and prosecute the bankers and executives at Swiss banks who have knowingly serviced and maintained the accounts of noncompliant U.S. taxpayers in Switzerland, as exemplified in the deferred prosecution agreement carried out between Credit Suisse AG and the United States.  

This article will begin by reviewing the history of banking policies in both the United States and Switzerland in order to understand the current issue of offshore tax evasion in the United States carried out in Switzerland, as well as the efficiency and success of current programs in the United States aimed at eliminating tax evasion. To understand why Switzerland has become a haven for offshore wealth, this article will evaluate the institutional factors that render Switzerland the ideal nation for maintaining offshore accounts and conducting undisclosed banking transactions. This article will then evaluate current IRS tax initiatives, which are targeted towards U.S. taxpayers with offshore assets and bank accounts valued at over $10,000, as well as the impact of these tax initiatives’ on the prosecution of UBS AG.  

The successes and failures in eliminating the issue of tax evasion by the Department of Justice in prosecuting noncompliant Swiss banks will be evaluated, as well as the Department of Justice’s actions towards individuals at noncompliant Swiss banks. In addition to examining current tax compliance initiatives in the United States directed towards Switzerland’s banking industry, this article will evaluate the flaws in the Swiss Bank Program. Following the evaluation of the Program, as exemplified in the non-prosecution agreements with Swiss banks that have entered into the Program, the clear conclusion is that the Department of Justice has failed to solve the problems presented by the maintenance of undeclared offshore accounts in Switzerland. Instead, the Swiss Bank Program should be altered so that lump sum calculations – as will be outlined and discussed later - are replaced by the total maximum value of the taxes evaded by U.S. clients in Switzerland. Furthermore, the Swiss Bank Act should be suspended once banks enter into non-prosecution agreements under the Swiss Bank Program, thereby allowing the Department of Justice to fully prosecute the U.S. taxpaying clients of Swiss banks not in compliance with the tax codes enforced by the IRS.

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10 Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns, U.S. DEPT OF JUST. OFF. OF PUB. AFF., May 19, 2014.
11 INTERNAL REVENUE SERV., REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FBAR) (Rev. Dec. 11, 2015).
I. Appeal of Switzerland’s Banks and the Impact of United States v. UBS AG on Offshore Banking and Tax Evasion

A. The Swiss Bank Act of 1934 and Mandated Swiss Banking Secrecy Retained During Non-Prosecution Agreements with the United States

The Swiss Bank Act introduced banker-client confidentiality in Switzerland and maintains that the release of names and basic information regarding account holders, in addition to the total value and activities therein of each account being held for the foreign client, is a criminal offense for both Swiss banks and independent wealth managers in Switzerland.12 The secrecy maintained by banks in Switzerland, established in the Swiss Bank Act of 1934, has long enticed wealthy foreign individuals to maintain their offshore assets in Switzerland because such individuals can conduct crimes vis-à-vis with ease by not releasing their banking activities and information to the IRS.13 Swiss banking policies are more enticing than the banking policies of other nations because Switzerland does not tax foreign-owned accounts, apart from foreign accounts being held by citizens of European Union nations.14 And, while U.S. citizens are required by law to report their offshore assets to the IRS, Swiss banks have not historically required that their U.S. taxpaying clients comply with United States tax law.15

Mandated confidentiality has made sanctioning tax evasion in undisclosed offshore accounts held by U.S. taxpaying clients extremely difficult for the Department of Justice (as an agent of the IRS) because Swiss banks are required by Swiss law to uphold their anonymity policies, and thereby take full responsibility for the actions of their clients. While Swiss banks can be sanctioned under both Swiss and United States law in the event that illegal banking activities - such as tax fraud or money laundering - are discovered, the sanctioning of a Swiss bank in the United States is undermined by the Swiss government’s authority to prosecute or sanction any Swiss bank or wealth manager, should they release any client information to either a domestic or foreign government or business.16

Swiss banks are liable to be sanctioned by the Swiss government if the banks release client information, and are likely to face fines of up to 250,000 Swiss francs and possible jail

12 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
13 Id.
14 PETER THORNE, SWISS BANKING SECRECY AND TAXATION 3-21 (HELVEA SA, 2009).
15 Id.
16 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
time for those with prior convictions. Therefore, Swiss banks have an incentive to withhold information regarding noncompliant U.S. taxpaying clients - thereby knowingly facilitating tax evasion - regardless of the fact that such actions warrant felony charges in the United States. Consequential to the lure of Switzerland’s banking policies, the assurance of confidentiality at Switzerland banks has led the nation to become one of Europe’s leading havens for global wealth and offshore banking. According to the Boston Consulting Group’s Global Wealth Market-Sizing Database in 2014, Switzerland possessed the largest amount of reported offshore wealth worldwide, totaling $2.7 trillion, or 25%, of total global offshore wealth. This estimate is conservative to that of other tax specialists and global wealth analysts, such as the Swiss Bankers’ Association, which reported in September 2015 that Switzerland holds approximately $6.5 trillion in global assets under management.

One such example of the complexity of abiding by two nations’ laws while sanctioning offshore clients is highlighted in United States v. Schroder & Co. Bank, wherein Schroder & Co. Bank AG (along with its wholly owned subsidiaries, Schroder Trust AG and Schroder Cayman Bank & Trust Company Ltd.) was unable to release any client information under the Swiss Bank Act, despite Schroder & Co. Bank AG’s entrance into a non-prosecution agreement with the Department of Justice under the Swiss Bank Program. Under the Swiss Bank Program, non-prosecution agreements are all conducted in the same manner for the Category 2 banks entering the program. Non-prosecution agreements provide eligible banks under the Swiss Bank Program with the incentive to admit to and resolve their criminal actions without facing an indictment or trial in the United States.

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17 Bankengesetz [BankG] [Banking Act] Nov. 8, 1934, SR 952.0, art. 47, para. 2 (Switz.).
22 Though this will be further discussed in subsequent sections, Category 2 banks are candidate banks eligible for non-prosecution agreements under the Swiss Bank Program. Such banks are not currently under investigation by the Department of Justice or the IRS, but have reason to believe that the bank or certain wealth managers at such banks have committed tax-related felony crimes.
Program of the complexities surrounding the sanctioning of felony tax charges, even when under the protection of non-prosecution agreement.\textsuperscript{24} While Schroder & Co. Bank AG paid a substantial sum of money in restitution and various other fees, the majority of the total value of evaded taxes by U.S. taxpaying clients was never retrieved by the Department of Justice for the Department of the Treasury and the IRS because of the flaws in the lump-sum calculation method for repayments, as established under the Swiss Bank Program.\textsuperscript{25} The greatest flaw in the use of lump-sum calculations for the retrieval of evaded tax dollars is the fact that the Department of Justice, representing the IRS, is not receiving the total value of annually evaded taxes.\textsuperscript{26} Moreover, under this method of repayment, the IRS is receiving money from Swiss banks instead of individual taxpayers, who are ultimately responsible for tax evasion and thus are liable to pay the restitution for their illegal banking activities.\textsuperscript{27} Further highlighting the Department of Justice’s failure to halt tax evasion, the Schroder & Co. Bank AG’s executives and wealth managers were not indicted as a result of the non-prosecution agreement, even though there was no claim of protection from indictment for Swiss bankers under the provisions of the Swiss Bank Program or Schroder & Co. Bank AG’s non-prosecution agreement.\textsuperscript{28} Failing to indict these executives is an extension of the Department of Justice’s failure to eliminate one of offshore tax evasions’ leading perpetuators, bankers and wealth managers who fail oblige their clients’ compliance with the tax laws of the United States. As has become practice with the non-prosecution agreements under the Swiss Bank Program, U.S. taxpaying clients at Schroder & Co. Bank AG – as well as other Swiss banks - who were not in compliance with reporting requirements of the United States tax law have remained anonymous because the Department of Justice requires account information, but not information pertaining to the account holder.\textsuperscript{29} The Department of Justice’s failure to indict both perpetuators of the issue of tax evasion has proven to be a major flaw in the retrieval of information under the Swiss Bank Program, furthering the conflicting standards set forth by the Program and the Swiss Bank Act.

\textsuperscript{24} U.S. DEP’T OF JUST., SWISS BANK PROGRAM (2013, updated Jan. 27, 2016).
\textsuperscript{25} U.S. DEP’T OF JUST. TAX DIVISION, EXHIBIT A TO SCHRODER & CO. BANK AG NON-PROSECUTION AGREEMENT STATEMENT OF FACTS, supra note 21, at 5.
\textsuperscript{27} Id.
\textsuperscript{28} U.S. DEP’T OF JUST. TAX DIVISION, EXHIBIT A TO SCHRODER & CO. BANK AG NON-PROSECUTION AGREEMENT STATEMENT OF FACTS, supra note 21.
\textsuperscript{29} SWISS BANK PROGRAM, supra note 24.
The Swiss Bank Act thus maintains its status as law during the conduction of non-prosecution agreements and deferred prosecution agreements between the Department of Justice and Swiss Banks under the Swiss Bank Program, even under the jurisdiction of the United States. In essence, although the Department of Justice expects the release of client information in order to successfully indict and prosecute tax evaders, the Department of Justice has been - and will continue to be - unsuccessful because Swiss confidentiality has continued to take precedence over the release of client information. In accordance with the Swiss Bank Program’s Category 2 Non-Prosecution Agreement policy, eligible Swiss banks must subject themselves to investigation regarding their banking practice; but, the Swiss Bank Act maintains its status as law, even in the jurisdiction of the United States, thereby making it nearly impossible to fully investigate or retrieve client information that is vital to the investigation itself.30 The Department of Justice through the Swiss Bank Program does not benefit from this agreement, as Swiss banks face sanctions following the conclusion of the non-prosecution agreement, but the U.S. taxpayers evading taxes remain anonymous and therefore unprosecuted.31 This program, then, is effective in collecting restitution payments by Swiss banks on the behalf of their noncompliant U.S. taxpaying clients.32 However, the program is ineffective in eliminating a perpetrator of the offshore tax evasion dilemma in the United States because the U.S. taxpayers maintaining offshore non-W-9 (undisclosed) accounts remain unnamed and capable of deferring their undisclosed accounts to other Swiss banks that have not entered into a non-prosecution agreement under the Swiss Bank Program.33 The Swiss Bank Program calls for all relevant account information, including the name the account was held under and its maximum value during each year the account was undisclosed, without explicitly calling for the release of the responsible account holder’s name.34

While Swiss banking laws mandate that banks conduct legal banking activities within the country, these laws are extremely flawed in that they provide a source of protection for Swiss banks, even after the banks’ entrance into the Swiss Bank Program. This source of protection exists because Swiss banks cannot provide information regarding both their

30 U.S. DEP’T OF JUST., PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS (Aug. 29, 2013).
31 Id.
32 Id.
33 Id.
34 Id.
domestic and their international clients to either the Swiss or United States’ governments, while being expected to conduct legal banking transactions that ensure covertness. Essentially, Swiss banks are compelled only by probity to conduct legal banking activities and can opt to comply with either Swiss or U.S. law. However, Swiss banks cannot concurrently comply with the two governments’ laws due to the conflicting expectations of banks set by the Swiss and U.S. governments regarding the maintenance of banking secrecy and the release of information regarding noncompliant U.S. taxpayers. Therefore, the Department of Justice is entering, per se, into a fruitless agreement on the grounds that the noncompliant U.S. taxpaying clients are remaining unsanctioned and anonymous, thereby making feasible the continuation of tax evasion at any bank that will maintain undisclosed accounts for the noncompliant U.S. taxpayers.

B. Foreign Account Tax Compliance Act and IRS Tax Reporting Requirements and Initiatives

The Foreign Account Tax Compliance Act (FATCA) was enacted in March 2010 after the IRS first proposed the Act in order to target U.S. taxpayers maintaining offshore accounts that are not compliant in filing annual W-9 tax forms. FATCA focuses on U.S. taxpayers’ reporting of their foreign financial accounts and offshore assets, as well as reporting by foreign financial institutions, such as Swiss banks. However, while FATCA expects foreign financial institutions to comply with FATCA policies by releasing information regarding the existence of undisclosed offshore accounts to U.S. authorities, certain foreign institutions, such as Swiss banks and private wealth managers, cannot comply with both FATCA policies and the Swiss Bank Act. FATCA has targeted noncompliant U.S. taxpayers worldwide, and while the Swiss Bank Act maintains its status as law, FATCA has nonetheless played a large role - both in Switzerland and globally - in the Department of Justice’s endeavors to identify and sanction banks that manage undeclared U.S. taxpayer-owned accounts. The enactment and implementation of FATCA by the Department of

35 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
36 PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS, supra note 30.
37 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
39 Id.
40 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
Sanctioning Tax Evasion Vis-À-Vis Offshore Accounts in Switzerland

Justice has sent a global-wide message to offshore wealth managers that the United States is taking tax evasion seriously by mandating the compliance by U.S. taxpayers with offshore accounts through requiring such individuals to file “Form 8938.”

As a requirement of FATCA, the IRS’s “Form 8938” must be attached to the income tax return of any U.S. taxpayer who holds foreign financial accounts or offshore assets. More specifically, the maximum value of the specific individual’s foreign financial assets must be declared in accordance with the specified applicable reporting thresholds set forth by the IRS on “Form 8938.” FATCA defines a United States taxpayer as being a citizen, resident alien, or nonresident alien that “makes an election to be treated as a resident alien,” in addition to nonresident aliens that declare themselves to be residents of American Samoa or Puerto Rico. Reporting thresholds range from a minimum total asset value of $75,000 to upwards of $600,000, depending on the marriage and residency status of the individual. Furthermore, separate from the FATCA and “Form 8938” reporting requirements, the IRS requires that all U.S. taxpayers report any foreign financial accounts if the value of the account exceeds $10,000 during any time of the tax year on the individual’s annual “W-9” form.

In Switzerland, due to the mandated secrecy requirements for bankers and wealth managers, the preeminent manner in which U.S. taxpayers have managed to meet the reporting threshold under Form 8938 but simultaneously evade taxes is by maintaining accounts abroad classified as “non-W-9 compliant” [undisclosed]. The W-9, the IRS’s most common tax-filing form, is formally known as the “Request for Taxpayer Identification Number and Certification.” “W-9” requires that any person paying taxes to the United States report “income, real estate transactions, paid mortgage interest, acquisition or abandonment of secured property, cancellation of debt, or contributions made to an IRA.” Non-W-9 (or ‘undisclosed’) accounts include accounts maintained in a foreign nation.

43 Id.
44 Id.
45 Id.
46 Id.
48 Id.
49 INTERNAL REVENUE SERV., FORM W-9, REQUEST FOR TAXPAYER IDENTIFICATION NUMBER (TIN) AND CERTIFICATION (Rev. Dec. 2014).
(commonly referred to as ‘offshore accounts’), such as Switzerland, that are owned by individuals who do not annually report the total value of their assets held within the offshore account. While it is illegal for Swiss banks to manage the accounts of U.S. individuals who do not annually report their offshore assets on the W-9 form (as written in Switzerland’s banking laws), the mandated secrecy of Swiss banks makes maintaining undisclosed accounts feasible whilst protecting both the bank managers and the U.S. taxpaying clients not in compliance with the United States’ tax laws. The illegality for Swiss bankers to service undisclosed accounts owned by U.S. clients comes as a result of Switzerland’s adoption of the Organization for Economic Co-operation and Development’s [OECD] standards regarding banking activities and information in 2014. Following international pressure by both the United States and other European nations, Switzerland became the 51st country to sign the Multilateral Competent Authority Agreement, which calls for the automatic exchange of requested financial information. The OECD’s standards on information sharing related to international banking state that releasing information regarding specific taxpayers to a requesting country is mandated, as specifically outlined in Article 26 ‘Exchange of Information’. Through Switzerland’s adopting the OECD standards while failing to repeal or amend the Swiss Bank Act (two policies with conflicting sets of standards regarding confidentiality), Switzerland is placing conflicting sets of expectations on the nation’s wealth managers and bankers, who are now expected to comply with both sets of expectations concurrently. Until the Swiss government explicitly defines its expectations for Swiss bankers and wealth managers, the Swiss government is the enabler of bankers’ noncompliance with U.S. tax reporting standards. However, upon amending or repealing the Swiss Bank Act, the fault for obliging their U.S. clients’ tax evasion will fall solely upon the bankers and wealth managers in the country that knowingly service undisclosed accounts.

51 Offshore Income and Filing Information for Taxpayers with Offshore Accounts, INTERNAL REVENUE SERV., June 2014.
52 BANKENGESETZ [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
54 Id.
55 THORNE, supra note 14.
C. Offshore Compliance Initiative’s Impact of United States v. UBS AG and Tax Evasion in Offshore Swiss Bank Accounts

The Offshore Compliance Initiative was established by the Department of Justice’s Tax Division - in coordination with the United States’ Attorneys’ offices - to combat the increasing sophistication of offshore banking and tax noncompliance carried out through internet wire transfers.\textsuperscript{56} The Offshore Compliance Initiative began in 2008 with the investigation of UBS AG, a world-renowned Swiss financial service company and Switzerland’s largest financial institution, which led to a deferred prosecution agreement in February of 2009.\textsuperscript{57} The Offshore Compliance Initiative and \textit{United States v. UBS AG} were two of the largest precursors to the establishment of the Swiss Bank Program, which targets Swiss banks that oblige the tax noncompliance of their U.S. taxpaying clients. Discussing the failures of the Offshore Compliance Initiative and \textit{UBS AG} that led to the separate establishment of the Swiss Bank Program, Mark E. Matthews, a member of Caplin & Drysdale’s Tax Controversies and Litigations practices and former IRS Deputy Commissioner, noted that the initiative “became a much more labor-intensive, painstaking job [than was initially expected]” because of the large number of cases (estimated to be 500) of offshore tax noncompliance discovered following the implementation of the Offshore Compliance Initiative.\textsuperscript{58} By complying with an agreement that consisted of restitution payments, an admission of guilt, and the release of client information and account data, UBS AG was able to defer prosecution in the United States.\textsuperscript{59} While the United States received many benefits as the result of UBS AG’s entrance into a deferred-prosecution agreement, UBS AG provided information on over 4,500 U.S.-owned accounts, leaving the IRS to the pain-staking and time-consuming task of sorting through legalities and tax-filing history associated with each account.\textsuperscript{60}

In accordance with the sanctioning policies for individuals outlined in the Offshore Compliance Initiative, the undisclosed account’s owner is fined a percentage of the account’s

\textsuperscript{56} \textit{Offshore Compliance Initiative}, supra note 6.

\textsuperscript{57} \textit{Id}.


\textsuperscript{59} David Voreacos, \textit{UBS Tax-Fraud Charge is Dropped by U.S. Prosecutors}, \textit{BLOOMBERG BUS.}, Oct. 22, 2010.

\textsuperscript{60} \textit{Id}.
maximum value during each year that account was undisclosed. This process proved to be complex and seemingly unfair between 2008 and 2010 in the United States due to the 2008 Financial Crisis, in which the overall market value decreased by more than 30%. Many of these accounts had extremely high-value assets, but due to investments in the U.S. market held in Swiss banks through equities and bonds, much of that money disappeared overnight. EuroMoney figures show that globally, offshore wealth dropped by $700 billion during the period of the stock market crash of 2008. And, as a result, the sanctions of these accounts essentially had inflated penalties for money that had been lost because many of the accounts’ values dropped by thousands of dollars the day of the crash, which became a pain-staking and time-consuming task for both lawyers and U.S. tax specialists to define and solve.

UBS AG, as part of the deferred prosecution agreement made with the Department of Justice, pled guilty to charges of “conspiring to defraud the United States by impeding the IRS,” which UBS AG knowingly did by concealing the documentation of account activity in undisclosed accounts and by maintaining accounts under sham entities. UBS AG subsequently agreed to comply with the Department of Justice’s mandate that UBS AG terminate all banking services to their U.S. clients with undisclosed accounts and by maintaining their disinclination to comply with U.S. tax-filing policies. Additionally, UBS AG agreed to pay $780 million in fines and restitution payments to the IRS, in addition to the release of account information of several thousand of their tax-evading clients from the United States to the IRS. The retrieval of account and client information was made possible by the Department of Justice Tax Division’s issuance of a “John Doe summons,” which called for the release of information regarding all UBS AG clients that had been transferred discretely into UBS AG from other Swiss financial institutions. This summons ensured that

64 Id.
65 OFFSHORE COMPLIANCE INITIATIVE, supra note 6.
66 Deferred Prosecution Agreement at 4, United States v. UBS AG, No. 09-60033 (S.D. Fla. Feb 16, 2009).
67 Id.
69 Wegelin’s indictment and the global impact of the verdict of this case will be further discussed below, in Section II, Subsection A.
the IRS would be able to retrieve information regarding noncompliant U.S. taxpayers in order to “break through international bank secrecy and protect [the] nation’s taxpayers,” thereby “allowing the United States to determine the identity of U.S. taxpayers who may hold accounts [in Switzerland]… to evade federal income taxes.”

In accordance with the Swiss Bank Act’s mandated secrecy - and thus the difficulty it lends to Swiss banks that must decide set of confidentiality and banking policies it wishes to follow - it is at every individual bank’s discretion as to whether or not they wish to comply with Swiss law (by not releasing client information) or with United States law (by releasing client information). The dispersal of noncompliant U.S. taxpayers with offshore Swiss accounts amplified the probity issue for UBS AG’s wealth managers, who were confronted with the option of covertly transferring their clients’ undisclosed accounts elsewhere within Switzerland. However, in appeasing their clients’ wishes to maintain undisclosed accounts, other Swiss banks were consequentially put in the same situation in regards to whether or not they should maintain such accounts.

Under the more aggressive actions taken by the IRS through the Department of Justice’s Tax Division, the United States has been overwhelmingly successfully at retrieving client information through the IRS’s Offshore Voluntary Disclosure Program, which has led to the voluntary disclosure of over 38,000 undisclosed foreign accounts and to “billions of dollars in back taxes, interest and penalties” being restored to the Department of the Treasury. Established in 2012, the Offshore Voluntary Disclosure Program offers taxpayers with “undisclosed income from offshore accounts another opportunity to get current with their tax returns” by providing these noncompliant taxpayers with the opportunity for a reduced penalty. These foreign account disclosures, in conjunction with the Department of Justice’s endeavors to identify and halt tax evasion carried out by U.S. taxpayers with Swiss accounts, led Switzerland to adopt the OECD standards in tax matters, which covers the exchange of information, thereby increasing the threat of increased taxes on Swiss accounts. And, while the Offshore Voluntary Disclosure Program helped

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70 Court Authorizes IRS to Seek Records from UBS Relating to U.S. Taxpayers with Swiss Bank Accounts, supra note 47.
71 OFFSHORE COMPLIANCE INITIATIVE, supra note 6.
72 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).
73 Id.
75 THORNE, supra note 14.
hundreds of individuals to avoid harsher tax-related penalties, the program has indirectly harmed Switzerland’s financial industry by providing foreign clients with less incentive to hold assets offshore (because these individuals must pay taxes to the U.S. regardless of where their account is now held). Helvea SA, a subsidiary of Helvea-Baader Bank Group located in Geneva, Switzerland, estimates that with 25% of private-banking assets in Switzerland being undeclared to the IRS and various other foreign authorities as of 2009 being combined with Switzerland’s recent adoption of OECD’s standards, the combination of undeclared assets and new economic standards will lead to a 10% loss of money for Credit Suisse and UBS, while as much as 20% in losses in other Swiss banks.

Since the beginning of the Offshore Compliance Initiative, which has been marked with the investigation that led to UBS AG’s deferred prosecution agreement, UBS AG has become known as the prototype of the consequences for noncompliant Swiss bank because of the profound forfeitures and restitution UBS AG was required to make. Because UBS AG did not enter under the more lenient expectations set by the Department of Justice under the Swiss Bank Program (because the Program did not yet exist), UBS AG remains an unprecedented case the Department of Justice’s endeavor to eliminate the issue of offshore tax evasion because UBS AG agreed to provide the United States with data on over 4,400 accounts upon the closure of the deferred prosecution agreement. UBS AG breached the Swiss Bank Act by releasing client information directly to the United States, marking an unprecedented information release by a Swiss bank to the United States.

UBS AG’s entrance into a deferred prosecution agreement with the Department of Justice also led to the indictment, arrest, and trial of former UBS AG wealth management executive, Raoul Weil, in October of 2013. This dealt a monumental blow to UBS AG and the Swiss banking community, as the Department of Justice’s action in indicting a high profile Swiss banking executive through the issuance of an international arrest warrant was unprecedented. Reuters’ account of Weil’s acquittal confirms this statement, validating that Weil is “the highest-ranking Swiss banker to stand trial in the United States.”

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76 Id.
77 Id.
78 Id.
79 Don’t Ask, Won’t Tell, supra note 18.
80 Indictment, United States v. Raoul Weil, No. 08-60322 (S.D. Fla. Nov. 6, 2008).
Weil was later acquitted of all charges, the message sent by the Department of Justice to the Swiss banking community was profound because it proved that the Department of Justice had no limits to retrieving unpaid taxes on behalf of the Department of the Treasury, as seen in its actions to indict both the bank and one of its most esteemed executives.\textsuperscript{83}

The prosecution of UBS AG led to the United States’ creation of the Exit Program, under which UBS AG exited cross-border business with U.S.–taxpaying clients who would not comply with the United States’ tax laws.\textsuperscript{84} As a result of this decision, UBS AG would only continue to provide banking and securities services to individual U.S. taxpaying clients with compliant private accounts through the banks’ Swiss subsidiaries that were legally permitted to conduct business negotiations with the United States at the time that the Exit Program was initiated.\textsuperscript{85} But, while the Department of Justice had seemingly won its fight against tax evasion in Switzerland in that the trial concluded with the cease of business between UBS AG and noncompliant U.S. taxpaying clients, the long-term result consisted of more complications - and thus failures - than achievements. The Exit Program actually led to an increase in tax evasion by U.S. taxpaying clients with offshore Swiss clients by dispersing - rather than eliminating - the issue at hand (noncompliant U.S. taxpayers with accounts at Swiss banks).

The perpetuation of tax evasion and the increasing tax evasion by U.S. clients in Switzerland following the initiation of the Exit Program and UBS AG led to the creation of the Swiss Bank Program.\textsuperscript{86} A majority of UBS AG’s noncompliant U.S. taxpaying clients were not prosecuted on charges of tax evasion or conspiracy to defraud the United States, and thus the Exit Program and outcome of United States v. UBS AG merely increased the dispersion of noncompliant U.S. taxpayers throughout Switzerland into other Swiss banks that would continue to open and manage undisclosed accounts.\textsuperscript{87} One such bank affected by the failures of the Exit Program was Schroder & Co., who later entered into its own non-prosecution agreement under the Swiss Bank Program.\textsuperscript{88} As transcribed in Schroder & Co.’s non-prosecution agreement, a large number of undisclosed accounts were transferred from

\textsuperscript{83}Id.
\textsuperscript{84}Deferred Prosecution Agreement, United States v. UBS AG, No. 09-60033 (S.D. Fla. Feb. 16, 2009).
\textsuperscript{85}Id.
\textsuperscript{86}U.S. DEPT OF JUST. TAX DIVISION, EXHIBIT A TO SCHRODER & CO. BANK AG NON-PROSECUTION AGREEMENT STATEMENT OF FACTS, \textit{supra} note 21, at 3.
\textsuperscript{87}Deferred Prosecution Agreement, United States v. UBS AG, No. 09-60033 (S.D. Fla. Feb. 16, 2009).
\textsuperscript{88}U.S. DEPT OF JUST. TAX DIVISION, EXHIBIT A TO SCHRODER & CO. BANK AG NON-PROSECUTION AGREEMENT STATEMENT OF FACTS, \textit{supra} note 21.
UBS AG to Schroder & Co. and its wholly owned subsidiaries, Schroder Trust AG and Schroder Cayman Bank & Trust Company Ltd., at the time of the Exit Program.\(^89\) Schroder & Co. was not the only Swiss bank directly affected by the dispersal of undisclosed accounts to Swiss banks after UBS AG exited the industry of servicing the accounts of U.S. taxpaying clients.\(^90\) Per contra, nearly every large bank in Switzerland (approximately 285 of Switzerland’s 300) that maintained undisclosed accounts at the time received a massive influx of noncompliant U.S. taxpaying clients, which further dispersed the issue of U.S. tax noncompliance throughout Switzerland.\(^91\)

II. The Swiss Bank Program

A. United States v. Wegelin & Co.’s Impact on Offshore Accounts Owned by U.S. Taxpayers

After the effects of the implementation of the Offshore Compliance Initiative and UBS AG on Swiss banks assisting noncompliant U.S.—taxpaying clients, the United States’ indictment of Wegelin & Co., Switzerland’s oldest private bank, led to equally profound implications for Switzerland’s banking industry. In February 2012, Wegelin & Co. was indicted on charges of “conspiring with U.S. taxpayers… to hide more than $1.2 billion in secret accounts,” marking the first tax-related overseas charge by the United States.\(^92\) Notably, however, a Senate report from a February 2014 hearing considers this number to be a conservative estimate, writing that this was the minimum total value of accounts being hidden at Wegelin & Co., and that “at least $1.2 billion [undeclared] assets” being concealed by the bank, alluding to the notion that $1.2 billion was merely the minimum value being held illegally at Wegelin & Co.\(^93\) Additionally, three of Wegelin & Co.’s client advisers—Michael Berlinka, Urs Frei, and Roger Keller—were charged with superseding indictment on previous charges of the same conspiracy.\(^94\) All three men began opening undeclared accounts upon the investigation into UBS AG by the United States and the dispersal of UBS AG’s noncompliant U.S. taxpaying clients.\(^95\) Later, in January 2013, Wegelin & Co. became the

\(^{89}\) Id.
\(^{91}\) Id.
\(^{93}\) U.S. S. PERM. SUBCMM. ON INVESTIGATIONS, OFFSHORE TAX EVASION: THE EFFORT TO COLLECT UNPAID TAXES ON BILLIONS IN HIDDEN OFFSHORE ACCOUNTS, at 155 (Feb. 26, 2014).
\(^{94}\) Swiss Bank Indicted on U.S. Tax Charges, supra note 92.
\(^{95}\) Id.
first foreign bank to plead guilty in the United States to felony tax charges, including the conspiracy against and the defrauding of the United States, both actions that are in direct violation of Internal Revenue Code. The guilty plea and closure of Wegelin & Co. had a lasting impact on the Swiss banking community.

As part of Wegelin & Co.’s guilty plea, the bank was required to pay $20 million in restitution payments to the IRS, $22 million in fines to the United States, and a civil forfeiture of almost $16 million, which represented the gross fees earned by Wegelin & Co. from undeclared accounts held by the bank’s noncompliant U.S.–taxpaying clients. Wegelin & Co. was also required to pay an additional forfeiture of over $16 million, representing Wegelin & Co.’s correspondent banks, which led to a total recovery amount of nearly $74 million. Yet, the primary reason that Wegelin & Co. has had such an international impact was not the heavy restitution the bank was required to pay, but rather the long-term reputational damage that Wegelin & Co. incurred. After pleading guilty, Wegelin & Co. found itself unable to “survive the reputational sting of the money laundering criminal forfeiture,” and as a result, Wegelin & Co. was forced to close after a historic 272 years of banking, thus forfeiting its title of “Switzerland’s oldest private bank.”

The massive fines and internationally-publicized scandal that caused Switzerland’s most historic bank to close sent a powerful aftershock throughout the international banking community after the initial shockwave of UBS AG. In both Wegelin & Co. and UBS AG, the United States had sent a resonating statement to Swiss banks aiding U.S. tax evaders that the IRS and the Department of Justice were taking austere measures to both ensure tax compliance and accrue the maximum value of unpaid taxes being held in Switzerland. Both UBS AG and Wegelin & Co. had paid heavily for their role in tax evasion in the United States, but the long-term effects that Wegelin & Co. suffered leading to its permanent closure were far more jolting. It is clear that the Wegelin & Co. outcome had largely damaged the international prestige and status of the Swiss banking community as a secretive banking

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96 **Offshore Compliance Initiative**, supra note 6.
99 Id.
In the United States as well, the profound impact of the result of *Wegelin & Co.* has not gone unnoticed. Robert Fink, an attorney specializing in taxes at Kostelanetz & Fink LLP and an adjunct professor of law at New York University School of Law’s Graduate Tax Program, pointed out that “[*Wegelin & Co.*] has an important symbolic significance in that you have a bank that has no branches in the United States, but the United States government was able to reach them and get them to plead guilty. It puts other banks on notice as to the long arm of the U.S. law.” Robert Fink’s statement is profound in that it is seemingly giving an ultimatum to foreign banks, but the United States has failed to display the ferocity and vigor Fink alludes to by failing to have halted offshore tax fraud in Switzerland since the beginning of the Offshore Compliance Initiative and UBS AG. While United States initiated a program to directly target offshore tax evasion in Switzerland, the United States has not yet been able to reach all of the clients or the bankers conducting tax fraud and evasion in Switzerland. Under the Swiss Bank Program, the Department of Justice has put forth an effort to support Fink’s statement with action, but the Department’s program has failed to live up to Fink’s bold assessment.

B. Swiss Bank Program

The unprecedented steps towards eliminating the malignancy of offshore tax evasion UBS AG, in conjunction with the monumental outcome of *Wegelin & Co.*, provided the platform for the Swiss Bank Program. On August 13, 2013, the United States and Switzerland issued a joint statement regarding tax evasion investigations in order to target offshore tax noncompliance in Switzerland by U.S. taxpaying clients. The statement was made with the intention of ensuring that Swiss banks conduct legal banking activities in Switzerland, as well as aiding the IRS and United States Department of the Treasury in the retrieval of the value of unpaid taxes held offshore in undeclared Swiss accounts. This joint statement subsequently became internationally renowned and transcribed as the Swiss Bank Program, a program within the Tax Division of the Department of Justice. Under the

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104 Id.
Swiss Bank Program, approximately 285 of Switzerland’s 300 banks are able to avoid prosecution and felony charges by divulging information to U.S. officials regarding American clients and their banking advisers and wealth managers. The Swiss Bank Program is significant in that it provides Swiss banks the opportunity to defer the potential of felony tax-related charges. However, the Swiss Bank Program’s largest failure is its ability to establish its expectations of Swiss banks regarding the divulgence of client information whilst the Swiss Bank Act, and thus client-banker confidentiality, remains law.

The Swiss Bank Program categorized Swiss banks into one of four classifications, based on the self-assumed status of each bank’s compliance with U.S. tax laws. Category 1 banks are not eligible for the Swiss Bank Program because the IRS classifies such banks as already being under investigation for felonies and other tax and banking activities. While the Swiss Bank Program has identified 285 Swiss banks that are eligible to either enter into a non-prosecution agreement or request a non-target letter, only Category 2 banks are eligible to enter into non-prosecution agreements, as offered under the Swiss Bank Program.

Category 2 banks are defined as not currently under investigation, but which they have reason to believe that they may have committed forms of tax fraud, conspiracy to defraud the United States, or tax evasion. Category 2 banks that voluntarily enter into the Program are required to make a full disclosure of their cross-border activities pertaining to U.S. taxpaying clients; provide detailed information for specific activity in accounts held by U.S. taxpayers; close the accounts of all U.S. taxpaying clients who fail to comply with the United States’ tax-reporting obligations; and, be willing and able to pay all appropriate penalties upon the conclusion of the investigation of the bank. If the Category 2 bank complies with all of these expectations, it becomes eligible for a non-prosecution agreement at the discretion of the Department of Justice following the completion of the investigation and the payment of all penalties and restitution. Upon the completion of the non-prosecution agreement, the bank will be able to continue its banking activities with foreign banks.

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105 Swiss Finisbede, supra note 90.
106 Swiss Bank Program, supra note 24.
107 US Tax Program for Swiss Banks, supra note 9.
108 Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, supra note 29.
109 Swiss Finisbede, supra note 90.
110 Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, supra note 29.
111 United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations, supra note 103.
112 Id.
clients without being indicted or prosecuted in the United States.\textsuperscript{113}

Category 3 and 4 banks are not eligible for non-prosecution agreements under the Program because these banks are classified as banks that have not knowingly committed tax fraud, evasion, or conspiracy to evade taxes under Titles 18 and 26 of the Internal Revenue Code (Category 3 banks), or as local banks that do not service U.S. taxpaying clients (Category 4 banks).\textsuperscript{114} Additionally, any Category 3 or 4 bank wishing to be eligible for participation in the Swiss Bank Program must be a ‘Deemed Compliant Financial Institution’ under the FATCA Agreement.\textsuperscript{115} If deemed a compliant financial institution, any Category 3 and 4 bank, while ineligible for a non-prosecution agreement, is eligible to request a “non-target letter,” as transcribed in the Swiss Bank Program.\textsuperscript{116} In order for a Swiss bank to receive a non-target letter from the Department of Justice, the bank must agree to the review of its banks’ accounts and must share such information with the Department of Justice.\textsuperscript{117} If the Department of Justice concludes that no felony tax offenses have been committed, the bank is assured - with the reception of the non-target letter - that it will not become subject to any prosecution by the Department or investigation by the IRS following the completion of the initial investigation.\textsuperscript{118}

Although the non-prosecution agreements given under the Swiss Bank Program appear to be an ideal solution for Swiss banks that have serviced noncompliant U.S. taxpaying clients, the rate of participation of eligible banks in this program is lower than expected, showing that these banks do not have enough incentive to come forward. As of April 15, 2016, only 78 banks had entered into the Swiss Bank Program, while an even smaller number had entered specifically into non-prosecution agreements as opposed to applying to receive a non-target letter.\textsuperscript{119} Only 27% of all eligible Category 2-4 banks have entered into a non-prosecution agreement or have applied for a non-target letter as a result of the Swiss Bank Program, leaving 207 banks eligible to participate in the Program unaccounted for.\textsuperscript{120} This figure is dismal at best, and shows a lack of efficiency in the

\textsuperscript{113} Jonathan S. Sack et. al., \textit{supra} note 23.
\textsuperscript{114} 26 I.R.C. § 7206 (2011).
\textsuperscript{115} \textit{PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS, supra} note 29.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} Duhaime, \textit{supra} note 100.
\textsuperscript{118} \textit{PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS, supra} note 29.
\textsuperscript{119} \textit{SWISS BANK PROGRAM, supra} note 24.
\textsuperscript{120} \textit{Id.}
Department of Justice’s administration and enforcement of the Swiss Bank Program. Still, entrance into the Swiss Bank Program inevitably means that Swiss banks under the Program must forfeit at least partial secrecy, though still mandated under the provisions of the Swiss Bank Act.

Although Swiss banks have not been as compliant as the Department of Justice would prefer - thus resulting in the Department of Justice’s failure to collect the total value of evaded taxes by noncompliant U.S. taxpaying individuals - private wealth under management at Swiss banks has nonetheless been negatively impacted by the Program in the past few years. According to Aaron Kirchfeld and Elena Logutenkova from Bloomberg Business, due to “rising compliance costs… assets under management [at Swiss banks] slid by a quarter [to $921 trillion]… as clients withdrew money or paid taxes on undeclared accounts.”  

Boston Consulting Group’s Global Wealth Report estimated that Switzerland’s share in global cross-border wealth will continue to decline by up to two percent by 2017.  

François-Xavier de Mallmann, head of the European branch of investment services for Goldman Sachs, added that consolidation is likely to continue, as Swiss private banking will continually become more costly.  

Still, Switzerland has a vested interest in maintaining a strong relationship with the United States, as the United States is Switzerland’s most important destination for foreign direct investment. Hence, complying with the United States’ demands regarding the release of client information by Swiss banks should help Switzerland maintain its strong relationship with the United States, thereby avoiding harsher economic sanctions in its investment and banking industries arising from noncompliance.

III. Failures of the Swiss Bank Program

A. Solutions to the Swiss Bank Program’s Inefficiency in Bringing Unpaid Taxes Back to the United States

Currently, Category 2 Swiss banks under the Swiss Bank Program are defined as not

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122 Id.

123 Id.


125 Id.
being under investigation for felony tax offenses, but which have reason to believe that a felony tax offense has been committed against the United States.\footnote{\textit{Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks}, supra note 29.} Under voluntary entrance into the Swiss Bank Program, these banks are subject to fines based on a lump sum calculation, with the penalties for each undisclosed account ranging from 20\% to 50\% of the total maximum value of the account, which are to be paid based on the number of years the account has been active.\footnote{\textit{US Tax Program for Swiss Banks}, supra note 9.} Specifically, undisclosed accounts in existence prior to August 1, 2008, have a lump sum calculation of 20\% of the maximum aggregate value, in dollars, during the tax years in which the account was undisclosed; accounts opened between August 1, 2008, and February 28, 2009, have a lump sum calculation of 30\% of the maximum aggregate value; and accounts opened after February 28, 2009 have a lump sum calculation of 50\% of the maximum aggregate value.\footnote{\textit{Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks}, supra note 29, at 6.} While the United States is receiving restitution under the Swiss Bank Program, all Category 2 Swiss bank entering into the program that have committed tax-related offenses should be sanctioned accordingly and equally. In other words, all fine rates should be set equally, regardless of when the offshore account was established because these banks and their U.S. taxpaying clients have been conducting illegal banking activities for years, and the length of time in which the illegal banking activities were conducted should be irrelevant when considering the illegality of maintaining an undeclared offshore account. The United States should have a 50\% fine for the maximum annual value of the account for each year the account remains undeclared, with the fine being the same percentage every year.

Although Swiss banks face increased restitution and other penalties under this proposed amendment to the Swiss Bank Program, Swiss banks undoubtedly have incentive to participate under the Program with the proposed amendment. If Swiss banks under the proposed revised Program face a fine of 50\% of the maximum value of every noncompliant account for each year the account was held at their institution, the Swiss bank would have a much greater incentive to release the information of their noncompliant U.S. clients to the United States. And, by releasing such information, the client becomes responsible for the restitution payment and fines for the client’s defrauding of the United States, thus making
any restitution or penalty the Swiss bank is required to pay much lower. With this proposed amendment to the Swiss Bank Program, it becomes beneficial for both nations, in that the United States is retrieving the client information it so strongly solicits, while the Swiss banks bequeaths the responsibility of restitution payments over to their clients. Although the fines are greater for the liable party, the responsibility of paying restitution for noncompliant accounts under the proposed amendment provides Swiss banks with great incentive to transfer the liability for tax fraud and evasion to its clients. Hence, if the bank in question releases client information to the United States, the bank would no longer be responsible for paying the fines of every noncompliant account it services. By placing liability on the banks’ clients to pay their own fines for tax evasion and fraud, the banks would conserve hundreds of thousands of dollars by taking the incentive this proposed amendment provides them with.

In the instance that the Swiss Bank Act is not considered null and void under the Swiss Bank Program, even with the proposed amendments, the Category 2 bank entering into a non-prosecution agreement with the United States would still have the opportunity to place the burden of restitution payments on the banks’ wealth managers and executives. By releasing the information of individual wealth managers that knowingly serviced U.S. clients not in compliance with United States tax law, the bank is freeing itself of being liable for the actions of its wealth managers and bankers that violate both United States tax law and the Swiss Bank Act.\(^{129}\) Although the U.S. clients serviced by the bankers are a responsible party for defrauding the United States, the wealth managers and bankers that service such clients’ accounts are participating in illegal banking activities, in direct violation of the Swiss Bank Act.\(^{130}\) And, by placing responsibility on wealth managers, the Swiss bank in question is still relieved from some of the restitution burden while remaining compliant with the Swiss Bank Act by not divulging information regarding its individual U.S. taxpaying clients.

By releasing information regarding either wealth managers or noncompliant U.S. clients to the United States, the Swiss bank would be relieving itself, at least partially, of the greater restitution burden it would face under the proposed amendment regarding increased account penalties to the Swiss Bank Program. The United States would benefit from this proposal by more adeptly targeting the responsible individuals that defraud the United States,

\(^{129}\) Bankengesetzz [BankG] [Banking Act] Nov. 8, 1934, SR 952.0, art. 46, para. 1 (Switz.).

\(^{130}\) Id.
rather than the banks, which are not directly responsible as institutions for tax evasion or fraud. And, the Swiss banks entering into non-prosecution agreements would both save their reputation and financially benefit by shifting the placement on blame and responsibility away from the institution, while also unburdening themselves of the heavy fines that would be required to be paid under the proposed revision to the Program. But, by considering the Swiss Bank Act to be null and void under the jurisdiction of the United States, the United States will be able to directly target individual noncompliant U.S. taxpayers.

Upon entering into a non-prosecution agreement under the Swiss Bank Program, Swiss banks should also be required to consider the Swiss Bank Act as inoperative. Swiss banks should give the United States complete jurisdiction over the status of the individual accounts owned by U.S. taxpaying clients and the account holders at these banks, regardless of Switzerland’s jurisdiction over the banks as businesses. The United States should demand jurisdiction over the indictments and prosecutions of U.S. taxpaying clients with undisclosed accounts, regardless of the fact that the clients’ banking activities were being conducted in Switzerland. Because Switzerland has released joint statements with the United States on the matter of tax evasion through the use of Swiss accounts and Switzerland’s adoption of the OECD’s standards, these banks should be assured by Switzerland that while the Swiss Bank Act remains law within their nation, it only does so in Switzerland; elsewhere, it should not be applicable, such as in the United States, where non-prosecution agreements are conducted under the Program. By enforcing such compliance by Swiss banks - and with the support of the Swiss government - in releasing all relevant information regarding noncompliant U.S. taxpayers to the Department of Justice, the Department and the IRS will be able to indict and prosecute account holders with undisclosed accounts on charges of tax evasion and conspiracy to defraud the United States. In turn, by indicting U.S. taxpayers not in compliance with the United States’ tax laws, the Department of Justice will be eliminating one of offshore tax evasion’s two perpetuators (noncompliant U.S. taxpayers). By revising the Swiss Bank Program so as to ensure the release of all relevant information by Swiss banks, the United States will be able to collect restitution payments from both Swiss banks that have committed felony tax-related charges and from noncompliant U.S. taxpayers, to make up more completely for unpaid taxes, rather than simply targeting Swiss banks and retrieving only a small sum of the total value of the taxes annually evaded in the United States by individuals with offshore accounts.
The best way in which to ensure Switzerland’s compliance with the Swiss Bank Program as well as its willingness to ensure Swiss banks that they will not be prosecuted for violation of the Swiss Bank Act upon entering into the Program is to impose sanctions on Switzerland’s financial and banking industries, should the country choose not to comply with the mandates of the Swiss Bank Program. The United States could be central to ensuring Swiss compliance by closing investment opportunities to Swiss banks and financial institutions, should the Swiss government choose not to comply with the proposed amendments to the Swiss Bank Program, as has been discussed. Such a threat by the United States would surely have a profound impression on both the Swiss government and the private financial institutions within Switzerland. Schweizerische Eidgenossenschaft Eidgenössisches Departement für auswärtige Angelegenheiten (EDA) [Switzerland’s Department of Foreign Affairs] reports that the United States is a “major partner for Switzerland in all respects,” additionally writing that 17.6% of all of the country’s direct foreign investment - which was valued at over $205.8 billion in 2013 - was towards the United States, making the United States “by far the most important destination for Swiss direct investment abroad.” If the United States were to threaten such massive implications for Switzerland’s refusal to comply with the proposed amendments to the Swiss Bank Program, Switzerland would lose its key investment partner, a main trading partner, and billions of dollars annually.

B. United States v. Credit Suisse AG as an Example of Sanctioning Swiss Banks that Conspire to and Assist U.S. Taxpayers to Defraud the IRS through Offshore Accounts

In May of 2014, Credit Suisse AG, an entity established in 1856 and estimated to have a value of 1.4 trillion Swiss francs assets under management, entered into an unprecedented plea agreement with the United States and the IRS after pleading guilty to “conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS.” The sanctions imposed on Credit Suisse AG are exemplary in that the unprecedented restitution and various indictments resulting from United States v. Credit Suisse AG were much harsher than sanctions given by the United States in other non-

131 Bilateral relations Switzerland–United States of America, supra note 124.
133 Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns, supra note 10.
prosecution agreements under the Swiss Bank Program. As part of this agreement, Credit Suisse agreed to pay $2.6 billion in restitution and fines - the highest payment ever made in a criminal tax case - to be paid to the Department of the Treasury.\footnote{134 Id.} This financial restitution came as a massive blow to Credit Suisse AG, which in the same year was required to pay $196 million to the Securities and Exchange Commission (SEC) for “violating the federal securities laws by providing cross-border brokerage and investment advisory services to U.S. clients without first registering with the SEC.”\footnote{135 Id.} Additionally, \textit{Credit Suisse AG} led to the indictment of eight Credit Suisse banking executives over the course of several years, from the beginning of the criminal tax case investigation in 2011 until the closure of the case in 2014.\footnote{136 Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns, supra note 10.} Affirming the profound nature of this case, Attorney General Eric H. Holder stated, This case shows that no financial institution, no matter its size or global reach, is above the law. When the Department of Justice conducts investigations, we will always follow the law and the facts wherever they lead. We will never hesitate to criminally sanction any company or individual that breaks the law. A company’s profitability or market share can never and will never be used as a shield from prosecution or penalty. And this action should put that misguided notion definitively to rest.\footnote{137 Attorney General Eric Holder Announces Guilty Plea in Credit Suisse Offshore Tax Evasion Case, U.S. DEP'T OF JUST. (May 19, 2014.)}

The conduct of \textit{Credit Suisse AG} by the United States and the IRS should be replicated in the conduction of non-prosecution agreements and non-target letters under the Swiss Bank Program because \textit{Credit Suisse AG} led not only to notably high restitution and fine payments, but also to the indictment of several of the bank’s executives. These indictments were in addition to the release of all relevant information regarding offshore account holders at the bank that were not in compliance with the IRS’s tax-filing policies. \textit{Credit Suisse AG} is a landmark case for the Department of Justice in its battle against offshore tax evasion, and should be replicated in all of Department’s non-prosecution agreements under the Swiss Bank Program because of the restitution the United States received. \textit{Credit Suisse AG} led to the highest restitution payment made to the IRS by a bank to date, as well as the indictment of numerous executives that oversaw and allowed the conduction of illegal
banking activities while conspiring against the IRS.\footnote{Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns, supra note 10.} By contrast, the majority of non-prosecution agreements consummated to date under the Swiss Bank Program have led to restitution payments that add up to only a fraction of the total value of taxes evaded by clients with offshore Swiss accounts, while the majority of non-prosecution agreements have not led to the indictment or prosecution of banking executives or wealth managers. Furthermore, Credit Suisse AG led to the release of all information regarding noncompliant U.S. taxpayers, making the Credit Suisse AG case a “double-edged sword” in the sense that both Swiss banking executives and U.S. taxpayers were indicted as a result of the case.

By considering the Swiss Bank Act to be null and void in Credit Suisse AG, the United States was able to retrieve information regarding its noncompliant taxpayers. By indicting and prosecuting Swiss banking executives at Credit Suisse AG, the United States was able to remove the support system that noncompliant U.S. taxpayers endorsed and used to perpetrate tax fraud and conspiracy to defraud the United States. And, by retrieving this information, the United States was able to retrieve restitution payments and fines that more accurately resembled the total value of evaded taxes by U.S. taxpaying clients at Credit Suisse AG. The conduct of the case against Credit Suisse AG underscores and demonstrates that the failures and inefficiency of the Swiss Bank Program are repairable through the implementation of more demanding standards and sanctions on those who commit felony tax crimes, in order to abide by Attorney General Eric Holder’s statement.\footnote{Attorney General Eric Holder Announces Guilty Plea in Credit Suisse Offshore Tax Evasion Case, supra note 134.}

C. Status of Switzerland’s Banks’ Compliance with the Swiss Bank Program and Amending the Program to Ensure Compliance

As of April 15, 2016, 78 Swiss banks, at times also representing their wholly owned subsidiaries, have entered into non-prosecution agreements as Category 2 banks under the Swiss Bank Program.\footnote{SWISS BANK PROGRAM, supra note 24.} However, when considering the approximately 285 licensed private banks eligible to participate in the Swiss Bank Program, 78 banks are too few to suffice, as many of these eligible banks have committed tax-related felonies but are simply not under investigation for doing so.\footnote{Id.} Precisely 27\% of all eligible banks, then, have not entered into
(or have not completed the eligibility requirements for) the Swiss Bank Program, which creates the notion that these banks have no incentive to participate. With only 27% of total eligible banks participating in the Program, the Department of Justice has not forcefully proven its intent to halt offshore tax noncompliance by U.S. taxpayers, thus failing to affirm Attorney General Holder’s statement regarding the Department of Justice’s aggressive nature in sanctioning offshore tax evasion.\textsuperscript{142} It is clearly evident that the Department of Justice has not firmly displayed, through indictments and prosecution, the profound actions that need to be taken in order to efficiently halt tax evasion by U.S. taxpayers in Switzerland.

The Department of Justice needs to increase the penalties for remaining noncompliant Swiss banks eligible for the program that have not yet entered into a non-prosecution agreement by revising their lump-sum calculation for repayment, while taking more effective steps to retrieve information from Swiss banks regarding their U.S. taxpaying clients that are not compliant with the United States’ tax laws. Increasing the demands of the Swiss Bank Program should manifest itself in increasing the severity of sanctions through increasing the required restitution payments (by way of revising the lump-sum calculation method for repayment) that Swiss banks must repay to the United States; demanding complete jurisdiction over the case and the voiding of the Swiss Bank Act for all banks entering into non-prosecution agreements or deferred prosecution agreements with the Department of Justice; and, increasing demands that should include the indictment and prosecution of Swiss banking executives and wealth managers who have participated in conspiracy against the IRS, as exemplified in \textit{Credit Suisse AG}.\textsuperscript{143} Most importantly, delivering an ultimatum to Switzerland’s banking and investment industries through threatening the closure of U.S. investment and financial markets to Switzerland, thereby cause hundreds of billions of dollars in losses to Switzerland’s related sectors, would prove to Switzerland the United States’ seriousness to cease tax evasion carried out in Switzerland by U.S. taxpayers.

Various components of \textit{Wegelin & Co.} should be mirrored in the Swiss Bank Program, such as the internationalized scandal of Wegelin’s conduct, in which the publication of this scandal had a transnational reach. This is in stark contrast to banks entering into the Program now, where these banks’ guilt is limited largely to the webpage for

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\textsuperscript{142} \textit{Attorney General Eric Holder Announces Guilty Plea in Credit Suisse Offshore Tax Evasion Case, supra note 134.}

\textsuperscript{143} \textit{Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, supra note 93, at 42.}
the Swiss Bank Program and is not publicized in the international press. Many Swiss nationals and Swiss bankers felt marred by the results of the Wegelin case and were livid about Wegelin’s indictment. The United States arguably received the most beneficial outcome in that its opponent, an internationally renowned bank accused of facilitating tax fraud, received such a damaged reputation following the case that it ceased operations. However, publicly disgracing an established bank has severe repercussions for transnational relations and comes with the caveat for which the United States must exercise care. While publicizing the illegalities conducted at these banks is a fundamental component of the Department of Justice’s message to Swiss banks of the seriousness of tax evasion vis-à-vis offshore account maintenance, repeatedly doing so may weaken United States-Switzerland relations, as a large component of the Swiss economy lies in its successful transnational banking. If Switzerland feels that it has become the sole target of the Department of Justice’s crackdown on tax evasion by U.S. taxpayers through the use of undisclosed offshore Swiss accounts, Switzerland may retaliate by increasing sanctions for violators of the Swiss Bank Act, which would prove to be entirely counterproductive. Switzerland, however, has issued joint statements with the Department of Justice on the topic of tax evasion and its wish for the conduct of legal banking activities within Switzerland and has allowed the United States to conduct many of the agreements with Swiss banks independent of the Swiss government’s presence and jurisdiction. On the other hand, though, Switzerland has not yet repealed the secrecy mandated under Swiss Bank Act, thereby putting conflicting expectations and standards on Swiss banks. Switzerland has taken steps to partially amend the Act, although the Act maintains that any banker that “discloses confidential information entrusted to them in their capacity as a member… of a bank” will be imprisoned and fined accordingly.

Publicizing and disgracing these banks, as seen in the Wegelin case, is an inadequate solution, albeit a strong counterargument for tax fraud. However, by combining the crippling of the bank’s public image with the severity of demands put on Credit Suisse AG in Credit Suisse AG, the Swiss Bank Program would be more effective in both providing incentive for Swiss banks to wish to enter into such a program rather than simply ignore the Program and risk becoming categorized as a Category 1 bank with no way to avoid felony charges, while also ensuring greater restitution and information retrieval for the United States. The closure

144 Don’t Ask, Won’t Tell, supra note 18.
145 BANKENGESETZ [BANKG] [BANKING ACT] Nov. 8, 1934, SR 952.0, art. 47, para. 1a (Switz.).
of banks that participate in tax fraud may help limit the number of banks that U.S. taxpayers use to stash undeclared offshore wealth, but may also lead to the dispersal of noncompliant U.S. taxpayers throughout Switzerland, thereby making it more difficult to locate and sanction noncompliant U.S. taxpayers. Although UBS AG did not close as a result of its prosecution, UBS AG’s closure to servicing U.S. taxpaying clients led to a dispersal of U.S. taxpaying clients throughout Switzerland, which only has made the Department of Justice’s task to eliminate the undeclared offshore wealth of noncompliant U.S. taxpayers in Switzerland more difficult.

D. The Department of Justice’s Misstep in Ending Offshore Tax Evasion in Conducting Non-Prosecution Agreements under the Swiss Bank Program

Schroder & Co. Bank AG, one of 78 Swiss banks to have entered into the Swiss Bank Program, concluded its non-prosecution agreement with the Department of Justice on September 3, 2015.146 In compliance with the lump sum calculations and restitution payments required as a component of the non-prosecution agreement, Schroder & Co. Bank AG agreed to pay a total of almost $10.4 million to the United States. Schroder & Co. Bank AG had, as of August 1, 2008, 243 U.S. accounts opened with a total value of approximately $506 million in assets under management.147 Schroder Trust AG was servicing 25 U.S. taxpayer-owned accounts totaling $80 million in assets, while Schroder Cayman Bank and Trust Ltd. was servicing an additional 16 U.S. taxpayer-owned accounts totaling $82 million in assets.148 Of the 284 U.S. taxpayer-owned accounts, at least 26 accounts were not in compliance with W-9 filing requirements, and Schroder & Co. Bank AG assisted at least these 26 accounts in processing cash withdrawals and wire transfers of between $100,000 and $1 million, which were then transferred to the clients in amounts less than $10,000, so as to remain undetected by IRS authorities.149 Various wealth managers at Schroder & Co. Bank AG and its subsidiaries covertly conducted these cash withdrawals in order to escape detection of managing undisclosed accounts by the IRS. This non-prosecution agreement imitates others carried out under the Swiss Bank Program while depicting the numerous failures of the United States to both retrieve client information and retrieve the maximum

146 SWISS BANK PROGRAM, supra note 24.
147 U.S. DEP’T OF JUST. TAX DIVISION, supra note 21.
148 Id.
149 U.S. DEP’T OF JUST. TAX DIVISION, supra note 21.

The total value of evaded taxes and tax-free transactions by U.S. taxpaying clients at Schroder & Co. Bank AG and its subsidiaries, however, far exceeds the $10.4 million that Schroder Bank Group was required to pay in restitution and penalties, as the value of $10.4 million was established based on the lump sum calculation system discussed earlier. Therefore, the value of $10.4 million to be paid to the Department of the Treasury was only a portion of the total value of undisclosed accounts being maintained at Schroder & Co. Bank AG and its subsidiaries. Furthermore, although the dates of establishment of the undisclosed accounts were not provided to the Department of Justice, Schroder & Co. Bank AG was founded in 1967 and licensed in March of 1980, and also established a branch in Geneva - Switzerland’s unofficial banking capital - in 1984. Thus, it is implausible to argue against the fact that undisclosed accounts held by U.S. taxpayers had been managed at Schroder & Co. Bank AG and its subsidiaries for anywhere between 31 and 45 years. Factoring the ages of the accounts and the fluctuations of the maximum aggregate value within each account, the penalty of $10.4 million that Schroder & Co. Bank AG was required to pay is dismal at best.

As part of Schroder & Co. Bank AG’s non-prosecution agreement with the Department of Justice, Schroder & Co. Bank AG agreed to fully cooperate with the Department and to disclose any and all relevant “information, documents, records, or other tangible evidence not protected by a valid claim of privilege,” as noted under the U.S. Income and Tax Reporting Obligations. However, the Department of Justice did not specifically reference whether or not a valid claim of privilege has the same expectations as the secrecy mandated under the Swiss Bank Act. As discussed earlier, under the mandate of the Swiss Bank Act, Schroder & Co. Bank AG and its wholly owned subsidiaries, Schroder Trust AG and Schroder Cayman Bank and Trust Ltd., remain unable to provide detailed information regarding both their tax-compliant clients and those that do not annually file their W-9 and Form 8938 due to the Swiss Bank Act, even though the Schroder Bank Group had entered

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150 Id.
151 U.S. Tax Program for Swiss Banks, supra note 9.
into a non-prosecution agreement with the Department of Justice.\textsuperscript{154} The United States’ ambitious expectations of retrieving client information while the Swiss Bank Act remains law has become an overarching problem across all non-prosecution agreements and deferred prosecution agreements. \textit{Schroder & Co. Bank AG} provides just one example of this problem with the Swiss Bank Program, as Swiss banks entering into the program are essentially waived from releasing client information by upholding the Swiss Bank Act.

As argued earlier, the Swiss Bank Act should be inefficacious once a Swiss bank enters into a non-prosecution agreement under the Swiss Bank Program. The Department of Justice and all courts in the United States wherein non-prosecution agreements with Swiss banks are conducted must not acknowledge the Swiss Bank Act, as exemplified in the conduct of Credit Suisse AG. Additionally, Swiss banks entering into non-prosecution agreements and deferred prosecution agreements with the Department of Justice under the Swiss Bank Program must accept that Switzerland’s banking laws are not applicable under the terms of the non-prosecution agreement with the Department of Justice. By obtaining all of this relevant information, the Department of Justice would have been capable of accurately mandating the full reimbursement of the sum of evaded taxes from each noncompliant U.S. taxpayer’s account by the individual taxpayers, instead of receiving a lump sum calculation by the Swiss bank.

Replicating further the conduct of non-prosecution agreements under the Swiss Bank Program, the Department of Justice did not target any banking executives or wealth managers who were knowingly guilty of felony tax charges in \textit{Schroder & Co. Bank}.\textsuperscript{155} Adrian Nösberger, Schroder & Co. Bank AG’s CEO and Chairman of the bank’s executive board, was not indicted as a result of the bank’s entrance into a non-prosecution agreement, along with the rest of Schroder & Co. Bank AG’s executive board, wealth managers, and bankers, who were guilty of at least allowing illegal banking activities and tax evasion to occur. The failure to indict the bankers and management teams involved in tax evasion at Swiss banks has been a resounding issue in nearly all of the non-prosecution agreements conducted under the Swiss Bank Program, as the Department of Justice is sanctioning the entire bank rather than the individuals guilty of felony tax charges under the Program. The Department of Justice has failed to target the foundation of the problem of offshore tax evasion by not

\textsuperscript{154} \textsc{Bankengesetz [BankG] [Banking Act]} Nov. 8, 1934, SR 952.0, art. 47, para. 1 (Switz.).

\textsuperscript{155} \textit{Schroder & Co. Bank AG Reaches Resolution under Justice Department’s Swiss Bank Program and Agrees to Pay $10.3 Million Penalty}, supra note 152.
indicting or prosecuting any banking executive or wealth manager at the Schroder Bank Group. The entire bank, instead, paid the fines for a handful of bankers who were otherwise guilty of tax-related felonies. A separate investigation and indictment should have been carried out against Nösberger, as well as other executives and wealth managers who knowingly opened and serviced undisclosed accounts for U.S. taxpaying clients, making them guilty of felony tax charges. As the CEO of the bank, it is highly unlikely that Nösberger was unaware of the tax-evasion activities the bank was conducting, and an investigation and indictment would likely have proved this to be the case. The Department of Justice should have taken actions similar to those taken in Credit Suisse AG, in which seven of the Swiss bank’s bankers were indicted on felony tax charges. The United States must sanction the permission of felony-stipulating banking and tax crimes carried out by banks, and by indicting a bank’s executive, the United States is sending an explicit message to each Swiss bank’s executives. It is highly likely that banking executives, seeing other executives who have committed similar crimes see the prosecution of someone of their own rank, will be provided with an incentive to ensure the compliance of their bank with the Swiss Bank Program.

**Conclusion**

While the introduction of the Swiss Bank Program has brought a massive influx of restitution payments to the IRS for tax evasion carried out by the noncompliant U.S. taxpaying clients of various Swiss banks, only 78 of the 285 eligible banks have entered into non-prosecution agreements or applied for non-target letters with the Department of Justice. This relatively small number implies that Swiss banks lack the incentive to submit themselves to investigation under the Swiss Bank Program, thereby suggesting that Swiss banks perceive that they are most likely to avoid indictment and prosecution by the United States whilst continuing to conduct felony-stipulating banking activities by not participating in the Program. By increasing the incentives for banks to participate in the Program by increasing the penalties for accounts at the bank not in compliance with the IRS reporting standards, the United States is more likely to receive information regarding the individuals responsible for tax evasion and defrauding the United States. Consequentially, Swiss banks

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156 Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, supra note 93, at 42.

157 Swiss Bank Program, supra note 24.
are more likely to enter into the Swiss Bank Program in order to avoid potentially facing felony charges; and, under the proposed amendments to the Program, the banks are relieved of paying the greater restitution by releasing client information, which would both appease the United States, save the Swiss banks from the reputational humiliation of being prosecuted on felony charges, and protect Swiss banks from being required to pay larger fines for its wealth managers and U.S. clients not in compliance with United States tax law.

Additionally, very few Swiss bank executives and wealth managers guilty of felony tax charges have been indicted, and just a fraction of those guilty Swiss bankers have been prosecuted. While not all banking executives and wealth managers at Swiss banks who have conducted illegal banking activities through conspiracy or tax fraud are guilty of felony charges in the United States, at least a portion of the executive and management teams at these banks are, and these bankers should therefore face the same indictment under the Swiss Bank Program that these bankers would eventually face when not participating in the Program. By threatening the indictment of wealth managers and executives at Swiss banks guilty of conducting illegal banking activities, the Department of Justice - vis-à-vis the Swiss Bank Program - would be more successful in eliminating a perpetuator of tax evasion.

The Department of Justice has additionally received limited information about specific U.S. taxpayers not in compliance with the United States’ tax laws under the Swiss Bank Program, due to the Program’s failure to require the release of information regarding noncompliant U.S. taxpaying clients at Swiss banks, and has therefore been unable to prosecute the noncompliant U.S. taxpayers responsible for offshore tax evasion.\footnote{Reto Heuberger & Stefan Oesterhelt, \textit{Switzerland to Adopt OECD Standard on Exchange of Information}, \textit{European Taxation}, Feb./March 2010, at 55.} Emulating \textit{UBS AG} in this manner would require Swiss banks to release client information; however, with Switzerland’s adoption of the OECD’s standards on information sharing, retrieving relevant information regarding U.S. taxpaying clients under the Swiss Bank Program makes the release of requested client information the only option wherein compliance with the OECD is feasible.\footnote{Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, \textit{supra} note 29.} The Swiss Bank Act, therefore, should not be applicable under the proposed amendments of the Swiss Bank Program, as discussed above, because Swiss banks will not be required to pay for the actions of which noncompliant U.S.
taxpayers are ultimately responsible.\textsuperscript{160} Although these banks’ executives and various wealth managers conspired and aided in the process of tax evasion, it is ultimately these banks’ U.S. taxpaying clients that caused the damage because of each individual’s choice to commit tax evasion. Furthermore, not every executive and wealth manager at each individual Swiss bank committed tax felonies, yet the Swiss bank remains responsible for repaying all damages to the Department of the Treasury, IRS, and Department of Justice caused by the actions of certain Swiss banking employees, as set under the terms of the Swiss Bank Program.\textsuperscript{161}

The Swiss government must redefine its expectations of Swiss bankers by fully embracing OECD standards and consequentially amending the Swiss Bank Act, to ensure that it does not conflict with the OECD’s banking information exchange requirements.\textsuperscript{162} Should Switzerland continue to allow tax fraud and evasion to be conducted within the country, the United States must be prepared to take further steps to ensure the end of tax evasion by halting investment opportunities in the United States for Switzerland, by cutting off direct investment opportunities to noncompliant Swiss banks, and by closing the United States’ financial market to noncompliant Swiss banks and investment firms. By placing a threat on the banking industry in Switzerland, which has a value of over $200 billion in bilateral trade and agreements with the United States, the United States would be conducting an “all or nothing” policy in which the banking and investment industries would either continue to benefit or would be subject to a loss of billions of dollars at the expense of banking secrecy, leading to a failure to comply with OECD standards and a subsequent set of sanctions.\textsuperscript{163} When given an ultimatum by the United States, Switzerland would have no choice but to comply unless it wished for the demise of its wealth and status as a tax haven.

Given this article’s presented statistics and rates of involvement and participation in the Swiss Bank Program, the Department of Justice has clearly failed to commit to meaningful actions to fully sanction noncompliant banks, wealth managers, and U.S. taxpayers, even though the Department’s action to initiate the Swiss Bank Program implies the intention to completely eliminate tax noncompliance in Switzerland.\textsuperscript{164} The Department must demand repayments for the total value of evaded taxes from each undeclared account.

\textsuperscript{160} PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS, supra note 29.
\textsuperscript{161} Id.
\textsuperscript{163} Bilateral relations Switzerland–United States of America, supra note 124.
\textsuperscript{164} SWISS BANK PROGRAM, supra note 24.
from the account’s owner instead of the bank, and noncompliant U.S. taxpayers must then face the felony charges of which they are guilty. Additionally, banking executives and wealth managers aware of their roles in tax evasion - by either servicing or permitting the existence of undeclared U.S. taxpayers’ accounts - must be indicted and prosecuted on tax-related felony charges. Until both the United States and Switzerland alter their policies regarding international banking and information exchange policies, and until the United States provides an ultimatum in which Switzerland’s banks will be forced to comply entirely with the United States’ standards set by a revised Swiss Bank Program, the United States will fail to halt and eliminate offshore tax evasion in Switzerland.
On the Constitutionality of Farm Protection Legislation: Why “Ag-gag” Laws Only Gag Criminals from Criminal Acts

Jennifer Weinberg

Introduction

In 1940, one farmer fed 19 people. Today, that number is 155.1 Meanwhile in 2014, the United States’ population was estimated at over 318 million;2 the farmers responsible for feeding that population make up only 2% of that number.3 Ever-increasing demand has led to the expansion of farm operations in terms of size, technology and farming capacity to sustain America’s growth and development; however American agriculture is under fire as critics react to expanded farming practices negatively, condemning them to be referred to as factory farms.4 Factory farms are said by opponents to be the epicenters of “big ag,” where animals are treated and processed just like items rolling down a factory’s conveyor belt.5 Despite these labels, recent USDA reports show that 97% or more of farms are family owned.6 Still yet, modern animal agriculture in America has a tense relationship with various groups of self-proclaimed animal activists.

Mostly affecting the realm of public opinion, various “undercover videos” have surfaced that document instances of supposed animal mistreatment.7 Animal rights

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5 Id.
organizations such as Mercy for Animals have proudly exposed various “investigations” on their website, including a 2015 Colorado investigation on a Walmart pork supplier operation, and another video accusing Perdue Chickens’ operations of abhorrent living conditions and treatment of chickens.\(^8\) Where animal activists claim that the creation of these undercover videos is protected expression of speech under the First Amendment, farmers and legislators reject this notion on the basis that the laws regulate conduct, not the press. Undercover videos largely result when individuals trespass onto farms and record pictures or videos without consent. Recently, a new wave of capturing undercover videos has been through individual falsifications of employment records to gain access to farms. In response, several states have enacted laws trying to protect private farms and farmers from being rendered unable to respond to those who have falsified employment records to gain access to farms or have simply engaged in unlawful undercover recording by other means. These will be referred to in this article as Farm Protection (FP) bills or legislation.

In the case of FP legislation, the misinterpretation of existing legal statutes and constitutional principles is threatening the property rights of farm owners in exchange for radical activist interests. In this case, the interest is in promoting an agenda through illegal means of gathering information. Whereas activist groups claim the prohibitions at hand are strictly on the exercise of speech and expression, analysis of the specific state statutes themselves clearly outlines that the laws outlaw conduct in a manner that applies to everyone equally.\(^9\) In addressing the relevant literature in the field, this article argues that, even if subjected to the constitutionally outlined newsgathering standard, Farm Protection legislation is fully compatible with the US Constitution. Enacted FP legislation survives even the strictest standards of review because: it is generally applicable as to not single out the press or any specific group, serves a compelling government interest in regulating unlawful conduct, and does not limit protected forms of expression. Further, if FP legislation was forced to adhere to the Court’s outlined regulatory test, strict scrutiny, it passes all criterion.

This paper has three sections. The first describes the nature and scope of First Amendment protections and the background and historic evolution of Farm Protection

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\(^8\) Id.

legislation from their origin in 1990. Part II discusses and refutes the legal precedent that activists and scholars alike have used to suggest the bills are unconstitutional. Finally, Part III examines how prior scholarship on the subject of FP bills is misused and, in effect, is aiding the erosion of private property rights through rewriting the legal system, as exemplified in the seminal August 2015 Idaho decision in *Animal Legal Defense Fund v. C.L. Butcher* and *Lawrence Wasden*.

I. The History of Farm Protection Bills and their Opponents

A. Farm Protection Bills

As of January 1, 2016, nine states have enacted various types of legislation that protect farmers and their property from trespassing and from the recording of undercover videos.\(^{10}\) Similarly, 11 states have attempted, but failed, to pass FP Bills,\(^{11}\) which seek to generally criminalize the following behaviors:

1. Falsifying employment to gain access to farms for the purposes of filming or taking photographs without the consent of the owner.\(^{12}\)
2. Intruding onto private farms and take photos or films of any kind without permission.\(^{13}\)
3. Transferring recordings/media of any type that have been obtained without consent to others/ outside media sources.\(^{14}\)

Activists against FP bills have relabeled them anti-whistle blowing legislation or as “ag-gag”\(^{15}\) bills, and claim that they violate First Amendment protections of the press and speech expression. This article argues that the enactment of FP legislation does not violate

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\(^{11}\) *Id.*

\(^{12}\) *Iowa Code* § 717A.3A (through 2013).

\(^{13}\) *Id.*

\(^{14}\) *Id.*

\(^{15}\) Mark Bittman, *Who Protects the Animals?* N.Y.T., OPINIONATOR (Apr. 26, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/. Minnesota’s Ag-gag law - isn’t that a great name?” is where it all started in 2011. The term was coined by Mark Bittman, a food journalist and contributor for the New York Times. Bittman’s history in journalism includes various stories on policies including agriculture, health, the environment, cooking and eating. Bittman’s influence spans beyond the New York Times to include various media with print and web columns, videos, interviews, TV appearances and shows, making him an influential member of society when the media’s perspective on food production and agriculture is concerned. Bittman may not be a member of any court of law however his influence plays a significant role in the court of public opinion. By framing FP bills as a method to “gag” First Amendment speech rights, Bittman’s notion became the common description of Farm Protection bills nationwide.
First Amendment speech rights, but rather protects private property rights as guaranteed under the Fourth Amendment and other fundamental constitutional principles. Further, this article analyzes how activists rejecting FP legislation conveniently disregard the court’s outline of newsgathering limitations which regulate the press when the desire for free speech tramples upon the regard for abiding by lawful conduct.

This paper will introduce and explain how the First Amendment protects the right to speech and expression, but does not provide an explicit right to gather news. The Supreme Court has established a standard of newsgathering that outlines the parameters in which private individuals and members of the press may lawfully engage in newsgathering. The act of filming undercover videos is a function of gathering news information; it is not expression in the eyes of the law. This being said, regulating the illegal acts recording undercover videos cannot be simply evaluated as speech, because it is not speech; it is conduct. Most academia to date has entirely ignored this essential idea.

B. Background from Sinclair to 2016

Arguably the beginning of the modern animal rights movement appeared not in a court of law, but in the literary workings of Upton Sinclair’s 1906 novel, The Jungle. Sinclair writes through the eyes of a young immigrant worker who, in trying to support his family, takes a job at a local slaughterhouse. What he finds while working in the slaughterhouse makes him question the animal treatment and makes him increasingly sympathetic. A passage from the novel describes the atmosphere of hog harvesting as, “appalling, perilous to the ear-drums…There were high squeals and low squeals, grunts, and wails of agony; there would come a momentary lull, and then a fresh outburst, louder than ever, surging up to a deafening climax.” Sinclair’s words, powerful in 1906, were poignant enough to influence many.

Sinclair’s writing also undoubtedly provided an example of the literature that would later fuel the outbreak of various animal rights groups. Today, groups such as Mercy for Animals, People for the Ethical Treatment of Animals (PETA), and The Humane Society of the United States (HSUS) have developed into multi-million dollar organizations, with large

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16 U.S. CONST, amend. I.
18 Id.
19 Id. at Ch. 3, pg. 4.
name recognition worldwide. For example, according to a 2010 tax return published by the Humane Society of the United States (HSUS), their net assets exceeded about $187.5 million, with yearly revenue exceeding, $148.7 million from the past year alone. Much of the criticism of organizations like the HSUS has come from outside groups like Humane Watch. Humane Watch released a 2015 study of HSUS released tax return records that yielded that less than one percent of their revenue goes to shelters and sources that help animals in need. Despite heavy criticism, HSUS’ mission statement proclaims, “Celebrating animals, confronting cruelty.”

HSUS has taken its stance on “ag-gag” legislation to the next level by inviting its members to take collective action. On the nature of FP bills, HSUS responds, “While these "ag-gag" bills can take many forms, their goal is always the same: stop investigators, and the public, from learning about the inhumane and hazardous practices that the industry considers business as usual.” In this example of the activist response, the implication of the FP laws is that they criminalize trespass and defamation actions instead of relying on the traditional notions of tort law. The argument as will be discussed later, claims that the laws infringe on the fundamental rights of individuals to seek information and to educate themselves. The rest of this paper will serve to dispute and reject these claims.

C. On the Necessity of FP Legislation

The influence of Sinclair’s work has reached through the decades, informing both organized interest groups and those who eventually formulated extreme activist groups such as the Animal Liberation Front (ALF). These groups took to violent means to spread their message which became an utmost concern for farmers across America. The FBI estimates that the ALF committed more than 600 criminal acts in the United States since 1996,
resulting in damages in excess of 43 million dollars.\textsuperscript{29} The presence of radical groups, such as the ALF, was a likely factor in the passage of federal laws against agro-terrorism.

A main argument against the constitutionality of FP legislation begins with the following questions: why are these bills needed as opposed to simply relying on existing statutes of trespass and defamation? Why is there the need for a more specific statute that opens the door to selectively target particular groups for crime already penalized in other legal codes? What makes the statutes for trespass and defamation insufficient to cover the acts involved with undercover videos? Existing statutes are not expedient enough to adequately protect against the damages that result from undercover video recording.

Tangentially, current debate rages on in Congress over the notion of over-criminalization.\textsuperscript{30} Federal inmate population has increased exponentially since 1980, growing by 685.4\%.\textsuperscript{31} Between 1980-2013, average inmate populations grew at an average of 5,900 per year.\textsuperscript{32} By and large, the existence of increased incarceration in America rests on a variety of factors irrelevant to this paper, however, one important factor connects here to the FP bill debate; namely, the nature of modern American law that leads to mass convictions.

Where there is indeed the threat of over-criminalizing actions, in certain instances, a more specific law that carries principles of unlawful acts provides the opportunity for the most expedient adjudication of the law with the best mechanism for remedy. This is not to say that there should be copious amounts of laws criminalizing the same act, but an appropriate balance between criminalizing statutes serving a specific need and the legal redundancies that may arise therein. The law needs to balance the interests of individuals in being free in society to do as the please under the law, while respecting the rights of others. In the case of FP bills, the need to further criminalize trespassing acknowledges the need to protect private property rights of farmers where existing law has not done so effectively.

Existing defamation law is incapable of providing sufficient and timely remedies. Farmers whose products are damaged through the reach of undercover videos face arduous and complicated legal proceedings on the path to legal remuneration, an end that is itself

\textsuperscript{29} Id.

\textsuperscript{30} Defining the Problem and Scope of Over-Criminalization Before the H. Comm. on the Judiciary Over-Criminalization Task Force, 113\textsuperscript{th} Cong. (2013) (Statement of John G. Malcolm, Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, The Heritage Foundation).


\textsuperscript{32} Id.
largely inadequate in the face of irreparable business reputation damage. In the iconic international “Mc-Libel” defamation case of McDonald’s Corporation v. Steel & Morris, the 12-year lawsuit ended with a winning settlement of only £57,000 awarded to McDonald’s, compared to the millions spent by McDonald’s in legal fees during the decade-long appeals process.\(^3\) In addition, the 2005 infamous Oprah v. Texas Cattlemen case led to a years-long defamation case in which Winfrey ultimately ended up evading the alleged defamation claims made against her on accounts of being “stopped cold from eating another hamburger,” when discussing mad cow disease on her TV show.\(^4\) Spending over a decade in court is not a practical option for America’s farmers; the legal costs and time demanded to settle lawsuits are incredibly high. For the 97% of farmers who run family-owned operations, and lack the resources that McDonalds does, there is no conceivable avenue for them to spent years and thousands to defend their reputations in court. According to the World Bank, the 2013 estimated value of American agriculture enterprise was $226,494,000,000.\(^5\) In other words, America’s farmers contribute billions towards the global and national economy by virtue of producing the food that feeds millions.\(^6\) For the industry as a whole, farmers cannot afford to spend the hours they would producing crops or raising livestock, mired in legal proceedings that prevent them working and damage their business reputation at the same time. Additionally, in an age where the internet allows for information to be spread like wildfire, the effect of settling a claim of defamation over a decade later becomes mute. This reality makes the capacity for damage to agricultural industries far greater than any counter-speech that could be released in response to the outbreak of various undercover videos.

Adjudication of trespass is also not sufficient to provide justice to farmers affected by undercover videos’ unlawful newsgathering. In most jurisdictions, trespass infringes on another individual’s right to private property and most times, is categorized under tort law.\(^7\) In seeking legal remedy, tort law provides the avenue to receiving compensatory damages in the form of both actual damages which equate to the numerical value of the damages, and punitive damages which aim to directly punish the offender and to deter future action of the

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36 Id.
same kind.\textsuperscript{38} The legal remedy here is strictly compensatory. If one has enough resources, as many activist groups do, then there little potential deterring effect from the current tort law if the desire to trespass is great enough, compelling a need for criminalizing statutes as well.

In looking at the current tort law remedies for defamation and trespass statutes, it is clear that attempting to tie these vague statutes to cases involving damage to food producing industries is not judicially expedient. In other words, the stakes for America’s food production are too high to involve a lengthy, inefficient process.\textsuperscript{39} In this, the specificity of FP legislation allows a comparable remedy to this legal loophole without exercising an abuse of state regulatory power. Laws addressing exactly this have begun to surface since 1990.

In 1990, despite the fact that unlawful trespass was already illegal under Kansas state law, legislators drafted an act to preserve farmer’s interests in private property protection. The Farm Animal and Field Crop and Research Facilities Protection Act, was passed to remedy the lack of protection which existed in existing trespass statutes.\textsuperscript{40} With advancement of technology that led activists to begin to film and record farm activities in the early beginnings of undercover videos, combined with the rise of the ALF, threat of server damages was real for Kansas farmers. This made Kansas the first state to draft and pass a Farm Protection Act.\textsuperscript{41} It states that:

\begin{quote}
No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility: Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section; enter an animal facility and commit or attempt to commit an act prohibited by this section; or enter an animal facility to take pictures by photograph, video camera or by any other means.\textsuperscript{42}
\end{quote}

Kansas established its law in 1990 to provide a legal remedy for instances of ecoterrorism.\textsuperscript{43} According to the United States Federal Bureau of Investigation, ecoterrorism is defined as, “the use or threatened use of violence of a criminal nature against people or property by an environmentally oriented, subnational group for environmental-political reasons, or aimed at an audience beyond the target, often of a symbolic nature.”\textsuperscript{44} In this, Kansas’

\begin{flushright}
\textsuperscript{38} Id.  \\
\textsuperscript{39} \textsc{The World Bank}, \textit{supra} note 35.  \\
\textsuperscript{40} \textsc{Kan. Stat. Ann.} \textsection{}47-1427 (1990).  \\
\textsuperscript{41} Id.  \\
\textsuperscript{42} Id.  \\
\textsuperscript{43} Id.  \\
\textsuperscript{44} Id. at 28.
\end{flushright}
establishment of its Farm Protection Bill sought to improve the ability of the state’s laws to prevent and provide remedy in instances of ecoterrorism from individuals who trespassed onto private property. To be clear, this bill only increased the severity of the fines associated with trespassing, still classifying it as a misdemeanor, and specified the relationship to farms and agriculture. As previously argued, this is not nearly forceful enough in addressing the majority of activist intrusions onto private property, and certainly not the most damaging ones.45

However, it can be said that Kansas’ FP act was the grandfather off all FP bills.46 At the time, in 1990, this act appeared to slip through the cracks of the Kansas state legislature, not getting much mainstream media attention, and thus there was no fiery criticism of the Kansas act itself.47 Lack of documentation on the reactions toward Kansas’ establishment of the 1990 law suggests that it was only after subsequent bills were passed in Montana and North Dakota in 1991 that the controversy over these bills began to surface.48 As this next section emphasizes, Kansas’ newly established law would have a lasting impact on any future reporting on modern agriculture.

Since 1990, nine other states have passed legislation similar to Kansas’ statute: Missouri, Iowa, Montana, Utah, South Carolina, Wyoming, Idaho, North Carolina and North Dakota.49 Seventeen other states have attempted to pass Farm Protection Legislation, but have failed to do so, with many of the laws that are passed becoming the subject of legal challenges.50 In August 2015, an Idaho Federal District Court, in Animal Legal Defense Fund v. Wasden, overturned the Idaho FP bill calling it “in violation of the First and Fourteenth Amendments.”51 The differences in the rhetoric of the various FP bills, as will be discussed next, will reveal the reasoning behind the successful appeal of Idaho’s law in contrast to the other state laws.

45 Id.
46 Id., at 40.
48 Id.
50 Id.
D. Not All FP Laws Are the Same: Trespass and Information Gathering

Farm Protection Bills vary between the state legislatures in which they are passed in, however, Kansas’ bill made it unlawful for any individual person to trespass onto Farm property to collect information by any means, including photography or filming of any kind.\(^{52}\) Over time, however, with the increase of undercover videos being released by various animal activist organizations, such as Mercy for Animals, PETA, and HSUS, state laws have evolved to specifically provide legal remedies addressing the ways in which animal activists operate, such as falsifying employment records to gain access to farm property.\(^{53}\) This section will describe the variations in the laws, and, while not describing each in depth, will indicate which states have passed which laws.

i. Falsifying Records – Recent laws passed by Idaho, North Carolina, Iowa, Utah and Missouri, it is now unlawful to falsify employment records to gain access to record information. North Carolina state law states,

> Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained…(from)…an employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer…An employee who…without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer…(or) knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.\(^{54}\)

The evolution of FP bills has expanded to include falsifying employment records to obtain information without consent. Here, the law has extended to include that being an employee does not grant authoritative permission to gather information about one’s place of employment without consent of the farm owner.\(^{55}\) Currently in addition to North Carolina’s law that explicitly mentions falsifying employment, Utah’s FP law also explicitly outlines falsifying employment records as a means to gain access onto farms.\(^{56}\) Iowa’s law outlaws...
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fraud in collecting information but does not specifically refer to fraud in employment, making it broader than that of Utah. The law that was overturned in Idaho in August of 2015 stated that agricultural interference included, “employment with an agricultural facility by…misrepresentation with intent to cause economic or other injury…”

ii. Duty to Report – Another form of FP law being proposed in states like California, and enacted in states like Missouri, includes the necessity to report captured evidence of animal mistreatment within 24 to 48 hours of initial possession. According to the Missouri State Statue, “employees of animal agricultural operations who videotape what they suspect is animal abuse must provide the recording to a law enforcement agency within 24 hours. Any such recordings must not be edited in any way.” Bills such as Missouri’s aim to prevent the false capture of animal mistreatment without additional computer editing that can cause inaccurate portrayal of mistreatment. By putting a time frame on possession without reporting captured animal mistreatment, evidence can be documented and pursued in a timely matter by authorities. The Missouri statute does not apply to general citizens, but rather only to any employee of the animal facilities regardless of their employment integrity and intentions. It is only if the footage is used after the time allotment for it to be reported that the conduct of filming becomes subject to criminal consequences.

In California’s Farm Protection Legislation, the proposed law dictates necessity for reporting of animal abuse, even if obtained by undercover means, to law enforcement. This bill would require “any person, with certain exceptions, who willfully or knowingly photographs, records, or videotapes documents evidence of animal cruelty to provide a copy of the photograph, recording, or videotape documentary evidence obtained to local law enforcement within 120 hours, and would make a violation of this…punishable by a fine of $250.” Here, lawmakers have attempted to make concessions for people who capture instances of animal abuse, even if illegally in order to partially satisfy activist interests in protecting animals against mistreatment. Additionally, the California state law says, “A

57 IA Code § 717A.3A (through 2013).
58 S.1337, 62nd Leg., 2nd. Sess. (Id, 2014).
60 Id.
61 Id.
62 Id.
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_Id=201320140AB343
64 Id.
person shall not be civilly or criminally liable for providing documentary evidence of suspected animal cruelty as required by the bill, or for providing a law enforcement agency with information about the person or employer suspected of animal cruelty.”\textsuperscript{65} This removes the burden off of anyone who actually captures an instance of animal abuse from being punished under the law within the outlined time frame. At the same time, the structure of California’s law prevents individuals from having other motives to film, mainly using the footage to manipulate and create campaigns such as those seen on activist websites.\textsuperscript{66}

\textbf{E. Federal Considerations: Animal Enterprise Terrorism Act}

The Supremacy Clause of the Constitution outlines that federal law is superior to state laws in that state law must not be in violation of federal law.\textsuperscript{67} With the enactment of state-wide FP Laws, federal laws must be considered as well. In 2006, Congress passed the Animal Enterprise Terrorism Act (AETA), which prohibited “any intentional damage or loss of any real or personal property… used in an animal enterprise.”\textsuperscript{68} The rhetoric of the federal law on animal terrorism is particularly broad, leading to heavy debate on the legality of the bill. prioritized

In \textit{Blum v. Holder} (2011), the First Circuit Court of Appeals upheld the Massachusetts District Court dismissal of animal rights activists’ law suit challenging the constitutionality of AETA. In the initial complaint filed in the Massachusetts District Court, the animal rights activist appellants argued that the vague language of the AETA violated First and Fifth Amendment rights by creating a chilling effect on protected speech.\textsuperscript{69} The “chilling effect,” as defined by the court, is the infringement of constitutionally protected rights.\textsuperscript{70} The Third Circuit Court of Appeals had come to the same conclusion in \textit{U.S. v. Fullmer} (2009) in a similar case.\textsuperscript{71} Appellants opposed to AETA further argued they had standing to file the suit due to their time spent as animal rights activists.\textsuperscript{72} The complaint cited various instances of individuals being charged and convicted under AETA, such as Scott Demuth who was

\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} U.S. CONST. art. VI, cl. 2
\textsuperscript{70} Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Laws that create a chilling effect limit First Amendment speech by placing undue burdens on the right to free speech and expression, therefore, by restricting speech it creates the chilling effect.
\textsuperscript{71} U.S. v. Fullmer, 584 F.3d 132 (C.A.3(N.J.) 2009).
\textsuperscript{72} Id. at 198.
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convicted in 2009 after refusing to testify in a case regarding a break-in at a University of Iowa lab.\footnote{Id. at 199.} On appeal, the First Circuit held that “the plaintiffs could not challenge the constitutionality of the AETA, because their prosecution as Animal Enterprise Terrorists was not “certainly impending.”\footnote{Blum v. Holder, 135 U.S. 477 (2014).} In this, the First Circuit agreed with the lower court decision that the activists lacked the necessary standing to file the suit.\footnote{Id.} Since they themselves were not being charged under AETA for any allegedly criminal acts, they could not seek injunctive relief from the law.\footnote{Id.} Even though AETA would survive criticism in the court of law, it would not be the last time that speech rights were claimed to be chilled as a result of agriculturally based legislation.

In considering state FP laws and federal laws preventing ecoterrorism, it is plausible that state action works in compatibility with the federal considerations on agricultural production and terrorism consideration. There is certainly a discernable difference between acts of radical terrorism against agricultural operations, such as committing arson by burning down barns or other facilities, and trespassing onto private farms to record videos. However, the damages of both forms of unlawful activity have the capacity to cause considerable amounts of harm to agricultural production by encouraging veganism and in turn the halt of sales of animal livestock products.\footnote{See PETA, supra note 10.} The goal of FP laws is to recognize this reality and make intentional, premeditated intrusion, a criminal offense.\footnote{See, IOWA CODE, supra note 12.} It is in this consideration that the recording of undercover videos becomes criminalized as well. As will be discussed in the next section of this article, this criminalization does not carry the unconstitutional burden that many aspire to place on it. Part II analyzes the atmosphere surrounding the court’s precedent on applicable newsgathering, speech and expression rights.

II. First Amendment Speech vs. Newsgathering.

The basis of FP legislation being called “Ag-gag” rests on the notion that the legislation violates First Amendment Speech rights. However, there is no explicit right to newsgathering provided by the First Amendment. The First Amendment specifically says,
“Congress shall make no law...abridging the freedom of speech, or of the press.”

In accordance with the First Amendment, the Court has explained how the First Amendment protects speech through establishing a hierarchy designating various levels of protected speech. Justice Harlan in *Konigsberg v. State Bar of California* (1961) wrote:

> Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection.... On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise...

Here, the hierarchy of First Amendment protected expression is structured with political and social expression at the top of the hierarchy, making it the most protected form of speech.

This means that in order for the government to restrict or place regulations on social and political expression, it must pass through strict scrutiny. On the second level of the hierarchy comes sexual and commercial expression, which can be regulated to a greater extent than the speech above it. The hierarchy concludes that speech on the lowest level is unprotected speech, including that which is held to be obscene or incite violence. Activists claim that undercover videos are included on the first level under speech and political expression, however that assumption is false. Recording of undercover videos is not exercise of speech, rather it is a function of newsgathering which is not subject to the same regulatory standards. FP bills criminalize the physical filming of the video, not its release or usage therefore the conduct being criminalized is not the expression in itself.

In order to determine Congress’ ability to regulate speech, legal precedent established by the Supreme Court has created various legal tests that apply to the different levels of protected speech. The Supreme Court has established the balancing standard of strict scrutiny in order to lawfully regulate social/ political speech. As outlined in the famous “Footnote 4” of *U.S. v. Carolene Products* (1938), the strict scrutiny standard provides that speech can be regulated only if there’s a justified by a compelling government interest, and

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79 U.S. CONST. Amend. I.
81 Id.
83 Id.
84 Id.
the regulation is narrowly tailored. In being narrowly tailored a regulation must avoid being overly vague. Courts have routinely employed what is known as the reasonable person standard. In this, a reasonable person would not have to “guess” the meaning if a regulation was too vague. Regulations must not be overly vague; the broadness of their scope poses the threat of prohibiting too much speech with chillingly limited First Amendment protections.

In regulating speech, there is also the notion of prior restraint which ties heavily into the notion of newsgathering and the nature of undercover videos. As seen in the Supreme Court’s holding in *New York Times v. United States* (1971), the seminal case regarding the legality of the publication of the Pentagon Papers and its top secret information on the Vietnam War, the government had to pass the strict scrutiny standard by having compelling evidence of immediate harm in order to restrict the flow of information from being published by an individual of the press. It failed to do so because the Supreme Court held that the Pentagon Papers failed to reveal any vital information that would put the country or soldiers in Vietnam in immediate risk such as revealing troop patterns, ship locations, etc. The Supreme Court’s holding in *New York Times* applies considering the constitutionality of FP legislation because activists argue that FP legislation restricts the flow of information coming from the farm before and after publication by criminalizing the filming of the video in its entirety; hence, qualifying as a prior restraint restriction on protected speech. In other words, activists argue that speech rights are being chilled in creating undercover videos, as the laws criminalize the act of taking videos, therefore, halting speech. Further, the FP bills restrain speech after the documentation process ends by allowing farmers to seek damages for the videos after they are published to the public.

The issue with the above argument, however, is that the actions being criminalized by the law do not refer to expression of speech. Instead the action being criminalized is unlawful newsgathering, which must be considered in an entirely different scope than the expression of speech outlined in the First Amendment. Newsgathering is essential to having the content necessary for free expression; however, this requirement does not mean that rights to gather information, even if considered news, may be automatically assumed.

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85 *Id.*
87 *Id.*
88 *Id.*
The Supreme Court has sought to address the discrepancy between speech rights and newsgathering over the years. *Branzburg v. Hayes* (1972) is among the most famous to attempt to define newsgathering limitations.\(^{89}\) In the majority opinion, the Supreme Court held that, “The First Amendment does not guarantee the press a constitutional right of speech access to information not available to the public generally.”\(^{90}\) The legal implications from *Branzburg* are instructive, meaning that newsgathering may be regulated out of the strict scrutiny standards of First Amendment speech. Subsequent cases have upheld this notion and furthered the *Branzburg* application such as *Houchins v. KQED* (1978), which held that there is no constitutional right to access of information.\(^{91}\) Simply because an individual desires to gather information, the law does not permit that individual to seek that information in any manner in which they desire.

Further, under the newsgathering standard, there are no differences in the rights of private citizens and journalists; the rights are equal between citizens and press for the First Amendment speech and newsgathering all the same. In *Desnick v. ABC Inc.* (1995), the court said, “There is no journalists’ privilege to trespass. But, consent is sometimes deemed to exist, even though it was gotten through fraud. Consent to entry is often given legal effect even though the entrant has intentions that, if known to the owner of the property, would cause him to revoke his consent. The law of trespass was made in order to protect a person’s property. Plaintiff’s property was not affected by the patients.”\(^{92}\) In this application, it appears as if the court is protecting deceitful entry, however the court simply qualified this notion by saying that there was no interference with the property itself. If there is a notion of interference with property, unlawful entry includes consent gained through fraud. This being said then, when it comes to newsgathering on the farm, farms are property and the livestock living there are property of the farmer. Harming the agricultural operation comes in form of revenue loss or reputational loss is an indirect application of this holding. However, when activists manipulate this footage to rile up public opinion and use loss of business as a threat to strong-arm farm owners into abiding by their subjective agricultural techniques, the application becomes direct, leaving undercover recording unprotected under the *Desnick* standard.

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\(^{90}\) *Id.* at 684.


\(^{92}\) *Desnick v. ABC Inc.*, 44 F.3d 1345 (7th Cir. 1995).
The Supreme Court further solidified *Desnick* in the holding in *Wilson v. Layne* (1999), claiming, “While executing an arrest warrant in a private home, police officers invited representatives of the media to accompany them. We hold that such a “media ride along” does violate the Fourth Amendment.”93 *Wilson* reinforces the idea that press and citizens have same rights – further, that newsgathering doesn’t provide any additional rights that surpass considerations of the law and privacy.94 This would extend to the private property rights involved in farm property.

Similarly, courts have ruled on various cases to further clarify the relationship between First Amendment rights and the newsgathering standard. For example, *Dietmann v. Time* (1972) involved journalists filming an undercover, unlicensed medical practice that claimed it could treat cancer with herbs, with the story subsequently aired on national television.95 The court held that no matter the interest in working with law enforcement or public knowledge, the filming was unconstitutional.96 The question before the court was, “Does the First Amendment insulate the defendant from liability for invasion of privacy because defendant's employees did those acts for the purpose of gathering material for a magazine story and a story was thereafter published utilizing some of the material thus gathered?”97 The majority opinion stated, “As we previously observed, publication is not an essential element of plaintiff’s cause of action. Moreover, it is not the foundation for the invocation of a privilege.”98 Further, the court strongly disagreed with the notion that hidden electronic recording devices were essential to newsgathering.99 The majority opinion discussed the history of gathering news and concluded that newsgathering had been occurring decades before the invention of any recording devices.100 This being said, the First Amendment does not provide immunity from the law because, “The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.”101 In this, the court effectively answered that breaking the law in the name of newsgathering is not protected speech, not only adding to the salience and

94 *Id.*
96 *Id.*
97 *Id.*, at 247.
98 *Id.*
99 *Id.*, at 251.
100 *Id.*
101 *Id.*
constitutionality of the FP bills at the heart of this issue, but also taking out a foundational pillar in the arguments of those standing opposed to such legislation.

In attempts to handle the discrepancy between newsgathering and speech protection, the court has tried to designate a balance between newsgathering and recording information. The Federal Wiretap Act, originally established in 1968, protects the privacy of phone calls and other oral communications by making intercepting, recording, disseminating or using a private communication without a participant's permission unlawful. The law has evolved over time to provide exceptions for circumstances involving terrorism, and for a multitude of CIA, NSA, and FBI actions typically justified by national security concerns. If violated, however, the law permits violators to be subject to criminal charges. The Federal Wiretap Act of 1968 does not explicitly cover photographic recordings; however, it does show that Federal law establishes standards for gathering intelligence. This being said, however, various states, in accordance with the Federal Wiretap Act, have passed laws that forbid the unauthorized use of cameras in private places. These states include Alabama, Arkansas, California, Delaware, Georgia, Hawaii, Kansas, Maine, Michigan, Minnesota, New Hampshire, South Dakota, and Utah. Outlawing usage of cameras in private places should certainly extend to the private property on which farmers live and work on.

In *Bartnicki v. Vopper* (2001), the court held that it was lawful for the media to publish unauthorized recording as long as the user did not have any connection to the direct recording of the illegal material. Further, the court held that the First Amendment protects a journalist who reports illegally intercepted private conversations only if the conversation is newsworthy and the journalist was not involved in the interception themselves. According to the court, the newsworthiness standard included all that was not held to be offensive to a reasonable person or not of the legitimate interest of the public. This precedent did not make it lawful for illegal for newsgathering to take place, rather it protected media sources who may publish information without being aware of its illegal sources. Further, the court in *Bowens v. Aftermath Entertainment* (2005) said, “One party consent is not sufficient if

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102 18 U.S. Code § 2511.
104 18 U.S. Code § 2511.
105 See Trager, *supra* note 102.
106 18 U.S. Code § 119.
108 Id.
109 Id.
recording is for an illegal purpose or to commit a tort.”\(^{110}\) This holding broadens the gap between those who believe that undercover recordings or any recording without consent are protected under the provisions of First Amendment rights. With respect to the newsworthiness standard, in many cases animal rights activists, for lack of a better term, use deceitfully obtained footage of private property to take non-issues, such as the indoor housing of poultry, and subjectively aggrandize the material to cause public backlash that often ends up hurting a seminal industry that feeds nations, material that can hardly be considered newsworthy and certainly not a legitimate interest to the public.

The conversation of newsworthiness and the holding in \textit{Bartnicki} is especially important with regards to the structure of the FP bills both proposed and passed. The FP bills seek to primarily criminalize the act of trespass in recording the videos and also the act of fraudulently seeking employment.\(^{111}\) The bills do not go so far as suppressing the videos and punishing those who yield them to the public like the facts found in \textit{Bartnicki} and \textit{Bowens} outline, an important distinction that has gone largely and almost entirely ignored by opponents of FP bills.

Over time, legal precedent surrounding newsgathering and expression has seemingly shifted away from \textit{Dietmann}. A prime example is found in the highly controversial holding in \textit{Food Lion, Inc. v. Capital Cities/ABC, Inc.} In \textit{Food Lion} (1997), undercover reporters falsified employment to gain access to Food Lion food stores to record their practices, after there were rumors of failure to abide by health and safety regulations.\(^{112}\) By pretending to be actual employees of Food Lion, Time reporters captured multiple instances of violations and published their findings.\(^{113}\) Food Lion sued for defamation, but lost in court, as the court held that the recordings showed true instances of Food Lion practices.\(^{114}\) Further the court in \textit{Dietmann}, held that the reporters had a valid interest in expressing their findings to the public.\(^{115}\) This being said, this precedent does not prove that newsgathering should apply limitlessly.

\(^{110}\) \textit{Id.}
\(^{111}\) \textit{Id.}
\(^{112}\) \textit{Id.}
\(^{113}\) \textit{Id.}
\(^{115}\) \textit{Id.}
While truth is an absolute defense to defamation suits and Food Lion lost their defamation damages claim, the precedent set forth by the court in Dietmann, has not been invalidated by the holding in Food Lion. The court upheld the trespass charges of the undercover reporters in Food Lion, and damages were awarded on the trespass charge. When connecting to FP laws, this is exactly the conduct that is being regulated, the trespass onto private property, not the release of the video itself. Animal activist groups and opponents of FP legislation hinge their arguments on the point that the reporters had a valid interest in sharing the report because there is a notion of imminent danger to the public safety in buying rotten meat and spoiled dairy products. This is precisely where in making their case, opponents of FP bills argue that it is of the public interest to have the inside information on how their food is produced. For example, the American Society for the Protection of Animals claims of the need to fight “Ag-gag” bills, “Animals deserve to be protected, and the public has a right to know how its food is produced.” In this, they have established a right to know and have exposure to information, which aligns with the First Amendment right to free expression and a free press. It is also through the mentions of literature, such as Sinclair’s The Jungle, opponents argue that maltreatment of animals contributes directly to dangers to health and safety of humans engaging in animal product consumption.

The above suggestion that there is a direct nexus between supposed animal mistreatment and a health and safety concern like that seen in Food Lion is incorrect. In the case of undercover videos, there is no immediate danger to the public, like in Food Lion knowingly selling potentially poisonous meat to customers. There is certainly a distinct difference between a grocery store selling rancid meat to shoppers and the debate over whether gestation crates for hogs are an ethical practice; whereas one directly and without argument speaks to a public safety concern and is both newsworthy and in the public interest, the latter has none of these qualities and is entirely subjective yet reputationally damaging. The two interests are far from synonymous in addressing public safety concerns, and therefore the First Amendment should not protect the latter the way that it protects the former.

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116 Id.
117 See HUMANE SOCY, supra note 9.
118 Id.
119 See Wasden, 44 F. Supp. 3d.
To separate the threat of health and safety and the right to know how food is produced in relation to the valid interest of the animals experiencing supposed harm it is important to note how the current FP laws attempt to balance activist interests with animal welfare interests. Returning to discussion of the states such as Missouri that have a duty to report farm protection law, the structure of those laws works to preserve interests of animal welfare. By allowing for individuals to go directly to law enforcement after capturing evidence of animal mistreatment, those animals are able to be relieved faster. At the same time, these laws promote justice in ensuring that undercover videos are not edited to create a false reality or manipulated directly to serve the interests of animal activist groups.

In sum, the court has navigated through the areas of speech expression and newsgathering and concluded that while speech is explicitly protected under the First Amendment, newsgathering is not. Further, the court has concluded that violating the law is not included in exercising of constitutional rights. This article’s next section will address prior literature and legal decisions surrounding the conflict the speech and newsgathering considerations of Farm Protection bills.

### III. Speech and Strict Scrutiny

Previous literature on the constitutionality of FP Bills suggest undercover videos are protected under the court established newsgathering standard. In 2012, Lewis Bollard writing for the Yale Law Review, wrote on the constitutionality of “ag-gag” laws. The core of his argument was that ag-gag laws were in fact examples of exercised speech that both needed to be discussed under strict scrutiny, and when done so, failed under the standard. Bollard’s argument seems compelling on the surface; however, applying Cohen makes no sense to support the right to gather news via undercover videos because the action in question is not speech; it is newsgathering which does not need to pass through the strict scrutiny standard.

Cohen states that the press “may not with impunity, break and enter an office or dwelling to gather news.” Further, the holding in Cohen stated, “This case, however, is not controlled by this line of cases but rather by the equally well-established line of decisions

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121 See S. 631, supra note 58.
holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” 124 The majority opinion states that simply because a regulation may make gathering news more difficult, does not mean that the regulation is automatically unlawful. 125 This draws a distinct line between speech and newsgathering standards, in which speech cannot be regulated as easily as newsgathering can, due to the hierarchy of protection established by the court in protecting speech and expression as the highest form of protected speech which excludes newsgathering.126

In order to negate the instructive ruling of Cohen, Bollard claims that FP bills are not generally applicable; therefore, they do not apply to the standard outlined in Cohen. He writes, “ag-gag laws are not generally applicable laws because they were drafted to top expressive activity at agriculture operations and are under inclusive for any other purpose.” 127 Bollard’s thoughts, however, are inconsistent with other literature in the field. According to a North Carolina Law Review article, general applicability serves to distinguish laws that are equally applied to everyone and do not target speech and laws that penalize or target certain groups from exercising their rights to speak. For example, a law requiring individuals to obtain a permit before hosting a concert in a public park is a general law that does not target speech, whereas a law requiring individuals to obtain a permit before conducting a demonstration in a public park specifically targets speech.128 So, FP laws simply prohibit filming without consent – they do not require a permit for capturing any speech on farms, rather they hold that informational newsgathering needs to be conducted lawfully.

Further, simply because these laws specifically clarify newsgathering limits on farms does not mean they lack general applicability. Basic interpretation of existing trespass law states that one cannot simply enter someone’s home or private property. Additionally, one may not conduct this action and justify it under the desire to gather intelligence. Using John Locke’s notion of private property, in his Second Treatise on Government, he explicitly claims “the sole purpose of government is to protect private property.”129 Locke’s influence on the Founders and the American political system notwithstanding, this is the implication

124 Id.
125 Id.
126 See Konigsberg, supra note 79.
127 Id.
129 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §125 (Stefan Collini, ed. 2012).
confirmed under *Wilson v. Layne* that protection of private property is among the principles the United States was founded on, particularly, the 4th Amendment which states, """[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."" Using this consideration, relying on dissenting opinions in *Cohen* does not make for the strongest of arguments.

**A. Rational government interest**

The foundation of using a rational basis review is built upon the notion that the government needs to have a direct stake in applying a regulation. The court has held that the government has had valid interest in regulating a variety of acts including, regulating the fittings for eye-glass frames and the ability of river pilots wanting to fill new job openings with their friends and family, to hire. In terms of speech, the court has held there is a rational basis in protecting individuals from speech that was obscene and damaging to the public as seen in the three-part test created in *Miller v. California*.

Concerns of governing overstepping its bounds using rational basis review have been of concern to many scholars including scholar Clark Neily. Specifically, he questions, what truly IS a rational government interest? Scholars like Neily believe the vagueness of the standard has led to Supreme Court precedent that has exploited the vagueness of the standard and led to vast government overreach, making the rational basis standard, the "Rationalize-a-basis-test." Neily outlines the danger of continuously applying the rational-basis standard through outlining the test’s preoccupation with exercising creativity in determining the existence of government interest, and the threat this poses to liberty. In fear that the government may soon be able to justify interest in everything therefore leading to regulations restricting individual liberties, he argues that the Supreme Court adjudicates in such a way that the rational basis is deemed to exist if "there is any reasonably conceivable state of facts that could provide a rational basis for it."

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130 U.S. CONST. amend. IV.
131 *Id.* at 57.
134 *Id.*
135 *Id.* at 49.
136 *Id.* at 50.
137 *Id.*
It is important to note however that not all applications of the rational basis test are arguably invalid. The Supreme Court in *Plyer v. Doe* (1982) held there was a rational basis for the state of Texas to prevent discrimination of distributing funds to schools to educate children who not “legally admitted” into the United States.\textsuperscript{138} The statute was held to be unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.\textsuperscript{139} In the majority decision, the court evoked the sufficiency of rational basis review in saying, public education is essential to sustaining society through virtue of allowing the individual to progress and secure individual achievement.\textsuperscript{140} Here, the Supreme Court held that promoting education was a fundamental interest of the government, therefore rational basis review was valid.\textsuperscript{141}

The interest of the government in promoting an educated population is certainly more justifiable that the government regulating eye-glass framers and claiming government responsibility to ensure people’s clear vision. In summary, rational basis review holds potential to be grant government expansion of influence into private citizen’s lives, however when applied within the proper scope of government’s intended purpose as outlined by the Constitution, the government serves to promote liberty. Using rational basis then to ensure the protection of one’s fundamental rights is entirely within the proper scope of constitutionality. Here then it is seen that rational basis, while not completely devoid of being used improperly by the court, has its place in protecting individual’s property, including farmers to the rights of their homes farms.

**B. Narrowly tailored so as to not be overbroad**

For a law to be narrowly tailored, it has to directly serve the existing government interest outlined in rational-basis review.\textsuperscript{142} Additionally, it must not be over inclusive to prohibit too much speech, or all speech based on content or a specific type and category.\textsuperscript{143} For example, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* (1991), the court held that “Son of Sam laws,” that forced prisoners to submit all profits from writing stories from jail was an overbroad restriction on speech because it prohibited

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 203.
\textsuperscript{141} Id.
\textsuperscript{142} Meyer v. Grant, 486 U.S. 414, 426 (1988).
that speech based on its content and subjected it regulations that other speech was not, and that there were lesser means possible to regulate that would not suppress speech.\footnote{144 Simon & Schuster v. Crime Victims Board, 502 U.S. 105 (1991).}

Prior writings and court arguments have argued that FP bills are not narrowly tailored.\footnote{145 Id. at 121.} However, when analyzing the concepts and rhetoric of the FP bills, it is clear that the laws do not regulate speech, they regulate the conduct of newsgathering. Looking at the laws, they are specific to exactly criminalize the specific actions of individuals in reference to how they gather information. FP legislation does not criminalize the release of the videos, it criminalizes the intrusive and deceitful ways they gather it. To reinforce this, Kansas’s law prohibits the entry into, “an animal facility to take pictures by photograph, video camera or by any other means.”\footnote{146 KAN. STAT. ANN. §47-142, supra note 40.} This regulates conduct and the act of gathering intelligence, not an exercise of speech or expression. In conclusion, FP statutes are appropriately tailored to balance vagueness without specifically targeting a particular group of individuals simply for their beliefs or desire to speak on a topic. Therefore, FP bills criminalize actions which are already inconsistent with common principles of American law.

C. No less intrusive regulations on speech possible

Hinging on the arguments in the Yale Law Review article comes Columbia Law Review’s article.\footnote{147 Matthew Shea, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws, COLUM. L. REV. 1-36 (2015).} The core of Columbia’s argument held that, while some bills such as the Duty to Report bills claim that they are vested in the interest of ending animal mistreatment, their underlying framework still allows for the intrusive suppression of activist’s speech and other critics of animal agriculture.\footnote{148 Id.} It is indeed true that the court has held that speech cannot be regulated simply because the government dislikes based on its content.\footnote{149 Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991), quoting Texas v. Johnson, 491 U.S. 397, 414 (1989).} At the same time however, it is not untrue that with compelling interests needing to be served by the government in protection of rights, it may be regulated. Even if FP bills were said to be regulating content-based speech instead of newsgathering, their answer to the type of regulation needed in the case of undercover videos is clear. To protect private property, there cannot be any other means to enact a protection law when the issue at hand is trespassing in...
one form of another. The various types of FP laws have attempted to ensure the regulation on action is as reasonable as possible with the addition of clauses that allow for undercover recordings to be given to law enforcement within a grace period to avoid legal punishments. In this, it is seen that FP laws do not directly prohibit scrutiny or criticism. Rather, they ensure that criticism is gathered lawfully and, further, that all criticism does not falsely portray reality due to editing or other means.

D. Strict Scrutiny, continued

Michael Shea connects to arguments of many animal advocates groups that claim that arguments against FP bills should restructure themselves in the court of public opinion to argue for food safety concerns. In this, Shea and like activists are arguing that the right to film undercover videos is valid because of the health and safety considerations found in cases such as *Food Lion*. The argument for physical public safety, however, does not describe the nature of undercover videos. The public safety consideration found in the holding of *Food Lion* is different than filming and staging videos to create false instances of abuse. As mentioned in the above considerations of abuse doesn’t always correlate to the safety of the final product. This is not to say that animal abuse is condonable, rather, it is to say that two legal principles cannot simply be lumped together and considered legally synonymous. In sum, FP Bills protect private property and allow for recourse in the event that the law is broken. FP bills are specific to farms to allow for clear recourse and adjudication under the law.

Different in structure than those published by Yale and Columbia Law, Duke Law published an “advisory article.” This article claimed that ag-gag laws do not necessarily violate First Amendment rights; rather, the article served the purpose of guiding actions under the law that would best serve activists in channeling their actions legally and effectively. A central argument of the Duke article is that it argues that ag-gag laws are likely not overbroad under the *Stevens* distinction because *Stevens*, only held a law was overbroad that forbade the sale of merchandise depicting animal abuse in instances such as dog fighting where those holding dog fits are obviously looking to make a profit. There is a

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150 Id.
large gray area that prevents establishing a clear path to explain how undercover videos are transferred to activist organizations who release them. In being unable to state that undercover videos are purchased by activist groups in return for financial compensation, this point may only be assumed within reason. Using this assumption that undercover videos are not filmed for direct profit like dog fighting paraphernalia, but rather divulged to the public to attempt to create radical change, Stevens doesn't apply.\textsuperscript{153}

This article makes a clear point that constitutional protections cover no journalistic immunity, but distinguishes between obtaining news information and releasing it.\textsuperscript{154} The act of releasing news is protected expression, but gathering it is not protected under the free speech standard. This advisory article suggests that perhaps professional journalists have a better chance of being protected under the law rather than other individuals who simply trespass; however, using considerations under Wilson and Dietmann, this point is not legally sound.\textsuperscript{155} This point of view, however, is the closest point to the arguments of this article.

IV. \textit{Animal Legal Defense Fund v. Wasden}

A. Idaho

Despite the legal analysis behind the claims of unconstitutionally of Farm Protection legislation, the emotional appeals supporting newsgathering protection have come to influence the court of public opinion leading activist groups to file law suits in federal court. In August of 2015, a groundbreaking decision released by the Idaho District Court overruled its FP law. In a 25-page opinion, the court held in \textit{Animal Legal Defense Fund v. Wasden} (2014) that the Idaho law violated Free Speech rights and was incompatible with the First and Fourteenth Amendments.\textsuperscript{156} Signed into law in February of 2014, the Idaho Farm Protection law was a two-page document which made interference with agricultural production unlawful\textsuperscript{157}. The law highlighted the following key points:

A person commits the crime of interference with agricultural production if the person knowingly: is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass; obtains records of an

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{157} S.1337, 62\textsuperscript{nd} Leg., 2nd. Sess. (Id, 2014).
agricultural production facility by force, threat, misrepresentation or trespass; Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers; Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or Intentionally causes physical damages. 158

This two-page document led to the Animal Legal Defense Fund’s lawsuit which reached the Idaho District Court in 2015. 159

B. Speech with Newsgathering

The Idaho District Court held that the state law “seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.” 160

Right away the claims made in the first pages of the Idaho decision neglect the considerations of newsgathering limitations outlined by Supreme Court precedent. By combining the interests of food safety, worker safety, animal safety and business impacts, the Idaho court fails to recognize that while these interests are important, the Constitution does not protect criminal actions in order to further those interests. In addition, the phrasing of “First Amendment values” is seemingly careless in consideration of the case at hand. The First Amendment protects five specific rights, not five specific values. The term “values” is entirely overbroad in the sense that many claim Farm Protection bills are overbroad. It is here that the Idaho Court has attempted to identify one problem and in describing this problem, illustrates an example of the proposed problem itself.

158 Id.
160 See Wazden, 44 F. Supp. 3d.
Further, the Idaho opinion falsely combines all plausible explanations for taking an undercover video. It is simply false to say that undercover videos in their entirety are protected by the First Amendment. When the Idaho court holds that, simply because one type of undercover video that supposedly videotapes potential food safety concerns, it completely ignores the reality that undercover videos aim to serve a larger, more calculated purpose. It ignores the reality that the main goal of these videos is use documented instances of supposed animal abuse after being edited to further a subjective agenda. The subjective agenda here is clearly laid out by these activists as “stop eating meat,” where, “stop eating meat” largely entails damaging agricultural businesses and the industry as a whole.

The court’s ignorance to these realities is exemplified through the holding that “an agricultural facility’s operations that affect food and worker safety are not exclusively a private matter.” The flowery language of the Idaho opinion creates a wide open door for attaching ownership rights to individuals who have none. There is no doubt that individuals purchase the food farmers grow. However, people also purchase hardware from businesses such as Home Depot. Hardware manufactures produce tools that are involved in many public activities like building cabinets or tables and chairs used in public settings. By allowing for unlimited access to information simply because something is held to be a public matter creates an environment where nothing is private because in using this analysis, everything can be traced to have some sort of public aspect. Essentially, the court’s holding means that since people consume the products made on farms or by virtue of farms that farmers have lesser rights to private property than other citizens in the name of the public good, or rather what Idaho sees as the public good.

D. Legally cognizable harm

Idaho also held, “The State has done nothing to show the lies it seeks to prohibit cause any legally cognizable harm… Rather, it sweeps into its prohibition all lies used to gain

161 See PETA, supra note 10. Specifically, under the section “what can I do?” PETA asks that you, “Keep an eye on this page for updates on bills as they’re introduced. In the meantime, the best way for you to save more than 100 animals every year from a life of misery on a cramped, filthy factory farm and a painful death at a slaughterhouse is to try healthy, compassionate vegan eating!”

162 Id.

163 Id.

164 See Wasden, 44 F. Supp. 3d.
access to property, records, or employment—regardless of whether the misrepresentations themselves cause any material harm.” As the court also noted earlier in the decision, “the limited misrepresentations ALDF says it intends to make—affirmatively misrepresenting or omitting political or journalistic affiliations, or affirmatively misrepresenting or omitting certain educational backgrounds—will most likely not cause any material harm to the deceived party.” 165

By claiming that individuals trespassing on private property and violating the law could pose no material harm, the Idaho court makes a very dangerous and broad assessment. There is never a guarantee that an individual would not cause damage while violating the law in the first place. There are no laws in place that currently allow for an individual to trespass onto private property without permission. The Idaho court is making sweeping allegations as to what could or could never be dangerous in preserving the rights installed by core principles of law. Setting precedent such as this would be unheard of in other areas of the law such as with the gun control debate. If the court here were to assume that a man illegally carrying around a semi-automatic weapon should not be held liable for that act because he was not likely to do harm, or did no harm, despite the fact that he is breaking the law, then the case of illegal trespass onto private property deserves the same rigor of analysis and resulting detailed standards.

E. Speech, generally

Another point made in the opinion that served to explain the law’s violation of the First Amendment was that, “Audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate an undercover investigator or whistleblower who is otherwise disbelieved or ignored. Prohibiting undercover investigators or whistleblowers from recording an agricultural facility’s operations inevitably suppresses a key type of speech, because it limits the information that might later be published or broadcast.” 166 In this, the Idaho court advocates for a preemptive form of state action to prevent infringements on foreseeable publications without any consideration of the means in which individuals are gathering that information. In other words, the Idaho court sacrifices one legal consideration for another; they are selectively ignoring newsgathering considerations in exchange for the

165 Id.
166 Id.
appealing call to expand speech rights.

Idaho further held that, “As the Supreme Court has repeatedly said in Moreno, ‘a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest if equal protection of the laws is to mean anything.’ As a result, a purpose to discriminate and silence animal welfare groups in an effort to protect a powerful industry cannot justify the passage of § 18-7042. Id. at 534–35.” What Idaho is missing in this analysis is that FP laws do not target any specific groups of people based on their affiliations. Rather, they make it unlawful for any individual whether working with an activist group or not to break the law. Further, the scope and purpose of the law is to provide remedy for those that incur damages from violation of the laws.

What is perhaps the most shocking of the claims made in the introduction of the opinion is that “investigative features are a common form of political speech.” This was highlighted in the claim, “Indeed, private party media investigations, such as investigative features on 60 Minutes, are a common form of politically salient speech.” To the Idaho District Court then there is no judicial difference between newsgathering and expression of news as speech. This, then, serves completely in rejection of Branzburg. The precedent established firmly by the Supreme Court in Branzburg yields that there is a clear distinction between newsgathering and news expression. With Idaho neglecting to uphold this principle, Idaho’s decision would presumably lack legal merit if ever appealed to the Supreme Court. In disputing the former claims above, there is potential for back and forth debate on the legal merits, however this article has served to dispute those.

Conclusion

Thus far, this article has argued that in the case of FP bills, the issue at hand is not simply speech rights. In fact, many times, the rights at hand are not speech considerations at all. The acts criminalized in FP bills do not target the exercise of speech – they regulate the gathering of information. As the court has clearly outlined, there are no rights to newsgathering explicitly granted under the Constitution, and further, newsgathering is not

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167 See Moreno, 413 U.S. at 534.
168 Id.
169 Id.
170 Id.
171 See S. 631, supra note 58.
172 See IOWA CODE, supra at note 12.
the same as exercising speech.\textsuperscript{173}

The faults in the Idaho decision prove that FP laws, even if subject to the strict scrutiny standards, survive such standards and are lawfully regulated types of speech. Strict scrutiny standards, as described above require three things to be satisfied; a rational government interest, a narrowly tailored regulation that is not overly broad or vague and the opportunity for no lesser regulation to achieve the same effect.\textsuperscript{174}

This paper has suggested that there is a clear substantial government interest to protect private property as it is a fundamental principle America was founded on. According to the Idaho decision, “Protecting the private interests of a powerful industry, which produces the public’s food supply, against public scrutiny is not a legitimate government interest.”\textsuperscript{175} Further, the Idaho court held that, Idaho had not sufficiently proven why the law was necessary and stated that simply refuting the videos or using counter-speech could easily be sufficient by using the same media platforms to make their own video disproving presence of abuse.\textsuperscript{176} In this, the Idaho court is essentially ignoring valid points of law and instead, encouraging farmers to fight fire with fire. This approach is entirely problematic, as one considers the reality that even under tort law, defamation exists once a false video is released because the reputational damage is already done.

The logic of the Idaho District Court is faulty in asserting that there is no damage caused by undercover videos, but at the same time holding that even if some damage resulted, that the injured parties could seek remedy under other legal statutes such as defamation of character. Even if farmers were able to sue for defamation, the legal remedy would not cover the legal issue of trespassing and the very real damages of loss of revenue and defamation of character would continue to arise from those trespassing onto private property. The notion of trespassing here could also be construed to mean falsified employment used to gain access to farms with damages including the wages paid to an individual who was fraudulent in their employment intentions. Returning to Locke’s notion of the importance of private property preservation, it becomes quite clear that there is certainly a government interest in protection of farmer’s property.

\textsuperscript{173} See S. 631, \textit{supra} note 58.
\textsuperscript{174} See Carolene Prods. Co., \textit{supra} note 81.
\textsuperscript{175} See Wasden, 44 F. Supp. 3d.
\textsuperscript{176} Id.
With these considerations made, this paper has made a complex arrangement of arguments surrounding the legal merits of FP legislation. This article has discussed Farm Protection laws and the complex legal arguments both for and against their constitutionality. Analysis has worked within the realms of academia, public opinion and the court of law to dissect a legal issue in its entirety is highly complex. Most times the battles over constitutionality center on the considerations of free speech rights and the specific precedent the court has set forth in protecting those rights.

In conclusion, the actions prohibited by FP laws are not actions relating directly to the protection of speech but rather are actions under newsgathering. The law differentiates between the rights of speech and those of newsgathering. This article has argued that the legislation allowing for legal recourse for farmers under these laws does not violate First Amendment rights, as it is not constitutionally protected speech. Further, even if the videos were to be considered speech, they pass the strict scrutiny test.
Russia’s Claim to The Arctic: Хребет Ломоносова

Nicole Bayat Grajewski

Introduction

In August 2007, Russia’s scientific research ship Akademik Fedorov and nuclear icebreaker Rossiya sent two submarines 4,300 meters deep in the Arctic Ocean seabed to gather seismic and bathymetric data in support of Russia’s territorial claim to the North Pole.1 After collecting samples and further mapping the Lomonosov Ridge, the expedition planted a Russian flag made of titanium on the seabed underneath the North Pole.2 The symbolic assertion of Russia’s claim to the Arctic seabed prompted some observers in the media to suggest a looming conflict in the Arctic as a result of increased interest in natural resources and the ongoing efforts to define extended continental shelf areas. However, Russia’s adherence to international law in the Arctic and commitment to resolving overlapping claims through a legal framework dispels the notion of a new ‘Cold War’ in the High North.

The United Nations Convention on the Law of the Sea (UNCLOS) stipulates the process by which Russia and the littoral Arctic states could lay claim to Arctic territory through the delimitation of maritime boundaries and the establishment of an extended continental shelf.3 Article 76 of UNCLOS grants each coastal state a continental shelf up to 200 nautical miles (nm) from the baseline of its coast. Within the continental shelf, a state possesses the exclusive right to the non-living resources. A state may define an extended continental shelf beyond 200nm if it meets the criteria in Article 76 of UNCLOS.4

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4 Id. art. 76.
Despite numerous disagreements over maritime delimitation in the High North, the Arctic states have continued to adhere to the rules and procedures for establishing seabed jurisdiction pursuant to UNCLOS. Arctic states engage and often cooperate in scientific research to gather data for submissions to the Commission on the Limits of the Continental Shelf (CLCS).\(^5\) The CLCS, established under Article 76 of UNCLOS, assesses bathymetric and geological data to determine the viability of a coastal state’s claim exclusive rights to the resources of the seabed beyond 200nm from its coastal baseline.\(^6\)

In December 2001, Russia submitted the first extended continental shelf claim to the CLCS.\(^7\) In accordance with Article 76, paragraph 8 of UNCLOS, Russia asserted its entitlement to a continental shelf beyond 200nm that included 1,191,000 km\(^2\) of Arctic territory. Russia’s argument hinged on demonstrating the Lomonosov Ridge, a 1,240 mile-long seabed mountain range that divides the polar basin from Canada’s Ellesmere Island to Russia’s New Siberian Islands, qualifies as “natural prolongations” of the Eurasian landmass.\(^8\) However, Russia’s submission overlapped with potential claims by Canada and Denmark to Lomonosov Ridge, which traverses the Central Arctic Ocean from Russia’s New Siberian Islands to an area, near the tip of Greenland and Canada’s Ellesmere Island.\(^9\)

In 2002, the CLCS withheld approval of Russia’s Arctic claims, requesting the Russian delegation provide more substantive data to support its submission.\(^10\) In August

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\(^5\) *Russia, Canada Agree to Share Information on Continental Shelf Demarcation, RUSSIA & CIS BUSINESS & FINANCIAL NEWSWIRE* (Mar. 30, 2007).


- to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;
- to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a)”


2015, after numerous scientific expeditions, Russia resubmitted its claim to the CLCS. Though the CLCS has yet to issue an opinion regarding the status of Russia’s revision, the provisions under Article 76 of UNCLOS will be critical to adjudication.

UNCLOS provides Russia and its Arctic neighbors with a legal framework to provide critical guidance for Arctic nations as they attempt to assert sovereignty claims. For the extension of the coastal state continental shelf, Article 76 of UNCLOS serves as the main legal basis and, thus, will have an important role in the development of the Arctic boundaries. Although the technological and procedural burdens prolong the process of delimiting a continental shelf beyond 200nm, UNCLOS offers alternatives such as the establishment of joint development zones for natural resources. As the Arctic ice thaws, opening new channels for territorial disagreements, assessing the merits of Russia’s territorial claims for an extended continental shelf in the Arctic Ocean sheds light on the legal and regulatory mechanisms suited to address the challenges of the Arctic region.

Since the onset of the Russian annexation of Crimea in 2014, the Kremlin’s relationship with the U.S. and its Western allies has devolved into one characterized by increasing enmity; however, Russia’s claims to continental shelf beyond 200nm in the Arctic comply with the procedural requirements of UNCLOS. The historical legacy of the Arctic explains Russia’s nationalistic provocations yet does not preclude adherence to international law. As a state driven to return to its historical self-image as a dominant player on the world stage, Russia seeks to benefit from the Arctic’s economic riches and strategic location. Therefore, achieving its goal through legal means appeals to the Kremlin far more than initiating a new Cold War in the High North.

Part I discusses the potential challenges facing the Arctic region, intensified by climate change, and forms of multi-lateral governance used to address it. Part II outlines the legal definitions and principles of continental shelf delimitations. Part III describes the principle disputes in the Arctic region that remain relevant for Russia’s submission to the CLCS. Part IV details Russia’s historical claims, national strategy, and military activity in the Arctic. Part V evaluates Russia’s initial and revised submission to the CLCS to ascertain

whether new geographic evidence may support Russia’s claim to an extended continental shelf. Taking into account the procedural constraints of the CLCS, Part VI presents a solution to Russia’s disputes in the Arctic through the development of a joint-development zone (JDZ).

I. CLIMATE CHANGE & GOVERNANCE IN THE ARCTIC

A. Climate Change & Hydrocarbons

Climate change presents new opportunities in the Arctic, including the opening of new maritime routes and offshore development of natural resources. As a warming environment continues to thaw and alter the landscape of the Arctic, a variety of complex questions arise over control of territory, extraction of resources, and security of the region. The Arctic ice cap shrinks annually by 28,000 mi², resulting large swaths of water opening up in the ice, making the possibility of commercial recovery of oil, gas, and minerals increasingly economically viable. Within the next decade, the melting polar ice will create new shipping lanes. The Arctic’s melting ice, a result of increased rates of climate change, thus opens up the area for navigation routes and development of non-living resources such as hydrocarbons.

The United States Geological Survey (USGS) released estimates in 2008 of a potential 90 billion barrels of oil, 1,699 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids, in the Arctic Ocean region. The USGS postulates that 13% of the world’s oil and up to 30% of its natural gas lie in the Arctic seabed. Currently, present technology renders it nearly impossible to exploit these potential reserves; however climate change and technological development make future exploitation much more likely. Furthermore, rising temperatures and the subsequent melting of ice increases this access to

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15 See generally Lincoln E. Flake, Russia’s Policy on the Northern Sea Route in an Era of Climate Change, 158(3) RUSI J. 44-52 (2013).

16 See Donald L. Gautier et al., ASSESSMENT OF THE UNDISCOVERED OIL AND GAS IN THE ARCTIC, 324 SCIENCE 1175, 1176 (2009) (specifying that USGS estimated that the Arctic region contains 13% of the world’s undiscovered oil resources and 30% of the world’s undiscovered natural gas resources).

sizeable and lucrative offshore hydrocarbon and mineral reserves in the Arctic Ocean located beyond 200nm from the coast. Increased interest in natural resources and ongoing efforts to define extended continental shelf area of the coastal state, however, do not suggest a new ‘Cold War’ looms on the horizon.

B. Arctic Governance

Eight circumpolar states — U.S., Russia, Canada, Norway, Denmark (via Greenland) Finland, Sweden, and Iceland — possess territories in the Arctic, which includes all land, submerged lands, and waters within the latitudinal circle 66° 33’39’N. The five littoral Arctic states, the U.S., Russia, Canada, Norway, and Denmark and hold the greatest stake in the future of the Arctic.

During the Cold War, the ideological and political differences between the western democracies and the communist bloc prevented any type of meaningful collaboration on issues relating to the Arctic region. The collapse of the Soviet Union in 1991 signaled an end to the Cold War and opened up the possibility that the circumpolar states could cooperate on matters of mutual concern in the Circumpolar North. Among the most important outgrowths of this collaboration was the creation of the Arctic Council, an international organization composed of representatives from each of the eight circumpolar states as well as six permanent participants representing northern indigenous organizations.

The Arctic Council, established in 1996, remains the only multi-lateral venue specifically dedicated to Arctic diplomacy. The Ottawa Declaration formally recognized the Arctic Council “as a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues: in particular, issues of sustainable development and environmental protection in the Arctic.” It focuses primarily on creating a regime for the protection of: a) the environment; b) maritime safety; and c) responsible development of the region. The mandate of the Arctic Council

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18 See Louise Angelique de La Fayette, Consequences of Climate Change in the Arctic, 23 Ocean Y.B. 39, 88 (2009).
19 See Richard Weitz, Russia Seeks Northern Riches, 6 Yale J. Int’l Aff. 70, 80 (2011).
20 The Arctic Five states border the Arctic Ocean including Canada, Denmark (via Greenland), Norway, Russia, and the United States. The three other Arctic countries – Iceland, Finland, and Sweden – are full members of the Arctic Council (for they reside in part north of the Arctic Circle), do not border the Arctic Ocean, and have no outstanding claims with any other Arctic state.
Council limits its affairs to issues involving environmental protection and sustainable development.

The Ottawa Declaration specifically placed military security issues outside of the Arctic Council’s mandate. There is presently no consensus on where, or even if, Arctic security should be discussed. Nevertheless, the Arctic Council members may bring up military security issues in the discussion of emerging challenges in the Arctic. While the Arctic Council’s goals are laudatory, it lacks the institutional structure to offer dispute resolution mechanisms comparable to UNCLOS.

As the preeminent authority for marine law, the UNCLOS provides the most favorable channels for arbitration over territorial disputes arising from competing claims to economic resources. The Arctic states reaffirmed their commitment to UNCLOS as the “constitution of the seas” in the 2008 Ilulissat Declaration stating, “no legal enforcement regime other than the UNCLOS is needed in the region.”22 The Arctic states agreed not only “the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf,” but also more broadly that “we remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.”23 With the Ilulissat Declaration, the five Arctic coastal states sought to dispel the notion of impending conflict by emphasizing the legal framework in the Arctic and their commitment to resolving overlapping claims through UNCLOS.

II. UNCLOS & THE CONTINENTAL SHELF REGIME

In 1982 the United Nations Convention on the Law of the Sea (UNCLOS) established a “new constitution for the oceans” building upon customary international law and the provisions in the 1958 Geneva Conventions on the High Seas, the Continental Shelf and the Territorial Sea.24 UNCLOS defines the rights and responsibilities of nations in their use of the world’s oceans, establishing guidelines for business, international navigation, protection of environment, and the management of marine natural resources. Since its adoption in 1982, 132 states have either acceded to or ratified the UNCLOS in most respects it is recognized as customary law of the sea.

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24 Since its adopted in 1982, 132 states have either acceded to or ratified the UNCLOS an in most respects it is recognized as customary law of the sea.
ratification, the UNCLOS has resolved numerous disputes relating to use of the oceans and claims of state sovereignty including those related to freedom of navigation rights, territorial sea boundaries, Exclusive Economic Zones (EEZs), and continental shelf rights. In addition, the UNCLOS created the International Tribunal for the Law of the Seas (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), and the International Seabed Authority.  

A major feature of the convention was the creation of maritime zones either under the sovereignty or sovereign rights of coastal states or beyond any national jurisdiction. UNCLOS codified a coastal state’s sovereign rights over its continental shelf for the purposes of exploring and exploiting its natural resources in the seabed and subsoil of the submarine areas.

The continental shelf comprises the seabed and subsoil, extending either as far as the outer edge of the continental margin or 200nm if the continental margin does not extend father. Article 76 of UNCLOS defines the continental shelf as “the sea-bed and the subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin to a distance of 200 nautical miles from the baselines.” The definition of the continental shelf, as stipulated in Paragraphs 1 and 3 of Article 76, declares the territory of a coastal state extends under water as the continental shelf comprises “submerged prolongation of its land territory” with its outer limit measured in relation to the “submerged prolongation of the land mass.” Through the natural extension of the land territory to the outer edge of the territorial margin

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26 UNCLOS, supra note 3, arts. 76 (1) (“The continental shelf of a coastal State comprises the sea-bed and the subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” This is a legal definition and must not be confused with the scientific definition. In scientific terms, the continental shelf is a flat and shallow submerged section of the continent, which extends from the shore to the apex of the continental slope.)

27 UNCLOS, supra note 3, arts. 76 (1-3) (defining the continental margin by specifying its physical components and specifically excluding adjacent features. The continental margin is neutral regarding the geological nature of the underlying earth’s crust and is defined in terms of the prolongation of the landmass of the coastal State. According to paragraphs 1 and 3 of Article 76, a coastal State is the starting point for the continental margin, and generates its continental shelf. The continental margin is the submerged prolongation of its landmass, while the continental shelf is the seabed and subsoil of the natural prolongation of its land territory.)

28 Id., art. 76(1) (continental shelf is identified as a unified “natural prolongation” of land territory).
or 200nm from the baseline of the traditional sea, the continental shelf extends beyond the territorial sea regardless of the geological characteristics.

Under UNCLOS coastal states are entitled to declare a certain area beyond its 200nm Exclusive Economic Zone (EEZ) as extended outer continental shelf if the continental margin satisfies certain morphological and geological conditions. The continental shelf comprises the submerged natural prolongation of a state’s land territory and consists of three components, namely, the shelf, the slope, and the rise collectively known as the continental margin. If a coastal state’s continental margin physically continues beyond 200nm from territorial sea baseline, the state is entitled to an extended shelf. Thus, Article 76 extends sovereign rights of certain wide-margin states beyond the usual 200nm limit, prescribes formulae for determining how far those sovereign rights can extend, and awards coastal state jurisdiction over resources on and beneath the seabed beyond 200nm.

The outer limit of the continental shelf is determined by satisfying one of two rules, the outer limit line must not extend 1) beyond 60nm from the foot of the continental slope or 2) beyond the point where the sediment thickness is less than 1% of the distance measured back to the foot of the slope. The maximum outer limit may not exceed 350nm from the baseline or, alternatively, 100nm seawards from the 2500 meter isobaths. However, the outer limits of continental shelf vary depending on certain submarine feature such as “oceanic ridges,” “submarine ridges,” and “submarine elevations.” Article 76 excludes oceanic ridges of the “deep ocean floor” from constituting the continental shelf, whereas submarine ridges may be part of the continental shelf up to a limit of 350nm. Submarine elevations “are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.” Unlike oceanic ridges and submarine ridges, submarine elevations provide a limited exception since they are not subject to the 350nm limit and may qualify as a continuation of the continental shelf if they satisfy the 2500 meter isobaths plus 100nm rule.

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29 See Baker, supra note 2, at 265.
31 UNCLOS, supra note 3, art. 76 (3).
32 Id., art. 76 (4).
33 CLCS Scientific and Technical Guidelines, supra note 31, at para. 5.1.3.
34 UNCLOS, supra note 3, art. 76 (5).
35 Id. art. 76 (6).
In order to establish limits of continental shelf greater than 200nm, a coastal state must delineate outer limits of shelf in accordance with the UNCLOS by submitting information to the CLCS, which requires a 2/3 majority to accept the proposal. The process requires a state to establish the 200nm limit from the baselines, determine the foot of the continental slope, apply the formula a test of appurtenance, draw the limits in the case of submarine elevations and/or ridges and apply constraints. Beyond 200nm, claims depend on scientific data and, “interpretation of the bathymetry, geology, and nature of the seafloor in a region.” Once the CLCS has received a nation’s submission on the limits of its continental shelf, “[t]he Commission shall make recommendations to [the] coastal State on matters related to the establishment of the outer limits of the continental shelf.” If rejected, the coastal state may resubmit its evidence with relevant information, including data establishing the outer limits of its shelf. If positively recommended by the CLCS, the coastal state acquires rights and responsibilities, such as exploring and exploiting non-living resources of the seabed and subsoil thereof including oil and natural gas, gas hydrates, and mineral resources.

III. OVERLAPPING ARCTIC CLAIMS

Upon ratification, a country has a ten-year period to make claims to an extended continental shelf, which, if validated, gives it exclusive rights to resources on or below the seabed of that extended shelf area. In order to claim an extended shelf, a country must collect and analyze data that describe the depth, shape, and geophysical characteristics of the

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36 CLCS Scientific and Technical Guidelines, supra note 31, at para. 6.2.3.
37 Id. para. 2.2.3.
38 UNCLOS, supra note 3, arts. 76 (4). (In order to determine the foot of the continental slope, measure the maximum change in the gradient at the foot of the continental slope. If unavailable determine the geological structure of the continental margin on the basis of bathymetric, geophysical and geological evidence. This contributes to the process of identifying the base of the continental slope and eventually, the foot of the continental slope.)
39 CLCS Scientific and Technical Guidelines, supra note 31, para. 2.1.2. (The CLCS’ test of appurtenance, tests the sediment thickness of at least 1% of the shortest from the outer edge to the front of the continental slope and the Hedberg formula that designates a line by reference to fixed points no greater than 60nm from the front of the continental slope).
40 See infra Part II, notes 64–84 (This delineates the outer limits of the continental shelf by straight lines not exceeding 60 M in length, connecting fixed points, defined by coordinates of latitude and longitude).
41 Id. Annex II, art. 2.
42 UNCLOS, supra note 3, art. 76 (7).
43 Id. Annex II, art. 2(1).
44 UNCLOS, supra note 3, art. 76 (7).
45 See Baker, supra note 2, at 268.
seabed and sub-sea floor. In order to meet the legal definition, countries must collect bathymetric data that provides a three-dimensional map of the ocean floor. They must also obtain seismic reflection data, which provides a cross-section view of what's beneath the floor. From this, scientists can derive information on the thickness, geometry, and other geologic characteristics of the layers.

Although Article 76 of UNCLOS provides for the delimitation of the outer continental shelf based on the physical characteristics of the seabed, in regions such as the Arctic Ocean, coastal states may use different methods and interpretations to determine the maritime boundaries. When coastal states are opposite or adjacent, the boundaries of the EEZ and continental shelf may conflict with disputes arising where boundaries overlap. While one state may consider boundary delimitation based on the principle of the median line or equidistance, another may espouse delimitation based on special circumstances such as historical claims or population size. Moreover, the physical characteristics of the seabed may not meet the requirements set out in Article 76 to generate an extended continental shelf.

Paragraph 6 of Article 76 provides a limit of 350nm for claims based on submarine ridges; however, this limit does not apply to submarine elevations which qualify as natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs. This specific provision gives rise to large claims in the Arctic where undersea ridges may extend across the North Polar region of the Arctic Ocean from Canada and Denmark (from the Greenland coast), across to the Russian coast.

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51 Id. at 361.
A. Norway-Russia

On November 27, 2006, Norway became the second Arctic littoral state to submit an extended continental shelf claim to the Commission.\(^{52}\) Norway’s submission represented an area six times larger than that of its mainland including, “three separate areas in the North East Atlantic and the Arctic: the Loop Hole in the Barents Sea; the Western Nansen Basin in the Arctic Ocean; and the Banana Hole in the Norwegian Sea.”\(^{53}\) The submission noted the unresolved delimitation dispute between Russia and Norway in the Barents, which at the time, was “the subject to ongoing negotiations.”\(^{54}\) Russia sought to delimit the maritime boundary based on the sector principle which accounts for population size, economic interest, and the past precedent of the Svalbard Treaty, whereas as Norway favored the principle of the median line which draws the border on equal distances from coastlines.\(^{55}\)

Four years later in 2010, Norway and Russia signed the Treaty Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean delimiting each state’s respective EEZ and continental shelf within and beyond 200 nautical miles.\(^{56}\) The Treaty defines the maritime boundary by eight points, dividing the previously contested area equally between the two states. Moreover, Russia abandoned the sector principle, which had little foundation in international law and agreed upon a fair, equitable maritime boundary as reflected in UNCLOS.\(^{57}\) The Treaty also contains provisions regarding cooperative exploration of petroleum resources in the areas designated with the new boundary line.\(^{58}\) The resolution of the maritime dispute demonstrates both Norway and Russia’s adherence to international law and cooperation in the Arctic.


\(^{54}\) Id. at 8 (Figure 2 map illustrating that Norway’s Article 76 claim in the Western Nansen Basin is based on the continental shelf).


\(^{58}\) Id. 510.
B. Canada-Russia

In December 2013, Canada submitted information concerning the outer limit of its continental shelf in the Atlantic Ocean to the CLCS.\(^{59}\) The submission noted Canada’s intention to submit information about its continental shelf in the future. Canada’s preliminary information concerning the outer limits of its continental shelf in the Arctic Ocean argued that the continental shelf represents a prolongation of “part of a morphologically continuous continental margin around the Canada Basin and along the Amundsen Basin.”\(^{60}\) In addition, Canada intends to prove its continental shelf also “comprises a number of seafloor elevations (Lomonosov Ridge and Alpha Ridge) and forms the submerged prolongation of the land mass of Canada.”\(^{61}\) In relation to the Lomonosov Ridge, Canada’s expected claim will likely overlap with that of Russia. To strengthen its case, Canada has collected a “substantial amount of the necessary scientific, technical and legal work for the submission of information in respect of continental shelf areas in the Arctic Ocean,” specifically around the Alpha-Mendeleev and Lomonosov Ridges.\(^{62}\) As of 2016, Canada remains committed to obtain scientific data required to support its claim to sovereignty rights of additional seabed territory, including the Lomonosov Ridge.

C. Denmark & Greenland-Russia

Denmark’s submission argues that the Lomonosov Ridge is “both morphologically and geologically an integral part of the Northern Continental Margin of Greenland.” On this basis, Denmark identified a continental shelf limit extending to the outer limit of the Russian EEZ, more than a 1,000nm beyond the nearest point on the coastline of Greenland. In total, the submission covers an area of 261,000nm\(^2\) beyond its 200nm baseline and overlaps approximately 3020nm\(^2\) with the Norwegian and 170,100nm\(^2\) with the Russian submissions.

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\(^{61}\) Throughout, the areas of continental shelf extend beyond 200 nautical miles from the territorial sea baselines of Canada and, on the Alpha and Lomonosov Ridges, beyond the 350 nautical mile constraint.

to the CLCS.\textsuperscript{63}

In December 2014, Denmark submitted a partial claim together with the Government of Greenland for an area of 895,000 square kilometers, extending from Greenland past the North Pole to the outer limit of the Russian EEZ. The Commission has not yet provided final recommendations on Denmark’s submission. In response the Russian Ministry of Foreign Affairs issued a statement:

We have been well aware of the Danish plans [...] and it has for a long time been clear that the country’s bid for extended continental shelf will include and even exceed the North Pole. [...] Possible overlapping parts of our countries’ shelf in the Arctic will be delimited in a bilateral manner, in negotiations and on the basis of international law.\textsuperscript{64}

As confirmed in the Ilulissat Declaration, Russia and the littoral Arctic states shall resolve maritime disputes through UNCLOS. Moreover, submissions to CLCS neither illustrate a coastal state’s ‘land grab’ nor grandiose vision for territorial supremacy. Nevertheless, the Arctic assumes an integral role in promoting national greatness in both past and present Russian policy.

\section*{IV. RUSSIA IN THE HIGH NORTH}

Although the collapse of the Soviet Union reduced the country’s borders, Russia’s territory spans 17,500 km across the Artic and includes Arctic archipelagoes, such as Franz Josef Land and Wrangel Island, comprising a total of one-third of Russia’s total area.\textsuperscript{65} In addition to possessing the greatest amount of territory among the Arctic Five, Russia estimates the presence of approximately nine to ten billion tons of oil, gas and minerals providing ten billion tons of fuel-equivalents in the Arctic seabed, and has thus designed an Arctic strategy around ensuring Russia’s access to it.\textsuperscript{66}

\footnotesize{\textsuperscript{63} See the map prepared by the International Boundaries Research Unit of the University of Durham, \textit{Maritime Jurisdiction and Boundaries in the Arctic Region}, http://www.dur.ac.uk/ibru/resources/arctic/ (last visited January 22, 2016).


\textsuperscript{65} Weitz, \textit{supra} note 19, at 72.

\textsuperscript{66} Weitz, \textit{supra} note 19 at 68, (arguing that the Arctic represents an untapped supply of hydrocarbon reserves. The melting of the ice caps is anticipated to make much of this area more accessible, and the greater accessibility of Arctic waters is likely to invite heightened interest in exploring its potential).}
A. Early Exploration of the High North

Past and present Russian territorial claims in the Arctic have been accompanied by nationalistic rhetoric, military power, and geostrategic aspirations. The High North has, for a long time, played an important role in Russia’s statehood and identity. While expansion into the Arctic region began during the reign of Tsar Nicolas II, the development of the Arctic emerged as a central objective of the Soviet Union.

The sources of Russian legal claims to the Arctic date back to the reign of Ivan the Terrible in the 14th century, which ushered in an era of Russia expansion beyond the Urals and along the Arctic coast. From 1616 to 1620, ukases, orders issued by the Tsar, asserted the Russian Empire’s exclusive rights to Arctic areas. In 1821, Emperor Alexander I issued a ukase that established Russia’s exclusive rights to Bering Sea.

The Soviet Union made massive investments in the Arctic, such as setting and protecting its borders based on the sectoral principle, investing in economic production of Russia’s North, utilizing its Northern Fleet, and securing the Northern Sea Route. Contemporary Russian Arctic policy draws parallels to Soviet Arctic policy, and it is therefore necessary to understand the significance of the Arctic for Russia.

In 1926, the Central Executive Committee of the Soviet Union claimed all the discovered and undiscovered lands located between Russia’s northern coast, and the meridian 32° 04’35” East and 168°49’30” West, and the North Pole. A 1932 decision by the Council of People’s Commissars of the USSR established the Northern Sea Route (NSR)
and marked the beginning of the route as an administered, legal entity under full Soviet jurisdiction and control. The Stalinist narrative of the Northern Maritime Route, *Sevmorput*, was used to exert Russia’s military and industrial prowess. Joseph Stalin asserted, “The Arctic and our northern regions contains colossal wealth. We must create a Soviet organization which can, in the shortest period possible include this wealth in the general resources of our economic structure.”

The Soviets pursued “economic conquest by *osvoenie*, massive population settlement.” A sizable population in the Arctic solidified the Soviet Union’s presence in the region.

**B. WWII & the Cold War**

The Arctic proved to be an important military outpost for the Soviet Union, especially during World War II, where major military operations occurred on the Kola Peninsula and vital supply routes connected Russia with allies. After 1945, the U.S. and the Soviet Union competed for military dominance in the High North. The Arctic gained even greater strategic importance for the Soviet Union as a nuclear deterrent and as a base for the Northern Fleet.

During Cold War, the Soviet Union maintained a robust naval presence in the Arctic to protect its borders. The Northern Fleet, stationed in the Kola Peninsula, guaranteed nuclear deterrence, while Surface combat ships created naval fortresses to protect the Soviet Union’s nuclear submarines against NATO’s fleets. In the event of war, the Soviet Union possessed the capability to conduct operations from its bases in the Arctic in order to interrupt Sea Lines of Communication (SLOC) and transit supplies. Throughout this era, Soviet naval forces in the Arctic upheld the credibility of nuclear deterrence while securing access to the world’s seas.

**C. Russian Arctic Policy during the Gorbachev Era**

Cold War competition in the Arctic thawed with Soviet President Mikhail

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73 Marlene Laruelle, *Russia’s Arctic Strategies & the Future of the Far North* 51 (M.E. Sharpe 2013).

74 During the era of the Ribbentrop-Molotov Pact, Stalin guided the German ship HSK-7 Komet through the North Passage and provided the Germans a base for their submarines in Murmansk. After the German attack on the Soviet Union in 1941, the Arctic became an important point of supply from the Allies, through the Arctic convoy system.


76 Id. at 418.
Gorbachev’s 1987 Murmansk speech, which initiated the modern era of international cooperation in the circumpolar world by proposing that the Arctic should become a “zone of peace” through the establishment of a Northern Europe Nuclear Weapons Free Zone (NWFZ), restriction of naval activities in Arctic seas, and cooperation on scientific research and indigenous affairs. However, lack of support by the four littoral Arctic states thwarted Gorbachev’s vision.

In 1990, the U.S. and the Soviet Union delimited a 1,390nm maritime boundary over the jurisdiction of fisheries and seabed resources in the Bering Strait, Bering Sea and Chuckhi Sea. The U.S.-U.S.S.R. agreement relied on the historic division of the 1867 Convention in which the U.S. received Alaska from the Russian Empire. The 1990 U.S.-U.S.S.R. agreement expressly identifies the maritime boundary as the line identifying the areas ceded in the 1867 U.S.-Russia Convention regarding the purchase of Alaska. It is the longest single maritime boundary in the world between two states, and delimits the territorial sea, the EEZ, and the continental shelf beneath and beyond the 200nm.

D. Russian Arctic Policy under Medvedev & Putin

Since the collapse of the Soviet Union, insecurity over NATO expansion, the desire to restore Russian greatness through economic development, and international prestige have dictated the Kremlin’s foreign policy narrative. After a series of incidents in the late 1990s, in which several foreign research ships allegedly trespassed into Russia’s territorial waters, the Russian government began taking steps to secure its northern border. In the early 2000s, Russia embarked on a modernization of its armed forces, including the nuclear arsenal on

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77 Mikhail Gorbachev, Speech at the Ceremonial Meeting on the Occasion of the Presentation of the Order of Lenin and the Gold Star Medal to the City of Murmansk (Oct. 1, 1987) (transcript published in IZVESTIIA, Oct. 2, 1987, at 1, 3) (Rus.).
78 Id.
79 Agreement on the Maritime Boundary, U.S.-U.S.S.R., June 1, 1990, 29 I.L.M. 941 (provisionally in force June 15, 1990) [hereinafter U.S.-U.S.S.R. Maritime Boundary Agreement]. See generally Michele Byers, INT’L L. AND THE ARCTIC 268 (2013) (“The U.S. was quick to ratify the treaty, with the Senate giving its advice and consent in September 1991. However, the treaty attracted a great deal of opposition within the Soviet Union (which was then disintegrating) and, in 1995, the Russian Foreign Ministry informed the U.S. that it would not be submitted to the Duma (i.e. Russian parliament) for approval. Yet both the U.S. and Russia have agreed, by way of an exchange of notes, to treat the agreement as binding as per Article 25 of the 1969 Vienna Convention on the Law of Treaties”).
80 Id.
81 Id.
82 Id.
83 Kari Roberts, Jets, Flags, and a New Cold War: Demystifying Russia’s Arctic Intentions, 65 INT’L J. 957, 963 (2009-2010).
the Kola Peninsula and resumed patrols with long-range bombers in the international air
space over the Barents, Norwegian, and Greenland Seas. Russian military activity is tied to
the importance of the Arctic’s strategic location and its potential energy reserves.

During the Russian Security Council meeting in September 2008, President
Medvedev set the task to transform the Arctic region into Russia’s resource base and
delimitate its continental shelf borders. At the same session, the basis of Russia’s national
policy in the arctic region for the period up to 2020 and in the longer term was adopted as a
strategy that would shape Russia’s policy in the Arctic region. Russia’s national economic
interests in the Arctic, as defined by its 2008 Arctic Strategy, include socio-economic
development, military security, environmental security, and international cooperation. Russia
hopes to expand the resource base of Russia’s Arctic zone, which is largely capable of
supplying Russia's demand for hydrocarbon resources and other strategic raw materials. The
maintenance of combat capabilities such as the Northern Fleet and the reopening of former
Soviet bases is intended to ensure favorable conditions for Russia in the Arctic. Two years
later, in 2010, President Medvedev asserted Russia’s plans to “defend its claims to mineral
riches in the Arctic in increasing competition with other powers” and stated the goal that
Russia would develop the Arctic as Russia's “top strategic resource base” by 2020.

In the context of increasing economic activity and global climate change, Russia’s
stated national strategy seeks to preserve and protect the natural environment of the Arctic,
while eliminating the environmental impacts of business activities. Despite the events in
Ukraine, Russia remains outwardly committed to international cooperation through mutually
beneficial bilateral and multilateral cooperation based on international treaties and
agreements. Furthermore, Russia’s strategic interests in the Arctic are closely related to the
country’s economic interests in the region.

There are modernization programs and efforts to increase the coastal states’ control
over the vast Northern territories to prevent non-traditional security challenges. Russia’s
Transportation Strategy to 2030 envisages the construction of three new nuclear-
powered icebreaker submarines as well as diesel-power icebreakers and smaller ice-hardened vessels.

84 See Vsevolod Peresypkin & Vladimir Vasilyev, Russian Arctic Marine Transportation Policy, The, 24
OCEAN Y.B. 411, 424 (2010).
85 Peresypkin, supra note 84, at 413.
86 Md. Walial Hasanat, Cooperation in the Barents Euro-Arctic Region in the Light of International Law, 2 Y.
Polar L. 279, 314 (2010).
for the purpose of Search And Rescue (SAR) operations. In January 2011, Nikolai Patrushev, the Secretary of the Russian Security Council, announced that the Council had taken a step of “enormous strategic and economic significance” by directing the Russian government to adopt a long-term program to extract mineral resources such as oil and natural gas from Russia’s Arctic shelf.

In the past, Moscow relied heavily on military personnel and equipment in its Arctic expeditions, but now, the Government uses primarily civilian resources, since these can be more readily detailed to the United Nations and other international bodies to justify Russia’s Arctic claims. Scientific research expeditions rather than military measures have attempted to reinforce the Russian government’s territorial ambitions in the Arctic. According to Richard Weitz, “although Russia is a rival claimant and potential security threat to the other Arctic countries, it is also a potential partner for energy-consuming countries eager to send Arctic oil, gas, and other natural resources to world markets.”

In 2007, the expedition, led by Duma Member and veteran Arctic explorer Arthur Chilingarov, resulted in the planting of a titanium Russian flag on the seabed underneath the North Pole. As a symbolic proclamation of its right to undersea Arctic areas and the resources lying at the bottom of the Arctic Ocean, “the flag in the ocean floor is a demonstrative political symbol of Russian legal claims to an extended continental shelf under the UN Convention on the Law of the Sea.” Reacting to foreign criticism of the flag ceremony, Foreign Minister Sergei Lavrov said that the expedition aimed “not to stake Russia’s claim but to [support it by showing] that our shelf reaches to the North Pole.” The planting of the Russian flag signifies Moscow’s desire to assert their geopolitical weight into the delimitation process. Even so, Russian action in the Arctic has been “predominately in accordance with international law” and the UNCLOS. Beyond nationalistic provocation,

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89 The UN Commission on the Limits of the Continental Shelf (CLCS), while confirming Russian claims in the Barents Sea and the Pacific Ocean, rejected Russia’s 2001 submission regarding its territorial claim to the Lomonosov Ridge (which is also claimed by Canada and Denmark) due to insufficient supporting evidence.
90 Weitz, *supra* note 19, at 69.
92 Weitz, *supra* note 19, at 75.
Russia has cooperated with states in the Arctic both bilaterally and multilaterally.

V. RUSSIAN SUBMISSIONS TO THE CLCS

A. 2001 Submission Commission On the Limits of the Continental Shelf

On December 20, 2001 the Russian Federation submitted information on the outer limits of its continental shelf to extend beyond 200nm to the CLCS. The submission, pursuant to Article 76, paragraph 8, of the UNCLOS includes areas of the Pacific and Arctic Oceans. Despite opposition from Canada, Denmark, Norway, and the United States, Russia argues its continental shelf spans as far as the North Pole. In its claim, Russia argued that the Lomonosov Ridge and the Alpha-Mendeleev Ridge are both a “natural prolongation” of the Russian continental shelf, thus, it contended that parts of the Central Arctic Ocean, as well as parts of the Barents Sea, the Bering Sea, and the Sea of Okhotsk, should fall under its jurisdiction.

Russia seeks to demonstrate that certain morphological features of the Arctic seafloor constitute a natural prolongation of its territory. By proving that these ridges, plateaux and caps are natural prolongations of its territory, Russia would gain sovereignty over the seabed. To justify its claim to the outer limits of its continental shelf, “the Russian government argues that the Lomonosov Ridge, which lies on the North Pole’s seabed, along with the Mendeleev Ridge and Alpha Ridge, are geographically linked to Russia’s Siberian-centered continental shelf and similar in structure.”

Article 76, paragraph 1, of the UNCLOS explains the continental shelf in terms of the outer edge of the continental margin. Accordingly, a state’s continental shelf based on a “natural prolongation” allows an extended continental shelf beyond 200 nautical miles. Whereas the continental shelf is the seabed and subsoil of the natural prolongation of its land territory, the continental margin is the submerged prolongation of its landmass.

Russia must prove that the Lomonosov Ridge and the Alpha Mendeleev Ridge qualify as a “submarine elevation” and not an “oceanic ridge.” An “oceanic ridge,” part of

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94 Russ. CLCS Submission, supra note 7, Map 2.
96 Russ. CLCS Submission, supra note 7.
97 UNCLOS, supra note 3, art. 76 (1).
98 Scovazzi, supra note 95, at 371.
the ocean floor, is located beyond the limits of areas under national jurisdiction. However, if evidence proves the Lomonosov Ridge is a “submarine elevation,” the ridge counts as part of the continental margin, and is thereby no longer bound by the maximum seaward limit. Submarine elevations are components of the continental margin and can be either oceanic or continental in origin if there exists a continuity of morphological or geologic origin and history to the coastal state landmass. Furthermore, if the Lomonosov Ridge and Mendelev Ridge are oceanic ridges then the CLCS may be required to reject that specific portion of the Russian claim.

In 2002, the CLCS “recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.” Since then, Russia has embarked on numerous scientific expeditions for the sake of proving that “the Lomonosov Ridge is directly connected to the Eurasian continent, making it a natural prolongation of its landmass.” Though the 2007 scientific expedition resulting in the symbolic planting of the Russian flag, its purpose related to Russia’s continental shelf submission that required necessary data to support its claim.

B. Russia’s Revised Submission to the CLCS

On August 3, 2015, in accordance with UNCLOS, Russia submitted revised evidence on the extent of its outer continental shelf beyond 200nm in the Central Arctic Ocean to the CLCS. In a public statement, the Russian Foreign Ministry noted that Russia’s bid would extend its continental shelf in the Arctic to 350nm from its coast, a total area of 1.2 million km$^2$. According to the Russian Foreign Ministry, the latest revised submission

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99 Matz-Lück, supra note 91, at 250 (“Russia emphasizes the qualification of the Lomonosov and Alpha-Mendelev Ridge as ‘submarine elevations’ and not as ‘submarine ridges.’”).

100 Id. at 235 (“Claims for an extended shelf cannot be based upon oceanic ridges, i.e. such ridges cannot be used to determine the outer limit of the shelf by e.g. relying upon the 100nm distance from the 2,500 m isobath. Submarine ridges that are a natural prolongation of the mainland can be employed for determination of an extended shelf but the maximum seaward limit of 350nm from the baselines applies. This maximum limit, however, does not apply for submarine elevations, provided, again, that they can be regarded as natural prolongations of the continental landmass. Russian insistence on the ridges qualifying as natural prolongations of the continental shelf in the form of underwater elevations, therefore, has the aim of achieving the largest possible extension of the continental shelf under the law of the sea and, in fact, to claim most of the seabed in the Arctic Ocean”).

101 UNCLOS, supra note 3, art 76 (4).

102 Russ. CLCS Recommendation, supra note 8, para. 41.


104 Comm’n on the Limits of the Cont’l Shelf (CLCS), Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial revised Submission by the
contains new arguments, with “ample scientific data collected in years of Arctic research.” The revised claim deals specifically with the area of the seabed that covers the geomorphological continental shelf of the Russian Arctic marginal seas, part of the Eurasian basin, the geomorphological shelf of the Russian Arctic marginal seas, and the Central Arctic Basin, which includes the Lomonosov Ridge and Mendeleev-Alpha Ridge.

In regards to the revised submission, the crucial question centers on whether Russia has succeeded in producing evidence that the submarine features such as the Lomonosov Ridge and Alpha Mendeleev Ridge qualify as submarine elevations that constitute natural components of the continental margin. The 2015 submission two new areas and subtracts one from the original 2001 claim. It also affirms “the rights of the coastal state over the continental shelf exist ipso facto and ab initio.” The summary of Russia’s claim states that new geological and geophysical data confirm that the Lomonosov Ridge is a natural prolongation of the Eurasian continental margin. In addition, the Lomonosov and Alpha-Mendeleev Ridges are submarine elevations and therefore, pursuant to paragraph 6 Article 76 of the Convention, are to be natural components of the continental margin.

Both “scientific and legal considerations” guide the CLCS ruling when determining the difference between an oceanic ridge and a submarine ridge. The CLCS recognizes “it is difficult to define the details concerning various conditions, the Commission feels it appropriate that the issue of ridges be examined on a case-by-case basis.” However, currently, there lacks a “broad consensus in the Arctic geoscientific community whether or not elevations such as the Lomonosov Ridge are natural prolongation.” There is also a significant limit on the exercise of jurisdiction by CLCS since the Commission’s mandate limits it to strictly evaluate the scientific and technical data submitted to it by a coastal state.

Beyond continental shelf mapping and the requirements of Article 76, previous cases of joint development raise the question of whether such an endeavor can become a useful realm of cooperation between Russia, Denmark, and Canada. Despite the image of

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105 Sally Deboer, Yours, Mine, And Moscow’s: Breaking Down Russia’s Latest Arctic Claims, CENTER FOR INTERNATIONAL MARINE SECURITY (Nov. 27, 2015).
106 Russ. CLCS Revised Submission, supra note 103.
108 Russ. CLCS Revised Submission, supra note 103.
110 Matz-Lück, supra note 91, at 235.
international rivalry and economic competition behind these claims, many Arctic nations are collaborating on the collection of the necessary data and could potentially cooperate in the field of development. Furthermore, UNCLOS remains the most significant instrument of international law that relates to Arctic waters.

VI. CREATION OF A JOINT DEVELOPMENT ZONE

Technological and procedural burdens could complicate as well as prolong the process of delimitating an outer continental shelf. While the nature of the legal definition of Article 76 requires substantial scientific data to support a coastal state’s case to jurisdiction, UNCLOS offers an alternative. The provisions in Article 74 (3) and Article 8 (3) of UNCLOS state:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

UNCLOS encourages adjacent or opposite states to seek “provisional arrangements of a practical nature” pending the final delimitation of boundaries. An establishment of a Joint Development Zone (JDZ) for the development of oil and gas resources in the Arctic Ocean could effectively resolve competing continental shelf claims arising under the continental shelf delimitation provisions of Article 76.¹¹¹ The precedent of a JDZ dates back to 1969 when the governments of Denmark, Germany, and the Netherlands submitted a case to the International Court of Justice (ICJ) to decide “what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea.”¹¹² The ICJ ruled “if ... the delimitation leaves to the parties areas that overlap, there are to be divided between them in agreed proportions or

¹¹¹ See Chidinma Bernadine Okafor, Model Agreements for Joint Development: A Case Study, 25 J. ENERGY NAT. RESOURCES L. 58, 102 (2007) (Examples of joint development as an alternative or in addition to boundaries are Iceland/ Norway, France/Spain, Jamaica/Colombia, UK/Norway, Senegal/Guinea Bissau, Nigeria/ Sao Tome, Czechoslovakia/Austria, Sudan/Saudi Arabia, Qatar/Abu Dhabi, Saudi Arabia/ Bahrain, Australia/Indonesia, Japan/Korea, Malaysia/Thailand, Malaysia/Vietnam, Australia/East Timor, Netherlands/Germany, Argentina/UKF); See United Nations Treaty Series, wwww.un.org J. I. CHARNLEY AND L. M. ALEXANDER, INTERNATIONAL MARITIME BOUNDARIES (1993).

failing agreement, equally, unless they decide on a regime of joint jurisdiction, use, or exploitation for the zone of overlap or any part of them.”

In overlapping zones with the potential oil or gas reserves, a JDZ offers an alternative to the maritime delamination process. The states concerned can either agree upon a boundary and share resources such as oil and gas within the JDZ area, or the states may agree to suspend the boundary delimitation, yet still share the benefits of development of oil and gas resources. JDZs have been used to resolve maritime boundary disputes in a growing number of cases, and therefore present a potential solution to the current and potential boundary disputes in the Arctic Ocean.

In 1974, France and Spain agreed to a JDZ applying in the Bay of Biscay region. The Bay of Biscay Agreement serves as an example of a determination of the continental shelf boundary, while also establishing a JDZ which straddles the agreed boundary. The JDZ in the Bay of Biscay, an area of approximately 1,300km², is defined as a region where specific procedures apply for the award of licenses for the exploration and exploitation of the natural resources of the zone. In 2001, Nigeria and Sao Tome and Principe settled a dispute over maritime boundaries to develop an area potentially rich in oil reserves and fisheries, encompassing an area of approximately 35,000km² including the “seabed, subsoil and the superjacent waters thereof.” The Agreement represented “a unique and historic compromise...in resolving a maritime border dispute,” providing for joint control of the exploration for and exploitation of resources” within the JDZ. The flexible nature of a JDZ in its area, administration, function, and duration means that it could apply to living or non-living resources, as well as environmental and security issues.

In regards to Russia’s overlapping claims with Denmark and Canada, a JDZ may be the appropriate solution where the CLCS cannot determine an appropriate interpretation of “submarine elevations that are natural components of the continental margin” in relation to the Lomonosov Ridge and Alpha Mendeleev Ridge. The 2010 Russia-Norway Barents Sea agreement demonstrates the Kremlin’s willingness to resolve disputes with an “equal

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113 See Peter C. Reid, Joint Development Zones between Countries, 6 AMPLA BULL. 4, 13 (1987).
114 See Chidinma, supra note 111, at 59.
116 Id.
117 UNCLOS, supra note 3, art. 76.
solution.”118 Under these circumstances a JDZ would separate natural resources from ongoing territorial disputes in order to expedite exploration and exploitation, while, at the same time, establish provisions that support the environment. A creation of a JDZ in the maritime zones of the Lomonosov Ridge and Mendeleev Ridge where the Russian claims overlap with Canada and Denmark could benefit all parties engaged.

In Arctic, joint jurisdiction would not only relate to the development of resources but also the joint protection of the environment. The creation of a JDZ in the Arctic requires robust environmental provisions. Multinational organizations such as the Arctic Council could play significant role in ensuring the environmental standards and fostering cooperation. UNCLOS also underscores the importance of scientific cooperation in Article 242, which relates to Marine Scientific Research (Part XIII). Article 242 instructs that states and competent international organizations “shall... promote international cooperation in marine scientific research for peaceful purposes.”119 As climate change gravely alters the Arctic environment, Article 242 could provide critical guidance to states and “integrate the efforts of scientists in studying the essence of phenomena and processes occurring in the Marine environment and the interrelations between them.”120 The combined cooperative provisions of the Arctic Council and UNCLOS as well as previous precedents could serve as an example for the resolution of competing claims in the Arctic.

**Conclusion**

With its exploration of the High North, Russia further demonstrated to the international community its intention to remain true to its claim to the Arctic. Contrary to Russia’s perceived aggression in Ukraine, Russia abided by international law in the Arctic and maintained cooperative relations with the circumpolar states, pursuant to the provisions of the Arctic Council and UNCLOS.

As a party to UNCLOS and the first to claim an extended continental shelf, Russia has deftly used international law to support its territorial ambitions. The Russian government has set forth ambitious territorial claims in the Arctic, which have been reinforced by scientific research expeditions and international law. Nevertheless, climate change and

118 Orebech, *supra* note 57, at 515.
120 *Id.*
untapped Arctic resources offer Russia, Denmark, and Canada an opportunity to cooperate.

The opening up of Arctic sea routes, once navigable only by icebreakers, coincides with competing claims to Arctic territory by the littoral states. Even so, media coverage of events like the planting of a flag beneath the Arctic Ocean distorts and obscures the effectiveness of legal regimes like UNCLOS and the cooperation amongst the members of the Arctic Council. While Russia interprets the Arctic as an integral aspect of its economic and security strategy, exploration for oil and natural gas as well as the preservation of the environment could provide a venue for positive collaboration.
Legal Implications of Brexit: A Study of Employment Law

Peter Borland

Following the British Conservative Party’s outright victory in the United Kingdom’s 2015 general election, and in honor of one of their key manifesto commitments, Prime Minister David Cameron promised an imminent referendum on Britain’s membership of the European Union. With the referendum date set for the 23rd June 2016, the issue is home to fierce partisan debate between Europhiles and Eurosceptics. The issue, however, known colloquially as Brexit, lacks sufficient legal analysis. Proper legal insight is necessary given that the prospect of Brexit is increasing, with recent polls suggesting that a majority of British voters favor leaving the European Union altogether. Moreover, the on-going migrant crisis and recent terrorist attacks on the West are likely to harden right-wing resolve in the United Kingdom, increasing both the likelihood of Brexit and relevance of this article.

Introduction

This article seeks to explain the context and outcome of British employment law in the event of Brexit, which is a colloquial term that references the United Kingdom (UK) withdrawing from the European Union (EU).\(^1\) Brexit is a difficult legal scenario to assess because the laws of the EU and UK are so intertwined.\(^2\) Employment law is the focus of this article because it is a highly controversial element of EU law, with the potential for a great deal of change.\(^3\) Moreover, recent studies have shown that whilst many British businesses are opposed to withdrawal from the EU, employment law remains the priority issue for

\(^1\) Why, and how, Brit. might leave the EU, THE ECONOMIST, Apr. 29, 2015.
reform in the event of any renegotiation between the UK government and EU following a vote to leave in June. It is also worth considering that no full member state has ever withdrawn from the EU, and after decades of integration, the legal situation has grown more complex.

Part I provides a background of the legal development of the EU, examining the obligations it currently imposes upon member states such as the UK. Specifically, it examines the nature of regulations, directives and the European Court of Justice (ECJ), thus providing necessary background for examining the consequences of revoking such laws. The main body of this article examines these consequences, with each part addressing a legal issue pertaining to employment law in the event of a full Brexit. Part II examines the areas of employment law that can be predicted with relative ease, following Brexit. Part III assesses the more fractious case of secondary employment legislation, laws which are supported by the European Communities Act, using the Working Time Regulations as a case in point. Part IV considers the role of the ECJ and its rulings on employment law in the UK post-Brexit, with a focus on Transfer of Undertakings Regulations (TUPE). The final section considers the legal mechanics of Brexit itself, and the various political scenarios that might result from a vote to leave the EU. A review of the various post-Brexit political scenarios, in light of UK employment law, concludes this discussion.

I. The EU and its Employment Laws

A great deal of current British law is derived from EU law. The exact amount, however, is debatable; many Eurosceptics, those in favor of leaving the European Union, claim as much as 80% of British law is created within the sphere of the EU. A large amount of UK employment laws are associated with and dependent upon membership of the EU. Certain aspects of UK employment law, however, are more tied to EU law than others. European employment law originated as a social policy in the 1970s, later being significantly

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5 H. OF COMMONS RESEARCH PAPER, LEAVING THE EU 12 (Vaughn Miller et al. eds., 2013).
advanced in its own right by the Maastricht Treaty (1992). Areas of UK employment law covered by the EU as per the Treaty on Functioning of the EU (TFEU) Title IX, and which would therefore theoretically be most influenced by Brexit, include Equality and Discrimination, Working Time Regulations, TUPE, and Family Friendly Laws. EU law, however, is limited in certain spheres of employment law, including dismissal, whistleblowing and industrial relations. Therefore, these latter three areas of employment law will not significantly change in the event of Brexit and are thus discounted from this review.

Full membership of the EU offers access to the European Single Market, along with a host of other business and travel privileges. Inclusion is in part repaid through the incursion of membership fees; however, the major obligation of a member state is undoubtedly the enforcement of European law. European law is laid out in two core treaties: 1) the Treaty on European Union (TEU), and 2) the Treaty on the Functioning of the European Union (TFEU), both of which were updated by the Lisbon Treaty in 2007. Art. 288 of TFEU details the capacities of the EU, which is crucial for considering the difficulties that Brexit presents. Art. 288 states, “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.” The article defines a regulation as “binding in its entirety and directly applicable in all Member States.” Supported by the UK’s own European Communities Act of 1972, which maintains that European law supersedes national law, employment regulations are directly applicable to British law. For this reason, many Eurosceptics favor Brexit, citing a lack of national autonomy in this inflexible legal system. Nevertheless, regulations have had limited impact upon the sphere of employment law; rather, the other major legal instrument detailed in Art.

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12 Id.
14 TFEU art. 288.
15 Id.
16 Eur. Cm’ty Act 1972, c. 68 (Gr. Brit.).
288, the directive, has been more typically used.\textsuperscript{18} Art. 288 states that “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the national authorities the choice of form and methods.”\textsuperscript{19} An example of this is the Working Time Directive, which is upheld by the UK’s own Working Time Regulations of 1998.\textsuperscript{20} Despite this, directives remain inflexible from the UK’s perspective. When an EU directive is adopted by a member state like the UK, it is virtually impossible for the directive to be removed,\textsuperscript{21} because the unilateral repeal of a directive requires the consensus of all member states.\textsuperscript{22} This inflexibility has led some leading employment lawyers to suggest that either renegotiation or a full Brexit are the only ways in which British employment law can be revised.\textsuperscript{23}

Eurosceptics are not only concerned by the legal structure of the EU, but also increasingly with the content and direction of its employment laws. Some have argued that many of the most recent employment directives have been the most controversial, such as the Working Time Regulations, which has been described as “a totemic symbol of Brussels’ interference in the British Economy,”\textsuperscript{24} and the Agency Worker Regulations of 2010.\textsuperscript{25} Underpinning all this European law is the Court of Justice of the European Union (CJEU), the EU’s overarching judicial body, which is composed of three distinct bodies.\textsuperscript{26} The most important of these is the European Court of Justice (ECJ), the greatest legal body in Europe and the EU, akin to the United States’ Supreme Court.\textsuperscript{27} Art. 288 confirms the authority of the ECJ, stating, “A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.”\textsuperscript{28} Employment lawyer Juliet Carp, of Dorsey and Whitney LLP, claims that EU case law, which is developed by the decisions of the ECJ, has pushed the boundaries of European employment law more than any directive

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\item \textsuperscript{19} TFEU art. 288.
\item \textsuperscript{20} 2003 O.J. (L 299); The Working Time Regulations 1998, SI 1988/1833 (Gr. Brit.).
\item \textsuperscript{21} Phillip Landau, How Leaving the EU would affect U.K. employment law, PERSONNEL TODAY (Apr. 8, 2015), http://www.personneltoday.com/hr/how-leaving-the-eu-would-affect-uk-employment-law/.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Holehouse, supra note 3.
\item \textsuperscript{25} Ben Clements, Britain Outside the European Union 66 (Institute Economic Affairs, 2014).
\item \textsuperscript{26} David Wood & Birol Yenilda, The Emerging European Union 3 (Pearson Longman, 4\textsuperscript{th} ed. 2007).
\item \textsuperscript{27} Id. at 3.
\item \textsuperscript{28} TFEU art. 288.
\end{itemize}
or regulations. She argues that ECJ case law has broadened the competencies of European employment law, imposing tougher regulations on UK employers, a major grievance of some UK businesses. The absence of the ECJ could therefore have profound implications for UK employment law. The UK’s recently established Supreme Court is the highest authority in the UK and would therefore assume the role of chief judiciary over employment law if Brexit were to occur. One major law that governs the enactment of European law into UK law, and is therefore of crucial significance for any analysis of Brexit, is the UK’s European Communities Act. The UK Parliament passed the Act with two major purposes in mind. First, it was designed to satisfy ascension to the European Community (the body preceding the European Union) and contained a number of provisions to help smooth the transition, which could be revoked in the instance of Brexit. Second, the Act ensured that British law would not contradict European Communities law (known as European Union law since 1992), which supersedes national law. Finally, in section 2(2), the 1972 Act grants powers to UK government ministers, who can pass legislation to enforce EU directives. The result, however, is that a number of UK employment laws are reliant upon the existence of the 1972 Act.

The implications of Brexit on employment law are both political and legal. In other words, the likelihood of any specific employment law being affected by Brexit depends on the political arrangement negotiated between the UK and the EU (post-Brexit) and on a government seeking to repeal certain laws for political capital. Focus is retained, however, by thoroughly examining the most contentious legal eventualities of a full withdrawal from the EU. UK employment law is not unitary and Brexit will impact its respective elements in different ways. The exposition of Brexit is guided by reference to three major UK employment laws, the Equality Act 2010 in Part II, the Working Time Regulations in Part III, and finally, the Transfer of Undertakings (TUPE) in Part IV. After examining these three aforementioned critical policies, the variety of effects Brexit could have upon UK employment law will be exposed.

29 CARP, supra note 10, at 34.
32 Id.
33 SLATTERY, supra note 11.
II. Clear-Cut Legal Implications

Some of the implications of Brexit are quite straightforward and easily predictable. If the UK were to entirely leave the EU, several UK employment laws would be unaffected. Some of them are derived from what legal literature describes as primary legislation.34 These are laws passed by the UK Parliament to enforce EU directives, which would remain in place following a complete Brexit. The Equality Act of 2010 is a prime example of this phenomenon.35 While this Act does indeed fulfill the criteria that is needed for the EU’s Equality Employment Framework Directive (2007), it underwent a full progression through Parliament, and is in no way dependent on membership of the EU.36 This primary legislation therefore differs from other employment legislation that was invoked through provisions of the UK’s European Communities Act.37

In the event of Brexit, employment laws such as the Equality Act will be unaffected, because, in this instance, there is no complex intertwining of UK and European law. That is not to say that these laws are completely immune from Brexit. Without the need to provide legislation that enforces the Equality Employment Framework Directive (2007), the UK government would have no European obligation to maintain the law and would theoretically have the legal capability to repeal it at its pleasure.38 Some observers are quick to point out, however, that laws like the Equality Act are now ingrained in British in society and are thus at the mercy of politics and popular opinion.39 There would be great political cost to repealing a progressive act which enforces the equal treatment of workers, suggesting that the act will continue to stand, which is something that applies to much employment law regardless of whether it originated from within the UK or the EU.40 As a generalization, most employment laws that are derived from or influenced by the EU tend to offer protection to UK workers. Some writers even suggest some of the most unpopular EU initiatives among businesses provide protections to employees [e.g., the Transfer of

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BRYANT & HAINSWORTH, BREXIT: A PRACTICAL GUIDE TO THE POTENTIAL LEGAL IMPLICATIONS (Berwin Leighton Paisner, 2015).


CARP, supra note 10, at 34.

Id. at 34.

LUCY MCLYNN, LEAVING THE EUROPEAN UNION 3 (Bates Wells Braithwaites, 2015)
Undertakings (Protections of Employment) Regulations (TUPE)]. A large proportion of
the general public and trade unions will likely make the process of repeal of such EU derived
employment laws very difficult, despite a complete Brexit from the EU. On the contrary,
there are a number of employment laws which would be targeted by businesses following
Brexit, including the Working Time Directive, Agency Worker Regulations, and TUPE.
These particular laws would therefore be particularly susceptible to repeal, particularly by a
Conservative Government. There is one other area of employment law that would be clearly
and predictably affected by Brexit: EU Regulations transpose wholly into national law as if
they were national statutes. Nevertheless, there are no significant EU employment
regulations. True to the EU’s ethos of “soft” persuasive power, EU employment initiatives
are all delivered through the use of directives. Even if they existed, employment regulations
would not need to be repealed, they would simply cease to have any effect in the UK. This
is therefore only of hypothetical significance, unlike the very tangible consequences of Brexit
that are next in line for discussion.

III. Legal Complications

A. Primary Complications

The situation is less straightforward for other UK employment laws. Many
controversial policies, (i.e. Working Time Regulations, TUPE) are secondary legislation,
different in nature to the Equality Act. The majority of directives are delivered into British
law through special statutory agreements, which allows a UK government minister to swiftly
pass legislation to satisfy a directive. This power is derived in section 2(2) of the UK’s Act
of Parliament, the European Communities Act, an act that is critical to any understanding of
Brexit. Many observers suggest that the government would repeal this act following Brexit
because it is the embodiment of the UK’s tangible legal link to the EU. There would,

41 Id. at 3.
42 H. OF COMMONS, supra note 5, at 53.
43 TFEU art. 288.
44 EUR. COMM., supra note 18.
45 DAVIES & CARNEY, VOTING FOR A BREXIT: EMPLOYMENT LAW IMPLICATIONS IF THE U.K.
LEAVES THE EU (Lewis Silkin, 2013)
46 BRYANT & HAINSWORTH, supra, note 35.
47 DAVIES & CARNEY, supra note 45.
however, be legal implications for a host of UK employment laws derived from directives, if repeal of the European Communities Act actually occurs.\textsuperscript{48} If the act were repealed, several important employment laws would cease to exist or would at least be more open to interpretation.\textsuperscript{49} This includes the Working Time Regulations which satisfy the Working Time Directive\textsuperscript{50} and TUPE, and which is underpinned by the Transfer of Undertakings Directive.\textsuperscript{51} Whilst the Equality Act is described in legal literature as primary legislation, it is fitting that employment laws created through the power of the European Communities Act are described as secondary legislation.\textsuperscript{52} In essence, secondary employment legislation is in a much more precipitous situation in the event of Brexit. Examining the Working Time Regulations will help more fully illustrate the implications of the repeal of the 1972 Act in the event of Brexit.

Despite being one of the UK’s most recognizable and oft-invoked employment laws since their introduction by the New Labour government, the Working Time Regulations are in fact vulnerable to repeal and change in the event of Brexit. It is dependent on the European Communities Act, in addition to two EU directives, the European Working Time Directive\textsuperscript{53} and the Young Workers Directive.\textsuperscript{54} Provisions made in the Working Time Regulations even defer authority under certain circumstances to the original EU Directive, thus reflecting the regulations dependence on original EU law.\textsuperscript{55} This is made clear in Part I Article 2(2) of the Working Time Regulations, which states: “In the absence of a definition in these Regulations, words and expressions used in particular provisions which are also used in corresponding provisions of the Working Time Directive or the Young Workers Directive have the same meaning as they have in those corresponding provisions.”\textsuperscript{56}

UK courts can therefore reference the original EU directives if precedence or statutory provisions are lacking, however, such capacity would cease in the event of Brexit. The dependence of the Working Time Regulations on the UK’s European Communities Act is affirmed in their introductory text, which declares:

\textsuperscript{48} McGarrity, supra note 34.
\textsuperscript{49} Brexit Analysis Bulletin 1 (Sheperd & Wedderburn, 2013).
\textsuperscript{50} 2003/88/EC, O.J. (L 299).
\textsuperscript{51} 2001/21/EC, O.J. (L 069).
\textsuperscript{52} Davies & Carney, supra note 45.
\textsuperscript{53} 2003/88/EC, O.J. (L 299).
\textsuperscript{54} 94/33/EC, 1994 O.J. (L 216).
\textsuperscript{56} Id.
The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 (1) in relation to measures relating to the organization of working time (2) and measures relating to the employment of children and young persons (3), in exercise of the powers conferred on him by that provision hereby makes the following Regulations.\(^{57}\)

The Working Time Regulations are dependent on both EU directives, and the European Communities Act, both of which will likely cease to have any effect in the event of Brexit.\(^{58}\) If such laws are consequently repealed it would create a great deal of confusion for businesses, as well as for government. This has led some leading British law firms [e.g., Berwin Leightner Paisner (BLP)] to reflect on the overall uncertainty of Brexit and the future of UK employment law, with BLP noting that, “It remains unclear how the UK would amend or repeal EU-derived employment law; and indeed which laws would be the subject of such change given that so many of the principles are now embedded into UK law.”\(^{59}\) The Working Time Regulations are thus a prime example of this uncertainty that BLP highlights.

B. Other complications

Another difficulty presented by the possibility of Brexit pertains to the nature of employment contracts. European employment law could survive post-Brexit in the sense that it has already been ingrained into employment contracts across the UK.\(^{60}\) Even if the UK left the EU, many entrenched European “rights” would continue to apply, having been transposed into employment contracts and the policies of businesses and organizations.\(^{61}\) Numerous EU derived employment rights have found their way into UK employment contracts, including maternity entitlement, discrimination protection and holiday entitlement.\(^{62}\) Mary Clarke, of DLA Piper LLP claims that discrimination protection is one area in which Brexit could affect employment contracts.\(^{63}\) Although there may be some changes to discrimination protections, the Equality Act would survive Brexit and therefore those EU derived discrimination protection conditions outlined in employment contracts

\(^{57}\) Id.

\(^{58}\) DAVIES & CARNEY, supra note 45.

\(^{59}\) BRYANT & HAINSWORTH, supra note 35.

\(^{60}\) Mary Clarke, How Leaving the EU would affect Employment Law, PERSONNEL TODAY (Apr. 8, 2015), http://www.personneltoday.com/hr/how-leaving-the-eu-would-affect-uk-employment-law/.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.
would be untainted by Brexit. The contracts also affect the employment of EU nationals. UK employers would likely need to create employment contracts for EU employees that meet EU standards, therefore presumably adhering to all current European law, as if Brexit had never even occurred. If the UK wishes to enjoy business and economic interaction with Europe post-Brexit, it will likely need to continue to obey EU rules in many respects.

It is true, however, that Brexit could affect some areas of employment contracts for UK nationals, like holiday and maternity entitlements. Nevertheless, even if UK employment law was revised following Brexit, and employers had the option to rewrite these elements in new employment contracts, they may face huge opposition from employees who view EU standards as “perceived” rights. This makes it difficult for employers to rewrite contracts without the same level of provision that the EU had originally provided. This would also be a complex and costly exercise. Clarke suggests that if companies wished to update their employment contracts in line with the new British regulation, which followed Brexit, they may have to terminate their existing employment contracts, and effectively re-hire with new contracts. This may be entering the realm of conjecture because individual employers would have complete discretion in making that decision. Nevertheless, doing so would incur heavy costs and create great confusion for British employers.

IV. ECJ Employment Rulings Post-Brexit

The potential repeal or revision of employment legislation is not the only complication presented by Brexit. A very different legal issue pertains to the interpretation of employment legislation. The ECJ is the ultimate authority on European employment law; however, its primacy in the event of Brexit would of course be revoked. UK national courts currently use its case law as precedent, and it has generally pushed the competencies of employment law in the UK, thus further complicating the issue. The next highest court that could assume the role of the ECJ would be the UK’s Supreme Court, which recently

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64 See U.K. Parl., supra note 37, Pt. II.
65 CLARKE, supra note 60.
66 See infra U.K. Parl., supra note 37, Pt. V.
67 Id.
68 Id.
69 Id.
70 CARP, supra note 10, at 34.
replaced the House of Lord’s Appellate Committee in 2009. Nonetheless, it remains to be seen how UK courts would interpret the legal rulings of the ECJ when they no longer have any claim to jurisdiction over the UK and when so much national case law has been built up with reference to ECJ decisions.

This is significant because the ECJ has time and again advanced the protections available to British employees. This reality can be depicted using a well-known EU-derived UK employment law, TUPE, which regulates the transfer of assets (which includes employees) when an organization is sold. It therefore protects the rights of transferred employees when a business changes owner. TUPE is popularly regarded as a law many British employers resent, though it is perceived as valuable to British employees. Some alterations to TUPE were made in a 2011 Act of Parliament, to make it easier for British employers to harmonize the terms and conditions for incoming employees with their current employees employment contracts. Nevertheless, the EU prevents TUPE from being substantially altered, because it remains within the remit of the EU’s Business Transfers Directive. Significantly, the capacities of TUPE have been pushed by the ECJ, further frustrating some British Employers. TUPE has been interpreted in the UK according to the ECJ decision known as Daddy’s Dance Hall (1988). The ECJ upheld that TUPE was originally derived from the EU’s Acquired Rights Directive, and this must be taken into account if in doubt. UK national courts went on to use this ECJ ruling in a number of national decisions, such as Wilson v. St Helen’s Borough Council (1998), therefore building up a body of national case law supporting the ECJ’s decision.

If attempts were made to legislate over TUPE in a post-Brexit era, a measure some British businesses would advocate, UK courts would likely find themselves conflicted between the decisions of a higher court in the UK - which have previously followed ECJ

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72 Carp, supra note 10, at 34.
74 Id.
75 Clements, supra note 25, 63.
76 H. of Commons, supra note 5, at 53.
77 Id.
78 2001/23/EC, (L 082) O.J.
80 2001/23/EC, (L 082) O.J.
81 Davies & Carney, supra note 45.
82 Id.
rulings - and new statutory law.\textsuperscript{83} Statutory law would of course take precedence; nevertheless, a great deal of case law would need to be disregarded.\textsuperscript{84} This is a significant issue; TUPE is hardly unique in having been interpreted by the ECJ, meaning the cessation of ECJ authority could impact a number of areas. This has led some, like employment lawyer Elizabeth Slattery, to argue that important ECJ UK employment cases like \textit{Lock v. British Gas},\textsuperscript{85} would no longer be binding.\textsuperscript{86} Nevertheless, this is dependent upon the creation of new statutory law, which is not necessarily in the best interest of the UK government. ECJ decisions could therefore be taken into account by domestic courts for years to come, despite a complete Brexit having taken place.\textsuperscript{87} In this regard, the UK would be subject to the rulings of an international body it is not even a part of.

Moreover, it has been suggested that some employment laws would remain untouched following Brexit, or at least for some duration. Likely, ECJ rulings would continue to be deemed relevant on employment law that remains European.\textsuperscript{88} Similarly, if the dispute was between a EU member business and a UK business, the ECJ may still have a say. The status of the ECJ post-Brexit can be more effectively examined through the use of comparison, as outlined in the next section of this article.

\textit{A. Status of the ECJ in non-EU jurisdictions}

Legal analysis of Brexit would be much easier if clear precedents existed, yet no full EU member has ever withdrawn. Comparison can be made to countries like Switzerland, which are not EU members yet maintain a relationship with the EU. Interestingly, there is evidence that Swiss courts frequently use ECJ case law despite only being a member of the European Free Trade Area (EFTA).\textsuperscript{89} The Swiss maintain a strong economic relationship with Europe through a cumbersome series of 120 bilateral agreements.\textsuperscript{90} In order to satisfy these treaties, which frame the relationship between Swiss and EU businesses, Switzerland

\begin{itemize}
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} Case 539/12, \textit{Lock v. British Gas}, 2015, E.C.R.
  \item \textsuperscript{86} \textit{DAVIES & CARNEY}, \textit{supra} note 45.
  \item \textsuperscript{87} \textit{MCARRITY}, \textit{supra} note 34.
  \item \textsuperscript{88} \textit{SUP. CT.}, \textit{supra} note 71.
  \item \textsuperscript{89} \textit{Id.}
\end{itemize}
must essentially obey EU laws as if they were a full member state.\footnote{Pascale Joannin, \textit{Should the U.K. Withdraw from the EU: Legal aspects and consequences}, \textsc{Foundation Robert Schuman} (May 4, 2015), http://www.robert-schuman.eu/en/european-issues/0355-if-the-uk-left-the-european-union-legal-aspects-and-consequences-of-the-various-possible-options}

There appears no good example of the ECJ getting involved in an employment-related dispute with Switzerland. A recent dispute, however, between Germany and Switzerland might provide some guidance.\footnote{Ct. of J. Rejects Switz.'s Appeal Concerning Zurich Airport, \textit{EUR. LAW BLOG} (Mar. 8, 2014), http://europeanlawblog.eu/?tag=swiss-eu-agreements.} It began in the early 2000s and concerned the imposition of German measures on the use of German air space, which Zurich flights used to approach the airport from the north. The measures essentially stopped Zurich-bound flights from using German airspace at low altitudes during times deemed unfair to the local population (e.g., after 9pm), creating concern over economic ramifications for Switzerland.\footnote{ANDREAS FANKHAUSER, \textit{ECJ Dismisses Appeal Challenging Measures Over Approaches to Zurich Airport} (Int'l Law Office. 2013)}

Despite not being an EU member, Switzerland filed a complaint to the European Commission. However, it reaffirmed the legitimacy of Germany’s measures in a decision in 2003.\footnote{Council Directive 2004/12/EC, O.J. (L 047).} Switzerland’s next option was to approach the General Court, a less prestigious branch of the Court of European Justice, of which the ECJ is also a part. In 2010, however, the General Court rejected Switzerland’s original action for annulment of the European Commission’s decision. This led to Switzerland’s recent appeal to the ECJ against the decision made by the General Court in 2010.\footnote{Case T-319/05, Swiss Conf. v Comm’n, 2010 E.C.R.} Ultimately, the ECJ rejected Switzerland’s appeal, ending over a decade of litigation and thereby agreeing with the decisions of the General Court and the European Commission.\footnote{Case C-547/10 P, Swiss Conf. v Comm’n, 2013 E.C.R.}

Several points from this lengthy example of litigation between a non-EU member and EU member are of interest to an analysis of Brexit. Switzerland is not an EU member, yet in this case it had the capacity to approach EU judicial institutions and was bound by their subsequent decisions. Most significantly, the ECJ was able to act because of the nature of the original agreement that governed the question of air transport. The original bilateral agreement, known as the Swiss-EU Air Transport Agreement,\footnote{Agreement between the Eur. Cmty and the Swiss Conf. on Air Transport, EC.- Sw., Apr. 30, 2002.} granted EU institutions competency in Article 20 of the agreement, stating: “All questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under...
this Agreement shall be of the exclusive competence of the Court of Justice of the European Communities.” The competency of the ECJ over non-member states in this case is therefore demonstrated. This example suggests the ECJ could still be involved with Britain even post-Brexit, if the agreement dictates it. In the event of a full Brexit, Britain would certainly still wish to maintain a close working business relationship with its European partners. The example of Switzerland’s experiences, however, suggests that any agreement may likely include provisions granting competency to European judicial institutions. Admittedly, these bilateral agreements are hypothetical, as is their content. Nevertheless, even setting aside the example of the Swiss-EU Air Transport Agreement, it is likely that EU states would want to afford all the legal protection they can in the crafting of agreements between themselves and the Brexited UK.

Essentially, if a Brexited UK wishes to keep up an integrated business relationship with the EU, which even extreme Eurosceptics advocate for, it must do so according to the EU’s terms. This will most likely include respecting the ECJ’s employment law rulings when business involves another EU member. With the current integrated labor market and the expansion of European businesses to include ventures in both the UK and other EU countries, UK employment law is a particular area that is likely to come into conflict with EU. The UK is therefore likely to continue to be subject to the rulings of the ECJ and the other courts which make up the Court of European Justice. Brexit is therefore not recommended, when the incentive is to be rid of ECJ employment rulings, because it is likely that the UK will need to continue to respect ECJ decisions in many circumstances.

Furthermore, it is worth noting that the ECJ unfortunately did not “take the opportunity to assess the legal consequences of the Swiss-EU Agreements on the procedural status of Switzerland before the CJEU.” In this sense, the status of non-EU members, including Britain post-Brexit, remains largely unclear. This lack of clarity acts to underline the ultimate lack of legal certainty over the issue of Brexit.

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98 EUR. LAW BLOG, supra note 92.
99 CLARKE, supra note 60.
100 EUR. LAW BLOG, supra note 92.
V. Brexit and Recommendations

A. Brexit

Having analyzed the legal implications of Brexit on UK employment laws, it is worth finally examining the legal mechanics behind Brexit. These specifications are found in Article 50 of Treaty on European Union.\footnote{Treaty of Lisbon, supra note 13, at art. 50.} The treaty does not specify the nature of any new relationship the UK would have with the EU in a post-Brexit realm. UK employment laws would, however, be determined by the nature of Brexit and the nature of any new relationship between the EU and UK. Thus, recommendations can be made in this section, because there are at least options at play, unlike the question of Brexit, which is at the mercy of partisan politics.

As Art. 50 (2) explains, after a member state decides to unilaterally withdraw, “the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.”\footnote{Id.} This lack of certainty in Art. 50 (2), when it discusses “taking account of the framework for its future relationship with the Union” as negotiated according to Art. 218 (3), complicates the way in which employment laws in the UK would be affected by Brexit.\footnote{Id.} If anything, Art. 50 (3) goes on to confirm that there would be no legal implications until a new relationship is established because a full Brexit would not materialize until negotiations conclude.\footnote{Treaty of Lisbon, supra note 13, at art. 50 (3).} Moreover, Art. 50 (3) notes that negotiations may take up to two years following a referendum; therefore, there would likely be no changes to employment law within this immediate time frame.\footnote{Adam Lazowski, How to Withdraw from the Eur. Union: Confronting Hard Reality, CEPS COMMENTARY 2, Jan. 6, 2013.}

Major alternatives exist and could be produced through Brexit negotiations. There are a number of different political eventualities for the UK following Brexit. Eurosceptics advocate for such models,\footnote{CLEMENTS, supra note 25, discussion.} and are keen to emphasize the flexibility Britain will enjoy free from the EU, as do Europhiles, those in favor of remaining in the EU, desperate to envision some form of salvageable relationship with Europe after a vote to leave.\footnote{SCHUMAN, supra note 91.} The best two
options and their impact upon UK employment law are considered in the following sections. These two options are either to follow the Norwegian model, thereby joining the European Economic Area (EEA), or to follow the Swiss model of simply being a member of the EFTA and forging numerous bilateral agreements with the EU on a case-by-case basis.

B. The European Economic Area

The EEA would certainly fulfill the UK’s desire for some form of free trade agreement, offering far more than the relatively primitive free trade measures imposed by the WTO, which would become the minimum the UK could enjoy in a full Brexit. The point, however, is made against the EEA that it requires its members to abide by many European laws. On the contrary, these members, like Norway, do not enjoy full EU membership and as such have limited scope to shape the institution and the development of European law. They do have some autonomy, yet ultimately are bound by EEA laws. Therefore, if Britain follows Norway’s suit and joins the EEA, its employment law could be seriously strained by EEA rules, yet without the option to substantially challenge this. In this regard, the UK could potentially leave the EU yet end up with even less control over its employment laws.

Norway, for example, must even abide by the Agency Worker Regulations, which many businesses and Eurosceptics particularly dislike. EEA membership also dictates in Council Regulation (EC) No 2894/94 that members must uphold certain directives, namely the Acquired Workers Directive, which ultimately translates into national acts like the UK’s own Agency Worker Regulations. Membership in the EEA brings with it positive economic benefits. Nevertheless, a Brexit followed by absorption into the EEA may actually offer even less flexibility with regard to the status of many national laws, of which employment laws certainly feature.

108 H. of Commons, supra note 5, at 18.
109 Schuman, supra note 91.
111 Id.
112 Shepherd and Wedderburn, supra note 49, at 1.
113 Slattery, supra note 11.
114 Clements, supra note 25, at 63.
115 2894/94/EC, O.J. (L 305).
C. The Switzerland Scenario

The option of following the Swiss by simply joining the European Free Trade Area is advocated by various writers, but it is also heavily criticized. To enjoy a close relationship with the EU, Switzerland has had to construct about 120 bilateral agreements.¹¹⁷ One such agreement was the previously discussed Swiss-EU Transport Agreement.¹¹⁸ This allowed the ECJ amongst other EU institutions to become involved in any ensuing disputes, as if Switzerland was a full EU member. Interestingly, Switzerland lost out in this particular case, perhaps adding to the argument that the Swiss Brexit model is plagued with problems.

One of the major purposes of the EU, after all, was to avoid such legal complexities and contradictions by harmonizing the laws and policies of member countries, and thus preventing the need for negotiations, and possible litigation, ensuing on a treaty-by-treaty basis. Switzerland, however, has to comply with a huge number of EU employment laws regardless, in order to meet its separate treaty obligations.¹¹⁹ Not only must it create treaties which pay respect to European law, Switzerland is actually accountable in many instances to EU judicial institutions. As with Norway in the EEA, however, Switzerland has a very limited capacity to shape and influence and these laws and judicial institutions.

Agreements will determine the nature and extent of such EU influence in a post-Brexit scenario. Nevertheless, the nature of employment law in particular, considering the transnational nature of European businesses who operate in multiple jurisdictions with employees all over Europe, suggests that it is an area of law which will continue to be affected by the EU, should the UK opt for either Brexit option. Consequently, it is argued that it is impossible for Brexit to occur and for the UK to retain an economically integrated role with the EU yet maintain its own truly autonomous legal framework. Given that some sort of free trade area is always going to be desirable, it appears that the yearning for a truly free and integrated economic area and full sovereignty over employment laws, are irreconcilable.¹²⁰

¹¹⁷ Christopher Grey, Here’s what will actually happen if there is a Brexit, FORTUNE (Oct. 7, 2015), http://fortune.com/2015/10/07/what-will-happen-in-a-brexit/.
¹¹⁸ 2002 O.J. (L 114), 73.
¹¹⁹ DAVIES & CARNEY, supra note 45.
¹²⁰ Andrew Lang, The Consequences of Brexit, Some Complications from Int’l Law, LSE LAW POLICY BRIEFINGS 2-3 (June 2014).
Conclusion

This article has emphasized the reality that Brexit will impact various British employment laws in a variety of ways. The impact is dependent both on the specific law in question and on the form of relationship that is established between the UK and the EU in the event of Brexit. It has been shown that so-called secondary legislation, those employment laws which are dependent on the existence of the European Communities Act, are particularly vulnerable to repeal. The European Communities Act will likely be repealed in the event of Brexit, meaning existing acts like Working Time Regulations may be revised to account for the fact that European Communities Act, and the EU directives that influenced it, would no longer be of any relevance. The pace at which this change is delivered and the degree of confusion it will no doubt generate for businesses is much more a question of speculation. Generally, it can also be concluded that the fate of both primary employment legislation and secondary employment legislation will, to some extent, be subject to public and business opinion following a complete Brexit.

Analysis of the role of the ECJ has led to some interesting conclusions. In the event of Brexit, new statutory law would overrule ECJ decisions, which would cease to have any effect. This could, however, create a confusing legal and business environment in the UK. If the government opts to repeal only some EU legislation, UK courts would face a major challenge. For EU derived employment legislation, UK courts would need to continue to follow ECJ decisions, and the body of national case law which has built up supporting this practice, as demonstrated in the example of TUPE. Nevertheless, in the event of new statutory law being enacted, these years of precedents would disappear, creating an uncertain legal environment. The situation would not be so complicated if new autonomous statutory law paved away all European law, thus entirely repudiating the influence of the ECJ. Nevertheless, as the earlier parts of this article argued, any repeal may be a slow, piecemeal process. Secondly, as the experience of Switzerland has demonstrated, new agreements that are drawn up may likely still invite the authority of the ECJ. In the event of a full Brexit, the influence, if not the authority, of the ECJ and other lesser EU judicial institutions will therefore continue to be felt.

121 Eur. Cm’ty Act 1972, c. 68 (Gr. Brit.).
123 Transfer of undertakings (Protection of Employment) Regulations, SI 2006/ 246 (Gr. Brit.).
In a final broad sense, it is concluded that following a full Brexit, European law would continue to influence UK employment law. Moreover, the UK will still require employment laws as protective and comprehensive for employees as for the rest of the EU, if it seeks to reap the rewards of the current amount of economic and business integration. There can be no compromising with the EU in this respect; if British organizations seek to employ EU nationals, and operate throughout Europe, then employment contracts and procedures will need to follow the European minimum. This argument has been strengthened through comparison with two realistic scenarios for the UK after leaving the EU. Neither the experiences of Norway as part of the EEA nor Switzerland as part of the EFTA appear to offer a more satisfactory framework for the creation of acceptable employment laws, laws which strike a balance between economic integration and the legal autonomy Eurosceptics claim to desire. While this article has focused on employment law, elements of these concluding thoughts may be applicable to other areas of law in the event of Brexit. As demonstrated throughout this article, however, many employment law outcomes post-Brexit are dependent upon specific acts and interpretations, thus rendering these effects unique. Other areas of UK law should therefore also receive legal appraisal, if the real consequences of this prospect are to be fully ascertained.

124 SHEPHERD AND WEDDERBURN, supra note 49, at 1.
Death with Dignity: Investigating the Constitutionality of Physician-Assisted Suicide and the Illegality of Euthanasia

Audrey Hertzberg

Introduction

Physician-assisted suicide was formerly introduced as a component of health policy in the late 1970s and early 1980s. The political climate of the Reagan era was unwelcoming to the concepts of both euthanasia and physician-assisted suicide, leaving these issues out of most legislative discourse both between officials and within the electorate. The subsequent polarization of political parties and increasing ideological division among voters has transformed issues such as physician-assisted suicide into partisan matters. Special interest groups represent both sides of the debate: the Death with Dignity National Center¹ and Patients’ Rights Council² aim to advocate for federal regulation of physician-assisted suicide and to educate the public about its benefits, while New York State Right to Life represents a commanding force from the right that vocally criticizes the practice.³ The opposition between physician-assisted suicide advocates and their adversaries is so strong that politicians have neither brought legislation to the floor nor staunchly opposed doing so, knowing that both groups will lobby hard for their efforts against either circumstance. This “standoff” scenario is extraordinarily common with social issues and encourages legislative inaction.

To fully understand the intricacies of this issue, the distinction between physician-

³ Assisted Suicide, NEW YORK RIGHT TO LIFE ORGANIZATION, http://www.nysrighttolife.org/assisted_suicide/ (last visited Nov. 29, 2015).
assisted suicide and euthanasia needs to be clearly stated. Physician-assisted suicide describes a medical treatment in which a physician prescribes a lethal medication or treatment directly to a patient and the patient then self-administers this medication or treatment, resulting in the end of the patient’s life.\textsuperscript{4} Euthanasia, on the other hand, describes a medical treatment in which a physician administers a lethal medication or treatment to a patient that results in the end of the patient’s life.\textsuperscript{5} While some supporters of euthanasia choose to argue that the two practices are similar enough that they should both be legalized together, this is plainly untrue. The component of self-administration of the lethal medication excuses physician-assisted suicide from being marked murder; euthanasia is not afforded this exception, as a registered physician administers it.\textsuperscript{6}

Due to its morally ambiguous nature, physician-assisted suicide and euthanasia are considered in ethical rather than political terms. Some scholars argue that the ability of patients to put an end to unnecessarily painful suffering in the last months of life is imperative to ensuring the wellbeing of the patient. A counter to this argument lies in the “slippery slope” distinction: legalizing suicide might allow medical professionals to take advantage of the physically handicapped by tricking or forcing them into utilizing physician-assisted suicide. Supporters of the “slippery slope” theorem believe that by desensitizing the public to the idea of legal suicide, they will eventually grow accustomed to involuntary suicide as well. Physician-assisted suicide advocates explain that this is far from their goal; they seek only to provide voluntary treatment.

In the United States, only five states – Michigan, Oregon, Washington, Vermont, and California – have legalized physician-assisted suicide thus far, and there are precise, exacting guidelines regarding the use of this practice. All laws have adopted the requirement that the patient is certified as having only six months to live, and California requires concurrence from two doctors on this issue. In addition, long-term counseling is required to ensure that patients are confident in their decision. To illustrate this, patients have the liberty of choosing whether or not they want to take the lethal medicine after they are approved for the program and a doctor prescribes it. There is no obligation to fulfill on the patient’s end regarding their participation in a physician-assisted suicide program.

\textsuperscript{4} Michael Manning, M.D., Euthanasia and Physician-Assisted Suicide: Killing or Caring? (Paulist Press, 1998).
\textsuperscript{5} Id.
\textsuperscript{6} Id.
The United States has a definitive ban on euthanasia and a less restrictive ban on physician-assisted suicide. Euthanasia is legal in The Netherlands, Belgium and Luxembourg. By comparison, assisted suicide is legal in Switzerland, Germany, Albania, Colombia, and Japan. Part of the debate specific to these social issues is that euthanasia is not an individual right while physician-assisted suicide is and must be treated as such. The opposition to this argument maintains that physician-assisted suicide and euthanasia are identical in that they unlawfully allow individual patients to take matters of life and death into their own hands.

Physician-assisted suicide has emerged as one of the most prevalent privacy rights in the twenty-first century. This issue is currently being addressed in various states within the United States, and it will be discussed in many more state legislatures before the year 2020. After extensive analysis of current bioethical literature, this article will hold that physician-assisted suicide is considered a self-governed liberty guarded by Fourth Amendment privacy protections while euthanasia remains a government-regulated illegality. Despite the potential constitutionality of physician-assisted suicide, the model of its implementation on a state-by-state basis could not be applied on a federal level.

I. Definitions and History of the Issue

Accepting the clearly defined differences in physician-assisted suicide and euthanasia practices is imperative to differentiating the constitutional merit, or lack thereof, in each. Physician-assisted suicide is an important part of privacy law in the United States today. The right to privacy is being redefined and debated in an era of warring political parties with deeply divided ideological beliefs; physician-assisted suicide and euthanasia are primarily privacy issues and the Supreme Court has heard a number cases regarding their legality over the past twenty years. However, the expanding chasm between the parties is contributing to the inability of the two sides to find space for these issues on the docket in areas outside of those distinctly populated by liberal voters. With this political power struggle comes difficulty in understanding what privacy rights each person has and how those rights are protected.

Two 1997 Supreme Court Cases stand out regarding setting precedent on this issue.

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8 Id.
In *Vacco v. Quill*, the Court unanimously upheld a New York ban on physician-assisted suicide.\(^{11}\) The state fought the practice on the grounds that it inhibited the state’s mission to protect its citizens. This is an argument which states often use in cases that engage with social issues as the state does bear some level of responsibility for its citizens and must act in a way that it feels will best protect them. The Court agreed, stating that preventing doctors from assisting even terminally ill patients was a legitimate state interest and could be regulated by New York as such.\(^{12}\)

Interestingly, this case also explored a second angle: three terminally ill patients joined the plaintiffs and argued that New York’s ban violates the equal protection clause because the state allows a competent person to refuse life-sustaining medical treatment, even if doing so will result in the termination of the patient’s life.\(^{13}\) The Court proposed a distinction between “killing” and “letting die;” they stated that honoring a patient’s rejection of life-sustaining treatment does not necessarily result in death, whereas the doctor’s intent when engaging in physician-assisted suicide is necessarily to kill. According to this understanding of the law, the New York Law was valid, as the state had a compelling interest in banning assisted suicide. Simultaneously, allowing a patient to refuse life support is a measure that protects the common-law right to bodily integrity and physical autonomy. The two words are similar not only in intent to die, but through the channels by which a patient would reach this result.

Another unanimous Supreme Court ruling in that year, *Washington v. Glucksberg*, addressed the argument that the right to physician-assisted suicide was protected under the Fourteenth Amendment’s Due Process clause.\(^{14}\) The Court responded that the Due Process clause does not protect assistance in committing suicide. The use of this clause to defend physician-assisted suicide has continued despite this case and the Court’s previous determination that this argument is invalid. In *Glucksberg*, Chief Justice Rehnquist reported that because suicide is not a fundamental liberty interest, it is not protected under the Fourteenth Amendment.\(^{15}\)

This case introduced another fascinating conversation into legal discussions of


\(^{12}\) *Id.*

\(^{13}\) *Id.*


\(^{15}\) *Id.*
physician-assisted suicide, which posits that American people should value life and condemn suicide.\textsuperscript{16} Many pro-physician-assisted suicide individuals found this argument to exclude patients in desperate need of pain management care, as it seemed to insinuate that seeking physician-assisted suicide makes one weak.\textsuperscript{17} They reflected that this argument was closed-minded and representative of a conservative, traditional United States that no longer defined the opinion of the nation in a time of technological and medical advancement.\textsuperscript{18}

One quintessential component of the rulings is that states are able to legalize physician-assisted suicide on a state-by-state basis, seeing as it is a state regulated right. The Supreme Court ruling, that physician-assisted suicide is not a protected liberty under the constitution but that states are still able to legalize it one-by-one, is significant for advocates of this practice.\textsuperscript{19} A more “liberal” court, in the political and judicial sense of the term, \textit{might} have ruled in favor of physician-assisted suicide, but the issue is certainly not purely liberal and conservative. A significant percentage of the voters in the United States, including many Democrats, do not have a distinctly “liberal” opinion on this issue.\textsuperscript{20}

Even a “liberal” court may not agree to take a case regarding physician-assisted suicide and hand down a ruling if they felt that it would be somehow infringing on the right to life or any other constitutional right. This political stance is highlighted by the concurring opinions of the liberally leaning justices on the Supreme Court in ruling that physician-assisted suicide is not a constitutionally protected right.\textsuperscript{21} After the death of Justice Antonin Scalia, the court is split between conservative-leaning and liberal-leaning Justices, with no Justices known to be seeking retirement. The current political impasse regarding the confirmation of Merrick Garland as a ninth Supreme Court Justice is now almost entirely reliant on the result of the 2016 Presidential election.\textsuperscript{22} If a Republican candidate wins and appoints a conservative Justice – compounded by the fact that Chief Justice John Roberts will most likely lead the court for another decade or two - this would preclude any

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{22} Id.
opportunity of a leftward shift, in the judicial sense, occurring in the Court’s near future. Despite these barriers, the open-ended decision of the Court to allow a future shift in policy on this issue illustrates that the Court may have seen potential justification of this practice under the privacy clause.

While Vacco v. Quill did address the concerns that physician-assisted suicide was protected under the fourth amendment, Washington v. Glucksberg did not address this claim, instead choosing to focus on the fourteenth amendment. The Court did not agree with the concept that the fourth amendment could include provisions for physician-assisted suicide in its rights, which came as a blow to advocates for this practice. This ruling, while consistent with the voting records of each of the judges and the period in which the case was heard, might find itself outdated at this point in time. Since 1997, four more states have legalized physician-assisted suicide, all of them citing part of their justification as rooted in the Fourth Amendment. It would be fascinating to reintroduce Vacco v. Quill to the Supreme Court today and see how they address this claim.

Following the 1997 Supreme Court cases pertaining to the constitutionality of physician-assisted suicide, many experts, including physician Michael Manning, argued that while the Fourth Amendment may protect the right to physician-assisted suicide, the same amendment protects the right of a physician to refuse to participate in this practice. Therefore, according to this logic, even if the legislation is passed, physicians should not be forced to assist the suicide of a patient. Non-compliance with a law that legalizes physician-assisted suicide could serve as a formidable barrier in its practice.

While there might be a surplus of physicians willing to write lethal prescriptions in some states, regions more resistant to this practice based on political or religious beliefs may feel no obligation to offer the services to dying patients in the area. Without at least one clinic for physician-assisted suicide in close range to a patient, the law may be essentially nullified as many of the patients sick enough to desire life-ending treatments are not well enough to take long journeys to a willing physician. Due to licensing restrictions, it would be impossible for a physician to travel away from the region where they practice in order to perform this act on a patient that lives in a distant place.

23 Manning, supra note 4.
Physician-assisted suicide would be a more widely accepted medical practice to integrate into pain management care than euthanasia due to the role of the individual in the choice of treatment, a crucial element of American health care. Until the point of incapacitation, the patient is allowed control over their own pain management, which includes physician-assisted suicide in the states where it has been legalized. Some religious groups that oppose the legalization of both practices have conceded that although they approve of neither physician-assisted suicide nor euthanasia, the two are not interchangeable. Leading discussion in the United States on the legalization of life-ending treatment characterizes euthanasia as illegal, stating that this practice detracts from the possibility of getting physician-assisted suicide legalized.

As the Supreme Court has ruled neither as constitutional, the two movements have become deeply separated, with physician-assisted suicide attempting to distinguish itself from what it sees as the more objectionable euthanasia. Opponents of both practices reject one major difference between physician-assisted suicide and euthanasia: the autonomy requirement. With its requirement of self-administration, euthanasia is a distinctly more individual act. Like these traditional opponents, the Supreme Court did not find this distinction forceful enough to grant constitutionality for physician-assisted suicide as a right.

II. The Bioethical Consequences of Legalizing Physician-Assisted Suicide

Bioethics offers a nuanced perspective on end-of-life care that crafts a scope viewed specifically from a moral standpoint. This outlook assists in fully understanding the intricacies of this issue. Frequently, the attitude of the assisting physician is not considered as a decision-making factor as the attention falls almost exclusively on the patient. Willingness of a physician to prescribe the lethal medication or treatment is meaningful in bioethical philosophy investigating physician-assisted suicide, though interest groups fighting for physician-assisted suicide do not always consider this perspective. The

26 Carl E. Schneider, Law at the End of Life: The Supreme Court and Assisted Suicide (The University of Michigan Press, 2000).
Hippocratic Oath plays a significant role in the discussion of physician-assisted suicide and its tenets applicable to this practice, particularly the concrete language regarding “treading with care in matters of life and death” and a reminder that “I treat a sick human being, whose illness may affect the person’s family and economic stability.”

Many conversations about physician-assisted suicide in the bioethics field pertain to whether or not physician-assisted suicide is a viable solution compared to other methods of pain management, not whether or not physician-assisted suicide itself is constitutional. One alternative to physician-assisted suicide is consciously sedating patients who are experiencing extreme pain and have a limited amount of time to live; this practice is controversial because it does not necessarily provide the relief that patients need and can be expensive to maintain until death.

Bioethicists are entrenched in arguments of political ideology. A major discussion in the field of bioethics regarding physician-assisted suicide is whether physician-assisted suicide is just symptomatic of the problems with end-of-life care that are prevalent in the United States. The states that have legalized physician-assisted suicide were also among some of the first to legalize or support other issues explored in the bioethical community, such as the legalization of marijuana and the promotion of stem cell research. Liberal ideology is much more likely to support physician-assisted suicide than conservative ideology, which indicates that some factions in the country would not support this measure based on opposition from conservative communities who find that these practices are not conducive to their beliefs.

34 Angela K. Martin, Alex Mauron, & Samia A. Hurst, Assisted Suicide is Compatible with Medical Ethics, 6 AM. J. BIOETHICS 55 (2011).
35 Timothy E. Quill, M.D., Bernard Lo, M.D., & Dan W. Brock, Ph.D., A Comparison of Voluntarily Stopping Eating and Drinking, Terminal Sedation, Physician-Assisted Suicide, and Voluntary Active Euthanasia (University of Rochester Medical Center Press, 2015).
Bioethics is sometimes derided as being too liberal as a natural result of the discussions at hand. Bioethicists attempt to provide comprehensive opinions of both sides of the issue. Many individuals who approach these issues from a religious perspective feel that bioethicists who do not consider the religious moral responsibility in legalizing physician-assisted suicide inadequately address the issue. This responsibility is understood as taking on the role of the “creator” by deciding when life should end – the insinuation being that physician-assisted suicide ends life prematurely. The growing feeling among religious bodies is that medicine is becoming a practice with professionals who do not know their own limits; for example, physicians can now revive stopped hearts, but this may lead to permanent brain damage for a patient, and therefore a significantly lower quality of life once revived. According to these religious experts, this instance may be one in which religious moral responsibility would dictate not to revive the patient in question. Religious opponents maintain that instead of allowing physicians to help patients end their own lives, medical professionals should seek new solutions to pain management.

III. The Application of End of Life Legislation

One way that states may justify physician-assisted suicide is by claiming that the same right to life for each individual applies to the right to death, or the right to end one’s own life. In “Still the Outstanding Moral Issue,” Teddy Locsin investigates why suicide is viewed as a measure of insanity in the eyes of the Roman Catholic Church rather than a rational course of action for someone who has found themselves in a position where they feel it is truly their best option, a topic similarly analyzed in Siegel and Fieger’s “The Right to Die: An End of Life Question.” It is fascinating to view this issue from the legislator’s perspective, specifically because many advocates argue that lawmakers cannot possibly understand the difficulty of the situation unless they themselves have been forced into the position of someone who wants to utilize the practice.

37 Id.
38 Id.
39 Id.
Oregon enacted the Death with Dignity Act on October 27, 1997.\textsuperscript{43} This legislation allows patients with terminal illnesses to use physician-assisted suicide to end their lives.\textsuperscript{44} Oregon was among the leading states to address the question of legalizing physician-assisted suicide, implementing standards that each patient must meet in order to take advantage of this service. These requirements eased the concerns of some physicians and lawmakers who felt that physician-assisted suicide was too similar to euthanasia. Part of the Death with Dignity Act is an annual publication of statistics and information that pertains to the Act and the patients who utilize it.\textsuperscript{45} This information has served as a guide for other state legislation such as that in Michigan and Vermont.

Other literature dives into physician-assisted suicide, investigating why competent persons who choose not to extend life beyond their desired time are not unquestionably obeyed, citing other privacy cases in which competent persons are given their privacy protections. Examples include \textit{Roe v. Wade} (1973)\textsuperscript{46} in which abortion was nationally legalized, and \textit{In re Quinlan} (1976) in which the parents of a terminally ill incapacitated patient were allowed to cease her life support.\textsuperscript{47} As of now, the successful application of Death with Dignity acts in northwestern states has encouraged other liberally leaning states to adopt similar laws. Oregon and Montana serve as laboratories of physician-assisted suicides in many ways. As more states ratify this law, the public opinion in left-leaning independent states is shifting; in 2012, the Massachusetts Death with Dignity Initiative surveyed public opinion and found that physician-assisted suicide would be defeated if proposed as a law 51\% to 49\%, but later in 2012 a poll by the Boston Globe and the University of New Hampshire found that 68\% of residents supported the proposal and 20\% opposed it.\textsuperscript{48}

A study on the implementation of Oregon’s law details the successes and statistics of Oregon’s first year with the law in practice.\textsuperscript{49} The information published highlights the many ways that the law brought more humanity to life-ending practices without encouraging a premature end of the lives of patients who may have been close to death, as many

\begin{thebibliography}{9}
\bibitem{1} Id.
\bibitem{2} Id.
\bibitem{3} Id.
\bibitem{5} In re Quinlan, 70 N.J. 10; 355 A.2d 647 (1976).
\end{thebibliography}
opponents of the law expected would occur upon legalization. Patients are given the opportunity to have several consulting sessions with psychologists trained in end-of-life care in order to weigh pros and cons of utilizing physician-assisted suicide. Additional studies have supplemented the argument in favor of physician-assisted suicide by illustrating that its legalization does not cause an abnormal increase in patients who wish to utilize it. This is an extremely important distinction because much of the opposition is based in the misconception that legalization has a direct correlation to increased utilization of physician-assisted suicide.

Physician Jack Kevorkian was a leader of this field in the 1990s. Kevorkian was a proponent of assisted suicide and of euthanasia. His actions brought the issue of assisted suicide to light in Michigan, where he was not charged for his involvement in the deaths of 130 people he assisted, as suicide—including physician-assisted suicide—was not illegal in Michigan at the time. Adversely, euthanasia was charged as murder and Kevorkian was jailed and served 8 years of his 10 to 25-year sentence. He was released on the terms that he would not advocate for or be involved in any way with physician-assisted suicide, euthanasia, or related movements.

Kevorkian forced this legal issue and spurred a frenzy of articles about physician-assisted suicide and related ethics. In Kaplan et al., Kevorkian’s medical practices are dissected and used to determine how he greatly shaped the way society thinks of physician-assisted suicide today. In many places, Kevorkian is still the face of the movement, even posthumously. One standing argument in favor of euthanasia legalization is that there is no moral difference in physician-assisted suicide in which a patient self-administers lethal medication, and euthanasia, in which case a licensed physician does so, so long as in both instances the patient wants to end his or her own life. If a patient is physically unable to self-administer life-ending medication, then the legalization of only physician-assisted suicide would seem to discriminate against their medical needs, the same way physician-assisted suicide is designed to help patients whose medical needs are being ignored.

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52 Id.
53 Id.
54 Id.
The legalization of assisted suicide has not been viewed as necessarily detrimental to the health care in the states where it has been implemented based on costs, number of cases, and quality of care. The states in which it is legalized have used similar legislative outlines to create their programs and they have been seemingly effective. As it stands in Montana, the legal climate holds that while doctors can prescribe intentionally lethal drug prescriptions and overdoses for the purpose of assisted suicide they can still be charged with assisting a suicide, though they are allowed to use the patient’s request as a defense.\textsuperscript{55} One Oregon Death with Dignity Act Official Report discloses that in 2013, 122 prescriptions were administered and 71 deaths were reported as of January 22, 2014.\textsuperscript{56}

The availability of this practice has not dramatically increased the number of patients who choose to use this method,\textsuperscript{57} although the public use of physician-assisted suicide by Brittany Maynard has led a larger audience to see some benefits for and gratitude of patients who are able to use the practice.\textsuperscript{58} Maynard was 29 years old and ended her life after living with a lethal brain tumor.\textsuperscript{59} Maynard’s case brought national attention to both the issue and the states that have already legalized the practice. There have been several other sensationalized cases of physician-assisted suicide since Maynard.\textsuperscript{60}

In terms of actual application of the law in specific states, physician-assisted suicide has been legalized or otherwise addressed in various states. It is now legal in California as of January 1, 2016, due to the recently approved California Death with Dignity Act.\textsuperscript{61} It has been legal in Oregon as of 1997 through the Oregon Death with Dignity Act and in Washington as of 2008 by the Washington Death with Dignity Act. Montana legalized the practice through a 2009 court ruling, \emph{Baxter v. Montana}.\textsuperscript{62} The practice was briefly legal in New Mexico as of a 2014 court ruling, but the ruling was overturned in 2015. Although not


\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Kathryn L. Tucker, \emph{The Right to Privacy: Symposium Article: Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying}, \textit{Mont. L.R.} 1 (2007).
as widely publicized, it is also legal to end one’s own life with physician assistance in Vermont as of May 20, 2013, by the Patient Choice and Control at End of Life Act. As of 2015, physician-assisted suicide-related legislation has been introduced in New York, New Jersey, Maryland, and the District of Columbia.63

IV. Future Implications of Physician-Assisted Suicide

The legalization of physician-assisted suicide could occur on a state-by-state basis through the justification of this practice as a protected privacy right and the liberty of life.64 This more liberal construction of the constitution would legalize only physician-assisted suicide, but maintain that human euthanasia is not justifiable. For example, Bernalillo County in New Mexico recently repealed a January 2014 ruling that legalized physician-assisted suicide; this decision was overturned on August 11, 2015.65 One common response among citizens was that there was not a thick enough line drawn between physician-assisted suicide and euthanasia, making it too easy for euthanasia to be legalized eventually if physician assisted suicide is.66 According to Shelly A. Cassity’s law review, this question is not one strictly for legislators to determine.67 The opinion of the people living in each state is a primary component of whether or not it could even be introduced into state legislatures.

One option is for this question to be introduced either nationally as a constitutional amendment, or in each state as a public referendum or popular vote. In the former scenario, this would effectively serve as a reversal of the Supreme Court ruling, establishing public consensus for the legalizing and constitutionality of physician-assisted suicide. In the latter case, the will of the people would be expressed through state legislatures. A majority of legislatures would need to adopt this new law in order for it to be seen as a true overturning of the Supreme Court ruling that assisted suicide is not a federally protected right. The issue with this method is that states would have to introduce this subject into the legislature and onto the voting ballot in order to be considered. In addition, the states that have already legalized physician-assisted suicide include the most liberal electorates in the nation;

65 Id.
physician-assisted suicide is unpopular in the mid-west region where constituents rely heavily on religious beliefs to guide their voting decisions.

Finding state funding for physician-assisted suicide is also a point of contention among opponents to the practice, as explained in “Policy Options for Delivering and Financing Care at the End of Life” published by the National Health Policy Forum and George Washington University. 68 If a state passed a law that compelled doctors—even those who do not support physician-assisted suicide—to practice it, then it would make it more difficult to carve out government funding for the program as more and more interest groups gather behind the opposition. This kind of political coercion is intimidating to pro-physician-assisted suicide legislators, which is why state-by-state ratification is only occurring in liberally leaning states right now. 69 This pattern may continue as legislation is slotted to appear in three more states in the next year—New York, New Jersey, and Massachusetts.

Another choice is for federal judges with state authority to rule that assisted suicide is legal. Based on the rulings from the Supreme Court in 1997, it is also possible to legalize physician-assisted suicide through any court case that comes before a state court. 70 In order for each state supreme court to rule on this issue, a case would be need to be presented—unfortunately, this is not a realistic option for the speedy legalization of assisted suicide and therefore is not a viable solution. Legalization by a judge is far more likely to occur, but this would cause media focus to spiral and pin criticism to one person rather than a legislative body. Even if a judge did attempt a unilateral constitutional ruling, there may be issues with enforcement in particular regions resistant to physician-assisted suicide legalization.

Conclusion

The future of physician-assisted suicide remains uncertain, but the standing precedent holds that the federal government will not legalize it in the foreseeable future. The possibility of further state ratifications depends on a changing political climate and the desires of the electorate. While physician-assisted suicide may be constitutional and therefore eligible for federal legalization, the legality of physician-assisted suicide relies on the

68 Policy Options for Delivering and Financing Care at the End of Life, PUBMED AND GEORGE WASHINGTON (1997).
69 Id.
70 Don Colburn, Survey Reveals Differences on Doctor-Assisted Suicide; Patients Facing Choice Want Relief from Pain, PUBMED (1996).
requirement that the lethal medication is not forced on any patient after it is prescribed to them. Adversely, euthanasia uses direct life-ending practices to serve the same purpose, which can be seen as contradictory to the constitutional right to protecting one’s own life.

The groups most responsible for developing the images of these movements, respectively, have very different takes on their causes. Physician-assisted suicide markets itself as a humane, moderate medical practice that is slowly achieving approval not just across the United States, but around the world. Euthanasia, on the other hand, still has a reputation of being too closely associated with the liberal Jack Kevorkian, and its inability to achieve widespread passage makes it a less attractive option for advocacy.

The bioethical discussions on this issue will continue to develop as more philosophers provide opinions on the two practices. The legalization of physician-assisted suicide in nations around the world may also influence the speed at which the United States addresses this issue, depending on whether or not United States allies adopt staunchly pro-physician assisted suicide positions. At this time, based on the research conducted here, it can be argued that physician-assisted suicide will not become legalized federally in the coming years in the United States. It stands to be legalized on a state-by-state basis in several states through its introduction into individual state legislatures, or by a judge ruling. Euthanasia will not achieve federal legalization, and it will also probably not be legalized on a state-by-state basis, as its practice cannot be defended by the same principles that physician-assisted suicide seeks to contest. Factors such as the upcoming presidential election and congressional elections, new appointments to the Supreme Court’s bench, and a drastic change in American public opinion will ultimately lead to a development in the legalization of physician-assisted suicide.
Blurred Lines: The Intersection Between Criminals, Victims, and the Fight to End Child Sex Trafficking

Emily Horak

Elementary students across America are taught that slavery ended in the 19th Century. But, sadly, nearly 150 years later, the fight to end this global scourge is far from over. Today it takes a different form and we call it by a different name – ‘human trafficking’ – but it is still an affront to basic human dignity in the United States and around the world. -Hillary Rodham Clinton

Introduction

On October 28, 2000, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (TVPA). The Act prescribed harsher punishments for those found guilty of child sex trafficking and sought to treat exploited children as victims, rather than juvenile delinquents. Yet, fifteen years later, child sex trafficking remains a persistent problem in the United States, calling into question the effectiveness of the TVPA and its subsequent reauthorizations. The Department of Justice estimates that there are between 100,000 and 300,000 children in the United States who have fallen or might fall into prostitution.

It is commonly thought that trafficking only occurs abroad, but this could not be farther from the truth, particularly when examining countries like the United States, the only modern democracy to significantly grapple with this problem. Before the TVPA was enacted in 2000, there was no substantial legislation to combat domestic trafficking of

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3 Id.
4 Tanya Mir, Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals, 51 FAM. CT. REV. 1, 3 (2013).
5 Id. at 3.
children. Even the United States viewed trafficking as an international issue and only prosecuted trafficking of persons between countries, neglecting the issue of domestic trafficking. Lax laws have made the United States one of the top three nominal destinations for child sex trafficking. In addition, the stricter provisions for international trafficking and the international emphasis within legislation has engendered an environment where domestic trafficking thrives.

The broader reason that child sex trafficking has become a booming industry in the United States is because of conflicts between laws and within laws. Acts such as the TVPA have blurred the lines between the definition of a victim of child sex trafficking and a minor who is prostituting. The TVPA and its reauthorizations also fail to provide any consistency between state laws, which means that the same crime of child sex trafficking is treated differently between states and leads to some states becoming hotbeds for trafficking. These inconsistencies have led to most victims being misidentified as juvenile delinquents, subjecting them to harsh penalties rather than needed treatment. The TVPA undermines the endeavor to end human trafficking by discouraging victims from seeking help. Children are easily manipulated by controlling pimps, who make prostitution seem more alluring because the law provides only one alternative, juvenile detention facilities. Without a clear legal distinction between prostitution and child sex trafficking, uniformity between state laws, and adequate social services available for victims, child sex trafficking will remain a prominent issue in the United States.

I. Federal Legislation

A. History of Federal Legislation

At first, child sex trafficking and prostitution were considered synonymous. However, the two scenarios were coupled together and the coercive nature of trafficking was ignored. Much progress has been made to classify the two independently, yet there still remains some entanglement between trafficking and prostitution within federal legislation, specifically within the TVPRA.

The first action taken by the United States to combat sex trafficking was the International Agreement for the Repression of the Trade in White Women, which was negotiated in 1902. This action only addressed international trafficking, and only white women were considered victims. Moreover, the agreement never defined prostitution, and instead used the word “debauchery” to refer to sexual activities. As a result, the agreement made trafficking a morality issue rather than a human rights issue.

The White Slave Traffic Act, later renamed the Mann Act of 1910, was the first piece of federal legislation dealing with prostitution and domestic sex trafficking. The act invoked the Commerce Clause to outlaw the transportation of “any woman or girl for the purpose of prostitution, or for the purpose of inducing, enticing, or compelling a woman to become a prostitute,” or causing women to travel for the purpose of prostitution. The Mann Act treated domestic victims of trafficking as prostitutes, with some women even charged with conspiracy, but evolved from an act criminalizing the transportation of women across state borders to criminalizing the transportation of children between ages thirteen and eighteen across both state and international borders. In 1994, the amended law outlawed traveling to other countries to engage in sexual activities with minors. Even if the act in question occurred in a different country, the 1994 amendment allows the defendant to be prosecuted under federal law.

Several loopholes in the Mann Act contributed to the rise of trafficking. First, prostitution was viewed as immoral rather than exploitive in the eyes of Congress. Therefore, under the Mann Act, it was difficult to identify any woman as a victim. Second, the trafficking of men was not outlawed under the Mann Act. However, globally, 9.5 million men are victims of human trafficking, indicating that trafficking is not exclusive to women. Most troubling is the use of the Mann Act to combat immoral activities. Two examples of this include Caminetti v. United States and Cleveland v. United States, both of which involve

8 Id.
9 Id. at 3.
10 Mann Act, 36 Stat. 825a (1910).
12 Id. at 5.
13 Id. at 5.
14 A Child is Not a Commodity, supra note 6, at 3.
transporting women for consensual sexual activities that do not involve any payments.\textsuperscript{16} Married men were charged for transporting their mistresses for a trip to a different state in \textit{Caminetti v. United States}.\textsuperscript{17} Because sexual activities occurred on this trip and infidelity was considered immoral, the Mann Act was used by the prosecution.\textsuperscript{18} Similarly, \textit{Cleveland v. United States} invoked the Mann Act when a Mormon man traveled with his wives to Arizona, California, Colorado, Idaho, Utah, and Wyoming.\textsuperscript{19} Again, the Mann Act was used not because women were being exploited, but rather because polygamy was deemed immoral, and thus prohibited under the Mann Act in Colorado.\textsuperscript{20} The Mann Act was used mostly in cases such as these and was rarely used to combat human trafficking.

In October 2000, Congress acknowledged that the Mann Act was exacerbating human trafficking and responded with the Trafficking Victims Protection Act and the Victims of Trafficking and Violence Protection Act. The TVPA defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”\textsuperscript{21} Voluntary prostitution is considered under this broad definition, consequently erasing the distinction between prostitution and trafficking. The TVPA further defines severe sex trafficking as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”\textsuperscript{22} The Act reserves the worst penalties for those found guilty of severe sex trafficking.

\textbf{B. Wavering Definition of Prostitution}

A critical component of combating child sex trafficking is recognizing the distinction between prostitution and trafficking. The misconception that prostitution is always voluntary and consensual is dangerous in that it allows for misidentification of trafficking victims. Federal law has evolved with regard to the definition of prostitution in an attempt to more clearly identify victims of trafficking, but politics have hindered this good intention.

\textsuperscript{16} \textit{A Child is Not a Commodity}, supra note 6, at 3.
\textsuperscript{17} \textit{Caminetti v. United States}, 242 U.S. 470 (1917).
\textsuperscript{18} Id.
\textsuperscript{20} Id.
\textsuperscript{22} \textit{A Child is Not a Commodity}, supra note 6, at 2.
Various organizations have provided comprehensive definitions for sex trafficking. For instance, the United Nations defines sexual exploitation as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”\textsuperscript{23} This is an important definition because it emphasizes the fear used to enslave victims. Another definition offered is when “[a person] is coerced, forced, or deceived into prostitution—or maintained in prostitution through coercion—that person is a victim of sex-trafficking.”\textsuperscript{24} With this definition, those who “engage in transporting, harboring, recruiting, receiving, or obtaining the person for a sexual purpose” are considered traffickers.\textsuperscript{25} Sex trafficking is acknowledged as a modern form of slavery.\textsuperscript{26} However, sex trafficking is different from other forms of trafficking because women are horrifically considered a reusable commodity, yielding large profits that encourage traffickers to continually exploit their victims. Whereas drugs can only be trafficked once, humans are seen as a continuous source of revenue, making the industry all the more lucrative for the traffickers and dangerous for the victims.\textsuperscript{27}

The TVPA separates victims into three groups: the first group includes minors involved in prostitution, with the second group including adults who are involved in prostitution because of force, fraud, or coercion, and the third group including children and adults who have become slaves.\textsuperscript{28} Under the TVPA trafficking must include an element of force, fraud, or coercion.\textsuperscript{29}

Linking trafficking and prostitution has produced several issues. First, in states where there is no age requirement to be charged with prostitution, minors are prosecuted as adult prostitutes or juvenile delinquents.\textsuperscript{30} Therefore, victims are misidentified and do not receive necessary support. Second, the TVPA focuses on the trafficking of international persons. As a result, individuals involved in international cases are identified as victims, provided with support, and offered legal immigration status while domestic victims are

\textsuperscript{24} Addressing the Sex Trafficking Crisis, supra note 11, at 2.
\textsuperscript{25} Id. at 2.
\textsuperscript{26} Why Minors Engaged in Prostitution, supra note 3, at 3.
\textsuperscript{27} Id. at 3.
\textsuperscript{28} Addressing the Sex Trafficking Crisis, supra note 11, at 5.
\textsuperscript{29} Id. at 5.
\textsuperscript{30} Why Minors Engaged in Prostitution, supra note 3, at 5.
charged as prostitutes. The 1910 definition of prostitution under the Mann Act is especially problematic, considering the act only identified white women as victims when in actuality, most victims are minorities, and men are exploited too. The Department of Justice also notes that the term prostitute carries a negative connotation, and by calling victims “child prostitutes,” choice is implied and child sex trafficking seems “different from other forms of rape or sexual abuse of minors.”

Some argue that prostitution is a form of sexual liberation and helps women exercise autonomy. 90% of child sex trafficking victims were either physically or sexually abused before being trafficked and 80% of female prostitutes enter the industry because of a coercive pimp or trafficker. Prostitutes usually enter the industry while still minors, with minority and transgender children entering the industry at especially young ages. Pimps retain between 60% and 70% of the money earned, proving that prostitution is not as profitable for participants as proponents suggest. Judges claim that it is difficult for the defense counsel of a child charged with prostitution to win because juries are usually biased against prostitutes. All of these statistics collectively dispel the notion that a prostitute enters the industry for sexual liberation.

C. Trafficking Victims Protection Reauthorization Act (TVPRA)

Congress reauthorized the TVPA in 2003, 2005, 2008, and 2013, with the next reauthorization due in 2018. Despite extensive revisions with each reauthorization, significant limitations within the TVPA continue to allow children who are victims to be treated as criminals.

The TVPRA 2003 made substantial changes to empower victims and provide them with services, such as the power to sue their traffickers in civil cases at the federal level. It used the Racketeering Influenced and Corrupt Organization (RICO) statute to include money laundering as trafficking evidence. A new subsection was added to TVPRA 2003 to

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31 Child, Victim, or Prostitute, supra note 7, at 6.
32 Nesheba Kittling, God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution, 6 NEVADA LAW JOURNAL 1, 4 (2006).
33 Amanda Shapiro, Buyer Beware: Why Johns Should Be Charged with Statutory Rape for Buying Sex from a Child, 23 JOURNAL OF LAW & POLICY 1, 3 (2014).
34 Id. at 5.
35 Id. at 5.
36 Id. at 9.
37 Id. at 10.
38 Id. at 12.
39 Kittling, supra note 29, at 3.
prohibit federal funding of any organization that promotes the legalization of prostitution. Campaigns against sex tourism were mandated. The act encouraged law enforcement officials to treat victims with compassion, setting an important precedent.40

The TVPRA 2005 was perhaps the most groundbreaking of all reauthorizations. Under Section 202 of the TVPRA 2005, the Department of Health and Human Services provided grants for U.S. citizens who are victims of trafficking. Section 204 of the TVPRA 2005 required the Department of Justice to allocate more resources to investigate sex trafficking involving U.S. citizens.41 The reauthorization in 2005 also required the Attorney General to gather more data about the epidemic of trafficking within the United States.42 In addition, the TVPRA 2005 included a federal grant program to assist state and local governments’ programs for victims of severe trafficking.43 An emphasis on domestic trafficking and the aiding of victims made the TVPRA 2005 a better tool to fight trafficking.

The TVPRA 2008 introduced a major amendment stating that regardless of whether or not the patron knows the child is a minor, reckless disregard makes the sexual act illegal.44 In addition, the 2008 law required the Department of Justice to release model legislation for states based off the District of Columbia’s prostitution and pandering statutes.45 This model legislation does not absolve victims of crimes they committed while being trafficked, such as theft, however the District of Columbia is known for having among the most stringent trafficking laws.46 Another provision was added, making it illegal for law enforcement to threaten charges to force victims to cooperate.

Punishment for trafficking has remained fairly consistent throughout the reauthorizations. It is a Class A felony to traffic children between ages fourteen and seventeen, subject to a mandatory minimum sentence of ten years to life imprisonment and fines not exceeding $250,000.47 The mandatory minimum sentence is raised to fifteen years if the victim is under fourteen years of age or if force, fraud, or coercion are used.48

40 Id. at 3.
42 Child, Victim, or Prostitute, supra note 7, at 4.
43 Id. at 4.
44 The Protected Innocence Initiative, supra note 41, at 4.
45 Child, Victim, or Prostitute, supra note 7, at 5.
46 A Child is Not a Commodity, supra note 6, at 5.
Meanwhile, buyers face between ten years and life in prison. Under the TVPA, the average offender serves 158 months in prison. The punishment remains fairly uniform.

D. Other Important Federal Laws and Initiatives

Other actions taken by the federal government have created a coordinated effort to end trafficking. For instance, in TVPRA 2005, Congress instructed the Secretary of Health and Human Services to test and evaluate rehabilitation residential treatment facilities for victims of child sex trafficking. The FBI’s “Operation Innocence Lost” is a collaborative effort between the National Center for Missing and Exploited Children, FBI, and Department of Justice that has been instrumental in uncovering traffickers and rescuing victims since its inception in June 2003. More than 4,800 children have been rescued by “Operation Innocence Lost.”

The Adam Walsh Sex Offender Registration and Notification Act (SORNA) has also played a crucial role in preventing repeat abusers from further exploiting children. If the victim is between the ages of fourteen and seventeen, the Adam Walsh Child Protection and Safety Act of 2006 subjects violators to a maximum sentence 20 years’ imprisonment. The Adam Walsh Act is often coupled with the TVPRA to bring justice for victims of trafficking.

The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) is another federal law often used in conjunction with the TVPA, jointly allowing the convictions of 92 human traffickers and 65 sex traffickers. The PROTECT Act makes it illegal to use misleading domain names to deceive minors into encountering obscenities. It also allows law enforcement to use wire taps in scenarios where sex trafficking is suspected. In addition, the PROTECT Act makes it more difficult

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49 Id. at 8.
50 A Child is Not a Commodity, supra note 6, at 9.
51 The Protected Innocence Initiative, supra note 41, at 3.
52 Id. at 4.
55 A Child is Not a Commodity, supra note 6, at 10.
56 The Protected Innocence Initiative, supra note 41, at 6.
57 God Bless the Child, supra note 32, at 4.
58 A Child is Not a Commodity, supra note 6, at 4.
59 A Child is Not a Commodity, supra note 6, at 4.
for defendants of trafficking to earn bail.\footnote{God Bless the Child, supra note 32, at 3.} When used in combination with the TVPA, the PROTECT Act can bring harsher punishments for those who traffic children.

Despite the advancements within federal law, children who are victims of child sex trafficking are still arrested and charged with prostitution. Nationwide in 2000, 924 minors were arrested for prostitution, with 120 being under the age of fifteen.\footnote{Child, Victim, or Prostitute, supra note 7, at 6.} In 2010, 804 minors were arrested for prostitution, with 91 being under the age of fifteen.\footnote{Id. at 6.} These numbers dropped to 763 and 70, respectively, in 2011.\footnote{Id. at 6.} 2012 brought similar progress, as the numbers once again fell to 616 and 46, respectively.\footnote{Id. at 6.} 

This progress might seem promising, but 616 is too many victims denied justice. These figures indicate that states must share the responsibility of eliminating trafficking.

II. State Laws

A. Role of the States

Sex trafficking is often perceived to be an international issue plaguing impoverished and developing countries. In 2003, the Trafficking in Persons report estimated that between 600,000 and 800,000 people are trafficked worldwide, with 80% of these victims being female and 70% of those females being sexually exploited.\footnote{Addressing the Sex Trafficking Crisis, supra note 11, at 2.} However, between 14,500 and 17,500 individuals are victims of sex trafficking each year in the United States.\footnote{11 Facts, supra note 13.}

The separation of powers under the United States' federal system is often beneficial, as states can tailor their laws to specifically address the issues faced within their borders. However, variation in state laws inevitably leads to variation in severity between states. As a result, the epidemic of human trafficking has become more severe.

Evidence suggests that child sex trafficking is becoming increasingly prominent. For instance, in 2012, the Department of State reported that 136 male and 443 female victims of child sex trafficking were arrested for prostitution.\footnote{Juan David Romero, Why Do We Treat Child Sex Trafficking Victims Like Criminals, NEW REPUBLIC (Dec. 4, 2014), https://newrepublic.com/article/120418/underage-sex-trafficking-victims-are-treated-criminals-us.} More commonly, children are arrested
for other crimes and law enforcement fails to properly identify these minors as victims of sex trafficking. During a 2010 hearing before the Senate Judiciary Committee’s Subcommittee on Human Rights and the Law, the Cook County, Illinois state attorney testified that the daily interactions between these victims and law enforcement provide crucial leads. In 2010, the FBI’s Uniform Crime Reports revealed that the victims of sex trafficking are more likely than their solicitors to get arrested, exposing just how prevalent misidentification is. Thus, the issue is occurring on a more local scale with law enforcement misidentifying victims as criminals guilty of other crimes.

Perhaps the larger issue posed by inconsistent state laws is that some states in particular become hotbeds for child sex trafficking. When states have laws that require more evidence to convict an individual of trafficking or do not punish those convicted of trafficking as harshly, traffickers are more likely to bring their business to these states. The National Center for Missing and Exploited Children (NCMEC) estimates that the 2010 Super Bowl in Miami brought 10,000 prostitutes to the region. In order to avoid the same predicament, Indiana, the host of the 2012 Super Bowl, passed stricter trafficking laws to prevent traffickers from bringing prostitutes to the game. The Super Bowl is evidence that state laws can dramatically change the landscape for sex trafficking within the state.

As of 2014, 28 states still fail to identify prostituted minors as victims and instead charge these children as criminals. Delaware, Washington, and New Jersey are the only states that do not charge victims for crimes they committed as a result of being trafficked. Loopholes still exist that allow traffickers not to be prosecuted to the fullest extent of the law. Although rape and kidnapping are serious charges, human trafficking carries a much longer minimum sentence. Prosecuting traffickers for rape or kidnapping has two consequences. First, victims are not protected by state or federal programs for trafficking victims and they might not qualify for services allocated for victims. Second, traffickers might receive a shorter sentence than had they been charged with trafficking, leading to inadequate justice. Even in states that properly identify traffickers, some states have set the

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68 The Protected Innocence Initiative, supra note 47, at 5.
69 Id. at 7.
70 Id. at 6.
71 Id at 6.
73 Id.
74 The Protected Innocence Initiative, supra note 41, at 6.
burden of proof so high that conviction is rarely feasible. Other states require “proof of knowledge that force, fraud, or coercion was used in sexual services” in order to charge someone as a trafficker.\textsuperscript{75} When minors have a manipulated perception of reality and view their traffickers as lovers or fail to believe that they are being trafficked, this burden becomes even more difficult to meet as the victim is unlikely to testify about force or coercion.\textsuperscript{76} These circumstances call into question the effectiveness of state laws to combat human trafficking. However, in order to understand the successes and shortcomings of the law, each state’s laws ought to be examined.

B. Safe Harbor Laws

Some states have enacted Safe Harbor Laws to combat child sex trafficking by identifying children as victims rather than criminals. In order for a law to be considered a Safe Harbor Law, it must meet the American Bar Association’s\textsuperscript{77} four requirements.\textsuperscript{78} First, the law must protect child victims from being prosecuted as prostitutes. This includes both criminal and delinquency proceedings. Second, the child must be placed in child protective services. Often times, victims are retained as juvenile delinquents for protection from their trafficker or from homelessness. Safe Harbor Laws ensure that a victim will not be retained as a juvenile delinquent and mandate proper care under child protective services. Third, the law must identify “prostituted minors as victims of sexual exploitation or abuse.”\textsuperscript{79} This protection serves as a bulwark against misidentification even in states with Safe Harbor Laws. Finally, a Safe Harbor Law must allocate state resources for victims of child sex trafficking. The resources can either be in the form of tailored services for those who are victims of child sex trafficking or generic assistance for those who are victims of sexual abuse. Examples of such services include crisis intervention and safe placement. Safe Harbor Laws are a revolutionary approach to fighting child sex trafficking, as they are victim-centered. Safe Harbor Laws have been instrumental in providing for victims with their goal of providing legal protection along with imperative social and rehabilitation services.

\textsuperscript{75} Id. at 7.
\textsuperscript{76} Id. at 7.
\textsuperscript{78} Child, Victim, or Prostitute, supra note 7, at 12.
\textsuperscript{79} Id. at 12.
Seven states have implemented Safe Harbor Laws, but the laws vary greatly from state to state. Most states that have comprehensive Safe Harbor Laws focus on decreasing the demand for prostituted minors. However, state laws vary in the maximum age that a minor can be offered immunity and protection. Six states have passed partial Safe Harbor Laws that either provide legal protection or social services for victims.80 However, these states do not meet all four conditions, which is why they are only considered to be partial Safe Harbor Laws. The Polaris Project has rated Safe Harbor Laws, or the lack thereof, in states across the United States in order to gauge each state’s willingness to pass critical legislation to eliminate child sex trafficking.81

C. Distinctions Between State Laws

Comparing laws in each state makes apparent the unique reasons trafficking flourishes in each jurisdiction. Despite strides made by federal legislation, state laws continually blur the lines between prostitution and trafficking and make identifying victims more difficult. The Polaris Project has divided states into four tiers.82 Tier one is reserved for states that have “passed significant laws to combat human trafficking” while tier two is designated for states that have “passed numerous laws that combat human trafficking.”83 States that have “made nominal efforts to pass laws to combat human trafficking” are placed in tier three.84 No states are listed in tier four. Thirty-nine states, as of 2014, are rated in tier one, with nine states and the District of Columbia in tier two and two states in tier three.85 Although there are thirty-nine states in tier one, the Polaris Project recognizes Delaware, New Jersey, and Washington as the only states with all necessary legal components enacted.86 Thirty-six states have a trafficking-specific law allowing victims to sue their exploiters for civil damages.87

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80 Why Minors Engaged in Prostitution, supra note 3, at 5.
81 2014 State Rankings, supra note 72.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
Illinois, Kentucky, North Carolina, and Tennessee provide immunity to all minors who are victims of child sex trafficking, regardless of their age.\textsuperscript{88} However, Oregon stipulates that only minors under the age of fifteen can be classified as victims.\textsuperscript{89}

Arkansas, Kansas, Texas, and Washington do not require proof that force has been used when classifying a minor as a victim while Alabama, New Hampshire, and South Dakota require proof of fraud or coercion.\textsuperscript{90} Georgia, Iowa, Massachusetts, Missouri, Oregon, South Carolina, and Rhode Island require proof of “force, duress, or coercion,” an even broader classification.\textsuperscript{91} The law in South Carolina is unclear. Although some observers note that legislators did not intend the South Carolina law to require proof of force, fraud, or coercion, courts have interpreted the law to require this additional proof.\textsuperscript{92} These aforementioned groupings of states will inform the organization of the remainder of this section with individual state analysis going in that order, in correlation with the tier classifications of the Polaris Project.

Illinois provides full immunity for victims by precluding prosecution of minors. If a minor is arrested for prostitution, state law requires a law enforcement officer to file a formal report with the Illinois Department of Children and Family Services State Central Register, which must begin an investigation within 24 hours of the report.\textsuperscript{93} After the reports are filed, the state considers minors to be abused and neglected children, and they are subsequently placed in the child welfare system. The Child Protection Agency is in charge of caring for these children and must provide social services crafted specifically for victims of child sex trafficking. Local organizations and human trafficking organizations partner with the child protection agency to further care for the victims. \textit{People v. Jones} strengthened the precedent for applying Illinois law to cases of child sex trafficking.\textsuperscript{94} When the defendant was arrested for soliciting sex for money from a minor under the age of sixteen, the defense argued that he had committed statutory rape. A court ruled, however, that the lighter charge of statutory rape would not be used. \textit{People v. Jones} substantially strengthened Illinois trafficking laws. Because Illinois does not allow children to be treated as criminals, children

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\textsuperscript{88} \textit{Child, Victim, or Prostitute}, \textit{supra} note 7, at 9.
\textsuperscript{89} \textit{Id.} at 10.
\textsuperscript{90} \textit{Id.} at 9.
\textsuperscript{91} \textit{Id.} at 10.
\textsuperscript{92} \textit{Id.} at 10.
\textsuperscript{93} \textit{Id.} at 13.
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with extreme circumstances who need extensive rehabilitation because they pose a threat to themselves or society are not detained.\textsuperscript{95} Critics worry that never charging minors leads to an increase in prostitution of minors because traffickers benefit when their victims are not incarcerated.\textsuperscript{96} Despite these possible shortcomings, Illinois maintains its reputation as one of the most effective states in handling child sex trafficking.

Kentucky has significantly strengthened its laws to address trafficking by expanding the definition of “abused or neglected child” to include prostituted minors who were solicited while under the age of sixteen by someone over the age of twenty-one.\textsuperscript{97}

Tennessee emphasizes providing victims with the services they need to recover, including “health care, mental health care, legal services, housing, job training, education and victim’s compensation funds.”\textsuperscript{98} The Department of Health Services has been delegated the task of coordinating care for victims.\textsuperscript{99} Similar to Illinois and Kentucky, Tennessee does not prosecute minors for prostitution. Rather, the minor is returned to his or her legal guardian, who is provided information about human trafficking such as the phone number for the National Trafficking Hotline.\textsuperscript{100} Tennessee is unique in its care-centered approach.

Arkansas, like Kentucky, has expanded its definition of sexually exploited children to include minors under the age of eighteen who were lured into prostitution. The Department of Human Services is in charge of providing services to the victims.\textsuperscript{101} Arkansas’s human trafficking law stresses the importance of providing victims with welfare services rather than placing them in the criminal justice system.

Texas law differs from other states in that law enforcement officers “take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse.”\textsuperscript{102} This provision allows for law enforcement officers to quickly rescue children who are suspected victims of trafficking. The Texas Supreme Court’s landmark case, \textit{In re B.W.}, the court ruled that because a thirteen-year-old cannot

\textsuperscript{95} \textit{Why Minors Engaged in Prostitution, supra} note 3, at 6.
\textsuperscript{96} \textit{Id.} at 6.
\textsuperscript{97} \textit{The Protected Innocence Initiative, supra} note 41, at 21.
\textsuperscript{99} \textit{Id.} at 21.
\textsuperscript{100} \textit{Id.} at 21.
\textsuperscript{101} \textit{Child, Victim, or Prostitute, supra} note 7, at 7.
\textsuperscript{102} \textit{In re B.W.}, No. 08-1044, 313 S.W.2d 825 (Tex. 2010).
legally consent to sex, a thirteen-year-old cannot be charged with prostitution.\textsuperscript{103} Texas has divided statutory rape charges into two tiers, depending on age: Tier one has longer mandatory minimum sentences and is reserved for offenders whose victims are thirteen years of age or younger, while second tier is reserved for offenders whose victims are between fourteen and seventeen years of age. In Texas, children who fall into the first tier are not prosecuted for prostitution while minors in the second tier might be charged depending on the discretion of the judge and prosecutor.\textsuperscript{104}

Washington distinguishes itself from other states by allowing the vehicles of those who sexually exploit children to be impounded.\textsuperscript{105} Regardless of what formal charges are filed against a defendant accused of trafficking, if found guilty, the crime will be considered first-degree.\textsuperscript{106}

Tackling the issue differently, Alabama focuses on the transportation aspect of trafficking, making it unlawful to force a person to travel to engage in sex with a minor. Alabama also criminalized the logistical aspect of child sex trafficking, such as the arrangements with solicitors.\textsuperscript{107} This combats the problem by decreasing the demand for prostitutes who are minors and expanding the definition of those who can be considered traffickers.

Massachusetts has repeatedly amended its laws to create stricter provisions for those found guilty of sexually exploiting minors. The law subjects those who pay a fee to a minor between the ages of fourteen and eighteen years old or younger in exchange for sex to heightened penalties.\textsuperscript{108} To protect victims, Massachusetts incorporated children who are sexually exploited into its definition of “children in need of services.”\textsuperscript{109} All provisions awarded to minors who are victims of rape are also reserved for victims of trafficking. Such provisions include providing alternative ways for a minor to testify against his or her accused trafficker.\textsuperscript{110} As an extra precaution, Massachusetts created a petition that can be filed on behalf of a child charged with prostitution. This petition identifies the child as someone in need of state services and is often filed for children under the age of seventeen who are

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\textsuperscript{103} In re B.W., 313 S.W.3d at 825.
\textsuperscript{104} Bayer Beneficial, supra note 33, at 7.
\textsuperscript{105} The Protected Innocence Initiative, supra note 41, at 14.
\textsuperscript{106} A Child is Not a Commodity, supra note 6, at 6.
\textsuperscript{107} The Protected Innocence Initiative, supra note 41, at 15.
\textsuperscript{108} Id. at 21.
\textsuperscript{109} Id. at 21.
\textsuperscript{110} Id. at 21.
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arrested for prostituting. If the minor agrees to receive rehabilitative care and follows the guidelines set, all charges are dropped. However, if the minor does not agree to rehabilitation or breaks his or her probation, the child will be prosecuted. The state chose this system in 2011 to provide an incentive for minors to remain in the care of the state rather than returning to their traffickers, subsequently breaking the vicious cycle of abuse.

Missouri requires law enforcement officers who find minors that are likely victims of trafficking to file a report alerting several state agencies. Missouri applies the same laws to all persons accused of soliciting prostitutes, regardless of the age of the person they paid for sex. This approach does little to decrease the demand for prostituted minors. Conversely, South Carolina assumes that the victim committed crimes under conditions of force, fraud, or coercion.

A tier one state according to the Polaris Project, New York has taken extraordinary measures to combat the trafficking of minors. New York was the first state to adopt a Safe Harbor Law. Similar to Massachusetts, if a minor is arrested once in New York for prostitution, he or she is considered a victim of “a severe form of trafficking” under the TVPA’s definition. If a minor is arrested multiple times or fails to comply with the prescribed rehabilitation and probation routine, charges may be filed.

The punishment for prostitution is a Class B misdemeanor and a maximum prison sentence of three months. If a person is found guilty of loitering with an intention to engage in prostitution, the crime is considered a violation if it is the person’s first conviction and a Class B misdemeanor if the person has had multiple convictions. These punishments apply regardless of the person’s age. The judge can file a petition for secure placement of the child if the judge deems the child to be a harm to himself or society or in need of extremely supervised rehabilitation. Every victim is provided with “emergency shelter, medical care, and counseling.” Unlike Missouri, patronizing a prostitute who is a minor carries harsher penalties than patronizing an adult prostitute.

111 Addressing the Sex Trafficking Crisis, supra note 11, at 8.
113 Boyer Beware, supra note 33, at 17.
114 Child, Victim, or Prostitute, supra note 7, at 10.
115 Child, Victim, or Prostitute, supra note 7, at 12.
116 Id. at 12.
117 Pimps, Johns, and Juvenile Prostitutes, supra note 48, at 6.
118 Id. at 7.
119 Why Minors Engaged in Prostitution, supra note 3, at 7.
New York continues to prosecute more prostitutes than patrons. In People v. Jackson, the solicitor was charged with statutory rape rather than sexual exploitation of a minor because he agreed to testify against the two prostitutes he solicited in exchange for a lesser charge. Statutory rape charges were used because the two victims were under the age of fourteen. When the state only prosecutes prostitutes, the demand for their services increases because there is little risk involved for the patron. Once money is exchanged, a minor is considered to have legally consented. New York’s failure to eliminate demand has led to an epidemic of trafficking in the state.

In 2007, the New York Prevalence Study revealed that 43% of upstate New York children who were prostituted began between the ages of ten and eleven. New York’s primary issue seems to be related to unstable home environments, for, of the children who became prostitutes, 85% were in the welfare system, 75% were in the foster care system, and 69% were investigated for neglect. Between 80% and 90% of these children suffered from sexual abuse before becoming a prostitute. The study interviewed people who had solicited prostitutes in New York, and two-thirds admitted that most of the prostitutes seemed to be forced into the industry. Critics have blamed a few significant flaws in New York’s laws that have led to these issues. The first is that New York’s Safe Harbor law is an unfunded mandate, making implementation difficult. Not all youth under the age of eighteen are protected, leading to some children not receiving the crucial care they need. In addition, New York’s state laws are not as harsh as federal laws, which is problematic because this encourages traffickers to conduct business in New York.

New Jersey, similarly, allows prosecutors to file petitions that drop all prostitution charges against a minor if the minor agrees to accept rehabilitation services. An important innovation in New Jersey’s law requires human trafficking training for all law enforcement officials. Because most victims encounter law enforcement regularly for petty crimes such as theft, law enforcement needs tools to successfully identify and rescue victims of trafficking. The burden of proof required for conviction in New Jersey was also lowered.

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120 Bayer Beware, supra note 33, at 16.
121 Pimps, Johns, and Juvenile Prostitutes, supra note 48, at 3.
122 Id. at 3.
123 Id. at 3.
124 Id. at 5.
125 Id. at 2.
126 Bayer Beware, supra note 33, at 6.
127 Id. at 6.
Nebraska makes children immune from criminal prosecution, but children arrested for prostitution can still be held accountable under juvenile code.\textsuperscript{128} Temporary custody is also used in Nebraska to protect children who are victims of sex trafficking. Vermont has implemented the same approach.\textsuperscript{129}

Minnesota has had tremendous success decreasing trafficking statewide. Safe Harbor for Sexually Exploited Youth Act (SHSEYA) made the prostitution of minors a human rights violation. This condemnation has made traffickers in Minnesota move their operations to surrounding states where the laws are not as harsh.\textsuperscript{130}

In Mississippi, if a child is found by a court to be a victim of trafficking, the child is immune from his or her crimes committed while being trafficked. Mississippi also expanded its definition of “abused child” to include children who are sexually abused or exploited.\textsuperscript{131}

Each victim of trafficking in Pennsylvania is provided with an individualized care plan from the Pennsylvania Commission on Crime and Delinquency, in partnership with local organizations. Pennsylvania often provides victims with counseling and medical treatment.\textsuperscript{132}

Like New York, Ohio allows the courts to decide if a child charged with prostitution has followed the mandates given by the state in a satisfactory manner that ought to be rewarded with legal immunity from prostitution charges and any charges related to “involuntary servitude” and “victimization.”\textsuperscript{133} All victims are entitled to compensation if they are under the age of eighteen when the prostitution crimes were committed. Ohio seizes any money a convicted trafficker made from prostitution and places that money in a state relief fund for victims.\textsuperscript{134}

If a victim is under eighteen and the solicitor of sex is at least three years older, Alaska prescribes harsher punishments. Alaska law, unlike other states, focuses on the defense for patrons by explicitly stating that not knowing the prostitute’s age is an inadequate defense unless “reasonable measures” are taken by the defendant to ensure that the prostitute is eighteen years or older.\textsuperscript{135}

\textsuperscript{128} Child, Victim, or Prostitute, supra note 7, at 11.  
\textsuperscript{129} Id. at 11.  
\textsuperscript{130} A Child is Not a Commodity, supra note 4, at 5.  
\textsuperscript{131} Child, Victim, or Prostitute, supra note 7, at 8.  
\textsuperscript{132} Id. at 7.  
\textsuperscript{133} The Protected Innocence Initiative, supra note 41, at 12.  
\textsuperscript{134} Id. at 21.  
\textsuperscript{135} Id. at 21.
Louisiana made the penalties for soliciting a prostitute who is a minor tantamount to the penalty for child sex trafficking, likening the two crimes. Louisiana, like Wisconsin, has permitted wiretapping to be used as a resource for trafficking investigations.\textsuperscript{136} Louisiana laws acknowledge that children who are used by traffickers for sex are indeed victims.

Connecticut addresses the business aspect of exploitation by banning the use of minors in advertisements for “commercial sex acts.”\textsuperscript{137} Like many other states, Connecticut works heavily with non-government organizations to develop coordinated care plans for victims of trafficking. Despite these triumphs, victims who are between the ages of sixteen and seventeen are placed in peril as evidence of force is necessary for them to be absolved of prostitution charges.\textsuperscript{138}

Oklahoma amended its trafficking laws to target buyers by expanding its definition of “human trafficking for commercial sex” to include “purchasing or obtaining.”\textsuperscript{139} Affirmative defense is now the standard in Oklahoma. Minors are assumed to be lured to prostitution through force, fraud, or coercion from someone who has violated the human trafficking statutes.\textsuperscript{140} The state requires law enforcement officers to report victims to the Department of Human Services, which is charged with the responsibility of following the state’s care procedures.\textsuperscript{141}

From 2000 to 2006, 364 children were prosecuted in Florida as prostitutes, leading to Florida making sweeping alterations to its law.\textsuperscript{142} Florida has followed New Jersey’s example by requiring all law enforcement officers to undergo human trafficking training that includes prevention and intervention tactics. A Safe Harbor Act was also adopted to include selling a child into prostitution or trafficking as a form of “sexual abuse of a child.”\textsuperscript{143} Legislation passed that changed the standard for evidence to no longer require proof of force, fraud, or coercion. Such changes have allowed Florida to successfully decrease the predominance of trafficking in the state.

Indiana requires officers to be trained, but the training focuses on helping victims through proper communication and “therapeutically appropriate investigative

\textsuperscript{136} \textit{Id.} at 21.
\textsuperscript{137} \textit{Id.} at 20.
\textsuperscript{138} \textit{Child, Victim, or Prostitute, supra} note 7, at 9.
\textsuperscript{139} \textit{The Protected Innocence Initiative, supra} note 41, at 20.
\textsuperscript{140} \textit{Child, Victim, or Prostitute, supra} note 7, at 10.
\textsuperscript{141} \textit{Id.} at 7.
\textsuperscript{142} \textit{A Child is Not a Commodity, supra} note 4, at 7.
\textsuperscript{143} \textit{The Protected Innocence Initiative, supra} note 41, at 21.
techniques.” Proof of force is not required to absolve a minor under the age of sixteen of prostitution charges. Nevada had a similar approach after 139 minors were prosecuted for prostitution and 9 minors were repeat offenders between 2006 and 2007. Training for law enforcement officers in Nevada is limited to the officers who consistently handle sexual exploitation and abuse cases, and the training is completed annually.

Colorado has an unparalleled policy that requires convicted traffickers to pay for the rehabilitation of their victims who are younger than fifteen years of age. Both Colorado’s trafficking in children law and sexual exploitation of children law have been criticized for limiting the definition of trafficking.

Alaska and Arizona have both clarified that not knowing that a prostitute is a minor is not an acceptable defense. Harsher penalties are assigned to those who exploit younger children. For trafficking or prostituting a child under the age of fifteen, the penalty is a maximum of twenty years in prison. The prison sentence decreases to 10 and a half years if the minor is between fifteen and seventeen years old, which is a longer sentence than what is typically given for trafficking minors in that age range. If the minor is between fifteen and seventeen years old and the solicitor was unaware of the child’s age, the prison sentence dramatically decreases to one year.

South Dakota and North Dakota are in the Polaris Project’s third tier because they have minimal legislation to combat trafficking of minors and must make substantial changes to state legislation in order to successfully identify and rescue victims.

III. Solutions

A. Why is a Federal Law Necessary?

The FBI released a study in 2005 that identified areas with the most juvenile prostitution: Atlanta, Chicago, Dallas, Detroit, Las Vegas, Los Angeles, Miami, Minneapolis, New York, San Diego, San Francisco, St. Louis, Tampa and Washington, D.C. As this list shows, trafficking is a problem that plagues the entire country, which is why a federal law is

144 Id. at 19.
145 A Child is Not a Commodity, supra note 4, at 7.
146 The Protected Innocence Initiative, supra note 41, at 19.
147 Id. at 12-13.
148 2014 State Rankings, supra note 72.
necessary to solve the larger national crisis of prostitution of minors and trafficking.\textsuperscript{149} The Department of Justice defines prostitution as “a sexual act or contact with another person in return for giving or receiving a fee or a thing of value.”\textsuperscript{150} However, children who are trafficked do not receive any profit or money, rather the traffickers do.\textsuperscript{151} Moreover, children who are trafficked do not make a conscious decision to engage in sexual activities. Rather, they are forced through fear and manipulation. Thus, their acts are not consistent with the federal definition of prostitution. As the Texas Supreme Court found, since a minor cannot legally consent to sex, a minor cannot be considered a prostitute.\textsuperscript{152} With wildly varying state laws, a federal law is necessary to create a standard for solving child sex trafficking.

A federal law must have several characteristics to be a successful departure from the TVPA. The legislation must target demand. This can be done in two ways. First, the penalty can be set so high for solicitors of prostituted minors that the risk is insurmountable. For instance, states that seize assets of convicted traffickers make the industry less alluring because, if caught, a trafficker will lose all of his or her profits. Second, patrons of prostitutes who are minors should not be offered plea bargains in exchange for testifying against a prostitute. This policy is objectionable because it punishes the victim instead of the perpetrator of the crime and fails to decrease demand for prostituted minors. The TVPA has consistently increased the punishment for defendants found guilty of trafficking, which prevents the industry from growing. Safe Harbor laws ought to be adopted on a federal level to absolve minors of crimes committed as a direct result of trafficking, including prostitution charges.

Sufficient services for victims must also be included in federal legislation. Without these crucial services, victims are likely return to the control of their pimps or traffickers. The practice of using criminal charges to encourage the victim to remain in rehabilitation ought to be eliminated. Victims should be absolved of their crimes based on the fact they are victims, not criminals. Predicating innocence on completion of rehab undermines justice and what it means to be a victim of sex trafficking. Training for federal law enforcement officers should stress that trust is crucial when conducting investigations of trafficking

\textsuperscript{149} \textit{God Bless the Child}, supra note 32, at 5.
\textsuperscript{151} Id.
\textsuperscript{152} \textit{In re B.W.}, 313 S.W.3d at 825, slip op. at 3.
victims. If sensitivity is not used, victims are unlikely to trust law enforcement, consequently discouraging the victim from seeking help or cooperating in the investigation to apprehend his or her trafficker. Stockholm Syndrome often affects victims of trafficking, which is something that law enforcement officers must be equipped to handle after extensive training.153

Federal laws gain more national attention, which is why they are crucial to changing the dialogue about domestic trafficking. Few people are educated about the issue of domestic trafficking. Additionally, prostitution has become largely associated with race in America. The government even launched an ad campaign featuring images of racially diverse children to demonstrate that trafficking and prostitution of minors affects others besides young African American women.154 Due to this misconception, a study published in 2000 reported that more prostitution arrests occur in low socio-economic communities because this stereotype affects law enforcement, who then target these low-income areas.155 Prosecuting minority women in these communities corroborated the stereotype. In fact, a study of New York revealed that one fourth of children who were victims of trafficking in the state were African American and another fourth were white.156 Thus, the stereotype has no basis in fact, which is why trafficking must be considered a human rights issue, not a racial issue.

B. Models for State and Federal Legislation

In each state court, prostitution is defined differently. Thus, there must be a universal definition and classification in order to make it so that no state becomes a hub for trafficking and that victims feel protected by the law.

Logic similar to that of statutory rape should by applied when crafting laws. Courts, in cases like Roper v. Simmons,157 have ruled that minors are emotionally and physically immature and consequently incapable of providing consent.158 Liability would be placed on the adult to ensure that consent from another adult can be given before engaging in any sexual act. This would make those who patronize prostituted minors entirely responsible for

153 Child, Victim, or Prostitute, supra note 6, at 11.
154 God Bless the Child, supra note 32, at 4-5.
155 Id. at 4.
156 Buyer Beware, supra note 33, at 5.
158 Child, Victim, or Prostitute, supra note 6, at 14.
their actions. By holding adults to the same standards as they are held for statutory rape, demand for trafficked victims would decrease.

The TVPRA’s penalties present an ideal model of appropriate punishments for those convicted of trafficking. Any trafficker whose victims are under the age of eighteen is sentenced to a maximum of life in prison, taking an effective “no-tolerance” stance against trafficking.\(^{159}\) New Jersey and Florida are prime examples of the training that should be mandated for all law enforcement officers, especially those who are assigned to trafficking cases. Minnesota’s perspective that trafficking children is a human rights violation is a perspective that should be adopted by all levels of government, as it represents a serious commitment to combat trafficking. Colorado traffickers who are convicted must pay for the rehabilitation of victims who are under the age of fifteen, which is another practice that can be adopted by states who are concerned about the financial burden of providing services to victims. Ohio seizes the assets a convicted trafficker earned from the industry and moves the money to a state fund to help victims, which can supplement efforts made in states like Colorado. Oklahoma strongly targets the solicitors of paid sex with minors, an approach that leads to the prosecution of more patrons and fewer prostitutes. Almost every state assumes that force, fraud, and coercion were used and requires no additional evidence. States that have not yet taken the stance of affirmative defense, as well as the federal government, should do so. Each of these models can be used to draft legislation that sincerely tackles trafficking and leads to long-term solvency.

C. Motivation Behind Laws

When any law is debated, it is important to understand the intent of the law and consider how people might attempt to abuse the law. In Mary E. Odem’s book, *Delinquent Daughters*, Odem explores the use of statutory rape laws between 1885 and 1920 by studying juvenile court cases in Los Angeles and Alameda County Superior Courts.\(^{160}\) Odem asserts that as girls began to work outside of the home and earn their own wages, newfound independence led to new sexual encounters.\(^{161}\) Prior to the rise of the factory, parents were able to regulate their daughters’ behaviors and arrange their daughters’ marriages.\(^{162}\) As girls

\(^{159}\) *Pimps, Johns, and Juvenile Prostitutes*, supra note 48, at 12.


\(^{161}\) Id. at 49.

\(^{162}\) Id. at 45.
left the house, however, parents no longer had the same control. In response, statutory rape laws were used to prevent young girls from having sexual intercourse before marriage.\textsuperscript{163}

Although the laws were intended to prevent older men from sexually abusing girls, in practice, the laws only punished girls who were considered to be promiscuous.\textsuperscript{164} Parents would report their own daughters to the authorities if they suspected that their daughters were frequenting dance halls or meeting up with unfamiliar men.\textsuperscript{165} Conversely, men were rarely reported or convicted. In the cases where men were convicted, they usually were put on probation while girls convicted of the same crime were sent to institutions for “wayward girls” or sent to other juvenile detention facilities.\textsuperscript{166} Thus, more women were prosecuted than men for crimes of a sexual nature.

Odem focuses on a phenomenon that occurred a century ago. However, it appears that Americans are still facing consequences of sexist statutory rape laws today with more prostitutes, and prostituted minors, most of whom are women, being arrested than are their patrons. This pattern in 2016 is strikingly similar to what occurred in 1916, calling into question law enforcement’s motives. This is not to suggest that law enforcement do not find trafficking egregious, for most can agree that this is a human rights issue. Rather, prostituted minors are being targeted rather than their solicitors in an attempt to continuously regulate girls’ sexual activities. Herein lies a double standard. Men soliciting minors for sex are committing a worse crime yet the girls are the ones being prosecuted because they are held to a different standard of acceptable sexual conduct.

When drafting legislation, policymakers must question the intent of the law and scrutinize motives. Regulating a girl’s sexual encounters because of moral opposition will do little to help end child sex trafficking nor will it help provide victims with justice. If lawmakers truly care about morality, they will pass comprehensive legislation that advocates for minors and prevents the sexual exploitation of children.

### Conclusion

Throughout this piece, children who engage in prostitution, or exchange sexual favors for money, are called simply prostitutes. In actuality, these “prostitutes” suffer the

\textsuperscript{163} Id. at 49.
\textsuperscript{164} Id. at 68.
\textsuperscript{165} Id. at 48.
\textsuperscript{166} Id. at 76-78.
Blurred Lines: Criminals, Victims, and the Fight to End Child Sex Trafficking

same consequences as victims, which is what they ought to be called. Rarely is it the case that children freely decide to sell their bodies. Far more often children are forced into the industry of prostitution by limited financial means or lured into the industry by people who only want to exploit them. Some victims experience the illusion of love while under the control of their trafficker, a well-known phenomenon called the Stockholm Syndrome. Others suffer throughout the experience.

It is important to emphasize that prostitution of minors occurs under conditions where force, fraud, and coercion are present. Thus, prostitution of children is, by its very nature, a form of trafficking. The only way to end trafficking is to enact legislation that accurately categorizes these “prostitutes” as victims and treats them as such. When the lines between victim and prostitute are blurred, children are easily misidentified and the problem only becomes more predominant. Prostitution is commonly opposed on ethical, feminist, and religious principles. Allowing these beliefs to condemn children to a life of exploitation is not only tragic. It is unjust. Trafficking is a human rights issue and it must be treated with the same severity and prudence. As evidenced by case studies of each state, when the law does not work to help aid victims, trafficking flourishes. In a modern society with the resources to end trafficking, governments must respond with the appropriate resources and legislation. Sex trafficking must no longer be viewed as an issue that is related to prostitution. Rather, child sex trafficking is a vile human rights abuse that earns $32 billion in profit each year at the priceless expense of exploiting children of all ages.\(^\text{167}\) As suggested by former Secretary of State Hillary Clinton, child sex trafficking strips victims of their fundamental right to human dignity.\(^\text{168}\) Policy makers, non-governmental organizations, and world leaders must address this issue with urgency so that no child will fall victim to sex trafficking; not in America, not anywhere.


\(^\text{168}\) Clinton, *supra* note 1.
The Crime of Mental Illness: Society’s Emphasis On Incarceration Over Treatment

Hope Mirski

Introduction

In modern society, support for the mentally ill is founded on cutting-edge medications, highly trained psychiatrists, and a scientific community yearning to find a cure for a variety of debilitating mental diseases. However, there is often a confounding failure on the part of the United States' federal and local government agencies to intervene when the mentally ill are treated improperly by the state, either through lack of treatment or improper incarceration. The Deinstitutionalization Movement, a movement of nonintervention aimed at closing psychiatric care centers, has been growing since the mid-twentieth century; as a result, the mentally ill often do not receive proper care, such as intensive psychiatric attention, thus unfittingly sending the mentally ill to prisons.¹ In recent decades, there has been an upward trend in the incarceration of a strikingly large amount of mentally ill persons for crimes ranging from minor offenses to violent acts, all because they are not treated properly according to their mental conditions in prisons.² In this article, several cases will be analyzed, marked by the acknowledgment of the brutal treatment of persons in need of urgent psychiatric care, who then committed more offenses in jail or even died. There is a pressing need for psychiatric treatment in the United States, as nearly 60% of those with mental illness in 2015 did not receive appropriate treatment in the previous year, a reality emphasized by the fact that roughly 1 in 100 adults in the United States have

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¹ Ana Swanson, A Shocking Number of Mentally Ill Americans End up in Prison Instead of Treatment, THE WASHINGTON POST, Apr. 30, 2015.
² Id.
been diagnosed with Schizophrenia.³

This law review article first explores the history of the incarceration of the mentally ill, and change in the government’s involvement over time. The next section will analyze specific cases of abuse of the rights of the mentally ill. The final section of this article will address legal call to action in the United States. In summary, the law review article addresses all facets of incarceration of the mentally ill, ultimately suggesting methods in which this dangerous trend can be adjusted.

Psychiatrists, and their medical professional organization, the American Psychiatric Association (APA), push for the United States government to guarantee institutionalization of those with mental illnesses, and for sufficient alteration of the legal system to decrease the amount of incarcerated mentally ill persons.⁴ Due to a high number of cases of inmate mistreatment via brutal environments unfit for their mental state, it is crucial that the federal government takes legal measures to alleviate these conditions. Even more paramount is the adoption of Forensic Assertive Community Treatment, a type of mandated and comprehensive institutional treatment that involves community efforts and mandates by professionals to place the mentally ill in proper care.⁵ Federal mental health criminal laws and processes must be put in place as well to ensure proper psychiatric treatment for the mentally ill.⁶

I. The Incarceration of the Mentally Ill

For purposes of this article, mental illnesses are defined as “disorders generally characterized by dysregulation of mood, thought, and/or behaviors recognized by the Diagnostic and Statistical Manual, 4th edition, of the APA” (DSM-IV).⁷ Here, it is important to consider the significant relationship between a lack of treatment and the likelihood of homelessness, which in turn correlates with incarceration.⁸ The mentally ill are arrested for

⁵ Steven Raphael & Michael A. Stoll, Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate, 42.1 The Journal of Legal Studies (2013).
⁸ Id.
slight misdemeanors and local authorities often place them in jail as “placement” before psychiatric treatment is available. Furthermore, there is a consensus in the medical field regarding the association of schizophrenia with violent crime, as well as an increase in substance abuse by the mentally ill and the subsequent incarceration that results.

Mental illness, drug abuse, and violence often go hand in hand; studies of this correlation show schizophrenic patients to be more prone to violence and criminal activity at much higher rates than non-mentally ill persons. For example, male subjects with schizophrenia had significantly more lifetime-to-date convictions for violent offenses (13.0%) than the male non-mentally ill comparison subjects (2.9%). According to studies provided by the Treatment Advocacy Center, as a result of psychosis, there is a 49-68% increase in the odds of violence, which often lead to arrest and imprisonment. The organization cites 22 studies between 1990 and 2004 which concluded that major mental disorders, especially schizophrenia, result in 5-15% of community violence. The American Journal of Public Health also published a study conducted in New Hampshire, Connecticut, Maryland, and North Carolina of 802 adults with severe mental illness, 64% schizophrenics and 17% with bipolar disorder, where 13.6% had been violent within the prior year. Here, one can see the likelihood of violent behavior for those with schizophrenia and bipolar disorders, specific mental disorders common among prison inmates. Overall, these studies indicate that with mental illness comes a likelihood of criminal activity and violence.

Mental illness and drug usage are often interconnected, yet another factor that puts those with mental illness at an even greater risk of imprisonment. In the United States alone, 10.2 million adults have co-occurring mental health problems and addiction problems, leading to significantly higher rates of incarceration for drug- or public disorderly conduct-

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10 Mental, supra note 7.
12 Are People with Serious Mental Illness Who Are Not Being Treated Dangerous? – Backgrounder, TREATMENT ADVOCACY CENTER, Nov. 2014.
13 Id.
15 Id.
related crimes.\textsuperscript{16} There have been a multitude of studies on the topic of linking the genes for mental illness and the inclination to drug usage/addiction.\textsuperscript{17} There have been many findings in the human genome of linkages and predispositions to both.\textsuperscript{18} Other studies have shown that 50\% of people with severe mental illness also have an addiction to drugs.\textsuperscript{19}

The American Psychiatric Association’s research reveals statistics on the high percentage of mentally ill persons incarcerated over those in psychiatric care.\textsuperscript{20} Some of these glaring statistics include 316,000 severely mentally ill people were inmates in the nation’s prisons and jails (115,000 jail inmates and 201,000 state and federal prison inmates) in 2008.\textsuperscript{21} Meanwhile, the mental hospital inpatient population, nationwide, is less than 60,000.\textsuperscript{22} According to the National Institute of Mental Health (NAMI), the percentage of mentally ill persons in the United States in 2014 was 4.2 \% of adults (people 18 years or older), or 9.8 million people.\textsuperscript{23} In comparison, 20\% of jail inmates have mental illness and 15\% of those with mental illness are in state prisons.\textsuperscript{24} There has been a ½ million decrease of institutionalized mentally ill since 1955 as well as a 4-7\% incarceration growth between 1980 and 2000 due to deinstitutionalization.\textsuperscript{25} These statistics clearly show that there is an imbalance in the treatment of the mentally ill. Over time, fixing the system for specialized care for the mentally ill has turned into a “quick fix” in which more mentally ill people are simply arrested instead of placed in hospitals. Overall, these statistics show the glaring difference in size between the large mentally ill population in prisons versus the mentally ill populations in psychiatric hospitals.

Highlighted by the APA, the Bureau of Justice Statistics has determined that 6-16\%
of prisons constitute of people with severe mental disorders.\textsuperscript{26} The Human Rights Watch focuses their campaign on the fact that so many mentally ill people are placed in prisons and not treated in accordance with their needs.\textsuperscript{27} Nevertheless, the organization cites an even higher percentage than the APA: 56\% of state prisoners and 45\% of federal prisoners have symptoms or a recent history of mental health problems, an increasingly high percentage that must not be overlooked.\textsuperscript{28} Additionally, in prison, those with mental illness are significantly more likely to be sexually victimized than inmates without mental illness which may exacerbate his or her mental illness by causing Post Traumatic Stress Disorder.\textsuperscript{29}

Sources have found human rights violations in prisons because these mentally ill patients are not provided the care they need, and often, due to their mental illness, harm themselves or others, face rape, or commit suicide.\textsuperscript{30} Ana Swanson in \textit{The Washington Post} discusses how many inmates may self-harm or attempt suicide, with 77\% of the 132 suicides in a Washington county jail, a result of a psychiatric disorder. Moreover, the US has less than 5\% of the world’s population, and 25\% of the world’s prison population, showing an inherent problem in the prison institutions in our nation.\textsuperscript{31} In addition, due to improper treatment, the mentally ill prisoners after release have a much higher chance of reentering prison or “recycling” as 50\% of the mentally ill persons reenter prison within 3 years, making prison a semi-permanent place for the mentally ill.\textsuperscript{32} Psychiatrists researching mental illness shed concern on the fact that these correctional facilities have become the “de facto state hospitals” highlighting the fact that prisons are serving as “hospitals” because they are the only place that keep the mentally ill.\textsuperscript{33}

Another troubling fact is that the mentally ill are often unfairly given longer sentences for the same crime as a non-mentally ill person as justification for public safety.\textsuperscript{34} In California, a mentally ill person will serve a 30\% longer sentence for a burglary crime than a non-mentally ill person who committed the same crime.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{26} Lamberti, Weisman, & Faden, \textit{supra} note 4.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} \textsuperscript{10th NAMI Public Policy Platform.}, \textit{NATIONAL ALLIANCE OF MENTAL HEALTH}, Sept. 2014, at 71.
\item \textsuperscript{31} Swanson, \textit{supra} note 2.
\item \textsuperscript{32} Lorna Collier, \textit{Incarceration Nation}, 45:9 \textit{AMERICAN PSYCHOLOGICAL ASSOCIATION, 56} (Oct. 2014).
\item \textsuperscript{34} Darrell Steinberg, David Mills, & Michael Romano, \textit{When Did Prisons Become Acceptable Mental Health Care Facilities? STAN. L. REV. THREE STRIKES PROJECT} (2015).
\item \textsuperscript{35} Steinberg, Mills, & Romano, \textit{supra} note 34, at 5.
\end{itemize}
II. The Legislative and Judicial History of Deinstitutionalization

In the 1950s, many institutions such as psychiatric homes were closed due to “inhumane conditions,” and the growing trend since then has been to close the institutions rather than reform them.\textsuperscript{36} This era of deinstitutionalization served as a way for politicians to save money defunding these institutions, spearheaded by states such as California under the governorship of Ronald Reagan.\textsuperscript{37} Acts such as the Lanterman-Petris-Short Act of 1968, which made forced institutionalization subject to judicial rule, as well as defunding of first state hospitals and later local community health services, caused a sharp rise in prison population.\textsuperscript{38} Further, the creation of Thorazine, an antipsychotic medication, and the implementation of Medicare and Medicaid resulted in the closing of many mental institutions through the belief that medicating mentally ill persons alone was a replacement for full and proper treatment.\textsuperscript{39} The New Freedom Commission Act on Mental Health of 2002 created during George W. Bush’s presidency closed many institutions in order to preserve resources and money as these institutions require large amounts of government funds to operate and maintain.\textsuperscript{40} It was implemented by federal, state, and local governments to “maximize the utility of existing resources, improve coordination of treatments and services,” with the claim that this would help integrate children and adults with severe mental illness back into the community, rather than excluding them in psychiatric hospitals.\textsuperscript{41} However, this commission focuses more on the idea that compulsory treatment is unfair, and mentally ill people do not know they need help and have the ability to actively seek out treatment.\textsuperscript{42} This concept of the cruelty of forced treatment, and reliance on self-institutionalization focused upon by the New Freedom Commission on Mental Health, fails to address that 50% of people with mental illness have a brain impairment that does not allow for self-awareness.\textsuperscript{43} Therefore, in regards to this statistic, if 50% of the population with mental illness do not have the
awareness to get help, one must provide help directly. Thus, it is theorized that the New Freedom Commission on Mental Health simply reaffirms the movement by politicians in the 1950’s, and by states, to preserve funds by closing psychiatric homes and putting the funding of the mentally ill on the federal government. This is achieved through the government programs of Medicaid, Medicare, Supplemental Security Income, and Social Security Disability Income.

NAMI’s organizational platform spans a variety of topics regarding mental health from the stigmatization of mental illness, to public policy, to laws regarding the mentally ill. In their platform, NAMI specifically discusses the need for “…an availability of effective, comprehensive, community-based systems of care for persons suffering from mentally illness...” This is because NAMI asserts that persons with severe mental illness cannot make the decision to institutionalize themselves, and that state laws currently are not sufficient regarding involuntary treatment and due-process rights of individuals. Through the medium of Mental Health Courts with flexible standards, forced treatment is viable for those who cannot take care of themselves. Medical professionals are needed in this process and required to be involved in the decision.

NAMI places a large focus on the detrimental effects on the mental health condition of an inmate associated with solitary confinement, a practice often forced upon mentally ill prisoners. Solitary confinement is utilized disproportionately in correctional settings for juveniles and adults with severe psychiatric symptoms or mental illness. This demonstrates the need for legal change and institutional restructuring to prevent the imprisonment of excessive numbers of the mentally ill. With this comes the insistence that state and local mental health authorities should work with correctional and law enforcement agencies to provide for methods of “compassionate intervention by law enforcement, jail diversion, treatment of individuals with serious mental illnesses who are incarcerated, and discharge planning and community reintegration services for individuals with serious mental illnesses released from correctional facilities,” which will increase medical presence in prison systems.

44 Satel, supra, note 42.
45 Id.
46 Mental, supra note 7, at 15.
47 Id.
48 Id.
49 Id.
50 Id.
to remove mentally ill persons.\textsuperscript{51} What this means is that the first step in fixing the system in our country now is that mentally ill persons need to be provided with specified treatment in prison by prison authorities.\textsuperscript{52} This includes mandatory intensive treatment and avoidance of isolation or uncomfortable conditions that could exacerbate their poor mental health condition.\textsuperscript{53} That being said, diversion from jail should ultimately be the priority so that the mentally ill are not suffering the penalty of crimes that their mental illness allowed them to commit.\textsuperscript{54}

In \textit{O'Connor v. Donaldson} (1975), the Supreme Court set forth important precedent in regards to the government’s legal rights to incarcerate the mentally ill.\textsuperscript{55} The court ultimately decided that the federal government cannot constitutionally confine a person to an institution unless they are a significant danger to themselves or others, thus giving the mentally ill the sole power to determine their own psychiatric treatment.\textsuperscript{56} Through this precedent, in future court cases, the court deemed forced psychiatric care unconstitutional for those who cannot decide for themselves. In \textit{Olmstead v. L.C.} (1999) it was similarly decided that it is in violation of the Americans with Disabilities Act (ADA) to confine those with disabilities to institutions, the implication from history being that these institutions would instigate unfair treatment and possibly violate their human rights.\textsuperscript{57} However, the ADA, an act to guarantee rights for those with disabilities in accordance with those without disabilities, does much more of a disservice to the mentally ill than does a service in protection of equality rights.\textsuperscript{58} Prisons can treat disabilities much more easily than a mental illness, as shown through the cases of mistreatment of people with severe mental illness that will be discussed later.\textsuperscript{59} According to the ADA, disabilities can be defined as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;(B) a record of such an impairment; or (C) being regarded as having such an impairment.”\textsuperscript{60} Here, people with disabilities have the right to access to medical care.\textsuperscript{61}

\begin{enumerate}
\item Mental, \textit{supra} note 7, at 71.
\item \textit{Id.}
\item \textit{Id.}
\item Mental, \textit{supra} note 7, at 72.
\item \textit{O'Connor v. Donaldson}, 422 U.S. 563.
\item \textit{Id.}
\item 42 U.S.C. § 12102(2).
\item \textit{Id.}
\end{enumerate}
However, there is a large difference between medical care for a disability such as deafness and hired interpreters versus schizophrenia. Even with access to some accommodations, people with “disabilities” under the ADA are not guaranteed accommodations that cause undue financial burden to the prison facility. Regarding severe mental illness, the mentally ill need significant, often highly expensive accommodations and treatment for their condition and therefore cannot be associated under the definition of “disabled.” If the mentally ill are being sent to prison due to lack of ability for forced institutionalization as set forth in *Olmstead v. L.C.* (1999), they require significant measures of treatment, much greater than any “disability treatment” that a prison will provide. Rather than institutionalization, when a mentally ill person commits a crime due to their illness, they are sent to prison, because they cannot institutionalize themselves due to a lack of decision making capabilities.

The United States Code Title 18 outlines the process in which a person is determined mentally ill in trial. The statute states that there must be a motion to determine what the mental condition of the defendant is and if the defendant is found guilty, they can file a motion for a hearing 10 days after the guilty verdict supported by substantial information that psychiatric treatment may be needed. The court may also order a psychiatric evaluation. The examiner can give an opinion stating that the convicted person has a mental illness, but does not need to be placed in a “suitable facility” nor is a judge required to provide a sentencing alternative. There is then a hearing and with a preponderance of evidence that the person is mentally ill, the person is turned over to the Attorney General. The Attorney General or court will place the person in a suitable facility for the maximum time sentence. Finally, after treatment, the director of the psychiatric facility will decide if the person has recovered from illness and then file a certificate with the court clerk that ordered the sentence. The court can modify the provisional sentence if it has not expired. Overall, this is a cumbersome process in which a mentally ill person is not

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63 42 U.S.C. § 12102(2).
64 Id.
65 18 U.S.C. § 4246
66 18 U.S.C. § 4246
67 Id.
68 Id.
69 Id.
70 18 U.S.C. § 4246
71 42 U.S.C. § 12102(2).
72 Id.
provided with sufficient care, simply placed in prison, and thus ignored by the government and society.

Further, when looking at the ADA, the definition of “mental illness” versus “disability” must be analyzed. According to The Boston University Center for Psychiatric Rehabilitation, mental illness is described as, “...a term that describes a broad range of mental and emotional conditions,” and different from mental impairments such as mental retardation, organic brain damage, and learning disabilities, yet can be understood in some cases as the ADA’s definition of mental impairment. The term “psychiatric disability” also is used in both the ADA and court terminology referring to a mental illness that interferes with a person functioning in society. These two terms cannot be interrelated and must be differentiated. The difference between disability and mental illness should be clearly delineated and legally treated differently because in prison, it is easier to treat those with disabilities than those with mental illness. The ADA treats disability and mental illness similarly to suggest both lack decision-making capacities of self-institutionalization. While this may be true, there are less long-term and extensive resources required to treat those with a disability than those with a mental illness. What the courts must do is make the trial process for mentally ill persons who commit crimes more efficient and hold clearer definitions of mental illness, so that people who require hospitalization do not end up in prison with insufficient resources to treat the mental illnesses to even avoid recidivism. The British Journal of Psychiatry’s 2015 Prisoner Cohort Study results support the crucial importance of treatment to avoid recidivism for people with psychosis, finding for example, lower rates of re-incarceration for those treated with illness such as schizophrenia and delusional disorders. This is an important fact to note when, for example, in one Houston, Texas county jail, prisoners were rearrested from 20 to 45 times, according to a 2008 study, due to lack of sufficient treatment available. Institutionalization on behalf of the courts

73 What is Psychiatric Disability and Mental Illness, BOSTON UNIVERSITY CENTER FOR PSYCHIATRIC REHABILITATION CENTER (2016).
74 Id.
75 ACLU, supra note 62.
76 Id.
77 Id.
80 Id.
must be the first and only step when dealing with psychiatrically diagnosed persons who have broken the law so that the mentally ill are provided with adequate treatment and resources not found in prisons.

III. The Need for Reform in the Criminal Justice System

What must be changed in the criminal justice system is the process by which mentally ill persons are tried, so that fair institutionalization becomes the norm and the mentally ill are not imprisoned improperly. NAMI advocates for a number of legal processes that can be altered so the mentally ill are not incarcerated. In their platform, they clearly state, “...a variety of approaches to diverting individuals from unnecessary incarceration into appropriate treatment, including pre-booking (police-based) diversion, post-booking (court-based) diversion, alternative sentencing programs, and post-adjudication diversion (conditional release).” This is a more investigatory approach for law enforcement officers and mental health professionals to determine if there is a chance of a prisoner of having a mental illness, and recommending them for separate prosecution. These approaches ensure that people with mental illness go through a separate trial system that allows for convicts to be treated rather than being placed in prisons. As past cases have dictated, the most likely result of placing those with mental illness in prisons is greater mental and physical harm which are ultimately a grave human rights violation.

There have been many cases that demonstrate the urgency for legal change. For example, in the New York Supreme Court, David Linder and John Cesario were denied physician appointment to treat their mental illnesses. This was after the superintendent of the correctional facility requested court-ordered physicians’ evaluations due to Linder and Cesario’s poor mental health and in accordance with NY correctional state law. The court’s decision provided for the two prisoners to be sent back to Elmira Correctional Facility, even though they were already in the psychiatric center, because this did not qualify as an emergency or follow due process proceedings as mandated by new state law. The court

81 Mental, supra note 7, at 72.
82 Id.
83 Id.
84 Id.
85 Id.
86 In re Lindner, 96 Misc. 2d 234 (NY: Supreme Court, Oneida 1978).
87 Id.
88 N.Y. Correct. Law 402(1).
decided the correctional facility physician, as a court ordered medical professional, must determine whether the defendants were mentally ill, and if they fit the requirements, they must be transferred to a psychiatric facility.\(^{89}\)

Clearly, there a conflict of interest in having a correctional facility physician make a judgment over whether an inmate stays or not. It is legally unreasonable to expect that the prison appointed physician opinion would have no contribution to a likelihood of a defendant ending up in prison rather than psychiatric care. These are the legal questions that must be asked in such cases where inadequate psychiatric care creates not only an unsuitable environment for the mentally ill, but increases the likelihood that these inmates will remain in jails or state prisons.\(^{90}\)

**A. Measures to Alter the Trend**

In 2015, in an incident that caught media attention, the violence that often occurs towards the mentally ill was made painfully clear.\(^{91}\) On February 3rd, 2015, Natasha McKenna, a diagnosed schizophrenic, was beaten and Taser’d to death by police in transport to different prison facilities without a mental health professional present, for reasons unknown.\(^{92}\) The result of the case was not in the favor of McKenna as the Court held that no criminal charges would ensue resulting from her death.\(^{93}\) In this case, one can see that the lack of action against prison enforcement to interact with the mentally ill. The case of Natasha McKenna shows a lack of training and ability of prison workers and police officers to attend to diagnosed schizophrenic prisoners like Natasha McKenna. The concept again arises that if prisons cannot maintain resources to guarantee not only treatment but training for all workers to handle mentally ill persons, then prison is not the place for the mentally ill.\(^{94}\) In turn, this case inspired pressing need for reform in the immediate placement of the mentally ill in institutions.\(^{95}\)


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\(^{89}\) Lidner, 96 Misc. 2d 234.

\(^{90}\) ACLU, *supra* note 50.


\(^{92}\) Id.

\(^{93}\) Id.

\(^{94}\) Mental, *supra* note 7, at 71.

\(^{95}\) Editorial, *supra* note 91.
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The system’s failure to provide proper care for its mentally ill. The cases addressed the absence of adequate health care in the prisons, as well as health care in general in *Plata v. Brown* (2011). It was shown that this medical care could not be provided sufficiently because of prison over-population. The case states that the “plaintiffs are a class of prisoners with serious mental disorders confined in the California Department of Corrections and Rehabilitation ("CDCR"),” and in 1995, the Supreme Court found defendants in violation of the Eighth Amendment’s interpreted obligation to provide class members with access to adequate mental health care. These cases show the inability of prisons to provide treatment needed for mentally ill patients that seems to be a recurring theme in deinstitutionalization of the mentally ill.

Another case that dealt with mistreatment of mentally ill prisoners is in *Gibson v. Moskowitz* (2008). Ozy Vaughn, a “mentally disabled” prisoner, died from dehydration after being kept in an observation room to assess his mental illness. Vaughn should not have been subjected to prison conditions to begin with, as his mental illness was later classified as severe, and could not articulate thoughts, act normally, nor function in manner necessary to communicate his needs. In this situation, the jail did not have an adequate psychiatric care or a medical team that a psychiatric hospital or institution would. The U.S. Court of Appeals decided to award his estate $1.5 million in compensatory damages and $3 million in punitive damages. However, the case shows the need for legal measures to prevent the situations that happened to Ozy Vaughn from happening again to other mentally ill prisoners. *Gibson* demonstrates that a common prison, like the one charged in this case, is an insufficient and inappropriate environment that cannot meet a mentally ill person’s needs. Whereas a proper psychiatric institution subject to guidelines articulated in the Social Security Act on proper psychiatric intensive evaluation required of a psychiatric hospital could save lives, prisons do not have to adhere to these guidelines because they are not defined as psychiatric

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97 Id.
99 Id.
101 Id;
102 Id.
103 Id.
104 Id.
hospitals.\textsuperscript{105}

The privatization of mental health and the services associated with the field are at the root of the lack of care for the mentally ill.\textsuperscript{106} In 1973, the administration of Riker’s Island Prison was one of the first to move towards the privatization of prison health, a trend that would continue into the 1980s.\textsuperscript{107} Presently, 25 states along with large urban jails contract private vendors to acquire mental health services.\textsuperscript{108} However, as scholars have stated, this causes ethical complications in the form of the dual loyalty conflict, which arises when the healthcare provider, in this case the prison’s contracted private company, and patients’ interests do not coincide.\textsuperscript{109} Such examples can include breaking doctor-patient confidentiality, ordering health care professionals to obtain body samples, or involving health care professionals in the approval of punishments.\textsuperscript{110} According to UN principles, medical ethics in prison necessitate that physicians follow standardized medical ethics in regards to prison healthcare.\textsuperscript{111} One of these medical principles is the equivalence of health care regardless of incarceration status, meaning that prisoners should be given the same medical treatments as anyone in the outside community, regardless of need.\textsuperscript{112} However, this can be extremely difficult in prison circumstances, where the health care providers are not chosen by the patient and often prison administrators can have an unethically large impact on what information the health care provider discloses, influencing the bigger question of whether or not mentally ill prisoners can even be in prison at all under ethical circumstances, given the inherent lack of quality treatment.\textsuperscript{113}

The precedent set in \textit{Ruiz v Estelle} (1981) recognized constitutional standards for prison conditions including medical care.\textsuperscript{114} Although the \textit{Ruiz} Court set forth precedence to protect a prisoner’s basic human rights within the prison, it is difficult for medical care professionals to properly deliver care due to the inherently punitive nature of prisons.\textsuperscript{115}

\begin{flushright}
\textsuperscript{105} Social Security Act §1861.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} Daniel, \textit{supra} note 33, at 16.
\textsuperscript{108} \textit{Id}.
\textsuperscript{110} \textit{Id}.
\textsuperscript{111} G.A. Res. 43/173, Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988).
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} Daniel, \textit{supra} note 33, at 26.
\textsuperscript{115} Daniel, \textit{supra} note 33.
\end{flushright}
Therefore, the question of what the government should be doing under legal standards is a pressing issue addressed by various people from human rights groups to psychiatric societies. One option is to make sure the government provides divisionary measures such as specialized mental health and drug courts so that the mentally ill persons are not tried in the same method as prisoners without mental illness when they have inherently differing needs. With separate courts for mental illness, the focus will be less on the consequence of the crime, rather how the crime can be prevented. Because the mentally ill do not have the capacity to change their behavior without professional help, prison is not an appropriate punishment.

Another option is Forensic Assertive Community treatment, the first form of action recommended by the APA. This is a type of treatment in which those who are at risk of hospitalization and homelessness receive treatment in terms of medication and evaluation. The APA’s recommendation specifically calls for specialized police teams, mental health courts, and pretrial service agencies needed to prevent the incarceration of the mentally ill. To begin to take steps to change societal trends discussed for the mentally ill, the Human Rights Watch bases their principles on the idea that better psychiatric care is needed in the prisons themselves and that prisoners have the right to treatment that will help them to assimilate or re-enter society. Additionally, the Treatment Advocacy Plan, an interest group supporting treatment for mentally ill persons, advocates for Assisted Outpatient Treatment (AOT), a series of court-ordered treatments for those with a history of medication noncompliance. The Treatment Advocacy Plan concludes that the chance of arrest in any given month for participants who were currently receiving AOT was about two-thirds lower than those not receiving AOT. According to a Florida study, this type of treatment reduced days spent in jail among participants from 16.1 to 4.5 days, a 72%, proving the effectiveness of AOT. In Wisconsin, the AOT program currently consists of 10 medical professionals from a hospital or health center who look for mentally ill person in jails and

116 Id.
117 Raphael & Stoll, supra note 5.
118 Id.
119 Id.
121 TREATMENT, supra note 39.
122 Id.
123 Id.
homeless and provide them the treatment that they require.124 With this, AOT would provide for the opening and government funding of new psychiatric institutions that were closed in the early deinstitutionalization movement of 1955 that caused a drop in population from 558,239 people in public mental health hospitals to 486,620, and accounting for total population size a drop of 885,010 to 71,619.125

In Olmstead v L.C. (1999) the government decided that it was a violation of the Americans with Disabilities Act to confine those with disabilities to institutions such as prisons.126 Eight years after this decision, reintegration into communities can be a slow and ineffective process for many mentally ill prisoners since there is no effective treatment method in place, meaning the many of the mentally ill ultimately recidivize and return to the institutions that failed to care for them.127 Treatment seems to be of little importance in this country, a matter that needs to change. This is especially relevant because treatment for “disabilities” and “mental illness” are specific to each. It is a necessity in this country that on-going follow up treatment and intensive care is provided, so that the cycle of recidivism ends for mentally ill individuals.128 This calls for the creation of more public psychiatric institutions and further proves that jails are no place to keep the mentally ill with the justification that there is simply “nowhere else” to house them.129 The current situation in our society of the higher chance of arrest of the mentally ill shows a weakness in government regulations, especially with a high rate of homelessness of the mentally ill; 200,000 individuals with schizophrenia or bipolar disorder are homeless or one-third of the estimated 600,000 person homeless population.130 Nearly 300,000 individuals with schizophrenia or bipolar disorder, or 16 percent of the total inmate population, are in jails and prisons.131 Their abnormal thought patterns make it far more likely that they will end up in prison for misdemeanor charges, often charged more seriously.132

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124 Torrey, supra at 43.
126 Olmstead v L.C., 527 U.S. 581 (mental illness and disability under same legal principle).
127 Id.
128 Treatment, supra note 39.
129 Id.
130 Id.
131 Id.
132 Id.
Conclusion

With the rate of the incarceration of the mentally ill over placement in mental institutions climbing, the federal government’s increased role in altering laws regarding the mentally ill must be addressed and incorporated into the American legal system. Evidence has shown that mental illness leads to a greater likelihood of crime, especially violent crimes, which ultimately leads to incarceration. The deinstitutionalization movement and the resulting transition from institutionalization to incarceration has resulted in overpopulated prisons far more cases of mistreatment of the mentally ill than would be expected in a responsible republic. A range of injustices such as higher chances of sexual violence, suicide, self-harm, and accidental death for mentally ill inmates necessitates legal action. A variety of court cases in which settlements trump change in the legal system prove that laws such as the ADA must account for fair and viable institutionalization. In the current system, humane treatment is shunted aside in favor of unjust incarceration and the deprival of constitutional rights for those who lack the capability to be held accountable for their own actions. The APA’s focus on Forensic Assertive Community Treatment as mandated institutionalization in accordance with altering laws to prevent mentally ill persons from incarceration will lower prison populations. Statistics, court precedent, and public response to the increasing incarceration of mentally ill persons contributes to the necessity of creating legal reform that exemplifies the values that American legal system was founded on.
Determining the Legal Permissibility of NFL Player Punishment: Has the NFL Commissioner Outkicked his Coverage?

Kylila Tucker

Introduction

Adrian Peterson has dominated opposing defenses in American football throughout his tenure as a National Football League (NFL) player, holding the record for most running yards in a single game and second most running yards in a single season. The spoils of his dominance include a record-breaking multi-million-dollar contract, frequent covers on *Sports Illustrated*, the responsibility of being the public face of the Minnesota Vikings football team, and a role model for many Americans.¹ A grand jury indictment on charges of reckless or negligent injury to a child – decided after Peterson used a switch to spank his son – handed down on September 12th, 2014, shattered this public façade and ultimately resulted in an indefinite suspension from the NFL.²

Contemporarily, the general public criticized NFL Commissioner Roger Goodell for the league’s lenient punishments against players who had committed acts of domestic violence, such as the Ray Rice scandal.³ This particular scandal involved an early morning fight between Rice, another lauded NFL football player, and his then fiancé, Janay Parker, with Rice clearly seen punching his partner. In response to the graphic TMZ video of the

incident and Rice’s ensuing simple assault charge, Commissioner Goodell issued a two game suspension which led to the end of Rice’s career. The resulting public outcry against what seemed to be a trend of domestic violence among NFL players proved to be the catalyst for an expansion of the NFL domestic violence policy stated in the NFL Player Conduct Policy (Policy), which mandated a minimum six-game suspension for such actions with ultimate discretion for longer suspensions given to the commissioner. In relation to the Peterson case, Goodell justified this sizable suspension by citing the young age of the injured child, the function of a switch as functionally equivalent to a weapon, Peterson’s lack of remorse, and the new NFL policy on domestic violence. In response, Peterson exercised his right to appeal the ruling, per the NFL’s Collective Bargaining Agreement (CBA) on the basis that the commissioner exceeded his authority and wrongfully applied the enhanced policy. Although a third-party arbitrator originally upheld the ruling, U.S. District Judge David S. Doty subsequently ruled in favor of the termination of Peterson’s indefinite suspension. Such challenges to the commissioner’s authority have reignited the debate regarding the legal permissibility of player punishment in accordance with the CBA, antitrust standards, and labor law.

Chief in this debate is the Sherman Antitrust Act, which states “every contract… in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States… is declared to be illegal.” The connection between this broadly-worded federal statute and the NFL is the categorization of suspensions and dismissals in the form of player restraints. This distinction is imperative to both scholars and football fans alike, and the rise in the prevalence and severity of player restraints validates the urgency of scholarly discussion. Additionally, the general public is heavily invested both emotionally and financially in the billion-dollar football industry and deserves a succinct interpretation of the

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4 Id.
7 Bien, supra note 3.
Determining the Legal Permissibility of NFL Player Punishment

legal standards that govern their weekly viewership. Moreover, when viewing the NFL as an economic model, the argument can be made that the enthusiastic football fans who tune into games each week are the consumers of the product of NFL games; thus, their interests constitute consumer welfare, the very ideal that the Sherman Act was created to protect.

This article argues that player restraints delineated by the Policy do not violate Section 1 of the Sherman Act, although the Policy should be reformed to establish uniform punishments in an effort to promote deterrence and bolster the public image of the NFL. An analysis of the structure of the league in consideration of the single-entity test, proper rule of reason, and ancillary restraints serves as evidence for this claim.

Specifically, Part I provides a broad overview of the Sherman Act and its common applications to the NFL through recent lawsuits involving NFL players, as well as defining the relationship between the NFL commissioner, owners, and players. Part II details the three arguments that substantiate the legality of player restraints outlined by the Policy and further argues that they do not violate Section 1 of the Sherman Act. This involves analyses of the economic role of NFL member clubs with the single-entity test, the reasonability of player restraints, and the ancillary nature of those restraints. Part III recognizes that there is inherent conflict generated by the Policy, though the player restraints as outlined by the Policy do not violate the Sherman Act, illustrating reforms to the Policy to introduce uniformity in punishment, with a broader discussion of the importance of these reforms to consumer satisfaction, public opinion, and the furtherance of the NFL.

I. The Sherman Antitrust Act and the NFL

Antitrust acts primarily operate to prevent the illegal restraint of trade or the promotion of anti-competitive behavior. Generally, these violations pertain to the theory of the freedom of competition regarding economics, business, and labor. The NFL team owners acted unilaterally in their representation of individual NFL players until 1956, when the players formed a specific labor union, the NFL Players Association (NFLPA), to debate mainly salary disputes. The National Labor Relations Board designated the National

Players Association (NFLPA) as the sole labor organization\textsuperscript{14} to argue on behalf of each individual player’s prerogative in 1968.\textsuperscript{15} This established a relationship of collective bargaining between the NFLPA and the NFL commissioner and owners.\textsuperscript{16} The NFLPA directly negotiates with the NFL team owners and creates an NFL collective bargaining agreement (CBA), which defines a variety of contested issues such as the distribution of league revenues, health and safety standards, and benefits for players under contract.\textsuperscript{17}

The NFLPA and Goodell agreed upon the most current draft of the NFL CBA after an extended lockout of NFL players by the league in 2011.\textsuperscript{18} This CBA officially gives the NFL commissioner disciplinary authority over “all disputes involving a fine or suspension imposed upon a player for conduct on the playing field or . . . conduct detrimental to the integrity, or public confidence in, the game of professional football.”\textsuperscript{19} A player in the NFL must sign an arbitration provision that denies a player from filing a lawsuit against the NFL in the event of a contract dispute. In such cases, a player instead agrees to participate in an arbitration process that is led first by the system arbitrator and then by an impartial arbitrator.\textsuperscript{20} Although the Federal Arbitration Act affords validity to arbitration clauses,\textsuperscript{21} the Supreme Court’s 1960 \textit{Steelworkers Trilogy} specified their applicability in varied circumstances.\textsuperscript{22} Particularly, the Supreme Court illustrated the permissibility of a refusal to comply with an arbitrator’s decision in \textit{United Steelworkers of America v. Enterprise Wheel & Car Corp.} on the grounds of “sufficient defectiveness.”\textsuperscript{23} Although broadly defined, this framework determines arbitration clauses invalid if the underlying implementation of an arbitrator constitutes an anti-competitive restraint of trade. Therefore, the argument can be made that the NFL arbitration policy is a statutory violation of Section 1 of the Sherman Act.

\textsuperscript{14} 29 U.S.C § 152 (1947).
\textsuperscript{15} History, supra note 13.
\textsuperscript{20} Id. at 262.
However, in 1975, the Supreme Court defined distinct and limited non-statutory exemptions in its decision in *Connell Co. v. Plumbers & Steamfitters*. Chief Justice Powell argued that such exemptions require “tolerance for the lessening of business competition based on differences in wages and working conditions,” which essentially legalized the implementation of restraints of trade by unions.\(^{24}\) Moreover, the Court limited the power of collective bargaining agreements, or multilateral union actions, such as non-labor and union parties agreeing to restraints on competition in a business market by denying complete protection under a non-statutory exemption.\(^{25}\) While this ruling provided some broad clarity for union actions, the ambiguous component of its decision has enabled the ongoing debate on the legality of portions of the NFL CBA. Later arguments in this article will prove that hypothetically, if the commissioner’s authority did not qualify as a non-statutory exemption, the Policy would still pass antitrust labor scrutiny.

The United States Court of Appeals for the Eighth Circuit’s decision in *Mackey v. National Football League* is perhaps the most widely cited interpretation of this legal dilemma.\(^{26}\) In this case, a group of current and former NFL players asserted that the “Rozelle” Rule was a violation of their Sherman Act rights.\(^{27}\) The “Rozelle” Rule states that “when a player’s contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player’s former team.”\(^{28}\) The court set forth a three-part test, which consisted of 1) “the restraint on trade primarily affects only the parties to the collective bargaining relationship,” 2) “the agreement sought to be exempted concerns a mandatory subject of the collective bargaining agreement,” and 3) “the agreement sought to be exempted is the product of bona fide arm’s-length bargaining,” in order to determine that the “Rozelle” Rule was a refusal to deal and a group boycott.\(^{29}\) Moreover, the Eighth Circuit found that this rule violates the Sherman Act.\(^{30}\)

This three-part test was set as the legal precedent until 2004, when the United States Court of Appeals for the Second Circuit opined in *Clarett v. National Football* that rules

\(^{24}\) *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 391 (1975)  
\(^{25}\) *Id.* at 421.  
\(^{29}\) *Id.*  
\(^{30}\) *Id.* at 9
regarding the eligibility of players were protected under antitrust challenges established by the non-statutory labor exemption.\footnote{Nathan Brooks, \textit{Clarett v. National Football League and the Nonstatutory Labor Exemption in Antitrust Suits}, \textit{Cornell U. IRLS Sch.} 1 (2004).} This determination came after the court challenged the need for all three Mackey court standards in order for the legal test to be satisfied.\footnote{\textit{Clarett}, 369 F.3d at 138.} In place of this old standard, a more holistic consideration of the purpose of eligibility rules found that the rules were CBA issues due to their “tangible effects on wages and working conditions of current NFL players.”\footnote{Id.} Therefore, the debate continued regarding the legal usages of the CBA and antitrust law precedent.

Central to these later arguments is the classification of the NFL as a single-entity, which is an interpretation that diverged from the Supreme Court’s ruling in \textit{American Needle Inc. v. National Football League}.\footnote{Ken Belson, \textit{N.F.L. and American Needle Agree to Settle Lawsuit}, \textit{The New York Times} (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/sports/football/nfl-and-american-needle-agree-to-settle-lawsuit.html.} The case was first filed in 2004 after the NFL attempted to designate Reebok as the exclusive apparel provider of the NFL.\footnote{Id.} In response, American Needle, another apparel company, sued the NFL’s action as a violation of the Sherman Act.\footnote{Id.} The Supreme Court ultimately issued a unanimous ruling that the NFL’s trademark licensing practices and broader actions were in fact subject to the Sherman Act and thus constituted a violation of the Act.\footnote{Id.} The Court presented the rationale that the NFL is comprised of a collection of 32 independent business entities, instead of a single-entity, and was thus, subject to antitrust scrutiny to support this opinion.\footnote{Marc Edelman, \textit{Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. National Football League}, 16 \textit{Stan. J.L. Bus. \\& Fin.} 183 (2011).} In determining the structure of the NFL, the Court cited \textit{Mackey v. NFL}, which established the NFL as an “unincorporated association comprised of member clubs which own and operate professional football teams.”\footnote{American Needle, INC., Petitioner v. National Football League et al., 560 U.S. 130 (2010).} This decision also delineated the NFL’s specific functions, such as “organizing and scheduling games between teams and promulgating league-wide rules,” and reaffirmed the NFL executive’s unilateral power as defined by the CBA.\footnote{Id.} Particularly, the executive officer of the NFL is its commissioner (currently Roger Goodell).\footnote{Nat’l Football League, Collective Bargaining Negot. \\& Cont. (BNA) (2011).}
Opponents of the CBA assert that granting the commissioner the authority to suspend players is the equivalent of an unlawful agreement among competitors (e.g., NFL owners and the commissioner) to boycott a potential seller (e.g., the NFL player) from providing a service by practicing his occupation (i.e., playing football). While there has yet to be adjudication of the entirety of the preceding argument, the First Circuit verified the underlying framework to consider NFL teams as economic competitors given that they compete against each other “for things like fan support, players, coaches, ticket sales, local broadcast, revenues, and the sale of team paraphernalia” in Sullivan v. National Football League.42

In contrast, proponents of the CBA say NFL member clubs are not economic competitors, but rather, economic partners in the production of football in the NFL market. According to this line of reasoning, member clubs are not considered as economic competitors; therefore, restraints, as outlined in the CBA, do not deprive the marketplace of independent-decision making. The Supreme Court ruled in accordance with this later argument in Brown vs. Pro Football, Inc., stating teams comprising a professional sports league (e.g., the NFL) “are not completely independent economic competitors” and further they “depend upon a degree of cooperation for economic survival.” 43 However, these commentaries were subsidiary to a more specific ruling regarding the non-statutory labor exemption and collective bargaining in the context of appropriate compensation for practice squad NFL players; thus, the Court has not ruled conclusively in favor of the fundamental economic partnership NFL teams.44 Such divergent interpretations of the economic status of NFL member clubs constitute the core of the single-entity dispute, arguably the most central component of the admissibility of the Policy debate, and will be examined more critically in the subsequent section.

An applied analysis of this legal precedent finds that these determinations have been critical to many cases of player discipline in addition to the aforementioned cases involving Ray Rice and Adrian Peterson. In 2012, the NFLPA challenged Commissioner Goodell’s authority to discipline several New Orleans Saints players after they were found to have played a role in a bounty scandal of paying fellow players for engaging targeted hits against

42 Sullivan II v. NFL, 34 F.3d 1091 (1st Cir. 1994).
44 Id. at 235-236.
opposing players. The system arbitrator sided with Goodell and upheld the consideration that the bounty system was classified as conduct that was detrimental to the game. Although the arbitrator’s ruling did not deal directly with Sherman Act considerations, the NFLPA used this incident to argue the lack of due process and detriment to competition that the arbitrator system propagated. Roger Goodell likewise disciplined Greg Hardy of the Dallas Cowboys by suspending him for the first ten games of the 2015 regular season in light of his previous domestic violence incident. Although no appeal process followed, Goodell’s decision was criticized for its apparent arbitrary nature and severity in consideration of the dismissal of Hardy’s legal case in North Carolina. These high-profile instances highlight the significance of the following legal argumentation.

II. The Legality of Player Restraints

A. Single Entity Test

The most basic definition of a single single-entity ownership structure is a for-profit league that owns and controls all member clubs. Moreover, an investor in the organization has equal financial interests in the performance of each member club. This structure implies the impossibility of economic competition between the individual member clubs, which further shows that member clubs are unable to “conspire” through the creation of “contract[s], combination[s] … or conspirac[ies]” as prohibited in Section 1 of the Sherman Act. This claim is the determining factor between a violation of Section 1 and Section 2 of the Sherman Act. Specifically, a violation of Section 1 must be collective action that restrains trade, while a violation of Section 2 applies to independent actions that “monopolize, or attempt to monopolize… any part of the trade or commerce.”

47 Id.
49 Id.
to the difference between a single-entity and dissimilar units, serves as the underlying cause for debate among courts and legal scholars.

The origin of this legal issue in respect to sports leagues is the Supreme Court’s 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* This case involved Copperweld Corp.’s purchase of a manufacturer of steel tubing, Regal Tube Co., from Lear Siegler, Inc. The transaction included an agreement between Lear Siegler and Copperweld under which Lear Siegler was prohibited from competing with Regal for five years. Subsequent to the initial purchase, a former officer of Regal Co., David Grohne, became an officer of Lear Siegler and formed a respondent corporation in order to compete with Regal. Grohne’s actions initiated a warning from Copperweld Corp. not to compete with Regal, and the company that Grohne had obtained to fill the order, Yoder Inc., voided its agreement. The respondent ordered the supply from another company and filed an action in federal court against petitioners and Yoder. The district court ruling found that Copperweld and its wholly owned subsidiary, Regal, were “incapable of comprising with each other as defined under Section 1 of the Sherman Act.”

This ruling overturned previous conventional wisdom that Section 1 liability is not excluded simply because a parent subsidiary is subject to common ownership. The “unity of purpose or common design” of the structure of a parent and a subsidiary necessitates that the subsidiary acts in concert with the parent’s interests. This ruling precipitated the seeking of Section 1 exemptions by various sports leagues, which viewed each team by itself as a meaningless entity due to its dependence upon the success and existence of the league as a whole. In contrast to this preceding legal argument, others hold that teams within a league must be classified as single entities because “each [team] is independently owned[,] … competes against the others on the field, and seemingly competes against them for fans and

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55 Id.
56 Id.
57 Id.
58 Id.
59 Id. at 759-777.
60 Id. at 759-766.
61 Id. at 771-774.
other sources of revenue.” The merits of both claims influenced the Supreme Court’s subsidiary decision in American Needle to limit the precedent established by its ruling simply to the narrow consideration at hand, the marketing of the “team’s individually owned intellectual property.” Essentially, this decision allowed for the continuation of the aforementioned debate due to its reluctance to determine an all-encompassing decision in favor of a case-by-case investigation to resolve any subsequent lawsuits regarding competitive behavior. Therefore, deciding whether NFL member clubs are economic competitors is central in determining the singe-entity nature of the member clubs with regards to player conduct and the exemption from Section 1.

Central to the concept of competition is the idea that multiple entities strive to obtain gains at the expense of others whom are fighting for the same gain concurrently. Thus, competition concludes when one competitor realizes the gain. Ideally, a competitor seeks to eliminate all others that are vying for the gain because of the mutually exclusive nature of being the victor. These above definitions deal specifically with actual competitors; however, defining potential competitors is also essential. A potential competitor is characterized as “a firm positioned on the edge of the market that exerted a beneficial influence on market conditions.” A beneficial effect, in terms of the Sherman Act’s first section, is the maintenance of competition in an effort to produce lower prices and better goods and services for consumers. Thus, only when the firm affects the aforementioned downstream marketplace benefits can it be considered a potential competitor. Such definitions can be used to show that individual NFL member clubs do not constitute actual or potential competitors.

Regarding actual competitors, one must determine whether or not NFL member clubs seek the same gain simultaneously and at the expense of other member clubs. For instance, member clubs may be viewed as entities that seek all revenue from the production of NFL games during a given season; however, this claim wrongly assumes that the member club can operate solely and that one club obtaining all revenue would not necessarily

63 Id.
64 Am. Needle, Inc., 560 S.Ct. 130 at 2201.
65 Gorkin, supra note 8, at 26.
67 Id.
68 Id. at 21.
eliminate other member clubs. In reality, if a member club does not have the opportunity to gain any revenue, as would be the case if another member club earned all revenue in the market, that individual member club would decline to participate in the market or would simply be eliminated. The elimination of all other member clubs suggests an inability of the single remaining club to generate revenue since NFL games, the profit-generating avenue, necessarily involve at least two member clubs, the massive growth that comes with covering the geographic fan bases of the United States with city teams notwithstanding. Therefore, the member clubs are interdependent and not actual competitors:

The product [sold by the member clubs belonging to the NFL] is the league’s annual series of [256] regular season games leading to a postseason playoff–tournament and ultimately a Super Bowl champion. It is only because each game is an integral part of this mosaic that it has substantial value. A league’s product is thus jointly produced, and no individual game is solely the product of one or even two teams; the value of every game is largely generated by the trademark and imprimatur of the league and the participation of all league members, each of which must recognize and accept the results of every game. Each team’s fortunes, no matter how the league elects to divide total league expenses and revenues, are to a greater or lesser extent inherently affected by the success or failure of every single league game… [E]ach league member is incapable of independent competitive activity [because] [e]ach team’s economic existence depends entirely on, and its profits derive solely from, its being an integral part of the league.70

This same logic can be used to invalidate the classification of member clubs within the NFL as potential competitors due to the joint nature of production within the professional football market. Therefore, if the NFL and its individual member clubs qualify (or are considered) as a single-entity, regulation of player conduct, including suspensions or fines necessarily do not constitute prohibited restraints.

B. The Reasonability of Player Restraints

Although the Sherman Act is strongly worded such that “every contract, combination … or conspiracy, in restraint of trade or commerce among several States…is declared to be illegal,”71 the Court incorporated the use of “the rule of reason” in

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determining the permissibility of restraints on both commercial and labor markets.\textsuperscript{72} Under the “rule of reason”, the determination is whether the “restraint imposed is such [that it] as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”\textsuperscript{73} However, not all legal interpretations of restraints have relied on “the rule of reason.” Particularly, the Supreme Court determined in \textit{United States v. Socony-Vacuum Oil} that the anticompetitive effects of actions prohibited by Section 1 of the Sherman Act are so harmful that restraints should be viewed as “illegal per se.”\textsuperscript{74} Illegal per se typically defines the conspiracy to commit a crime as akin to the actual execution of the action in violation of a given statute of federal law.\textsuperscript{75} Consideration of both legal approaches, illegal per se and “the rule of reason,” is pertinent to the specific restraint of a group boycott within sports leagues.

Suspensions of players as defined by the Policy constitute group boycotts; from an economic standpoint, the owners, a group, are entering an unlawful agreement to limit the availability of a seller of production of football games, the individual player.\textsuperscript{76} In broad, legal terms, a group boycott is defined as a concerted effort to refuse to deal and is normally considered to be illegal per se.\textsuperscript{77} \textit{Klor v. Broadway-Hale Stores} has long been used to establish the impermissibility of a group boycott.\textsuperscript{78} The case involved the petitioner, a retail store selling radios, which alleged that manufacturers and distributors conspired to refrain from selling their products to the petitioner.\textsuperscript{79} The Court found that the aforementioned manufacturers and distributors did in fact constitute a forbidden group boycott as defined by the Sherman Act.\textsuperscript{80} However, a later ruling by the Supreme Court in \textit{NCAA v. Board of Regents of University of Oklahoma}, found that in the context of sports leagues, horizontal restraints should not necessarily be found to be illegal per se in an effort to promote the continuation of the availability of the product.\textsuperscript{81} A horizontal restraint is defined as “a restraint of trade involving an agreement among competitors at the same distribution level

\textsuperscript{72} Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1918).
\textsuperscript{73} Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).
\textsuperscript{77} \textit{Socony-Vacuum Oil Co.}, 310 U.S. at 219-20.
\textsuperscript{79} \textit{Id.} at 359.
\textsuperscript{80} \textit{Id.}
for the purpose of minimizing competition.” Although this ruling applied specifically to the collegiate level, the same judgment should apply to the NFL, particularly in cases in which the establishment of an institution between NFL member clubs and owners can be deemed completely necessary for the functioning of the league.

For example, the NFL player draft is a clear case of a reasonable horizontal restraint. Defined as “an off-season event in which NFL teams, in reverse order of wins from the previous season choose eligible players… to fill their rosters,” the NFL draft is an annual staple of the NFL. Smith v. Pro Football, Inc. explicitly found that the association of an individual with a particular team (a limitation in terms of the economic market) as a result of the NFL player draft is not “the type of boycott that traditionally has been held illegal per se.” Moreover, the inappropriateness of the illegal per se categorization applies to all issues regarding the NFL because the NFL teams, as established earlier, “are not competitors in any economic sense” and “have not combined to exclude competitors or potential competitors from… the market.” Negating the illegal per se finding in terms of the NFL does not necessarily bind the Court to determine that player restraints are legal; instead, it merely demands that such issues are examined in terms of the rule of reason rather than automatically dismissed as illegal.

Thus, the essential question is whether or not player discipline as outlined by the Policy is pro-competitive or anti-competitive in its effects. There is value in revisiting the stated purpose of Section 1 of the Sherman Act to define these characteristics. Primarily, Section 1 is interested in preserving consumer welfare such that “the law assesses both harms and benefits in light of the Act’s basic objectives…to bring…consumers the benefits of lower prices, better products, and more efficient production methods.” Two teams with similar abilities that produce a close game in terms of points scored constitute a better quality product (e.g., a football game). Such a game implies a high level of outcome uncertainty and a high level of competitiveness, thus imparting a greater entertainment value for the viewers and increasing consumer welfare.
The reality for sports leagues like the NFL, however, is that not all teams have the same number of talented players, and there is disparity between financial equality, as established by the salary cap, and win-loss record.\textsuperscript{89} Institutions such as the NFL Player Draft and the NFL Trade Deadline are classified as restraints in the legal sense; however, they increase the uncertainty of the outcome. For example, the redistribution of players from college or those who already exist in the NFL makes it nearly impossible that a team stockpiles all of the best talent throughout the league.\textsuperscript{90} The pro-competitive effect of these non-disciplinary restraints is clear. Furthermore, although a cursory examination of disciplinary restraints suggests the opposite categorization, a broader interpretation of consumer welfare proves similar pro-competitive effects.

Supply for football players in the NFL market is essentially inelastic – largely unaffected by a change in the price of the good or service in question – because there are almost 100,000 college football players vying for 1,600 NFL opportunities and an unfaltering social prestige for players. However, this inelasticity cannot be said to extend to extremely talented football players, such as the ones who play currently in the NFL. A finite number of such players exist, and they are motivated in part by the promise of a substantial salary. Therefore, proponents of the anti-competitive nature of disciplinary restraints find that suspending or eliminating an elite player depresses wages because less talented players who earn less money populate the league. This argument is further expressed as follows:

Depressing wages below the competitive level would discourage some potential players from becoming professionals. Even if few potential players have alternative opportunities outside their sport, a reduction in salary levels at the least reduces the incentive for some young people to invest the human capital necessary to become a skilled professional and thereby subtracts from maximum potential consumer satisfaction.\textsuperscript{91}

The known statistic that only a small percentage (1.6\%) of all NCAA athletes go on to participate in the NFL disputes this claim.\textsuperscript{92} Essentially, students and lay people alike participate in football regardless of the fact that they know prior to investing their time and

\textsuperscript{89} Gorkin, supra note 8, at 29.
\textsuperscript{90} Smith, 593 F.2d at 1194-1205.
\textsuperscript{92} Estimated Probability of Competing in Professional Football, NCAA.ORG (Feb. 27, 2015), http://www.ncaa.org/about/resources/research/football.
energy that there is a slim chance of compensation for their work. Therefore, any compensation, especially the high salaries of elite NFL players, cannot be seen as a key motivation, and a disciplinary restraint cannot be deemed anticompetitive in reducing talent and salary. Furthermore, one must recognize that parents initiate any potential career of a NFL star. If criminals and people of poor moral character populate the NFL, the likelihood of a mother or father condoning his or her child’s participation in the sport diminishes. Thus, the argument can be made that preserving the integrity of the league through the use of disciplinary restraints expands the diversity of prospective talent in the league, promotes variability in outcome, and ultimately increases consumer surplus. In conclusion, disciplinary restraints as defined by the Policy improve competition and are by nature, therefore, reasonable and not a violation of Section 1 of the Sherman Act.

C. Ancillary Restraints

An ancillary restraint is defined as a “subordinate and collateral (agreement) to a spate, legitimate transaction … in the sense that it makes the main transaction more effective in accomplishing legitimate purposes.” The case of United States v. Addyston Pipe and Steel Co, involving an attempt by cast iron pipe producers to fix prices in the market, established the distinction of such ancillary restraints and the contrasting naked restraints, which are unambiguously anticompetitive. For example, in the context of the NFL, many agreements must be made to facilitate the production of the game such as deciding on the specific on-field rules (e.g., which types of hits are illegal, what yard-line the ball should be kicked off from, or how many yards must be gained to achieve a first down). These decisions were made either arbitrarily or based on evidence outside of the realm of legal justification throughout the history of the NFL in an effort to help promote the integrity of the game, and thus the continuation of the league. Simply stated, ancillary restraints are in the spirit of promoting competitive environments and therefore do not violate Section 1 of the Sherman Act.

95 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
96 Gorkin, supra note 8, at 51.
In light of the previous analysis, there is no dispute regarding the ancillary nature of disciplinary player constraints as granted by the NFL Policy. The rules governing the acquisition and distribution of playing talent to each team are ancillary restraints to the principal transaction: the operation of the league sport. Because player restraints are ancillary to the formation and continued operation of a legitimate, principal transaction, they are presumably lawful. Any suspension or expulsion of a player from the league does not prevent the legitimate transaction of the production of football games for consumption by the general public. The Policy simply constitutes an agreement entered into by players and owners alike that determines who is allowed to participate in the football game. However, there is an additional standard that player restraints must satisfy to be considered legal and not a violation of Section 1. This standard is to be “reasonably necessary” such that player restraints are not “unduly injurious to the public.”

A collective disciplinary policy, such as the Player Conduct Policy, is necessary in order “to protect the viability of the joint venture” by regulating competition. Essentially, if the NFL teams did not have the power to collectively agree on enforcing a suspension that the Commissioner imposes, then there is no guarantee that individual member teams will adhere to any given suspension. Thus, individual member teams that decide not to abide by the Commissioner’s ruling would have an unfair advantage given that they may obtain players that other member teams neglected to consider due to their compliance with the authority of the Commissioner. In short, the desired effect of the policy is not met unless it has full compliance. Furthermore, such a decision is ancillary and crucial to determining how the game should be played because it determines what constitutes a NFL player and regulates the production of the game. This aforementioned argument deals mainly with the economic precompetitive considerations of the agreement.

Additional moral and societal arguments can be made regarding the necessity of establishing a new, league-wide policy. By suspending players who have acted illegally or morally reprehensibly, the NFL general audience may be spared any harm that may come from glorifying and giving celebrity status to criminals or thugs. Additionally, the quality

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98 Gorkin, supra note 8, at 52.
100 Bd. of Trade of Chi. v. United States, 246 U.S. at 238.
101 Vaughan, supra note 45, at 629.
of the product of NFL games may be arguably increased if the players involved are held to a higher moral standard.

In sum, an analysis of the economic role of NFL member clubs using the single-entity test, as established by the Supreme Court, shows that Section 1 of the Sherman Act does not apply to the NFL because it requires a “combination...or conspiracy,” an impossibility of a single-entity.103 The second argument draws attention to the reasonability of player restraints to deny that they are in violation of the Sherman Act. The final argument centers on the ancillary nature of player restraints such that they do not actively alter the price or reduce the quantity of the NFL games that are being produced. Thus, the Sherman Act does not apply to ancillary restraints, but rather, to naked restraints only.104

III. Issues of the Existing NFL Player Conduct Policy and Solutions

The previous arguments establish the legal permissibility of player restraints as defined in the NFL Policy. However, there is inherent conflict generated by the Player Conduct Policy even though the player restraints as outlined by the Policy do not violate Section 1 of the Sherman Act. This conflict stems from data regarding the history of Goodell’s rulings that show the arbitrary nature of his decisions. Since 2010, Goodell has overseen two indefinite suspensions, two one-game bans, two multi-game suspensions, all of which were later eliminated. Additionally, numerous reductions of suspensions have occurred under his purview.105 These occurrences suggest that independent arbitrators disagree with Goodell’s rulings more often than not. Additionally, different players have historically been given different lengths of suspensions for similar instances of misconduct. Notably, Dashon Goldson and Brandon Meriweather, both players in the NFL, committed helmet-to-helmet hits, a punishable football tactic; however, Goldson received a reduced punishment of a $100,000 fine after appeal, while Meriweather only saw his initial two-game suspension reduced to a one-game suspension upon appeal.106 The aforementioned domestic violence suspensions of Ray Rice and Adrian Peterson are even further examples

103 American Needle, 560 U.S. at 130.
105 Jack Andrade, NFL Suspensions That Have Been Overturned or Reduced in the Goodell Era, BOSTON.COM (May 12, 2015), http://www.boston.com/sports/football/2015/05/12/nfl-suspensions-that-have-been-overturned-reduced-the-goodell-era/xSClqUIrLlta5xIqevPdMN/story.html.
106 Id.
of this issue. Such a track record of leniency and failure to impose proper punishment inherently conflicts with the stated purpose of the Policy both in terms of economic considerations with consumer surplus and societal benefits in light of the popularity of the NFL.

These shortcomings are particularly damaging due to the high-profile nature of player suspensions. Young children and adults model their interests, ideology, and in some cases morality based on the NFL players, who are essentially celebrities in American society. Evidence for this claim is the billion-dollar industry of the NFL itself that is sustained by revenue garnered primarily from ticket sales and merchandising. This argument suggests that such a trend would be problematic in any high profile league. However, other leagues, which arguably house similar celebrity athletes, do not have the same negative perception regarding punishment as the NFL. This discrepancy can be attributed to the lack of integrity and faith in the Commissioner’s rulings, precisely because of their randomness and overreaching nature.

One could place blame for this conflict on Commissioner Roger Goodell by citing individual ineptitude in leadership and decision-making. However, the reality is that any individual, when given very loose standards and unchecked power, could fail to infallibly determine appropriate punishment. Therefore, the solution is not a change in leadership, but rather, a reform establishment to the existing Policy such that it provides for specific penalties (e.g., a fine, suspension, or expulsion) for specific actions.

For instance, in the case of on-field behavior, an instance of helmet-to-helmet contact to a defenseless player carries strict definitions for each term of the misconduct in the NFL Rulebook. Namely, a defenseless player is defined as “a receiver attempting to catch a pass” among other specific postures. This article proposes that the same meticulous nature by which these actions are defined should extend to their punishments. The creation of a two-part key by which each action is ranked in terms of severity of action as well as punishment would help to clarify and unify player punishment.

The same method could be extended to punishments in response to actions

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committed off the playing field. Consultation of owners and player representatives in a joint meeting could be held to determine initial standards by which to rank punishments. By including all three parties, the Commissioner, owners, and players, an appeal by players would be less valid given that all participants would have previously agreed to the terms. This would decrease the media attention that is given to each disciplinary issue because of the reduced need to debate the fairness of each individual arbitrary decision. Additionally, the range of off-the-field actions that are punishable by the NFL should be limited to include solely violations of criminal or league rules. Although the NFL is constantly in the public eye and has great influence, its authority should not extend to determining the morality of every questionable action. If not strictly prohibited by the league or federal law, a player’s actions can be condemned; however, one must avoid the arbitrary mission of protecting the image of the NFL at the expense of integrity. This uniformity in player punishment, as authorized by a highly specific, collectively determined Player Conduct Policy, would reestablish credibility to the league and begin the process of reshaping the public image of the NFL as a whole.

Conclusion

The legal permissibility of Commissioner Goodell’s punitive rulings in consideration of Section 1 of the Sherman Act is paramount in light of the darkening public perception of the NFL. However, an analysis of the single-entity test, the reasonability of player restraints, and the ancillary nature of disciplinary restraints shows that these determinations are not inherently illegal. This determination does not negate the necessity for reform to the player conduct policy, as established by a brief review of the unsuccessful nature of the Commissioner’s rulings. This paper proposes uniformed definitions and treatment of specific actions of misconduct through a joint effort by the Commissioner, NFL owners, and NFL player representatives. These reforms are the most direct way to help reestablish credibility in the governance of the NFL and redefine its public image for the better.
Insider Trading and Federal Securities Law: A Demand for Reform

Nikhil Ram Venkatasubramanian

Introduction

In the appointment of Preetinder Singh Bharara as the U.S. Attorney for the Southern District of New York, the United States and Wall Street saw one of the harshest crackdowns on financial securities fraud in the history of its regulation. Since 2009, Mr. Bharara and his office in the Southern District of New York successfully made 87 straight convictions against Wall Street employees and officials including those against hedge fund superstar Raj Rajaratnam and McKinsey CEO Rajat Gupta. Even when convictions weren’t successful, they resulted in some of the largest settlements for insider trading cases in the history of the activity. The relentless and incredible success rate of securities-based prosecution originating in the Southern District of New York has sent ripples throughout the financial industry and has most likely been a key player in creating a significant amount of deterrence against such activities.

On October 5th 2015, the Supreme Court of the United States engaged in its routine docket disclosure for its following term—publicizing the cases that it had accepted to hear by a vote of four of the nine justices. This announcement truncates the line of successes that Mr. Bharara and his office are in the midst of leading. Implicit in the Supreme Court's deferral to the appeal's court decision is an approval of the appeals court's decision to reverse

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4 Id.
6 Id.
the conviction of two hedge fund managers that the U.S. Attorney’s Office attempted to convict. The appeals court decision fundamentally alters the evidence standard and “direct benefits” conferral that is necessary in proving insider trading allegations to be true. In the aftermath of the indecision by the Supreme Court and the implicit approval of the appeals court decision, Mr. Bharara questioned the validity of several cases against high-profile hedge fund managers and analysts. This is certain to be only the first of many cases that will be affected by the appeals court’s decision. However, this legal conundrum allows for a review of a much larger question. It is in the context of this indecision that this article aims to question the credibility of existing federal securities law regulating the activity of insider trading and whether the current insider trading regulatory matrix ought to be reformed.

In order to form an understanding of the legal regimen surrounding insider trading today and what may be accomplished to reform its regulation, this article will expand on existing regulations, and tie them to past Supreme Court decisions. Secondly, this article will discuss the problems in application of the law regarding insider trading. This section will discuss recent SEC attempts at adjudicating insider trading cases and their constitutionality, inherent issues in execution and policing of insider trading cases, and the detrimental economic effects that bans on insider trading may confer. Finally, this article will suggest steps to reform or attempt to reform the existing legal code surrounding insider trading.

I. Federal Securities Law and Insider Trading

Although it was of little importance in 1961, the very first insider trading case in the United States set longstanding legal precedents that would only be fully realized and implemented in the decades following their initial passing. On November 8th of 1961, William Cary, a former professor of law at the Columbia University Law School, shortly after becoming the chair of the Securities and Exchange Commission, issued a groundbreaking opinion in “In the Matter of Cady, Roberts & Co.” The case represented a relatively simple example of insider trading; one of the board members of Curtiss-Wright, then a leader in the aviation industry, communicated to his peer at a stock brokerage that the company had

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8 Id.
10 Id.
11 40 S.E.C.—34—0668.
decided to reduce dividends in the following year.\textsuperscript{12} Robert Gintel, the brokerage associate at Cady, Roberts and Co., sold thousands of shares in the aviation company before the general public had become aware that Curtiss-Wright had decided to reduce dividend prices.\textsuperscript{13} By selling these shares, Gintel’s Cady, Roberts and Co. was able to avoid thousands of dollars in losses when share prices fell in accordance with the notification of decreased dividend pay-outs.\textsuperscript{14} Shortly after the opinion that SEC Chair Cary authored in Cady, Roberts and Co., the Securities and Exchange Commission began its emphasized reliance on Rule 10(b)-5 of section 10b of the Securities Exchange Act of 1934.\textsuperscript{15} The expansion of Rule 10(b)-5 to cover insider trading fraud represent one of the most important legal norms with respect to federal securities law.\textsuperscript{16} Under this “classical theory of insider trading”, a corporate employee violates securities law, and Rule 10(b)-5 specifically, when they trade the corporation’s shares on the basis of “material non-public information” concerning the corporate entity.\textsuperscript{17} In such a case, the employee is legally obligated to either disclose the information to the general public or abstain from trading on the information; lending the informal name to this insider trading rule the “disclose or abstain” rule.\textsuperscript{18} Before the application of this section of federal securities law, in the time before the administrative reign of William Cary, states had approached the prosecution of insider trading on an individualized basis.\textsuperscript{19} Insider trading has since evolved into a legal area unbound by clear definitions, but rather a somewhat murky area of federal securities law.\textsuperscript{20}

The brunt of the legal framework surrounding insider trading and its regulation originate not only in William Cary’s application of the Securities and Exchange Act of 1934 and its instantiation of Rule 10(b)-5, but also from two seminal Supreme Court decisions in the decades following the Cady, Roberts and Co. administrative decision of 1961 as well as many more recent cases concerning insider trading.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{12} Michael Bobelian, \textit{The Obscure Insider Trading Case that Started it All}, \textit{FORBES}, Nov. 30, 2012.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Anthony Lewis, \textit{High Court Rejects S.E.C. Bid to Widen Ban on Insider Profit}, \textit{N.Y. TIMES}, Jan. 23, 1962.
\item \textsuperscript{17} Kaplan et. Al, \textit{The Law of Insider Trading}, ABA, Feb. 2, 2016.
\item \textsuperscript{18} Id.
\item \textsuperscript{21} Id.
\end{itemize}
A. Chiarella v. United States

The first of these cases, Chiarella v. United States (1980), is an important stepping stone in the application and evolution of the nexus between federal securities law and insider trading.22 Vincent Chiarella, a printer at a financial printing firm on Wall Street, was responsible for printing the details of any major mergers or acquisitions that the printing firm’s clients planned on entering.23 Chiarella was aware of these restrictions set forth by his employer, but traded on the merger and acquisition plans of a corporation before official public disclosure, turning a substantial profit.24 Vincent Chiarella was subsequently found guilty of all 17 violations of Section 10(b)-5 of the Securities and Exchange Act of 1934.25 Following an appeal, Chiarella’s initial conviction by a district court was upheld by the Second Circuit Court of Appeals, although he was technically not a “corporate insider”, the standard that the SEC rule had set.26 The Appeals Court ruled that although Chiarella was not a corporate insider, he did have consistent and continuous access to non-public information through the financial printing firm that employed him.27 This liability based on regular access, although he was not an insider at any of the firms he traded information on, formed the brunt of the legal standard set forth by the Appeals Court.28 The Supreme Court of the United States reversed this decision in a controversial decision in Chiarella v. United States.29 Rather than adhering to the “access to information” approach lower courts had relied on, the Supreme Court instead ruled that legal liability and fraudulent action under 10(b)-5 relied on a duty to disclose from “a relationship of trust and confidence” between two parties.30 Since Vincent Chiarella was not an employee of the corporations that the securities originated from, he was not a “corporate insider”—a relatively simple logical step.31 The Supreme Court’s rationale from this step is of far greater importance; it stated that because Chiarella was not a corporate insider, he did not enter into a relationship of

24 Id.
25 Id. at 12.
26 Id. at 17.
27 Id. at 12.
28 Id. at 14.
29 Id. at 14.
30 Id. at 20.
31 Id.
trust and confidence with the corporations, so liability for fraud under 10(b)-5 could not be instantiated as a warrant for his conviction. In summation, the Chiarella court held that an individual that was not under any fiduciary duty to a corporation could not be charged with insider trading within that corporation.

B. Dirks v. SEC

The other significant precedent in federal securities law regulating insider trading arrives from the Supreme Court's decision in Dirks v. The Securities and Exchange Commission (1983). In this ruling, the Supreme Court reaffirmed its decision in Chiarella v. United States concerning the reliance on a subject's relationship to the security's origin company rather than information acquisition status as a litmus test for fraud liability under section 10b. In Dirks v. SEC, Equity Funding of America, an insurance corporation, fraudulently overstated the value of corporate assets to institutional investors and creditors. A former head analyst of the corporation came forward about the fraudulent misrepresentations to Raymond Dirks, an investment analyst and broker of securities of insurance companies to institutional investors. During Dirks’s investigation of Equity Funding of America, several of his peers and friends sold their shares based on information that was non-public through Dirks’ tips.

The Supreme Court’s opinion on the matter carries a bifurcated legal significance. First, in its propagation of the liability standard resting in fiduciary duties to corporations rather than access to non-public information, the court affirmed and strengthened the legal standards originating in Chiarella v. United States. Furthermore, the court ruled that since there was no direct personal benefit for the individual who told Dirks of the initial overvaluation fraud, that no fraud had occurred, especially because the individual was exposing fraud that had been committed. This direct personal benefit principle has been a crucial facet of the public’s scrutiny of insider trading and recent crackdowns.

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32 Id. at 14.
34 Id.
36 Id. at 16.
37 Id. at 16.
38 Id. at 20.
C. Misappropriation and Outsider Trading

A third and final fundamental legal precedent that this article will present is the Supreme Court in the insider trading case presented in United States v. O’Hagan (1997). The case features the actions of a lawyer who traded shares and profited from confidential information presented to him through an attorney-client relationship. When analyzed, it is obvious that the classical theories of insider trading presented by the Dirks or Chiarella Courts cannot apply in this situation. However, there still seems to be some indication of foul-play beyond a violation of the attorney-client privilege. The O’Hagan court thus ruled that such ‘misappropriation’ of information that was entrusted to O’Hagan’s firm classified wrongful trading by an outsider that was entrusted with such information with legally binding or implied confidentiality. The SEC responded by codifying this interpretation in Rule 10(b)-5 listing circumstances in which misappropriation has occurred. By listing circumstances in which insider trading had still occurred even if it is outside of a strict fiduciary duty, the SEC expanded the scope of insider trading regulation significantly.

While the above cases only represent the most fundamental understanding of insider trading, it is important to consider the present and future states of financial markets and capital flow. While the internet, email, and computers were non-existent nor prevalently used during the Dirks, Chiarella, and O’Hagan insider trading fraud cases, they play a significant role in corporate communication today—suggesting that a multi-dimensional platform exists for insider trading to transpire. More contemporary examples of insider trading involving more prevalent technology will be discussed in Part II of this article in discussing problems with existing federal securities law regulating insider trading.

II. Issues with Federal Securities Law and Insider Trading Regulation

A significant portion of the academic discussion surrounding insider trading regulation revolves around the efficacy of such regulation. As the methods used to
investigate and convict alleged perpetrators of insider trading become more invasive and complex, an increasing number of authorities on the matter have begun questioning the fundamental underlying warrants of reforming regulation of insider trading by corporate insiders in the first place. Parallel to the Supreme Court’s recent deferral by lack of inclusion in the docket, this section aims to question the efficacy of regulating insider trading writ large. In the following section, constitutional and legal issues, theoretical enforcement issues, and economic issues with insider trading regulation will be discussed.

A. The Ethical Grounds of Insider Trading Bans

In order to frame later issues with legal complications in enforcement and economic efficiency arguments, this paper will first suggest why current aspects of the regulations against insider trading are inappropriate because of the ethicality of insider trading in the first place. That is, this paper will explore non-consequentialist arguments before moving to utilitarian positions against insider trading regulations.

Of the supposed moral dilemmas instantiated when banning insider trading, a call for fairness is usually the most significant. This fairness example is posited in two distinct versions.\textsuperscript{47} Levmore (1982) offers a representation of the first version by arguing that a moral obligation has been violated by using information that is available to one party but not most others—an asymmetrical information advantage.\textsuperscript{48} Because the benefitting party has not treated themselves like the majority of other parties, a moral violation has occurred.\textsuperscript{49} However, upon further analysis, it is evident that such a notion is contrary to the existence of the financial marketplace, or any marketplace for that matter. Most actions and benefits in some manner stem from inherent informational asymmetries in society. Investment managers and analysts, for example, profit specifically because they study information that isn’t always available to the general public; this equality argument therefore stands contrary to the existence of most financial markets in the first place. That is, asymmetrical informational advantages are a significant reason for the existence of financial markets in the first place. This argument does not suggest that insider trading be legalized writ large, but that the Securities and Exchange Commission draw a more specific, clearer line on what asymmetries ought to be assuaged by federal securities law.

\textsuperscript{47} Id.
\textsuperscript{49} Id.
A second version of the argument arises with access to such information, rather than the possession of said information.\textsuperscript{50} That is, the argument in favor of banning insider trading on grounds of fairness rests in the notion that such information is only gained in a legal and fiduciary relationship to a corporate entity that isn’t available to most members of society.\textsuperscript{51} However, one could argue that divisions of labor, and focuses on certain kinds of labor, innately expose individuals to these fiduciary relationships. For example, might a journalist follow a certain lead or topic area, or a physician may go to medical school and specializes in certain paths, leading them both to different benefits and practices. Those individuals that end up in fiduciary relationships or exchanges that put them in the position of exchanging such valuable information have arguably spent their lives preparing for such roles and have made adequate self-rational decisions on their own labor commitments. This sort of decision on labor pathways demand that the SEC clarify what sort of informational asymmetries it considers unlawful, and provide a philosophical justification as to why those unique instances of asymmetry demand sanctioning.

While these ethical dilemmas and conversations themselves provide little reason for reforming the existing federal securities law regime surrounding insider trading, their combination with more practical arguments within this section concerning legal complications and economic efficiency arguments reveals a sufficient opprobrium against the broad swath of current insider trading regulations.

\textbf{B. Legal Issues in Federal Securities Law and Enforcement Concerning Insider Trading}

The cyclical booms in investigating and enforcing laws against insider trading have led to a peculiar change in the interpretation of the definitions of insider trading. As noted in the Part I, definitions of insider trading have become much broader since the Chiarella, Dirks, and O’Hagan decisions to what they have more recently been portrayed as in the Rajaratnam case.\textsuperscript{52} These vague and uncodified definitions are only a single facet of the broader legal complications that have recently arisen in the investigation, enforcement, and sentencing of insider trading cases.

One of the less notable legal complications in recent years surrounding federal

\textsuperscript{50} Peter Jan-Engelen, \textit{An Ethical Analysis of Regulating Insider Trading}, TJALLING C. KOOPANS RESEARCH INSTITUTE (June 2006).

\textsuperscript{51} Id.

prosecution of insider trading has been the investigative efforts of the Department of Justice and the Securities and Exchange Commission. In the infamous conviction of Raj Rajaratnam of the hedge fund Galleon Group in 2009, there were parallel investigations launched by the SEC as well as the DOJ. Several problems exist with this parallel investigation pertaining to the constitutional standards set forth for fair trial.

Firstly, as both the SEC and DOJ pursued a conviction of Rajaratnam, Rajaratnam’s counsel could have claimed a violation of the double jeopardy clause early on in the process, instead of filing a short time before the decision was made. When the Securities and Exchange Commission as well as the Justice Department can pursue dual convictions of a single action by an actor, double jeopardy surely has occurred and several cases have tested the ability of such dual suits.

Another constitutional inadequacy presented in the Rajaratnam trial which may be present at other less-popularized insider trading cases is the intense wiretapping campaign by the Department of Justice. While the wiretapping was accepted by a court before it began, it is important to note that the conferral of these warrants could be intensely political instead of based in any concrete, consistent methodology. A more generalizable issue that presents itself in the investigation and conviction of insider trading cases is the non-principle popularized by George Mason University Professor of Law Donald Bordreaux in his Wall Street Journal piece. That is, if insider trading is the use of nonpublic information to profit, then all non-actions from non-material information is also technically insider trading—but, there is no way to convict these crimes. Material benefit due to inaction is perhaps just as common and as supposedly dangerous as traditional insider trading—but it is ignored by the contemporary federal securities regime. Bordreaux is correct when stating that such prosecutorial inconsistency results in an incredibly biased application of the law. This is not to suggest that Bordreaux’s conclusion to do away with insider trading regulation should be

55 Id. at 425.
56 Id.
57 Id.
58 Id. at 426.
61 Id.
62 Id.
followed, but that the SEC ought to develop a standard to regulate the inaction that is equally as unjust as insider trading.

C. Sentencing Procedure

One of the most heavily impacted facets of the legal process in the last decade, with regards to insider trading regulation, has been the sentencing and punishment of those convicted of insider trading. In light of congressional criticism of the SEC’s lack of policy initiative and legal academic opprobrium towards its use of administrative courts, the SEC has been cracking down on insider trading. Simultaneously, the severity of punishments for those crimes has increased tremendously—an extremely contentious issue given the vagueness of federal securities code in the first place. Average sentences for insider trading have undergone a significant increase in length. Sentencing procedure and its role in the current federal securities law paradigm and process carries a bifurcated legal significance.

The first of these sentencing issues concerning insider trading involves the significant amount of import that is conferred to the “loss calculation” in share prices. When insider trading convictions are made, the share prices of publicly traded companies drop drastically, creating a perception of gain by the perpetrator that is astronomically high in comparison with the price of the stock at the point of the jury or judge sentencing decision. Such misperceptions have led to fines and prison sentences that are accordingly aggrandized. The exercise below exemplifies differing sentences through a focus on loss calculation when the exact same crime is hypothetically committed:

Imagine three corporate executives who share the same positive, material, nonpublic information about the future of their corporation. Based on this information, all three buy 1000 shares of stock at five dollars per share, costing them $5000 each. The positive information is publicized four weeks later. After the fifth week, the market has absorbed the information and it is reflected in the stock price, which is now fifteen dollars per share. On this day, Officer A sells his 1000 shares, making $10,000. Officer B retains his shares until three months later, when the stock price has risen to fifty dollars per share. Officer B pockets $45,000. Officer C was not so lucky; the market crashes six months later, the stock price drops to two dollars per share.

67 Id.
68 Id.
share, and Officer C sustains a loss.\textsuperscript{69}

All three individuals are not fully culpable for selling at different points because they do not control the trends of the market, but all are charged in increasing severity.\textsuperscript{70} This article suggests a new formula or alternative be offered for sanctioning insider trading violations.\textsuperscript{71}

Secondly, inconsistencies in court sentencing procedures have led to other significant problems in biased applications of the law—often times ending in sentencing for similar insider trading offenses that are only delineated by their massive prison terms and fines.\textsuperscript{72} Loss calculation is ambiguous when it comes to insider trading because it is untraceable like the Enron or WorldCom accounting fraud.\textsuperscript{73} While accounting fraud is relatively easy to pinpoint—a Ponzi scheme would function with absolute losses that are attributable to individual institutional investors, insider trading is at the cost of the public.\textsuperscript{74} That is, cost to members of the public is difficult to delineate and attribute.

\textbf{D. Insider Trading Regulation and Market Efficiency}

In considering the feasibility of insider trading regulation, one must analyze the popular economic arguments made against the practice; it represents a core principle on both sides of the insider trading regulation debate.\textsuperscript{75}

The general warrant for those in support of insider trading regulation is a relatively simple economic principle. Those in favor of regulation posit that insider trading guarantees massive losses in investor confidence in the financial market in which it is taking place.\textsuperscript{76} The market efficiency argument for insider trading presents an effective mitigation of the economic warrants for banning insider trading.\textsuperscript{77} In fact, it posits that insider trading can make the marketplace more efficient and safer for investors by creating a statistically

\begin{thebibliography}{99}
\bibitem{70} Id.
\bibitem{74} Id.
\bibitem{76} Id.
\bibitem{77} Rikard Nystrom & Gustav Soderberg, \textit{Insider Trading—an Efficiency Contributor?}, \textit{Umeå School of Business and Economics} J. (Spring 2013).
\end{thebibliography}
significant positive effect from insider selling.\textsuperscript{78} The Atlanta Federal Reserve Bank notes that although insider trading may reduce any given corporation’s liquidity, it offers an increase in the “informational efficiency” of its stock price.\textsuperscript{79} Such conclusions are supported by vast economic data; Leland (1992) suggests that stock prices rapidly reflect information more accurately when insider trading is allowed.\textsuperscript{80} Others have pointed out that in cases when public announcements cannot confer complex economic or financial health statements of any given corporate entity to average investors, discrepancies in prices can offer a more accessible guide for buying and selling securities and other investments—an argument that falls under the traditional informational asymmetry argument in favor of regulation.\textsuperscript{81} 

However, it is important to address the viability of the investor confidence argument in a vacuum as well, as a sole economic argument for continued regulation of insider trading.\textsuperscript{82} From the preceding paragraph, it follows that investors would have increased confidence in financial markets if insider trading affects share price in a way that causes a more accurate representation of the financial health of an entity.

Insider trading could also benefit shareholders and their contractual position relative to bondholders. Many make the argument that the occurrence of insider trading and the allowance of such a practice encourages executives within corporations to take on riskier initiatives.\textsuperscript{83} However, for bondholders as well as executives, who are often paid on fixed returns, they prefer stable returns. Shareholders would have insider trading by the executives in their best interest, since such actions allow for the possibility of a higher return, and because shareholders are limited in loss by the size of their initial investment. Additionally, one might consider that top-level executives may demand increase compensation because of their restriction from trading on the firm’s advantages or losses, decreasing the amount of retained earnings available for shareholder compensation.\textsuperscript{84}

This section of the article has proposed and highlighted various issues with the

\textsuperscript{78} Id.  
\textsuperscript{81} Peter Jan-Engelen, An Ethical Analysis of Regulating Insider Trading, Tjalling C. Koopmans Research Institute (NDG).  
\textsuperscript{84} Id.
current regulatory matrix concerning insider trading as well as the trajectory of federal securities law in that area. A lack of a comprehensive moral basis for the complete ban on insider trading necessitates revision by both the SEC and legal academia. In addition to the problems with investigative and sentencing procedure as well as the market-based benefits of insider trading, the combination of issues concerning insider trading necessitates a legal review of the regulatory environment of insider trading, particularly one that is rooted in market accuracy and the legal process rather than the overgeneralized and publicly satiable conceptions of right and wrong.

III. Insider Trading Reform: Analysis in Legalization

Part I in this article clarified the history of government and private persecution of insider trading, as well as the supposed moral hazards associated with the practice. Part II suggests that contemporary insider trading regulation is problematic and inhibits the full efficacy of federal securities law while also constraining the optimal efficiency of the market. Part III will suggest possible broad-level solutions that the law bodies of the United States may take in order to assuage the problems that Part II discusses.

A. Harsh Sentencing and Criminalization

Over-criminalization is a broadly observable phenomenon in the justice systems associated with drug and violence related crimes, but little attention is paid to how such trends in the judicial system apply to those that have been accused of breaking federal securities laws. Legal regimen in the United States, and the politicians and legislators that constitute them, have an established and bifurcated incentive system that continues to unjustly increase penalties for violators of federal securities law.

The first of these incentives involves the extremely high publicity involved in arresting and convicting those alleged of insider trading. The attention surrounding the conviction of Rajaratnam of SAC Capital proves such a phenomenon perfectly. Although it wasn’t exactly clear and the trial had not begun yet, the mere act of arresting Rajaratnam

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86 Hristova, *supra* note 66.
87 Id.
88 Katya Wachtel, *The SECs Charging of Rajat Gupta Caused Such a Bitter Feud with the DOJ Mary Schapiro Had to Step In*, BUSINESS INSIDER (Mar. 11, 2011).
and the presence of federal investigators in a public manner at SAC’s headquarters sent ripples through the markets. This not only impacted the impartiality of Rajaratnam’s trial, but clearly presented an unfair motivation for his prosecutors to seek out the harshest possible penalty without properly adhering to his right to a fair trial. The fact that this incentive structure obfuscates that right is reason enough to mandate change.

Going even further, the second of these incentives for regulative harshness is through a violation of the harm principle. Without actually measuring the harm done by insider trading in a clearly quantifiable manner, many politicians and authors of federal securities law take advantage of certain societal standards of moral wrongfulness, rather than a clear and consistent rule of law or harm. Governing through emotion and shaky concepts of morality is precisely what the American justice system strives to prevent with its values of “blind justice” and “balanced scales.” Entirely subjective methods of deducing punishment and publicity-driven efforts to deprive citizens of their rights are themselves morally unconscionable, and this argument is supported by hundreds of years of judicial principle stretching back to the founding of the United States, and beyond, rather than the shifting values of modern society.

B. Clarifying Legal Vagueness

A crucial step in identifying and discerning the direction of the law and its attitudes towards insider trading is to force the legal regimen of the United States to adopt a clear and consistent standard towards the investigation, sentencing, and conviction of federal securities law. In this matter, the Supreme Court may have done better to take the case and clarify the definitions and case precedents, rather than defer to the relatively narrowly-impacting appeals court case. The Supreme Court’s recent decision to review *Salman v. United States* (2015) offers an excellent vehicle for such legal clarification. The suit concerns Bassam Salman providing insider information to his future brother-in-law without any direct personal benefit to Salman. The case has mystified Appellate courts in the United States and provides a valuable opportunity for the Supreme Court to clarify what needs to be

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90 Hristova, *supra* note 66.
93 *Id.*
proved for an individual or institution to be charged with insider trading. The case itself has divided legal academia over the definitions and procedures in determining if insider trading has occurred. In the Supreme Court’s expected decision in October of 2016, a strict and expansive definition of insider trading must be included in the definition to reflect and review the contemporary trend of insider trading crackdowns if the future of insider trading regulation is to have a more pointed, well-specified approach.

Parallel to or preceding the Supreme Court’s decision, the SEC must offer a more concise definition of insider trading that is crafted to the contemporary financial sector as well—one that specifically includes a comprehensive loss-calculation strategy that does not punish the trader for publicizing of the event. At the very least, even if it is to continue its crackdown on insider trading, it must make clear to the general public what sorts of actions constitute such a violation. In addition, a new comprehensive definition must include an answer to insider inaction, a practice which is just as legally corrupt as insider trading if one follows the SEC’s argumentation. At the very least, even if it is to continue its crackdown on insider trading, it must make clear to the general public what sorts of actions constitute such a violation.

Conclusion

This article emphasizes and highlights some of the issues that plague the regulatory environment spanning insider trading actions. A lack of moral basis for charging all insider trading exists; the court system as well as legal academia must explain and discuss why certain asymmetries in financial markets are justified by those in insider trading are not. In doing so, it can establish an extremely valuable moral bright line concerning informational asymmetries that can impact the rest of the vast expanse of federal securities law. Secondly, legal issues concerning the current iteration of insider trading conviction have been called into question. The inability to convict insider inaction and a severe propensity to increase the magnitude of already harsh sentences have been central aspects of the issues with insider trading conviction. Third and finally, this article discussed the root economic benefits of insider trading and its impacts on market efficiency—an intersectional topic that deserves significantly more research but generally concludes that insider trading creates a fairer and
accurate stock price. In focusing on three broad-level issues with current insider trading regulation, this article requests an ever-important clarification from the Supreme Court and the Securities and Exchange Commission in their imminent review of *Salman v. United States* (2015). The case provides a meaningful and opportune canvas for the Supreme Court to clarify the current iteration of insider trading law as well as set an essential regulatory trajectory concerning the issue, rather than relying on a broad interpretation of the law by the Securities and Exchange Commission and the Department of Justice. The legal system of the United States has been held to the standard of creating a valuable nexus between universal applicability and unbiased application, those two tenets must not be void from federal securities law. If we cannot manage these facets of justice in the current market, technological evolution of the markets in the future will create increasingly immense issues for the United States justice system.
Justice of Freedom:
The Supreme Court in the Civil War

Zach Sanders

“The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation.”

— Abraham Lincoln, December 1, 1862

Introduction: Prelude to Constitutional Conflict

In 1832, the United States was engulfed in a crisis, the political consequences of which would wreak the greatest havoc the relatively young country would ever see. In response to President Andrew Jackson’s issuance of the so-called “Tariff of Abominations”, the state of South Carolina voted to secede from the Union. Vice-President John C. Calhoun, speaking as the voice of philosophical logic for the secession movement elaborated in his “South Carolina Exposition and Protest” on the constitutional nature of South Carolina’s desire to secede: “The Constitution grants to Congress the power of imposing a duty on imports for revenue, which power is abused by being converted into an instrument of rearing up the industry of one section of the country on the ruins of another. The violation, then, consists in using a power granted for one object to advance another, and that by the sacrifice of the original object. It is, in a word, a violation by perversion, the most dangerous of all because the most insidious and difficult to resist.”¹ Calhoun proceeded to outline a course of action by which South Carolina would cease to be a member of the United States of America. History tells us that South Carolina’s secession was brought down in flames when Congress passed a Force Bill in 1833 to authorize Jackson’s use of military force against South Carolina’s ordinance of secession. Calhoun calls to attention a fatal flaw in the

Constitution as it stood in the early nineteenth century: it lacked the ability to reconcile regional ideologies with national priorities. As such, the Constitution’s structure made a national struggle to interpret its meaning almost unavoidable.

Such was the situation at the outset of the 1850s. The nation’s problems had reached a boiling point, having simmered since the Constitutional era. The proverbial heat increased throughout the decade, finally spilling over on April 12, 1861 with the firing on Fort Sumter. Between Calhoun’s writings of 1828 and the beginning of the war, the nation failed to come to terms with the fact that the Constitutional system was in danger. Given the nature of such fundamental, Constitutional issues, the Supreme Court would be the logical battlefield—the Court has original jurisdiction for all issues where the meaning of the Constitution forms a central legal question. However, the Constitution offered little in the way of guidance as to the course of action during a state of insurrection; the words “rebellion” and “insurrection” are mentioned in only one section within the document, and in only a single amendment.

In truth, the Court had little ground to affect meaningful influence on the course of the war as it was being charted. The Court was structurally limited in the impact its decisions could have based upon political reality, that the lower judiciary was biased towards recognizing a state of war that created a legal status-quo for the duration of the war, and that the suspension of habeas corpus and associated legal proceedings rendered Executive authority the dominant voice in the prosecution of the war. These factors combined to render the highest court in the land powerless to have an impact on the general course of the war.

This article will seek to outline the legal reasons for the Court’s lack of impact on the prosecution of the war itself, given the fundamentally Constitutional nature of the conflict. It will not examine the issues which brought the nation to conflict, but rather the legal issues present in the fighting of the war—issues which this article will demonstrate to be impossible for the Court to have resolved in a manner that would have had a dramatic impact on the conflict. We begin with the idea of judicial absence, introduced in Lincoln’s response to the *Dred Scott* decision; the structural realities preventing significant cases from meeting the Court’s standards for certiorari; and the political realities that prevented

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3 Marbury v. Madison, 5 U.S. 137, 175 (1803).
4 U.S. CONST. art. I, §9, cl. 2.
5 Id. art. I §8 cl. 15.
6 Id. amend. XIV.
Democrats opposed to Lincoln’s policies from prosecuting cases to the Supreme Court. Analysis continues in the Prize Court and elsewhere, where attempts were made to fill the Constitutional gaps in the definition of insurrection to assert that a state of war unquestionably existed, creating a climate where executive and military power was superior to judicial power. Finally, one of the central legal issues of the war, the suspension of *habeas corpus*, is examined to ascertain that executive power was a definitive check on judicial power, an issue that continues to vex the nation today as the executive continues to expand its power in situations beyond the accepted constitutional categories of war and rebellion.

**I. Introducing the Idea of Judicial Absence**

Analysis of the Court’s lack of involvement begins with examining circumstances surrounding the judicial climate prior to the Civil War. Such an examination will reveal that both political implications, systemic factors, and political realities combined to create a minor role for the Court from even before Lincoln’s election in 1860.

*A. Dred Scott v. Sandford and the Precedent for Judicial Irrelevance*

As the political climate of the 1850s approached its tipping point, Chief Justice Roger B. Taney authored the Supreme Court’s decision in *Dred Scott v. Sandford.* The decision, broad and inflammatory in nature, was irrelevant to the fighting of the war itself, but the fallout following the release of the decision set an important precedent for Abraham Lincoln’s attitude towards the Court, its decisions, and his executive conduct during the war. Taney noted the impossibility of “introduc[ing] a new member into the political community created by the Constitution of the United States” who was “intended to be excluded from it.”

Taney’s opinion established the doctrine that not only can an African-American not be a citizen of the United States, but that states do not have the right to legislate to change their citizenship status: “The enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.” Arguably, this was the legal tipping point for the war, the

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7 Dred Scott v. Sandford, 60 U.S. 393 (1857).
8 *Id.* at 406.
9 *Id.* at 410.
action which forced the public conscience to reconcile itself to a confrontation of a generations-old issue. The Court had “shown a sense of courageous responsibility, in striking contrast with the protracted equivocation of Congress.”\textsuperscript{10}

Nonetheless, political actors rejected Taney’s perception of judicial power. In an address to the people of Springfield, Illinois, Lincoln commented on the emptiness of judicial power when jurisprudence flies so blatantly in the face of national preference. He deconstructs Taney’s legal argument against the citizenship of the Scott family: “We desired the court to have held that they were citizens so far at least as to entitle them to a hearing as to whether they were free or not; and then, also, that they were in fact and in law really free.”\textsuperscript{11} He refers to Andrew Jackson’s veto of the Bank Act to question the authority of the Court in making a decision contrary to the beliefs of much of the country and, in reality, the legislature: “Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled.”\textsuperscript{12} Lincoln, albeit dangerously, was citing the contemporaneous climate of compromise, wherein legislators were debating within the paradigm that they must determine where and when slavery will be legal, the center of much of the preceding ten years of congressional drama.

In making such a declaration, Lincoln brought the question of judicial power to the center of the antebellum debate. His thoughts predisposed his presidency to a prioritization of executive power over judicial power. Lincoln’s condemnation branded Taney’s decision as a defamation of the Declaration of Independence. Lincoln claims the document “is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from the grave, they could not recognize it.”\textsuperscript{13} Lincoln would never forgive the Court for this gross distortion of the American foundation. His faith in “an impartial, rational judiciary was shaken”, and he would never again “give deference to the rulings of the Supreme Court.”\textsuperscript{14} His views as stated here will come to manifest themselves, where Lincoln ignores Taney’s rejection of executive authority to suspend the writ of \textit{habeas corpus}.\textsuperscript{15}

In the interim between 1857 and 1863, Lincoln’s statements in Springfield set a

\textsuperscript{10} \textit{Impending Crisis}, \textit{supra} note 2, at 285.
\textsuperscript{11} Abraham Lincoln, \textit{Speech at Springfield, Illinois} (June 26, 1857).
\textsuperscript{12} \textit{Ibid}.
\textsuperscript{13} \textit{Ibid}.
\textsuperscript{14} \textit{David Herbert Donald, Lincoln} 201 (Simon & Schuster, 1995).
\textsuperscript{15} \textit{Ex parte Merryman, 17 F. Cas. 144} (1861).
pattern for the Republican establishment to reject Taney and the Court’s authority. Republicans thereafter utilized the existing judicial system to ensure that the Court was limited wherever possible.

B. Structural Realities Limiting the Court’s Power

An initial assessment would draw the conclusion that the length of the war and the speed at which relevant rulings would have been necessary would render the judiciary entirely powerless to exert meaningful influence.\textsuperscript{16} However, this falls short of explaining the lack of judicial impact. In fact, cases such as \textit{Kneedler v. Lane},\textsuperscript{17} the many Prize Court matters heard by the Court as the \textit{Prize Cases},\textsuperscript{18} and the infamous \textit{Ex parte Merryman},\textsuperscript{19} all were wartime matters that rose quickly enough in the Federal system to be heard during the war. Rather, the appellate system as dictated by the Judiciary Act of 1789 and decades of precedent imposed systemic boundaries to the ascension of relevant war powers cases to the Supreme Court. When such cases were indeed granted \textit{certiorari}, the Court’s decisions were either pro-Republican or narrow in scope.

The Federal Judiciary Act of 1789\textsuperscript{20} lays the foundation for the structure of the judicial system of the United States. Congress acted “as it [saw] fit” to establish an arm of the federal government to enforce federal laws within the states.\textsuperscript{21} The system is relatively straightforward: there will be a system wherein the United States is divided into thirteen Districts and three Circuits; two Supreme Court justices will sit on the bench in each Circuit, and there will be a District Judge for each District.\textsuperscript{22} Deeper lies the statutory provision which allowed Republicans sitting in state supreme court positions to prevent potentially strategy-damaging cases from reaching the Supreme Court:

\textit{And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the

\textsuperscript{17} \textit{Kneedler v. Lane}, 45 Pa. 238 (1863).
\textsuperscript{18} \textit{Brig Amy Warwick}, 67 U.S. 635, 68 (1862).
\textsuperscript{19} \textit{Merryman}, 17 F. Cas. 144.
\textsuperscript{21} \textit{U.S. Const.} art. III, §1.
\textsuperscript{22} 73 U.S.C. §2-4 (1789).
ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity […] may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error… 23

In other words, the Supreme Court could hear any appeal of any decision by the highest court of any state, provided that such a decision struck down a federal action, while a state court’s approval of a federal action could not be appealed to the Supreme Court. 24 This provision, now buried deep in the annals of a nearly 100-year old act, “had a more significant effect on the constitutional history of the Civil War than Roger B. Taney.” 25 In effect, it barred Taney and any Democratic allies he had on the bench from hearing party-sponsored appeals from state court decisions which upheld the validity of a federal law or action.

Such was the case in Kneedler v. Lane, 26 a Pennsylvania Supreme Court challenge to the Enrollment Act 27 for which the U.S. Supreme Court denied certiorari under the auspices of §25. 28 The Pennsylvania court originally ruled against the Act, which would have made it eligible for consideration by a petition for a writ of certiorari. But the Republican Justice Daniel Agnew rose to replace Chief Justice Walter H. Lowrie, a Democrat, precipitating a pro-Republican ruling in the case. 29 Such a ruling, in favor of the Conscription Act, invoked stare decisis. Thus, the decision could not be appealed to the Supreme Court. The Kneedler situation represented the first layer by which the Supreme Court was limited in its ability to hear war powers cases that could have had an impact on the shape of the war. While such situations arose throughout the war, the Republican success at keeping potentially decisive cases out of the highest levels of the judiciary constituted politically motivated denial of certiorari.

C. The Politically-Motivated Denial of Certiorari

Besides acting within judicial tradition to keep relevant cases out of the Supreme Court’s jurisdiction, the system also worked to exclude cases on grounds of political exigency. The case of former Ohio Representative Clement Vallandigham is one such

23 Id. §25.
25 Id. at 229.
26 Kneedler, 45 Pa. 238.
28 Kneedler, 45 Pa. at 238.
29 Strangely Insignificant Role, supra note 24, at 229.
instance. Mr. Vallandigham gave speeches in the Military Department of Ohio in violation of General Ambrose Burnside’s Field Order No. 38 and was subsequently arrested and tried by a military tribunal. Mr. Vallandigham sued for a writ of *habeas corpus*, but his claim was denied by Justice James Moore Wayne—a Georgia Unionist who fiercely opposed secession but nonetheless remained a stalwart ally of Chief Justice Taney. Wayne would come to set the jurisprudential model for military cases tried in civil court throughout the war.

Justice Wayne denied certiorari by way of a brief opinion, in which he cites *U. S. v. Ferreira.* Incidentally, Chief Justice Taney wrote in *Ferreira* that “the powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States.” Wayne ironically uses Taney’s opinion to elaborate that the power of a military commission “involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission.” Justice Wayne thus asserts that the Supreme Court has no jurisdiction in trying cases that originated in military court. In other words, Wayne shoots the Court in the foot with regard to ruling on the constitutionality of military/civilian interactions. Wayne utilized his position as a Justice of the Supreme Court to create this judicial doctrine. *Stare decisis* prevented further military tribunal cases from being appealed to the Supreme Court for at least the duration of the war, creating another barrier for Democrat-sponsored judicial protests to wartime executive policy.

Another *habeas corpus*-related case that would serve to play a part in political limitations on the Court’s power came before *Kneedler*, in 1862. *In re Kemp* was a Wisconsin Supreme Court case which arose in response to the 1862 militia draft. Wisconsin Chief Justice Luther S. Dixon recognized Lincoln’s intentions to defend the safety of the Union but nonetheless condemned Lincoln’s actions in suspending the writ of *habeas corpus* as unconstitutional. However, he noted that the issue of civil liberties must be decided by the

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30 Ex parte Vallandigham, 68 U.S. 243 (1863).
31 United States v. Ferreira, 54 U.S. 48 (1851).
32 Id.
33 Vallandigham, 68 U.S. at 252.
34 In re Kemp, 16 Wis. 359 (1863).
35 *Strangely Insignificant Role*, supra note 24, at 219.
Supreme Court of the United States, not the Wisconsin Supreme Court, and issued his decision against suspension as “preliminary and not final”, a preparation “for the determination of the court which can alone settle the law.” Despite Dixon’s intentions, his opinion was based on the assumption that the Lincoln administration would appeal the case, an assumption that failed to account for the actors involved in making such a decision.

US Attorney General Edward Bates was prepared to execute the appeal, much as Dixon foresaw, until Secretary of War Edwin Stanton advised him against it. In a letter written on January 31st, 1863, Stanton expressed his opinion that appealing the decision would certainly result in a decision antagonistic to the administration’s strategy:

We know that the party of political thinkers with whom the majority of the Court affiliate are entirely or very nearly unanimous in the expression of their opinion against the power assumed by the President, and so far as I am informed, we have no evidence that any one of that majority dissent[s] from that party on this question. Many loyal men deny this power to the President, and, however confident we may be that he possesses it, it is no imputation on the loyalty of the majority of the Court to presume that on this point they agree with their political school.

Stanton argues that, while Justice Wayne and others support the administration’s efforts, a majority of the current composition would side with Taney and his Merryman decision. The difference would lie in the legitimacy of each respective decision: while Merryman was a federal case decided by Taney “at chambers”, a Supreme Court decision in In re Kemp would be decided by the full Court, a judicial mandate much more difficult for Lincoln and his administration to ignore than a decision of the Chief Justice issued in his capacity as a Circuit Court Judge. Stanton advocated for political expediency, pointing out that it is far easier for the administration to ignore a state court ruling than to bring a case before the Supreme Court on principle and lose, as a decision against the administration would undoubtedly be used by the Democrats “to divide and weaken the loyalty of the country.”

Bates was thus convinced to refrain from responding to Dixon’s ploy. In re Kemp is

36 Kemp, 16 Wis. at 359.
37 Strangely Insignificant Role, supra note 24, at 221.
39 Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).
40 Strangely Insignificant Role, supra note 24, at 222.
41 Letter by Attorney General Bates, supra note 38, at 264.
hardly remembered as a landmark case in American jurisprudence, but its advent represents an important facet in the discussion of judicial power in wartime. Ultimately, the administration sought to act in a manner most conducive to actualizing its wartime policies. This logic might suspend considerations that would otherwise be expected of an administration, such as the appeal of a state supreme court decision against the federal government. Such was the nature of the judiciary in the throes of a constitutional crisis: The Supreme Court was excluded from decision-making that could affect the war through all possible channels.

II. The Existence of War: Why the Court’s Involvement Was Categorically Unnecessary

The existence of a state of insurrection meant that the Court had no reason to be involved in major decision-making, especially with regards to the most important civil liberties issue of the war: the suspension of the writ of Habeas Corpus. This suspension and the Court’s response will be discussed below, but the discussion must be preceded by a firm establishment of the legal existence of a war.

Johnson elaborates on the necessity for legally establishing the paradigm of war at this juncture:

In the nineteenth century, ‘war’ had two meanings. One was popular or material, the other legal. The first connoted a large-scale organized military conflict; the second was a condition rooted in the law of nations and carrying with it fairly definite rights and obligations. There was no doubt that the events following the attack upon Fort Sumter eventually constituted a war in the popular sense. But what was its legal nature?

Such was the nature of the United States’ constitutional conflict. The judiciary would be tasked with determining the conflict’s nature. But while doing so, it would prove how little power it possessed to influence the conflict’s course.

A. Constitutional Basis for Executive Authority in War

Two constitutional provisions are relevant to the discussion of war-making in the United States. First, the Congressional War Powers Clause: Congress has the power “to

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declare War, grant Letters of Marque and Reprisal, and make Rules concerning captures on Land and Water." Despite the Constitution granting the right to declare war, it fails to address what constitutes a state of war in the case of rebellion. Consequently, where explicit constitutional provisions fail to accommodate circumstances, judicial opinion must interpret the founding principles. Chief Justice John Marshall did just this with regards to war-making powers. Writing for the Court, in *Rose v. Himely*, Marshall instituted the concept of "sovereign and belligerent rights" in wartime. The decision established that when a sovereign power declares war against an opposing belligerent, the former cannot commit aggression against the latter without violating the latter's belligerent rights. This chain of logic applies throughout the argument regarding the existence of state of war. According to Marshall's test, by firing on Fort Sumter, the South granted Lincoln and the Union "sovereign and belligerent rights as against the enemy." This gave Lincoln, as the President and Commander-in-Chief, the ability to proceed under the auspices of war because the rebellious Confederacy fit Marshall's standard for belligerency.

The second relevant provision is the *Habeas Corpus* Clause: "The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Besides the clause's centrality to the discussion of civil liberties, the clause is the only place in Article I where "rebellion" is mentioned. Although Article I might indicate that this power would automatically be a Congressional power, there are no specific provisions to declare when a state of rebellion exists. Again, Marshall's opinion in *Rose v. Himely* dictates the justification for the existence of a state of war: by attacking Fort Sumter, the Confederacy automatically granted the Union rights as a belligerent power.

The Civil War represents a legal quagmire because the Constitution says so little about when a state of insurrection exists. Lincoln inherently needed to be contradictory at some point in his policymaking: he could not be against the notion that a war existed if he was to justify his actions in treating the South as a belligerent. He relied upon what the

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43 U.S. CONST. art. I, §8, cl. 11.
44 *Marbury*, 5 U.S. at 177.
45 *Rose*, 4 U.S. at 273.
46 *Id.* at 274.
47 *Id.* at 273.
48 U.S. CONST., art. I, §9, cl. 2.
49 *Rose*, 4 U.S. at 273.
Constitution did say, which allowed for the suspension of habeas corpus in a state of rebellion, though it left ambiguous who could affect that suspension. This article will address this issue later. For now, we must acknowledge that the Constitution fails to delineate exactly when a state of rebellion exists.

The existence of a state of insurrection became important after the ratification of the Constitution; the Militia Act of 1795 confirms that insurrection grants the Executive extraordinary powers. The statute reads, “and in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection.” Marshall’s ruling was made within the context of this law: if the standard for belligerency is met, the Executive has the authority to act upon his powers as Commander-in-Chief.

**B. Connecting Legality and Reality: Why De Facto Triumphs Over De Jure**

On April 19th, 1861, Abraham Lincoln declared a blockade of Southern ports “whereas an insurrection against the Government of the United States has broken out in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, [and] Texas.” The declaration of a blockade created the legal fodder for the de facto state of war which allowed the executive to skirt the authority of the court; by declaring a blockade, Lincoln “entered the realm of international law by claiming certain rights vis-à-vis other nations, rights that existed only in war. This guaranteed that the question of the nature of the war would come into the Federal courts, and with it the right of the president to initiate war.” Situational expedients dictated that the Confederacy must be considered a belligerent under international law in order to justify the blockade and the execution of war-related actions.

Shortly after the declaration, federal courts were inundated with appeals from cases in prize court where ships were seized on blockade-related grounds. The following cases all were of this category; they all, however, arrive by some logic at the conclusion that

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50 Id. at 273.
51 Militia Act of 1795, Ch. 36, 1 Stat. 424 (1795) at §1.
52 Declaring a Blockade of Ports in Rebellious States, Proc. 81, April 19, 1861.
53 Prize Cases Revisited, supra note 42, at 209.
54 Id. at 216.
55 Id. at 209.
regardless of whether or not Congress has issued a formal declaration, a state of war existed which afforded the Executive belligerent rights. This affirms that *de facto* triumphs over *de jure*, the Court did not need to affirm a state of war because circumstances dictated that such a status already existed. In 1863, the Court’s Republican--leaning majority would consolidate the Federal opinions into a judicial declaration of status quo.

From the outset, the prize cases asserted that the judiciary need not comment on the matter of the war’s existence. The earliest such case arose in 1861 with *The Tropic Wind*, in which a British schooner was seized when cargo was loaded after the April 19th declaration.56 Judge James Dunlop of the Southern District of New York utilized the Militia Act of 1795 and cases from the Mexican War to assert the legality of the blockade; his logic concludes that since a blockade could only exist in a state of war, and Lincoln had declared a blockade, a state of war existed and the blockade was lawful.57 He cites *Rose v. Himely* to claim that the United States had “sovereign and belligerent rights as against the enemy.”58 Most importantly, Dunlop argues that there is no difference between “belligerent rights in civil and foreign war”, that the executive branch alone can make the decision as to whether such a status existed, and that from the perspective of the judiciary, the matter must be regarded as concluded.59 Dunlop’s reasoning is the first piece of a grand tautological affirmation of the executive’s wartime authority.

May of 1861 saw *The Parkhill* captured off the coast of Charleston, South Carolina, attempting to make landfall.60 The schooner was libeled before Judge John Cadawaler of the Eastern District of Pennsylvania, who stated that “the present proportions of the contest resemble those of a general war.”61 He argues that the Mexican war had begun when troops crossed the Rio Grande, and cites Dunlop in *Tropic Wind* to reassert the principle that there was no difference between a foreign and civil war as far as belligerent rights are concerned.62 He also mirrors Dunlop’s circular blockade logic: because there was a blockade, there must have been a war.63 Cadawaler further attempts to codify the *de facto* existence of as state of war by drawing further parallels between the Mexican War and the Civil War:

56 *The Tropic Wind*, 28 F. Cas. 218 (1861).
57 *Id.* at 220.
58 *Rose*, 4 U.S. at 273.
59 *Tropic Wind*, 28 F. Cas. at 221.
60 *The Parkhill*, 18 F. Cas. 1187, 2 (1861).
61 *Id.* at 1.
62 *Id.* at 21.
63 *Id.* at 45.
Congress happened to be in session and "thereupon declared that, by an act of Mexico, a state of war existed between her government and the United States. If no such law had been enacted, there would, not the less, have been war with Mexico. The president must, then, as commander in chief of the army and navy, have directed its prosecution conformably to the rules of public law... The case of a civil war is practically the same.\footnote{Id. at 47.}

When troops were killed across the Rio Grande earlier in the 19th century, a \textit{de facto} state of war existed. Cadawaler’s opinion leaves the executive with the power to decide “when there is a war and what should be done about it”\footnote{Prize Cases Revisited, supra note 42, at 211.}—effectively eliminating the need for judicial discussion.

\textit{The Hiawatha} and \textit{The Crenshaw}\footnote{The Hiawatha, the Crenshaw, 12 F. Cas. 95, 4 (1861).} represented the first instance where Dunlop’s logic is inverted; rather than asserting that the war is justified by the existence of a blockade, District Judge Samuel R. Betts argues that the blockade is justified by the existence of a war.\footnote{Id. at 212.} Betts brings relevant documents to the Court’s attention, such as the secession documents of South Carolina, to confirm that insurrection amounted to war.\footnote{Id. at 4.} He proposes a doctrine of wartime property seizure, arguing that “citizens of the United States levying war against the United States are enemies of the government, notwithstanding their residence within the Union; and the property possessed and held by them thus becomes property of the enemy of the government, subject to confiscation when arrested at sea.”\footnote{Id. at 100-101.} In the face of the claimant’s challenge to the President’s ability to change the status of the insurrection to a war \textit{jure genitum}, Betts dates the start of the “flagrant civil war”\footnote{Id. at 23.} to when the Confederate states each individually seceded from the Union.

The next month, Judge William Giles of the Maryland District Court directly tackled the question: “Did the nature of the conflict justify the United States in claiming the belligerent rights sanctioned by [the law of nations]?”\footnote{Prize Cases Revisited, supra note 42, at 212.} Giles cites Philemore’s \textit{Commentaries} for the standard to determine the answer to the question: “In the case of a civil war, the English law furnishes a good criterion as to whether the country is to be considered at peace or at war – that whenever the king’s courts are open it is a time of peace, in judgment of
In applying this standard, Giles observes that since “the federal courts are closed in the Southern states, there is a state of civil war. And the government is remitted to its belligerent rights...to be observed by both parties in every civil war.” The ship in question, The F.W. Johnson, was restored to its owners on procedural grounds, but Giles asserts his legal justification for the existence of war.

The final federal case argued prior to Supreme Court’s ruling on the Prize Cases in 1863 arose with the capture of The Amy Warwick in 1862. Judge Peleg Sprague of the District of Massachusetts sends a pointed message to those who would argue against the existence of war:

A traitorous confederation, comprising several organized states, after seizing by force several forts and custom-houses, attacked a fortress of the United States garrisoned with its soldiers, under the sanctity of its flag, and by superior military force compelled those soldiers to surrender, and that flag to be lowered. This was war, open, flagrant, flagitious war; and it has never ceased to be waged by the same confederates with their utmost ability.

Sprague’s opinion encapsulates the climate of the judicial establishment throughout the early part of the war. Dunlop, Cadawaler, Betts, Giles and Sprague all concur that a war existed, and the Executive had the right to prosecute it. It would be for the Supreme Court to decide whether or not such a judgment was consistent with the Constitution.

C. The Prize Cases: Squandered Judicial Opportunity

The preceding cases all offer the same conclusion, that Lincoln was within his power as the Executive to act on the imminent danger to the country, thus demanding that neutral nations grant the Union belligerent rights under international law. This conclusion came about through varied chains of logic, however, thus bringing the prize issue under the purview of the Supreme Court. Justice Samuel Nelson, in his capacity as Circuit Court Judge, offered a limited ruling in 1863 when the cases of the Hiawatha, Crenshaw, Amy Warwick, and the Brillante were brought before him. Nelson affirmed the decisions of the lower courts, but facilitated an oral argument before the Supreme Court in 1862, as less-structured procedures at the time permitted. Incidentally, by this time, Lincoln had been able to appoint three

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72 PHILLEMORE, ROBERT SIR. COMMENTARIES ON INTERNATIONAL LAW, V. 3. 740 (1856).
73 United States v. The F.W. Johnson, 25 F. Cas. 1232, 1233 (1861).
74 The Amy Warwick, 1 F. Cas. 799, 6 (1862).
staunch Republicans to the bench—Noah Haynes Swayne, Samuel Freeman Miller, and David Davis.75

The Prize Cases combined the aforementioned libel issues into an omnibus decision; Justice Robert Grier delivered the opinion of the Majority. The opinion attempts to answer two central questions: 1) “Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on principles of international law, as known and acknowledged among civilized States?” 2) “Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as ‘enemies’ property?”76

Grier answers “yes” to both questions. He cites Marshall in Rose v. Himely, “It is not intended to say that belligerent rights may not be superadded to those of sovereignty.”77 By firing on Fort Sumter, the South had declared itself a belligerent. As such, the Union had belligerent rights with respect to its treatment of the South. But furthermore, as follows Grier’s interpretation of Rose, the Union, as the original sovereign, had sovereign rights, thus permitting the North to seize the property of the South merely by association.78 This assertion dates far back in the annals of international law; in Grier’s view, “The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.”79 His declaration is unequivocal: The United States was at war. Grier’s reading of the Militia Act of 1795 is in concurrence with that of Marshall in Rose: that the President, acting as the Commander-in-Chief, has the power to respond to crisis as he sees fit, to call together the armed forces of the nation, to respond to an imminent threat, and to exert the right of confiscation.80 Jus belli dictates that in order for a vessel to be seized under belligerent rights, war must exist de facto.81 The practical reality that a war existed was not a matter of debate; the battery in Charleston Harbor fired on Fort Sumter on April 12, 1861.82

75 Prize Cases Revisited, supra note 42, at 215.
76 Id. at 216
77 Rose, 4 U.S. at 272
78 Brig Amy Warwick, 67 U.S. 635, 68 (1862).
79 Id. at 71.
80 Id. at 63.
81 Id. at 56.
and a blockade was declared on April 19th, 1861.\textsuperscript{83} Thus, it is not, as Grier argues, for Congress to legislate on how the Executive responds. The situation was a crisis, and Lincoln had the authority to treat it as such.\textsuperscript{84}

Grier broke no new ground with his decision; his logic, in its near entirety, followed similar logic to the appellate claims. But the \textit{Prize Cases} opinion was inherently important because of its jurisprudential impact. Whereas lower court opinions have limited institutional value vis-a-vis the Executive, the rulings of the Supreme Court dictate the law of the land.\textsuperscript{85} Finally, the Court had the opportunity to affect the course of the war: if the blockade had been declared unconstitutional, public sentiment, at a wartime low in the wake of the Union losses at Antietam,\textsuperscript{86} could have gone strongly against the Union government. Despite the limited historical acknowledgement of the \textit{Prize Cases} and their significance, the ruling could have had a more profound impact on the course of the war. Edwin Stanton’s comments in his January 31, 1861 letter are retroactively relevant; the appeal of the \textit{Prize Cases} to the Supreme Court was precisely the judicial disaster that he predicted. Like the hypothetical appeal of \textit{Kneedler v. Lane}, the \textit{Prize Cases} could have created a situation where the Supreme Court ruled in such a fashion that the Executive Branch could not ignore without significant legal consequences.\textsuperscript{87} This was the Court’s opportunity to curb the power of the Executive by declaring his first wartime measure unconstitutional. But, once again, the inherently conservative construction of the judiciary hindered such a coup.

By solidifying the logic of the lower courts, Grier succeeds in clarifying the judicial stance on the existence of war. By doing so, he maintains the status quo. This was a strong declaration of executive power, and perhaps a strong rebuke of judicial power. But for Stanton to not express alarm in Grier’s handling of the majority opinion is intriguing; Grier was a man at odds with himself in his judicial opinions, having concurred fiercely with Taney in \textit{Dred Scott}.\textsuperscript{88} History has not revealed Grier’s motives for handing the Union such a strong judicial victory, but without question, the \textit{Prize Cases} present a remarkable instance in which the Court had the opportunity to make a wartime decision which could have affected the

\begin{itemize}
  \item \textsuperscript{83} \textit{Impending Crisis}, supra note 2, at 554.
  \item \textsuperscript{84} \textit{Amy Warwick}, 67 U.S. at 55.
  \item \textsuperscript{85} \textit{Marbury}, 5 U.S. at 179.
  \item \textsuperscript{86} \textit{Battle Cry of Freedom}, supra note 82, at 544-545.
  \item \textsuperscript{87} \textit{Letter by Attorney General Bates}, supra note 38, at 264.
\end{itemize}
course of the war. That it did not is a testament to the realpolitik conclusion that the Court must have recognized its inherent wartime shortcomings. Such qualities would only stand to be highlighted in the venue of civil liberties during the war.

III. Suspending the Writ: Executive Power Wins the Day

Jurisprudence ultimately was a sharp rebuke of judicial power when it came to affecting lasting change on the war through the lens of civil liberties. The argument over the suspension of the writ of habeas corpus culminated with Roger Taney’s opinion in Ex parte Merryman, but the irrelevance of the opinion had been established long before it was released. Foundational constitutional principles had set the ideological course in the late 18th century for American thought towards suspension as a power to be exercised by the Executive in the case of such a crisis as rebellion.

A. Constitutional Commentary on Suspension

The Constitution offers only a single provision regarding the suspension of the writ of habeas corpus. This necessitated a fair amount of ideological jockeying to legitimize the passage of the Habeas Corpus Act of 1863. Foundational documents indicated that suspension was placed in the Constitution as a method for the Executive to exercise emergency powers, not for the Congress to vote for suspension as they might under normal circumstances. Records of the Constitutional Convention also indicate that most members of the convention were aware of the considerable authority that the Suspension Clause would invest in the executive in the event that suspension were to be called into effect.89

It was apparent that the framers of the Clause fully imagined it to be utilized in such a manner as Lincoln would use it in the early years of the Civil War. Shays’ rebellion, the series of 1786-87 Massachusetts farm protests led by Revolutionary War veteran Daniel Shays in response to delayed wartime pay, was the original inception for the suspension debate during the Convention. The Massachusetts government needed to suspend the writ in order to maintain the peace during the insurrection, with the goal of maintaining peace throughout the Commonwealth.90 This Confederation-era suspension was an important model to the framers for how suspension would work under the federal system, and as such

89 Amanda L. Tyler, Suspension as an Emergency Power, 118 YALE L.J. 600, 627-630 (2009).
90 Id. at 625.
stands as an important model for Lincoln’s actions “four-score and seven years” later. Alexander Hamilton points out in Federalist Number 28 that “[a]n insurrection…eventually endangers all government.”91 Such was the mentality that pervaded Convention discussions of the clause. Amanda Tyler writes, “Whether for or against the Clause, those taking part in the debate appear to have understood that a suspension would vest considerable discretion over individual liberty in the executive.”92

Hamilton comments again on the Suspension Clause in Federalist No. 84 to reinforce that the suspension of habeas corpus is anathema to British law upon which American law would come to be largely based; yet, Blackstone writes, “sometimes even this [the suspension of the writ of habeas corpus] may be a necessary measure.”93 It is Blackstone himself who labels habeas corpus as the “bulwark of the British constitution”,94 but he acknowledges that in order for the constitution to succeed at its goal of protecting its citizens, the constitution must be properly equipped to enable action in times of crisis. Thus, the habeas corpus clause found its way into the Constitution of the United States.95 Its inclusion should not belie the fact that exercising the provisions of the clause is a monumental measure.

As has been argued above, where constitutional provisions stop, Federal statutes and jurisprudence must fill the gaps. The Federal Judiciary Act addresses the Constitution’s failure to directly address the questions of who can suspend habeas corpus and when suspension can be executed. Section 14 reads:

That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.96

91 THE FEDERALIST NO. 28 (Alexander Hamilton).
92 Suspension, supra note 89, at 630.
93 THE FEDERALIST NO. 84 (Alexander Hamilton).
94 Id.
95 U.S. CONST. art. I, §9, cl. 2.
96 Judiciary Act of 1789, ch.20, §14, 1 Stat. 73 (1789).
As such, the Federal courts had original jurisdiction in *habeas corpus* claims. The Act, however, fails to define exactly who has the authority to issue writs, and in what situations. Marshall offers judicial guidance with regards to jurisdiction in *Ex parte Bollman*: “Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.” In other words, the Supreme Court can only have jurisdiction in cases that fall under the purview of the Court’s appellate jurisdiction, and thus, the Court can only rule on cases that come before the bench through the Federal system, except for the rare appeals from State courts. Taken in conjunction with Marshall’s assertion in *Marbury v. Madison* that Congress cannot expand the Court’s original jurisdiction, *habeas corpus* jurisdiction is thus stationary until the *Merryman* decision.

This status quo presented a problem with the advent of the war and relevant military trials. It was the wont of the Army to execute Lincoln’s orders, but prisoners who sued for writs of *habeas corpus* had no legal remedy when under military custody, consistent with the Judiciary Act and Marshall’s opinion in *Bollman*. Interestingly, this issue was not wholly unnoticed by the judiciary. Judge Samuel Treat issued a writ of *habeas corpus* in response to a petition from Emmett McDonald, a Missouri militia commander who worked to gather arms for the state’s secessionist governor, but General William Harney of the Department of Missouri refused to produce McDonald, claiming that the circumstances of war exempted his military operations from federal jurisdiction. Treat’s opinion “established the jurisdiction of his court over habeas petitions from persons detained by the military.” He refers to the writ as a sacred provision which the Court must liberally support, referring, like Hamilton, to the operations of the courts of England. He writes, “They expound the exercise of the power benignly and liberally in favor of the deliverance of the subject from all unlawful imprisonment; and when restrained of his liberty, he may appeal to the highest common law court in the kingdom to inquire into the cause of it.” Treat comes to the conclusion that the Judiciary must always be working to expand its jurisdiction. If the Judiciary accedes to

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97 Ex parte Bollman, 8 U.S. 75, 93 (1807).
98 Judiciary Act, 1 Stat. 73, at §25 (1789).
99 Bruce A. Ragsdale, *Ex parte Merryman and Debates on Civil Liberties During the Civil War* 16 (Federal Judicial History Center, 2007).
100 Id. at 17.
101 In re McDonald, 16 F. Cas. 17, 47 (1861).
Marshall’s views, Treat argues, “the liberties of the people are hopelessly at the mercy of all lawlessness and violence, whether exerted by the arbitrary will of one man or many, whenever the oppressor acts under color of the authority of the United States—a condition worse than ever known in England since the days of Magna Carta, and wholly incompatible with the idea of civil or constitutional liberty.”

Treat’s advocacy did little for McDonald, ultimately. Nonetheless, his opinion raised an important point for the Democratic opposition to Lincoln’s actions, that the Federal judiciary should be understood to have jurisdiction over the issuance of writs of *habeas corpus* regardless of whether or not the prisoner is held in federal or military custody. His proposition flies in the face of decades of jurisprudence; moreover, the traditional appellate process would have prevented his opinion from being considered for certiorari before the Supreme Court. But Treat highlights the issue of jurisdiction that the civil liberties debate is centered on: Who can say when a writ can or cannot be issued? Taney would attempt to answer this question where Treat could not mere days later.

B. Merryman and Afterwards: Executive Confirmation of Judicial Stagnancy

In April of 1861, John Merryman was arrested at his Baltimore County home. Merryman, a secessionist cavalry lieutenant, contributed to the destruction of bridges and railways, an effort aimed at preventing federal troops from being transported through the city of Baltimore. In late May, he filed for a writ of *habeas corpus*, granted by none other than Chief Justice Roger B. Taney in his capacity as Circuit Court Judge. The marshal sent to collect Merryman was denied entry to Fort McHenry, where Merryman was being held; General George Cadawaler, the ranking officer of the McHenry garrison, cited Lincoln’s April 27th suspension of the writ for the department of Maryland. The marshal returned to Taney empty-handed, and Taney began drafting his infamous opinion.

At its most basic, Taney’s ruling in *Ex parte Merryman*—issued as a Supreme Court justice “at chambers” in Baltimore—was a refutation of the logic that the Executive had the authority to suspend the writ of *habeas corpus* by pointing out that the Suspension Clause is located in article I of the Constitution:

> It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and

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102 Id. at 79.
103 *Battle Cry of Freedom*, supra note 82, at 287-288.
prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.\textsuperscript{104}

The Sixth Amendment, Taney points out, guarantees a right to “be informed of the nature and cause of the accusation,”\textsuperscript{105} invalidating any attempts to rob the accused of these rights—after all, the rights in the Bill of Rights were enumerated because their importance, according to eighteenth-century proponents, began and ended with inviolability.\textsuperscript{106} Further, Taney refers to Art. II, §3 as a limiting clause for the Executive in this situation—“he shall take care that the laws be faithfully executed.”\textsuperscript{107} Were the Executive to be responsible for decisions affecting the rights of his constituents, Taney argues, the language of Art. II §3 would be vastly different.\textsuperscript{108} Moreover, according to Taney, the Executive does not have the authority to arrest civilians through military officers without sanctions from civil courts, nor can it hold a prisoner indefinitely without trial.\textsuperscript{109}

The actual legal significance of the \textit{Merryman} decision is far overblown. It was not published as an opinion of the Supreme Court, which would carry weight as national jurisprudence for every level of the judiciary, but rather an opinion of the Circuit Court of the District of Maryland—an opinion which, as such, carries weight as practical jurisprudence for the appellate level and lower.\textsuperscript{110} Taney had none of the clout of the Supreme Court to support his ruling, nor was any petition for certiorari documented. Historiography grants \textit{Merryman} the status of a “landmark case”, whereas Lincoln’s response would attribute no more significance to the case than a pesky fly to be duly swatted.\textsuperscript{111}

On July 4\textsuperscript{th}, 1861, Lincoln indicated such before Congress:

\begin{quote}
It was not believed that any law was violated. The provision of the Constitution that ‘the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it’ is equivalent to a provision—that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. It was decided that we have
\end{quote}

\textsuperscript{104} \textit{Merryman}, 17 F. Cas. at 147.
\textsuperscript{105} U.S. CONST. amend. VI.
\textsuperscript{106} \textit{Merryman}, 17 F. Cas. At 150.
\textsuperscript{107} \textit{Id.} at art. II, §3.
\textsuperscript{108} \textit{Id.} at 11.
\textsuperscript{109} \textit{Id.} at 10.
\textsuperscript{110} LINCOLN, supra note 14, at 299.
\textsuperscript{111} \textit{Id.} at 304.
a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.\footnote{Abraham Lincoln, President, United States of America, \textit{Message to Congress} (Jul. 4, 1861).}

His interpretation is indisputably clear: Taney is incorrect and his analysis of the Constitution fails to account for the current state of emergency. Obviously, the framers included the clause to be utilized in a state of emergency, when Congress would be inherently unable to authorize the suspension.\footnote{\textsc{Battle Cry of Freedom}, supra note 82, at 288.} Were the opposite to be true, as Taney argues, the clause would include a more detailed procedure for suspending the writ. The framers left the wording vague to allow the execution of situational expedients. In emergencies, procedure must be subservient to reality.

Thus, Lincoln is publicly declaring that he would ignore Taney’s decision. It was not a Supreme Court decision, it was not a Congressional act, nor was it a public mandate. “Taney commanded no troops and could not enforce his opinion, while Lincoln did and could.”\footnote{\textit{Id.} at 289.} The Supreme Court was powerless to do anything, an error in Taney’s reasoning; had he arranged for Merryman’s case to be argued before by facilitating a certiorari hearing, perhaps history and jurisprudence would be different. As it was, the Court was powerless. Executive power had won the day.

\section{D. The Act: Congressionally-Approved Executive Authority}

From a legal standpoint, the 1863 \textit{Habeas Corpus} Act was merely icing on the cake. Lincoln declared his intentions long before the act was ratified, and the Act did little to affect the realities of war. Nonetheless, it was useful in affirming the legality of Lincoln’s actions and put the concerns of hardline Democrats (like Taney and others) to rest as the country entered its third year of warfare.

The language of the Act grants the Executive considerable authority to execute arrests without \textit{habeas corpus} rights and suspend the writ during times of rebellion: “Be it
enacted by the Senate and House of Representatives of the United States of America in Congress assembled, The President may suspend the writ of habeas corpus during the rebellion. That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."

Procedural sections follow the first, but, like Lincoln’s speaking, the preliminary section dictates the relevant provisions.

As with many far-reaching Congressional acts today, the Habeas Corpus Act was tested before the Supreme Court, first in Ex parte Milligan, where the Court reminded the political establishment that such a discussion was now moot. Lambdin Milligan of Indiana was a suspected member of the Order of American Knights which allegedly conspired to seize arms from a U.S. military base in October of 1864; he was arrested in Indiana and tried by a military commission for “conspiracy against the government, aiding the rebels, inciting insurrection, disloyal practices, and violating the laws of war.” The military commission found Milligan guilty and sentenced him to hanging, but Lincoln stopped the punishment. After Lincoln’s assassination, President Johnson ordered that the execution proceed; nine days before the planned gallows date, Milligan’s lawyers filed for a writ.

Writing for the majority, Justice David Davis proclaimed the arrest unconstitutional, that Milligan’s arrest was carried out by a military commission, a court not “ordained and established by Congress”, and thus his rights were grossly violated. Incidentally, he cites Justice Grier in Prize Cases and Blackstone’s test of war: “[Counsel] know[s] it to be a settled rule that war cannot be said to exist where the civil courts are open.” Yet, Davis overlooks a critical fact of Justice Grier’s opinion, that the schooners in question were seized after the Southern states had seceded, thus closing federal courts in the region. Milligan was arrested before Armistice and the beginning of Reconstruction, in 1864, thus in the same war period. Chief Justice Salmon P. Chase, in his dissenting opinion, writes that Congress

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117 Ex parte Milligan, 71 U.S. 2 (1866).
118 DEBATES ON CIVIL LIBERTIES, supra note 99, at 19.
119 Id. at 19.
120 Milligan, 71 U.S. at 76.
121 Id. at 77.
122 Amy Warwick, 67 U.S.
authorized the suspension of the writ during the war, and since Milligan was imprisoned during wartime, his case could be subject to Executive authority, and critically, the terms of the 1863 Act.\textsuperscript{123}

Regardless of the scope of the Democratic victory in the \textit{Milligan} ruling, the ruling must be considered in due context: the war was over. Five years had elapsed between the two landmark cases that defined discussion of wartime civil liberties. One had been decided against the Republican agenda, but had too little clout to impact the civilian arrests of the war, while the other was decided too late to hinder Republican wartime policy. And in \textit{Ex parte McCardle}, Chase defined suspension’s postwar legacy. McCardle was arrested by the Mississippi Reconstruction government; his lawyers filed for a writ, claiming \textit{Milligan} forbade a military government from convicting civilians. When it became apparent that the case would be granted certiorari, Congress amended the Habeas Corpus Act of 1867, which previously allowed for habeas appeals directly to the Supreme Court.\textsuperscript{124} The amendment repealed the provision for such a procedure; McCardle’s suit was against the constitutionality of this repeal.\textsuperscript{125} Chase shot down the assertion, arguing in favor of Congress’s ability to modify the appellate jurisdiction of the court.\textsuperscript{126} So ended any possibility of the Court hearing habeas appeals during Reconstruction—a direct result of Republican policymaking which favored the agenda of the Congressional majority.\textsuperscript{127}

In the few instances where habeas corpus questions rose to the Court, jurisprudence and ideological bias prevented the Court from making lasting decisions. The reality of \textit{stare decisis} was that the national conscience had its mind made up: The President had the power to rescind the writ if he deemed it necessary in a time of rebellion. The Court had no authority to say otherwise; any authority it was under the impression it possessed was irrelevant. Discussion prior to the war recognized the Executive’s authority to suspend the writ, and \textit{Merryman} had no legitimacy as an instrument of affecting policy. Postwar jurisprudence confirmed that the Court had little clout to affect the habeas corpus issue, one of the most contentious of the war.

\begin{itemize}
\item \textsuperscript{123} \textit{Milligan}, 71 U.S. at 136.
\item \textsuperscript{124} Habeas Corpus Act, ch. 28, 14 Stat. 385 (1867).
\item \textsuperscript{125} \textsc{Debates on Civil Liberties, supra} note 99, at 20.
\item \textsuperscript{126} Ex parte McCardle, 74 U.S. 506, 515 (1868).
\item \textsuperscript{127} \textsc{Debates on Civil Liberties, supra} note 99, at 21.
\end{itemize}
Conclusion: The Judicial Legacy of the Civil War

Robert E. Lee surrendered the Army of Northern Virginia to Ulysses S. Grant's Union Army on April 9th, 1865. In the weeks that followed, Abraham Lincoln would be shot, the remaining Confederate armies would surrender, and Jefferson Davis would flee to the deep South. Reunion governments would be established, and the Court would have little to say about the massive executive authority imposed on the South's five military districts in the following decade.

Civil War jurisprudence confirms unequivocally that the Supreme Court is fundamentally limited in its ability to deter executive wartime policy. The judiciary is constructed such that antiwar parties are hindered in their capacity to influence what cases the Courts hear; the de facto existence of a war meant that the Executive had the authority to execute the war as it saw fit; and the Court failed to execute its civil liberties authority until far past relevance.

The underlying reason for this conclusion is the fundamental nature of the Constitution's implicit construction for the handling of crisis; without a doubt, the framers envisioned a time when expediency would be paramount to public safety. The only indication as such was the suspension of habeas corpus—a stipulation which has been repeatedly used to authorize executive action in wartime. The Militia Act of 1795 gave the Executive authority to prosecute war as he saw fit, and has continued to do so for much of American history. But American jurisprudence takes an interesting turn in the mid-twentieth century, when the nation found itself in a wartime crisis once again.

At the outset of the Korean War, President Truman issued Executive Order 10340, confiscating all steel plants for re-appropriation as industrial manufacturing facilities to support the imminent war effort. The United Steelworkers of America brought suit, claiming that Truman grossly violated executive authority. Writing in concurrence with the majority, Justice Robert Jackson codified the historical assumption of wartime executive authority, while issuing an important qualifier:

[The Framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready

128 Battle Cry of Freedom, supra note 82, at 851-853.
130 U.S. Const., art. I, §9, cl. 2.
131 Militia Act of 1795, ch. 36, 1 Stat. 424 (1795).
pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.\textsuperscript{132}

Justice Jackson raises an important point: The Constitution gives to no one any authority to do anything extraordinary in the case of a crisis. But it must be understood, by nature of the inclusion of the habeas corpus clause, that the framers anticipated situations of crisis. Jackson uses the same logic as jurists of the Civil War to curb executive authority, but finally places an acknowledgement of the Constitution’s implicit war-making powers in the annals of American case law. Naturally, \textit{Youngstown} is a landmark case for its implications for the broader tale of executive power. The opinion echoes strongly the tenors of old: Once a war exists, how can the nation respond?

Yet, even this is not the loftiest legacy of the Civil War. For while the Constitution’s limits were bent, broken, and reconstructed through a fiery trial of grand proportions on the issue of executive authority, habeas corpus was only the beginning of the fight between civil liberties and executive power in American wartime jurisprudence.

\footnote{\textsuperscript{132} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 17 (1952).}
THINK PIECES
Racial Isolation, American Style: Redlining Under the Fair Housing Act

Brett Mittler

Introduction

The Supreme Court ruled on June 25, 2015 that housing discrimination does not have to be intentional to be illegal. That day the Court interpreted the Fair Housing Act of 1968 and preserved a law that is a crucial tool in the long-fought battle for a more integrated society. In a vote of 5-4 the justices ruled that plaintiffs could challenge government or private policies that have a discriminatory effect, without having to show evidence of discrimination. This law was written to protect minorities, but inequitable lending practices and zoning laws that favor more affluent buyers are persistent patterns that still exist. This practice is known as redlining or the purposeful outlining of an area which is discriminated against both ethically and financially in terms of housing loans. Although much progress has been made, there is still a preponderance of evidence indicating that America is still living with two societies, one for the rich and one for the poor.

Segregation is a term mostly associated with the 1960’s, the Civil Rights movement, and the America of the past, but in actuality segregation continues to characterize the present lives of many minorities in America. Segregation can give us insight into the perpetuity of the poverty that continues to exist in so many cities around the country and proves that there is a lack of safe and affordable housing in economically stable suburban towns. The large racial disparity that exists in our country, in terms of wealth, is due to mortgage lending discrimination in the form of racial redlining which limits access to home ownership.

This article will discuss the history and legal ramifications of the practice of redlining and will suggest a foundation on which we can begin to remedy this wrongful practice. First, the article will look at the historical origins of redlining in our country, through the
discriminatory federal policies of the Home Owners Loan Corporation (HOLC) and the Federal Housing Administration (FHA). Secondly, this article will scrutinize the laws relating to redlining including, the Fair Housing Act, The Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act (CRA). In the Third Section, this article will delve into the racial redlining that has occurred in urban areas across the United States. Next, the article will look into the framework the courts have adapted in relation to the practice of redlining. In the fifth section, we will demonstrate the problem with the existing way the courts deal with redlining. In the following section, the article will look into a new approach to challenging the policies and practices which have caused redlining and resulted in the perpetuation of segregation. Finally, this article will look at how the United States government has taken steps to eradicate the perpetuation of redlining.

I. History of Redlining in the United States

Prior to 1930s, selection of residence was an individual decision. Citizens of the United States had the freedom to select, purchase, and build a residence wherever they pleased.¹ In response, the government adopted a laissez-faire attitude.² The government did not play a significant role in housing, as the government was limited to surveying land in large cities, creating the Federal Land Bank System, and constructing housing for workers post World War I.³

In 1929 the Great Depression came about and the national opinion regarding the government’s intervention in housing issues seemed to change.⁴ The Great Depression forced many people out of their homes and caused much damage to homeowner’s and the housing industry.⁵ From 1928 to 1933, residential construction decreased by almost 100% in addition to seeing a major decline in homeowners repairs.⁶ In 1933, the nation was in

² Id. at 193.
³ Id. at 192.
⁴ Id. at 193.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Douglas A. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making Of The Underclass 51-52 (1993) (In 1931, President Hoover convened the President’s National Conference on Home Building and Home Ownership designed "to support homeownership for men of sound character and industrious habits.").
such despair that nearly half of the residential mortgages were in despair, and forecloses with a grand a day.\textsuperscript{7}

In response to such economic turmoil, the federal government implemented various programs that were aimed at reviving the economy and increase employment, specifically through construction. The HOLC, the FHA, and the Veterans Administration were some of the programs to lift up the public.\textsuperscript{8} Although these programs were extremely successful in providing many Americans with housing, the programs helped lay the ground work for the practice of redlining. Consequently, we will look at each program to ascertain the origins of redlining.

\textbf{A. Home Owners’ Loan Corporation}

In response to the housing crisis of the Great Depression, the Home Owners’ Loan Corporation (HOLC) was established to “help families prevent the loss of their home through mortgage foreclosure.”\textsuperscript{9} Furthermore, the purpose was to provide “funds for refinancing urban mortgages in danger of default” and to grant low-interest loans for those who had previously lost their properties due to foreclosure.\textsuperscript{10} HOLC was the first government sponsored program to allow for long-term, self-amortizing mortgages with uniform payments. According to Harris, homeowners loved this program, and approximately 40% responded to HOLC applying for loans.\textsuperscript{11} For a period of two years, between 1933 to 1935, the HOLC managed to supply over three billion dollars’ worth of loans.\textsuperscript{12}

As C. Lowell Harriss stated, “the success of the HOLC in its over-all program and in its handling of individual cases hinged on its appraisal policies.”\textsuperscript{13} The HOLC had a formal set of policies and procedures, that were reduced to writing, and implemented by individuals only after intensive training.\textsuperscript{14} The HOLC began dividing cities into specific neighborhoods and required individuals that were applying for a loan to have specific answers to the

\textsuperscript{9} C. Lowell Harriss, History and Policies of the Home Owner’s Loan Corporation (1951).
\textsuperscript{10} Massey & Denton, supra note 8, at 51 (The HOLC program provided for the exchange of HOLC bonds with federal guarantees for home mortgages in default and cash loans for taxes payment and mortgage refinancing); Harriss, supra note 20, at 1 (”The HOLC loans were restricted to mortgages in default... and secured by nonfarm properties with... not more than four families and appraised by the HOLC not more than $20,000.”).
\textsuperscript{11} Harriss, supra note 9, at 1.
\textsuperscript{12} Id. (”The HOLC received 1,886,491 applications...and approximately one million refinancing loans totaling $3.1 billion were approved averaging $3,039 per loan.”).
\textsuperscript{13} Harriss, supra note 9, at 41.
\textsuperscript{14} Jackson, supra note 1, at 197.
questions on the form they had developed. As part of the appraisal process, HOLC developed a rating system to evaluate the risks of loans to certain neighborhoods in urban settings, including procedures on the evaluation of race in the community.

The rating system had four different categories which were each assigned a color. The first category was green and described as “new, homogenous, and in demand as residential locations in good times and bad times.” Homogeneous was further defined as “American business and professional men.” The second category was blue and was made up of areas that had “reached their peak,” but were “still desirable.” The third category was yellow with the definition of “definitely declining.” The fourth category was coded red and the “neighborhoods were defined as areas ‘in which things taking place in [third category] areas have already happened.’”

The HOLC incorporated notions of ethnic and racial worth during their process of rating neighborhoods. This led appraisers to assume that there was a decline in infrastructure because of the narrow filtrations of housing loans to families with lower incomes. Additionally, Richard M. Hurd concluded that socioeconomic characteristics were more important in determining the value of a home then structural characteristics. Unfortunately,

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15 Id. (First, the appraiser conducted "an informal appraisal, typically a look at the property from the street" to determine if there was a reasonable prospect that the property would qualify for a loan); HARRIS, supra note 9, at 45-48 ("If [the informal appraisal] was favorable, a detailed appraisal was ordered." Id. The appraisal utilized a form containing 98 terms to be filled in by the appraiser and 11 items to be completed by the reviewers. Id. Each report contained a photograph of the building a location map, dimensions of the lot and any other relevant information concerning the neighborhood and property. Id. “In valuing the buildings, the appraiser [considered] the building code classification .... the material used,... the quality of the structure[.] ... the number and kinds of rooms, [necessary repairs], and an estimate of reproduction cost less depreciation.” Id. at 76. The final element considered was the capitalized value of rentals based upon a 10 year average normal rental.).


17 JACKSON, supra note 1, at 197.

18 Id.

19 Id.

20 Id.

21 Id.

22 Calvin Bradford, Financing Home Ownership: The Federal Role in Neighborhood Decline, 14 URB. AFF. Q. 313, 321-323 (1979) (The model was premised upon a comparison of urban development and plant biology); Id. (The model’s premise was that just as certain pieces of land are best suited for a particular type of plant, certain urban areas were best suited for particular types of persons); Id. (When an invading plant takes over an area inhabited by another plant, it drives out the original plant because it is best suited for that environment.); Id. (Such a theory applied to neighborhood development suggested that different groups of people "infiltrated" and "invaded" territory that was held by other groups and, through a Darwinist survival of the fittest struggle, eventually assumed control over the area completely.); Id. (In 1939, Homer Hoyt elaborated on this theory in 'The Structure and Growth of Residential Neighborhoods in American Cities.").

23 JACKSON, supra note 1, at 198.
HOLC monitored the movement of only African American families and had maps that showed the density of black settlement.\textsuperscript{24} The combination of the conceptions of property value and racism already existing in America, resulted in black neighborhoods being “redlined.”\textsuperscript{25}

An argument can be made that the HOLC impartially issued mortgage assistance. The funds that were distributed to the redlined neighborhoods were relatively minor, but the damage caused by the agency was major because it served as a model for other credit institutions.\textsuperscript{26} The agencies “Residential Security Maps” were regularly distributed throughout the lending industry.\textsuperscript{27} The consequence was that the private banks adopted HOLC’s racially discriminatory policies which stabilized, normalized, and enhanced the racial practice of redlining. The HOLC’s greatest effect was the rating system and its influence on underwriting the policies of the FHA.

B. \textit{Federal Housing Administration and Veterans Administration}

The Federal Housing Administration (FHA), established in 1934, and the VA, established in 1944, completely altered the housing market in the United States by helping to finance suburbanization.\textsuperscript{28} Kenneth Jackson said that “no agency of the United States government has had a more pervasive and powerful impact on the American people over the past half-century then the FHA.”\textsuperscript{29} For that reason we must look at how the programs by the FHA have affected the racial redlining and perpetuated its existence.

The FHA program was designed to “encourage increased mortgage lending, especially by those financial institutions which were not already required to provide mortgage loans.”\textsuperscript{30} More specifically, the program was designed “to encourage improvement in housing standards and conditions, to facilitate sound home financing on reasonable terms, and to exert a stabilizing influence on the mortgage market.”\textsuperscript{31} The two government agencies

\begin{flushright}
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 200 (For example, Lincoln Terrace in St. Louis was originally intended for middle class white families.); \textit{Id.} (The project, however, was unsuccessful and it developed into a black neighborhood.); \textit{Id.} (Despite the fact the homes were relatively new and of good quality, the HOLC gave the area a D rating in 1937 and 1940.); \textit{Id.} (It asserted that the houses had 'little or no value today, having suffered a tremendous decline in values due to the colored element now controlling the district.').
\textsuperscript{26} \textit{MASSEY \& DENTON, supra note 8, at 52.}
\textsuperscript{27} \textit{JACKSON, supra note 1, at 198.}
\textsuperscript{28} \textit{Id. at 204.}
\textsuperscript{29} \textit{Id. at 203.}
\textsuperscript{30} \textit{BRADFORD, supra note 23, at 316.}
\textsuperscript{31} \textit{JACKSON, supra note 1, at 203.}
\end{flushright}
did not lend money or build house themselves, but the offered insurance to lenders to encourage them to invest in mortgages while preventing losses.\textsuperscript{32}

Before the FHA, mortgages were limited to a small percentage of the property’s appraised value.\textsuperscript{33} This resulted in prospective purchasers needing a down payment of at least thirty percent of the property’s value. With the introduction of the FHA program, which guaranteed ninety percent of the value of collateral for loans made by private banks, the program decreased the size of the down payment to nearly ten percent.\textsuperscript{34} The FHA program even prolonged the repayment period of loans to twenty-five years, which allowed for low monthly payments, and assisted in fully amortized loans.\textsuperscript{35} With loans virtually guaranteed by the FHA, there was little risk to the banks which resulted in lower interest rates and a higher amount of lending.\textsuperscript{36}

The FHA has had wild success in stimulating the growth of the lending market. From 1936 to 1941, housing sales nearly doubled and from 1932 to 1950 the national rate of mortgage foreclosures was reduced from a quarter of a million to less than twenty thousand.\textsuperscript{37} By the end of 1972, the FHA had assisted eleven million families in buying a house.\textsuperscript{38} For the first time in the history of our nation, home ownership and the American dream became a reality for most. Unfortunately, this came at a price: Whites were able to afford to move to the suburbs, but African Americans were left to reside in urban areas.

There were multiple ways in which the FHA favored the suburbs and neglected the inner cities. First, the FHA favored the financing of single-family detached homes over multi-family projects.\textsuperscript{39} Second, the FHA favored the purchase of new homes over the repair of existing dwellings.\textsuperscript{40} This prompted people to move out the city instead of trying to renovate their existing residences in the city because it was cheaper to start new.\textsuperscript{41} Lastly, the FHA required an “unbiased” professional appraisal as a requirement to a loan guarantee, which more often than not was extremely prejudice.\textsuperscript{42} The stated purpose of this loan

\textsuperscript{32} Id. at 204.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Massey & Denton, supra note 8, at 53.
\textsuperscript{37} Jackson, supra note 1, at 204-05.
\textsuperscript{38} Id.
\textsuperscript{39} Oliver & Shapiro, supra note 16, at 17.
\textsuperscript{40} Jackson, supra note 1, at 208.
\textsuperscript{41} Id. at 207.
\textsuperscript{42} Id.
appraisal was to guarantee that the value of the property would outlast the outstanding debt, a nearly impossible thing to guarantee.

The FHA not only used HOLC’s appraisal system as a model, but also expanded upon it in its own Underwriting Manual. The manual outlined three elements to an appraisal: the property, the borrower, and the neighborhood. Each evaluation was used “to determine the degree of mortgage risk…of the location of the property at a specific site.” Directly stated in the manual was a clause on neighborhood stability that “it is necessary that properties shall continue to be occupied by the same social and racial classes.” This manual further recommended “subdivision regulations and suitable restrictive covenants” as a means of enforcing the segregation and method in maintaining community stability. It was not until 1950 that these covenants were declared illegal by the US Supreme Court. The FHA was concerned that property values would not be maintained “if rigid black and white segregation was not maintained.”

When we analyze data county by county there is a distinct pattern of “redlining” in the inner cities, while loans seem to thrive to in the suburbs. Given the importance of the HOLC, the FHA, and the VA in the housing markets, by the 1950’s many blacks were denied access to traditional sources of housing finance. With this unfortunate reality, many blacks were forced to rely on less favorable and predatory forms for mortgage financing. As a consequence it is necessary to examine the laws that have been enacted to eradicate redlining, including the Fair Housing Act, the Home Mortgage Disclosure Act, and the Community Reinvestment Act.

43 Oliver & Shapiro, supra note 16, at 18.
44 Jackson, supra note 1, at 207.
45 Id.
46 Id. at 208.
47 Massey & Denton, supra note 8, at 54.
49 Oliver & Shapiro, supra note 16, at 18.
50 Id. (Among a sample of 241 new homes in the St Louis metropolitan area insured by FHA loans between 1935 and 1939, 220 were located in the suburbs); Jackson, supra note 12, at 209.
51 Bragford, supra note 23, at 318 (Since traditional sources of mortgage financing were effectively unavailable to African Americans, the most common source of mortgage funds for African Americans was the installment contract.)
II. Fair Lending Laws

A. Fair Housing Act

The federal government became increasingly concerned in the 1960’s about housing discrimination because of the riots that began to take place. President Johnson became so concerned that he appointed the Kerner Commission to determine the cause of the uprisings. The Commission concluded that “our nation [was] moving towards two societies, one black, one white – separate and unequal.” Furthermore, they said that the ghetto that African Americans live in was created by whites, maintained by whites, and condoned by whites, thus never giving the African Americans a chance to change their plight. The Commission recommended that federal housing programs be overhauled and aimed at combatting the prevailing patterns of racial segregation.

The Fair Housing Act had two major goals: to give minorities more housing opportunities and to foster racial integration. Congress designed the law to facilitate the replacement of ghettos by encouraging integrated and balanced living patterns. Senator Walter Mondale noted that in the past the government played a role in establishing and perpetuating the ghetto. He stated that “Negros who live in slum ghettos have been unable to move to suburban communities…an important factor contributing to exclusion has been the policies and practices of agencies of government at all levels.”

The goal of the Fair Housing act as stated was to “provide fair housing throughout the United States.” More importantly sections 3604 and 3605 of this law were included and applicable to racial redlining, declaring a wide range of discriminatory practices in the housing and real estate industries unlawful.

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52 Metropolitan Housing Development Corp. et al. v. Village of Arlington Heights, 558 F. 2d 1283, 1290 (7th Cir.) (The “New Era Riots” began to surface with disturbances in Harlem and Rochester, New York, Elizabeth and Jersey City, New Jersey, and Philadelphia, Pennsylvania).
53 Arlington Heights, 558 F.2d at 1290 (The Kerner Commission’s purpose was to determine the cause of the recent disorder, develop a method for controlling it, and appropriating the role of the local, state, and federal authorities to deal with the disorders).
54 Id. at 16 (The Commission noted that while the early pattern of African American settlement within metropolitan areas followed that of other immigrant groups, the later phases of settlement diverged sharply from those of the typical white immigrant group).
55 Jackson, supra note 1, at 214-15. The FHA began shifting its policies in 1966 in an effort to make mortgages insurance more widely accessible to inner city properties.
57 114 Cong. Rec. 3422 (1968).
Section 3604 relates to the discrimination in the sale or rental of housing, making it unlawful to deny anyone the rights to ownership of the dwelling because of their race.\footnote{Id. § 3604(a).} Section 3605 of the act addresses the issues of discrimination in the real estate-related transactions. It states that it is unlawful to discriminate “against any person in making available” or “in the terms and conditions of such a transaction.”\footnote{Id. § 3605(a).} They further defined a residential real estate transaction as “providing financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling” and “the selling, brokering, or apprising of a residential property.”\footnote{Id. § 3605(b).} We must take the Fair Housing Act as step in the right direction, which could be used to eradicate redlining.

\textbf{B. Home Mortgage Disclosure Act}

The Home Mortgage Disclosure Act (HMDA) was enacted in 1975 in response to finding that some “depository institutions have contributed to the decline of certain geographic regions...for failure to provide adequate home financing.”\footnote{12 U.S.C. §2801(a) (1994).} This law was designed to determine if “depository institutions [were] filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located.”\footnote{Id. §2801(b).}

Originally, the HDMA only required financial institutions to provide information on the income levels of successful mortgage applicants.\footnote{Id. §2803(b).} Unfortunately, it was not until 1990 that the HDMA was amended to require financial institutions to report information on their mortgage loan application including their rejection and acceptance rates by race and location of properties.\footnote{Deanna Caldwell, An Overview of Fair Lending Legislation, 28 J. Marshall L. Rev. 333 (1995).} If was then concluded after a Federal reserve study was conducted that blacks were more rejected 33.9\% of the time compared to 12.9\% for Asians, 21.4\% for Latinos, 14.4\% for Anglos, and 22.4\% for American Indians.\footnote{Glenn B. Canner & Dolores S. Smith, Home Mortgage Disclosure Act: Expanded Data on Residential Living, FED. RESERVE BULLETIN (Nov. 1991).} With this alarming data, the Federal Reserve Board was forced to conclude the data acted as a “red flag.” It showed that unlawful mortgage lending practices were perpetuating discrimination and that further action must be taken to prevent this pattern from continuing.

\footnotesize{\textsuperscript{61} Id. § 3604(a).  
\textsuperscript{62} Id. § 3605(a).  
\textsuperscript{63} Id. § 3605(b).  
\textsuperscript{64} 12 U.S.C. §2801(a) (1994).  
\textsuperscript{65} Id. §2801(b).  
\textsuperscript{66} Id. §2803(b).  
\textsuperscript{68} Glenn B. Canner & Dolores S. Smith, Home Mortgage Disclosure Act: Expanded Data on Residential Living, FED. RESERVE BULLETIN (Nov. 1991).}
The Community Reinvestment Act (CRA), enacted in 1977, was another congressional response to redlining. Congress was fed up with the fact that banks and savings and loan companies would disinvest in older urban communities. Senator Proxmire said that he was tired of seeing these financial institutions actually of figuratively draw a red lien on a map around an area of a city because of the individuals that lived in that region.\(^6^9\)

The CRA’s purpose was “to help meet the credit needs of local communities in which they are chartered consistent[ly]” met by the financial institutions in that neighborhood.\(^7^0\) This act helped make it mandatory that federal regulatory institutions have access to the institutions financial records of meeting the community’s needs, not limited to but including low- and moderate-income households.\(^7^1\) The CRA in 1989 was amended to mandate that these written assessments and ratings of the CRA performance were made public. It was further stipulated that these ratings could be used to block financial institutions efforts to acquire or merge with one another or even build or open new branches if they were not compliant with the act.\(^7^2\) Unfortunately, the CRA ratings were rarely used as a basis to deny mergers and acquisitions and as a consequence the CRA only became an information tool of the lending practices of financial institutions.\(^7^3\)

It is clear that early on in the 1960’s and 1970’s that congress recognized the existence of redlining and it identified it as a cause of creating urban ghettos and forcing the segregation of African Americans. In its efforts to eradicate the practice, it passed the Fair Housing Act, the Home Mortgage Disclosure Act, and the Community Reinvestment Act. Despite their most valiant efforts it appears that the issue of redlining still persisted in depriving minorities of mortgages. While these acts seem to stop the physical drawing of the red lines on maps, the practice further developed in the marketing and policies that precluded minority areas. As a consequence, it is necessary to examine a study that shows the evolution of redlining and its continued existence in the United States.

\(^{69}\) 123 CONG. REC. 17,630 (1977).
\(^{71}\) Id. §2903(a).
\(^{73}\) Id. (CRA examinations have been nearly impossible to fail).
III. Marketing Redlining

Studies have confirmed the continued existence of redlining in financial institutions provision of mortgage loans. The first study examined the issue of racial redlining by major mortgage lenders in the nation’s sixteen of the largest metropolitan areas. The study identified the continued existence of poor lending patterns whereby lenders excluded minority neighborhoods. First the study explained that there was a lack of loan application from minority neighborhoods, rather than a low loan application approval rate. As a result, redlining was not an issue of disparate treatment of individual applicants but rather the result of a failure to effectively market and solicit applications form minority communities. This is consistent with the legacy of the HOLA and FHA, which was later adopted by private lenders which resulted in complete failure to provide for the minority communities.

Secondly, the study looked at the evolution of redlining by looking at the existence of marketing practices by lenders in delineating effective lending territory. The study explained that most lending institutions do not sit idly and wait passively for customers to walk through the door and request a loan application form, rather most major lenders target certain types of customers often upscale customers and the geographic regions they live in. The lending patterns rise as a result of choices by the mortgage lenders on where to locate offices, where to solicit mortgage applications, where mortgage brokers cultivate relationships and what advertising topics to adapt. The study showed that the prevalence of redlining was related to the effects of the policies adapted by lenders rather than “the underlying preferences of mortgage loan applicants.”

Lastly, the study showed that the flow of home purchase loans in minority neighborhoods was 54% the flow of white neighborhoods in general. The study concluded that while the flow was less than the flow in white neighborhoods, an active market did not exist in minority neighborhoods.

75 JONATHAN BROWN, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS (1993).
76 Id. (The study was based upon a computer-assisted analysis of 1,256,982 home purchase loan applications in sixteen metropolitan areas during 1990 and 1991 maintained by the Federal Reserve Board pursuant to the Home Mortgage Disclosure Act).
77 Id. (Lending policies that contributed to this practice were: minimum loan amounts, high down payments, refusal to lend to 204 family structures, etc).
78 Id.
79 Id.
80 Id.
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The study established and confirmed that redlining continued to exist and that a major cause of redlining was the marketing practices and policies of such lenders. It appears that the practice to exclude minority neighborhoods are directly related to the discriminatory practices of the HOLC and FHA. It is necessary to examine several relevant court decisions in order to access the legal, analytical framework designed to address the racially discriminatory practice of racial redlining.

IV. Legal Formulation of Redlining

In the years after the passing of the Fair Housing Act, there have been relatively few court decisions regarding the practice of redlining. It was not until 1976 that issues pertaining to redlining were addressed. In Laufman v. Oakley Building & Loan Co., Robert and Kathleen Laufman alleged that their mortgage loan application was denied due to redlining practices in violation of sections 3604 and 3605 of the Fair Housing Act of 1968.\textsuperscript{81} The Oakley Building and loan company sought summary judgement.\textsuperscript{82}

The court rejected the defendant’s contention that Section 3604 of the Fair Housing Act was strictly limited to the sale or rental of housing.\textsuperscript{83} The court held that Section 3604’s explicit application to other situations indicated that it “deals with discrimination in the sale or rental of housing in the broadest possible manner.”\textsuperscript{84} The court also held that Section 3605’s prohibition in financing housing was an explicit prohibition of redlining.\textsuperscript{85} The court reasoned that the practice of redlining seemed to fall under the prescription against the denial of loans when the purpose was to finance the purchase of a home.\textsuperscript{86}

When they reached the decision they examined the history of the Fair Housing Act. The initial concern of the legislation was to combat “the rioting and civil disturbances of that had rocked the cores of the nation’s major cities.”\textsuperscript{87} The court also explained that

\textsuperscript{82} Id.
\textsuperscript{83} Id. at 492.
\textsuperscript{84} Id. (The court noted that Section 3604(b), which prohibits racial discrimination "in the provision of services or facilities," has been interpreted to include "municipal services such as sewage treatment." Id. The court also noted that Section 3604(c), which "prohibits racially discriminatory advertising practices in connection with the sale or rental of housing[,] ... has been interpreted as prohibiting the recorder of deeds in the District of Columbia from accepting for filing instruments that contain racially restrictive covenants."); Id. at 492-493 (citing Meyers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972)).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 496.
Congress responded to the riots of 1967 with the passage of the Civil Rights Act of 1968 which included the Fair Housing legislation that was currently being debated before the court.\textsuperscript{88}

After the analysis, the court concluded that “redlining directly contributed to the decay of our cities.”\textsuperscript{89} They held that “transactions involving both the sale or rental of a dwelling and real estate loans…are subject to both provisions,” Sections 3604 and 3605.\textsuperscript{90} While the court’s decision firmly established the justiciability of a cause of action premised on redlining, courts found the necessity to address the analytical framework for establishing a cause of action premised on redlining.\textsuperscript{91}

\textbf{A. Dunn v. Midwestern Indem. Mid-Am. Fire and Casualty Co.}

In the case of \textit{Dunn v. Midwestern Indem. Mid-Am. Fire and Casualty Co.}, an action was brought against an insurer under the Fair Housing Act alleging insurance redlining.\textsuperscript{92} On a motion to dismiss for failure to state a claim on which relief could be granted, the court held that “insurance redlining,” was a discriminatory refusal to provide property insurance on dwellings, violates the Fair Housing Act.\textsuperscript{93} In addition, the court held that allegation that the insurer had determined to cancel a certain business portfolio “based on the fact that the portfolio included a ‘significant portion of black homeowners and/or persons residing in predominantly black neighborhoods.’”\textsuperscript{94} Based on this finding by the court, the United States Department of Housing and Urban Development issued regulations which explicitly declared insurance redlining illegal.\textsuperscript{95}

\textbf{B. McDonnell Douglass Corp. v. Green}

\textit{McDonnell Douglass Corp. v. Green} developed an analytical framework to examine redlining. The court held that the plaintiffs made out that the law of the FHA and the Civil Rights act was violated because they sought to secure housing in a minority neighborhood,
the application for the loan was made in a minority neighborhood, an independent appraisal concluded that the value of the housing equaled the sale prices, and that the buyers were credit worthy, but the loan ended up being rejected.\textsuperscript{96} The court held that the defendant must produce evidence that would rationally conclude that the loan was not denied because of a discriminatory practice.\textsuperscript{97} The defendant was able to produce evidence that the loan was denied because the property value exceeded the value in that area and that approving the loan would violate their underwriting guidelines. When the court analyzed the plaintiff’s claim that their Civil Rights were violated, they found that the defendants past treatment of loan applications from minority neighborhoods could shed some light on defendants’ actions.\textsuperscript{98} Additionally to counter their actions, the Plaintiff’s produced an expert witness which indicated that the defendants’ application of the Fannie Mae underwriting guidelines was improper.\textsuperscript{99} The court finally ruled that the defendant’s actions were motivated by an intent to discriminate.\textsuperscript{100}

“In support of their Fair Housing Act claim, Plaintiffs argued that the underwriting practices resulted in discriminatory effects.”\textsuperscript{101} The plaintiffs produced statistical evidence which established that the defendant treated mortgages from white neighborhoods differently than applications from integrated or minority neighborhoods.\textsuperscript{102} The court denied the defendants motion for summary judgement because based on the evidence produced by the plaintiff one could reasonably conclude that the defendants’ actions were discriminatory, resulting in the analytical framework to analyze redlining cases.

\section{Court’s Analytical Approach to Redlining Could Be Flawed}

The legal approach adopted by the courts to address redlining, as outlined in \textit{McDonnell Douglass Corp. v. Green}, is premised upon the intentional discrimination. This model could not apply to all circumstances as many companies can conceal their motivation and their intent could be to be elusive. Applicants for mortgages could be denied for any number of reasons: employment history, debt-to-income ratio, credit history, collateral, or even

\textsuperscript{96} Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987).
\textsuperscript{97} Old West End Ass’n, 675 F. Supp. at 1103.
\textsuperscript{98} Id. at 1105.
\textsuperscript{99} Id. at 1104.
\textsuperscript{100} Id. at 1105
\textsuperscript{101} Id.
\textsuperscript{102} Old West End Ass’n, 675 F. Supp. at 1105.
insufficient cash. The average applicant does not possess knowledge on these topics, so it may be easy to mask the denial in a maze that the applicant must navigate to obtain the loan itself.

Historically, redlining has been institutionalized by both private and public financial institutions. The effects of this process denied minorities access to credit because the services are simply not marketed in those areas. This forces minorities to look for alternate forms of financing, thus perpetuating the redlining factor because they would not receive many applicants from these particular areas. Due to the poor intentions of companies and the historical implications by both the private and public sectors, we must examine the discriminatory effects as an alternative framework to addressing racial redlining.

VI. Perpetuation of Segregation Claims

Courts have long used Title VIII to prohibit claims in perpetuating segregation in a community. More often than not these cases involved municipalities that tried using their power to block the construction of housing developments in predominantly white areas. The perpetuation of segregation claims may be prompted by an across the board policy practice. An analytical framework may be applicable to redlining as this practice has undoubtedly contributed to the perpetuation of redlining.

A. Metropolitan Housing Development Corp. v. Village of Arlington Heights

In Metropolitan Housing Development Corp. v. Village of Arlington Heights, the court established framework for evaluating perpetuation of housing segregation claims. The plaintiff brought a claim before the court based on the defendant’s refusal to rezone the property for low income housing to be built, saying that was a violation of the Fair Housing Act.

In order to properly analyze the claim, the court established four factors to assess whether the defendant’s conduct had a discriminatory effect. The first factor was the

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103 Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).
104 SCHWEMM, supra note 57, at 10-39.
105 Id.
106 Metropolitan, 558 F. 2d 1283.
107 Id. at 1285.
108 Arlington Heights, 558 F.2d at 1290.
strength of the plaintiff’s showing of discriminatory effects.\textsuperscript{109} Discriminatory effects occurs when a decision has a greater adverse impact on one racial group than on another or the effect which the decision has on the community involved; if it perpetuates the segregation and prevents further interracial association.\textsuperscript{110} The second factor seeks to validate if there is some sort of discriminatory effect.\textsuperscript{111} The third factor measures the defendant’s interest in taking action that resulted in discriminatory effect.\textsuperscript{112} They will put different weight if it is a private individual attempting to protect private rights or if it is a governmental body acting outside of their scope of authority, trying to abuse its power.\textsuperscript{113}

The fourth factor that is analyzed is the intention of the plaintiff, if they are trying to compel the defendant to provide housing for members of minority groups or they are trying to restrain the defendant from interfering with property owners who to provide such housing.\textsuperscript{114}

In this case, the court found that only two of the four criteria pointed towards relief and that there was no evidence of discriminatory intent. They found that the governmental authority was acting within their scope of authority.\textsuperscript{115} However, since the Fair Housing Act was open to loose interpretation, they decided that in cases involving integrated housing it must be in favor of segregation.\textsuperscript{116} The court ruled that since there was no other land other than the plaintiff’s current property in Arlington Heights neighborhood that was both properly zoned and suitable for low-income housing, then the defendant’s refusal to rezone was in direct violation of the Fair Housing Act.\textsuperscript{117}

B. \textit{Huntington Branch NAACP v. Town of Huntington}

In \textit{Huntington Branch NAACP v. Town of Huntington}, the analytical standard for the perpetuation of segregation was further developed. In this particular case the plaintiff alleged that the town violated Title VIII by refusing to rezone a parcel of land to allow for multifamily dwellings to be built.\textsuperscript{118} The court decided to adapt the formula that was used in
the Arlington Heights case. Furthermore, the court decided that they would adopt a prima facie case that required the plaintiff to establish the discriminatory effect. This puts the burden on the defendant to present legitimate justifications for their actions. The court held that the refusal to rezone resulted in a disproportionate harm to blacks and that they “violated Title VIII by refusing to amend the zoning ordinance to permit developers to build multi-family dwellings.”

Under either the Arlington Heights or the Huntington standards, the primary focus of analysis is based on size of the segregating effect caused by defendant’s actions. If application does not have a segregating effect, it is certain the plaintiff will lose under these circumstances.

VII. Government Steps to Eradicate Discrimination

The Clinton Administration, in conjunction with the Department of Justice Civil Rights Division, launched an aggressive assault on the problems associated with mortgage lending discrimination, including redlining, in series of lawsuits. Several of the lawsuits, including those against Chevy Chase Federal Savings Bank and Albank Federal Savings Bank, represented a discriminatory impact analysis of the financial institutions marketing efforts which resulted in redlining of minority areas. Even though both cases settled, it is necessary to examine the allegations of complaints and the contents of the cases because they recognize and acknowledge the historical and institutionalized effects of redlining and provide guidance for additional enforcement activated related to redlining and marketing discrimination.

A. US v. Chevy Chase Federal Savings Bank

The Department of Justice Civil Rights Division filed a complaint against Chevy Chase Federal Savings Bank alleging that their “policies and practices are intended to deny and have the effect of denying, an equal opportunity to residents of African American Neighborhoods” Prior lawsuits focused on disparate treatment of African Americans and

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119 Id. at 935.
120 Huntington N.AACP, 844 F.2d at 936.
121 Id. at 939.
122 Id. at 941.
white loan applications. The Chevy Chase lawsuit was different because it focused on the marketing practices of the bank and the discriminatory effect of those practice among African American applicants. Chevy Case dropped Washington, DC from its Reinvestment Act service area, and when called out on it, by the Justice Department, they reinstated their service in DC in the area with the highest percentage of whites. The Department of Justice and Chevy Chase agreed to settle the alleged unlawful discrimination suit with further stipulations. The consent decree concluded that Chevy Chase must implement a heavy marketing plan designed to improve the needs of the African American community in the DC region. The objective of the decree was to achieve a fair market share of home mortgage loans in African American communities.

B. Albank Federal Savings Bank

The Justice Department continued their efforts to combat redlining in the form of marketing in their lawsuit against Albank Federal Savings Bank. The Justice Department alleged that Albank prohibited mortgage loans from multiple different cities in New York and Connecticut that were demographically African American and Hispanic. The President and Chief Executive Office of Albank, denied the allegations citing that they have had outstanding ratings on each of its last three bi-annual Community Reinvestment Act examinations. Nevertheless, to make the allegations go away, Albank agreed to enter into a consent decree in order to avoid litigation with the understanding that the consent decree was not an admission or a finding of any violation of law. Albank was ordered to provide fifty five million dollars to the areas it redlined and contribute a significant marketing campaign to reverse this practice. The settlement ensured that residents of the redlined areas will have a chance to obtain credit.

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124 See Complaint and Consent Decree, Civ. Action No. 5:94 CV 6(B)(N).
125 Complaint and Consent Decree, Civ. Action No. 5:94 at para. 16, CV 6(B)(N).
126 Id.
127 Id.
130 Complaint and Consent Decree, Civ. Action No. 5:94 at para. 16, CV 6(B)(N).
131 Id. at 7, para. 4.
Conclusion

Acts of history oftentimes act as a constraint on individual agencies, according to author Orlando Patterson.\(^1\)\(^3\)\(^3\) He further defines acts of history as "the accumulated patterns of discrimination over long periods of time against particular groups of people that create not only generalized disabilities of a collective nature but also generalized advantages to those who benefit from the discrimination."\(^1\)\(^3\)\(^4\) Racial Redlining represents an extraordinary example of an act of history which has maintained segregation in cities across the country, as you look the historical analysis of the Home Owners’ Loan Corporation and the Federal Housing Administration. A report by the United States Conference of Mayors stated that the long history of housing and lending discrimination in this country has scarred the lives of millions of families trying to realize the American dream.\(^1\)\(^3\)\(^5\)

In order to combat this history, the courts must adopt a pragmatic analytical framework for interpreting racial redlining that has the ability to serve as a useful tool in mending the historic pattern of housing and mortgage discrimination perpetuated upon minority communities. The Department of Justices’ actions are nearly the beginning to evaluate the atrocious behavior of some of the lending institutions in our country. These cases begin to shed light on the historical origins of redlining and more clearly define the goals of the Fair Housing Act. In addition, the outcomes of these cases seem to promote a more open, integrated society and provide for a chance to nullify the segregation of various minority groups.

\(^{133}\) ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S "RACIAL" CRISIS 121 (1997).

\(^{134}\) Id.

\(^{135}\) The United States Conference of Mayors, supra note 9, at 1.
Drug Testing for Social Welfare: A New Way of Marginalizing America’s Impoverished

Vaishali Ashtakala

The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.

— Franklin D. Roosevelt

Introduction

In 2015 alone at least eighteen states have proposed some form of legislation that would require drug screening for applicants and recipients for public welfare assistance.¹ The basis of these legislative proposals draws from President Bill Clinton’s watershed law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which allows for the imposition of unequal legal standards on the United States’ impoverished citizens.² Consider Alabama, a state that has one of the strictest eligibility requirements for welfare recipients, and where a family of three making more than $3,228 per year would not be eligible for any government assistance because of the blanket legislation allowed by PRWORA.³

PROWRA followed President Bill Clinton’s campaign proposals to reinvent welfare and amend its flawed system.⁴ Under PROWRA states were able to incorporate regulating restrictions to drug test welfare beneficiaries.⁵ This unprecedented ability to invade privacy

⁵ Id.
provoked intense public policy debates on the national stage. Increased drug use in young populations in the United States in the 1990’s, as reflected by University of Michigan’s Monitoring the Future survey, demonstrates a more than double increase in illicit use of drugs in youth populations from 1991 to 1996. In 1997 more than 1.5 million Americans were incarcerated due to a drug-law violation, an all-time high for the United States in drug related arrests. Considering the statistical evidence in the rise of a drug problem in the 1990’s, public officials demonstrated a political agenda in curtailing drug use. With an additional push to lower the national debt, politicians, over the past years, have pushed legislative proposals in state welfare programs to require welfare applicants and beneficiaries to submit to drug testing. The popularity of these legislative proposals has drastically increased throughout the years and has been met with extreme amounts of controversy.

This note explores the contemporary efforts of state legislatures to incorporate discriminatory proposals of public assistance beneficiaries to submit to drug testing. In assessing this current public policy debate, the note will first provide historic background on the nature of federal and state relationships regarding public welfare. Next, the note will assess past legal precedent regarding the constitutionality of drug testing. The note will begin by describing specific stipulations within the Fourth Amendment’s special needs doctrine, which is the criterion the Supreme Court has used to rule on suspicionless or randomized drug testing without probable cause. Next, the note will look specifically at other state laws that attempt to implement suspicion based drug testing in concordance with PROWRA, focusing on the state examples that skirt the special needs doctrine and assert that states with legislative proposals are facially constitutional. Finally, the note will consider the compelling government interest as a factor to conclude that drug testing welfare recipients with suspicion or without is economically inefficient as well as statistically insignificant in finding a relationship with drug using welfare recipients. The note will go further to suggest that the section 902 of the Personal Responsibility and Work Opportunity Reconciliation Act be amended to revoke the portion of that federal law stating “states shall not be prohibited by

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8 Finzel, supra note 1.
the Federal Government from testing welfare recipients for use of controlled substances.”

In conclusion the note affirms that drug testing welfare recipients proves as a futile and marginalizing practice in public policy.

I. Historical Progression of Social Welfare

The history of social welfare in the United States has been continually evolving as the nation progresses socially and politically. Prior to the 1900’s social welfare, or “public relief” was the responsibility of local governments. As the nation grew rapidly, the need for social welfare became pronounced in urban areas and soon became a federal concern to account for public welfare. By 1926, forty states had adopted some means of providing social welfare for women and children. The Emergency Relief and Construction Act of 1932, signed into law by President Herbert Hoover, marked the first major overhaul of state welfare programs and began the balancing act of federal intervention in social programming. The program created provisional funds that allowed for reproductive construction work of public character which to lead to employment for thousands of people.

President Franklin Delano Roosevelt immediately developed the Federal Emergency Relief Act following the onset of the Great Depression. The pressing need for federal intervention caused President Roosevelt to enable the national government to disburse $1 billion in funds to states to sustain the states’ existing programs. Believing the Federal Emergency Relief Act of 1933 to be only temporary, President Roosevelt wanted to implement a more permanent and preventative measure that protected Americans from the economic distress of the Great Depression. His goal was to create a safety net for unemployed families, as he claimed in his 1935 state of the union address: “The time has come for action by the national government [to provide] security against the major hazards

13 Id.
14 Id.
16 Id.
and vicissitudes of life.”  

The ensuing legislation, titled the Social Security Act (SSA) of 1935, consisted of eleven separate titles and three individual programs created to provide varied economic support depending on the economic circumstance. SSA shaped the basic relationship between state and federal government involving public welfare systems. Under the terms of SSA, each state had the choice to participate in the new public welfare programs. If a state decided to partake in the joint federal-state public assistance programs, it had to submit a “state plan” that delineated to the federal government that the states adhered to the minimal standard laws set by the national government.

President Lyndon B. Johnson’s term Johnson announced the “War on Poverty in 1964” and proposed his “Great Society” agenda in order to tackle poverty in the United States with legislature that provided safety nets for American citizens. In 1964 he created the Food Stamp Act 1964 and the Economic Opportunity Act. These programs allowed for an increased federal presence over state legislation in the form of welfare programs concerning food security and economic assistance. His programs intended to strengthen the agricultural economy and provide economically needy households with a cooperative Federal-State program of food assistance.

An understanding of the complicated interplay of federal and state legislation in developing social welfare programs is needed to assess the contemporary cases regarding drug testing welfare recipients, as well as the ability of states to create their own programs and implement them accordingly. The Temporary Assistance for Needy Families (TANF) program was created under PROWRA to replace permissive programs in place at the time, geared to provide assistance for children of low-income families. The federal law allowed for states to implement and administer their own welfare programs with general guidelines issued by the federal government. Under TANF the federal government provides a block grant to states, which use the funds to administer their own programs. TANF requires states to adhere to a strict state-spending requirement known as the maintenance of effort.

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22 Id.
requirement (MOE). States can utilize MOE allocations to meet any of four federal stipulations of TANF. States can use funding to provide cash assistance to needy families, end dependence of parents on government benefits by providing job preparation, prevent and reduce pregnancies out of wedlock and lastly, encourage two parent families.24

State policies shifted from rule based to discretionary, which is a form of policy that imposes a “social cost.”25 States have shifted from policy that is based on predetermined rules to policy that is based on in moment judgment of a particular situation, allowing States to have more prudence in deciding welfare programs.26 The welfare law bans any state from providing TANF benefits to any person convicted of a felony for possession use or distribution of illicit drugs.27 Today thirteen states maintain PRWORA’s original ban and twenty-three states maintain a partial ban to include limitations of convicted felons.28 In efforts to preserve a concerted effort on the War on Drugs, states have been able to maintain bans against past offenders and felons.

Despite TANF’s success in creating a program that adheres to strict accountability in welfare assistance, there is momentum to increase additional barriers for needy families. The proposals for drug testing gained massive momentum in 2011, as three states passed formal legislation, continuing to 2014 where a totally of twelve states to have passed legislation and implemented the law into public welfare assistance.29 State legislatures in (a) Arizona, (b) Missouri, (c) Illinois and several others have either passed bills or discussed the issue at legislative hearings.30 In addition to individual state’s efforts to push for such legislation, Congress has also made efforts to implement a nation-wide bill to require all states to test welfare applicants and recipients in the TANF program.31

Given the contemporary public policy issue, it is imperative to understand the policy and constitutional effects of laws mandating drug testing for welfare beneficiaries. This note

25 Id.
26 Id.
will go on to briefly describe the Fourth Amendment’s special needs doctrine which the Supreme Court has used to rule on randomized drug testing scenarios. The note will assess the drug testing schemes of Florida and Michigan. The note will then determine that suspicionless drug testing for welfare recipients is unconstitutional and a breach of search and seizure, that cannot be justified within the special needs doctrine.

II. Legal Precedent

A. The Fourth Amendment

The Fourth Amendment of the United States Constitution states, “The right of the people to be secure...against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” Courts and governing bodies have accepted that the Fourth Amendment possesses separate standards of suspicion to administer warrants. The Supreme Court holds the warrants section of the Amendment of utmost necessary and regards it as an imperative component to the application of the Fourth Amendment.

However, over time, the Supreme Court itself has altered its stringent requirement of warrants prior to search and seizure cases. After expanding the exceptions to the rule, making it more lenient to mandate search and seizures without form of probable cause, the Supreme Court employed a new method of ruling, creating a balance between government interests and privacy. Under this method, Justices weigh the government’s motive for conducting a search and seizure against the intrusive nature of the search and seizure itself. Applying the balancing test, established in United States v. White Justice Harlan’s dissent provided for a new criterion when “assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.”

Terry v. Ohio set the ground for the 1985 case New Jersey v. TLO, which challenged warrantless searches of high school students’ property. Justice Blackmun stated the balancing test would be used under “exceptional circumstances in which special needs, beyond normal

32 U.S. Const. amend. IV.
33 Id.
need for law enforcement, make the warrant and probable cause requirement impracticable.” 36 The final decision governing Terry v. Ohio found that a search conducted without probable cause was in compliance with the Fourth Amendment, as it relayed a strong need for government interest over the intrusion of privacy. 37 The special needs doctrine was immediately accepted as a form of a new balancing test that would be used for all cases regarding Fourth Amendment rights involving warrantless searches. This deviation from the strict language in the Fourth Amendment causes contemporary scholars to argue over the departure of warrant based search and seizure. TLO demonstrates the basic principle, that despite the standard of reasonable suspicion, it requires that searches be supported by more than just conjecture.

The departure of individualized suspicion caused great concern, Justice Marshall disagreed with the Court’s holding that reasonable suspicion as opposed to probable cause should be the criteria for determining whether such searches be permitted.” 38 The special needs doctrine has become part of the understanding of Fourth Amendment when ruling on cases regarding warrantless searches and seizures.

B. Special Needs in reference to Drug Testing

Since the adoption of the special needs doctrine as a part of the Fourth Amendment, the Supreme Court has been using this legal reasoning to rule on several drug-testing cases. It has upheld drug-testing schemes to be constitutional in specific cases where a significant public safety concern has been clearly identified, thus meriting the extraordinary need for a search and seizure without probable cause. 39 The Court also applies special needs as an exception to groups that exhibit a diminished expectation of privacy based on their relationship to the government or a private organization. 40 After instructing that just noting a special needs case is not enough of a reason to overstep the Fourth Amendment, the Court stressed the need for effectiveness, as a means of how practical and efficient is the proposed law. 41 Effectiveness refers to that the proposed law must be reasonably effective deterrent

37 Terry v. Ohio, 392 U.S. at 21-35.
40 Id.
to the safety concern.\textsuperscript{42} Effectiveness also refers to economic efficacy, according Orin S. Kerr, where reasons, “regardless of whether the remedies scheme actually achieves the goals of efficient enforcement, the rules have been expressly justified by the goal of efficiency.”\textsuperscript{43} The Court instructs lower courts to adhere to three main points of analysis when judging warrantless based testing. The criterion is as follows: existence of public safety violations, diminished expectations of privacy and effectiveness of the active policy.\textsuperscript{44}

\textit{i. The Public Safety Factor} – The 1997 Supreme Court case \textit{Chandler v. Miller} challenged a Georgia statute, which stated, “a [public office] candidate must present a certificate from a state-approved laboratory showing that the candidate had a negative urinalysis drug test within 30 days prior to qualifying for nomination.\textsuperscript{45} Petitioners were candidates from the Libertarian Party, seeking injunctive and declaratory relief.”\textsuperscript{46} The issue remained whether or not Georgia’s implementation of suspicion-less drug testing was violated the Fourth Amendment right. The Court acknowledged that Georgia “has effectively limited the invasiveness of the testing procedure,” and focused on the concern as to whether the testing was a special need. While the State argued that “the use of illegal drugs draws into question an official’s judgments and integrity,” the court dismissed the argument, claiming: “Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia’s polity.”\textsuperscript{47} Moreover, the Georgia law “is not well designed to identify candidates who violate anti-drug laws” nor is it a “credible means to deter illicit drug users from seeking election to state office.”\textsuperscript{48} The Court held that in Chandler Georgia’s statute did not fall into this exceptional special needs category, since the state failed to show why its desire to avoid drug users in its high political offices should outweigh candidates’ privacy interests. In addition to that state’s inability to provide evidence of a drug problem among state officials the Court concluded that even if the problem existed, the “affected officials would most likely not perform the kind of high-risk, safety sensitive tasks, which might justify the statute’s proposed incursion on their individual privacy rights.”\textsuperscript{49} This case

\begin{itemize}
    \item \textsuperscript{42}Id.
    \item \textsuperscript{43}Orin S. Kerr, \textit{An Economic Understanding of Search and Seizure}, 164 \textit{University of Pennsylvania L.J.} 591, 591-647 (2016).
    \item \textsuperscript{45}Chandler v. Miller, 520 U.S. 305, 306 (1997).
    \item \textsuperscript{46}Id.
    \item \textsuperscript{47}Id.
    \item \textsuperscript{48}Id.
    \item \textsuperscript{49}Id.
\end{itemize}
Drug Testing for Social Welfare

provides that state officials under the Supreme Court are not constitutionally able to be drug tested for office positions, the failure to prove the special needs doctrine. The Court deemed the Chandler case as a purpose as a “need revealed is symbolic, not 'special.' The Fourth Amendment shields society from state action that diminishes personal privacy for a symbols sake.” The Chandler Court decision made clear that randomized drug testing is a violation of the Fourth Amendment unless it is justified by safety concerns.

The 1989 case, Skinner v. Railway Labor Executives, assessed the constitutionality of drug testing enacted in order to address the need to reduce fatalities of on duty railroad employees. This particular drug testing measure demonstrates a clear need for public safety and precautionary measure. The regulations also permitted drug tests in other circumstances under a reasonable suspicion standard. Considering there was a public safety concern present in Skinner v. Railway Labor Executives, the Fourth Amendment was not violated. Through the Skinner case the Court rigidly identified the safety concerns as the main factor for determining the constitutionality of the government’s need to intrude on individualized privacy. The Court characterized the government’s interest as “compelling” since the employees’ safety was in jeopardy “risk[ing] injury to others that even a momentary lapse of attention can have disastrous consequences.” The Court affirmed that safety interests heavily outweighed individual privacy interests. When assessing welfare cases that require warrantless based testing, or testing in general, Skinner is an important case in point of comparison. In Skinner the public safety factor was clear, while refusing drug testing would severely endanger employees. However, this lack of clarity is not present when assessing welfare cases. States cannot arguably demonstrate a public safety concern that would require beneficiaries to testing schemes.

Following Skinner, the Court concurrently ruled on another case in 1989 called National Treasury Employees Union v. Von Raab. The case further illustrates the idea behind diminished regard for privacy in an institution wherein the “special needs” doctrine is upheld and where in public safety was again a major focus for the Court’s analysis of the case. The case involved the United States Customs Service, an agency responsible for primary enforcement on the seizure and eradication of illegal drugs entering the country, enforced

50 Id.
52 Id.
53 Id.
mandatory drug testing for employees seeking transfer or promotion to positions that have a direct intersection with drug prohibition.\textsuperscript{54} A federal employee’s union and officials filed a suit on behalf of the service employees seeking mentioned positions; on the ground that drug-testing program violated the Fourth Amendment right. As in \textit{Skinner} safety concerns was the entire focus for the Court. This case is pertinent in assessing social welfare testing as it demonstrates the clear need of testing when public safety is compromised. \textit{National Treasury} case allows for a clear example of what public safety violation is and how it demonstrates that social welfare drug testing does not meet the same criteria set forth by \textit{National Treasury}.

The Supreme Court addressed public safety in a school setting regarding mandatory drug testing in public schools. In \textit{Vernonia School District 47J v. Acton}\textsuperscript{55} and \textit{Board of Education v. Earls} the Court upheld school drug testing of student athletes and all students participating in extracurricular activities.\textsuperscript{56} By highlighting specific safety risks that the schools were protecting against, the \textit{Vernonia} Court described threats to childhood development.\textsuperscript{57} Incorporating arguments that developing brains have a proclivity to addiction, drug use poses a threat for potential permanent damage to the brain, and reduction in participation in athletics, the \textit{Earls} Court was able to determine specific health risks, which jeopardized child development, which supported a finding for a special need.\textsuperscript{58}

Throughout the Supreme Court’s rulings on special needs exemptions, public safety concerns determine the basis for warrantless testing schemes. The \textit{Chandler} case specifically asserts that safety concerns are a mandatory stipulation for suspicionless searches.

\textit{i. The Diminished Expectation of Privacy} – According the Supreme Court, each of the groups in the preceding cases (rail employees, drug enforcement agents, and public school students) has submitted rights to the institution they are a part of—thus experiencing a diminished expectation of privacy.\textsuperscript{59} These groups are expected to accept a moderate intrusion of privacy given the institutions interests and the group’s affiliation to the institution. Typically groups

\textsuperscript{57} Vernonia Sch. Dist. 47J v. Acton. 515 U.S. 646.
\textsuperscript{58} Id.
\textsuperscript{59} \textit{Terry v. Ohio}, 392 U.S. 1, 21.
that have an individual or specified legal relationship with the government that is more than citizenship can be groups that are subject to diminished expectation of privacy.\textsuperscript{60}

Relating this concept of a government relation back to \textit{Skinner}, the employees of the railroad were working in a highly government regulated industry which warranted a diminished expectation of privacy. The Court stated “The employees [had] long been …focus of regulatory concern” and made very clear that the requirement to test the employees was given with prior warning, allowing employees to be notified they were forgoing privacy in exchange for employment.\textsuperscript{61} Considering railroad employees were subject to regular physical examinations, the Court stressed that employees were expected to maintain an understood level of physical and health standards.\textsuperscript{62} The Court was able to substantiate a clear link between the safety of employees and health standards. The Court did not simply state that the employees had a diminished expectation of privacy merely based on the relation to the government, but rather because of the nature of the job in both \textit{Skinner} and the \textit{Von Raab case}. Considering the jobs of these sectors rely so judgment the employees cannot expect to have physical health viewed independently from their employment.

Similar to the cases involving occupation, the public school cases of \textit{Vernonia} and \textit{Earls} follow a similar logical structure when understanding diminished expectation of privacy. Both case ruling stated that attending public school asserts an understanding of diminished rights: “\textit{since} student vaccinations and physical exams are constitutionally reasonable, student drug testing must be so as well; but rather that, by reason of those prevalent practices, public schoolchildren in general, and student athletes in particular, have a diminished expectation of privacy.”\textsuperscript{63} The \textit{Earls} decision states: securing order in the school environment…requires that students be subjected to greater controls.”\textsuperscript{64} Both cases clearly outline the nature of students in school settings as an outstanding group that warrants a diminished expectation of privacy. Justifying warrantless drug testing must include the idea of diminished expectation of privacy to supplement the reasoning. The groups ruled on submit a portion of their rights in relationship with their institution. Therefore, without an understanding of diminished expectation of privacy, randomized drug testing is unconstitutional under the Fourth Amendment.

\textsuperscript{60} \textit{Id}. at 21–33.
\textsuperscript{61} \textit{Skinner}, 489 U.S. 602, 626-29.
\textsuperscript{62} \textit{Id}.
\textsuperscript{63} \textit{Vernonia Sch. Dist.}, 515 U.S. 646.
\textsuperscript{64} \textit{Bd. of Educ.}, 546 U.S. 822-832.
iii. Efficacy – Within the special needs doctrine, the Supreme Court includes effectiveness, which is the basis that schemes be practical, and efficiency implemented. By considering the urgency of the Government Issue as well as the efficacy of the government’s solution to said issue; the Court creates a reasoning based when assessing warrantless drug testing. Relaying to the Chandler case, the Court ruled: “Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws and is not a credible means to deter illicit drug users from seeking state office.” The Georgia statute allowed candidates to select their own test date, which permits candidates to avoid detection. Georgia implements a testing procedure that does not effectively and practically implement the procedure. In Chandler the Supreme Court asserts that both a compelling government interest and efficacy were lacking in the Georgia statute as well as efficacy, showing that elected officials could easily test a false positive since candidates would select their own testing period.

The case Marchwinski v. Howard, a United States District Court case, became the first contested case regarding the constitutionality of suspicionless drug testing in regards to a Fourth Amendment violation considering it failed to substantiate a finding for public safety rationale in support for a special need. The Family Independence Program (FIP), a state run welfare program, provided temporary cash assistance to families with children and pregnant women to help them pay for living expenses. The Plaintiff brought this action on their own behalf and on behalf of a class of all adult residents of Michigan whose ability to receive FIP benefits was conditioned on their willingness to submit to drug testing. Michigan argued: “it has shown a special need even if jeopardy to public safety is required. It states that there is overwhelming evidence that substance abuse and child neglect are highly correlated and that the children are the primary beneficiaries of FIP benefits.” Michigan’s argument is misplaced while the state claims that the drug-testing program is designed to strengthen family relationships, which is the main focus of the FIP program in Michigan. Yet, administration of the program, failed to provide results, while only a meager 8% of applicants tested positive for illicit drugs. Only three individuals out of the sample testing positive for drugs other than marijuana.

65 Chandler, 520 U.S. at 324.
67 Id.
68 Id.
69 Id.
Similarly, in 2011 a Florida statute required every applicant for TANF to pass a urine drug test, at the expense of the applicant if they tested positive. The challenger sought an injunction arguing the Florida statute violated the Fourth Amendment. The case, Lebron v. Wilkins went to the United States District Court Orlando division marking it the first contested suspicionless drug testing case with TANF beneficiaries. Within the four-month launch of the mandated program 108 applicants out of 4,086 (roughly 2.64%) tested positive. A district court of appeals blocked the requirement as a violation of the Fourth Amendment’s rights as an unreasonable search and seizure. The United States Circuit Court of Appeals for the 11th circuit upheld the ruling. The judge panel ruled that the state of Florida had not demonstrated a prevalent, significant drug problem among TANF applicants when compared to the general population. A 2012 Georgia law similar to Florida’s in 2011, to include a reasonable suspicion stipulation. After the ruling in 2011 on Florida’s attempt to test all TANF applicants, other states have passed legislature to screen all beneficiaries for whom they conclude a “reasonable suspicion.”

Government officials in charge of the Florida legislature argued that the suspicionless testing policy is a compelling government interest as a means to reduce state compliance with drug use. Furthermore, the statute serves as an economically efficient means to rightfully allocate taxpayer’s money to beneficiaries. Considering Florida did not provide a clear association of Florida TANF beneficiaries having a higher drug usage problem compared to the general Florida population, Florida legislators failed to prove a compelling government interest. The Florida legislature failed to provide statistical significance that welfare recipients have a drug use problem. In addition to the lack of evidence in substantiating a drug problem, the state failed to demonstrate that taxpayer money was being used effectively, considering the policy increased government spending. The Florida 11th Circuit Court denied the right to warrantless drug testing for TANF beneficiaries.

72 Lebron v. Wilkins, 990 F.Supp.2d 1280 (M.D.Fla.2011).
73 Id.
75 Covert and Israel, supra note 29.
76 Lebron v. Wilkins, 990 F.Supp.2d 1280 (M.D.Fla.2011).
77 Id.
The Supreme Court in *Chandler* upheld that poorly planned programs initiating warrantless drug testing and inefficient testing procedures are not upheld within the efficacy requirement of the special needs doctrine. The Michigan and Florida courts also presented similar lines regarding efficacy, considering neither states demonstrated evidence that a drug problem existed among their state’s welfare recipients nor was the economic allotment of funding for drug testing fruitful, therefore rendering the laws unconstitutional and ineffectual in their original goals. Considering both Michigan and Florida administered the program with the intention of managing taxpayers’ money more efficiently, they were unable to economically justify warrantless testing plan.

C. Fourteenth Amendment

While the Court does not officially mention the Fourteenth Amendment, it is a necessary aspect of the Supreme Court rulings and the 11th Circuit Court ruling in *Lebron v. Wilkins* and 2003 Michigan case *Marchwinski v. Howard*. While the Fourth Amendment has stipulations specifically challenging such legislation, the Fourteenth Amendment is a new means for challenging the barriers for social welfare beneficiaries under the Equal Protection Clause as well as the Due Process Clause. Specifically, the equal protection clause only applies to states when using the Fourteenth Amendment as a tool in assessing legislation. The Fourteenth Amendment clearly illustrates that states have an obligation to protect their citizens equally and fully. Considering that “obligation to assist the poor if the state has ‘done’ something to cause the undue poverty.” There is a clear need for the Fourteenth Amendment as a discerning factor in assessing government welfare policies.

While drug-testing welfare beneficiaries does not necessarily demonstrate a state’s action in placing people in economic hardship, the requirement to drug test does show a violation in equal protection, disenfranchisement, and economic discrimination based on socioeconomic background. The Supreme Court scrutinizes laws that are based on socioeconomic background, race, sexual orientation and religious adherence. The Supreme Court has demonstrated a resistance on ruling on legislation that concerns socioeconomic disenfranchisement. This neglect leads to a national lack of judicial oversight to apply to members of the United States population. Although *Lebron v. Wilkins Marchwinski v. Howard*

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78 U.S. CONST. amend XIV, § 1
did not utilize the Fourteenth Amendment to assess the validity of the drug testing proposals, the Fourteenth Amendment is a necessary method in evaluating drug testing welfare beneficiaries. Within the Due Process Clause, the Court utilizes the strict scrutiny analysis to discern at which level of scrutiny a policy will be judged based on the infraction to the Fourteenth Amendment the law imposes.\(^8\) A minimal scrutiny test and rational basis test is used in regards to laws “that discriminate against non-suspect classes including economic classifications as well as classifications based on age, wealth, and mental disability.”\(^9\) The standard of review requires that the use of the classification be rationally related to a legitimate government justification.”\(^10\) It focuses on whether or not there is a practical reason for the difference in treatment “between those the law applies to and those it does not apply to” with regards to the law itself.\(^11\) In regards to the application of low-level scrutiny, a law must show that there is legitimate purpose for the law. Or the proposed law must “not rely on a difference that is at all designed to achieve the state’s purpose so that the classification is not rationally related to the state’s objective.”\(^12\) Applying the Fourteenth Amendment to the basis of warrantless drug testing for welfare, the drug testing schemes as enforced by states, would violate the Fourteenth Amendment, demonstrating discrimination against classes of low economic stature. The standard of review also imposes a government justification factor. As likely in the Fourth Amendment, where states could not prove efficacy in their testing schemes, the same logic applies with a rational basis test for the Fourteenth Amendment, states have not been able to prove a legitimate purpose for the law. Although discrimination based on economic rank is a low-level scrutiny in regards to the Fourteenth Amendment, states still demonstrate a lack of compelling government interest and demonstrate socioeconomic discrimination.


\(^9\) Id.

\(^10\) Id.

\(^11\) Id.

\(^12\) Id.
III. Drug Testing Objected

A. The Issue at Hand

In 2015 alone, at least eighteen states have proposed some form of legislation that would require drug screening for applicants or recipients of public welfare assistance. Even though states are not able to validate high drug use among welfare beneficiaries, states are still passing legislature to be implemented. Typically, these laws specifically target TANF applicants and recipients, but some states have even attempted to include Supplemental Assistance Nutritional Program (SNAP) beneficiaries as well. The laws fall into two approaches: welfare recipients submit to testing as a precondition for eligibility of welfare or agencies test only suspected individuals with prior history and notification of drug use noted within paperwork filed in each TANF application. After 2011 and the ruling for *Lebron v. Wilkins*, states now adhere to testing policies that test suspected individuals with a prior reported history of drug use.

B. Reasonable Suspicion Drug Testing

After *Lebron* states are cautiously implementing drug-testing plans that are based off of suspicion. Although reasonable suspicion laws are constitutional according to section 902 of the Personal Responsibility and Work Opportunity Reconciliation, these laws are still issued under unreasonable requirements of the Fourth Amendment and Fourteenth Amendment.

In 2009, Arizona became the first state to officially pass legislation that mandates TANF applicants to complete a questionnaire relating to drug use. If an applicant’s answer suggests drug use, the agency requires the applicant to undergo drug testing. Bill Supporters claimed this new legislation would save the state $1.7 million annually. However, the results for this effort prove otherwise: “Since 2014, more than 140,000 Arizona TANF recipients have been screened by the Arizona Department of Economic Security. Just 42 have been referred for a drug test over that time — of the 19 who completed the test, only three have ever tested positive.”

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85 Finzel, supra note 1.
86 Id.
87 Id.
89 Covert and Israel, supra note 29.
90 Id.
Although the special needs doctrine only applies to purely suspicionless search and seizure, the same legal reasoning should be applied to suspicion based testing. Arizona has proved the law is completely inept at reducing potential drug use, as the main source of information is from a self-reporting questionnaire. Learning from Arizona’s ineffectual ability to actually produce results, in 2015 Wisconsin and Arkansas adopted legislation that pushes for suspicion based testing.

Arkansas legislature requires that an applicant for TANF benefits must be screened using an “empirically validated drug-screening tool.” Arkansas’ enacted legislature does not provide a specified method in screening tool to discern if applicants are on drugs. Although a drug-screening tool is better than Arizona’s proposed self-reported method, S.B. 600 is still ineffective. The inefficiency in both Arizona and Arkansas legislation does not maintain the special needs exception, considering neither testing procedures are effective, or efficient. Arkansas has beneficiaries self-report drug use, and Arkansas mentions an ambiguous “drug-screening tool” that does not specify efficacy in detecting potential drug users in the TANF applicant pool.

Chandler ruled that public officials running for candidacy in Georgia did not have to submit to testing, but SB 600 is making the assertion that low-income residents of Arkansas must submit to testing even though there is no diminished expectation of privacy. This is illogical reasoning considering the Supreme Court ruled against public officials needing testing, the need to test a citizen attempting to exercise his or her right to acquiring federal welfare is unreasonable. TANF applicants of Arkansas experience no diminished expectation of privacy while residing in Arkansas.

Efficacy strikes down any validity in S.B. 600. Given past state implementations of similar legislation, research proves that there is no compelling government interest. State legislatures have proposed many rationales that support drug testing welfare applicants. However, these rationales consist of rhetoric that is departed from statistically significant evidence and economic policy research. Lawmakers have pushed that taxpayers do not want through

91 Id.
92 Finzel, supra note 1.
94 Id.
95 Id.
to comply with drug use. While politicians and leaders put forth the taxpayers’ preference that their money not support drug use, suggesting social welfare money is used for that purpose, there is no statistical evidence supporting the assertion that drug use is more prevalent among social welfare beneficiaries than the general population of the United States.\textsuperscript{96} Lawmakers insist that drug testing will increasing net savings and reduce government spending by weeding out applicants who fail to pass the drug test. This assertion is false considering states end up spending more on drug tests.\textsuperscript{97}

Utilizing data from other state examples that have implemented drug-testing procedures, states have incurred a loss from drug testing schemes. For instance, in 2015, the Missouri Department of Human Services published a monthly report that included the number of TANF applicants and drug testing statistics. In 2015, 293 of the 31,336 TANF applicants were tested for drug use. Just 38 of those 293 (roughly 12.96%) tested positive for fiscal year 2015, $336,297 was appropriated to the Family Support Division for drug testing and system tracking.\textsuperscript{98} The percent yield of testable applicants is 0.93% and of that 0.93% only 38 were actually reported as being unable to seek welfare benefits.\textsuperscript{99} States lack a fundamental compelling government interest, considering policy makers are increasing costs instead of decreasing costs. The ineffectual results substantiate that drug testing for welfare is purely discriminatory in nature.

Considering states lack statistical evidence and states are unable to justify increasing costs, while promising a reduction of costs, there is no special needs in these testing procedures. The implementation of legislature like S.B. 600 does not demonstrate a special need in form of public safety violation, diminished expectation of privacy, or efficacy. Linking Fourth Amendment reasoning to Fourteenth Amendment logic: the idea behind special needs is based on the belief that certain classes of people enjoy a lesser expectation of privacy. There may be clear reason that these classes of people, such as public employees, undergo drug testing—but it is discriminatory in nature and deceitful to claim that based on socioeconomic standing an individual has a lesser expectation of privacy. The breach of privacy disproportionately sacrifices the rights of the poor, demonstrating a violation of the equal protection clause of the Fourteenth Amendment.

\textsuperscript{96} Covert and Israel, supra note 29.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
Conclusion

Suspicion based drug testing is clearly facially unconstitutional and should be struck down by federal courts as was suspicionless drug testing in 2011. The questionable efficacy, clear violation of the Fourteenth Amendment, and lack of special needs demonstrates the unnecessary need for state legislatures to penalize the poorer members of society. At the fundamental principle these laws are representative of a deep-rooted frustration with drug use in the United States and a need to establish a hierarchal order of penalizing poor members of society.