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The University of Southern California Journal of Law and Society is a student-run, interdisciplinary Journal that promotes outstanding undergraduate scholarship. The Journal provides a print and online forum to publish exceptional undergraduate papers by students at the University of Southern California and around the world. The Journal seeks to publish papers from a wide range of disciplines that reflect diverse viewpoints. Guided by top faculty members at the University of Southern California, papers selected for publication undergo a rigorous editing process by undergraduate students at USC to ensure that each paper is of the highest quality. The USC Journal of Law and Society strives to promote greater awareness and understanding of the legal field, and aims to become the preeminent journal of its kind.

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INTRODUCTION

Andrew Lockridge
Editor-in-Chief

Poet Ralph Waldo Emerson once wrote, "Peace cannot be achieved through violence, it can only be attained through understanding." The last decade has seen its fair share of controversial, heated, and even violent issues. Events like the Arab Spring, still unfolding, allow us to gain perspective on the oppression that individuals still face. The war between the cartels and the government in Mexico has reached an all time high and does not appear to be slowing down. The gay and lesbian movement becomes a more important issue everyday but they still face intense discrimination. Perhaps understanding the struggles that individuals around the world face is indeed the key to peace.

I am particularly excited for this issue because our theme of "The Law and Politics of Violence" is one that my staff and I have talked about since the Journal's inception. The aforementioned issues are just a few of those that the following papers deal with and I think they do so brilliantly. We were able to select and publish a handful of outstanding papers due to the commitment of the entire Journal staff. Without them, I would not be writing this.

The first person I absolutely must thank is our director of publicity, Evan Lester, and his team consisting of Raul Beke and Micaela Rodgers. In Fall 2013, Evan took over one of the most difficult jobs on the Journal. Evan worked with our prior director of publicity, Oriah Amit, in order to learn how the job was done, and then he worked tirelessly at sending emails, posting flyers, and discovering new colleges and universities to reach out to. I am eternally grateful for Evan, Raul, and Micaela for allowing us to have such an excellent array of papers to choose from. Once we had so many excellent papers, however, we needed someone to organize the selection process and Gracie Chediak did so flawlessly. Gracie has been with the Journal since our first issue and I am lucky to have someone so talented be our submissions editor.

Sarah Beshir and Tyler Cundiff were our executive articles editors and this semester they handled it impeccably. We had seven editing groups for this issue, which kept Sarah and Tyler very busy. Our editing groups were led by Raul Beke, Eszter Boldis, Evan Lester, Micaela Rodgers, Stephanie Schmidt, Mabel Tsui, and Shannon Zhang. Each leader oversaw two to three associate editors and they worked on perfecting one paper per group. Especially given our tight publication schedule, I am continually impressed as to how efficient and adept our lead editors are.

Throughout the process I was aided by the managing editor and chief of staff, Sarah Nadel. Sarah did a wonderful job streamlining the Journal's publication process and we will greatly miss her presence in the spring given her fall graduation. Mallorie Maranda was our director of finance and provided an integral role in acquiring funding for this issue of the Journal. Leslie Chang and Shannon Zhang continue to be our incredibly talented production editors and I am excited to have them on our staff for the coming semesters.

Marissa Roy took over our position of director of faculty relations and under her guidance our advisory board was better than ever. Our advisory board was ably led by Jeb Barnes and I thank him for all of his guidance. I would also like to thank Professors Lyn Boyd-Judson, Michael Cody, Lee Epstein, C. Kerry Fields, Ariela Gross, Nancy Lutkehaus, Erin Moore, Alison Dundes Renteln, Wayne Sandholtz, Jefferey Sellers, Nancy Staudt, and Karen Sternheimer. All of us on the Journal staff greatly benefit from their edits to our

submissions, and we are appreciative of their valuable time and advice. I would also like to thank Simone Riley, Editor-in-Chief of the Southern California Review of Law and Social Justice at the Gould School of Law, for working with our editors and imparting helpful insight into the publication process.

My staff and I would not be where we are today were it not for Professor Steven Lamy, Vice Dean for Academic Programs in the USC Dana and David Dornsife College of Letters, Arts and Sciences, and his office. They generously funded this issue of the Journal and we thank them immensely.

Of course I must also thank our Editor-in-Chief Emeritus, Alex Fullman. Alex is somehow available at all times of the day in case I have a pressing question or issue that I need help with. I am thankful that he is kind enough to continue to lend a hand when we need it. With each semester comes growth: new members, new universities, new editing techniques. I am very excited to present this latest issue of the Journal to not only everyone who was involved but those interested in learning about the law and politics of violence from some very bright, inquisitive, and intelligent minds.

SELF-DETERMINATION IN THE ARAB SPRING

Raul Beke*

*In the wake of democratic insurrections, many nations within the Middle East face opposing forces from warring factions, and mixed messages from the international community. Although the principles of self-determination are manifested in multiple instruments of international law, the application of this law to separatist movements has created a legal conundrum between a right to democratic governance and a right of incumbent governments to deny it. Finding a balance between the avocation of democracy and preservation of a state's sovereignty affects the interpretation of the right to self-determination as it relates to democratic self-governance in international law. This study attempts to find the means for this balance to occur, while examining the role of the international community as well as legal documents that to support or deny this new wave of democracy.***

* Candidate, Bachelor of Arts, Politics, Philosophy, and Law, University of Southern California (expected 2014).

** Note to readers: This paper is tailored solely to the Syrian Revolution.

INTRODUCTION

Political philosopher John Stuart Mill characterized self-determination as a natural right of human beings. Without such a right, Mill depicts nations to be bands of uncivilized peoples ruled by despots who produce "a state of nerveless imbecility that everyone subject to their will… was the prey of anybody who had a band of ruffians in his pay."[1] Years after Mill's description of self-determination, the right was defined in the Charter of the United Nations in 1945 as the principle of "all peoples [to]… freely determine, without external interference, their political status and to pursue their economic, social, and cultural development."[2] As a legal norm of international law, the right has attained the status of jus cogens: it is considered a strict rule of international law that is to be obeyed at all times.[3] The International Court of Justice (ICJ) and the Inter-American Commission on Human Rights (IACHR) have argued that the principle has achieved a legal status of erga omnes (found in the Advisory Opinion on the Wall), or a right that flows to everyone. Erga omnes obligations are presented as duties owed to all states and the international community that are to be respected in all circumstances.[4]

Although the international community has acknowledged the right of peoples to determine their political, economic, social, and cultural destinies, the debate over the interpretation of "peoples" has led to much debate over just how expansionary or revolutionary this right is. Two interpretations pervade the legal literature on the topic and exist in constant tension with one another. The first is often supported by states that interpret the right more conservatively – applying self-determination to the nation as a governing body – while a more liberal perspective has been adopted by citizens who have felt disenfranchised by their government and hope to determine their own political, economic, social, and cultural destinies.[5]

As both interpretations posit insight to the development of the

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[1] MICHAEL W. DOYLE, SOVEREIGNTY AND HUMANITARIAN MILITARY INTERVENTION (2006) at 10.
[2] Karen Parker, *Understanding Self-Determination: The Basics, Presentation to First International Conference on the Right to Self-Determination*, United Nations, August 2000, Geneva.
[3] S. JAMES ANAYA, SELF-DETERMINATION: A FOUNDATIONAL PRINCIPLE, *Indigenous Peoples in International Law*, 75-76 (1996).
[4] Karen Parker, *Understanding Self-Determination: The Basics Guide to Action*, ASSOCIATION OF HUMANITARIAN LAWYERS, (2000), http://www.guidetoaction.org/parker/selfdet.html.
[5] Margaret Moore, *National Self-Determination and Secession*. OXFORD PRESS SCHOLARSHIP ONLINE, (2003), http://www.oxfordscholarship.com.libproxy.usc.edu/view/10.1093/0198293844.001.0001/acprof-9780198293842-chapter-1.

cardinal principles found within the right, it will become important to understand some of the implications of choosing one interpretation over another. One particularly interesting case study is found in many of the ongoing democratic movements throughout the Middle East and Northern Africa.[6] The goal of this paper is to find the most appropriate definition for the right of self-determination as it applies to this instance, and will offer a plausible course of action for the international community.

PART I. THE ARAB SPRING

On December 18, 2010, the self-immolation of a Tunisian fruit vendor began a wave of democratic insurrections throughout many states within the Middle East and North Africa, known as the "Arab Spring." As protests rose throughout Tunisia, Egypt, Libya, Yemen, and Syria, individual states sponsored violent attacks towards their revolting citizens.[7] As the international community watched from the periphery, protestors demanded the right to be free from government oppression, advocating for a more expansive interpretation of the right of self-determination Much to their dismay, the international community has been silent – favoring a more conservative interpretation of self-determination in order to maintain international order and respect of state sovereignty. Before any legal scholar of international law can decide to what degree the international community should favor a conservative or liberal interpretation of self-determination, it is necessary to understand the possible interpretations of important terms as well as the historical context and application of the right.[8]

PART II. DEFINITIONS

In his Fourteen Points speech before a joint session of Congress on January 8, 1918, President Woodrow Wilson defined the "self" of self-determination as the people. Yet Sir Ivor Jennings is quoted to reply to Wilson's interpretation with the following remark: "On the surface, it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people."[9] From this example, one can see the need for clarity in defining many of the

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[6] Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences between Tunisia, Egypt, and Libya,* FOREIGN AFF., Apr. 3, 2011.
[7] Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 3 UNIV. HOUS. PUB. L. & LEGAL THEORY SERIES, 1-38 (2012) at 2.
[8] Aleksander Pavokovic & Peter Radan, *In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order*, 3 MACQUARIA L.J., 1-12 (2003) at 1-2.
[9] LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978) at 10-11.

terms surrounding the argument for self-determination. Therefore, defining what constitutes and delineates the "self" and understanding who can invoke this principle will be central to this study as it will play an important role in understanding how to further implement the right.[10]

There are two approaches in defining the self. The first is known as the subjective approach, in which a group of peoples may become a self when it can perceive itself as a separate and autonomous entity. Although this definition seems appealing to a Western democratic worldview and should not be immediately dismissed, the sheer perception of distinctiveness may simply be rooted in passion for autonomy.[11] As societies support multiple social, professional, and religious groups, it is unclear to what extent these groups would be considered to have "selfness" for the purposes of an international right to self-determination. It would seem difficult to distinguish many of the overlapping, unverifiable, and changing natures of these groups.[12] Considering that this definition of the self may create many problems for domestic and international law, it appears that a more objective definition may provide a better understanding of how this principle will apply as a right.

What sort of objective criteria should be applied for a given population? International law has typically used a combination of factors including the "religious, historic, geographic, ethnologic, economic, linguistic and racial" characteristics along with a unifying sense of injustice. For the purposes of the right to self-determination, it has been said that a group must satisfy a number of these criteria before they may have a legitimate claim to self-determination. One example of this criteria applied to a group is the American colonies: the colonists had a separate and autonomous identity to England on the basis of economic interests, religion, geography, and "above all, a sense of injustice and oppression in the mother country's handling of colonial affairs."[13]

Assuming that the objective definition of "self" will be sufficient, one must define "determinism" in order to decide what activities should be determined and therefore protected. The UN Declaration of Principles of International Law Concerning Friendly Relations establishes a criterion to distinguish what it means for a people to have realized their right to determination. According to the declaration, a peoples must either: (1) establish a sovereign and independent state; (2) freely associate with another state; or (3) integrate with another state after freely having expressed a will

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[10] Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, INT'L & COMP. L.Q., (1994), at 102.
[11] Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*. 16 YALE J. INT'L L., 177-202 (1991) at 198.
[12] ALEXIS HERACLIDES, THE INTERNATIONAL NORMATIVE FRAMEWORK, THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS, 21-32 (1990) at 6-7.
[13] BUCHHEIT, *supra* note 9, at 10-11.

to do so. Both the UN Charter and the Declaration of Principles Concerning Friendly Relations indicate that all states have a duty to refrain from any forcible action that would deprive peoples from successfully realizing their right of self-determination.[14] Additionally, Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) outline the political, economic, social and cultural development rights guaranteed by international law.[15] If a people are found to have a legitimate claim to this right of self-determination then from a Rawlsain perspective, there is a *duty* by some other legal entity or body to uphold this right, and this entity must be the entity that has supported and established the right, namely the United Nations.

One major distinction to be made is that between "peoples" and "nations." Often governments seek to narrow the definition of people in order to limit the number of groups who may seek claim to self-determination. In so doing, states often favor the conservative approach that interprets the term "all peoples" to mean a nation.[16] The basis for this approach is mutual respect for state sovereignty that can be traced back to the 1648 Peace of Westphalia.[17] According to Professor Brad Roth, states may feel that ascertaining a public will is a complex, presumptuous, and ultimately controversial task. In adopting a limited interpretation, a state may make decisions to prevent violent insurrections, civil wars, and coup d'états.[18] One primary problem with the interpretation is found in the "Friendly Relations" Declaration of 1970. This declaration rejects any right of secession by peoples from an independent state. Who are the beneficiaries of self-determination if secessionist self-determination is to be excluded? It is said that the "peoples" who benefit from this right are distinctly the people who are under colonial rule.[19]

Even from an expansionary perspective, the definition of peoples may constitute a self only in particular instances. In order to give a better account of just when self-determination should apply, the UNESCO Division of Human Rights Democracy and Peace organized an international conference of experts entitled "The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention," held in Barce-

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[14] Sara Yarden, *International Humanitarian Law Analysis of the Settlements* http://www.diakonia.se/sa/node.asp?node=858, (2009).
[15] HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, (1996) at 41.
[16] MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER, (1992) at 47.
[17] Michael J Kelly, *Pulling at the Threads of Westphalia: Involuntary Sovereingty Waiver- Revolutionary International Legal Theory or Return to Rule by the Great Powers?,* 361 UCLA J. INT'L L. & FOREIGN AFF., 363-91 (2005) at 364.
[18] Brad Roth, *State Sovereignty, International Legality, and Moral Disagreement* (2005) at 10-13.
[19] HERACLIDES, *supra* note 12, at 21.

lona in 1998. The group found that the right of self-determination should always be interpreted in manner that will maintain the peace, a simultaneously conservative and expansionary interpretation of self-determination. As these findings may apply to the Arab Spring, the groups interpretation allows for rebellion only in instances in which a government has not fulfilled its duties to protect its citizens, namely as a right of last-resort.[20]

Throughout the twentieth century, scholars distinguished between an internal and external right of self-determination.[21] The external principle is a duty of the state to decide the political status of its people and the state's place in the international community, as well as a duty to prevent the outside coercion of other states onto its own citizens.[22] The internal principle of self-determination is often attributed to President Wilson and viewed as the democratic implementation of the right. It provides the peoples of state the necessary avenue to influence the constitutional and political framework of its nation.[23] Although the dichotomy between external and internal principles has been instrumental in explaining the right, it can be argued that this simple distinction is no longer adequate as new protections of people become necessary. Some examples of new protections include: (1) *anti-colonial self-determination*, in which a territorial population is under colonial rule and seeks complete freedom or more political power. The potential for these claims may exist in states such as Puerto Rico, New Caledonia, Gibraltar, and elsewhere. (2) *Sub-state self-determination* describes an attempt made by a group within an existing state to form a new state and break off or achieve greater political autonomy within the current state. Examples of these movements include the movements of the Francophone people in Canada, the Tamil movements in India, and Ibo movements in Nigeria. (3) *Trans-state self-determination* involves claims of ethnic groups that transcend national borders; for example, the ethnic minority of Romanian people in Moldova who seek ties to Romania. Many of these ethnic groups seek to break from one state into another. Dispersed peoples often face a lack of territorial protection and may require a right of self-determination among dispersed peoples, in order to implement a local self-government. Lastly, (4) a claim to *representative self-determination* would result in situations when a population within an existing state attempts to challenge or resist the current political structure in favor of a more representative structure. Representative self-determination can be seen most

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[20] Onno Seroo Van Walt Van Praag, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (1998), at 16.
[21] Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 (5) FORDHAM INT'L L., 1477-1532 (2000), at 1500.
[22] BUCHHEIT, *supra* note 9, at 14.
[23] HANNUM, *supra* note 15, at 30.

clearly in past movements including South Africa, Haiti, and Myanmar.[24] This form of self-determination may also describe the protestors of the Arab Spring.

PART III. HISTORY

As history has played a significant role in evolving the right of self-determination, it is important to understand the relationship between the right's definition and its historical context. The right's definition has oscillated between a limited focus and an expansive one.

Prior to its codification, the principle of self-determination can be traced to the American Declaration of Independence (1776) and French Revolution (1789).[25] These two instances marked the end of a paradigm in which citizens were subjects of the monarch, living in accordance to the will and limitations of the throne.[26] After the revolutions, the divine right to rule was vested in the people, where government was established from the consent of the governed.[27] Professors Aleksandar Pavokic and Peter Radan of Macquarie University note that this paradigmatic shift from the rule of the monarch to the rule of the people created a collective right for nations to rule themselves.[28] As the state became increasingly democratized, nationalism took the form of national self-determination.[29] The development of the concept of self-determination is attributed more frequently to the French Revolution.[30] Formally enshrined into the French Draft Constitution in Article 2 of Title XIII, the right of self-determination was formally proposed in order to settle disputes regarding the transfer of territory. Later, it would be adopted into the French Constitution of 1958 under Article 53(3) stating: "No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned."[31]Although the article's original intent was to allow territories to define their political destines, it was too narrowly focused and often misconstrued. There are three examples of such application: first the scope and implementation of the principle was often misconstrued to apply only in cases in which the French government was to benefit from the annexation of territories. Secondly, it failed to protect minorities, ethnic, religious or cultural

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[24] Morton H. Halperin, David J. Scheffer and Patricia Small, *Self-Determination in the New World Order*, FOREIGN AFFAIRS BY COUNCIL OF FOREIGN RELATIONS (1992-1993) at 50-52.
[25] Munakata Takayuki, *Human Rights, The Right of Self-Determination and the Right to Freedom*, 4 (1) INT'L J. PEACE STUD. (1991).
[26] Malcom N. Shaw, *Peoples, Territorialism and Boundaries* EUR. J. INT'L L., (1997) at 480.
[27] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, (1995).
[28] Pavokovic & Radan, *supra* note 8, at 1.
[29] ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINISM (1970).
[30] Brilmayer, *supra* note 11.
[31] CASSESE, *supra* note 27, at 11-14.

groups, and colonial peoples. Lastly, the principle failed to mention any rights of peoples to freely determine their own rulers.[32]

Regardless of the flaws and limitations of the principle's origins, it can still be said that the French Revolution created an opening for the right of self-determination to exist in the form of popular sovereignty. According to Professor Lea Brilmayer of Yale Law School, "the concept of popular sovereignty can be understood to encompass the right to rebel against the rule by another national or ethnic group just as it includes a right to rebel against one's own government."[33] Guiseppe Mazzini of Italy would later invoke the same principle in order to demand that all nations should freely choose their international status.[34]

Until the period after the First World War, the principle of self-determination played a limited role in international policy-making.[35] This period often noted as a time of limited interpretation of the right even as acceptance of self-determinism became increasingly prevalent.[36] During this period, President Woodrow Wilson would advocate his view of self-determination as a logical corollary of popular-sovereignty rooted in Western democratic theory. According to Wilson, the principle of self-determination was one that "effectively transferr[ed] the initiative in state-making from the government to the people."[37] Wilson would later face opposition to this approach from delegates in the Paris Peace Conference of 1919 who argued that the implementation of this principle was unworkable and unpopular among states. Two major concerns of the conference's members were possible interference of the international community into domestic issues as well as the right being used as grounds for secession by various factions within a sovereign state. In order to reconcile this issue, the discussions resulted in a fundamental shift in the view of the right under positive international law as a right of minority groups.[38] From this interpretation, a minority as a separate entity may claim a self-determination right as a "people" in accordance to Article 1 of the U.N. Human Rights Conventions.[39] This definition effectively satisfied many of the members of the UN, as they felt the mistreatment of minorities should

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[32] Chimène I. Keitner. *National Self-Determination from a Historical Perspective*: *The Legacy of the French Revolution for Today's Debates*, 2 (3) INT'L STUD. REV., 3-26 (2000).
[33] Brilmayer, *supra* note 11, at 180.
[34] CASSESE, *supra* note 27, at 13.
[35] Shaw, *supra* note 26, at 480.
[36] Brilmayer, *supra* note 11, at 180.
[37] COBBAN, *supra* note 29.
[38] CATRIONA JANET DREW, POPULATION TRANSFER: THE UNTOLD STORY OF THE INTERNATIONAL LAW OF SELF-DETERMINATION (2006).
[39] Enver Hasani, *Self-Determination, Territorial Integrity and International Stability the Case of Yugoslavia*. AKADEMIEDRUCKEREI LANDESVERTEIDIGUNGSAKDEMIE, NATIONAL DEFENSE ACADEMY INSTITUTE FOR PEACE SUPPORT AND CONFLICT MANAGEMENT VIENNA, 1993.

be considered a matter of international concern.[40]

As self-determination finally began to take form as an enforceable right for a particular peoples (under a broad interpretation of self-determination), the success or failure of many groups was largely determined by many of the geopolitical interests of the Great Powers. This can be largely seen in the Aland Islands case of 1920.[41] In 1920, the Council of the League of Nations assigned a committee of three jurists – the Aaland Commission of Jurists – to determine whether the inhabitants of the Aaland Islands (situated off the coast of Sweden within the Baltic Sea) were able to secede from Finland and join Sweden. Under a claim of self-determination, Sweden argued that the Aaland people should be allowed to unify with Sweden. Finland argued the case brought before the council should be left to the Finnish domestic jurisdiction.[42]

Ultimately, the commission issued two reports concerning the legal issues of the dispute, in which it adopted a conservative interpretation of self-determination. The first report dealt with whether the Aaland Islands issue fell within the jurisdiction of the League of Nations or simply a domestic concern. In this report, the commission decided that the right of self-determination was not considered an international legal norm. The commission recognized that because the right was not mentioned within the Covenant on the League of Nations and was only mentioned in a few international treaties, it should not be considered a positive rule of the Law of Nations. The second report made an argument of international utility. It declared that in interest of preserving a state's territorial and political unity, factions and minorities should not be allowed to secede from the mother nation, as this could lead to instability within the state and anarchy to international life.[43]

Upon the establishment of the U.N. in 1945, the meaning and application of self-determination began to evolve again more broadly. The rhetoric of Articles 1(2) and 55 of the U.N. Charter both outline the support of the United Nations to the process of self-determination is listed in each document as one of the goals of the United Nations.[44] Although Chapters XI and XII of the U.N. Charter make no direct reference to the right, the principle seemed to be established indirectly. Article 73 of Chapter XI refers to a duty of states to promote self-government in territories where people have yet to establish a formal government as well as promote

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[40] BUCHHEIT, *supra* note 9, at 58.
[41] COBBAN, *supra* note 29, at 68-69.
[42] Oliver Diggelmann. *The Aaland Case and the Sociological Approach to International Law,* 18 (1) EUR. J. INT'L L., 135-43 (2007).
[43] Hanum, *supra* note 12, at 28-30.
[44] HERACLIDES, *supra* note 12, at 21.

and assist in the progressive development of free political institutions.[45] The notion of a duty for states to promote self-government continues in Article 76 of Chapter XII of the Charter, which designates the promotion of progressive development of trust territories towards "self-government and independence" as a basic objective of U.N. trusteeship.[46] Furthermore, the Charter of the United Nations would also establish International Trusteeship Council in Chapter XIII to monitor Trust Territories, which has since granted more than eighty former colonies independence.

During the early years of the United Nations, member states were split on many of the matters concerning self-determination and decolonization. While Eastern Europe and Asian nations supported a more expansive view of the right of self-determination, many Western nations still feared involvement of the international community into domestic matters.[47] In a further attempt to limit the scope of the right, the international community came up with two tests to determine whether self-determination applied to a particular situation – of which neither has lasted. The first is known as the "saltwater" test, which required a body of salt water to separate the governing state from the governed colony. The second was often cited as the "pigmentation" test, in which race could be a deciding factor of whether to apply self-determination to peoples within a state.[48]

Although debate surrounds the precise definition of the right to self-determination, the simplest definition seems to be the right of all peoples "govern their own affairs."[49] Throughout the period of the Cold War, the principle of self-determination was viewed skeptically and interpreted only in cases that demanded for independence from colonial rule.[50]

In a contemporary context, the right of self-determination has gained a more significant legal role as it is beginning to become recognized in various instruments of international law.[51] Some examples of its most recent introductions include: The Declaration on the Granting of Independence to Colonial Territories and Countries (Resolution 1514); The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States; International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). In these documents, signatory states commit themselves to implementing these rights of self-

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[45] Sidi M. Omar, *The Right to Self-determination and the Indigenous People of Western Sahara*, 21 (1) CAMBRIDGE REV. INT'L AFF, 41-57 (2008).
[46] HALPERIN ET AL., *supra* note 16, at 20.
[47] HALPERIN ET AL., *supra* note 16, at 35.
[48] BUCHHEIT, *supra* note 8, at 18.
[49] Halperin, *supra* note 24, at 1.
[50] Halperin, *supra* note 24, at 39.
[51] ANAYA, *supra* note 3, at 75.

determination for all citizens within their jurisdiction.[52] Resolution 3314 of the General Assembly, entitled "The Definition of Aggression," reaffirms the duty of states under the Charter to settle disputes by peaceful means and not use armed force to deprive peoples of their right to self-determination, freedom or independence.

There are also a few examples of self-determination within existing treaty law. The African Charter on Human and People's Rights of 1981 was ratified by fifty-three members states of the African Union and it recognizes the right of self-determination of African people to their natural wealth and resources as well as the rights of equality and social and cultural development. Another example comes in Article 1(4) of the Protocol I of 1977 in the addition to the Geneva Convention of 1949 on the protection of war victims, which defines international armed conflicts against peoples who are fighting to exercise their right to self-determination.[53]Although there is still need for consensus among the international community over the definition of self-determination, the right's legitimacy is no longer in doubt.[54]

PART IV. JURISPRUDENCE

Apart from the Aland case, the international legal community has seen a series of cases in relation to the right of self-determination. Although international law posits no precedent, the understanding of the concept of self-determination from the perspective of international courts may further assist in the defining of a right to self-determination.

The Barcelona Traction Case (1970; ICJ)

In his separate opinion of the Barcelona Traction Case, Judge Ammoun comments on the right of self-determination as a right that cannot be denied or conceded. He goes on to make the case for the right as a part of positive international law that should be solemnly reaffirmed.[55]

Advisory Opinion on Western Sahara (1975; ICJ)

In the advisory opinion of the Western Sahara case, the ICJ held that the indigenous population of Western Sahara constituted a collective "self" under the right of self-determination. Given this right, the popula-

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[52] MELIK ÖZDEN & CHRISTOPHER GOLAY, THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND TO PERMANENT SOVEREIGNTY OVER THEIR NATURAL RESOURCES SEEN FROM A HUMAN RIGHTS PERSPECTIVE, (2010).

[53] Allan Rosas, *Internal Self-Determination* in MODERN LAW OF SELF-DETERMINATION, 1993, at 226-227.

[54] Araujo, *supra* note 21, at 1495.

[55] Araujo, *supra* note 21, at 1493.

tion of indigenous peoples was entitled to be free from the alien subjugation of the Spanish government in 1884.[56]

Reference re Secession of Quebec (1998; Canadian Supreme Court)

In the case concerning the legality of secession of Quebec from Canada, the Canadian Supreme Court ruled that a minority could become a people for the purpose of applying a right of self-determination as a remedy of last resort.[57] According to the Court, a Canadian providence may only secede if a majority of the provinces' population voted in favor of a secession referendum and all parties of the Canadian federation negotiate a constitutional amendment to allow the secession.[58]

Advisory Opinion on the Wall (2004; ICJ)

In its Advisory Opinion on the Wall, the International Court of Justice held that Israel should not build a wall in and around East Jerusalem, as this would infringe upon the right of self-determination of the Palestinian people. The Court cited many existing international legal treaties and covenants to reaffirm the right's place within international law, as well as establishing self-determination as a right of erga omnes, applicable to all peoples and territories.[59]

PART V. CONTEMPORARY APPLICATION

The first question to be asked prior to any involvement by the international community into the Middle East is whether or not the Arab Spring nations have infringed on the self-determination rights of their people.

In his speech before Cairo University in June of 2009, President Barack Obama reiterated many of the early Wilsonian beliefs in democratic self-governance and self-determination. For some members of the audience, they believed this speech was the beginning of a new wave of foreign policy towards the Middle East. Listeners ardently hoped that the West would reverse many wrongs such as election fraud, repression of women's rights, and the rights of religious minorities. Much to the surprise of his audience, the United States and other Western nations did not take the aggressive foreign policy approach that the President's original rhetoric

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[56] Omar *supra* note 45, at 43.
[57] Pavokovic & Radan, *supra* note 8, at 11.
[58] Richard Hustad, *The Right to Self-Determination*. UNIVERSITY OF OSLO NORWEGIAN CENTRE FOR HUMAN RIGHTS, 2009, http://www.uio.no/studier/emner/jus/jus/JUR5710/h09/undervisningsmateriale/Self-determination.pdf, at 9-10.
[59] Yarden, *supra* note 14.

seemingly promised.[60] Although the cause of the Arab Spring is a multi-faceted one, with years of political, social, economic, and religious history, the influence of a desire for democracy and economic freedom that echoed from the president's Cairo speech should not be taken for granted.[61] It has been noted by some scholars that this visit sparked a sense of urgency in leaders of Tunisia, Egypt, Libya, Yemen, and Syria to take an aggressive approach towards political demonstration in fear of democratic uprisings. In many instances, citizens in states that had been denied fundamental human rights such as free expression, freedom of assembly, human dignity and worth, equality, political discrimination, as well as participation in government, began to voice their concerns and were often met with harsh responses. This harsh response and the forcible denial of these rights should raise concern for the international community.[62] What can be said of the role of self-determination in relation to the Arab Spring and other movements to follow? Once a nation infringes upon its duty to protect its people, actively suppresses the political and civil rights, and/or causes harm or acts of genocide towards its citizens, a test of the government's legitimacy should be in order. In the opinion of the *Nuremberg* Case, the court ruled that sovereignty is not an absolute right of states when the state moves outside its competence under international law.[63] Article 21(3) of the Universal Declaration of Human Rights designates the will of the people as the sole authority for a legitimate government.[64] Should it be said then that any group that feels that it has been legitimately disenfranchised by its government can secede? Not necessarily — it may be that the appropriate course of action for dissatisfied groups is to be included in the polity, rather than to separate them altogether. The international community should *always* favor peaceful negotiations, if possible, to preserve the territorial and political unity of a nation.[65]

Although peaceful negotiations are favored, the nature of the Arab Spring and the violent attacks against protestors throughout Tunisia, Egypt, Libya, Yemen, and Syria seem to constitute a different course of action.[66] In cases of governments using force against their own citizens, international law seems to justify the use of force by the oppressed in armed revolution as a form of self-defense.[67] Scholars have noted that the

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[60] Anderson, *supra* note 6, at 1.
[61] Anthony Celso, *Obama and the Arab Spring* (2012), http://wpsa.research.pdx.edu/meet/2012/celsopaper.pdf. at 4-8
[62] Paust, *supra* note 7, at 6.
[63] Paust, *supra* note 7, at 15.
[64] ÖZDEN & GOLAY, *supra* note 52, at 23.
[65] Brilmayer, *supra* note 11, at 185.
[66] Paust, *supra* note 7, at 24.
[67] Edre U. Olalia, *The Status in International Law of National Liberation Movements and Their Use of Armed Force*, INT'L ASS'N PEOPLE'S LAW, (2008) at 6.

right of revolution or revolt against tyranny is becoming a recognized principle of international law.[68] As democracy begins to flow throughout the Arab Spring, determining which groups shall begin to gain rights of self-determination will be left to the individual states.

PART VI. SYRIA

In response to the events that have enfolded during the Syrian revolution, this paper's main aim is to argue that the United Nations must take a more aggressive stance against the Syrian government. By recognizing self-determination as a right endowed to all peoples, the United Nations has a duty to not sit idly as Syrians are continually denied a voice in their government. As Solon Solomon astutely recognizes, there are and should be limits to the right's implementations. What Solomon fails to provide is a framework through which the international community may make prudent decisions as to their level of involvement or whether they should be involved at all.[69] One helpful framework that might lead to an objective sort of test is one that has been apart of American jurisprudence since *Marbury v. Madison*. In *Marbury,* the Supreme Court not only ruled to establish its power of judicial review, it also established what constitutional scholars call "political question doctrine." According to this doctrine, the Supreme Court should not become involved in matters concerning "political questions." By political questions, the Court has meant conflicts solvable by the political system such as voting. The doctrine is not absolute though, as the Court has made exceptions to hear cases when plaintiffs cannot find remedy through the political system. This is usually the case when voting rights are suppressed or infringed and the matter cannot simply be solved by simple vote or referendum.[70] Under a similar framework, the UN could make decisions to become involved in particular state conflicts where self-determination is infringed based on whether the concerns of a people could be acknowledged by their government. Critics of this view might argue that this would necessarily commit the United Nations to acknowledge democracy as the only viable form of government for its member states. What this objection fails to consider is that a government's interest in its own people's future is not mutually exclusive to it's supporting of their rights and political concerns. Surely those governments who do not identify as democracies still value the ability of its citizens to be pursue their own prosperity. If the right of self-determination has the firm ground-

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[68] Paust, *supra* note 7, at 24.
[69] Solon Solomon, *The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits,* 11 (2) SANTA CLARA J. INT'L L., (2013) at 418.
[70] Lee Epstein, Thomas G. Walker, *Institutional Powers and Constraints: Constitutional Law for a Changing America,* (2013) at 97-98.

ing it appears to have in international law, it appears that all UN member states have the duty to affirm its own people's right of self-determination. When member states effectively fail on their duty and there is no viable avenue for complaint of a state's people, the duty can and should be transferred to the U.N. For a nation such as Egypt, where political dissent leads to negotiations in government, the international community should not get involved – or at least as long as it continues to seem this way. Whereas in states such as Syria, where the government ahs attempted to silence all dissent, the international community has a duty to let Syrians be heard.

CONCLUSION

From the conception of the right of self-determination in the American and French Revolutions, the effects of democracy can be seen throughout history in many parts of the world. The effects of the right of self-determination on the Arab Spring movement are in progress. It should be the goal of the international community to not harm or hinder this growth of self-determination, yet also realize that there may be instances in which international involvement may be necessary. It is important to remember that self-determination should not be an easily classified right applied in all circumstances; it should be used sparingly and with hesitation as to not disrupt the international order. As the Arab Spring continues to unfold, the hope is that all peoples within the movement realize their rights as citizens of the world community and begin to support one another in their movement towards equality and democracy.

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THE DIVIDED COURT AND "CRUEL AND UNUSUAL PUNISHMENT": THE BURGER COURT, ITS JUSTICES, AND THE WARREN LEGACY

John Treat*

This paper covers the development of the death penalty as a cruel and unusual punishment under the Eighth Amendment in the United States. It does this by charting Eighth Amendment jurisprudence as part of the Warren Court's liberal revolution and how the Burger Court dealt with the Warren Court's legacy. The death penalty is one of the last bastions of state-sponsored violence in the United States, but many believe that it ought to be banned as a cruel and unusual punishment. The Supreme Court has never been willing to take that step, and instead has judged capital punishment on a case-by-case basis, leading to an uneven record that refuses to ban capital punishment comprehensively but increasingly restricts its use for different categories of defendants.

* Candidate, Bachelor of Arts, Political Science & History, Stanford University (expected Spring 2014).

The Eighth Amendment is considered a fundamental right, whose ban of cruel and unusual punishment protects convicted defendants against overly harsh sentences and restricts the death penalty for most defendants.[1] However, like the entire Bill of Rights, the Eighth Amendment applied only to the federal government until it was incorporated to the states through the Due Process Clause of the Fourteenth Amendment. Although the Fourteenth Amendment was ratified in 1868, the Eighth Amendment was not used to overturn a state law until 1962 in *Robinson v. California*, 370 U.S. 660 (1962), and likewise, capital punishment was not considered an Eighth Amendment question until 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972). In this paper, I analyze how some applications of the death penalty became an unconstitutional cruel and unusual punishment by charting Eighth Amendment jurisprudence under the Burger Court (1969-86). To place the Burger Court's actions in context, I consider the prior actions of the Warren Court (1953-69), which incorporated the Eighth Amendment in *Robinson*. In a variety of fields, including civil rights,[2] reapportionment,[3] First Amendment liberties,[4] and criminal procedure,[5] the Warren Court opened up new vistas of liberal judicial activism, imposing substantive limits on government in the name of equality, fairness, and justice. With the Eighth Amendment, the Court started down that path, incorporating the Amendment and imposing some limits on state punishment statutes, but it balked at abolishing the death penalty completely. The court's hesitation combined with the rising social consensus to abolish the death penalty, forced its successor, the Burger Court, to ultimately question the merit of the death penalty as a cruel and unusual punishment.

As the Burger Court attempted to answer Eighth Amendment questions, it wrestled with the legacy of the Warren Court. Generally, the Burger Court continued the Warren revolution, leading to the eventual consolidation of most doctrine. However, the more conservative Burger Court did not inherit the Warren Court's liberal consensus and was plagued by a deep ideological divide that inhibited full acceptance or rejection of the Warren Court's doctrine in certain fields. In its Eighth Amendment jurisprudence, the Burger Court followed the Warren Court

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[1] The Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, Amendment Eight.
[2] See Brown v. Board of Education, 347 U.S. 483 (1954), Loving v. Virginia, 388 U.S. 1 (1967).
[3] See Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, 377 U.S. 533 (1964).
[4] Notably New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Brandenburg v. Ohio, 395 U.S. 444 (1969).
[5] Notably Mapp v. Ohio, 367 U.S. 643 (1961), Gideon v. Wainwright, 372 U.S. 335 (1963), Miranda v. Arizona, 384 U.S. 436 (1966).

precedent, and in a series of cases, refused to rule the death penalty unconstitutional per se, yet left its use increasingly limited. The Burger Court's ideological split and its incomplete acceptance of the Warren Court's activism diverted what could have been a major revolution in the American social contract into a case-by-case, haphazard set of restrictions on the ability of states to execute criminals.

Chief Justice Earl Warren led the liberal majority on the Court to a series of decisions that used judicial activism to place limits on government, favoring the extension of ideals such as equality, fairness, and justice to the people. The first of the Warren Court's impactful cases was *Brown v. Board of Education*, 347 U.S. 483 (1954), which overturned the doctrine of "separate but equal" and declared segregation in schools unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.[6] Warren spoke for the unanimous Court, ruling segregation in schools unconstitutional and expanding the definition of the Fourteenth Amendment. Warren approached the constitutional questions in Brown as evidence of a living constitution, writing, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson [163 U.S. 537 (1896)] was written."[7] The activist doctrine that Warren adopted saw school segregation as a contemporary question, independent of prior holdings. Warren did not avoid the civil rights implications of his decision by hiding behind procedural grounds. Instead, he framed the constitutional question as a violation of civil rights, drawing the ire of Southerners, but making *Brown* the standard for modern civil rights reform.

The Warren Court's greatest area of substantive change was its expansion of criminal procedure. The Court dramatically increased the protections afforded to criminal defendants, and insisted "upon uniform, national constitutional standards for judging the fairness of a state's criminal procedures."[8] The Court did this through the idea that the protections of the Bill of Rights ought to apply to all levels of government, not just to the federal government. Justice William Brennan articulated this as "the 'sporting contest' thesis that the government must 'play the game fairly' and cannot be allowed to profit from its own illegal acts."[9] As a whole, the Court's criminal procedure jurisprudence reflects a single theme: where the

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[6] "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[7] Brown v. Board of Education, *supra* note 6, at 492.

[8] MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE, 94-95 (1998).

[9] Bivens v. Six Unknown Agents, 403 U.S. 388, 414 (1971).

Court saw an infringement of defendants' rights, it took action to undo the violation and prevent future occurrences.

Using Brennan's selective incorporation doctrine,[10] the Court applied the Fourth, Fifth, Sixth, and Eighth Amendments to state laws. It incorporated the Fourth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961), holding that evidence obtained by illegal searches and seizures was inadmissible in state courts.[11] The Court also protected state defendants against self-incrimination by incorporating the Fifth Amendment to the states. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court freed a defendant who was placed in prison for refusing to testify, applying Malloy's Fifth Amendment right against self-incrimination to the Texas court. In its most famous criminal procedure case, *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that the privilege against self-incrimination required law enforcement officials to give defendants "full and effective warning of [their] rights at the outset of the interrogation process."[12] Furthermore, the Court, in a string of unanimous decisions, extended the provisions of the Sixth Amendment to state defendants.[13] Most notably, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that states must abide by the Sixth Amendment right to counsel.[14] The majority's reasoning was simple: "Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants

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[10] The selective incorporation doctrine rejected the narrow position of Justice Felix Frankfurter and held that the rights that are "fundamental to our justice system should be applied against the states just as they [apply] against the federal government." HORWITZ, *supra* note 8, at 94. For a description of Frankfurter's position, see *Id.* at 92. For examples of the Vinson Court's refusal to incorporate the Bill of Rights, see Adamson v. California, 332 U.S. 46 (1947), Wolf v. Colorado, 338 U.S. 25 (1949). For an analysis of Frankfurter's tempering influence over the Court, see MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953-1967, 107 (2005).

[11] Mapp in particular shows the Court's commitment to defending defendants' rights. Were the Fourth Amendment not to apply to the states, "the assurance against unreasonable [state] searches and seizures would be a 'form of words,' valueless and underserving of mention in a perpetual charter of inestimable human liberties." Mapp v. Ohio, *supra* note 5, at 655.

[12] Miranda v. Arizona, *supra* note 5, at 445. These rights are familiar to anyone who watches modern police television shows: the right to remain silent, the fact that anything the defendant says can and will be used against him in court, the right to an attorney, and the fact that an attorney will be provided if the defendant cannot afford one.

[13] In Pointer v. Texas, 380 U.S. 400 (1965), the Court incorporated the Confrontation Clause - the right of a defendant to confront the witnesses against him. In Klopfer v. North Carolina, 386 U.S. 213 (1967), the Court ruled the Sixth Amendment provision for a speedy trial to be applicable to the states.

[14] Gideon theoretically extended the right of counsel to all state defendants, but it specifically targeted the poor. Warren biographer Ed Cray writes, "No tale so affirmed the American democracy. No story broadcast around the world so clearly proclaimed that not just the rich received justice in American courts." Quoted in MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY, 172 (2001).

charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[15] These criminal procedure cases show the Court's commitment to fairness and rights. Despite opposition,[16] the incorporation of the amendments remains a critical part of criminal procedure jurisprudence, as the Court used activism to impose substantive change upon the ability of state governments to violate what the Court considered to be defendants' fundamental rights.

The incorporation of the Eighth Amendment fits into the Warren Court's application of the Bill of Rights to states in order to protect defendants' rights. It began this process in *Robinson v. California*, overturning a California statute as cruel and unusual punishment because it criminalized drug addiction. The Court held that drug addiction was a disease and that "[i]t is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be affiliated with a venereal disease ... a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[17] The Court rejected the California law as unconstitutional because it punished a disease, even one as widely loathed as drug addiction. Responding to potential counter-arguments regarding the length of Robinson's sentence, Justice Potter Stewart argued, "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[18] The Court concluded emphatically that the Eighth Amendment applied to this particular statute, even though the possible punishment could only be considered lenient.

Unlike other criminal procedure cases, the incorporation of the Eighth Amendment was not a contentious issue in *Robinson*. Justice Stew-

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[15] Gideon v. Wainwright, *supra* note 5, at 344.

[16] Miranda especially faced vocal and powerful critics as an over-extension of judicial authority, one that handcuffed police in favor of criminals. Opponents claimed that the Miranda decision destroyed the ability of police to use confessions as a tool of law enforcement, and that police departments must not be following Miranda because confessions were not decreasing. See Miranda Decision Said to End the Effective Use of Confessions, N.Y. TIMES (Aug. 21, 1966), at 52. For other examples of opposition to Warren rulings, see HORWITZ, *supra* note 8, at 25, and EARL WARREN, THE MEMOIRS OF EARL WARREN, 288-293 (1977), for Southern resistance to Brown.

[17] Robinson v. California, 370 U.S. 660 (1962), at 666.

[18] *Id.* at 667.

art's opinion assumed that the Eighth Amendment applied to states, and the dissenters did not object to this assumption.[19] The lack of debate came because the Court had already concluded that the Eighth Amendment applied to the states, but failed to actually do so because the state action was judged constitutional. Louisiana ex rel. *Francis v. Resweber*, 329 U.S. 459 (1947), regarded the failed execution of Willie Francis, who claimed that another attempt violated the Eighth Amendment. The Court remarked that "The Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner," but did not judge Louisiana's second execution attempt of Francis to be cruel.[20] Thus *Robinson*, while a landmark decision in Eighth Amendment jurisprudence, did not establish any new constitutional principle, it merely affirmed in practice what already existed in theory.

However, the Warren Court's overall Eighth Amendment and capital punishment stance became uneven in the late 1960s as the Court attempted to avoid the growing criticism to its decisions. This fits the general pattern of the Court's jurisprudence at that time, as it either pulled back from earlier activist decisions or avoided issues altogether. Although at this time, there was a very strong liberal consensus on the Court - with Justices Black, Brennan, Douglas, Fortas, and Marshall joining the Chief Justice in the liberal camp - scholars theorize that significant public backlash to the Court's earlier activist decisions caused it to become timid and less innovative.[21] For example, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court did not extend the protections provided by *Mapp v. Ohio*, holding that a police officer did not violate the Fourth Amendment by stopping and frisking a suspect on the street even without probable cause to arrest.

Regarding the death penalty, while the Court's liberal majority appeared ready to abolish capital punishment and write the final piece of the Warren activist canon, the Court refused to do so. Instead, its Eighth Amendment jurisprudence merely judged the proper limits of the Amendment. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that stacking a jury with jurors who would choose the death penalty violated defendants' Sixth Amendment right to an impartial jury that represents a cross-section of the community. However, the Court refused to extend *Robinson* and overturn a Texas public intoxication statute as "cruel and unusual punishment."[22] Justice Abe Fortas dissented, taking the *Robinson* position that public intoxication was a disease, but he could not

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[19] BELKNAP, *supra* note 10, at 235.
[20] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), at 463.
[21] BELKNAP, *supra* note 10, at 260. See footnote 16 for examples of backlash against the Warren Court's activist rulings.
[22] Powell v. Texas, 392 U.S. 514 (1968).

convince a divided (5-4) Court.[23] Similarly, on the death penalty, the largest and most important Eighth Amendment issue, the Court abstained from activism and spurned the opportunity to rule capital punishment unconstitutional, despite support for such an action among the justices.[24] This mixed jurisprudence characterizes the later Warren Court. By refusing to rule conclusively on capital punishment, the Warren Court left the issue for a future Court to resolve.

Once Earl Warren retired in 1969, Warren Burger was appointed as Chief Justice. His Court could not avoid the death penalty like the late Warren Court. It was forced to rule on the question of capital punishment as an Eighth Amendment issue because the death penalty became a pressing national issue in the late 1960's, and because the Warren Court's decisions failed to comprehensively give an answer.[25] The exercise of capital punishment declined in the United States after the 1930's (from 199 executions in 1935 to one in 1966 and none between 1967 and 1977).[26] Furthermore, between 1964 and 1966, six states abolished the death penalty, more in three years than in the previous forty.[27] Public support for the death penalty sat at an all-time low, and in 1966, it dipped below 50% for the first time in history.[28] Still, at the time of Furman, about 600 prisoners sat on death rows in 34 states.[29] To combat this enormous number, an abolitionist movement led by the American Civil Liberties Union and the NAACP Legal Defense Fund moved to provide legal assistance to all death row prisoners, tying up the cases for years and imposing a de facto

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[23] BELKNAP, *supra* note 10, at 258-259.

[24] The greatest proponent was Justice Arthur Goldberg, whose dual concerns about the death penalty's effectiveness as a deterrent and about mistaken executions of innocent defendants led him in 1963 to write a memo to the Court noting "that 'most civilized nations of the western world' had done away with capital punishment and that 'the world-wide trend is unmistakably in the direction of abolition.'" BELKNAP, *supra* note 10, at 259.

[25] Along with the fact that the death penalty was rarely used, opponents claimed that capital punishment was cruel, that it failed as a deterrent, and that it discriminated against blacks and the poor (see Tom Wicker, *The Question of Death*, N.Y. TIMES, (Mar. 14, 1975), at 39, and Lesley Oelsner, *Court to Hear Test Today On Death Penalty Return*, N.Y. TIMES, (Jun. 30, 1977), at 61.) Opponents, as did Justice Arthur Goldberg in 1963, also cited the fact that many other Western nations to whom the United States compared itself had already outlawed the death penalty. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA, 3 (1986).

[26] I*d.* at 26.

[27] LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE, 46 (1992).

[28] *Id*. at 46-47.

[29] Richard Halloran, *Death Penalties Argued in Court: Justices, for First Time, Weigh View of Execution as 'Cruel' Punishment*, N.Y. TIMES, (Jan. 18, 1972), at 15.

moratorium on capital punishment.[30] The ACLU and NAACP brought hundreds of habeas corpus suits to federal and state courts, questioning the constitutionality of their clients' sentences under Eighth Amendment or any of the other recently expanded procedural due process grounds.[31] Because these hundreds of cases covered multiple levels of courts, a great number of appeals reached the Supreme Court.[32]

These various state and federal court rulings necessarily conflicted with each other, and some courts began to rule the death penalty unconstitutional in certain situations. In *Ralph v. Warden*, 438 F.2d 786 (1970), the federal Fourth Circuit Court of Appeals held that a death sentence for rape was "cruel and unusual punishment" because it was disproportionate to the crime committed. In 1972, California became the first jurisdiction to rule the death penalty unconstitutional per se in *People v. Anderson*, 64 Cal.2d 633 (1972), holding that the death penalty was unusual in California, thus violating the California Constitution.[33] Between the growing number of prisoners sitting on death row and the capital punishment litigation offering numerous conflicting rulings, the Supreme Court could not continue to ignore the question of whether the death penalty constituted an unconstitutional "cruel and unusual punishment."

The Burger Court's Eighth Amendment rulings act as the perfect case study for the Court's jurisprudence as a whole. Because liberal justices continued to sit under Burger and because the Warren Court's legacy dominated contemporary legal theory, judicial activism continued in part,

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[30] EPSTEIN AND KOBYLKA, *supra* note 27, at 53-60. This movement was started by a dissent written by Justice Goldberg joined by Douglas and Brennan to a denial of certiorari in the case of Rudolph v. Alabama, 375 U.S. 889 (1963). This dissent was the first time that a Supreme Court justice was willing to commit to the unconstitutionality of the death penalty, and was forwarded to lawyers all across the country. *Id.* at 42-43. Epstein and Kobylka also argue that this moratorium also had a secondary purpose, which was to increase the number of inmates on death row to the point where no governor or judge would want their decision to be responsible for the killing of hundreds. *Id.* at 53, 60.

[31] ZIMRING AND HAWKINS, *supra* note 25, at 34-37. See also EPSTEIN AND KOBYLKA, *supra* note 27, at 44-56.

[32] See Boykin v. Alabama, 395 U.S. 238 (1969), McGautha v. California, 402 U.S. 183 (1971). In Boykin, Boykin argued that his death sentence for robbery was "cruel and unusual punishment," but the Supreme Court avoided the constitutional question and sent the case back to the state trial court on procedural grounds. In McGautha, the Supreme Court held that juries did not have to be given definite standards to make their sentencing decisions and that states did not have to provide separate sentencing hearings in capital cases.

[33] At the time, Article 1, Section 6 of the California Constitution banned "cruel or unusual punishments," as opposed to the United States Constitution's ban on "cruel and unusual punishments." (Emphasis added.) The California Supreme Court found the use of the death penalty in the state to be unusual because there had only been two executions since 1963, none since 1967, and because 80% of eligible defendants received life sentences rather than death. WICKER, *supra* note 25, at 15.

as the Burger Court affirmed and augmented some previous decisions to encompass and protect new rights. *Reed v. Reed*, 404 U.S. 71 (1971), unanimously used the Warren Court's expanded notion of equal protection to hold for the first time that gender discrimination violated the Fourteenth Amendment. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court ruled that the right of privacy created in *Griswold v. Connecticut*, 381 U.S. 479 (1965), extended to abortions.[34] Similarly, the Court used the incorporation in *Robinson* to build upon and clarify the mixed Warren Court precedent. However, as the intellectual composition of the Court changed with conservative justices appointed by Republican presidents, the Burger Court was more conservative than the Warren Court.[35] The deep internal schism on the Court meant that the liberals were not able to fully continue the Warren Court's judicial activism, but the conservatives could not fully eliminate it. In many instances, the most that the conservatives could do to limit activism was to temper the effects of activist decisions and move Warren Court precedent to a more centrist position.[36]

Regarding the Eighth Amendment question, the Burger Court could not fully decide the constitutionality of the death penalty. It laid down a string of decisions, which restricted the use of the death penalty for certain defendants. However, while the Court prevented certain uses of the death penalty, its Eighth Amendment jurisprudence was only somewhat

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[34] Griswold, which overturned a Connecticut law prohibiting the use of contraceptives, is perhaps the Warren Court's most activist decision. Justice Douglas's majority opinion asserted that the right to privacy existed from various guarantees emanating from the penumbras of the First, Third, Fourth, and Fifth Amendments (Griswold v. Connecticut 381 U.S. 479 (1965), at 484), a contention that owed less to a concrete textual basis than a sense that the right to privacy ought to exist.

[35] Here, a discussion of the composition of the Court under Warren and Burger is necessary (see Appendix I for the precise composition of the two Courts). The retirement of Justice Frankfurter in 1962 created a liberal majority on the Court, while the other justices occupied centrist and mildly conservative positions. However, the appointment of Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist between 1969-72 ended the Warren Court's liberal consensus, and the Court split into three camps: the liberals (Brennan, Marshall, Douglas), the centrists (Blackmun, Stewart, White), and the conservatives (Burger, Powell, Rehnquist).

[36] The Burger Court was particularly concerned with tempering the Warren Court's criminal procedure revolution, much of which remained extremely unpopular. See United States v. Harris, 403 U.S. 573 (1971), Illinois v. Gates, 462 U.S. 213 (1983), Massachusetts v. Upton, 466 U.S. 727 (1984). Martin H. Belsky argues that "the Burger Court pragmatically contained the scope of the Warren Court criminal justice rulings and also challenged their theoretical premises" and that the changes made were minor but noticeable. (BERNARD SCHWARTZ, ED. THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? (2nd. ed. 1998), at 132.) However, he argues that the Burger Court, with the exception of pretrial identification, did not overturn the Warren Court's landmark criminal procedure cases. (*Id.* at 131.) See also Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987).

activist, as it refused to rule the death penalty unconstitutional. Despite this uneven approval of Warren Court doctrine, the Burger Court's record reflects a fundamental agreement about the principles behind Warren Court activism: the importance of the protection of defendants' rights and promotion of fairness and justice. The end result of this mixed record was the cementing of much of the Warren Court's unprecedented legal doctrine as the permanent future of American law, as even its opponents could not renounce it. Columbia Law Professor Vincent Blasi sums up this idea, "Constitutional principles that were once innovative and controversial are now familiar, even basic."[37]

The Court first analyzed the constitutionality of capital punishment in *Furman v. Georgia*. William Furman was sentenced to death under Georgia's felony-murder rule because he murdered while committing a robbery. The Court ruled that the death penalty, as practiced in the United States, was unconstitutional because the arbitrary and capricious manner in which it was applied was a cruel and unusual punishment for those sentenced to death. However, the five justices in the majority could not form a single argument, and each of the nine justices filed a separate opinion. Justices Brennan and Marshall were categorically opposed to the death penalty as unconstitutional in all circumstances. Brennan wrote, "The Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[38] He added, "It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a 'cruel and unusual' punishment."[39] Brennan used the "evolving standards" doctrine set forth by Earl Warren,[40] thus historical acceptance of the death penalty was irrelevant. Because contemporary society refused to use the death penalty, its norms had evolved to hold that capital punishment violated the Eighth Amendment.

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[37] VINCENT BLASI, ED. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, 199 (1983).
[38] Furman v. Georgia, 408 U.S. 238, 270 (Brennan, J., concurring).
[39] *Id.* at 286 (Brennan, J., concurring).
[40] "The [Eighth] Amendment must draw its meaning from the evolving standards of decency which mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), quoted in Furman v. Georgia, *supra* note 38, at 269-270 (Brennan, J., concurring).

Justice Marshall agreed with Brennan's categorical ban on capital punishment. In his concurrence, he used statistics and the history of the death penalty to conclude that capital punishment was an excessive punishment because it was no better than life imprisonment.[41] By contrast, Douglas, Stewart, and White - the other members of the majority - were not willing to strike capital punishment as unconstitutional in all applications. Their concurrences instead focused on the arbitrary, capricious, and discriminatory nature of the death penalty in the United States.[42] Justice Potter Stewart wrote, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[43] The majority could not come to a comprehensive answer as to the constitutionality of capital punishment. It agreed that the death penalty, as practiced in the United States, was unconstitutional, but it did not rule that the death penalty could not be constitutional in a different fact scenario.

In *Furman*, the ideological split in the Burger Court is most apparent. The liberals declared the death penalty unconstitutional per se, the conservatives held the opposite, and the centrists split. White and Stewart concurred while Blackmun and Powell dissented, though none ruled on the larger constitutional issue. Furthermore, the liberals, conservatives, and centrists all implicitly invoked the Warren legacy, theorizing whether the Court ought to be activist or restrained but not reaching consensus. Furman started the trend that characterizes the Burger Court's Eighth Amendment jurisprudence: issuing a conditional judgment but failing to reach an across-the-board conclusion on the issue due to the unbridgeable ideological differences on the Court and its uneven acceptance of the Warren legacy.

The importance of *Furman* was and remains unclear. Immediately following the ruling, a widespread belief was that Furman was a revolutionary decision that ended capital punishment in the United States. Leading contemporary anti-capital punishment scholar Hugo Bedau predicted, "We will not see another execution in this nation in this century."[44] The day after the decision, the New York Times agreed, "Although the five Justices in the majority issued separate opinions and did not agree on a

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[41] Furman v. Georgia, *supra* note 35, at 333-359 (Marshall, J., concurring).

[42] Justice William Douglas's concurrence analyzed the discriminatory nature of death sentences and found that blacks and the poor disproportionately received the death sentence, thus making capital punishment laws unconstitutionally discretionary. Furman v. Georgia, *supra* note 35, at 249-253 (Douglas, J., concurring). Justice Byron White argued that the death penalty was so infrequently imposed, and its imposition so random that the punishment had become cruel and unusual. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT, 218 (1979).

[43] Furman v. Georgia, *supra* note 35, at 309 (Stewart, J., concurring).

[44] Quoted in ZIMRING AND HAWKINS, *supra* note 25, at 26.

single reason for their action, the effect of the decision appeared to be to rule out executions under any capital punishment laws now in effect in this country."[45] Tasked with rewriting their capital punishment statutes, 35 states and Congress reinstated the death penalty, and the Justice Department urged the Supreme Court not to rule the death penalty unconstitutional per se.[46] These states were acting with public approval; after a fall in support for the death penalty after *Furman*, polls showed that around two-thirds of Americans approved of the death penalty.[47] Furthermore, *Furman* implicitly urged legislatures to adopt mandatory death penalty sentences, which would mean that the result of the nominally anti-capital punishment Furman was actually a toughening of death penalty legislation.[48] Vincent Blasi argues that Furman solved nothing. He states that opposition to the death penalty usually rests on morality – execution is barbaric even as punishment or for deterrence.[49] He writes, "The Court's rationale [in Furman], however, was context-bound and pragmatic: current systems of criminal justice operate in such a way that the decision as to who will die is made in an unpredictable and arbitrary manner."[50] Due to this approach, states believed that they could pass laws that would meet the standard set in *Furman*. Thus, *Furman* created a series of contradictions: it ruled against capital punishment, but at the same time, it inspired states to reinstate the death penalty, in many cases with stronger mandatory sentences.[51] These inconsistencies show that the Supreme Court's attempt to settle the issue in Furman was unsuccessful that and the death penalty would need to be addressed again.

The Court did so four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg* was the lead in a series of cases challenging various death penalty laws instituted in order to fulfill the standards set in *Furman*.[52] Two of the statutes in question, those of North Carolina and Louisiana, regarded the accidental effects of Furman: mandatory death sentences enacted for certain crimes in order to eliminate arbitrariness and discretion.

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[45] Fred P. Graham, *Court Spares 600: 4 Justices Named by Nixon All Dissent in Historic Decision*, N.Y. TIMES (Jun. 30, 1972).

[46] The Justice Department wrote in a brief, "We submit that its is utterly implausible that so many legislatures can, time and again, fail to reflect the will of the people concerning capital punishment." Oelsner, *supra* note 25, at 61.

[47] EPSTEIN AND KOBYLKA, *supra* note 27, at 90.

[48] Joseph G. Cook, *Criminal Law in Tennessee in 1974: A Critical Survey*, 42 TENN. L. REV. 187, 189-190 (1974).

[49] BLASI, *supra* note 37, at 213.

[50] BLASI, *supra* note 37, at 213.

[51] BLASI, *supra* note 37, at 213.

[52] The other cases are Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, 428 U.S. 280, and Roberts v. Louisiana, 428 U.S. 325. These cases, decided on July 2, 1976, are known together as the July 2 Cases or by the lead case Gregg.

In *Gregg*, the Court held "that the punishment of death does not invariably violate the Constitution."[53] Justice Stewart in the plurality opinion argued that evidence against the usefulness of the death penalty as a deterrent cannot overcome "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction... [thus], in the absence of more convincing evidence, [the] infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[54] Stewart's opinion attempted to clear up the ambiguity of Furman by stating conclusively that the death penalty is not unconstitutional.[55] He wrote, "When a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."[56] Stewart then carefully analyzed the reinstated Georgia statute and found that it fit the standards outlined in *Furman*.[57] The majority hoped that its opinion would settle the problems stemming from *Furman* by declaring that states could meet the Furman standards with legislation carefully designed to remove ambiguity and discretion from their execution processes.[58] In a sense, the majority was successful: never again would the Court seriously consider the general question of the death penalty as a cruel and unusual punishment.[59] The liberals on the Court could not gain the necessary five votes to overturn capital punishment in all cases, but

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[53] Gregg v. Georgia, 428 U.S. 153, 169 (plurality opinion).
[54] *Id.* at 186-187 (plurality opinion).
[55] Here I use the uncomfortable double negative because this is Gregg's proper holding, "We hold that the death penalty is not a form of punishment that may never be imposed..." Gregg v. Georgia, *supra* note 53, at 187 (plurality opinion).
[56] Gregg v. Georgia, *supra* note 53, at 187 (plurality opinion).
[57] The Court approved the Florida and Texas statutes in question by the same argument that upheld the Georgia statute. The North Carolina and Louisiana mandatory death statutes were declared unconstitutional because society was averse to automatic sentences (Woodson v. North Carolina, *supra* note 52, at 295-296 (plurality opinion)) and that mandatory sentences were "unduly harsh and unworkably rigid," *Id.* at 293 (plurality opinion).
[58] "[W]e have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." Gregg v. Georgia, *supra* note 53, at 195 (plurality opinion).
[59] The majority in Gregg used the reestablishment of capital punishment by 35 states and Congress as evidence against the "evolving standards" doctrine, arguing that the mass reinstatement proved that the American people believed the death penalty to be an acceptable punishment for the most heinous crimes. Gregg v. Georgia, *supra* note 53, at 180-181. This argument leads to the conclusion that had these states summarily eliminated their capital punishment statutes, the Court would consider this a sign of the "evolving standards of decency which mark the standards of a maturing society" (Trop v. Dulles, *supra* note 40, at 101 (plurality opinion)) and reconsider the larger constitutional question. However, this never occurred and most of the states which restored the death penalty after Gregg still have it.

neither could the conservatives gain five votes to hold it constitutional with only nominal restrictions. This reality led to minimal, centrist decisions in all five death penalty cases decided by the Burger Court, with the decision essentially made by only three of the nine justices – Potter Stewart, Lewis Powell, and John Paul Stevens.[60] Unable to make a conclusive ruling due to the deep ideological divides, the Court chose to analyze the constitutionality of state capital punishment laws on a case-by-case basis according to the standards set in *Furman* and *Gregg*. Unlike *Furman*, *Gregg* offered a final answer as to the constitutionality of the death penalty, but like *Furman*, the ideological differences on the Court led to a centrist-driven holding that only brought more Eighth Amendment cases to the Court and forced it to consider them one by one.

Just as *Gregg* was bound to follow *Furman* and clear up its ambiguities, a series of cases came after Gregg to test the Court's commitment to judging state death penalty laws on a case-by-case basis. The Court was clear in *Gregg* that it would no longer hear the question of the death penalty's constitutionality as a cruel and unusual punishment, but it would still examine the constitutionality of certain state death penalty statutes. However, the first such case to come before the Court did not address the standards set in *Furman* and *Gregg* regarding the capricious nature of death sentences. Instead, it questioned the constitutionality of a Georgia statute, which authorized the death penalty for the rape of an adult woman. The Supreme Court had not ruled whether such a sentence was a cruel and unusual punishment,[61] but it granted certiorari in the case of *Coker v. Georgia*, 433 U.S. 584 (1977), only a year after *Gregg*. Ehrlich Coker escaped from prison, raped a woman, and stole her car, for which he received the death penalty.

In *Coker,* the Court held 7-2 that the defendant's death sentence was unconstitutional as a cruel and unusual punishment. The plurality opinion by Justice White argued that the Georgia statute was unusual, "Georgia is the sole jurisdiction in the United States at the present time that authorizes the sentence of death when the rape victim is an adult woman."[62] It was also cruel;

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[60] See BLASI, *supra* note 37, at 210-213, for a discussion of the ideological weaknesses of the Burger Court and the impact of the Court's centrist-driven decisions.

[61] The Supreme Court rejected a petition for certiorari on this issue in 1963 over the dissent of three justices. (Douglas, Brennan, and Goldberg. A minimum of four justices is required to grant the writ.) (BELKNAP, supra note 10, at 260.) The Court of Appeals ruled in 1970 that the death penalty was an unconstitutional punishment for rape in Ralph v. Warden 438 F.2d 786 (1970), but the Court did not hear the case.

[62] Coker v. Georgia, 433 U.S. 582, 595-596 (plurality opinion).

> "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder... The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life."[63]

Coker is notable as the first restriction placed on the application of the death penalty since its reinstatement in *Gregg*. The Georgia law did not violate the standards set in *Furman* and *Gregg*, but the Court held it to be cruel and unusual nonetheless. The Burger Court may not have been committed to liberal activism, but Coker's protection of defendants in the name of fairness was an instance that showed Warren activism's continued relevance, even on the Burger Court.

Before Warren Burger's retirement in 1986, the Court twice more restrained the ability of states to sentence defendants to death. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court held 5-4 that death is not a valid penalty for a defendant who neither took life, attempted to take life, nor intended to take life. Justice Byron White's majority opinion built upon the logic of *Coker*, arguing that only eight jurisdictions allowed the death penalty for non-murderer participants in a robbery; thus, the penalty was unusual enough to meet the Eighth Amendment standard.[64] It similarly used the *Coker* standard to judge the sentence's cruelness, holding that the death penalty is "an excessive punishment for a robber who, as such, does not take human life."[65] Furthermore, White argued that neither deterrence nor retribution was served by putting Enmund to death, thus removing the last possible counterargument.[66] Since the punishment was cruel, unusual, and served no purpose, it violated the Eighth Amendment.

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[63] *Id.* at 598 (plurality opinion). Quoting Gregg v. Georgia, *supra* note 53, at 187 (plurality opinion).
[64] Enmund v. Florida, 458 U.S. 782, 792-793.
[65] *Id.* at 797.
[66] *Id.* at 798-801. For the argument that retribution is not served, White writes, "Putting Enmund to death to avenge two killings he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.* at 801.

The Court extended its restrictions on the use of the death penalty by prohibiting the execution of the insane in *Ford v. Wainwright*, 477 U.S. 399 (1986). Justice Marshall analyzed the history of capital punishment and concluded that it overwhelmingly rejected the idea of executing the insane. The history of capital punishment, coupled with the fact that no state allowed the execution of the insane, met the "evolving standards" doctrine and made Ford's execution cruel and unusual.[67] Marshall added, "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether,"[68] showing a respect for the Warren principle of fairness to defendants. Ford built upon *Coker* and *Enmund*, continuing to prohibit states' ability to execute certain classes of defendants on a case-by-case basis.

The Burger Court's series of conditional rulings on the death penalty - affirming its constitutionality overall yet finding every opportunity to curtail its specific uses - failed to solve a major constitutional question and left a confusing definition of the Eighth Amendment. In 1972 in *Furman v. Georgia*, the Court declared capital punishment as it was practiced to be unconstitutional, but refused to completely overturn it. Four years later in *Gregg v. Georgia*, the Court held the death penalty to be constitutional as long as certain standards were met. However, the Court then restricted the uses of capital punishment again in three cases: for rapists in *Coker v. Georgia*, for non-murderer robbery defendants in *Enmund v. Florida*, and for the insane in *Ford v. Wainwright*.

The Burger Court's mixed record on the Eighth Amendment issue is representative of its uneven jurisprudence overall. This results from the circumstances facing the Court. Coming directly after the Warren Court, the Burger Court was forced to answer difficult constitutional questions which had been raised in the Warren Court, which had used a liberal activist consensus to effect drastic changes in American law. From civil rights to criminal procedure, the Warren Court revolutionized the relationship between people and their government(s), placing significant substantive limits on the powers of government in order to protect the rights of the people. Along with the Warren Court's legacy, the Burger Court inherited some of its liberal justices, who, when joined with newly appointed conservatives, made a deeply divided Court. Thus, the Burger Court's great dilemma was the degree to which it accepted this legacy, given its clear importance to the modern American social contract. The unbridgeable ideologies on the Court prevented it from either fully accepting or rejecting

[67] Ford v. Wainwright, 477 U.S. 399, 408-409.
[68] *Id.* at 411.

the Warren Court's activism, leading to the cementing as permanent the Warren Court's landmark decisions but limiting the ability of the Burger Court to answer the pressing questions left by the Warren Court, especially the constitutionality of capital punishment.

The Burger Court's inability to settle the death penalty question and its precedent of case-by-case restrictions on the use of the death penalty have both continued to the present. The Court since Burger, plagued by similar ideological schisms, adopted the same strategy for judging capital punishment cases. The Rehnquist Court (1986-2005) addressed death penalty issues with little more doctrinal clarity than its two predecessors. In a pair of cases, the Court ruled that the death penalty was unconstitutional for juvenile offenders under the age of 16 but constitutional for defendants over 16 but under 18.[69] In 2005, it overturned these cases and held the death penalty unconstitutional for all juvenile offenders.[70] In 1989, the Court refused to extend Ford's ruling protecting the insane to cover the mentally retarded, but reversed in 2002.[71] Finally, the Court held that the evidence presented in a scientific study showing the racially disproportionate impact of the death penalty was insufficient to overturn a death sentence because the study did not prove a racially discriminatory purpose.[72]

In contrast to the Rehnquist Court's uneven jurisprudence, the Roberts Court (2005-) has consistently expanded the Eighth Amendment. Not satisfied with Roper's protection, the Court held that juveniles cannot be sentenced to life imprisonment without the chance of parole for non-homicide offenses and channeled Woodson and Roberts by overturning mandatory life sentences without the chance of parole for all juveniles, even murderers.[73] Last, the Court extended *Coker* to hold that death is a disproportionate sentence even for the rape of a child.[74] Essentially, these post-Gregg rulings now limit the use of capital punishment to mentally competent adult murderers. Thus, after the reinstatement of the death penalty in 1976, the Supreme Court judged Eighth Amendment questions on a case-by-case basis, leading to an uneven jurisprudence, but one that has consistently restricted the right of states to punish their criminals. It is unlikely that the justices in *Gregg* intended for the Eighth Amendment to be used as it has been, but their failure to come to a comprehensive answer to

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[69] Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989).
[70] Roper v. Simmons, 543 U.S. 551 (2005).
[71] Atkins v. Virginia, 536 U.S. 304 (2002), overturning Penry v. Lynaugh, 492 U.S. 302 (1989).
[72] McCleskey v. Kemp, 481 U.S. 279 (1987).
[73] Graham v. Florida, 130 S. Ct. 2011 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012).
[74] Kennedy v. Louisiana, 554 U.S. 407 (2008).

the issue allowed the "evolving standards of decency which mark the progress of a maturing society" to decide the answer.[75]

[75] Trop v. Dulles, *supra* note 40, at 101.

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MILLER V. ALABAMA AND JUVENILE SENTENCING FOR MURDER: CHILD'S PLAY?

Jack Merritt*

A recent step our Supreme Court took to re-examine societal values took place in two cases argued in tandem: Miller v. Alabama and Jackson v. Hobbes. Both regarding life without parole sentencing for juveniles who committed violent crimes, each case left the Court with the ability to make a serious statement regarding perceptions of the mental health of this subcategory of offenders. However, as this paper argues, the majority's reasoning in fact left more questions on the table even though it tried to navigate a contentious political issue. The ultimate conclusion? The Court's ambiguity has the potential to affect jury trials of this nature in a variety of ways now and for years to come.

* Candidate, Bachelor of Arts, History, University of Southern California (expected Spring 2016).

PART I

Since 1980, a variety of Supreme Court cases have repeatedly explored the question of proportionality in sentencing. Several common issues include what distinctions, if any, should be made between violent and non-violent offenses; which punishments are appropriate, and when; and how much deference ought to be given to the state legislatures that establish sentencing procedures. They raise a particular quandary for juvenile defendants, who lack the judgment and mental fortitude to appropriately and efficiently aid their own defense throughout the trial process, specifically as a result of their age,[1] or so the thinking goes. In the last ten years or so, recent cases such as *Roper v. Simmons* and *Graham v. Florida* decided that these factors obviate special consideration. The inclusion of these factors elicited a general pattern: more liberal justices were in favor of a generalized ban against capital or similar, long-term sentencing for this younger population of offenders, while more conservative justices tended to side with a more specialized, case-by-case analysis of mitigating factors. In light of the fact that some of the crimes juveniles commit are shockingly heinous in nature, thereby engaging in grave acts in spite of their age, these conservative justices felt that specialized attention was necessary, though they are the exception rather than the rule.[2] In 2012, the Supreme Court had the opportunity to put an end to the equivocation with two cases argued in tandem: *Miller v. Alabama* and *Jackson v. Hobbes*. Though the Court should be approbated for its navigation of a divisive political question which should be left to state legislatures, its analysis in *Miller* is deplorably vague, and makes generalized assumptions about the population of juvenile offenders which necessitate life imprisonment without parole for felony murder. This decision therefore evinced a majority opinion which, for the time being, raises more questions than it answers. Specifically, the Supreme Court will be forced to deal with the policy implications of a sociological jurisprudence that will negatively impact judges' or juries' power in sentencing proceedings, as well as ambiguity in the decision's retroactive application to the population of convicts who were sentenced under such mandatory provisions as juveniles. Indeed, the Court should not have instilled its own values on a legal procedural tradition that should hardly have been considered "unusual" under the Eighth Amendment analysis regarding "cruel and unusual punishment."

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[1] Graham v. Florida, 130 S. Ct. 2026 (2010)
[2] Roper v. Simmons, 543 U.S. 551 (2005) (Scalia, J. dissenting).

PART II

The principal argument for the petitioners in *Miller* and *Jackson* is that children have inherently undeveloped brain functions which, when combined with other mitigating factors, such as an unstable upbringing, lack of maturity, and peer pressure, might predispose them to commit crime. Underlying the majority opinion's understanding of the neurological science in the briefs is the belief that the offenders' ages and brain functions indicate an absence in the cognitive abilities that inform the moral choice necessary to violate the law. Therefore, a liberal wing of the Supreme Court voiced their concerns that mandatory sentencing for juveniles not only fails to take into account factors which are often beyond the child's control, but also fails to evaluate his or her "increased capacity for change"[3] as the brain develops. To these justices, this sociological argument exhibits a degree of practical sense because the Constitution implicitly requires that the government simply ought not to treat juveniles in the same way as adults. Before the series of precedents in *Roper*, *Graham*, and now *Miller*, this was inconsistent: the Constitution prevents children from assuming many of the same civic functions as adults, such as voting or serving on juries, as well as prohibits them from certain activities, such as drinking or smoking. Most importantly, their entrance into the legal process is essentially the same as that of adults.[4] The majority in *Graham* found this as a sign of common agreement in our society that children do not evaluate risks, make decisions, or appreciate consequences for their actions in nearly the same way that adults do. Though one might reasonably find the existence of juvenile courts as evidence that the legal system treats juveniles equitably, the High Court objected to these "transfer statutes" with revulsion, since most of the states prior to *Miller* did not have different sentencing procedures for juveniles even when transferred from juvenile court. Interestingly, there was also no minimum age for transfer to adult court in most of these states.[5] Arguably, this alone conforms at the very least to the "cruel and unusual" standard within the Eighth Amendment. Nevertheless, in making the *Miller* ruling, the Court carefully considered the ways in which the various states made no distinctions between juveniles and adults in regards to sentencing. If the fundamental assumption underlying the Anglo-American legal tradition is that murder is never permissible, then for juveniles and adults who commit the same violent act of murder, there

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[3] *Id.* at 10.
[4] Casey Schutte, *Behind Bars, Forever: American Children Jailed for Life*, 12 KENNEDY SCH. REV., 41 (2012).
[5] Miller, 567 U.S., slip op. at 24.

ought to be some analysis on the sentencing jurisdiction's behalf of how the child perceives his actions in regards to the law, as many of them do not possess adequate sense of legal and moral guilt as a result of their age.

The *Miller* decision *prima facie* represents a highly questionable extension of the line originally drawn in *Graham v. Florida,*[6] which established that life without parole (LWOP) sentences are unconstitutional for all juveniles who commit nonviolent crimes. These defendants are already ineligible for the death penalty due to their age, placing the state legislatures in a double-bind situation: where the mandatory punishment was life without parole, it simultaneously represented the minimum and the maximum punishment available to juveniles convicted of felony murder.[7] Both of these cases possessed the principle of "objective indicia of society's standards"[8] as a means of providing protection from what the Court views as "excessive sanctions"[9] to individuals who have not yet reached the traditional legal age of consent. The very justiciable issue of providing similar relief to the few thousand[10] currently serving sentences for homicides committed when they were under the age of 18 still remained after *Graham*, as the Court made a clear distinction between violent and nonviolent crime, specifically centering on "mismatches between the culpability of a class of offenders and the severity of a penalty."[11] To this end, the Court was ruinously ambivalent in *Miller*, since *Graham* implies that there was some basis for the argument that there exists a set of crimes for which this line against LWOP sentencing ought not to be drawn. The Court was wary to recognize that some crimes might necessitate a mandatory sentence, even for juveniles; the Court's caution is evident throughout the logic of the majority opinion. Its limitation of the decision to prefer only "individualized sentencing," which "make[s] clear that a judge or jury must have the opportunity to consider mitigating circumstances."[12] This is one of the reasons why the opinion should be considered so vague: a divided Court unsuccessfully tackled a contentious political issue and con-

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[6] Graham, 560 U.S., slip op. at 2.
[7] Thompson v. Oklahoma*,* 487 U. S. 815 (1988) (plurality opinion); prohibited capital punishment for minors under the age of 16. Curiously, the majority opinion written by Justice Stevens relied on a similar argument citing a gradual change in societal standards. This was the precursor to the categorical ban on the death penalty for all minors under the age of 18 in Roper v. Simmons, 543 U. S. 551 (2005).
[8] Brief for Petitioner at 18, Miller v. Alabama, 567 U.S. (2012) (No. 10-9646).
[9] Miller, 567 U. S., slip op. at 10.
[10] Miller, 132 S. Ct. 2455 (2012); Lerner notes that there were "roughly 2,000 life-without-parole sentences, which had been imposed on juveniles by twenty-eight states and the federal government," *infra* note 11, at 1. Other estimates say more than 2,500 were sentenced in this way.
[11] Miller*,* 567 U.S., slip op. at 7.
[12] *Id.* at 27.

travened one of its earlier decisions. As we shall see, without a reasonably specific mandate, this ultimately leaves the future population of juvenile offenders at risk to fall within the margins of criminal sentencing.

PART III

Based on the fact situations of the cases, however, it is curious that the majority opinion so willingly lumped this group of offenders into the same category as in *Graham v. Florida*. This brings into question in the mind of any reader curious the innate nature of juvenile murderers at issue here. Especially in regards to their state of mind, the Court appears to have been so eager as to distinguish them in a different light than adults. Justice Kagan went out of her way to downplay the heinous nature of the crimes committed by the two defendants in *Jackson* and *Miller* in a hagiography of a majority opinion. Evan Miller was a 14-year-old who, with a friend, assaulted a man named Cole Cannon in his trailer with a baseball bat in 2003. Beforehand, Cannon had purchased drugs from Miller's mother. Miller, Miller's friend, and Cannon were unconscious in a marijuana-induced stupor; Miller apparently woke up and tried to take advantage of Cannon by robbing him of the $300 that was in his wallet at the time; Miller split the money with his friend. Cannon awoke, found Miller attempting to replace the wallet, and proceeded to strangle him. After his friend helped subdue Cannon, Miller reportedly covered him with a sheet and stated, "I am God, I've come to take your life," and hit him at least one more time with the bat.[13] Miller and his friend deserted the scene, only to return later and set fire to the trailer with Cannon still inside languishing from his beating. What Kagan fails to mention in her description of the events, however, is that Miller's friend wanted to go back to save Cannon, but Miller prevented him from doing so.[14] Regardless of the differences in cognitive ability between juveniles and adults, any objective observer would likely characterize Miller's actions as a deliberate disregard for human life. This is the point at which the Justices should have placed less weight upon the petitioners' arguments based in scientific reasoning. Miller's decision demonstrates a cognizance of his actions that increase his level of culpability, a point that Justice Breyer seemed especially concerned about in his concurring opinion.[15] The facts of Miller's crime support the

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[13] *Id.* at 5.

[14] Craig Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*. 20 (1) GEO. MASON L. REV., 2012, at 25-40, *available* at HeinOnline.

[15] Miller, 567 U.S., slip op. at 28 (Breyer, J. dissenting); Breyer's logic in his concurring opinion is curious, given the substantial weight he gives to the intent which informs a crime. No-

assertion that juveniles commit crimes with the same fecklessness and impulsion as adults, despite age and neurological differences.

Similarly, for *Jackson v. Hobbes*, in order to substantiate their own justifications of lesser legal and moral culpability for juvenile offenders, Justices Breyer and Kagan combined to add a certain spin on the facts to a similar manner as in *Miller*. Like Miller, Kuntrell Jackson was 14 when he conspired with his friends to rob a local video store. Derrick Shields, an accomplice, revealed that he was carrying a sawed-off shotgun. Jackson was instructed to wait outside and act as a lookout while the robbery was taking place. After some time, he went into the store to find that Shields was using the gun to threaten the store clerk for money. Shields shot the clerk in the face, killing her.[16] Instead of directly confronting the issue concerning the proportionality of Jackson's sentence to his involvement in the crime, which would very certainly provide a justification for discretionary sentencing statutes, the two Justices collaboratively reach the same conclusion: they diluted the facts of the crime in order to serve their policy preference in this case.[17] Justice Kagan summarizes Miller's crime as a "botched robbery,"[18] indicating a singular mitigation of the most relevant factor in Jackson's sentencing. This opinion disregards that the taking of another human life is a distinctly foreseeable consequence of a robbery, even more so when someone in the group is holding an illegal firearm. While Jackson was likely influenced by peer pressure, simply because there was another person's blood on the floor does not and ought not make his involvement any less objectionable.[19] This contradiction strikes at the heart of the petitioners' defense and, ultimately, the majority's holding. The underlying revelation here is that there are some crimes, included in these states' felony murder statutes, which, when combined with other serious offenses such as robbery or arson, necessitate a mandatory pun-

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ticeably, he omits analysis of Miller's case when saying, "Quite simply, if the juvenile either kills or intends to kill the victim, he lacks 'twice diminished' responsibility." In fact, he argues in principle against the "transferred intent," which necessitates LWOP for Miller's involvement in his crime.

[16] Lizzie Buchen, *Arrested Development*, 484 NATURE, 304-306 (2012), http://www.ucsf-hastingsconsortium.org/sites/default/files/lizzie_buchen_-_nature_19_april_2012_-_arrested_development.pdf.

[17] Miller, slip op. at 31: "Jackson simply went along with older boys to rob a video store." (Breyer, J. dissenting).

[18] *Id*. at 10: "those features [of distinctive and transitory mental and environmental traits] are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing" (alterations in brackets added). To some extent, Miller also committed a murder in the act of a robbery; however, Miller was not charged in that fashion. Rather, he was charged with the murder in connection to the arson of Cannon's trailer. See *Miller*, Respondent's original oral argument, transcript pg. 38, line 4.

[19] Lerner, *supra* note 14, at 28.

ishment for everyone involved. In fact, a concomitant issue at Jackson's trial was whether he said, "We're not playin'," or "I thought you all was playin',"[20] which would make a significant difference in terms of gauging his involvement and resistance to the others' behavior, as the difference between the two quotes is one of cooperation or deception on behalf of his accomplices. However, what Kagan and Breyer also fail to note was that this supposed statement had no effect on the juries who decided Jackson's fate: his involvement in the store clerk's murder was settled when the jury decided in favor of the prosecution.[21] This is not mere oversight; this is bold-faced bending of the facts to uphold the vulnerable images of these youth upon which the Court must rely to prohibit mandatory sentencing. Miller and Jackson certainly should be considered particularly at-risk teenagers, and to a good extent,[22] still highly complicit in felony murders, even when their ages were taken into account per the Graham standard,[23]since they made conscious decisions to participate. Contrary to the overall argument of the abundance of sociological evidence provided in the *amici curiae* briefs, these children were able to gauge the moral significance of their own cooperation in violent crimes, as exhibited by their singular choices to carry them out, despite the risks and violence involved.

PART IV

The dissenting opinions for these two cases are notable for excoriating the majority's rather broad interpretation of the Eighth Amendment as reinforcing this ideological bias, since it would appear that even an "unusual" punishment procedure could be the rule of law in a majority of the states.[24] The majority opinion points to some indication of an actual evolution in societal standards, whereby the general consensus would agree that non-discretionary sentencing for offenders as young as the age of 14 is contrary to the conscience of a democratic society. Justice Kagan seems to write it off, saying that the *Graham* precedent overturned a sentencing policy which was active in 39 states.[25] Certainly this was less of an issue back then, since mandatory LWOP sentences are far less proportional for non-violent crime. However, when the majority of state legislatures have

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[20] Miller, slip op. at 2.
[21] Lerner, *supra* note 14, at 28.
[22] See Miller, slip op. at 2, 4. Miller had been in and out of foster care, regularly abused drugs and alcohol, and had a history of attempted suicide. Jackson had committed car theft and shoplifting on numerous occasions as a juvenile.
[23] Graham, *supra* note 1 at 25.
[24] Schutte, *supra* note 4.
[25] *Miller*, 132 S. Ct. 2471 (2012).

passed laws which provide obligatory sentences for specific types of violent crime, it suggests a statement regarding society's outrage in response to the taking of another life independent of the age of the offender. There are competing societal perceptions of age here; and, to the justices in dissent, it would appear that crimes of murder should not be evaluated in the same way as civic functions and other privileges with regard to age. Opponents of this argument, including counsel for the petitioners, assert that the small prison population of these offenders shows that there is little national consensus for such policies,[26] but the rarity of conviction also illustrates the heinous nature of these homicides. To that end, there are even 13 states that have already decided that the minimum age for a mandatory LWOP sentence is 18,[27] implying that the legislatures have thoroughly considered how the legal and moral implications of such policies reflect on their respective jurisdictions. Though the Court possesses the authority to decide that a law is unconstitutional even if it is endorsed by a majority of states, it should assume this power only if there is an unquestionable violation of the Constitution so repugnant as to necessitate judiciary action, and several prominent decisions come to mind. However, there is no such violation in *Miller*.[28] Most often the Court's overruling of common state law practices is a watershed decision, substantively affecting the nature of the interpretation of the constitutional amendment at issue. *Miller* hardly conforms to this, as the vast majority of jurisdictions have already effectively decided the moral dilemma of the issue of juvenile LWOP, and therefore the legitimacy of the *Miller* majority's decision ought to be called into question.

PART V

Another point of contention showing the true political nature of the majority's holding is in the absence of international law citations therein that positively indicates the majority's willingness to craft an opinion which would avoid political entanglement insofar as possible.[29] Historically, decisions have relied upon international law to show the United States' unique distinctions in providing LWOP sentences to juveniles.[30]

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[26] Lerner, *supra* note 14, at 17.
[27] Lerner, *supra* note 14, at 17, line 10.
[28] One needs only to look to Brown v. Board of Education or Gideon v. Wainwright to find such decisions.
[29] Jonathan Levy, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in Miller v. Alabama*. 36 HARV. J.L. & PUB. POL'Y 1, 2013, at 355-374, *available at* InfoTrac.
[30] *Id.*, at 363. Simmons emphasized the U. N. Convention on the Rights of the Child; speaking for a divided court, Justice Kennedy stated that the United States is "alone in a world that

Indeed, the U. S. is one of only two nations, which have not ratified the U.N. Convention on the Rights of the Child. Mandatory policies for juveniles contravene several other international treaties, including the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment.[31] The Court should never rely exclusively upon international law to decide a case, but instead look to such international standards in order to confirm opposition to specific sentencing procedures. Nevertheless, national opinion as seen through the legislatures ought to pre-empt the international opposition to such sentencing procedures; however, this opposition's absence from the majority holding leaves much doubt as to the legitimacy of the Court's finding in this case that there is an actual consensus, national or international, and therefore that the practice of providing mandatory LWOP sentences to juvenile offenders for murder is "unusual" under the Eighth Amendment. This constitutes a belief on the behalf of the majority that they could simply rely on the *Graham* and *Roper* precedents, rather than bring up international law again.[32] While some scholars see this using of domestic cases as a proverbial Trojan Horse for supplanting U. S. law with international norms,[33] many others see it as an about-face from myriad international covenants which complement the Court's findings of mental deficiencies in juveniles.[34] However puzzling it may be, Justice Kagan's seemingly indifferent attitude towards international law here only adds to the argument that the Court overturned a policy which was not already unusual.

Mirroring significant objections to the majority's holding in this case, broad policy implications in criminal sentencing remain to be seen as a result, both directly and indirectly. Since the Supreme Court established a specific ban on mandatory punishment for juveniles convicted for murder, there has been the significant question as to the retroactive applications of the decision. However, as previously mentioned, since *Miller* does not constitute a watershed change in the criminal law; therefore, it ought not to be applied in such a manner to all who were convicted under such statutes. Indeed, since the case was handed down late 2012, criminals have

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has turned its back on the juvenile death penalty." *Roper v. Simmons*, 543 U. S. 578 (2005) (majority opinion). For a similar brief, Graham cited statistics showing the rarity with which international courts provide LWOP sentencing to juveniles for a non-homicide offense. Brief for Petitioner at 63-64, Graham v. Florida, 130 S. Ct. (2011).

[31] Schutte, *supra* note 4, at 42.

[32] Levy, *supra* note 29, at 370. See also Lerner, *supra* note 14, at 34.

[33] Levy, *supra* note 29, at 374.

[34] Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults after Graham and Miller*, 61 EMORY L.J. 6, at 1447.

already started their appeals,[35] based on the fact that Jackson's case at the very least was remanded to Arkansas for resentencing after having applied the rule in *Miller*.[36] According to Alicia D'Addario, co-counsel for both Miller and Jackson, using this reasoning, there appears to be an "outstanding interest" in applying the decision retroactively.[37] However, in a similar interview, John Bursch, the Solicitor General of Michigan, who assisted in writing an *amicus curiae* brief on behalf of the state, said in an interview that precedent already provides narrow, specific guidelines for decisions to apply retroactively, most notably *Teague v. Lane*.[38] Under this precedent, only those rules which fundamentally alter the likelihood of a conviction or exempt a class of persons from punishment are subject to retroactive application.[39] The standard set by this case is very high, as *Gideon v. Wainwright* is the only decision which has been considered to affect due process so significantly as to induce watershed ramifications.[40] While Miller neither increases nor decreases the prospect of a homicide conviction for a new defendant, it arguably closes off a portion of the population from a specific type of sentencing, since juveniles are no longer subject to specific sentencing requirements. However, as Justice Kagan noted in the majority opinion, Miller only changes the procedural outcome for a juvenile already convicted under a mandatory statute.[41] Comparatively, this appears to be a stronger legal argument, since the lower courts would most assuredly be occupied with numerous hearings if every procedural decision were assumed to be retroactive based upon the disposition of the original case provided to the Supreme Court. Therefore, the mere fact that Jackson's case was remanded at the highest level provides no impetus for the lower courts to revisit the sentences currently being served by those who committed crimes under the now-unconstitutional statutes.

PART VI

There are obvious impacts in discretionary sentencing and age consideration that will affect judges' opinions in future cases, both social and familial. Since many children who commit crimes are often in situations beyond their control, legislatures, judges, and juries must be ready to

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[35] Balingit Moriah, *Convicted Killers Appealing Automatic Life Sentences*, MCCLATCHY-TRIBUNE BUSINESS NEWS, (Sept. 12, 2012), *available at* PROQUEST.
[36] Lerner, *supra* note 14, at 29.
[37] Interview, 12 April 2013.
[38] Teague v. Lane 489 U. S. 288 (1989).
[39] John Bursch, Solicitor General for the State of Michigan. Interview, 11 April 2012. He was kind enough to supply a precedent from his own state, *infra* note 40.
[40] People v. Carp, 2012 Mich. App. Lexis 2270 (2012), at 27.
[41] Miller, 567 U.S., slip op. at 20.

consider this lack of control in sentencing. They must be careful, however, as Justice Kennedy briefly touched on this specific outcome in oral argument[42] While his supposition that judges' time will fill with trumped-up testimony from sociologists ought to be taken with a grain of salt, triers of fact must now assume the added responsibility of weighing the probability of rehabilitation, the effects of home surroundings, and perhaps exposure to a criminal peer group, all in addition to age, when sentencing someone for a particular crime. While the High Court was hoping for discretionary sentencing would be "uncommon"[43] as a result of the decision declaring that the mandatory LWOP punishment was already unusual, whether or not the several states will freely interpret this ruling to make more 'humane' sentencing procedures for juveniles remains to be seen. As of this writing, very few states have reacted to the ruling, and their decisions have been largely unchanged by *Miller*.[44] However, in the wake of previous decisions where other factors were determined to warrant consideration, a preponderance of hearings was the result.[45] In a similar way, state courts may now be required to give heed to "Miller Hearings" whereby testimony is given as to the actual effect of those outside factors on the juvenile defendant. The various courses of action taken by the states to accommodate these defendants' right to voice their specific circumstances will be of great interest to the Court should they decide to return to the issue of a categorical ban on general LWOP sentences for juveniles in general.

The most singular ambiguity with regard to the states' grappling with this decision lies in the majority holding's repeated urge towards "individualized sentencing," consistent with *Roper* and *Graham*.[46] This is not a very consistent solution, since the Court essentially cannot and does not provide an alternative to mandatory LWOP sentences, not even transfer statutes. Not only does this abandon the issue to the states, as previously discussed, but it also provides no guidelines as to how these individualized sentences ought to occur. The Court does not state that any sentencing proceeding considering transient or permanent age-related factors would be sufficient; nor does it delineate that there should be a series of hearings which must be exhausted procedurally, as in cases requiring the death penalty.[47] Theoretically, long prison sentences consisting of several dec-

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[42] Miller slip op. at 21, lines 8-10: "If I'm the trial judge… what do I look at? What's a judge supposed to do?"
[43] Mille*r*, slip op. at 17.
[44] Lerner, *supra* note 14, at 39.
[45] Wood, *supra* note 34, at 1480. Atkins v. Virginia 536 U. S. (2002) ruled that the death penalty was unconstitutional for the mentally retarded. So-called "Atkins Hearings" are not infrequently held to determine if the convicted fulfills the status of that requirement.
[46] Interview, *supra* note 37.
[47] Lerner, *supra* note 14, at 30.

ades, which could very well result from the sort of individualized, discretionary procedure that this majority presumptively endorsed, may circumvent the findings of this opinion anyway. The states are left to resolve on their own, as the Court did not provide to the aforementioned majority of states any rule which must be followed.

The most optimistic lesson of the ruling of Miller v. Alabama is that it turns away from a "one-size-fits-all" legal approach; that is, mandatory sentencing structures used to treat all defendants the same way. If only in this aspect, the majority should be commended: if this decision were not reached in this way, our legal system would continue to unfairly exploit the inexperience and naïveté of these juvenile defendants, for whom it still is very common to misjudge chances of success at trial, a plea bargain, and the possibility of their own childhood friends becoming witnesses for the state.[48]

While there is something to be said for this optimistic outlook, the inherent obfuscation of such an ideologically divided decision leaves the states as the ones in charge of enforcing the decision, in regards to how such a decision ought to be enforced, as a result of the majority's projection of their own values on the states.[49] That being the case, different defendants in different states can expect to be affected in various ways in the future, beginning with how their state decides to apply the decision retroactively. Even so, the Court can expect to return to its reasoning in this case, perhaps in the future, should it have the opportunity to declare that the majority of states' laws on any LWOP sentence for juveniles is unconstitutional. For the time being, however, one must be content that the interests of justice have been met in protecting otherwise marginalized individuals from a due process system which remains largely unsympathetic to them.

[48] Wood, *supra* note 34. In D'Addario's experience, it was "extremely common" for juvenile defendants to have older co-defendants plead out to lesser sentences.
[49] Roper, Graham, and Miller all feature virtually the same justices in majority.

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CARTELS AND DEMOCRACY IN MEXICO: CAUSE, EFFECT AND ¿RESOLUTION?

Jackson Nye*

This paper will demonstrate that the Mexican drug cartels pose the single greatest threat to Mexico's democratic institutions. It analyzes how the shift in Mexican politics from the authoritarian rule of the PRI to its current democracy, which coupled with the concurrent shift in the drug trade market, has provided the perfect opportunity for the cartels to emerge as the most formidable threat to Mexico's fledgling democracy. This paper also analyzes the insidious influence the cartels have had on the political sector, the military, law enforcement agencies, and most importantly, the psyche of the Mexican people.

* Bachelor of Arts, Political Science, Baylor University's Duke School of Law (graduated Spring 2013).

INTRODUCTION

Mexico's democracy now faces its most formidable enemy: the drug cartels. They are a group of highly organized and armed individuals who operate outside the rule of law, control cities, states, and police, and reign supreme over the general population in border regions along the US-Mexico border.[1] The shift from authoritarian rule to democracy, concurrent with the shift in the makeup of the drug trade in Mexico, gave the drug cartels the opportunity to infiltrate and compromise the four cornerstones of Mexico's democracy: the political spectrum, law enforcement agencies, military, and structural actors that are necessary for a democracy to function properly. This paper will analyze the creation of the drug cartels, their influences in these structural institutions of democracy, and the threat that these groups have on the fledgling Mexican democratic process.

PART I. HOW MEXICO BECAME A DEMOCRACY

A Brief History of Mexico's Shift to Democracy

Following the Revolution of 1910, a nationalist state with a presidential system was created. The new government was comprised of agrarian reformers led by Pancho Villa and Emiliano Zapata in the south, and a number of Northern generals with heterogeneous interests in the north.[2] Political opposition was led by Catholic militants who were outspoken opponents to the leftist ideologies of the post-revolution presidential regime.[3] The state adopted an interventionist approach, taking on the responsibility to promote economic growth as well as political and social stability.[4] The state was governed by the corporatist Institutional Revolutionary Party (PRI), whose main objective was to amass enough power to govern and, more importantly, stay in control. The PRI controlled the Presidency from 1934-2000, and no other party received a representative in the Senate until 1988.[5] The PRI maintained this power by not recognizing political dissent in elections, by hand picking presidential successors, and by having political actors (peasants, working class) compete for limited

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[1] June S. Beittel, *Mexico's Drug Trafficking Organizations: Source and Scope of the Rising Violence*, CONGRESSIONAL RESEARCH SERVICE, Apr. 15, 2013

[2] THOMAS E. SKIDMORE ET AL., MODERN LATIN AMERICA (2010).

[3] *Plutarco Elías Calles*, PBS (2012), http://www.pbs.org/itvs/storm-that-swept-mexico/the-revolution/faces-revolution/plutarco-elias-calles/.

[4] NORA HAMILTON, MEXICO: POLITICAL, SOCIAL, AND ECONOMIC EVOLUTION (2011).

[5] Andrew D. Selee & Jacqueline Peschard, *Mexico's Democratic Challenges: Politics, Government, and Society.* WOODROW WILSON CENTER 2010.

governmental resources.[6] To prevent a military coup d'état, every president from 1921-1964 reduced the military's allocation as a percentage of the federal budget in relation to their predecessor.[7] As a result of the economic crisis in the 1980s, the PRI was forced to acknowledge political dissent.[8]

By the 2000 election, Mexico was a competitive democracy with a three-party system in which the parties competed for power and governed at the municipal, state, and national levels.[9] Not only were these levels governed by different parties but, for the first time since the revolution, all three levels had significant governing power. This created inefficiency in the government because the PRI hegemony had eroded. The transition to democracy, however, made the new democratic institutions vulnerable to corruption and coercion. There existed less stability in the political sphere, as these institutions learned how to function properly within the new democratic principles. Moreover, this instability and vulnerability opened the door the for the drug cartels to undermine the foundational institutions of Mexico's fledgling democracy.

PART II. HOW THE DRUG TRADE CAME TO EXIST

The Type of Drug Trade in Mexico Before the Colombian Drug Trade Fell

Drug trafficking in Mexico is not a new phenomenon but the nature and type of this trade has drastically changed.[10] It exists as a paradigm shift that has led to the violence and corruption that threatens the current Mexican democracy. It existed in Mexico before the 1980's cocaine outbreak in the United States, and the crackdown on cocaine in Colombia, but "…the trade was chiefly confined to marijuana and small quantities of heroin and involved a large number of small trafficking organizations."[11] For over a century, Mexico produced illicit drugs that the US populace demanded and then transported across the US-Mexico border.[12] Unlike Colombia and other drug producing countries, Mexico had access to specific trade routes that had been used for decades which enabled cartels to

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[6] THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA (1992).
[7] RODERIC A. CAMP, POLITICS IN MEXICO: THE DEMOCRATIC CONSOLIDATION (2007).
[8] David A. Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, 60 COUNCIL ON FOREIGN RELATIONS, Mar. 2011, at 1-29.
[9] CAMP, *supra* note 7.
[10] PAUL KENNY ET AA., MEXICO'S SECURITY FAILURE: COLLAPSE INTO CRIMINAL VIOLENCE (2012).
[11] Robert C. Bonner, *The new cocaine cowboys: how to defeat Mexico's drug cartels*, FOREIGN AFF., Jul./Aug. 2010, at 1.
[12] Gabriela Recio, *Drugs and Alcohol: US Prohibition and the Origins of the Drug Trade in Mexico, 1910-1930*, CAMBRIDGE UNIVERSITY PRESS., Feb. 2002, *available at* JSTOR.

smuggle drugs more efficiently into the US.[13] It was not until the cocaine boom in the US and the consequential crackdown on drug trafficking in Colombia that the drug trafficking and trade in Mexico became a serious security threat to the Mexican state and Mexican democracy.[14]

The inadvertent consequences of the drug war included increased violence and a geographical rearranging of cocaine production and transportation. The focus remains on the cocaine market in part, because "US consumers have spent twice as much on cocaine as on heroin and marijuana combined [from 1989-1998], with cocaine expenditures totaling nearly 500 billion dollars."[15] The US remains the sole exemplar of the Mexican drug trade because over 87% of all drugs trafficked from Mexico end up in the US.[16] Cocaine became the most profitable drug to traffic into the US; statistics demonstrate the impact that the shift in cocaine routes had on Mexican narcotics-trafficking. Until 1984, trafficking cocaine across the US Mexico border was unheard of; cocaine previously came across the southeastern border of the US.[17] This began to change, however, in 1989, when one-third of the US cocaine market came across the Mexican border. This shift occurred because of the crackdown of cocaine smuggling through the southeastern borders of the US and consequently the Colombian cartels needed new trade routes. By the late 1990s, over three-fourths of the product was smuggled across this border. This surge and change in cocaine trafficking is what Gottenberg calls the "blowback effect."[18]

As the US cracked down on the drug trade, Colombian drug traffickers looked to Mexico as their new means of transporting cocaine into the US. The Mexican traffickers were initially the middle-men of the cocaine trade between Colombia and the US. This relationship, however, began to shift as the Mexican traffickers realized how integral a role they played in this chain. They began to shift the balance of power to their favor. One man and organization in particular, Miguel Angel Felix Gallarado of the Sinaloa Cartel, "…swiftly won bargaining power against the beleaguered Colombians, demanding instead half shares in kind."[19] Gallardo commercialized cocaine, and dispersed the Sinaloan smugglers

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[13] *Id*.
[14] Randy Willoughby, *Crouching Fox, Hidden Eagle: Drug trafficking and transnational security*, CRIM., L. & SOC. CHANGE, Jul. 2003, at 117, *available at* EBSCO.
[15] *Id.* at 115.
[16] MARÍA CELIA TORO, MEXICO'S "WAR" ON DRUGS: CAUSES AND CONSEQUENCES (1995).
[17] Bonner, *supra* note 11, at 1.
[18] Paul Gootenberg, *Blowback: The Mexican Drug Crisis*, 43 NACLA REPORT ON THE AMERICAS (Oct. 17, 2011), at 2, *available at* GENERAL ONEFILE.
[19] *Id*. at 3.

across Mexico's territory. Over time, the organization split into a series of regional competing "cartels."[20]

The "blowback" effect created a number of cartels, all of which wanted a share of the cocaine market. By 2010, over 90% of the cocaine market came across the Mexican border.[21] In 2006, there was an estimated $32,876,712.33 to $219,178,082.19 a day of illicit drug profits that occurred on the US-Mexico border.[22, 23] However, understanding how the drug cartels came into existence remains only the beginning of understanding their crippling effect on Mexico's fledgling democracy. An analysis of how the drug trafficking process operated and flourished before democracy under the PRI, and post-PRI in the liberal democratic era remains necessary as well.

PART III. INFLUENCE WITHIN MEXICO'S POLITICAL AND CIVIL STRATA

How the Cartels Came to Exist Under the PRI

The PRI control of Mexico created a protected legal-area for the cartels to operate outside the rule of law. The government "…established a patron-client relationship with drug traffickers" that began in the first half of the twentieth century.[24] This was no different than the relationship the government had with any other political or social actors in Mexico, and was mutually advantageous as the government established a framework for which these organizations would operate and the cartels were allowed to operate outside of the rule of law as long as they curtailed their violence towards each other and the citizens.[25] This lawlessness worked until simultaneous shifts in both the political and drug spheres began to occur in the late twentieth century.

In the late twentieth century, Mexico was shifting away from its corporatist authoritarian rule towards a democracy. At the same time, the drug trade in Mexico was shifting from solely supplying marijuana and heroin to partnering with the Colombian cocaine drug lords and becoming the primary transporter of cocaine into the US. Due to the new actors in play, the shift in political dynamics in the twentieth century severed many

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[20] Gootenberg, *supra* note 18, at 3.
[21] *Id*.
[22] Virdiana Rios, Evaluating the Economic Impact of Drug Traffic in Mexico (unpublished manuscript) (on file with author), at 5.
[23] These daily figures were calculated by this author from the studies statement of "12 to 80 billion annual drug revenue."
[24] Shannon O'Neil, *The Real War in Mexico,* FOREIGN AFF., Jul. 1, 2009, at 2, *available at* PROQUEST.
[25] *Id*.

of the traditional ties between the cartels and the government. There existed new political parties with political agendas and new drug cartels who wanted to expand their profits into the cocaine market. With the new political regime, the cartels realized they could no longer reap the benefits they previously did under PRI rule and used this political change as the opportunity to end their dependence to the government. The cartels previously relied on politicians, judges, and police officers to turn a blind eye to cartel operations in return for money.[26] However, with new actors in play, this blind eye was no longer possible. This newfound independence allowed the cartels to use coercion, their most efficient mean for requiring the safe trafficking of their drugs across the border. By this method, the cartels were still able to operate outside the rule of law.[27]

The new political actors in play occurred at the same time of the increase in cocaine trafficking. This resulted in violence as cartels fought each other for trade routes which had previously been under control through cartel-politician relationships.[28]

Turf War for Trade Routes

When the drug market shifted from marijuana to the transportation of cocaine, the cartels needed to find new trade routes. Two major cartels emerged from this struggle, and they continue to fight each other to this day. Both cartels have distinct goals and means of operation. The Sinaloa cartel, operates its cartel and drug trade as a legitimate business enterprise, in contrast to the Gulf cartel, which has amassed a bloody and violent reputation. At the core of the Gulf cartel is the Los Zetas, an infamous sect, which was initially comprised of a group of special-force deserters from the Mexican military. The violence that Mexico is experiencing today began approximately in 2003 when the home of the Zeta's Nuevo Laredo, one of the largest inland ports across the Rio Grande, was attacked by the Sinaloa cartel. Violence ensued ever since, with the Juarez cartel and Tijuana cartel becoming more involved.[29]

One of the major problems concerning the infighting amongst the cartels is that there exist no codes for combat or rules of engagement, allowing the cartels to operate with a sense of impunity. While citizens usually are not the main target of cartels, collateral deaths do not impede the

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[26] *Id*.
[27] *Id*.
[28] Thomas Kellner & Francesco Pipitone, *Inside Mexico's Drug War*, 27 WORLD POL'Y J. (Apr. 8, 2010), at 2, *available at* GENERAL ONEFILE.
[29] *Id.*

cartels. The crime in Mexico has only continued to increase, and there is a direct correlation between the increase in crime and the increase in drug violence.[30]

Coercion and Payment of Politicians

The deep roots the cartels have in politics and the extent the cartels will go to coerce and co-opt individual politicians remains critical to how the cartels are undermining democracy in Mexico. Under the PRI rule, politicians were heavily involved with the drug cartels. When the democratic shift occurred, politicians were no longer able to be openly involved in cartels and drug trafficking affairs. Presidential candidates ran on platforms of ending drug violence and trafficking in Mexico; however, they did not prevent drug cartels from incorporating or coercing politicians to become involved in their illegal operations. Former Mexican president, Felipe Calderón, was so adamant about ending drug violence that he initiated "the war on drugs," which saw a death toll of 34,000 people from December 2006 through 2010.[31, 32] Furthermore, "…the number of reported crimes in Mexico increased from 810,000 in 1991 to 1,370,000 in 1998 – a 70 percent increase…"[33]

No level of government is safe from infiltration from the cartels. Cartels give politicians the choice of between corruption through bribery, or coercion through force. This policy has been successful, as "…drug cartels have corrupted as much as 60 percent of the country's 2,500 municipal governments," including political elites such as senators and governors.[34] If the drug cartels are unable to convince individuals to participate in their illegal activity, they have coercive means of reaching their goals.

The cartels will use force to send their message to politicians actively opposing cartel operations. It took two assassination attempts for Mexican Congressman David Figueroa to drop out of the race for governor of Sonora. A cousin of Calderón's wife was murdered by the cartels in order to send a message to the president on their views of his crackdown of

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[30] Willoughby, *supra* note 14.

[31] David Hernandez, *How Many Have Died in Mexico's Drug War?* L.A. TIMES (Jun. 7, 2011), at 1, http://latimesblogs.latimes.com/laplaza/2011/06/mexico-war-dead-update-figures-40000.html.

[32] The death toll today is estimated at closer to 50,000

[33] Willoughby, *supra* note 14, at 117.

[34] Dudley Althaus, *Drug, gang allegations stain Mexico politics Recent arrests of officials show depth of problem MEXICO: Collusion appears rampant across country,* HOUS. CHRON. (Oct. 17, 2011), at 1, http://go.galegroup.com/ps/i.do?&id=GALE%7CA200969635&v=2.1&u=txshracd2488&it=r&p=ITOF&sw=w.

their enterprise.[35] However, more politicians have seemingly fled or become corrupt. If the cartels were held accountable by law enforcement agencies, their growth and influence would be impeded.

Inefficiency of Law Enforcement

Under the PRI, the lack of application of the law to the cartels allowed for lawless action within certain areas and branches of the government. No facets of law enforcement hold drug cartels accountable for their violence or illegal activity. Even the shift towards democracy has not remedied these procedures for accountability. In fact, this has exacerbated these problems; law enforcement institutions that previously protected elites under the authoritarian rule were then forced to protect all citizens under the democratic rule of law, which is proving to be an impossible task. Since 2006, not one of the 1,000 murders that have occurred in the state of Sinaloa has been solved because the cartels have infiltrated the very law enforcement agencies that are supposed to prosecute them. This included the Office of the Attorney General and the Mexican Department of Justice, of which 65 percent of the Mexican Department was on the payroll of the cartels.[36, 37]

Another agency, the Customs and Border Protection Agency (CBP) not only had many of its members co-opted by the cartels, but also experienced direct infiltration by cartel members. From "…October 2004, 121 current or former CBP employees have been…prosecuted for corruption."[38] More startling is that the cartels have sent drug traffickers to take the entrance examination to work at the CBP. Once the CBP began administering polygraph tests to determine if individuals were eligible for employment, 60 percent were ineligible due to a failure to disclose a history of drug abuse or criminal activity.[39] However, bribery remains the most common form of corruption used by the cartels.

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[35] Kevin Hall, *Mexico's Drug Traffickers Set Their Sights on Top Officials*, Knight Ridder Wash. Bureau (Aug. 10, 2008), *available at* General OneFile.
[36] Arturo Zamora Jimenes, Criminal Justice and the Law in Mexico, 40 CRIM., L. & SOC. CHANGE, 33-36 (2003).
[37] Willoughby, *supra* note 14, at 123.
[38] Katherine McIntire Peters, *How Drug Cartels Try to Corrupt Federal Employees*, NAT'L J., (Apr. 12, 2011), http://www.nationaljournal.com/how-drug-cartels-try-to-corrupt-federal-employees-20110412.
[39] *Id,* at 3.

Corruption and Coercion of Law Enforcement

The relationship between the corruption and coercion of law enforcement is fundamental to the cartels' undermining Mexican democracy. Mexico's police force is plagued with disorganization and corrupt members. Those that are not corrupt are often targeted and killed by the cartels. The public persona of a police officer is not one of great integrity as the majority of those who join the field do so for capital gain rather than a true interest in law enforcement. Furthermore, even when these corrupt officers are discovered police municipalities are so disconnected that individuals have been know to go from one force to another after being discharged for links to drug trafficking and corruption.[40] Extortion by officers, however, is not how the police make most money of their money. Rather, payment by the drug cartels is an even more lucrative and "get rich quick" scheme for an officer.

Between 1988 and 1989, the Juarez cartel processed 21 billion dollars' worth of cocaine. This cartel allocates at least 10 percent of its income to bribery of officials.[41] Assuming this cartel spent the minimum this year on paying off law enforcement, they would have a bribery budget of 2.1 billion dollars from cocaine alone. Mexico has 366 officers per 100,000 people. With a population of approximately 113,423,015 there are approximately 415,128 police officers.[42] This allows the Juarez cartel to hypothetically give every police officer $5,000 in bribes in one year. The average police officer earns $350 a month, annualizing in $4,200 a year. Based solely on the proceeds of cocaine trafficking, The Juarez cartel could double every police officer's salary and still have $332 million to pay to justices and politicians.[43] Of course, those officers who refuse to participate in cartel corruption and take these often sizable payoffs face a second option – cartel coercion.

Within two days in 2008, the drug cartels murdered Mexico's Federal Police Chief Edgar Eusebio Millan Gomez and the commander of Mexico City's investigative police force Esteban Robles Espinosa. These brutal murders came only a week after the director of investigation for organized crime, Roberto Velasco Bravo, was murdered. All three were active participants in the Mexican government's crackdown on the drug car-

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[40] Nelson Arteaga Botello & Adrian Lopez Rivera, *Everything in This Job is Money*, WORLD POL'Y J., Fall 2000, at 61, *available at* JSTOR.

[41] Jamie Dettmer, *U.S. drug warriors knock on heaven's door*, Insight on the News, Apr. 21, 1997, at 8, *available at* EBESCO.

[42] *Organized Crime in Mexico: Under the Volcano*, THE ECONOMIST, (Oct. 14, 2010).

[43] These are the independent calculations of the author and have not been verified by any other independent source.

tels, individuals who embodied what the police sought to enforce and obtain: Justice. They were murdered because they tried to enforce the rule of law. However, the cartels have no allegiance to the police officers they bribe and do not fear breaking the alliance they have with corrupt officials.[44] Police officers who previously worked with cartels, but cooperate with judicial officials, are not immune to cartel violence. The cartel's allegiance is to their members and their profits.[45]

However, there exists one political entity that has the potential to end the violence and rule of the cartels: The Mexican army. Understanding the role the army plays in relation to the drug cartels is critical in understanding why the cartels are capable of posing such a threat to democracy in the state of Mexico.

Corruption of the Mexican Army

Corruption of the army is nothing new in Mexico, and understanding the relation between the army and cartels is fundamental in understanding one of the methods the cartels use to undermine Mexico's democracy. The rewriting of the social contract between the Mexican people and the government, coupled with the shift from authoritarianism to democracy, the military could no longer be used as a mechanism to advance political gain.[46] President Felipe Calderón deployed approximately 50,000 soldiers to fight against the drug cartels and organized crime that had engulfed Mexico. While this seemed to be one of the most viable methods by which the government could combat the military prowess of the cartels, the results were less than what Calderón intended. Within the first eight months of the operation, one-tenth of the force had to be fired due to corruption.[47]

Since the second half of the twentieth century, the army has played an active role in aiding and abetting drug trafficking across the Mexico-US border. During the 1960's and 1970's, Mexican army soldiers guarded cartel marijuana fields. The greatest benefit that the army provided the cartels was that it physically helped transport drugs across the

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[44] Harris Whitbeck, *2 Top Mexican Police Officials Killed in 2 Days,* CNN (May 9, 2011), http://articles.cnn.com/2008-05-09/world/mexico.violence_1_drug-cartels-police-force-mexican-state?_s=PM:WORLD.

[45] *Monterrey Casino Arson Attack Policman's Family Killed,* BBC News (Sept. 15, 2011), http://www.bbc.co.uk/news/world-latin-america-14941742.

[46] RICHARD L. MILLETT ET AL., LATIN AMERICAN DEMOCRACY (Richard L. Millett, Jennifer S. Holmes, Orlando J. Perez eds., 2009).

[47] ECONOMIST, *supra* note 42

border.[48] The Mexican army ran these operations the same way the cartels run their operations today: through corruption and coercion. The army would bribe citizens to use their land to establish a perimeter and transport drugs into the US.[49] The army, like the cartels, did not hesitate to use violence when necessary. As it was not uncommon for there to be bounties for killing border patrol agents (sometimes in the amount of $200,000), Mexican soldiers would use deadly force if necessary to deter US border patrol agents, who tried to interfere with the trafficking business. [50, 51]

Training new military personal has yet to solve the problem of the imbedded corruption by the cartels. Many of the military individuals who are suspected of transporting drugs and inciting violence were actually trained by the US in an effort to constitute a Special Forces branch of the Mexican military. The goal of this branch was to seize landing strips used by the drug smugglers.[52] This operation seems to have had the opposite effect, as these individuals are now seen collaborating with the cartels. Furthermore, "[t]he military has been perpetrating more violations of human rights after they were given [the] key role in the fight against drug cartels in Mexico by the Calderón [administration]."[53] The abuse of human rights by the military is able to continue because the institution charged with investigating and prosecuting these actions is the military itself.[54]

As in any democracy, the last unspoken factor that can combat the cartels would be the people. Understanding the power that the cartels exert over the citizens may be the most important factor in understanding the cartels' threat to Mexico's democracy.

How the Cartels are Winning the Hearts of Citizens

The move to militarize the war on drugs was initially seen as a popular move and was embraced by the citizens. The military was one of the most revered political institutions and the existing corruption of the military was considered minimal compared to the police and law enforcement agencies. The militarization of the drug war, however, led to the rampant corruption of the military. What has occurred is more violence, which is unpalatable to the citizens. When it comes to choosing the lesser

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[48] Patrick O'Day, *The Mexican Army as Cartel*, J. CONTEMP. CRIM. JUST., (Aug. 1, 2001) at 278-295, *available at* EBSCO.
[49] *Id.* at 286.
[50] *Id.* at 287.
[51] *Id.* at 289.
[52] *Id.* at 289.
[53] ALEJANDRO ANAYA MUNOZ ET AL., MEXICAN SECURITY FAILURE: COLLAPSE INTO CRIMINAL VIOLENCE (Monica Serrano, Paul Kenny, Arturo C. Sotomayor eds., 2011).
[54] *Id.* at 131.

of two evils, the population is increasingly leaning towards the cartels instead of the military as a solution to the problem, if only to end the number of drug-related deaths.

The violence that has engulfed Mexico is unparalleled in the western world. In 2010, Ciudad Juárez was designated the most violent city in the world. With a population of approximately 1,300,000, and an estimated 7,000 executions,[55] the city recorded 1 violent drug-related death for every 190 people.[56] More devastating was the economic destruction this violence did to the once prosperous intermediary city: "The city's outgoing mayor recorded for these years: 10,000 orphans; 250,000 migrations because of the violence; 10,000 businesses closed; 130,000 jobs lost; and 80,000 addicts. The exodus represented almost 20 percent of the city's population."[57]

The violence that has occurred in Mexico undermines the stability of the region. Over 25 percent of the Mexican population now lives in extreme poverty, unsure of where their next meal will come from, and over 50 percent of the population lives in ordinary poverty without access to health facilities, regular water, and transportation.[58, 59] While The Mexican people are starving and burying their dead, it is the cartels, not the government, that the people turn to for help.

"El Chapo," the head of the Sinaloan Cartel, was listed as one of the richest and most violent men in the world; however, he supports the local economy.[60] He is revered by the local residents and like many of the cartel leaders he has an enormous arsenal of money at his disposal. As a result, he provides hospitals, roads, and electricity to the community and single-handedly stimulated the local economy.[61] Beyond the goods the cartels provide to the economy, the cartels offer jobs to a population in

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[55] To put this into context, the city of San Diego, California has a similar population to Ciudad Juárez. In 2010, San Diego reported 29 murders (City of San Diego). Police Chief Bill Lansdowne told a City Council committee that "'[w]e've reached the tipping point… [f]or the first time in several years, we're seeing a disturbing increase in the level of crime in the city of San Diego, and we're also beginning to experience again officers leaving the San Diego Police Department and making other choices'" (Hall, Matthew).

[56] This figure was independently calculated by the author from the estimated population in 2010 coupled with the 7,000 executed. These numbers came from independent sources of one another.

[57] MUNOZ, *supra* note 53, at 213.

[58] MUNOZ, *supra* note 53, at 221.

[59] The figure on ordinary poverty was independently calculated by the author from the raw number given in the source cited.

[60] Mario Gabelli, *#937 Joaquin Guzman Loera*, FORBES (Mar. 10, 2010), http://www.forbes.com/lists/2010/10/billionaires-2010_Joaquin-Guzman-Loera_FS0Y.html.

[61] *Mexican Drug Wars*. MSNBC (Oct. 12, 2011).

desperate need of work; the violence and income inequality in Mexico has become crippling. As a result of the free market neoliberal model, inequality gaps forced disenfranchised individuals to find alternative means of employment. The most accessible alternative has been the underground black market, which "…accounted for 40 percent of all economic activities,"[62] and the drug trade. As a whole, the drug trade accounts for approximately 3 to 4 percent of Mexico's GDP.[63] Mexico has a GDP of 1.657 trillion dollars, thus the drug trade is approximately a 66.28 billion[64] dollar a year industry.[65] For individuals who have been disenfranchised by the new economic model, the drug trade becomes an accessible and profitable means of earning a living. Mexico has a population of approximately 115 million, and it has been found that there are an "…estimated 450,000 people who rely on drug trafficking as a significant source of income today."[66] With this alternative means of economic benefits has come an increase in violence.

Currently, there is a more prevalent, negative view of the military held by the same group of citizens. Like the police, the citizens rightly view the military as corrupt. Furthermore, with the cartel offering such substantial benefits to many citizens, law enforcement appears to be taking from the citizens instead of protecting them, providing the cartels a more favorable opinion than law enforcement. While the cartels operate outside the rule of law, they concurrently and routinely enhance the lives of citizens, as contrasted with local law enforcement attempt to act like cartels, rather than abiding by their sworn duty to uphold the rule of law.[67]

There seems to be no singular or collective institutional governmental entity that is capable of eradicating the cartel organization and curb the current reign of terror. The citizens are worn out from living in fear and the incessant violence and would rather have peace than the violence and death associated with the movement to eradicate them. From a theoretical framework, the detrimental effect of the violence on the psyche of

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[62] Rios, *supra* note 22.
[63] Rios, *supra* note 22, at vii.
[64] This number was independently calculated by this author based on the figures given by Shirk and The CIA-The World Fact Book with respect to GDP and percentage of GDP attributed to the drug trade and have yet to be verified by alternative sources. Furthermore, there has been evidence provided that the actual monetary benefit from the drug trade is far above the 66.28 billion dollar figure.
[65] *The World Factbook,* CENTRAL INTELLIGENCE AGENCY, 2012-2013.
[66] Shirk, *supra* note 8, at 7.
[67] Brian J. Fried, et al., *Corruption and Inequality at the Crossroad: A Multimethod Study of Bribery and Discrimination in Latin America*, 45 LATIN AM. RES. REV., 76-97 (2010).

the Mexican population is probably the single greatest threat to a functioning Mexican democracy.

CONCLUSION

If the cartels continue to gain significant control of the democratic institutions, Mexico will become a failed state and no longer function as a democracy. If the cartels are eliminated, or significantly curtailed, then Mexico can continue to flourish as a functional democracy, and have all of the political and social freedoms that are encompassed within a democracy. However, time is running out. The cartels have corrupted the four cornerstones of a democracy; any country that has one of those four cornerstones corrupted cannot be considered a democracy. Mexico now is not a democracy; it is either a semi-democracy, or simply a government ruled by cartels. The only practice allowing Mexico to retain any democratic potential is that it still holds free and fair elections, which is the foundation of a democracy. However, if the cartels are able to coerce and affect the outcome of Mexico's elections, then Mexico will become a failed democratic state. Mexico is already on the verge of failing unless significant reform occurs.

With the election of current president, Enrique Peña Nieto of the PRI, Mexico has reinstated power to the party that ruled under authoritarian measures for seventy years. This populous vote of confidence by the people for the PRI comes one election after the PRI was unable to garner a single victory in the 2006 election. They won a mandate in the 2012 election by winning an average of 14.1% more votes per state than the 2006 election. The people have spoken in the ballot box and demanded an end to the violence that is destroying the country.

The Peña Nieto regime has begun the necessary reform required to save Mexico's democracy. At the forefront of their proposed constitutional reform is the constitutional prohibition on reelection of politicians.[68] Senators, governors, mayors, and the President, are not allowed to seek reelection. Without reelections, politicians are not held accountable to the people for their actions during their term. Allowing reelections is a necessary step in accountability of politicians. Beyond accountability of politicians, there is electoral reform at the forefront of the political debate. After decades of electoral fraud, Mexico instituted the Instituto Federal Electoral (IFE) to be an independent observer of federal elections. The proposed

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[68] Duncan Wood, *A Look at Mexico's Political Reform-The Expert Take*, WILSON CENTER (Oct. 16, 2013), http://www.wilsoncenter.org/article/look-mexico%E2%80%99s-political-reform-the-expert-take.

reform would be for a national electoral observer for state elections as well.[69] As of now, each state has their own electoral institutions to oversee state elections, the proposed reform would allow for more legitimacy at the local and state level elections. These two major reforms are the first of many necessary steps to curtail cartel violence and political corruption. These reforms allow for the accountability and legitimacy. However, if the PRI is unable to curtail the violence, Mexico will be a failed state by the 2018 election.[70]

[69] *Id.*

[70] This figure and these assertions of the election and implications of the election are further expounded in this authors paper *Party Affiliation and Violence in Mexico: A Comparative Analysis* which was presented at the 2013 Western Social Science Association Conference in Denver, Colorado.

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CITIZENSHIP DOCUMENTATION AND EXPLOITATION ON THE THAILAND-MYANMAR BORDER

Rachel Brown*

*Since the 1980s, ethnic persecution, political insecurity, and deprivation of livelihood under military oppression have caused minority populations from Burma/Myanmar to cross the border into Thailand to seek refuge, creating one of the most severe cases of protracted displacement in the world. In 2011 and 2012, negotiations between the Government of Myanmar and ethnic armed groups resulted in ceasefire agreements and increased prospects for voluntary repatriation. However, there are an estimated two to three million unregistered Burmese migrants in Thailand. Without citizenship documentation, asylum-seekers are regarded as illegal migrants and subject to arrest, detention, and deportation. Lack of citizenship is the single greatest risk factor for women to be trafficked or otherwise exploited in Thailand.***

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* Candidate, Bachelor of Arts, Business and Enterprise Management, Politics and International Affairs, Wake Forest University (expected Spring 2015).

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PART I. FIELD RESEARCH

I spent six weeks during June and July of 2013 in Mae Sot, Thailand, studying the contributing factors of protracted statelessness and the subsequent vulnerability to human trafficking. I worked with a 501c3 non-profit organization, Life Impact International, that intervenes in humanitarian abuses by rescuing children from exploitation and providing long-term care for them. Through observations, personal interviews, and literature reviews I found that exploitation on the border is primarily caused by a lack of citizenship. I also realized there are strong political, religious, and ethnic biases undermining the legal documentation of asylum-seekers from Myanmar. My research advocates for partnership between government entities, non-profit organizations, and civil society groups in the universal birth certification and registration of migrants in Thailand to prevent statelessness for future generations and protect the legal rights of workers should repatriation become a viable option in the near future.

PART II. PROBLEM OF STATELESSNESS

Nationality is a legal bond between an individual and state, and a prerequisite for full participation of human rights. Statelessness refers to the situation when an individual is not considered a national by any state. In order to address the global problem, the United Nations hosted two conventions on the Status (1954) and Reduction (1961) of Statelessness. Over fifty years later, however, more than twelve million people remain stateless.[1] Only a few governments in the world are able to determine statelessness and extend official status to persons; it is not common for UNHCR or other UN agencies to register stateless persons.[2] Persons without citizenship are often prevented from voting, traveling, working, schooling, and accessing health care. They are also subject to discrimination, deportation, and abuse by authorities. According to identification activities conducted by UNHCR from 2009 to 2011,[3] the countries with the largest number of stateless people are Estonia, Iraq, Latvia, Myanmar, Nepal, Syria and, Thailand.

From 1962 to 2011, Myanmar was ruled by a military junta that launched an aggressive campaign against ethnic minority groups and en-

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[1] *Who is Stateless and Where?* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/pages/49c3646c15e.html.
[2] *The State of the World's Refugees: In Search of Solidarity* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, (2012).
[3] *Id.* at 107.

gaged in human rights abuses such as genocide, systematic rape, child soldiers, forced labor, and forced migration. Since their initial arrival in the 1980s, refugees from Myanmar have been confined to nine closed camps within Thailand, creating one of the most severe cases of protracted displacement in the world.[4] In addition, inter-communal violence in Rakhine State in June 2012 forced an estimated 75,000 people to flee their homes, leaving over 800,000 residents, mostly Rohingya Muslims, without citizenship in Myanmar.[5]

Systematic Factors

There are two systematic factors that contribute to the situation of protracted statelessness on the Thailand-Myanmar border: Refugee determination and refugee camps.

Refugee Determination

First, the Royal Thai Government is not a signature to the 1951 Refugee Convention and its 1967 Protocol, nor does it have refugee laws or working asylum procedures. The United Nations Convention relating to the Status of Refugees is the primary document for defining refugee status and rights and the legal obligations of states. It is founded on Article 14 of the 1948 Universal Declaration of human rights and is the centerpiece of international refugee protection today.[6]

Furthermore, Thailand does not permit UNHCR to determine refugee status for asylum seekers from Burma, Laos, or North Korea.[7] The agency is allowed to issue "Persons of Concern" certificates to refugees of other nationalities, but these papers do not provide employment authorization or protection from local police forces. The government's obstructive control over refugee monitoring prevents an accurate assessment and appropriation of aid to those most in need.

Additionally, Thailand's procedures for refugee screening are inherently biased. Legal rhetoric in policy reflects national discrimination and propagates xenophobia in the country. Thai officials use the category

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[4] *Who is Stateless and Where?, supra* note 1.
[5] *2013 UNHCR Country Operations Profile – Myanmar*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/pages/49e4877d6.html.
[6] Introductory Note, *Convention and Protocol Relating to the Status of Refugees,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Dec. 2010), http://www.unhcr.org/3b66c2aa10.html.
[7] *Thailand: Refugee Policies Ad Hoc and Inadequate*, HUMAN RIGHTS WATCH (Sept. 13, 2012) http://www.hrw.org/node/110100.

"temporarily displaced persons fleeing fighting" instead of "refugees" to emphasize that those seeking asylum will return as soon as conditions in Burma allow for repatriation.[8] The category adopted by Thai officials does not include people fleeing natural disasters or human rights abuses such as forced labour. Although the country has generally been hospitable to refugees in past decades, there is a growing intolerance towards Burmese migrants in the last several years, particularly as return becomes a more viable option under Myanmar's recent reforms.

Refugee Camps

Although there are an estimated two to three million Burmese migrants living in Thailand, less than 140,000 reside in the camps. Moreover, only 60 percent of the 140,000 people in the nine camps along the Burmese border are actually registered; few cases have been registered since mid-2006, leaving 40 percent of the camp's population particularly vulnerable to exploitation and deportation.[9] Accordingly, the number of Burmese refugees registered is significantly disproportionate to the population in need of aid within the country.

All refugees living outside designated camps are treated as illegal immigrants and subject to immediate arrest and deportation, often following bribery as well as verbal and physical abuse. Bill Frelick, Refugee Program director and co-author of the 2012 report by Human Rights Watch, outlines the central problem:

> "Thailand presents Burmese refugees with the unfair choice of stagnating for years in remote refugee camps or living and working outside the camps without protecting from arrest and deportation."[10]

Despite the known risks of residing outside the camps, the majority of refugees choose to self-settle in the host country to protect their freedom of movement and access to work. The repressive nature of the camps causes many already-vulnerable Burmese refugees to settle on their own, increasing the likelihood of exploitation by employers and deportation by local police forces.

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[8] Inge Brees, *Refugee Business: Strategies of Work on the Thai-Burma Border*, 21 J. REFUGEE STUD. (2008), http://jrs.oxfordjournals.org/content/21/3/380.full.pdf+html.
[9] *Thailand: Refugee Policies Ad Hoc and Inadequate, supra* note 7.
[10] *Thailand: Refugee Policies Ad Hoc and Inadequate, supra* note 7.

Exploitation

Persons without nationality or citizenship documentation are exceptionally vulnerable to exploitation due to a lack of legal protection from the state. The state has a primary responsibility to protect its own citizens, grounded in the concept of state sovereignty, international humanitarian law and national law.[11] However, not all governments have a sense of obligation to protect the rights of individuals residing within their country illegally. Consequently, there is little to no support from Thai officials to protect the rights of stateless persons, making Burmese migrants easy targets for traffickers for the purposes of forced labor and commercial sex.

Human Trafficking

The term "human trafficking" includes the act of recruiting, harboring, transporting, providing or obtaining a person for forced labor or commercial sex acts through the use of force, fraud or coercion.[12] Human trafficking is the fastest growing criminal industry and is tied with illegal arms as the second largest criminal industry in the world today.[13] The total market value of illicit human trafficking is estimated to be in excess of $32 billion annually.[14] Due to the transnational nature of the industry, nearly every country in the world is a source, transit, or destination country for victims of trafficking. For instance, Thailand is a well-known transit country, exporting victims from North Korea, China, Vietnam, Pakistan and Burma to Malaysia, Indonesia, Singapore, Russia, Republic of Korea, United States and Western Europe.[15]

For the last thirteen years, the US Government has issued an annual Trafficking in Persons (TIP) Report to engage foreign governments in anti-trafficking reforms and prevention, protection, and prosecution programs. The Department of State locates each country on one of three tiers based on the governments' efforts to comply with the "minimum standards

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[11] *Responsibility to Protect,* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Canada, International Development Research Centre, 2001, at XI.
[12] *Trafficking in Persons Report 2013*, UNITED STATES DEPARTMENT OF STATE (2013), http://www.state.gov/j/tip/rls/tiprpt/2013/.
[13] Press Release, *HHS Fights to Stem Human Trafficking*, UNITED STATES DEPARTMENT OF HEALTH AND SERVICES (Aug. 15 2006), http://www.hhs.gov/news/factsheet/humantrafficking.html.
[14] Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits*, INTERNATIONAL LABOUR OFFICE, 2005.
[15] *Trafficking in Persons Report 2013, supra* note 12, at 358.

for the elimination of trafficking" found in Section 108 of the Trafficking Victims Protection Act of 2000.[16] Below is a guide to the Tiers:

> "Tier 1: Countries whose governments fully comply with the TVPA's minimum standards for the elimination of trafficking.
>
> Tier 2: Countries whose governments do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards.
>
> Tier 2 Watch List: Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:
>
> a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
> b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
> c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.
>
> Tier 3: Countries whose governments do not fully comply with the TVPA's minimum standards and are not making significant efforts to do so."[17]

Thailand has been located on the Tier II Watch List for four consecutive years and narrowly avoided a mandatory downgrade to Tier III in 2012 with a written agreement to meet minimum standards regarding anti-trafficking laws.[18] However, most trafficking victims are viewed as illegal migrants by local police and are arrested, detained and summarily deported back to Myanmar. Even if the government decides to implement

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[16] Section 108, *Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No 106-386*, UNITED STATES DEPARTMENT OF STATE, http://www.state.gov/j/tip/rls/tiprpt/2011/164236.htm/.

[17] *Trafficking in Persons Report 2013, supra* note 12.

[18] *Trafficking in Persons Report 2012*, UNITED STATES DEPARTMENT OF STATE (2012), http://www.state.gov/documents/organization/192597.pdf.

new anti-trafficking laws, fear of deportation and abuse will likely preclude many victims from seeking support from authorities.

Forced Labor

According to the International Labor Organization, nearly 21 million people are victims of forced labor across the world.[19] Of the 18.7 million individuals exploited in the private economy, 22 percent are victims of forced sexual exploitation. An additional 68 percent are victims of forced labor exploitation, involving industries such as agriculture, construction, domestic work and manufacturing.[20] The Asia-Pacific region is responsible for the largest concentration of forced laborers at 11.7 million, or 56 percent of the global total.[21]

The industrialization of Thailand's export-oriented economy provides employers with abundant sources of cheap labor. The lack of adherence to labor laws and "ease of doing business" incentivizes investors, especially in textile and garment manufacturing, where easily controlled workforces are particularly desired.[22] Currently, Mae Sot is experiencing a period of rapid expansion as multinational corporations compete to gain access to Asia's "final frontier," Myanmar, which opened its borders to international visitors and investors for the first time in 2011.[23]

The proliferation of factories and availability of undocumented workers on the border drastically increases opportunities for forced and exploitative labor practices. Employers often take advantage of undocumented migrants by offering wages well below legal minimum requirements and demanding overtime hours without pay. Some companies on the border provide illegal migrants with temporary identification cards to protect workers from deportation by local police, and many employers claim possession of any paperwork, such as birth certificates or work permits, upon employment.[24] Threats of deportation prevent workers from

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[19] *ILO 2012 Global Estimate of Forced Labour*, INT'L LAB. ORG. (2012), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181921.pdf.
[20] *Id.*
[21] *Id.*
[22] Dennis Arnold and Kevin Hewison, *Exploitation in Global Supply Chains: Burmese Migrant Workers in Mae Sot, Thailand*, 35 J. CONTEMP. ASIA (2005), http://burmalibrary.org/docs3/exploitation_in_global_supply_chains.pdf. 319-340.
[23] Linda Yueh. *Burma: Asia's Last Frontier is Opening Up*, BBC NEWS (June 2, 2013), http://www.bbc.co.uk/news/business-22721804.
[24] Kyaw Htun. Interview by Rachel Brown. Personal Interview. Life Impact Office: Mae Sot, Thailand. July 8, 2013.

disobeying orders, and fears of extortion by police and immigration officials keep victims from reporting crimes, perpetuating a vicious cycle. Immigration officers are known to accept bribes from factory owners, brothel owners, even from migrants themselves.[25] Without citizenship documentation, Burmese migrants are forced to rely on employers for legal protection, putting them at risk for violence and abuse.

Commercial Sex

Sex tourism plays a prominent role in Thailand's economy. In fact, Bangkok is referred to as the sex tourism capital of the world; the "Disneyland for pedophiles."[26] The country received over 22 million visitors in 2012 alone,[27] with American, European, and Australian tourists driving the demand for the commercial sex industry.[28] Even though prostitution is technically illegal in the country, the number of prostitutes in Thailand ranges from 800,000 to 2 million, 20 percent of which are age 18 or younger.[29]

Women and girls without citizenship are especially vulnerable to this form of exploitation. Fifty-three of the fifty-eight children at Life Impact International's Safe Home in Thailand are stateless.[30] Most of the children's parents sold them or their older siblings to traffickers in Bangkok, and many of the girls had been sexually or physically abused before arriving at the home.[31] A survey conducted by UNESCO found that lack of citizenship is the single greatest risk factor for highland girls and women to be trafficked or otherwise exploited in Thailand.[32] The commercial sex industry is characterized by violence and manipulation, and stateless women and girls are the main victims.

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[25] Myat Mon, *Burmese Labour Migration into Thailand: Governance of Migration and Labour Rights,* 15 J. ASIA PAC. ECON. (2010), at 33-44, http://www.tandfonline.com/doi/abs/10.1080/13547860903488211.
[26] Deena Guzder, *Thailand: The World's Sex Tourism Capital*, HUFFINGTON POST (Aug. 14, 2009), http://www.huffingtonpost.com/wires/2009/08/14/thailand-the-worlds-sex-t_ws_259562.html.grant_Info_Note_No_21-ocr-en.pdf.
[27] Justin Bergman, *Can Burma Avoid the Curse of Sex Tourism?* TIME (April 12, 2013), http://world.time.com/2013/04/12/can-burma-avoid-the-curse-of-sex-tourism/.
[28] Guzder, *supra* note 26.
[29] Guzder, *supra* note 26.
[30] Rachel Brown. Email to Samantha Ray. Oct. 28, 2013.
[31] Lana Vasquez. Interview by Rachel Brown. Personal Interview. Life Impact Office: Mae Sot, Thailand. July 10, 2013.
[32] Krista Clement, *Stateless in their Own Home*, VOICES (Jan. - Mar. 2011), *available at* UNESCO.

Durable Solutions

The United Nations supports three robust solutions for refugees: voluntary repatriation, resettlement to a third country, or local integration.[33] The ultimate goal of UNHCR is to identify solutions to help refugees rebuild their lives in dignity and peace, but protracted situations often exacerbate problems with protection.[34] Although the Thailand-Myanmar border is one of the worst situations of protracted displacement in the world,[35] recent political reforms in Myanmar have generated discussion on the possibility of return.

Repatriation

In September 2012, the Thailand National Security Council released a statement announcing the preparation for the return of 120,000 Burmese refugees within the year.[36] The Myanmar government has been fighting ethnic Kachin rebels since June 2011, but violence has escalated in recent months. Talks of ceasefire agreements between the Myanmar government and Kachin Independence Organization may improve the chances for voluntary repatriation of refugees living on the border. However, political instability, military bases, and abundant landmines remain significant challenges to repatriation. According to the Geneva-based International Campaign to Ban Landmines, the army and at least seventeen non-state armed groups have used anti-personnel mines in conflicts over the past fourteen years.[37] Maja Lazic, senior protection officer at the UNCHR in Myanmar, confirmed: "There will be no active promotion of return until landmines areas are identified, openly marked and cleared."[38] This goal has not yet been realized, preventing refugees from making a safe return.

Prior to return, Myanmar's Parliament must draft a new citizenship law to improve the status of stateless groups within and outside the

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[33] *Durable Solutions,* UNHCR, http://www.unhcr.org/pages/49c3646cf8.html.
[34] *Id.*
[35] *2013 UNHCR Country Operations Profile – Myanmar, supra* note 5.
[36] *Thailand Says Myanmar Preparing for Refugee Return*, UNHCR REFUGEES DAILY (Sept. 16, 2013), http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=5056b4fc5.
[37] *Landmine and Cluster Munition Monitor: Myanmar/Burma,* INTERNATIONAL CAMPAIGN TO BAN LANDMINES (Dec. 17, 2012), http://www.the-monitor.org/custom/index.php/region_profiles/print_profile/536.
[38] *Myanmar's Landmines Hinder Return of Displaced*, INTEGRATED REGIONAL INFORMATION NETWORKS (Apr. 3, 2013), http://m.irinnews.org/Report/97768/Myanmar-s-landmines-hinder-return-of-displaced#.UnMtPpGrKeI.

country. If Burmese migrants are not granted nationality, they will face similar conditions of protracted statelessness in their home country. Due to the lack of international attention on displacement contained within a single country, as opposed to the spread of refugees across recognized borders, this places the migrants in an even worse situation. Human rights groups should study this legal process carefully, keeping a critical eye on the documentation and treatment of those who voluntarily return.

Resettlement

Resettlement to a third country is typically supported in situations where it is impossible for an individual to remain in the host country or return to his or her home country. Over 80,000 Burmese refugees residing in Thailand have been resettled since 2006.[39] In 2012 the Thai Government initiated a process to provide access to the Provincial Admissions Board for unregistered camp residents who are immediate family members of registered individuals already resettled.[40] The majority (78 percent) of resettlement has been to the United States, but in June 2013, the U.S. announced the end of group resettlement from the camps.[41] The closure of a group resettlement program for Burmese refugees further limits their options, pressuring them to return to Myanmar.

Local Integration

Repatriation and resettlement are the only durable solutions for temporarily displaced persons in Thailand; the government does not offer local integration as an option. However, de facto local integration has been occurring for several decades, and many refugees have resided in Thailand since ethnic uprisings began in the early 1950s.

Ultimate Solution

The ultimate aim of UNHCR and host governments is to return the refugees to Myanmar once it is physically safe and economically viable to do so. Repatriation is the ideal durable solution in any situation of protracted statelessness, and it is typically one of only two accepted solutions in ASEAN countries. Nevertheless, the Royal Thai Government should

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[39] *2013 UNHCR Country Operations Profile – Myanmar, supra* note 5.
[40] *2013 UNHCR Country Operations Profile – Myanmar, supra* note 5.
[41] *Programme Report July to December 2012*, THE BORDER CONSORTIUM (Dec. 2012), http://www.tbbc.org/resources/resources.htm.

take active steps to protect the legal rights of asylum-seekers from Myanmar so long as they reside in the host country.

PART III. REGISTRATION

There is an urgent need for the comprehensive registration of undocumented migrants in Thailand. Migrant workers contribute to around 6.2 percent of Thailand's gross domestic product, and approximately 80 percent of migrant workers in Thailand are from Myanmar.[42] Registration is essential to regulate migration in Thailand, protect the legal rights of workers, and secure citizenship documentation upon return to Myanmar.

Nationality Verification

In July 2009, Thailand initiated a Nationality Verification (NV) program to register illegal migrants with the government in an attempt to regularize migration and reduce labor abuses. First, Burmese migrants had to verify their nationality and obtain a three-year temporary passport from Myanmar.[43] They could then apply for a two-year work permit, eligible once for a two-year renewal.[44] The NV program was originally set to expire in 2010 but has been extended multiple times since; most recently on August 6, 2013 for an additional year.[45] As of July 2013, 778,258 migrant workers from Myanmar have completed nationality verification and possess a valid work permit; 36,650 have entered through Memorandums of Understanding (MOUs); and 462,162 have employers who submitted requests for employment.[46] Although the NV program has good intentions, there are several faults that actually increase the exploitation of illegal migrants in Thailand.

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[42] *Thailand: Tightening the Screws on Migration?* AL JAZEERA (Dec. 22, 2012), http://www.aljazeera.com/programmes/insidestory/2012/12/2012122285524785231.html/

[43] *Process for Nationality Verification*, MAP FOUNDATION (Aug. 13, 2010), http://www.mapfoundationcm.org/eng/index.php?option=com_content&view=article&id=37:process-for-nationality-verification&catid=13:current-migration-policy-in-thailand&Itemid=17.

[44] *Id.*

[45] *Migrant Information Note 21,* INTERNATIONAL ORGANIZATION FOR MIGRATION (Sept. 2013), http://www.burmalibrary.org/docs16/IOM-Mi.

[46] *Id.* at 4.

Program Failures

There are three salient problems with this system. First, the process requires detailed documents that are largely inaccessible to workers. The most recent Thai Cabinet Resolution requires the following documents from applicants: work permit application (Tor Tor 8), civil registration document (Tor Ror 38/1), medical certificate, certificate of employment, copy of employer's household registration document, copy of employer's identity card, certification of company registration, three photos, and a map of the workplace.[47] Many employers are unwilling to provide the necessary documents for migrants because they do not want to pay the legal minimum wage of 300 baht (USD 10) per day.[48] Without the appropriate paperwork, workers are prevented from accessing the NV system.

Second, the registration process is extremely expensive, costing up to USD 400 per applicant.[49] The mandatory health examination and one year of insurance cost USD 90 per person alone.[50] Undocumented workers receive an average of less than USD 4 per day, compared to documented migrants who receive close to USD 7.50 per day.[51] The unattainable fees prevent many migrants from registering, or worse, forcing them to rely on labor brokers to facilitate the process.

Third, the role of corrupt brokers and bosses results in debt bondage to the employer for processing registration fees. The policy forces migrants to stay with one employer, as changing employers requires re-registering for a work permit.[52] It is also common for employers to hold the original work permit and only give migrants a copy, if any documentation at all.[53] These practices force dependence on the employer, increasing the risk for violent and exploitive labor conditions.

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[47] *Id.* at 1-2.
[48] Daniel Schearf, *Thailand Extends Migrant Worker Registration Deadline*, VOICE OF AMERICA NEWS (Jan. 18, 2013), http://www.voanews.com/content/thailand-extends-migrant-worker-registration-deadline/1586395.html.
[49] *Id.*
[50] *Migrant Information Note 21, supra* note 45, at 3.
[51] *Thailand: Tightening the Screws on Migration?, supra* note 42.
[52] Jerrold Huguet and Sureeporn Punpuing, *International Migration in Thailand*, INTERNATIONAL ORGANIZATION FOR MIGRATION (Bangkok, 2005), http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/iom_thailand.pdf.
[53] *Id*. at 39.

Citizenship Documentation

In 2010, the Royal Thai Government implemented the Civil Registration Act of 2008, which provides birth registration for all children born in the country, even if the parents are not Thai nationals.[54] Of the 3319 babies born at Mae Tao Clinic in 2012, 2814 received official Thai birth certificates from the Mae Sot District Office.[55] The goal is to gain recognition by the Burmese Authorities of all stateless children born in Thailand so that they will be granted nationality upon return.[56] This requires partnership between the two governments as well as involvement on the part of existing networks on the border.[57] Two operating networks in Mae Sot are the Child Protection Network and Protection Working Group, consisting of community-based organizations, non-profit groups, and international non-governmental organizations.[58] However, there are major obstacles to registration, including lack of parental awareness on the importance of birth certificates, lack of knowledge on how and where to obtain a certificate; language barriers, and failure of officials to fully implement the policy. Although birth registration in and of itself does not grant nationality, it is a key document in preventing statelessness by establishing a primary link between an individual and a state.

It is imperative that all undocumented migrants in Thailand are registered so that they are able to apply for Burmese citizenship upon return to Myanmar. Although the government has repeatedly denied Thai citizenship to migrants, officials should work with Burmese authorities and non-governmental organizations in the registration of stateless individuals to prevent exploitation and protect workers' legal rights.

CONCLUSION

There is not a simple solution to the situation of protracted statelessness on the Thailand-Myanmar border. There are strong political, religious, and ethnic biases undermining the legal documentation of asylum-seekers from Myanmar.

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[54] CIVIL REGISTRATION ACT (No. 2), B.E. 2551 (2008) (Thai).
[55] MAE TAO CLINIC ANNUAL REPORT 2012, at 22.

[56] *Recognize Us,* COMMITTEE FOR PROTECTION AND PROMOTION OF CHILD RIGHTS BURMA (2012), *available at* UNESCO.
[57] Cynthia Maung. Interview by Rachel Brown. Personal Interview. CPPCR Office: Mae Sot, Thailand. July 9, 2013.
[58] James Ferguson. Interview by Rachel Brown. Personal Interview. UNHCR Office: Mae Sot, Thailand. July 1, 2013.

Thai immigration policy, as well as xenophobia towards unregistered migrants, prevents favorable local integration. A study funded by the World Health Organization found that 75.8 percent of 2000 respondents surveyed believed that non-registered migrants pose a threat to their "life and property;" in Tak, the province of Mae Sot, the figure was 82.4 percent.[59] Other perceptions measured were the belief that non-registered migrants, as opposed to refugees or registered migrants, are disease carriers (27 percent), compete with national workers for jobs (63 percent), and compete for land and natural resources (57 percent).[60] However, these perceptions contrast the facts: crime statistics are actually lower for migrants and Thailand has one of the lowest unemployment rates in the world today at less than one percent.[61] Although the Thai government does not offer local integration as a durable solution for refugees, multiculturalism should be promoted to lessen ethnic tensions between nationals and migrants and decrease the likelihood of violence.

Recent changes in the U.S. group resettlement program will largely deny Burmese refugees the option of relocating to a third country other than Thailand and Myanmar. This leaves an estimated two to three million migrants to choose between returning to Myanmar or risking exploitation in Thailand. Myanmar has not yet proven to the international community that it is able to safely receive refugees, preventing the active promotion of voluntary repatriation.[62] In the meantime, Thai officials should partner with Burmese authorities and non-governmental organizations to issue birth certificates and register migrants in order to prevent statelessness for future generations and protect the legal rights of workers should repatriation become a viable option in the near future. Thailand has been a generous host country for decades, and it should continue to protect refugees as they transition from a situation of protracted statelessness to one of nationality.

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[59] Malee Sunpuwan and Sakkarin Niyomsilpa, *Perception and Misperception: Thai Public Opinions on Refugees and Migrants from Myanmar*, 21 J. POPULATION & SOC. STUD. 1 (July 2012), 47-58.

[60] *Id.*
[61] *Id.*
[62] James Ferguson, *supra* note 58.

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Social Mobilization Against Hate Crimes: The Gay & Lesbian Movement

Mariam Azhar*

The present paper focuses attention on the definition of "hate crime" and how socially mobilized advocacy groups changed its definition over time. The gay and lesbian movement has been pushing to expand the domain of individuals protected under hate crime laws to include sexual orientation as a category. The movement was able to achieve its goal through the use of issue salience and legal parlance, providing us with yet another instance of the social mobilization phenomenon that began in the late 1950s.

* Bachelor of Arts, Political Science, University of California, Berkeley (graduated Spring 2013).

INTRODUCTION

Social movements, many organized at the grass roots level, have advocated successfully for a greater sense of realized equality in America. The power structure produces a vested interest for elites in maintaining power over others, and often tolerates restricting and limiting the freedom and equality of those considered relatively powerless. However, various social movements have functionally resisted oppression, through organizing community activism, drawing attention to inequality and injustice, and by systemically challenging norms and definitions of how oppression has been sustained.

The mobilization against hate crimes is a recent development revealing how groups organize in pursuit of legal policy changes. The present paper focuses attention on the definition of a "hate crime," and seeks to chronicle historically how the term came to be used, how its definition has changed over time, and how socially mobilized advocacy groups pressed communities and government into adopting the special designation of "hate" with increased penalties. Social mobilization of community groups have influenced society and the legal community to address, monitor, and restrict hate crimes. Applying the framework offered by the first wave of mobilization against hate crimes in the early 1970s, a case study will be conducted on the contemporary gay and lesbian movement's gradual process towards domain expansion in federal hate crime laws. Through a process of issue salience, legal parlance, and framing the gay and lesbian movement became empowered and able to force the inclusion of their demographic under the federal hate crime statute with the passage of the Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act of 2009. Hence, the research conducted on social movements against hate crimes will be three-fold. The first section will discuss the term 'hate crime' and how such acts were criminalized, followed by a focus on how social movements in the 1970s mobilized against hate crimes. Using the model from the first wave of social movements against hate crimes, a detailed discussion on how the gay and lesbian movement organized towards domain expansion will explain how they were able to incorporate themselves as a category target group in federal hate crime laws.

PART I. LITERATURE REVIEW & HATE CRIMES OVERVIEW

The literature available on this subject can be divided into three categories based on the sources: information about acts now labeled as hate crimes, statistical information about the different kinds of hate crimes and how the numbers have changed over time, and analytical information by scholars about the progression of hate crimes as it relates to particular

social movements. An accumulation of derived information from all three will provide a basis for assessment of the recent addition of the gay and lesbian movement to the hate crime discourse at the federal level.

Institutionalization of the Term 'Hate Crime'

According to a 2005 report by the National Institute of Justice, "studies in which hate crime is so named and defined, in ways consistent with contemporary hate crime statutes, have grown from the occasional study in the 1980s to a steady flow over the past ten years."[1] The federal government first criminalized hate violence in 1969 by creating a statute which allowed prosecution of anyone who "willingly injures, intimidates or interferes with another person, or attempts to do so, by force because of the other person's race, color, religion or national origin."[2]

For the statute to apply, the victim had to be engaged in one of six types of federally protected activities, such as attending school, patronizing a public place/facility, applying for employment, acting as a juror in a state court, or voting. This statute ignited the effort to criminalize hate violence, which triggered further legislation on hate crimes. From then on, the "institutionalization of the term hate crime…signal[ed] two main concepts – the idea that crime motivated by hate or discrimination is different than other criminal acts, and the idea that victims of hate crimes are worthy of additional public and legal attention."[3]

Frequency of the term can be seen more closely through the graphs produced by Google Books Ngram (*fig. 1 & 2*). These graphs depict the number of books referencing hate crimes over the years. A closer look at Figure 1 between 1965-1990 reveals the escalation in reference due to the passage of the 1969 federal statute on hate crimes. The sudden peaks in 1979, 1986 and 1989 illustrate the rise in hate crime discourse leading up to the Hate Crime Statistics Act of 1990. In Figure 2, we can see that an increase in reference began in 1990, reaching its peak in 2004. This increase occurred during the period following the enactment of the Hate Crime Statistics Act of 1990, thereby illustrating the rising discussion of hate crimes as a social problem for specified groups. Hence, these graphs illustrate the literal expansion in hate crime discourse, which in turn help legitimize it as a social problem that requires legal action.

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[1] Michael Shively, *Study of Literature and Legislation on Hate Crime in America, National Institute of Justice,* UNITED STATE DEPARTMENT OF JUSTICE, Jun. 2005.
[2] Civil Rights Act of 1968; 18 U.S.C. § 245(b)(2).
[3] Valerie Jenness, *The Hate Crime Canon and Beyond: A Critical Assessment,* 12 L. & CRITIQUE, 2001, at 279-308, *available at* PROQUEST.

Statistics over Time

A plethora of information and statistics are made available by government agencies due to the Hate Crimes Statistics Act (HCSA) that required hate crimes in each state to be recorded. The Uniform Crime Report prepared by the United States Department of Justice has a complete section devoted to hate crimes, with information about the number and kind of hate crimes divided by states. The information is flawed, however, because each state varies in their penal codes on hate crimes. Nonetheless, these statistics do offer an insight on how different demographics are targeted during different time periods. For instance, hate crimes motivated by race were much higher during the era immediately following the civil rights movement, but in recent decades, hate crimes motivated by discrimination based on sexual orientation has increased as the group has gained more attention due to the popular discussion of same-sex marriages (*fig. 3*).[4]

Former Scholarly Research

Prior research on this topic predominately focuses on the first wave of social mobilization against hate crimes that surfaced in the 1970s and 1980s. The second wave of social mobilization began in 1998 as "a second tier of categories clearly emerged, with sexual orientation, gender, and disability becoming increasingly recognized in state hate crime laws."[5] The information on the second wave is limited, yielding more interesting examination considering the phenomenon is presently in progress. The framework presented by scholars analyzing the first wave can be applied to decipher the current gay and lesbian movement in the second wave.

A majority of the relevant research stems from Valerie Jenness, a Criminology and Sociology professor from the University of California, Irvine. Her focus on the progression of hate crime discourse and research on the "hate crime canon" serve as model to perform a case study on the gay and lesbian movement. Ryken Grattet, a Sociology professor from the University of California, Davis, contributes to the discussion with his research on the policing of hate crime in America, focusing on the role law enforcement organizations hold in distilling statutory understanding of hate crimes and applying them to incidents. Valerie Jenness and Ryken Grattet (2001) believe that there are four separate institutional spheres of policy activity on hate crimes: social movements and interest group poli-

[4] Jenness, *supra* note 3.
[5] Jenness, *supra* note 3.

tics, legislatures and policymaking, courts and statutory interpretation, and law enforcement policing and prosecution.[6] The first two spheres are evident in relation to the gay and lesbian movement as the legislation on hate crimes against gays and lesbians was recently passed in 2009. The next two spheres are still in progress today and will be subject to research in the future as more information is accumulated.

PART II. THE FIRST WAVE OF HATE CRIMES

Timeline of Hate Crime Legislation

An overview of the hate crime legislation since 1969 exposes the changes in protections provided to target groups over time (*fig. 4*). The 1990 Hate Crime Statistics Act (HSCA) obligated the Attorney General to collect data on all hate crimes committed due to the victim's race, religion, disability, sexual orientation, or ethnicity.[7] The passing of HCSA marked the first time that the federal government recognized the gay and lesbian community. However, this act was created merely for the purpose of collecting data on those hate crimes, and did not "stipulate new penalties for bias-motivated crimes, nor did it provide legal recourse for victims of bias-motivated crimes."[8] This legislation did not criminalize hate violence motivated by sexual orientation discrimination in the federal legal statutes and did not subject the crime to federal prosecution.[9]

The Violent Crime Control and Law Enforcement Act of 1994 required the United States Sentencing Commission to increase the penalties for hate crimes committed on the basis of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.[10] However, since sexual orientation was not recognized as a target group on the national level, this act only applied if the original crime committed was a federal offense. The Campus Hate Crimes Right to Know Act of 1997 necessitated campus security to collect and report any data on hate crimes motivated by race, gender, religion, sexual orientation, ethnicity, or disability.[11] Similar to the HCSA, this act simply focused on data collection. In 2001 and 2005, attempts to pass the Local Law En-

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[6] RYKEN GRATTET & VALERIE JENNESS, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT (Russell Sage, 2001).
[7] Hate Crime Statistics Act; 28 U.S.C. § 534.
[8] Jenness, *supra* note 3.
[9] Further explanation about the difference between state and federal jurisdiction will be provided in Part V of this paper.
[10] Violent Crime Control and Law Enforcement Act of 1994; H.R. 3355, Pub. L. 103-322.
[11] Campus Hate Crimes Right to Know Act; 20 U.S.C. § 1092(f)(1)(F)(ii).

forcement Hate Crimes Prevention Act (HCPA) failed in Congress as the Act was met with tremendous opposition to include sexual orientation as a target category.

Ultimately in 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) passed as a rider bill to the National Defense Authorization Act for the 2010 fiscal year. This act expanded existing United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.[12] Moreover, this act dropped the prerequisite that the victim must be engaged in a federally protected activity for the hate crime to be subject to the federal statute. The support and opposition this act faced will be discussed in greater detail. Before performing the case study of the gay and lesbian movement, it is essential to establish the framework produced by the first wave of social mobilization against hate crimes.

Social Movements in the 1970s - The First Wave

The civil rights movement of the 1960s and 1970s built the "structural basis and discursive themes necessary to set the stage for violence and hateful expression directed toward minorities as hate crime."[13] Some social movements politicize violence performed against their own community to ensure minority rights and to demonstrate that a particular issue should be of social concern. For instance, the black civil rights movement politicized police brutality against blacks, the women's rights movement politicized rape and domestic violence, and the disability movement politicized 'mercy killing' against those deemed unfit to live meaningful lives due to their medical conditions. Each of these groups pointed out those particular criminal acts in order to show how they were being discriminated against as the crimes were motivated by hate. These social movements were crucial to the development of hate crimes as a concept because "they historically have shared a common commitment to publicizing, framing, and combating violence directed at minorities *because of* their minority status."[14] All of these groups "sponsored anti-violence projects to combat discriminatory violence directed [towards them]…which established them in social and legal discourse to set the stage for the emergence of hate crime discourse."[15] The second step was to translate social movement goals into

[12] National Defense Auth. Act; Pub. L. 111-184
[13] Valerie Jenness, *Managing Difference and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the U.S., 1985-1998*, SOC. PROBS., 1999, at 548-571, *available at* AMERICA HISTORY & LIFE.
[14] Jenness, *supra* note 3, at 283.
[15] Jenness, *supra* note 3, at 284.

legal parlance. At the social movement level, all the crimes are well documented to prove that the issue is salient. Social movement organizations (SMOs) publicize this well-documented problem so they can pursue legal redress to create hate crime laws. Statutes are the end goal of these SMOs because they require "authorities to collect data on hate or bias-motivated crimes and mandate law enforcement training."[16] Throughout the 1980s and 1990s, the group participants described above successfully achieved social movement goals that translated into public policy in both state and federal law.

From the beginning, discussions of what to do about bias violence have been "inextricably linked to considerations of law and policy…hate violence politics is, first and foremost, a law-centered politics.[17] This link between law and policy is why social movements push for legal statutes to include them as a protected group as the social movements are designed around a particular common demographic. Therefore, the gay and lesbian movement's push for inclusion under the federal hate crime statute can be analyzed under the framework of issue salience, legal parlance, and domain expansion. Issue creation leads to the need to adopt a legal solution, which can be achieved through rule-making by legislation and courts that will then operationalize the precise meaning of the policy against hate crimes.

PART III. THE GAY & LESBIAN MOVEMENT: MOBILIZATION & ISSUE SALIENCE

Increased National Attention & Documentation

Issue salience is central for social movements because if the issue is prominent, "information cost will be low, allowing for high citizen participation and the mobilization of interest groups, [thereby] attract[ing] the attention of politicians in a competitive political environment."[18] Information cost would be low if the issue gains salience in media and attracts more support through awareness campaigns. With more citizens pushing for the cause, politicians are pressured into taking action particularly in those districts with significant number of supporters. The gay and lesbian movement "attempts to make their definition of select social condition into a public definition of a social problem, one worthy of public concern and

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[16] Jenness, *supra* note 3.
[17] Jenness and Garrett, *supra* note 6.
[18] Donald P. Haider-Markel, *The Politics of Social Regulatory Policy: State and Federal Hate Crime Policy and Implementation Effort*, POL. RES. Q., 1998, at 69-88, *available at* SAGE JOURNAL.

response."[19] The documentation of hate crimes against the homosexual community, both by local anti-violence projects and states under the HCSA, garnered further national attention. Presenting the frequency of hate crimes gave legitimacy to the claim that anti-gay and lesbian violence was a present problem. Attaching a number to the hate crimes allowed them to be more real in the eyes of the public and increased "visibility and empirical credibility."[20] It is difficult to argue against the fact that hate crimes on the homosexual community are not an immense problem when there is a large amount of information and statistics available on their frequency. Media coverage was crucial as information was presented to the public to garner bystander support and to demobilize opposition forces.[21]

Gaining Media Coverage: The Matthew Shepard Tragedy

The Matthew Shepard story increased national attention due to the heinous nature of the crime. In 1998 Matthew Shepard, a student at the University of Wyoming, was tortured and brutally murdered. During trial in the Wyoming state courts, many reported that Shepard was attacked due to his homosexuality as the incident occurred "a few hours after he had attended a planning meeting for Gay Awareness Week event on campus."[22] The nation responded with thousands of candle light vigils and Shepard's attack gained further media coverage from celebrities and congressional representatives "who not only condemned the beating death of Shepard but also urged immediate passage of a federal hate crimes bill."[23] Although only one incident, Shepard's tragic story brought national attention to hate crimes against the gay and lesbian community. The gay and lesbian movement utilized the media attention around this incident to expose to the public the fact that sexual orientation was not protected by federal statute. When the HCPA passed in 2009, it was named in honor of Matthew Shepard as it finally included sexual orientation as a category protected by the national statute on hate crimes.

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[19] Valerie Jenness, *Social Movement Growth, Domain Expansion, and Framing Processes: The Gay/Lesbian Movement and Violence against Gays and Lesbians as a Social Problem,* 42 SOC. PROBS., 1995, at 145-170, *available at* JSTOR.
[20] *Id.* at 157.
[21] Robert D. Benford and David A. Snow, *Ideology, frame resonance, and participant Mobilization,* 1 INT'L SOC. MOVEMENTS RES., 1988, at 197-217, *available at* JSTOR.
[22] James Brooke, *Witnesses Trace Brutal Killing of Gay Student,* N. Y. TIMES (Nov. 21, 1998), http://www.nytimes.com/1998/11/21/us/witnesses-trace-brutal-killing-of-gay-student.html
[23] Eric Aoki & Brian L. Ott, *The Politics of Negotiating Public Tragedy: Media Framing of the Matthew Shepard Murder*, RHETORIC & PUB. AFF., 2002, at 438-505, *available at* PROQUEST.

Local Anti-Violence Projects

Furthermore, local projects against gay and lesbian violence gained attention at the community level. Local projects formed in order to "respond to anti-gay and lesbian violence by documenting the incidents and prevalence of anti-gay and lesbian violence, establishing crisis intervention and victim assistance programs, sponsoring educational programs, and forming street patrols."[24] The statistical documentation was distributed to the general public through press releases and to forwarded to the National Gay and Lesbian Task Force for national data collection. The statistics produced by local projects were more inclusive of non-violent hate crimes that are often disregarded under legal statutes. Since there is a lack of recognition of homosexuality hate crimes in some states, local anti-violence projects not only documented the incidents that go unnoticed by law enforcement, but also "follow[ed] incidents to better prepare the community to protect itself."[25] Crisis intervention and victim assistance programs provide for better handling of individual cases by using "homophobia hotlines" that addressed the individual matters in a case-to-case basis. Furthermore, preventative education and enhanced surveillance through street patrols increased the interventionist abilities of these local anti-violence projects.

SMO - National Gay & Lesbian Task Force

Social movement organizations (SMOs) have formed to try to define violence against their groups as a social problem and to bring attention to social conditions to incite social change at a national level. The two major successes of SMOs in general are the "effective linking strategies with lawmakers" and the "crucial construction of 'people-categories' early in the history of the construction of the 'condition-category.'"[26] For the gay and lesbian movement, the National Gay and Lesbian Task Force (NGLTF) was the key player to secure hate crimes protections for their community. The NGLTF was founded in 1982 by Kevin Berrill with the mission statement "to build the grassroots power of the lesbian, gay, bisexual, and transgender community" using various mechanisms to campaign against anti-LGBT referenda and advancing pro-LGBT legislation.[27] In 1986, the NGLTF was present at the first congressional hearing on hate

[24] Jenness, *supra* note 19, at 163.
[25] Jenness, *supra* note 19, at 159.
[26] Jenness, *supra* note 13, at 567.
[27] *Mission Statements*, NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/about_us/mission_statements

crimes against the LGBT people in effort to pass the HCSA, and delivered "vivid testimony by victims [which brought] public pressure on federal agencies to address what has by then been recognized as an epidemic of violence."[28] Signing the HCSA of 1990 into law was only seen as a partial victory as prosecution under federal law was still not achieved. The NGLTF also played a key role in the two attempts in 2001 and 2005 to pass the Hate Crime Prevention Act that authorized federal investigation and prosecution of crimes based on the victim's sexual orientation. They eventually gained victory in 2009 with the passage of the HCPA. These efforts illustrate how active the NGLTF has been, and continues to be, in the movement towards gaining equal rights and equal protection for the gay and lesbian community.

PART IV. THE GAY & LESBIAN MOVEMENT: LEGAL PARLANCE & DOMAIN EXPANSION

From Mobilization to the Legal Field

The next step towards gaining recognition is taking action in the legal field. The gay and lesbian movement's legal agenda was to add their demographic to the target groups protected under the federal hate crime legislation. This process, called domain expansion, occurs when "claims-makers offer new definitions that extend the boundaries of the phenomenon deemed problematic."[29] The inclusion of sexual orientation in the HCSA "expanded the domain of protected groups and gave new meaning to the term hate crime by redefining the people-category associated with it."[30] As a result of the good organization of the gay and lesbian movement, the movement was able to convince political officials to support the cause as it was in their congressional self-interest to respond to constituents' needs if they wanted to win reelections.

Federal vs. State Jurisdiction

It is important to note that some states had already include sexual orientation as a group protected under their state hate crime laws, but the 2009 act made hate crimes against the homosexual community subject to federal prosecution if "state or local officials (1) were unable or unwilling to prosecute, (2) favored federal prosecution, or (3) prosecuted, but the

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[28] *Hate Crimes Protection Timelines,* NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/hate_crimes_main_page/timeline.
[29] Jenness, *supra* note 13, at 557.
[30] Jenness, *supra* note 13, at 557.

investigation's or trial's results failed to satisfy the federal interest to combat hate crimes."[31] The gay and lesbian movement sought to obtain domain expansion in the federal statute because it would make hate crime against the homosexual community a punishable crime in all states, regardless of whether they had state laws protecting them. A nationwide stance could strengthen deterrence, presenting a more unified message than that depicted by the few existing state laws at present.

Resistance from Legal Actors for 1990 HCSA and 2009 HCPA

The primary objection to the HCSA was "that anti-gay and lesbian violence is more distinct from than similar to violent connected to race, religion, or ethnicity."[32] Senators Hatch and Helms believed that homosexuality was a lifestyle choice and not "innate, politicized individual characteristic, something beyond an individual's realm of choice or volition."[33] The 2009 HCPA had to be passed as a rider to National Defense Authorization Act of 2010 because it would not have survived the congressional floor by itself. Homosexuality is a sensitive topic that Congress is divided over, making it difficult to gain enough votes, particularly from representatives of conservative districts. Opponents believe hate crime legislation lacks value because it would only produce symbolic law to satisfy the respective target groups. They argue that it is difficult to determine intent of hate or discrimination for these crimes and therefore such crimes should be prosecuted through existing penal laws. For instance, opponents would claim that one cannot determine the intent of the offender who steals a homosexual man's property – was the motivation derived from desperate economic needs or from discrimination against homosexuals? Therefore, instead of trying to prosecute on ambiguous hate crime laws, opponents would call for prosecution on existing laws on property theft.

PART V. CHALLENGES IN THE FUTURE

Law On The Books vs. Law In Action

The legal process turns from an innovation "law-on-the-books" phase of policymaking, to operationalization "law-in-between" phase of policy expressed in training, roll calls, and general orders, to finally prac-

[31] Cassandra L. Foley & Alison M. Smith, *State Statutes Governing Hate Crimes,* CONGRESSIONAL RESEARCH SERVICE, (2010).
[32] Jenness, *supra* note 13, at 560.
[33] Jenness, *supra* note 13, at 561.

tice "law-in-action" phase of law enforcement.[34] For the gay and lesbian movement, the law-on-the-books phase was their efforts to include sexual orientation as a category in hate crime laws. Although the 2009 HCPA successfully generated inclusion of the homosexual community under federal law, the law-in-between phase of actual implementation and enforcement by local officials are challenges that the community will face. It will be difficult to prosecute hate crimes based on sexual orientation, especially since states vary in their hate crime laws and law enforcement efforts. The next two spheres of law enforcement and constitutional framing will be the steps that the gay and lesbian movement will now have to encounter.

CONCLUSION

Since the institutionalization of the term "hate crime," many groups have utilized social mobilization to gain recognition of discriminatory violence as a social problem and to be protected under the law. Social movement growth causes awareness and issue salience of the matter, in effort to gain domain expansion for their respective demographic category and then frame the issue in order to set the conditions to recognize it as a social problem. Analysis of the gay and lesbian movement towards domain expansion has proved how vital social mobilization is towards seeking recognition of problems and how influential it can be in changing current laws. Just like the civil rights movement mobilized African Americans to demand equal rights and equal protection, the gay and lesbian movement strives to change history by criminalizing hate violence against their community. An adherence to equality became a vocal force in the 1960s, and we continue to see this part of democratization of America today.

[34] Ryken Grattet & Valerie Jenness, *The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime*, SOC. PROBS., 2005, at 341, *available at* JSTOR.

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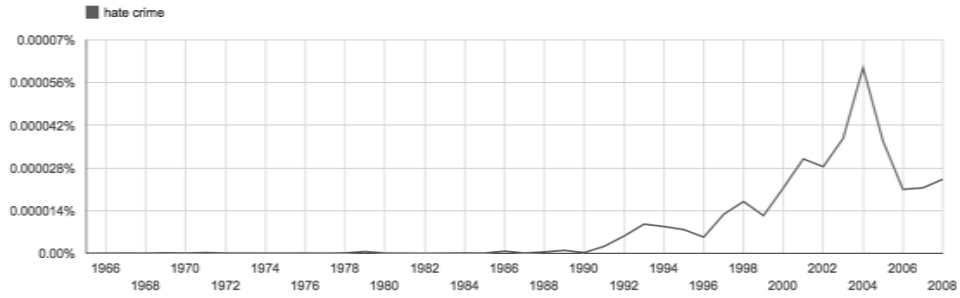
Figure 1: Hate Crime Term from 1965-1990

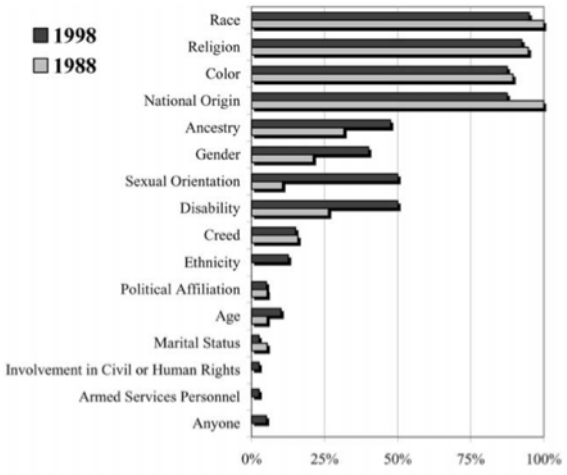
Source: Google Books Ngram Viewer

Figure 2: Hate Crime Term from 1965-2008



Source: Google Books Ngram Viewer

Figure 3: Hate Crimes Shift from 1988-1998



Source: "The Hate Crime Canon and Beyond – A Critical Assessment" by Valerie Jenness (2001)

Figure 4: Timeline of Category Groups Covered by Legislation