Volume 4 Spring 2021 UCF Department of Legal Studies Law Journal

UNIVERSITY OF CENTRAL FLORIDA DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

Volume 4 Spring 2021

Articles

UNIVERSITY OF CENTRAL FLORIDA

DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

BOARD OF EDITORS FOR 2020-2021

Table of Contents

FOREWORD

Dr. Alisa Smith, J.D., Ph.D.

Department Chair and Professor, Department of Legal Studies

In my fourth and final foreword, it is my pleasure to welcome readers to the University of Central Florida (UCF) Department of Legal Studies Undergraduate Law Journal. Over the last four years, the journal has become a mainstay in our department and is widely accepted by legal professionals and legal scholars. The caliber of papers published by our students and the editorial work by our student board is phenomenal. This year, we introduced our first annual undergraduate law forum, which allowed students who published in this edition to present their findings. The marriage of published scholarship and conference presentations provides students with unique and significant learning opportunities.

During a tumultuous year, the journal's advisor, Professor Beckman, never lost sight of the importance of his students' scholarship, their editorial duties, and the importance of the journal. His selfless and dedicated efforts provide the foundation for student success. This year, he attracted increased article submissions and oversaw enriched learning experiences and superior scholarship. The students and our program are indebted to him and his efforts which year-after-year transform our undergraduate students into a fully functioning editorial board and published authors.

It has been my distinct honor to serve as the Chair of the Department of Legal Studies and support Dr. Beckman and his students in producing our top-notch undergraduate law journal. Interacting with these students and reading their important and poignant work gives hope. As I read their articles, I recalled Justice Ruth Bader Ginsburg's inspiring quote to "fight for the things that you care about, but do it in a way that will lead others to join you." Through their scholarship,

dedication, and love of the law, these students will lead positive changes in the world.

INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

The 2020-2021 academic year was a unique year in the history of higher education in the United States. The need to engage in "social distancing" and learn (and teach) by remote virtual classrooms was ubiquitous nationwide as a means to combat and impede the spread of the COVID-19 (Coronavirus) Pandemic. Arguably more students across the country engaged in more distance and remote learning in the United States than ever before in the history of U.S. higher education. Indeed, even a few academic journals fell behind in their publication timeline/schedule because of the disruptions caused by the pandemic. Yet, this law journal, composed completely by the work of undergraduate students listed on the Board of Editors page, stayed on schedule. During the course of several months, these undergraduate students researched and wrote articles, conducted blind peer review critiques of paper submissions, debated and voted on the best papers to publish, and completed the necessary editing of these articles. The result is the fourth annual volume of the University of Central Florida (UCF) Undergraduate Law Journal. Since the inaugural issue of this journal in 2018, the journal has been published each Spring/Summer—even when the pandemic gripped the country in Spring/Summer 2020. This year will be no different, and the breadth and scholarship of the student-authored articles should amaze you.

In previous issues of the journal (and indeed in this year's journal as well), the Department of Legal Studies Chairperson, Dr. Alisa Smith, has been profuse in her praise and credit as to the work of others with this journal. While there is little doubt that Dr. Smith's praise of the work of the contributing students was well placed and appropriate, Dr. Smith failed to identify perhaps the most important person in the overall success of this journal since 2018, namely herself. The publication of the journal marks a bittersweet moment in the history of this nascent journal, as it marks the last year that the

journal will be published under Dr. Smith's auspice as the Department of Legal Studies Chair. In each of the last four years, Dr. Smith has graciously introduced the readers to the current issue via her annual "Foreword" to the current issue of the journal. Dr. Smith was also instrumental in her efforts at promoting and distributing the journal after publication each year. Dr. Smith's distribution list for the journal included many of the top law schools and law school deans in the country and prominent state leaders as well. Dr. Smith's efforts were not in vain, as many law school deans spoke to me or sent positive written notes about the quality of the journal after receiving a courtesy copy from Dr. Smith. Even former Florida Governor Jeb Bush sent a note back to Dr. Smith indicating that the journal was intriguing and interesting.

Yet, the above efforts by Dr. Smith only scratch the surface of her contributions to this journal. Because Dr. Smith avoids the spotlight, many faculty, staff, students and administrators would be greatly surprised to learn that Dr. Smith was the mastermind and initiator behind the creation of the journal in 2017. It was Dr. Smith who first envisioned the importance and possibilities for an undergraduate law journal. As the faculty advisor, I was very happy to help Dr. Smith operationalize this wonderful concept. In addition to being the true visionary behind the journal, Dr. Smith allocated the necessary departmental funds needed to publish even a modest print "run" of the journal. While the costs of publication are not by any means prohibitively costly compared to the costs of other analogous college and university student activities, Dr. Smith recognized the expenditure of modest funds for the publication costs were miniscule in comparison to the great value in showcasing the superior work of some of UCF's best students, scholars, and writers. In the brief four years of the journal's existence, countless stories exist about proud parents and other relatives having a copy of the journal on their bookshelf in their office or home. Other faculty learned about a talented student or emerging legal issue by reading the journal. Law firms have hired UCF students because of their participation in the journal. The journal is now indexed and available worldwide to scholars through digital databases such as the HeinOnline research

portal. Thus, even though Dr. Smith will no longer be Department Chair, her contributions to this journal are unforgettable.

As in previous years in this introduction to the journal, a few words on the construction and preparation of the journal are in order. For this year's journal, the journal received thirty-seven total submissions for possible publication. This compares with fifty-three submissions for the 2018 journal, thirty submissions for the 2019 journal, thirty-two submissions for the 2020 journal and thirty-seven submissions for this year's journal. In order to conduct blind peer-reviews of these articles, I removed all identifiable author information for each submission and converted each file into a randomized PDF file labeled and given the title of a submission letter. As in years past, and to guide the Editorial Board in their critique and blind peer-review of the submissions, an "Article Review Sheet" was utilized to aid in a proper review. This "Article Review Sheet" appears at the end of this Introduction. As one may observe from even a casual perusal of the review sheet, articles were evaluated on a variety of different criteria, ranging from the writing style and proper use of citations and scholarly attribution, to the timeliness and currency of the topic being addressed in the article. Every editorial board member read each of the submissions. After individual reviews of the articles, the entire editorial board discussed the merits and deficiencies of each submission and then ranked and voted on each. As part of the student review process, not only are students required to review and rank the articles but must also justify each of their reviews/comments in writing. On this step alone students generated eighty-eight written pages of single-spaced comments on the deficiencies or merits of the papers under consideration. These eighty-eight pages of comments, along with class rankings of the articles, and a discussion board debate represented the most voluminous amount of data to consider about each article in the first four years of the journal's existence. After selection of the final eight articles for publication, two editors reviewed and edited each article in detail.

Additionally, as in years past, undergraduate students produced this entire journal. This includes the authors published articles and the student editing of the accepted articles. The work by these

undergraduate students is remarkable and a testament to their collective hard work and talent. A perusal of the Table of Contents will reveal a plethora of diverse topics on a range of intellectually fascinating topics. Article topics include interdisciplinary topics such as an analysis of the writings of John Stuart Mill and its application to First Amendment to an interdisciplinary article on psychology and the law. Other articles include an article analyzing the use of social science data in Supreme Court jurisprudence to two articles dealing with the innovative issues of the burgeoning legal rights of both animals and nature. These are just a few of the fascinating articles in this year's journal. The article entitled "John Stuart Mill and Social Media: Evaluating the Ethics of De-Platforming" was chosen as the lead article for this year's journal.

One can selectively read articles in this journal based on one's personal interests. Regardless of the article one chooses to read, however, I am confident that you will be impressed with the intellect and work of these burgeoning scholars and writers. Almost certainly, the topics covered, research conducted, and information presented by these authors will be highly educational to the reader and should provide motivation for those readers to seek out more information on their own. Enjoy the work of this talented group of students.

LEGAL STUDIES UNDERGRADUATE LAW JOURNAL

Department of Legal Studies

College of Community Innovation and Education, University of Central Florida

Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal[1]

Timeliness, Currency and Overall Analysis

1. Does the article deal with a topic of current relevancy? Is it timely? 1 2 3 4 5

2. Does the article offer new information or new perspectives for the readers? 1 2 3 4 5

3. Is the article coherent for the intended audience(s)? 1 2 3 4 5

4. Are the qualitative or quantitative analyses appropriate? 1 2 3 4 5

5. Does the article offer a viable solution, an alternative approach, or a transition position to the problem the research defines? 1 2 3 4 5

6. Does the evidence and reasons support the conclusions and implications made by the author(s)? 1 2 3 4 5

Facts, Issues and Conclusions in Article

7. Does article include clear legal issues and most significant facts? 1 2 3 4 5

8. Does article have clear conclusion and/or answers? 1 2 3 4 5

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[1] This review sheet was designed utilizing multiple resources dedicated to effective writing and designing top-notch research papers. See, for example, The University of Southern California: Research Guide: Organizing Your Social Science Research Paper: Theoretical Framework, http://libguides.usc.edu/writingguide/theoreticalframework. See also, Louis J. Sirico, Jr. and Nancy Schultz, *PERSUASIVE LEGAL WRITING*, 4th edition, Wolters Kluwer: 2015.

9. Does article use and apply legal principles/rules? 1 2
3 4 5

10. Does article include all material facts? 1 2
3 4 5

11. Does article exclude extraneous facts? 1 2
3 4 5

12. Does article include unfavorable and favorable facts? 1 2
3 4 5

13. Is Article organized in a logical fashion? 1 2
3 4 5

Discussion Issues

14. Is Article organized around issues and sub-issues? 1 2
3 4 5

15. Devotes appropriate amount and depth of analysis
consistent with the importance of the authority 1 2
3 4 5

16. Does Article utilize appropriate authorities? Does the article
weigh or apply the authorities appropriately? 1 2
3 4 5

17. Explains why and how the legal rules applies to the topic of the article? 1 2
3 4 5

Writing Style, Organization and Proper Grammatical Usage

18. Article uses complete paragraphs and paragraphs are
organized to communicate logical progression of ideas 1 2
3 4 5

19. Article uses thesis sentences to create logical progression 1 2
3 4 5

20. Article uses appropriate word choice and grammar 1 2
3 4 5

21. Article contains few excess words 1 2
3 4 5

22. Article uses complete sentences with subject and verb agreement 1 2
3 4 5

23. Article uses accurate punctuation and proper quotation marks 1 2
3 4 5

24. Article includes no contractions or slang 1 2
3 4 5

25. Article writes out numerals and abbreviates as appropriate 1 2
3 4 5

26. Article uses correct possessives and capitalizations 1 2
3 4 5

Proper Citation

27. Provides citation for every utilized quotation 1 2
3 4 5

28. All citations are substantively accurate 1 2
3 4 5

29. Names of authorities are accurate 1 2
3 4 5

30. Volumes and sources accurate 1 2
3 4 5

31. Year and court accurate 1 2
3 4 5

32. Page numbers of cases or articles correct 1 2
3 4 5

33. Pin point cites are utilized and are accurate 1 2
3 4 5

34. Typeface, spacing, italicizing, underlying, et cetera, are accurate 1 2
3 4 5

JOHN STUART MILL AND SOCIAL MEDIA: EVALUATING THE ETHICS OF DE-PLATFORMING

Rachel Casey

INTRODUCTION

The First Amendment to the United States Constitution protects the freedom of speech, religion, and the press, among others. Though seemingly straightforward in writing, the meaning of the First Amendment has been the subject of continuing interpretation and debate since its original ratification in 1791.

Freedom of speech rests as a core inalienable right of the United States citizen and one of the most important protections for a sustained democracy. However, in addition to the active participation and contribution of all citizens, preservation of a functioning democratic society also requires the protection of human rights, a tenet of democracy which can fall prey to speech or actions which, intentionally or unintentionally, inflict harm on other individuals.[1] Thus, in the present unequivocally flawed social order, a full liberty of speech and action can be understood to permit the potentiality of more anarchy than sustainable for a functioning democratic governance. Though citizens enjoy freedom of speech and action as guaranteed by the First Amendment, they too have an obligation to exercise these rights peacefully, with respect for the law and for the rights of others.[2]

[1] Larry Diamond, Senior Fellow, Stanford University, Freeman Spogli Institute for International Studies, Lecture at Hilla University for Humanistic Studies: What is Democracy? (Jan. 21, 2004).
[2] *Id.*

I. FIRST AMENDMENT PROTECTIONS

The First Amendment describes the role of the government in mediating civilian affairs and interactions: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[3] It exists to protect much of individuals' speech and actions from government interference; however, as exemplified in practice, neither freedom of speech nor freedom of the press are absolute.

Over time, the Supreme Court of the United States has established guidelines for what speech is protected under the First Amendment.[4] This includes the bad tendency test established in *Abrams v. United States*,[5] the clear and present danger test established in *Schenck v. United States*,[6], the preferred freedoms doctrine established in *Jones v. City of Opelika*,[7] and the compelling state interest test established in *Korematsu v. United States.*[8] From these set guidelines, certain categories of unprotected speech have been delineated, including libel and slander, "fighting words," obscenity, and sedition.[9] One classic example that seeks to exemplify the line drawn between protected and unprotected speech as offered under the clear and present danger test was first given by Justice Oliver Wendell Holmes, Jr. when he observed how the act of an individual falsely shouting "Fire!" in a theater would be considered unprotected speech.[10] Situation and circumstance, Holmes

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[3] U.S. Const. amend. I.
[4] Elizabeth R. Purdy, *Censorship,* THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/896/censorship.
[5] Abrams v. United States, 250 U.S. 616 (1919).
[6] Schenck v. United States, 249 U.S. 47 (1919).
[7] Jones v. City of Opelika, 316 U.S. 584 (1942); 319 U.S. 103 (1943).
[8] Korematsu v. United States, 323 U.S. 214 (1944).
[9] Elizabeth R. Purdy, *Censorship,* THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/896/censorship.
[10] *Id.*

contended, matter, and determining the "danger" offered by words is a "question of proximity and degree."

II. FREE SPEECH AND SOCIAL MEDIA

The First Amendment, as outlined above, protects individuals from government censorship which, back in the day of the First Amendment's origination, would have served as sufficient guarantee for individuals' general right to speak and act without fear of unwarranted suppression. Communication and individual expression, at that time, generally took place in government regulated public spaces, thus under the protection of the U.S. Constitution. However, given the evolution of technology and, consequently, the expansion of available mediums for speech and expression in the twenty-first century, communication has moved into new domains not addressed by the U.S. Constitution. While the First Amendment protects citizens from government censorship, it has little to no effect on private companies, such as social media platforms which can currently censor their domains as they see fit as provided by Section 230 of the Communications Decency Act.

A. SECTION 230

Section 230 of the Communications Decency Act (CDA) of 1996[11] was developed in response to two court cases[12] in the early 1990s that had conflicting results. Congress' intent for writing this amendment to the previously introduced CDA was to ensure that "providers of an interactive computer service"[13] would not be treated as publishers of third-party content. In effect, Section 230 had two purposes: the first was to promote the unregulated development of free speech on the internet as permitted by the relief of provider liability; the second was to allow online providers to employ their

[11] 47 U.S. C. § 230 (1996).
[12] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 712 (N.Y. Sup. Ct. 1995).
[13] 47 U.S. C. § 230 (1996).

own standards when policing third-party content.[14] It allows internet companies to regulate themselves as they see fit—for example, for purpose of keeping offensive material away from children—while also allowing them to operate without fear of liability for everything their users post.

However, these concurrent provisions create a bind, opening Section 230 to an onslaught of criticism from both sides of the political spectrum. To many, the law allows social media companies to exist with impunity and avoid doing more to combat the spread of disinformation and hate speech online.[15] To many others, the law allows those same companies to impart partisan bias in speech regulation, unduly censoring certain voices and messages.[16] Both opinions are substantiated in examination of the law's written provisions as well as its practice in present-day society. Although both elements of the law's received criticism are legal in practice, the question of Section 230's ethics and alignment with democratic theory has come under recent scrutiny.

The growth of twenty-first century technological innovation and new social contentions has given rise to renewed interpretation of the First Amendment and has inspired debate on the degree of free expression that can reasonably be maintained for the preservation of a representative democracy.

III. OUTLINE OF ANALYSIS

As social media's role in public discourse continues to expand, the platforms' respective practices of censorship and de-platforming must be examined in order to understand how they fit with the First

[14] Id.
[15] Anshu Siripurapu, Trump and Section 230: What to Know, COUNCIL ON FOREIGN RELATIONS (Dec. 2, 2020), https://www.cfr.org/in-brief/trump-and-section-230-what-know.
[16] Id.

Amendment and its evolving interpretations regarding the protections offered to individual expression. Social media platforms have essentially become the new, albeit more globalized, town square, and with the rise in pervasiveness of such virtual discourse, guarantees of free expression must evolve to meet the changes of this twenty-first century society and continue to provide for the preservation of representative democracy. In this article, the concepts of free expression and speech censorship in social media communication will be evaluated through the lens of John Stuart Mill's traditional philosophy on liberty and democracy.

Nineteenth century British philosopher John Stuart Mill developed the grounds for free speech and defended uncensored discourse as vital to the preservation of democratic society. In his 1859 book *On Liberty*, Mill presents a classical argument in favor of free expression and individual freedom over censorship and authoritarianism. His writing has since become a cornerstone for First Amendment theory and free speech guidelines, extending its influence not only in academia but also to practical application by Justices in the Supreme Court of the United States.[17] Here, Millian philosophy will be introduced to another contemporary legal dilemma: social media platform regulation.

In the following discussion, Mill's theories on liberty and freedom of expression will first be introduced to establish grounds for analyses. Next, Mill's philosophy as recorded in *On Liberty*[18] will be applied to current situations in social media platform regulation, censorship, and de-platforming. Finally, theoretical amendments to current U.S. social media practice in line with Mill's thoughts on liberty and democratic representation will be proposed.

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[17] Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence,* 15 U. MASS. L. REV. 2, 4-53 (2020).

[18] JOHN STUART MILL, ON LIBERTY (Batoche Books 2001) (1859).

JOHN STUART MILL AND THE PHILOSOPHY OF LIBERTY

John Stuart Mill was an adherent to the philosophies of both naturalism and utilitarianism.[19] Mill believed that humans are rational beings and, to that end, that wisdom and knowledge come as a direct result of observation and experience. In contrast to this naturalist claim of human rationality, other epistemological theories maintain that the human mind either has been gifted for the purpose of comprehension, such as in theism, or plays a fundamental role in shaping the world, such as in idealism. Mill, a naturalist, saw human beings as nothing more than creatures arising from nature, and consequently, he believed the human mind needs interaction with others to shape society and, in turn, be shaped for individual and societal prosperity.[20]

Mill too held a utilitarian moral philosophy. Traditional utilitarian philosophy exists on the premise that actions are right insofar as they produce happiness, with an aim towards the betterment of society as a whole. Mill grounded his views on liberty and democracy in utilitarian moral philosophy, but deviating from its traditional foundation, Mill also argued that actions themselves can be distinguished in value with intellectual pleasures ascribed greater merit and consequence than material pleasures.

Mill's adherence to the extant philosophies of naturalism and utilitarianism grounded his own conjectures on proper democratic liberty and guided his ideas on how to provide maximum social pleasure. *On Liberty* purports the greatest end goal to be progress and prosperity for both the individual and society. If human beings act rationally by engaging in reasoned discourse, Mill contended, then society may follow in rationality by progressing and prospering, in turn benefitting the individual. The point of reasoned discourse being the primary means to better the existences of both society and the

[19] Christopher Macleod, *John Stuart Mill,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 30, 2020), https://plato.stanford.edu/entries/mill/.
[20] *Id.*

individual is where Mill's discussion of free expression finds its purpose.

I. MILL AND THE HARM PRINCIPLE

Mill believed that all opinions should be expressed regardless of their truth. The only standard for opinion suppression is that which is now popularly called the "harm principle:" "That the only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others."[21] Mill argued that the only grounds for censorship or suppression should be if one's speech or actions cause harm for another individual. If the said expression is understood to lead to harm, then society has the grounds to intervene and stop that harm from occurring. Further on this point, Mill distinguishes between harm and offense. Harm, as applied in his "harm principle," is any effect which injures another individual's rights or impairs interests which benefit others. Offense, on the other hand, refers to any negative effect on another's feelings. Mill argues that offenses, unlike harm, need not be prevented as offense felt is neither serious nor universal.[22] On the subjectivity of offense, Mill elaborates by examining the benefits accrued through the publicization of opinions both true and untrue.

II. MILL AND UTILITARIANISM

Based on his held utilitarian philosophy, Mill viewed liberty as that which, above all else, should be maintained for an actively growing and improving society. Mill understood all opinions to have societal value as each opinion contributes to this end goal of moving society forward. On this point, he viewed the act of silencing any individual's opinion as a "peculiar evil," effectively "robbing the

[21] JOHN STUART MILL, ON LIBERTY 13 (Batoche Books 2001) (1859).
[22] *Id.* at 13-18.

human race" [23] of its chance to bring clarity to falsities or strengthen the extant truth.

According to Mill, "[the] truth of an opinion is part of its utility."[24] First, the opinion attempted to be suppressed may be true, and although those trying to suppress it may deny its truth, Mill argued that humans are fallible and one fallible man should not have the authority to silence an opinion from all others only on the basis that it does not align with his own.[25] Times change and, with that, opinions. What is the held truth at present may not be in the future. An individual holding any opinion should hear opposition for opportunity to challenge his own belief and alter his present mindset.

On the other hand, the expression attempted to be suppressed may be false, and if taken under consideration, debated and discussed, Mill contends that such an academic scrutiny will benefit the truth-holder as it will allow him to confirm his beliefs and further possess the whole of the truth:

> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.[26]

Understanding false opinions surrounding an issue from the people who actually believe them, rather than as second-hand teachings from teachers, parents, or scholars, will extend not only knowledge of truth but also a surer understanding of the whole of the professed doctrine. Mill argued that hearing and understanding both true and

[23] *Id.* at 19.
[24] *Id.* at 24.
[25] *Id.* at 19.
[26] *Id.* at 35.

false opinions allows for the greater education of individuals and, consequently, the forward movement of society.

On the subject of potential offense felt through the assertion either of false opinions or of true opinions which go against one's held beliefs, Mill reasoned from a utilitarian premise: the universal good of society must be sought when negotiating the merits of free expression. Mill's utility is grounded on the "permanent interests of a man as a progressive being,"[27] meaning that in his advocacy for liberty he seeks the best state of man and, with that, the best state of society. Mill saw offense felt in response to comments made on one's character as subjective and lacking in universality. He believed that statements made on one's person without concurrent inciting action did not impede the evolution of society but rather aided in its progress. The presentation of false opinions provided substance to debate and also content with which to contrast and strengthen the extant truth, both for the progression of society.

III. MILL AND THE GROUNDS FOR CENSORSHIP

While offense Milled defined as individual expression which incites no action impeding another's interest, harm he described to be any form of expression which hinders or prevents the interests of others such as to impede societal progress.[28] Harmful expression warranted censorship. This concept of harm and the grounds which necessitate speech censorship Mill described through the hypothetical example of actions taken against corn-dealers. If, Mill argued, defamatory statements were published about corn-dealers and their intent to starve the people, such allegations would not constitute as harm as, in that instance, it would be one person's opinion shared via print with no direct harm to be had minus the speech's potential effect on public perception of corn-dealers and their business practices. However, if the same defamatory statements

[27] *Id.* at 14.
[28] *Id.* at 52.

were complemented with inciting actions, such as intentional circulation around an angry mob, the speech would constitute harm as defined by Mill because it was intended to provoke further action against others or, at the very least, could be understood by the general individual to have such direct harmful consequences.[29] Through this example it can be understood that any speech with the clear end of producing or contributing to the production of setbacks to an individual's freewill warrants censorship.

DE-PLATFORMING AND SUSPENSION IN SOCIAL MEDIA REGULATION

Although communication regulation by social media companies has been a relevant topic in First Amendment theory for some time, recent rises in legal cases addressing online censorship and de-platforming and protests of hate speech circulated online have brought the issue to the forefront of democratic theory and debate. The question of how best to uphold principles of liberty shows itself to be one important for the protection of present democratic society and movement towards a full realization of the social equality the founding fathers envisioned when first building the nation. This section will provide an overview of current issues in social media regulation for succeeding discussion.

Section 230 permits the free regulation of online content by social media companies who have recently taken to unilateral removal of extremist posts. In 2018, right-wing social media personality Laura Loomer was banned from Twitter and Facebook for post history containing anti-Muslim rhetoric.[30] Loomer appealed the ban in 2020, citing conspiracy behind her Twitter account removal. Although the alleged conspiracy went unproven, the court did rule on the legality of Twitter's right to ban users, acknowledging that Twitter's terms of service give it the right to ban any online account holder for "any reason at all."[31] The courts granted that social media

[29] *Id.* at 52-54.
[30] Illoominate Media, Inc. v. Cair Fla., Inc., 2020 U.S. App. LEXIS 40611 (2020).
[31] *Id.*

companies are not state actors and, as such, not subject to First Amendment regulation. Nonetheless, the editorial decisions made for the content of their provided speech forums were said to be protected under the premise of the First Amendment to allow liberty in individual action.[32] Similarly, extremist celebrities Milo Yiannopoulos, Alex Jones, and Paul Joseph Watson were removed from Facebook and Instagram in 2019 for being engaged or involved in organized hate or organized violence, reason as offered by Facebook's terms and services policy.[33] The de-platformed actors spread instead to alternative social media platforms, such as Telegram and Gab, the latter of which has been deemed a "haven for white supremacists."[34]

The most recent and most prominent case of social media de-platforming which stimulated much of the current attention paid to social media regulation was the removal of then-president Donald Trump from his social media accounts shortly following the attack on the United States Capitol on January 6, 2021. The acting social media companies, including Twitter, Facebook and Instagram, contend that Trump's rhetoric provoked the violence experienced at the Capitol and report the incited violence as the primary factor in the decision for his platform removal. While many Democratic and liberal-leaning groups have praised his de-platforming as a way to curb disinformation and extremism,[35] a number of world leaders, including

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[32] Tim Ryan, *Court Sinks Suit by Right-Wing Activists Against Social Media*, COURTHOUSE NEWS SERVICE (May 27, 2020), https://www.courthousenews.com/federal-judge-shuts-down-right-wing-activists-free-speech-suit-against-social-media-companies/.

[33] Richard Rogers, *Deplatforming: Following Extreme Internet Celebrities to Telegram and Alterative Social Media,* 35(3) EUROPEAN JOURNAL OF COMMUNICATION 213, (2020).

[34] Abby Ohlheiser and Ian Shapira, *Gab, the white supremacist sanctuary linked to the Pittsburgh suspect, goes offline (for now).,* WASHINGTON POST (Oct. 29, 2018), https://www.washingtonpost.com/technology/2018/10/28/how-gab-became-white-supremacist-sanctuary-before-it-was-linked-pittsburgh-suspect/.

[35] Craig Timberg and Elizabeth Dwoskin, *Misinformation dropped dramatically the week after Twitter banned Trump and some allies,* THE WASHINGTON POST (Jan. 16, 2021), https://www.washingtonpost.com/technology/2021/01/16/misinformation-trump-twitter/.

German Chancellor Angela Merkel, various French ministers, and Mexican President Andrés Manuel López Obrador, have come out in condemnation of Trump's social media ban, calling it a reflection of tech monopolies as an emerging "world media power."[36]

The purported merits of de-platforming have been mixed, but regardless of perceived benefit or detriment paid to society by account suspension and removal, social media's growth in active membership and its prominent position in global discourse warrants examination of the ethics of social media companies in policing online participation and limiting speech on the basis of private policies.

PRACTICAL APPLICATION OF MILLIAN PHILOSOPHY

This examination of the decisions of social media companies to de-platform and suspend the accounts of alleged extremist or radical users will focus on the traditional theory of liberty as recorded by John Stuart Mill. As a prominent and often-cited democratic theorist, Mill's writing in *On Liberty* offers framework for the rights of man and the maintenance of free will in democratic society. Employing Mill's theories, it can be understood that, while free speech should be maintained as much as possible, good reasons can arise for social media companies to restrict certain content. Nonetheless, the current subjectivity in processes of content evaluation and removal as permitted by social media companies' status as private entities impedes the overall concept of individual liberty.

I. THE SYNONYMY OF TRADITIONAL AND MODERN MODES OF COMMUNICATION

[36] Spencer Bokat-Lindell, *Deplatforming Trump Could Work. But at What Cost?,* THE NEW YORK TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/opinion/trump-deplatform-twitter.html.

Mill's theory of liberty is grounded in principles of utility, citing the greatest good as his sought end goal. This "greatest good," according to Mill, is that of "individual and social progress"[37] and can best be achieved through open discussion. Mill would have been a proponent of free and uncensored media, even when opinions went against popular thought or extant ideals of "political correctness." Mill did not live at the time of digital media; however, his discussions did address printed speech and publications. Admittedly, all forms of non-verbal discourse in the nineteenth century were under government protections, meaning that they each would have fallen under the guarantees of the First Amendment. Nonetheless, Mill stood in favor of full free speech protection, regardless of the domain. He saw the intrinsic good of free speech and expression as not just to protect the people from government overreach but also to protect the right of the people to share, debate, and, together as a collective society, grow.

Mill argued that "[protection]…against the tyranny of the magistrate is not enough"[38] to prevent encroachment on the right of man to live in individuality. Rather, Mill contended that there also "needs [to be] protection…against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."[39] Mill detested suppression of speech regardless of it if was censored at the hand of the government or at that of a fellow private individual. While government involvement in speech censorship would direct what was printed or circulated in a regulated forum, private censorship would entail social conformance in a fashion unproductive to the maintenance of a liberal society.

To get a better sense of the connection between Mill's thoughts on public discourse and discussion of today's social media

[37] JOHN STUART MILL, ON LIBERTY 53 (Batoche Books 2001) (1859).
[38] *Id.* at 9.
[39] *Id.*

discourse, it must first be established how social media platforms can be seen to mimic, albeit in an expanded and more global fashion, Mill's own experiences of interpersonal communication. The two discourse forums, in-person public communication and social media communication, are much more similar than might be seen at first glance. Social media platforms today are commonly viewed as private, elective involvements, and while this may be true in the sense that social media selection and participation is a choice, the fact that it has become a large segment of the global community's daily communication distinguishes social media from private, regulated workplace communication and places it on a level with letter-writing, public artistic production, and general telephone communication, three distinct areas of elective participation which fall under First Amendment guarantees of free speech. Out of the current world population of 7 billion, there are 2.7 billion daily active Facebook users[40] and over 1 billion monthly active Instagram users.[41] One in five adults use Twitter, and over 500 million tweets are sent per day.[42] Social media has grown with an unprecedented speed and scale. Users share their daily activities and update followers, or "friends," with a stream of current thoughts and opinions. This use of social media for daily communication mimics on a grander scale the previous popularity of letter writing and phone calls for distanced communication.

The merits of social media and users' share frequency is not a subject presented for debate as it is not one which must be evaluated for determination of the synonymy of traditional communication and social media communication. Rather, the sheer magnitude of social media's reach speaks for itself in showing the like nature of discourse

[40] Salman Aslam, *Facebook by the Numbers: Stats, Demographics & Fun Facts,* OMNICORE AGENCY (Jan. 6, 2021), https://www.omnicoreagency.com/facebook-statistics/.
[41] Salman Aslam, *Instagram by the Numbers: Stats, Demographics & Fun Facts,* OMNICORE AGENCY (Jan. 6, 2021), https://www.omnicoreagency.com/instagram-statistics/.
[42] Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts,* OMNICORE AGENCY (Jan. 6, 2021), https://www.omnicoreagency.com/twitter-statistics/.

in both forums—and the even greater danger to liberty and individual independence social media has to offer if subject to poor processes of protection.

Mill spoke to a full protection of opinions, including protection from both the "tyranny of the magistrate" and the "tyranny of the prevailing opinion and feeling,"[43] or one's fellow community members. Social media has become its own global community, and although operated privately, social media platforms have become public staples in interpersonal communication. Consequently, social media posts and shares can fall prey to the same "prevailing opinion and feeling," or current conception of "political correctness," as the interpersonal communication to which Mill referred in *On Liberty*. Further, the synonymy of traditional and modern modes of communication, including their shared potential for threat to liberty imposed by the prevailing majority opinion, supports the idea that modern social media discourse must operate from a similar basis in preventing harm to others while allowing maximum individual liberty in expression.

II. DEFINING "HARM" TODAY

Determining "harm" of speech and action is arguably more difficult than simply making a resolve to prevent Mill's theoretical concept of "tyranny of the prevailing opinion and feeling."[44] What speech acts realistically initiate harm is a subject which has been relentlessly debated since the harm principle's origination in the mid-nineteenth century.

Mill's hypothetically posed situation of defamatory statements made against corn-dealers saw the influence of situation on harm produced by speech. While, in Mill's scenario, the critical statements made were the same, the accompanying act of circulating

[43] JOHN STUART MILL, ON LIBERTY 9 (Batoche Books 2001) (1859).
[44] JOHN STUART MILL, ON LIBERTY 9 (Batoche Books 2001) (1859).

said critical statements around an angry mob could be deemed harmful (in contrast to the non-harmful simple publicization of statements made to no specific group and in the absence of any riotous culture). The active circulation of defamatory statements in a culture predisposed to riot sought to incite further angry action against the corn-dealers. This concept of the importance of context for determination of intrinsic harm exhibits similarity to Justice Oliver Wendell Holmes, Jr.'s 1919 example of shouting "Fire!" in a crowded theater. Holmes would not have seen the word "fire" itself as harmful; however, its use in creating an intentional false alarm effectively impairs the rights of others by asserting overtly false claims with potentially dangerous consequences. This combination of speech and context could thus be classified as harmful.

American ethics philosopher Joel Feinberg argued that there is no independent standard of harmfulness but that harm can be attributed to any action which induces a setback to the interests of others.[45] This concept of harm coincides with Mill's theory on the importance in individualism and, similarly, offers that free speech which does not directly cause setback to others should be let stand. However, while Mill distinctly separated harm from offense, or hurt to feeling versus physical status, Feinberg went further to integrate offense into his designation of harm. Feinberg suggested that offense can be limited in some instances, such as if the behavior is wrongful, serious, and causes universally disliked mental states.[46] In Feinberg's integration of offense into physical harm, hate speech could be characterized as harmful and therefore warrant censorship as it could be argued that hate speech is as psychologically damaging as other forms of physical attack or plays into established power dynamics, seeking to further oppress minorities.[47]

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[45] JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME ONE: HARM TO OTHERS 31-104 (1984).
[46] PHILOSOPHY OF LAW (Joel Feinberg & Jules Coleman eds.) 278-293 (7th ed. 2004).
[47] The Ethics Centre, *Ethics Explainer: The Harm Principle,* THE ETHICS CENTRE (Oct. 27, 2016), https://ethics.org.au/ethics-explainer-the-harm-principle/.

At the same time, however, speech and media content regulators must be cognizant of Mill's theories of utility and societal progression. Although an idyllic society might include perfect harmony and full acceptance of all people, present society sees division, discord, and disagreement. Not all discriminatory speech should be outright prohibited as it is important for society to hear false opinions in addition to those of truth. The assertion of falsities, even if the opinion holder fails to change his mindset, still offers opportunity for the opinion receiver to expand his personal understanding of the truth, which includes being able to see all sides and reasons for the asserted false claims. Transparency in opinions allows society to progress as well as keeps false claims in the open rather than forcing the holders into alternative domains wherein false opinions create an echo-chamber of likeminded individuals, effectively hindering any natural social pressures which might lead to diffusion or deradicalization. However, with Feinberg's categorization of offense with harm and Mill's view that harm initiated from speech is contextual, it can be understood that when hateful speech is seen to offer substantial psychological harm or be directed to a specific group with intent of riling up action, grounds for regulation and censorship can be established.

This philosophical debate on what constitutes harm may have begun before the existence of internet; however, it does extend to the social media domain and has practical application in social media content regulatory practices. When looking at directly expressed violent intentions, grounds for censorship and punishment can be somewhat simple.[48] However, when users' posts do not directly indicate violent action but rather hint at provocation of action or include mass instances of serious psychologically-damaging hate speech, establishing justifiable grounds for regulation can prove more difficult.

[48] Elonis v. United States, 135 S.Ct. 2001 (2015).

III. DEMOCRATIC PROCESSES OF REVIEW

As online social media discourse has been shown to be akin to Mill's in-person public discourse, social media domains should be managed by principles of utility and liberty, being run instead on the basis of nonpartisan protections for individual expression, similar to those of the First Amendment currently in place for in-person public communication.

Admittedly, social media posts are currently monitored and user accounts, as described previously, are subject to censorship and de-platforming. In May 2020, Facebook announced its development of a "Supreme Court" for post regulation,[49] and in January 2021, Twitter published a new "Civic integrity policy" for censorship of disinformation.[50] Social media companies are trying to take action against the dissemination of false information or harmful content, especially in the wake of recent violent extremist attacks fueled by digitally-circulated hate speech and organization plans, such as the 2017 attack in Charlottesville, Virginia and, most recently, the 2021 raid on the U.S. Capitol. However, at present, there exists no uniform set of guidelines for social media regulation. Instead each privately-owned entity attempts to implement its own privately written set of speech codes.

Although social media companies operate as private entities, the communication platforms they service have become some of the most prominent facilitators of public discourse. They have an incredible power to shape discourse, and each company CEO, acting from his or her own moral script, essentially sets "the sentiment of the majority"[51] that Mill, in his negotiations of individualism and

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[49] David Ingram, *Facebook Names 20 People to its "Supreme Court" for Content Moderation,* NBC NEWS (May 6, 2020), https://www.nbcnews.com/tech/tech-news/facebook-names-20-people-its-supreme-court-content-moderation-n1201181.

[50] Twitter, *Civic Integrity Policy*, TWITTER (Jan. 2021), https://help.twitter.com/en/rules-and-policies/election-integrity-policy.

[51] JOHN STUART MILL, ON LIBERTY 12 (Batoche Books 2001) (1859).

social accord, attempts to circumvent. Social media companies can be applauded for their efforts to silence harm and prevent the circulation of hate speech through taking actions such as Facebook's building of a "Supreme Court" or Twitter's addition of a "Civic integrity policy." However, the specific capacity of social media companies to effectively implement ethical procedures for content evaluation and censorship can be viewed as a subject for concern.

It is unclear whether social media companies are trained to distinguish between mere offense and genuine harm. As the concept upon which social media companies—and all communication forums for that matter—are basing new regulatory guidelines is the philosophical, and quite enigmatic, "harm," it would be fitting to relegate content regulation to trained ethicists and nonpartisan scientists in a best effort to identify present harm and then regulate accordingly. Content should only be censored based on the determination of its harmful nature, how it would effectively setback the interests of others, or their respective abilities to obtain at least the bare minimum necessary to live a physically and mentally healthy life.[52] Censorship that goes beyond this aim impedes the interests and freedoms of the speaker. Because speech's intrinsic "harm" is a complicated and complex concept for which to evaluate, that is all the more reason why social media content should not be up to tech CEOs and business people.

Deviating from current practice, it can be theorized that social media accounts would be best run when not up for subjective, private censorship or removal but, instead, when viewed in the light of a traditional town square soapbox. Social media accounts are elective but not private. Each social media "town square" should not be regulated individually but by a greater set of external speech guidelines which offer standardized yet thoughtful protections while keeping social media companies themselves at a distance from direct liability for their users' posts, a compromise between the two

[52] JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME ONE: HARM TO OTHERS 31-104 (1984).

contested premises of Section 230 of the Communications Decency Act. A standardized set of guidelines built from a foundation in the First Amendment and operated by a diverse, nonpartisan committee would permit a more democratic evaluation process in line with principles of liberty and equality.

THE CONFUSING NATURE OF JURY INSTRUCTIONS IN CAPITAL CASES

Madeline Medoff

Abstract

A jury's role is critical, specifically in capital cases, as it functions in determining the life or death of an individual. For juries effectively to carry out their duties, judges must deliver jury instructions that serve as a roadmap of the applicable laws to a case. However, often, rather than assisting the jury, jury instructions become a puzzling compilation of legal jargon that is unclear to the average juror. This misunderstanding and confusion on a juror's behalf can lead to irremediable consequences. This article argues that capital case jury instructions are confusing to the average juror and therefore calls for courts to modify these instructions to preserve fairness in capital cases.

INTRODUCTION

How does a jury work through the crucial decision of whether a capital defendant should live or die? The answer is through guidelines set out in death penalty jury instructions. Consider the following California death penalty jury instructions for capital cases,[1] specific to the weighing process:

> In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of

[1] Judicial Council of Cal. Criminal Jury Instr. (2020).

> aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of the punishment….
>
> Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that sentence of death is appropriate and justified.[2]

Here are the questions left unanswered by these instructions: How does one weigh aggravating and mitigating circumstances against each other? How does one know the appropriate weight to give to one circumstance versus another? If there are no mitigating circumstances, how could the aggravating circumstances outweigh them?

The confusing nature of just a sliver of these jury instructions shown above leads to further misunderstanding in a juror's process to reach a fitting sentence. The misunderstanding of capital case jury instructions can pose severe consequences to individuals facing the death penalty. This article will argue that courts should do more to ameliorate the often confusing nature of jury instructions.

This article will explore the complex nature of death penalty jury instructions before proposing a simpler alternative. Part I discusses the timeline of capital punishment jurisprudence in the Supreme Court, specific to the emergence of jury instructions. Part II examines standard content within death penalty instruction that is often confusing and misinterpreted by the average juror. Part III looks

[2] CACI No. 766.

at studies focusing on testing jury instruction comprehension and concludes that juror comprehension of death penalty instructions is a significant issue that merits change. Part IV argues for ways courts can make appropriate changes to promote juror comprehension and discusses the states that have made advancements in their jury instructions for capital cases.

I. History of Capital Punishment in the Court

While this article argues that the complexity of modern jury instructions for capital cases can be harmful, there was a time that no set of standards, instructions, or guidance was necessary in imposing a death sentence. Prior to the 1970's, juries had unrestricted discretion in imposing the death penalty.[3] In fact, in *McGautha v. California*,[4] the Court held that there was no constitutional issue in allowing the jury to have "untrammeled discretion" in imposing the death penalty.[5] This ruling was overturned one year later in the 5-4 landmark decision of *Furman v. Georgia,* when the Court invalidated all death penalty schemes, ruling that they were in violation of the Eighth Amendment.[6] With each member of the majority writing a separate opinion, due to varying in reasoning, the collective impact of opinions served as a catalyst for states to make changes in their process of imposing the death penalty.[7] With no prior precedent demanding guidelines for jurors, *Furman* essentially serves as the first call for a structure a jury can follow in order to make appropriate sentencing decisions. Following *Furman*, guided sentencing statutes[8] emerged as a partial remedy to the Court's *Furman* ruling. The Court

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[3] Furman v. Georgia, 408 U.S. 238 (1972).

[4] 402 U.S. 183 (1971), *overruled by* Furman v. Georgia, 408 U.S. 238 (1972).

[5] *Id.* at 247 ("In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

[6] Furman, 408 U.S. at 400 ("it would be disingenuous to suggest that today's ruling has done anything less than overrule McGautha in the guise of an Eighth Amendment adjudication.").

[7] *Id.* at 403.

[8] Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976) (the Court approved these capital punishment schemes).

recognized in *Gregg v. Georgia*, that if courts provide guidance in decision-making, the lack of knowledge that the average juror has could be improved.[9] These guided sentencing statutes are standards designed to direct jurors' in making their sentencing decisions.[10] While these statutes vary among states, they all uphold the goal of creating a form of guidance that juries can rely on to ensure a fair imposition of the death penalty.[11]

Along with the inception of guided sentencing statutes came the rise of two concepts that serve to trouble many jurors today: mitigating circumstances and aggravating circumstances.[12] These concepts are considered when deciding whether to impose a death sentence. In short, mitigating circumstances are those that lessen the culpability of the criminal act, while aggravating circumstances elevate the culpability of the criminal act.[13] In *Lockett v. Ohio*, the Court held that specific mitigating circumstances and aggravating circumstances are to be specified by state statutes.[14] In regards to mitigating circumstances, this decision established the importance of jurors considering mitigating circumstances in death penalty cases, and the principal that those circumstances should not be limited.[15] Jurors must be allowed to both consider *all* mitigating factors when sentencing, and to consider *any* evidence as a mitigation.[16] As I will discuss later, this rule can be a problem for jurors.[17]

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[9] Gregg, 428 U.S. at 192.
[10] William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 INDIANA L. J. 1043, 1045 (1995).
[11] Gregg, 428 U.S. at 195 ("the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").
[12] *See infra* Part II.
[13] LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/aggravating_circumstances (last visited April 14, 2021).
[14] 438 U.S. 586 (1978).
[15] *Id.* at 587.
[16] Michael B. Blankenship, James Luginbuhl, Francis T. Cullen & William Redick, *Jurors' Comprehension of Sentencing Instructions: A Test of the Death Penalty Process in Tennessee*, 14 JUST. Q. 325, 336 (1997).
[17] *See infra* Part II.A.

While the Supreme Court acknowledges the value in instructions for death penalty jurors to follow,[18] and therefore allows juries to still apply the death sentence in jurisdictions that permit them, the current death penalty jury instructions still contain many pitfalls for jurors.[19] Why these instructions are found to be confusing to an average juror is explained in the next few sections.

II. Common Confusion Among Jurors

Jury instructions inform a jury of the correct principles of law that they are to be applied to a case's evidence.[20] Through deliberation, the jury applies said instructions to the evidence and arrives at a sentence they deem appropriate.[21] Jury instructions are often pattern jury instructions, which are a model set of instructions constructed by a committee of judges and lawyers.[22] The instructions are necessary to provide a jury with an appropriate and applicable mindset to deliberate and arrive at a legitimate sentence.[23] But often, these instructions are so complex that they become too complicated for the average juror to interpret and put into effect. Juror miscomprehension of death penalty jury instructions often stem from either: (1) a lack of understanding the legal definition of terminology such as, "aggravating circumstances" and "mitigating circumstances," and (2) uncertainty in the weighing process of such circumstances, in order to reach a sentence.[24]

A. Juror Instruction Terminology

[18] *See* Furman v. Georgia, 408 U.S. 238 (1972) (the Court's position of the need for sentencer's being given adequate guidance and information).
[19] Bowers, *supra* note 10, at 1053.
[20] Susie Cho, Capital Confusion: *The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 547 (1994).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 L. & HUM. BEHAV. 339, 340 (2011).

Unfamiliar legal terminology often makes jury instructions difficult to understand.[25] Specifically, what causes most jurors' difficulty in comprehending death penalty jury instructions derives from the terms "aggravating circumstances" and "mitigating circumstances."[26] An average juror has minimal to no prior knowledge in death penalty legal instructions, leaving the legal terminology as new information. For the purpose of jury instructions, these terms are meant to categorize evidence that is presented at trial to determine if the defendant's actions warrant a death sentence. While not always explicitly stated in the instructions, aggravating circumstances are those that heighten the culpability and severity of the crime[27] and mitigating circumstances are those that diminish the severity in deciding whether to impose death.[28] Often, jury instructions will only state that aggravating factors are "considerations that tend to support the death penalty" and mitigating factors are "considerations that suggest that a sentence of death should not be imposed."[29] This can leave jurors wondering what makes a piece of evidence qualify as aggravating or mitigating.

Jurors are expected to rely on these terms and apply their general meaning to the evidence presented. Rather than using plain English and simple syntax, the terms are often written ambiguously leaving them to be misinterpreted by jurors.[30] In addition to this, there is a lack of uniformity among death penalty punishment

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[25] Laurence J. Severance, Edith Greene, Elizabeth F. Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 200 (1984).
[26] Smith, *supra* note 24, at 340.
[27] Aggravating Circumstance Definition, *Merriam-Webster Legal Dictionary*, http://meriam-webster.com/legal/aggravating%20circumstance (last visited April 14, 2021).
[28] Mitigating Circumstance Definition, *Merriam-Webster Legal Dictionary*, http://meriam-webster.com/legal/mitigating %20circumstance (last visited April 14, 2021).
[29] Criminal Pattern Jury Instructions of the United States Court of Appeals for the Tenth Circuit (2011).
[30] Cho, *supra* note 20, at 549; see also Severance, *supra* note 25, at 200.

instructions in how the key terms are defined, or if they are even required to be defined.[31]

An even greater issue is that courts are not required to provide general language explanations of *any* of the terms in death penalty instructions.[32] In fact, some courts have held that "aggravation" and "mitigation" are ordinary words that the jury does not need defined.[33] Yet, if these terms are "ordinary," why do jurors experience difficulty in grasping and applying these concepts?[34] Jurors can also be apprehensive to ask a judge for clarification or further defining of a term out of fear of their response.[35] Because of this difficulty, jurors deserve the aid of clear definitions of these terms in the provided instructions. A juror's understanding of "mitigation" is imperative[36] because for a defendant, mitigating circumstances are often their strongest defense in steering away from being sentenced to death[37] and an understanding of "aggravating" is crucial because, it is a determinant in whether the evidence is severe enough to impose the death penalty. If the jury does not have the proper understanding of both aggravating and mitigating circumstances, it can be harmful to the integrity of the case and the court and lead to the wrongful execution of an individual.

B. Weighing Process

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[31] Smith, *supra* note 24, at 340.
[32] Buchanan v. Angelone, 522 U.S. 269 (1998) (holding that the absence of instructions on the concept of mitigation and on particular defined mitigating factors, does not violate the Eighth and Fourteenth Amendments).; *See also* Smith, *supra* note 24, at 340.
[33] Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1102 (2001).
[34] *Id.*
[35] SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 167 (2005).
[36] Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & HUM. BEHAV. 411, 415 (1994).
[37] *Id.*

Another obstacle for jurors is how to weigh aggravating and mitigating circumstances. While instructions can direct jurors to weigh the mitigating and aggravating circumstances against each other, how to do so is dependent on the discretion of the average juror. In short, if the instructions indicate that aggravating circumstances must outweigh the mitigating circumstances for a jury to impose the death penalty, the jury must be able to weigh the circumstances at their discretion.[38] In weighing the circumstances, most instructions guide jurors that they should not weigh the circumstances quantitatively. For example, California's instructions state:

> Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.[39]

Likewise, the Introduction to Preliminary Instructions, in the Eighth Circuit's Manual of Model Criminal Jury Instructions, addresses qualitatively evaluating versus quantitatively evaluating by stating:

> However, I instruct you now that you must not simply count the number of aggravating [and mitigating] factors and reach a decision [based on which number is greater]; you must consider the weight and value of each factor.[40]

Because state guidelines vary in how they instruct jurors to weigh evidence, a level of complexity and difficulty emerges when trying to strip down the instructions to their basic essence. For example, the California Supreme Court has stated that jurors must "weigh" aggravating and mitigating circumstances present in the case on their own moral scales.[41] Thus, a juror must rely on their own

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[38] Linda Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L. J. 195 (1991).
[39] Judicial Council of Cal. Criminal Jury Instr. (2020), *supra* note 1, at No. 766.
[40] MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS for the DISTRICT COURTS OF THE EIGHTH CIRCUIT No. 12.01 (2013).
[41] Haney, *supra* note 36, at 417.

individual understanding and interpretation of aggravating and mitigating circumstances.[42] In addition, courts leave the weighing process up to the juror's individual discretion because the jury serves as a representation of the community,[43] and it is the jury's role to reach a decision based on the evidence presented. However, due to the minimal guidance provided on *how* to weigh these circumstances, the process becomes unclear and can potentially be performed erroneously by the jury.

III. Testing the Comprehension of Juror Instructions

The testing of juror comprehension is necessary to measure the effectiveness of jury instructions in capital cases. A researcher who conducted a study on instructions found that eighty percent of jurors do not understand foundational evidence rules within instructions and the instructions did not serve as an aid in helping them to understand their task.[44] There is an immediate danger in jurors not understanding the material within jury instructions, as it affects their ability to properly evaluate case evidence. Even more concerning is the potential consequence— wrongful imposition of death.

A. Study 1: Preliminary Study of California's Capital Penalty Instructions

In a 1994 study, Craig Haney and Mona Lynch tested jury comprehension of aggravation, mitigation, and the ability to distinguish them within a statutory list of enumerated factors.[45] Although the California death penalty instructions have been modified since this study, the issues identified by the study still remain as prevalent issues in other states' instructions.[46]

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[42] *Id.*
[43] Krauss, Stanton D., *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*" 64 INDIANA L. J. 617, 651 (1989).
[44] Cho, *supra* note 20, at 550.
[45] Haney, *supra* note 36, at 418.
[46] *See infra* Part IV.B.

The sample of subjects tested was made up of undergraduate students.[47] While this sample is unrepresentative of the average juror, the goal behind selecting these subjects is that they were intended to have the ability to interpret the jury instructions given, based on their current higher level of education.[48] To start, the California death penalty jury instructions were read aloud to participants.[49] After the instructions were delivered, they were asked to define "aggravation" and "mitigation."[50] Then, after defining the terms, the participants were asked if each specific factor listed in the instructions should be considered an aggravating circumstance or a mitigating circumstance.[51] The results of the study were then broken down into two parts: conceptual definitions and template of specific factors.[52]

1. *Conceptual Definitions*

Among subjects, there was an extensive inability to comprehend the key terms of the instructions and a fair amount of confusion surrounding the concept of mitigation.[53] Only fifteen percent of participants produced legally correct definitions of the term aggravation and only twelve percent produced legally correct definition of the term mitigation.[54] Many participants provided definitions that were in lay context, such as describing aggravation as, "to anger or to push."[55] This is a problem among jurors in capital cases, where state statutes do not require an explicit definition of terms within jury instructions. Not only were most participants unable to provide the correct legal definitions of mitigation and aggravation, but this is after the instructions were read three times.[56]

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[47] Haney, *supra* note 36, at 418.
[48] *Id.*
[49] *Id. at* 419.
[50] *Id.*
[51] *Id.*
[52] *Id. at* 421-424.
[53] *Id. at* 420.
[54] *Id.*
[55] *Id. at* 421.
[56] *Id.*

Had the participants been given a copy of the instructions, a better chance of being able to define the terms could have happened.[57] In addition, only one-third of participants comprehended the concept of mitigation in a way that would be presented at trial.[58] This may be due to the fact that mitigation is most likely used for evidence not directly related to the crime,[59] such as a hardship in the defendant's past.[60]

2. *Specific Factors*

At the time of this study, California's death penalty instructions did not label the specific aggravating or mitigating factors that jury is intended to use.[61] While California currently defines aggravating and mitigating circumstances,[62] the results of this study are relevant because currently jurors must consider all mitigating factors, including those not enumerated.[63] Participants experienced difficulty in deciphering what constituted an aggravating circumstance versus a mitigating circumstance.[64] The evidence provided caused participants to be almost evenly split on deciding whether it counted as a mitigating or aggravating circumstance.[65] An example of this is the circumstance of a defendant's age, [66] since in some cases it can qualify as mitigating or aggravating depending on the situation. For example, a defendant's young age can trigger a juries' sympathy or hostility depending on their own experiences and upbringing from a time when they were that age.

[57] *See infra* Part IV.A.
[58] Haney, *supra* note 36, at 422.
[59] *Id.*
[60] MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS for the DISTRICT COURTS OF THE EIGHTH CIRCUIT, No. 12.10 (2013) (listed as number 8 as an applicable mitigating factor).
[61] Haney, *supra* note 36, at 422.
[62] Judicial Council of Cal. Criminal Jury Instr. (2020), *supra* note 1.
[63] Blankenship et al., *supra* note 16, at 336.
[64] Haney, *supra* note 36, at 422.
[65] *Id. at* 423.
[66] *Id.*

B. Study 2: A Test of the Death Penalty Process in Tennessee

To gain a better understanding of jury instruction comprehension in Tennessee, a study measured the comprehension of Tennessee death penalty sentencing instructions among jurors.[67] A sample of individuals summoned for jury duty were given a copy of the jury instructions for the case and completed a questionnaire with seventeen scenarios.[68] Five main issues were tested: (1) Does a juror understand that unanimity is not necessary in considering the existence of mitigating circumstances? (2) Are jurors aware that they must be unanimous in deciding that a mitigating circumstance outweighs an aggravating circumstance? (3) Do jurors know that they can consider mitigating circumstances that were not specifically included in the sentencing instructions?[69] (4) Does a juror understand the difference in the standard of proof for mitigating circumstances versus aggravating circumstances? (5) How do jurors weigh aggravating circumstances against mitigating circumstances? [70] Alarming results came from four out of the five issues.[71] The four subsections below break down the results of the study by each particular issue.

1. *Issue #1: Jury Unanimity is NOT Necessary*

Regarding the first issue of jury unanimity on existence of mitigating circumstances, which encompassed four out of seventeen scenarios within the questionnaire, a large percentage of the participants did not reach the correct answer. Many participants incorrectly selected the answer choice that indicated a jury must be unanimous in considering the existence of mitigating circumstances.[72] The more concerning measure here is the percentage of participants

[67] Blankenship et al., *supra* note 16, at 325.
[68] *Id. at* 332.
[69] *Id.*
[70] *Id.*
[71] *Id. at* 336 (Issue two, on jury unanimity of mitigating circumstances outweighing aggravating circumstances, was not alarming because the majority of the study's participants answered the scenarios' questions correctly).
[72] *Id. at* 335.

that simply answered "Don't Know" to the scenario.[73] These results convey that the instructions are not suitable in effectively explaining the appropriate stance on unanimity for the jury to take.

2. *Issue #3: Jurors are NOT Limited to Enumerated Mitigating Circumstances*

The scenarios encompassed in the third issue were focused on testing the comprehension of Tennessee's sentencing instructions, stating that jurors are not limited to enumerated mitigating circumstances.[74] Like most other states, Tennessee's jury instructions provide a list of possible mitigating circumstances. Also included in Tennessee's jury instructions is the concept that a jury is not limited to the enumerated mitigating circumstances, meaning that there could be mitigating circumstances within the evidence that are simply not enumerated in the instructions. The results from these scenarios displayed that over 50% of participants chose the wrong answer when asked if they could consider a piece of evidence as mitigating, even though it was not one of the mitigating circumstances given by the judge.[75]

Finding non-enumerated mitigating circumstances is a two-part task. First, it starts with the definition of mitigating circumstances or mitigation. An uncertainty of the definition of a mitigating circumstance will lead a juror to, secondly, question if a circumstance qualifies as mitigating. The same can be said for determining a circumstance as aggravating. This is another way a death sentence can be improperly imposed.

3. *Issue #4: Lower Standard of Proof for Mitigating Circumstances*

Scenarios twelve and thirteen tested the participants understanding of the standard of proof necessary for mitigating

[73] *Id.*
[74] *Id. at* 336.
[75] *Id. at* 337.

circumstances.[76] The standard of proof for aggravating and mitigating circumstances is different.[77] In Tennessee, an aggravating circumstance must be proven beyond a reasonable doubt.[78] For a mitigating circumstance, it must only be proven to a juror's satisfaction.[79] The results from these scenarios suggest that participants misunderstood the differences in standards of proof for aggravating circumstances versus mitigating circumstances.[80] Many participants believed that both circumstances needed to be proven beyond a reasonable doubt, which is not the case.[81] These results are another example of how inadequate jury instructions can lead to confusion among jurors and cause a sentencing based on incorrect processes.

4. *Issue #5: Weighing Mitigating Against Aggravating Circumstances*

The last issue tested participants' understanding of the process of weighing mitigating circumstances against aggravating circumstances. The instructions convey that if the jurors unanimously agree there is an aggravating circumstance, they then must consider the existence of mitigating circumstances.[82] If at least one juror believes there is a mitigating circumstance, whether is it enumerated in the instructions or not, they must determine if the mitigating circumstance outweighs the aggravating circumstance.[83] The instructions invite misunderstanding because there is no explanation for the jurors on *how* to weigh the circumstances.[84] When asked if a jury should impose the death penalty simply because more aggravating circumstances exist than mitigating circumstances, about

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id. at* 338.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

forty percent of the participants answered incorrectly.[85] These results convey that participants are likely to be further confused when the instructions on applying the law are minimal and vague.

IV. Suggested Jury Instruction Improvements

The main issues that arise from death penalty jury instructions are the miscomprehension of legal terminology and uncertainty of how to weigh evidence.[86] One important question to ask is: "Can modifying jury instructions in capital cases improve its current broken features?" While there are skeptics in the legal community who are leery of change,[87] due to their own ability to comprehend these instructions, based on their legal knowledge, several states have already begun to recognize a need for change and have reconstructed their pattern jury instructions.

A. Methods to Improve Juror Comprehension

According to previous research, there is a link between juror incomprehension and legally flawed decision-making.[88] If an individual interprets material incorrectly, they will most likely carry out what is asked of them incorrectly.[89] Simple adjustments such as discarding double negatives and either outright avoiding or explaining legal jargon in plain English, can improve comprehension.[90] A study was conducted in California, after a new set of instructions had been approved in 2006, to test its comprehensibility in comparison to the old set of California death penalty jury instructions.[91] The study found that the use of plain English language in the second set of instructions, versus the language in the old set of instructions, led to increased comprehension.[92]

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[85] *Id. at* 339.
[86] Smith, *supra* note 24, at 340.
[87] Cho, *supra* note 20, at 553.
[88] Smith, *supra* note 24, at 341.
[89] *Id.* at 339.
[90] *Id.*
[91] *Id.*
[92] *Id.*

Another issue jurors come across is as follows: What constitutes a mitigating circumstance? If a piece of evidence is not listed as a mitigating circumstance within the instructions, it is up to the juror to determine if it constitutes as a mitigating circumstance, and the courts should focus on helping jurors get to that answer. One way to solve this is, states enumerating more mitigating factors to ensure they are properly considered and weighed by jurors.[93] Jurors must consider all mitigating factors in their deliberation, but if they cannot categorize the evidence properly, they will not be able to correctly weigh the evidence. While this addition of possible circumstances may create lengthier instructions, it provides jurors with an extensive and inclusive list of what can be considered a mitigating circumstance.

B. First Steps Toward Improvement

Several states have taken the initiative to work towards making their death penalty jury instructions more understandable. For example, California has recognized the apparent issue in jury instruction comprehension and has since decided to rewrite their capital sentencing instructions.[94] The current instructions steer away from complex legal jargon and now use more simplified language. For example, the instructions read:

> An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.[95]

[93] Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 399 (1998).
[94] Judicial Council of Cal. Criminal Jury Instr. (2020), *supra* note 1.
[95] CACI No. 763.

> A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.[96]

The United States Court of Appeals for the Eighth Circuit has also adjusted their death penalty instructions for jurors, resulting in a far better explanation of the legal terminology within the instructions. Rather than only listing examples of aggravating and mitigating circumstances, the Eighth Circuit Courts now provide definitions of the terms in the preliminary stage of the instructions.[97] For example, the preliminary instructions read:

> [The word "aggravate means to "make worse or more offensive" or "to intensify." The word "mitigate" means "to make less severe" or "to moderate"] An aggravating factor [, then,] is a fact of circumstance which would tend to support imposition of the death penalty. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense(s), of any other relevant fact or circumstance which might indicate that the defendant not be sentenced to death.[98]

With several states taking action in rewriting their jury instructions, there is hope that juror comprehension can improve. Even minor revisions to jury instructions can allow a jury to feel more confident in appropriately sentencing a defendant.

CONCLUSION

[96] *Id.*
[97] MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS for the DISTRICT COURTS OF THE EIGHTH CIRCUIT, No. 12.01 (2013).
[98] *Id.*

The severity of the confusing nature of capital case instructions deserves scrutiny. Revamping the current state of death penalty jury instructions is necessary because alteration and simplification can aid in protecting the validity of sentences in capital cases. States such as California and Texas have made modifications to their instructions and set an example for other states in recognizing the importance. This same urgency to make necessary jury instruction changes ought to apply to the other states that permit the death penalty.

NATURE'S DAY IN COURT: AN OVERVIEW OF EARTH JURISPRUDENCE

Catherine Crafa

On January 27, 2021, just one week after his inauguration, President Biden signed a batch of executive orders to signify his administration's commitment to tackle climate change issues. This included orders concerning the conservation and restoration of public lands and waters.[1] In light of the devastating effects of recent hurricanes and forest fires, which have intensified due to climate change, this effort is considered to be urgent.[2] However, these executive orders can easily be overturned by future administrations. Organizations across the globe have long been searching for more permanent solutions to address ongoing environmental issues. One method being explored by environmental groups, and a method which countries have gradually begun to embrace, involves the global community adopting the legal philosophy of Earth Jurisprudence.

I. INTRODUCTION

Earth Jurisprudence is a legal philosophy that "recognize[s] the Earth as the primary source of law,"[3] and argues that all living things, including plants, rivers, and animals, have rights that should

[1] FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific, Jan. 27, 2021, http://whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/

[2] Sarah Kaplan, *The undeniable link between weather disasters and climate change*, The Washington Post, Oct 22, 2020, https://www.washingtonpost.com/climate-solutions/2020/10/22/climate-curious-disasters-climate-change/.

[3] Glen Wright, *Climate Regulation As If the Planet Mattered: The Earth Jurisprudence Approach to Climate Change*, 3 Barry U. Envtl. & Earth L.J. 33, 42 (2013).

be respected by the law.[4] The idea was first suggested by Professor Christopher D. Stone's 1972 *Southern California Law Review* article, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*.[5] Stone argued that the classes of persons who hold legal rights have expanded over the course of history, and now also include non-human legal entities such as trusts and corporations.[6] He proposed that, given the environmental issues faced by modern humans, recognizing the legal rights of the natural environment is the next logical expansion.[7] Stone specifically delineated these rights to include the ability to institute legal actions on behalf of nature.[8] Stone's argument, if adopted as standard legal practice, would strengthen legal avenues for protecting the environment by giving citizens the ability to bring suit on behalf of the resource itself.

Stone's proposal has slowly gained traction over the years since its publication. Countries outside of the United States have already begun to recognize the legal rights of nature, whether through constitutional changes, new laws, or court decisions. However, from the very first mention in a 1972 Supreme Court case to more recent cases arguing for the standing of nonhuman animals in court, federal and state courts in the United States have been hesitant to grant any rights to the natural environment generally, specific natural entities, or nonhuman animals. Instead, it appears that at this time Earth Jurisprudence is best pursued within the United States through municipalities and Indigenous American tribes via the passage of legislation.

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[4] Wright, *supra* footnote 3 at 48.

[5] Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*,
17 U.N.H. L. Rev. 355, 357 (2019).

[6] Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S.C. L. Rev. 450, 452.

[7] Stone, *supra* footnote 5 at 456.

[8] Stone, *supra* footnote 5 at 458.

II. INTERNATIONAL RECOGNITION OF RIGHTS OF NATURE

Although Earth Jurisprudence is an issue of growing importance, there are currently no global standards. There is no international treaty that addresses the inherent rights of nature and its ecosystems to exist, be maintained, thrive, and have legal standing in the courts as its own entity. The closest the United Nations has come to acknowledging the rights of nature is through its Harmony with Nature dialogues, which is a series of resolutions to convene conversations between United Nations member states about shifting towards Earth Jurisprudence in the consideration of environmental matters.[9] In its 2016 Harmony with Nature dialogue, the United Nations addressed that the focus of the dialogues is to explore the Earth Jurisprudence approach and discuss "how to reshape human governance systems to operate from an Earth-centred [*sic*] rather than human-centred [*sic*] perspective, so that we may all be guided to live as responsible members of the Earth community."[10] These dialogues have called on the United Nations to adopt a "universal declaration on the rights of Mother Earth," and the United Nations has in turn asked its member states to consider further discussion on drafting such a declaration.[11]

While there has been no international coordination, many countries have taken actions on their own. The Constitution of Ecuador now states that nature has "the right to exist, persist and maintain and regenerate its vital cycles."[12] Bolivia has affirmed the rights of nature with its Law of Mother Earth.[13] In 2017, New Zealand passed the Te Awa Tupua Act, also known as the Whanganui River

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[9] U.N. Secretary-General, *Harmony with Nature*, ¶7, U.N. Doc A/74/236 (Jul. 26, 2019), http://undocs.org/A/74/236 [hereinafter *Harmony 2019*].

[10] U.N. Secretary-General, *Harmony with Nature*, ¶1, 3, U.N. Doc A/71/266 (Aug. 1, 2016), http://undocs.org/A/71/150 [hereinafter *Harmony 2016*].

[11] Harmony 2019, *supra* footnote 8 at ¶134.

[12] Wright, *supra* footnote 3 at 49.

[13] Wright, *supra* footnote 3 at 49.

Claims Settlement Act.[14] This act was the result of negotiations between the Whanganui tribe and the New Zealand government regarding the treatment of the Whanganui River, and granted legal standing to the river and its ecosystem. This made the Whanganui "the first river in the world to hold the same legal rights, liabilities, and responsibilities as a human person."[15] In 2019, the Ugandan Parliament passed its National Environment Act, in which it recognized that "nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution," and granted its people the right to bring action to court for infringement of those rights.[16]

In addition to legislative action, foreign courts have begun to recognize the legal rights of natural entities. The Constitutional Court of Colombia declared the Atrato River possessed its own rights to "protection, conservation, maintenance, and restoration" in 2016.[17] As a result of this ruling, the Court directed the national government to act as a steward for the river and mandated that legal representation of the river would be exercised through the presidential office along with the communities that inhabit the river basin.[18] Additional rivers in Colombia have since had similar rights recognized by various courts.[19] The High Court of Bangladesh granted legal personhood to the Turag River in 2019 and ordered that structures deemed to be illegal must be removed from its banks.[20] In India, the High Court in the State of Uttarakhand cited New Zealand's law as precedent for declaring the Yumana and Ganga Rivers to be legal persons and living entities to preserve the rivers. The High Court further stated that all rivers have the right to "maintain their purity and maintain their free and natural flow," and called for legislation on

[14] Randall S. Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources*, 140 (2020).
[15] Abate, *supra* footnote 13 at 141.
[16] Harmony 2019, *supra* footnote 8 at ¶33.
[17] Abate, *supra* footnote 13 at 135.
[18] Abate, *supra* footnote 13 at 138-139.
[19] Harmony 2019, *supra* footnote 8 at ¶26-28.
[20] Harmony 2019, *supra* footnote 8 at ¶23.

the national level for protection of the Ganga River.[21] There is also a plethora of pending litigation seeking to recognize the legal rights of the natural environment.[22] While it is yet to be seen whether international coordination will occur to enshrine the expansion of legal rights to include natural entities on a global scale, it is clear that nations have begun to embrace this concept on their own in order to protect and maintain their natural resources.

III. RIGHTS OF NATURE IN THE COURTS OF THE UNITED STATES

While the rights of nature have been recognized through both legislative action and in courts worldwide, courts in the United States have demonstrated a pattern of resistance to the idea. Within the United States, the prevailing legal theory is that a party must have legal personhood and must have personally suffered injury in order to have standing to redress some harm in the courts.[23] Proponents of Earth Jurisprudence follow Stone's argument and contend that the law in the United States already provides mechanisms to address standing issues, such as with guardian ad litem for children or legal personhood of corporations.[24] Generally, plaintiffs seeking protection of natural entities or nonhuman animals use one of two approaches. The first method involves bringing an action on behalf of the members of an organization who may be impacted by environmental degradation, such as in *Sierra Club v. Morton*.[25] The other common approach is for a group to file an action as a "next friend"[26] of the natural entity whose rights are in question, such as in the cases of *Naruto v. Slater*[27] and *Nonhuman Rights Project, Inc. v. R.W.*

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[21] Abate, *supra* footnote 13 at 161-162.

[22] Harmony 2019, *supra* at ¶39-44.

[23] Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*,
17 U.N.H. L. Rev. 355, 364-365 (2019).

[24] Wright, *supra* footnote 3 at 51.

[25] Sierra Club v. Morton, 405 U.S. 727 (1972).

[26] The "next friend" legal concept allows a third party to initiate a claim on behalf of a party who is unable to do so on his own.

[27] Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).

Commerford And Sons, Inc.[28] These groups were attempting to lay the groundwork to be recognized as stewards and guardians of environmental resources and animals. Had their standing in the court been recognized, it would have provided an in-road for groups dedicated to the protection of these entities to bring suit to enforce those protections. However, courts in the United States have thus far been hesitant to grant standing even to individuals and groups who cannot demonstrate they have been *directly* injured, let alone to recognize legal personhood for natural resources and nonhuman animals.

A. *SIERRA CLUB V. MORTON*

The first time the idea of granting rights to nature was seriously mentioned in the courts was in the dissent to a Supreme Court opinion in 1972, in which Justice William Douglas agreed with Stone's proposal that judicial rights should be recognized for natural resources, specifically the ability to bring an action on their behalf. While the overall issue in *Sierra Club v. Morton* ("Morton") pertained to whether or not the plaintiff had legal standing, the issue of the rights of nature was directly addressed by Justice Douglas in his dissent.[29]

In this matter, the Sierra Club sued to stop federal approval of a ski resort near the Sequoia National Forest.[30] The Sierra Club claimed they were able to bring suit because it was a public action regarding the use of natural resources which would change the aesthetic and ecology of the area, and which was at odds with the federal laws and regulations that govern the protection of these areas.[31] While the District Court of California granted a preliminary injunction, the Ninth Circuit Court of Appeals did not find any injury

[28] Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc., 192 Conn.App. 36 (2019).
[29] *See* Sierra Club, 405 U.S. at 727.
[30] *See id*. at 729.
[31] *See id*. at 730.

that would give the Sierra Club standing and overturned the injunction. This led the Sierra Club to file a writ of *certiorari*, which petitions for a review of a case by the Supreme Court of the United States.[32]

The issue in *Morton* was whether the Sierra Club had standing under section 10 of the Administrative Procedure Act, which provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[33]

The Court relied on the rulings in *Association of Data Processing Service Organizations, Inc. v. Camp*[34] and *Barlow v. Collins,*[35] which were decided the same day, as well as *Scripps-Howard Radio v. FCC*[36] and *FCC v. Sanders Bros. Radio Station*[37] to come to their conclusions regarding the *Morton* issue.[38] In these cases, the court held that section 10 of the Administrative Procedure Act only provided standing where the individual alleged that they had an injury in fact caused by the challenged action and where said injury involved a protected interest regulated by statutes allegedly violated by the agency.[39]

The Sierra Club alleged an injury due to the damage that would be caused to the scenery and ecology of Sequoia National Park by development of a road through the area, which would negatively affect enjoyment of the park for future generations.[40] However, the Court determined that while this type of injury could be considered

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[32] *See id*. at 731.
[33] *Id*. at 732-733.
[34] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184.
[35] Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192.
[36] Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942).
[37] FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).
[38] *See* Sierra Club, 405 U.S. at 733.
[39] *See id*. at 733.
[40] *See id*. at 734.

an injury in fact, the group had failed to allege that it or any of its individual members use the area for any purpose (including one that would be impacted by the development).[41] Furthermore, the identified case law states that while once review is invoked the person may argue on the basis of public interest in support of a claim that the agency did not comply with its mandate, this still requires the person seeking review to have suffered the injury in order to invoke the review.[42]

Accordingly, the court in *Morton* ruled that the Sierra Club lacked standing and the Appellate Court's judgement overturning the preliminary injunction by the District Court was affirmed.[43]

However, Justice Douglas disagreed with this ruling, and it is in his dissent that the first mentions of Earth Jurisprudence and the rights of nature are discussed by the courts in the United States. Justice Douglas began his dissent by declaring:

> [t]he critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.[44]

He continued by identifying other non-human objects that are considered persons for standing in court, specifically mentioning ships and corporations.[45] Justice Douglas argued that the natural environments themselves speak on behalf of the entire ecology that is a part of them, and the people who use and enjoy these resources

[41] *See id*. at 735.
[42] *See id*. at 737-738.
[43] *See id*. at 741.
[44] *Id*. at 741.
[45] *See id*. at 742.

must be able to speak on their behalf about their destruction.[46] He further argued that the federal agencies set up to manage these resources for the public interest are under pressure from powerful economic interests, and that public interest has lost its meaning in an environmental context.[47] Accordingly, the land needs a voice in the courts.

It was not until 2017 that any lawsuit was filed wherein a natural resource sought recognition of its own legal rights.[48] In *Colorado River Ecosystem v. State of Colorado*[49] ("Colorado River"), the international organization Deep Green Resistance filed a lawsuit as a next friend on behalf of the Colorado River and sought recognition of the river as a legal person, as well as requesting recognition of the liability of the state of Colorado in future actions that constitute a violation of its rights.[50] However, the Attorney General of Colorado threatened sanctions against the attorney who represented Deep Green Resistance and the river if he did not withdraw the complaint, and the attorney complied.[51] The merits of this matter were not given a chance to be argued in court.

B. *NARUTO V. SLATER*

Most cases in the United States have instead focused on securing legal rights for nonhuman animals rather than securing legal rights for natural resources. As seen in the *Colorado River* case, one common approach to the issue of legal standing in United States courts has been for an organization to declare itself a next friend suing on behalf of the subject natural entity. One of the more prominent cases came when the organization People for the Ethical

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[46] *See id*. at 743.
[47] *See id*. at 745.
[48] Abate, *supra* footnote 13 at 123.
[49] *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316 (D. Colo. filed Sept. 25, 2017), 2017 WL 4284548.
[50] Abate, *supra* footnote 13 at 123.
[51] Abate, *supra* footnote 13 at 123.

Treatment of Animals ("PETA") sued on behalf of a macaque named Naruto to obtain the copyright for a series of pictures taken by him using the unattended camera owned by photographer David Slater.[52]

Slater published the photographs in a book that claimed that the copyright of the photographs belonged to Wildlife Personalities, Ltd. and Slater.[53] PETA, along with Dr. Antje Engelhardt, filed suit on behalf of Naruto claiming next friend status. The complaint claimed that Dr. Engelhardt had studied the macaques in that region for over a decade, and had monitored Naruto since his birth; however, the complaint did not claim any direct connection between PETA and Naruto.[54] The respondents filed a motion to dismiss stating that standing was not sufficiently established under Article III of the Constitution or the Copyright Act, which was granted by the court.[55] After PETA and Dr. Englehardt filed an appeal, Dr. Englehardt withdrew from the lawsuit, leaving only PETA's next friend claim.[56]

The Court analyzed the issue of standing from both the perspective of PETA as a next friend and the perspective of Naruto having his own standing. The Court referred to *Coalition of Clergy v. Bush*[57] when outlining the requirements for next friend standing; that is, that due to lack of access to the court or mental incapacity the petitioner is unable to litigate his own cause and that the next friend can demonstrate a significant relationship with the petitioner and is dedicated to his best interests.[58] It further pointed to *Whitmore v. Arkansas*[59] to discuss why, if PETA had alleged a significant relationship to the macaque, it would still be unable to sue on behalf of the macaque as next friend due to the limitations of the next friend

[52] Abate, *supra* footnote 13 at 111.
[53] Naruto v. Slater, 888 F.3d 418, 420(9th Cir. 2018).
[54] *See id*. at 420.
[55] *See id*. at 420.
[56] *See id*. at 421.
[57] Coalition of Clergy v. Bush, 310 F.3d 1153, 1159–60 (9th Cir. 2002).
[58] *See* Naruto, 888 F.3d at 421.
[59] Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990).

standing. The court then relied on *U.S. v. 30.64 Acres of Land*[60] and *Cetacean Cmty. v. Bush*[61] to support its discussion of Naruto's own standing.[62] Finally, it looked to the Copyright Act and *Davis v. Mich. Dep't of Treasury*[63] to further evaluate the question of Natruto's standing.[64]

The Court determined that PETA was unable to demonstrate a significant relationship to Naruto, and therefore lacked standing as next friend under *Coalition of Clergy*.[65] Furthermore, even if it were able to demonstrate a significant relationship, the statute authorizing a next friend standing does include nonhuman animals and, as previously cautioned against in *Whitmore*, the court declined to expand the scope of the definition set forth in the statute.[66]

The Court identified that in *Cetacean* the Ninth Circuit had previously recognized that Article III "does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.'"[67] Furthermore, the allegations in the complaint (that Naruto is the author and owner of the photographs, that he has suffered particular economic harm by the copyright infringement, and that the harm can be redressed by a judgment declaring Naruto as the copyright holder of the photographs) are sufficient to meet standing under Article III as previously outlined in *Cetacean*.[68] Therefore, the Court next looked at whether Naruto had statutory standing under the Copyright Act. As a statute must be contextually read, the Court determined that Naruto did not have standing under the Copyright Act as the Act included terms such as "children," "grandchildren," and "widow," which "all imply humanity

[60] U.S. v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986).
[61] Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).
[62] *See* Naruto, 888 F.3d at 422-423.
[63] Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d.
[64] *See* Naruto, 888 F.3d at 426.
[65] *See id*. at 421.
[66] *See id*. at 422.
[67] *Id*. at 420 (quoting Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004)).
[68] *See id*. at 424-245.

and necessarily exclude animals that do not marry and do not have heirs entitled to property by law."[69] Accordingly, the motion to dismiss the case for lack of standing was affirmed by the Court.[70]

While *Naruto* and its precedent have confirmed that it is possible for animals to have Article III standing, the decision illustrates the need for legislative action in the United States to enshrine such standing into statutory law for the rights of nature to be protected in the courts on their own merits.

C. *NONHUMAN RIGHTS PROJECT, INC. V. R.W. COMMERFORD AND SONS, INC.*

Other courts have taken a different view of the next friend principle and have declared it to fall short due to the animal's own lack of standing in the courts. These courts maintain that precedent is clear that animals lack legal standing in court and consider expansion of that principle through judicial action to verge on legislating from the bench.

The Nonhuman Rights Project ("NhRP") initiated a series of legal actions arguing that nonhuman entities have standing to sue under the principal of *habeas corpus,*[71] focusing first on chimpanzees and then on elephants.[72] The most recent of these cases is the case of *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.* ("Commerford").[73]

In *Commerford*, the NhRP filed a petition for writ of *habeas corpus* in the Superior Court of Connecticut on behalf of three

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[69] *Id*. at 426.

[70] *See id*. at 427.

[71] The principal of *habeas corpus* allows a court to determine whether an imprisonment or detention is unlawful.

[72] Abate, *supra* footnote 13 at 100.

[73] Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc., 192 Conn.App. 36 (2019).

elephants being held at the Commerford Zoo, in which they argued that the elephants were being illegally detained.[74] The Court denied the application on the basis that the petitioner lacked standing, and NhRP appealed to the Appeals Court of Connecticut.[75] The issue again in this matter is whether the animals themselves have standing, and therefore whether NhRP, as an organization whose purpose is to change the legal status of some nonhuman animals to personhood with fundamental rights, has standing as a next friend of nonhuman animals.[76]

The court pointed to precedent established by *Phoebe G. v. Solnit*,[77] *El Ameen Bey v. Stumpf*,[78] *State v. Ross*,[79] *Hamdi v. Rumsfeld*,[80] as well as *Whitmore*, to illustrate why NhPR's next friend claim fell short. These cases again identify the nature of the next friend standing - that the party in interest is not competent and is unable to pursue a claim in court on its own, that the next friend has no personal interest in the action, and that the party in interest must have standing under Article III for the next friend to have standing.[81] The court then cited *Gold v. Rowland*[82] regarding the necessity of the petitioner to establish its legal standing through evidence of personal interest and direct injury.[83] Finally, the court relied on *Johnson v. Commissioner of Correction*[84], *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*[85] (a prior case initiated by the Nonhuman Rights

[74] *See id*. at 38-39.
[75] *See id*. at 38.
[76] *See id*. at 38-39.
[77] Phoebe G. v. Solnit, 252 Conn. 68, 77, 743 A.2d 606 (1999).
[78] El Ameen Bey v. Stumpf, 825 F. Supp. 2d 537, 559 (D. N.J. 2011).
[79] State v. Ross, 272 Conn. 577, 597, 863 A.2d 654 (2005).
[80] Hamdi v. Rumsfeld, 294 F.3d 598, 603 (4th Cir. 2002).
[81] See Nonhuman Rights Project, Inc., 192 Conn. App. at 42.
[82] Gold v. Rowland, 296 Conn. 186, 207, 994 A.2d 106 (2010).
[83] *See* Nonhuman Rights Project, Inc., 192 Conn.App. at 44.
[84] Johnson v. Commissioner of Correction, 258 Conn. 804, 815, 786 A.2d 1091 (2002).
[85] People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 App. Div. 3d 148, 150, 998 N.Y.S.2d 248 (2014).

Project), and *Griffin v. Fancher*[86] as precedent denying the legal standing of nonhuman animals.[87]

In its reasoning, the Court took a more simplistic approach to the issue of an alleged next friend standing and focused solely on the merits of that specific argument. Regarding NhPR's next friend claim, it reasoned that the party on whose behalf the claim is initiated must have standing of his own.[88] It then determined that animals do not have standing, as they have never been legally considered to be able to assert rights as "ascription of rights has historically been connected with the imposition of societal obligations and duties."[89] Additionally, it determined that non-human entities that have been granted legal standing have been provided that privilege because of human interest in the entity.[90] These reasonings taken together, since the animal does not have standing neither does the next friend.

Accordingly, the Court affirmed the denial of the writ of *habeas corpus* petition. However, in a footnote to the opinion, the Court noted that the case does not restrict the advocacy of protections for nonhuman animals, and stated that it is up to the legislature to address whether nonhuman animals should possess individual rights such as bringing claims in a court of law.[91] This footnote again reinforces the previous decisions that statutory law must make specific reference to the standing of animals (and, perhaps, other natural entities) if they are to have recognizable standing in the court.

IV. LEGISLATION WITHIN THE UNITED STATES AND INDIGENOUS AMERICAN TRIBES

[86] Griffin v. Fancher, 127 Conn. 686, 688–89, 20 A.2d 95 (1941).
[87] *See* Nonhuman Rights Project, Inc*.,* 192 Conn. App. at 45.
[88] *See id*. at 42.
[89] *Id*. at 45.
[90] *See id*. at 47, n.8.
[91] *See id*. at 48, n.9.

In the spirit of the decision of *Naruto* and the footnote in *Commerford,* municipalities and tribes across the United States have begun to take action to enshrine the rights of natural resources in legislation and ordinances.

The first step in securing the rights of nature on a local level was taken in 2006 by the rural community of Tamaqua, Pennsylvania, which dealt with companies dumping minerals dredged from nearby rivers and toxic sludge into open pits leftover from previous mining activities.[92] The town granted civil rights to nature in its "community bill of rights." This made it illegal for corporations to "interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage" to them within the community.[93] Furthermore, the ordinance provides standing to any citizen of Tamaqua to bring an action under the provision regarding violations of these rights.[94]

The City Council of Santa Monica, California, also recognized the rights of nature by enacting a Sustainability Rights ordinance in 2013. [95] The ordinance states, "natural communities and ecosystems possess fundamental and inalienable rights to exist and flourish in the City of Santa Monica," and expanded on Stone's original idea of protection of "living" natural resources, such as trees, by defining these as "groundwater aquifers, atmospheric systems, marine waters, and native species within the boundaries of the City."[96] As in Tamaqua, Santa Monica's ordinance provides the authority and standing for citizens of the city to bring suit to protect these natural communities.[97] In 2018, the city reinforced its recognition of the

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[92] Madeleine Sheehan Perkins, *How Pittsburgh embraced a radical environmental movement popping up in conservative towns across America*, Business Insider, Jul. 9, 2017, https://www.businessinsider.com/rights-for-nature-preventing-fracking-pittsburgh-pennsylvania-2017-7.

[93] Perkins, *supra* footnote 95.

[94] Borough of Tamaqua, PA, Code §260-66(B) (2020).

[95] Harmony 2016, *supra* footnote 9 at ¶ 45, n. 8.

[96] Santa Monica, CA, Municipal Code, §12.02.030(b).

[97] *See id*. at §12.02.030(b).

rights of nature when it prohibited private water wells.[98] These examples suggest that, in light of the hesitance of the courts to expand legal rights in environmental matters, activists may find it easier to pursue an Earth Jurisprudence approach at the local level.

Indigenous American tribes in the United States have also taken action to secure the rights of natural entities. Seeing the necessity in securing the legal basis for the protection of wild rice ("manoomin"), the White Earth Band of Ojibwe in Minnesota passed a law in 2018 that formally recognized the rights of the rice.[99] This law declared it illegal for any business or government to violate the "Rights of Manoomin."[100] In 2019, the Yurok Tribal Council in California passed a resolution establishing the rights of the Klamath River in a unanimous vote.[101] The waters were threatened by years of water management systems and climate change. With this action, the Klamath River became the first legally protected river in North America.[102] These actions not only help further establish the concept that nature has legal rights, but it has allowed Indigenous American tribes to reclaim their own rights to the resources they have used for generations.

However, not all local initiatives have been successful. In Florida, Section 120.68(1), Florida Statutes (2000), states that only an adversely affected party may institute a judicial review of a final administrative order. This law has been continuously upheld in the courts of Florida and, as demonstrated, in the wider United States.[103]

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[98] Harmony 2019, *supra* footnote 8 at ¶ 37.

[99] Harmony 2019, *supra* footnote 8 at ¶ 36.

[100] Harmony 2019, *supra* footnote 8 at ¶ 36.

[101] Harmony 2019, *supra* footnote 8 at ¶ 34.

[102] *Tribe Gives Personhood To Klamath* River, NPR (Sept. 29, 2019), https://www.npr.org/2019/09/29/765480451/tribe-gives-personhood-to-klamath-river.

[103] Florida Chapter of the Sierra Club v. Suwannee American Cement Company, Inc., 802 So.2d 520 (2001)(citing Daniels v. Florida Parole and Prob. Comm'n, 401 So.2d 1351 (Fla. 1st DCA 1981), Legal Envtl. Assistance Found. V. Clark, 668 So.2d 982, 987 (Fla.1996), and Sierra Club v. Morton, 405 U.S. 727 (1972)).

In order to supersede this legislation and case law, environmental groups have focused on trying to get localities to pass legislation stating that nonhuman entities also have natural legal rights. For example, an environmental group has proposed that the Santa Fe River be given rights by the Alachua County Charter.[104] If such laws were passed, it would allow anyone to sue on behalf of nature as a steward or guardian (or "next friend"), whether or not they have been directly harmed. However, members of the Florida legislature recently preemptively blocked any such progress by passing a law as part of the Clean Waterways Act that local laws may not "recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment."[105]

V. CONCLUSION

As awareness of environmental issues has grown in American society, now is the time to reconsider the expansion of legal rights to include natural resources and ecosystems. While courts globally have begun to recognize legal standing for natural entities, this has not yet been the case in American courts. For the moment, the adoption of the Earth Jurisprudence legal philosophy within the United States lays with municipalities and tribal nations. Efforts to grant legal rights to nature would be most effective by working with local and tribal governments to pass ordinances and legislation, rather than relying on the courts to overturn decades of precedent.

[104] Alexandra Sabo, *Rights of Nature*, WUFT News, Apr. 22, 2020, https://www.wuft.org/news/rights-of-nature/.
[105] Sabo, *supra* footnote 107.

SOCIAL SCIENCE USE IN SUPREME COURT CASES FROM 2013-2017

Alia Hardy

ABSTRACT

History shows that the opinions of the United States Supreme Court are highly influential on our society and the justice system. Many scholars argue that social science research would benefit legal decision-making due to its real-world application and the scientific reliability it offers.[106] *James Acker, a Professor in the School of Criminal Justice at the University of Albany, SUNY examined the prevalence of social science used in Supreme Court opinions and found that very few social science materials were cited.*[107] *The current study builds on Acker's work to examine the prevalence of social science in a systematically random sample of forty United States Supreme Court opinions in criminal cases from the October 2013 through the October 2017 terms. Despite expectations, advances in technology, and wide-spread acceptance of empirical research, the Supreme Court has decreased its reliance on social science in its decision-making, since Acker.*

INTRODUCTION

The United States Supreme Court has often received national attention when deciding landmark decisions such as *Roe v. Wade*[108]

[106] *See* Tracey L. Meares & Bernard Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000); Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 179-222(2011).

[107] James Acker, *Thirty Years of Social Science in Supreme Court Criminal Cases*, 12 L. & POL'Y 1, 1-23 (1990).

[108] Roe v. Wade, 410 U.S. 113 (1973).

and *Brown v. Board of Education.*[109] When such cases were decided, Americans who were never concerned with the Supreme Court were suddenly engrossed by these issues, and only a majority vote was necessary to change the course of history. The Court's decisions change societal and personal circumstances for generations of Americans and the justices' opinions not only set precedents for the way the justice system operates but also establishes what is acceptable in society. A Supreme Court decision on an individual's civil liberties reflects how the constitution applies to everyone. As such, the justices on the United States Supreme Court must make informed decisions.

Utilizing social science research in legal decisions has been advocated for since the legal realism movement in the early twentieth century.[110] In recent times though, scholars such as Paul Rosen, John Monahan and Laurens Walker have urged Supreme Court justices to rely on research beyond mere black letter law[111] and incorporate social science or empirical research to answer fact-based questions.[112] Prior to social science research becoming readily available in the mid 1900's, justices and lawmakers relied on personal perspective, common sense, and legal knowledge. Over time, however, cases and disputes involving social issues have become more complex. It is not difficult to imagine that the justices' expertise might fall short. Social science and empirical evidence offer Supreme Court justices substantial justification for constitutional decisions and fact-finding. Additionally, social science research has become increasingly available and widely accepted.[113] As

[109] Brown v. Board of Education, 347 U.S. 483 (1954).
[110] Frans L. Leeuw, *American Legal Realism: Research Programme and Policy Impact*, 13 UTRETCH LAW REV. 28, 28 (2017).
[111] The term "black letter law" refers to standard legal rules that are well-known, accepted and often applied in legal decisions. See *Black letter law*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/black_letter_law (last visited April 10, 2021).
[112] *See* PAUL L. ROSEN, THE *SUPREME COURT AND SOCIAL SCIENCE* 201 (1972); John T. Monahan & W. Laurens Walker, *Social Science Research in Law: A New Paradigm*, 43 AM. PYSCHOL. 465, 465-472 (1988).
[113] Murray Levine & Barbara Howe, *The Penetration of Social Science into Legal Culture*, 7 LAW & POL'Y 173, 190 (1985).

our culture shifts towards an increased public availability of and reliance on scientific studies, the Supreme Court should likewise produce impactful opinions rooted in and justified by science and empirical study.

Background

The Supreme Court's significant influence on our society began in the eighteenth century, when the founding fathers formulated the first plans concerning how the government should operate in their new nation. Such ideas were documented in the Constitution, explicitly laying out the framework for the intricate way the new government was to function. The government was to have three branches to balance responsibilities, intentionally crafted to not bestow an overabundance of power on any one branch. Article III of the Constitution expressly gave the Supreme Court its authority: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[114]

Arguably more important than the language of the Constitution was the power of judicial review. Not explicitly written by the founding fathers but established under *Marbury v. Madison* (1803), the power of judicial review empowered the Supreme Court to strike down laws determined to be in conflict with the constitution.[115] The Supreme Court, in using its powers of judicial review, has had monumental effects on the path of the United States by landmark decisions such as in *Roe v. Wade* [116] and, more recently, *Obergefell v. Hodges.*[117] These decisions and countless others demonstrate the influence of the Supreme Court in shaping society and its norms.

[114] U.S. CONST. art. III, § 1.
[115] Marbury v. Madison, 5 U.S. 137 (1803).
[116] *Roe*, 410 U.S. at 113.
[117] Obergefell v. Hodges, 576 U. S. 644 (2015).

History of Social Science in Law

Although there has been a recent push to integrate scientific and empirical evidence into legal decision-making, social science as supporting evidence in case decisions is not a recent phenomenon. In 1908, the Supreme Court ruled on *Muller v. Oregon* [118] that upheld an Oregon statute that limited the hours worked by women to ten hours a day in "any mechanical establishment, or factory, or laundry."[119] The Court reasoned that the law did not violate the Fourteenth Amendment and was distinguished from its recent decision in *Lochner v. New York* (1905) which found a New York law that similarly limited the hours of bakers unconstitutional, hindering the right of employees and employers to freely contract on the "difference between the sexes."[120] In *Muller v. Oregon*, Louis Brandeis, representing the state of Oregon as special counsel, relied on extralegal materials to establish the harm that might be inflicted if women's hours were not limited.[121] In a brief to the Court, Brandeis dedicated only a few pages to true legal application and more than 100 pages to "social science" data detailing the consequences of horrible conditions for women working long hours.[122] Using the brief, Brandeis relied on studies and statistics[123] to prove that working at laundries were hazardous and shorter hours improved productivity while also allowing the female workers to spend more time with their families and taking care of their responsibilities at home.[124] Although the Supreme Court unanimously upheld the constitutionality of the Oregon statute on the grounds of differences in the sexes, it is

[118] Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324 (1908).
[119] 1903 Or. Laws 148, §1.
[120] Lochner v. New York, 198 U.S. 45 (1905).
[121] Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 361 (2009), https://willamette.edu/law/resources/journals/review/pdf/volume-45/wlr45-3-justice-ginsburg.pdf.
[122] Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 65 (2013).
[123] The studies relied on by Brandeis arguably would not pass muster today – they were not truly scientific.
[124] Ginsburg, *supra* note 16, at 363.

unclear that the social science influenced the Supreme Court's decision.[125] Nevertheless, the Brandeis brief presented extralegal information to the Supreme Court for the first time and ushered in a new method of informing and persuading the Court in decisions that affect the lives of everyday people.[126]

The next major instance of social science impacting a Supreme Court decision was in *Brown v. Board of Education of Topeka* (1954).[127] Chief Justice Warren, in footnote 11, cited social science evidence from sociologist Kenneth Clark's doll study.[128] This study was conducted to determine African American children's awareness and attitudes concerning racial differences by observing how the children interacted with black dolls and white dolls.[129] The results showed that the majority of the African American children had a preference for the white doll and some experienced a negative reaction when they learned that they looked similar to the doll they rejected. This study demonstrated that the segregation of black and white children in public schools was detrimental to the education and psychological well-being of African American students.[130] The *Brown* decision overruled *Plessy v. Ferguson* (1896), which upheld the Louisiana statute that mandated railroad companies segregate black and white people as not violative of the Fourteenth Amendment, reasoning that segregation was "separate but equal."[131] The *Brown* decision overruled the principle of "separate but equal" as violating the Constitution.[132] The Court concluded that "to separate them [the children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to

[125] *Id.* at 365.
[126] Rublin, *supra* note 1, at 184.
[127] *Brown*, 347 U.S. at 483.
[128] Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, READINGS IN SOCIAL PSYCHOLOGY 169, 169-178 (1947).
[129] *Id.* at 169.
[130] *Brown*, 347 U.S. at 494.
[131] Plessy v. Ferguson, 163 U.S. 537, 548 (1896).
[132] *Brown*, 347 U.S. at 495.

ever be undone."[133] The Court arrived at this conclusion by relying on social science. Citing social science not only helped to desegregate schools but it also communicated that social science was influential and compelling in legal decisions. *Brown* was another defining moment in judicial history that demonstrated social science can provide real-world context for fact-finding and constitutional decisions that affect United States citizens. Examining whether the Court has continued to use social science as authority is vital as it will confirm if the Court is utilizing all available resources to make informed decisions. [134]

PREVIOUS RESEARCH

Acker's Study of the Use of Social Science in Legal Opinions

One of the earliest studies on social science and legal decisions was conducted in 1990 by James Acker, a Professor in the School of Criminal Justice at the University of Albany, SUNY. He investigated the frequency of social science research in Supreme Court decisions.[135] Acker's study built on prior research by Victor Rosenblum, a Professor of Law and Political Science at Northwestern University, who analyzed 606 cases from the 1954, 1959, 1964, 1969, 1974 Court terms.[136] The objective of his study was to learn more about the effect of social science data on the decisions of the Supreme Court, as information about this subject at the time was insufficient.[137] Both Acker and Rosenblum examined whether Supreme Court decisions relied solely on "black letter law" or if social science influenced their decisions.[138] Acker observed that although many commentaries were published on the Supreme Court incorporating social science in some of their decisions, few

[133] *Id.* at 494.
[134] Acker, *supra* note 2, at 1.
[135] *Id.*
[136] Victor R. Rosenblum, *Report on the Uses of Social Science In Judicial Decision Making*, NATL. SCI. FOUNDATION 1, 1-80 (1978).
[137] *Id*. at 1.
[138] *Id.*; Acker, *supra* note 2, at 1-23.

quantitative studies analyzed the patterns of social science use and its prevalence over time.[139] His study began to fill that gap in the literature and updated the Rosenblum study.

Acker's Methodology

Acker concentrated on 240 randomly selected criminal cases from the 1958 to 1987 Supreme Court terms, focusing on six time periods and organized by four-year intervals: 1958-1962, 1963-1967, 1968-1972, 1973-1977, 1978-1982, and 1983-1987.[140] Forty criminal cases were selected from each interval.[141] In addition to examining the actual Supreme Court opinions, Acker analyzed the submitted briefs and the lower court opinions.[142] Acker classified the cases by four different issues presented: Type 1 cases involved statutory, administrative, or judicial rule interpretation; Type 2 dealt with the constitutionality of statutes or official rules; Type 3 concerned the constitutionality of other governmental actions; and Type 4 raised other questions.[143] In his study, Acker also differentiated the types of sources relied on by justices in their opinions.[144] He found six unique source types: (1) periodicals referenced in the Index to Legal Periodicals (ILP); (2) periodicals not referenced in the Index to Legal Periodicals (NonILP); (3) books; (4) statistical compilations such as the *Uniform Crime Reports* or *Sourcebook of Criminal Justice Statistics*; (5) governmental documents or reports; or (6) other.[145] He used these categories to monitor from which type of authority the social science was cited and how often each was cited.[146]

For consistency, Acker considered the "use" of social science research to be "the citation of a qualifying reference in a Supreme

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[139] *Supra* note 2, at 2.
[140] *Id*. at 3.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 5.
[144] *Id.* at 11.
[145] *Id.*
[146] *Id.*

Court opinion, brief, or lower court opinion."[147] Further, Acker introduced a definition of social science research evidence:

> [Information] derived from the traditional methods of science -- through systematic observation and objective measurement, allowing for replication and empirical verification – and within the subject purview of the social sciences, the study of behavioral events relevant to individuals and social relations, including psychology, sociology, psychiatry, economics, political science and criminal justice, but not history.[148]

This definition differentiated legitimate social science citations from other sources. Citations that fit such criteria counted as "use" of social science research in Acker's study.[149]

Acker's Findings

Acker observed a variety of patterns in the Supreme Court's use of social science research. He investigated how often social science was cited as well as the type of opinion, the issue decided, and even the political party of the justices.[150] In answering the central question of how often social science research is cited in Supreme Court decisions, Acker examined 240 cases and recorded the number that cited social science research evidence at least one time.[151] Acker found that only thirty-three of the cases cited one or more social science studies, representing only 13.8% of the cases.[152] Additionally, he found no linear increase in social science use by justices over time.[153] The use of social science increased in the 1968-1972 and the

[147] *Id.* at 3.
[148] *Id.* at 3-4.
[149] *Id.*
[150] *Id.* at 4, 5, 7, 9.
[151] *Id.* at 4.
[152] *Id.*
[153] *Id.*

1978-1982 terms, but decreased in the 1973-1977 and 1983-1987 terms.[154]

Using the issues-decided classification, Acker observed a correlation between the type of case and the frequency of social science use.[155] Acker found that Type 2 (constitutionality of statutes or rules) cases tended to have higher rates of social science use than other types.[156] In fact, Type 2 cases comprised more than half of the social science citations of all studied cases.[157] This finding exposed patterns to explain why certain terms had more instances of social science use than others.[158] For example, Acker reported that the Supreme Court decided eleven Type 2 cases during the 1968-1972 terms.[159] The 1968-1972 terms showed peak uses of social science research which was credited with the high number of social science citations examined.[160] Acker was uncertain about the reasons for Type 2 issues resulting in the highest number of uses of social science evidence, but he hypothesized that justices might be more likely to rely on empirical evidence to justify statutory analysis.[161]

Using his source classification, Acker found that justices who relied on social science cited more conventional forms of legal authorities, such as the government documents/reports, Index to Legal Periodicals or ILP's, and books.[162] These sources accounted for 23.4%, 22.2% and 19.2%, respectively, of the social science citations.[163] Reliance on non-Index to Legal Periodicals references did

[154] *Id.* at 4-5.
[155] *Id.* at 5, 7.
[156] *Id.* at 7.
[157] *Id*.
[158] *Id*.
[159] *Id*. at 5.
[160] *Id.*
[161] *Id.* at 7.
[162] *Id.* at 11.
[163] *Id.*

not emerge until the 1978-1982 terms, suggesting that improved technology made online social science databases more accessible.[164]

Additionally, Acker evaluated the types of opinions (the plurality, the majority, the concurring and dissenting) most likely to cite social science.[165] The only discernable difference that he noted was that social science citations were marginally more likely in dissenting opinions.[166] Involving himself in deeper examination, Acker observed that cases which were decided by a fragmented Court (four or fewer justices joining the prevailing opinion) had higher percentages of social science references (33.3%) compared to decisions with a bare majority (16.3%) or clear majority (4.5%).[167] Acker surmised that with a greater number of decisions, more authorities from varying sources will inevitably be cited to support the disparate views.[168] Finally, Acker identified that liberal-leaning justices were more likely to cite social science sources than conservative justices.[169] Centrist justices were likewise more middle of the road in their citations to social science research as well.[170]

When analyzing the briefs and lower court opinions, Acker found that 52.7% of the social science references cited in the Court's opinions were original and had not been cited in the corresponding briefs.[171] Likewise, he observed that social science was seldom cited in the lower court decisions.[172] Only ten lower court opinions, or 3.6% of the 280 published opinions, cited social science for twenty-six citations.[173]

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[164] *Id.*
[165] *Id.* at 7.
[166] *Id.*
[167] *Id.* at 9.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 11.
[172] *Id.* at 12.
[173] *Id.*

Acker's Conclusion

Acker's objective was to observe whether social science was utilized in Supreme Court decisions.[174] His research found that although the use of social science in Supreme Court decisions was more prevalent than in the past, it remained rare.[175] Acker determined that the observed lack of social science reliance could be related to the types of issues brought to the Supreme Court.[176] Social science was most often cited in cases challenging the constitutionality of statutes or official rules.[177] He also hypothesized that the justices' lack of familiarity with social science research was an impediment to citing social science frequently.[178]

Acker concluded that the disconnect between social science and legal decision-making might be mitigated if lawyers and social scientists made research readily accessible to the justices.[179] Acker speculated that the increasing availability of high-quality social science research would result in a greater acceptance and use over time by the Supreme Court, leading to less habitual and better informed decision-making.[180]

Post-Acker Research: Meitl

Acker's theory on increased use over time was investigated in a recent study by then PhD student at the University of Texas at Dallas, Michele Meitl. Meitl replicated, in part, Acker's 1990 study. Using a similar methodology to Acker, Meitl examined the use of social science by the Supreme Court in a sample of criminal procedure

[174] *Id.* at 1.
[175] *Id.* at 4.
[176] *Id.* at 13.
[177] *Id.*
[178] *Id.* at 14.
[179] *Id.*
[180] *Id.*

cases.[181] Meitl identified 1,153 Supreme Court cases over the course of fifteen terms from the Justia website.[182] For her study, Meitl eliminated any case that did not raise constitutional criminal justice issues, specifically related to the Fourth, Fifth, Sixth, Eighth, or the Fourteenth Amendments.[183] The number of relevant cases was narrowed to 168.[184] Unlike Acker, Meitl's study focused only on social science cited within the Court's opinions, as citations in the opinions are most likely to influence the decision in some way.[185] Meitl used Acker's definition of social science evidence, that is, "[social science research evidence] that encompassed the study of behavioral events relevant to individuals or social relations."[186] Also similar to Acker's study, Meitl included research that related to "social (sociology, criminal justice, political science, and economics), social psychological, and psychological issues."[187] In conducting her research, Meitl reviewed the Court's opinions and recorded the number of references to social science research.[188]

Once she determined that a given citation qualified under her employed social science definition, she identified the source of the research, relying again on categories similar to Acker: (1) law review article, (2) peer reviewed article, (3) government document, (4) book or (5) other (policy and foundation studies).[189] Finally, she identified

[181] Michele Bisaccia Meitl, U.S. Supreme Court Use of Social Science Research to Inform Constitutional Criminal Law and Procedure Opinions Throughout The 2001-2015 Terms, (May 2017) (published Ph.D. dissertation, University of Texas at Dallas) (on file with ProQuest).
[182] Meitl's cases were reviewed using https://supreme.justia.com/cases/federal/us/.
[183] Meitl, *supra* note 77, at 19.
[184] *Id.* at 20-21.
[185] *Id.*
[186] *Id.* at 18; Acker, *supra* note 2, at 4.
[187] Meitl, *supra* note 77, at 19.
[188] *Id*. at 18.
[189] *Id.* at 21.

the specific justice who cited the social science research, and whether it was found in the majority, concurring, or dissenting opinions.[190]

Building on the previous research, Meitl explored how the opinion types varied in their use of social science citations, how often the individual justices cited social science, and whether there was a correlation between constitutional issues and the likelihood of drawing on social science research.[191] Meitl hypothesized that the Supreme Court would cite more social science in criminal procedural cases such as Eighth Amendment cases.[192]

Meitl reviewed 168 criminal cases involving the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments decided by the Supreme Court during the October 2001 to the October 2015 terms.[193] Of the 168 cases, Meitl found that justices cited social science research in sixty-seven (or 39.9%) of the cases.[194] The 2007, 2011, 2013 and 2001 terms had the highest percentages of citations made to social science research.[195] Specifically, 83.3%, 61.5%, 50% and 46.2% of cases per term, respectively, cited social science.[196] The 2002 term had the lowest number of social science research citations (18%).[197] Compared to Acker's findings, Meitl found an increase in the use of social science research.[198] Her research, however, examined only cases involving constitutional issues, and Acker studied general criminal case opinions.[199]

Meitl found that majority and dissenting opinions were most likely to cite social science references.[200] Majority opinions had 218

[190] *Id.* at 24-28.
[191] *See id.* at 24-28, 32-33.
[192] *Id.* at 22.
[193] *Id.* at 23.
[194] *Id.*
[195] *Id.* at 23-24.
[196] *Id.* at 24.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 24-25.

social science citations (40.37%), and dissenting opinions had 222 social science citations (41.11%).[201] Concurring opinions had the fewest citations with only 100 (18.52%).[202] Meitl found variation among individual justices and their reliance on social science research. Justice Breyer, a democratically appointed justice, wrote fifty-three of the opinions under study, and he cited social science in twenty-four of them (45.28%), making him the justice with the highest percentage of social science research citations.[203] The justice with the fewest social science citations was former Chief Justice Rehnquist, a Republican appointed justice who wrote eleven of the opinions but cited social science research only once (9.10%).[204] Based on her findings, Meitl suspected that justices' political affiliations might influence their willingness to cite social science research.[205] Her study served to show that although social science is important in legal decision-making, more research is necessary to understand the type of social science research cited by the Court.[206] Meitl suggested that more social science research might be relied upon if law students were trained on its use and how it might improve legal decisions.[207]

CURRENT STUDY

Acker's observation that few scholars have investigated the use of social science research in Supreme Court opinions remains true today.[208] Acker's quantitative study of 240 criminal cases in 1958-1987 was the most comprehensive study of how social science research factored into legal opinions.[209] While extensive, Acker's study is now dated. Meitl's later study provided some insight on more current uses of social science in Supreme Court opinions, but it was

[201] *Id.* at 25.
[202] *Id.*
[203] *Id.* at 26.
[204] *Id.* at 27.
[205] *Id* at 28-29.
[206] *Id.* at 44.
[207] *Id.* at 45.
[208] Acker, *supra* note 2, at 2.
[209] *Id.* at 3.

arguably too narrowly focused. Meitl's study included only constitutional issues in criminal cases, and she did not investigate whether social science was cited in appellate briefs or lower court opinions.[210]

The current study builds on Acker and Meitl's prior research, examining criminal cases decided by the Court during the October 2013 through October 2017 terms. The use of social science by individual justices, the opinion type (majority, dissent, or concurring), and the type of social science authority (law review articles, peer-reviewed article, government reports, books or other sources) are investigated. Like Acker, social science cited in lower court opinions and appellate briefs are examined. The central question under study is whether social science citations have become more prevalent in Supreme Court opinions. As hypothesized by Acker, it was expected that with improved technology and greater accessibility of social science research, more social science would be cited in Supreme Court decisions, lower court decisions, and appellate briefs.[211]

Methods

Using Lexis-Nexis, United States Supreme Court decisions were identified by (1) focusing on the "Criminal Law and Procedure" practice area, (2) narrowing the "Content Type" to cases, and (3) listing the "Publication Status" as reported. Cases decided during the October 2013 through October 2017 terms were included.[212] Based on the criteria, ninety cases were identified. The cases were listed in descending order by the date decided. Using systematic random selection, every second case was selected for inclusion in the sample. This method was consistent with the data selection technique

[210] *Id.* at 20.
[211] *Id.* at 14.
[212] The case dates in the tables of the findings section reflect the term decided, not the year. (For example, a case decided on January 2018 is listed under the 2017 term).

adopted by Acker.[213] If a selected case did not actually match the criteria (e.g., a civil case), the case was skipped and the next qualifying case was selected for the sample. With this method, forty cases were selected for the study. For each case, the following was downloaded from Lexis-Nexis: (1) Supreme Court opinions, (2) immediately preceding lower court decision, and (3) available petitioner, respondent, and amicus briefs filed.

The first step was to read and annotate each Supreme Court opinion. Each opinion was meticulously searched for in-text and footnote citations. For each citation, the original research study was identified to ensure that only social science authorities, as defined by Acker, were included. Acker defined social science as "information derived from the traditional methods of science – through systematic observation and objective measurement, allowing for replication and empirical verification."[214] Moreover, Acker maintained that the citation had to be "within the subjective purview of the social sciences, the study of behavioral events relevant to individuals and social relations, including psychology, sociology, psychiatry, economics, political science and criminal justice, but not history."[215]

Once the citations were confirmed as social science authorities, each case was listed on a Microsoft Excel spreadsheet with columns denoting the various data points. Using the Acker and Meitl's categorizations of social science sources, each source was identified as originating from a (1) law review, (2) peer reviewed journal, (3) governmental report, (4) book, or (5) other written authority. The location of the social science citation in the opinion was identified as well as the Justice who wrote the opinion. The same process was employed to annotate the amicus briefs and lower court opinions.

[213] Acker*, supra* note 2, at 18.
[214] *Id.* at 3-4.
[215] *Id.* at 4.

Findings

The hypothesis that social science research use would increase due to technology advances and greater access to social science research since 1990 was not born out by the current study. Of the forty cases, only five (12.5%) included one or more citations made to social science research. This finding was consistent with Acker's (1990), wherein thirty-three of 240 cases (13.8%) cited social science.[216] Table 1 reports the number of cases examined, the number of cases with one or more citations to social science research, and the total number of citations for each term year.

Table 1. Summary of Cases –

Social Science Citations in the U.S. Supreme Court Cases (2013-2017 Terms)[217]

Year	**No. of Cases Examined**	**No. of Cases with 1+ Uses of Soc. Science**	**Total # of Social Science**
2013	3	0	0
2014	8	1	2
2015	11	2	17
2016	8	1	5

[216] Acker, *supra* note 2, at 4.

[217] The data included in the following tables were compiled by the author of this paper.

2017	10	1	2
Total	**40**	**5**	**26**

Among the forty cases included in the study, there were twenty-six social science reference citations. No linear increase was evidenced during the five years (Table 1). The number of citations peaked in 2015 with two cases including seventeen social science citations. One case in particular, *Birchfield v. North Dakota*, was about a Fourth Amendment challenge to a state law that criminalized the refusal of submitting to blood alcohol testing.[218] This single case accounted for half of the social science references. Likewise, in *Pena-Rodriguez v. Colorado* (2016), concerned whether juror testimony that established racial bias was prohibited accounted for almost twenty percent of the social science citations (19.2%), and it was the only case with citations in 2016.[219]

Justices' Citation Data

Since only five of the selected cases cited social science, the justices' uses of social science are reviewed by case. The political party that appointed each justice is noted as well.

The majority opinion in *Birchfield v. North Dakota* (2016),[220] authored by Justice Alito who was appointed by a Republican administration, included eleven social science citations. These citations accounted for 42.3% of the total citations in this study. Justice Sotomayor, appointed by a Democratic administration, wrote a concurring (in part) and dissenting (in part) opinion. The concurring opinion was joined by Justice Ginsburg, also appointed under a

[218] Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
[219] Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).
[220] Birchfield, 136 S. Ct. at 2160-2187.

Democratic administration. Justice Sotomayor's opinion referenced two social science research citations (7.7%).

In *City of Los Angeles v. Patel* (2015),[221] Justice Sotomayor authored the majority opinion with a single social science citation (3.84% of the total citations). A dissenting opinion authored by Justice Scalia and joined by Justices Roberts and Thomas, all appointed under Republican administrations, referenced a single social science citation (3.84%).

In *Class v. United States* (2018), Justice Alito wrote a dissenting opinion and was joined by Justices Kennedy and Thomas.[222] All three justices were appointed under Republican administrations. Two social science research citations were included in this opinion, accounting for 7.7% of the total citations.

In the case *Pena-Rodriguez v. Colorado* (2017), Justice Alito wrote a dissenting opinion that was joined by Justice Thomas and Chief Justice Roberts.[223] Five social science references were cited in footnotes, accounting for 19.2% of the total citations.

Lastly, in *United States v. Bryant* (2016),[224] Justice Ginsburg authored the majority opinion and referenced four social science citations (15.3%).

Contrary to the hypothesis that justices appointed under Democratic administrations would be more likely to cite social science than justices appointed under Republican administrations, the findings show no disparity on political appointment. The findings

[221] City of Los Angeles v. Patel, 576 U.S. 409 (2015).
[222] Class v. United States, 138 S. Ct. 798 (2018).
[223] *Peña-Rodriguez*, 137 S. Ct. at 874-886.
[224] United States v. Bryant, 136 S. Ct. 1954 (2016).

demonstrated, however, that there were justices who consistently cited social science.

Opinion Type

In examining the appearance of social science citations by types of opinion, a consistency with the observations of Rosenblum (1978) was expected, anticipating that increased social science citations would appear in dissenting opinions because justices authoring dissenting opinions would be more likely to justify their opinion using extralegal materials.[225] Our findings did not support this hypothesis.

Table 2. Social Science Citations by Opinion Type

Opinion Type	**# of Citations**
Majority	16
Concurring	0
Dissent	8
Dissent (in part)/ Concurring (in part)	2

As shown in Table 2, and contrary to the aforementioned hypothesis, social science citations appeared most often in majority opinions as opposed to dissenting opinions. Sixteen social science citations, accounting for 61.5% of the total citations, were found in

[225] Rosenblum, *supra* note 32, at 38.

majority opinions. No such citations were included in concurring opinions. In an opinion that dissented in part and concurred in part, however, two social science references were cited (7.7%). Eight social science citations appeared in dissenting opinions, but the citations accounted for only 30.8% of the total.

Social Science Authorities by Type

In examining the types of social science authorities cited by the Court, the current study categorized the sources, consistent with Acker (1990) and Meitl (2017) by five different types: (1) law review, (2) peer reviewed journal, (3) governmental report, (4) book, or (5) other.[226] It was hypothesized that most of the citations would come from law review articles because this is the source most familiar to justices. As shown in Table 3, however, this was not the case.

Table 3. Social Science Citations by Source Type

SOURCE TYPE	NO. OF CITATIONS	TOTAL PERCENTAGE
LAW REVIEW	3	11.5%
PEER REVIEW	3	11.5%
GOVT REPORT	18	69.2%
BOOKS	0	0%
OTHER	2	7.7%

The most cited authority was government reports (Table 3). Eighteen social science citations were derived from government reports, accounting for a majority (69.2%) of the total citations. Peer-reviewed

[226] Acker, *supra* note 2, at 11; Meitl, *supra* note 77, at 21.

and law review article citations were tied for the second most often cited sources of social science authority. Three citations originated from peer-reviewed and law review publications (11.5%). An additional two citations derived from other sources, accounting for only 7.7% of the citations. In these cases, the other sources included statistics from polling websites. Similar to Meitl's findings, the current research found that the "other" category comprised 8.0% of the total citations. The only source that was not relied on for social science authority was books. This point is in absolute contradiction of the finding by Acker (1990), who observed that social science citations from books comprised 19.2% of total included citations.[227]

Amicus Briefs, Party Briefs and Lower Court Opinions

In this study, amicus briefs, party briefs and lower court opinions were reviewed to assess whether these were sources of social science citations, giving specific focus to amicus (or friend-of-the-court, non-party) briefs. It was hypothesized that social science research citations would be most common in amicus briefs and that peer-reviewed publications would be most often cited in these briefs because non-parties author such submissions and, consequently, might be most willing to gather outside research from publications, including peer-reviewed article research.

In total, there were 240 amicus briefs submitted across the forty cases. The amicus briefs that supported the petitioner and respondent were analyzed separately.

[227] Acker, *supra* note 2, at 11.

Table 4. Amicus Brief Citations and their Authorities

Type of Support	Total # of Briefs	No. of Briefs Citing Social Science	No. of Citations	# of Law Review Citations	No. of Peer-Review Citations	No. of Govt. Reports	No. of Book Citations	No. of "Other" Citations
Petitioner	174	74	299	39	118	86	6	50
Respondent	66	28	105	4	45	49	0	7

One hundred and seventy-four amicus briefs were filed in support of Petitioners. Seventy-four (42.5%) referenced social science. Using the same method employed for opinion analysis, the amicus briefs were examined to identify the types of social science authority and the source of the authority. As expected, citations from peer-reviewed publications were most often cited by amicus briefs in support of petitioners (39.4% of the citations). Government reports were another popular authority, cited second most often (28.7%) in amicus briefs. The government reports commonly cited government statistics. The "other" category and law reviews were less prevalent authorities, citing only 16.7% and 13% of the total citations, respectively. Least prevalent were citations to books, accounting for only six citations (2.0%).

Sixty-six amicus briefs were filed in support of respondents. Twenty-eight of the sixty-six respondent briefs cited to social science (42.4%). Contrary to the citations in support of petitioners, the amicus briefs in support of respondents most often cited to governmental reports (46.7%). Peer-reviewed publication citations comprised 42.8% of the total. Citations to other sources and law review publications were less prevalent sources for social science

citations, 6.7% and 3.8% of citations, respectively. No books were sources of citations in the amicus briefs supporting respondents.

Table 5. Party Brief Citations and their Authorities

Type of Party Brief	Total # of Briefs	No. of Citations	# of Law Review Citations	No. of Peer-Review Citations	No. of Govt. Reports	No. of Book Citations	No. of "Other" Citations
Petitioner	124	55	10	14	29	0	2
Respondent	82	37	7	7	19	0	4

As for the party briefs, 124 petitioner briefs were filed. There were fifty-five social science citations found in the petitioner briefs. The party briefs were also examined to identify the types of social science authority and the source of the authority. Citations from government reports were most often cited by petitioner briefs (52.7% of the citations). Peer-reviewed publications were cited second most often (25.4%) in the petitioner briefs. The less prevalent authorities were law review citations and "other" citations, accounting for only 18.2% and 3.6% of the total citations, respectively. Again, the least prevalent authority were book citations, which accounted for none of the citations.

Eighty-two Respondent briefs were filed and examined in this study. There were thirty-seven social science citations found in the respondent briefs. Similar to petitioner briefs, respondent briefs most

often cited to governmental reports (51.4%). Peer-reviewed and law review publication citations both accounted for 18.9% of the total. Social science citations in "other" authorities were not prevalent in the respondent briefs comprising of 10.8% of the citations. Social science references from books were not cited in the respondent briefs.

Consistent with Acker's study, this current study found no social science citations in the lower court opinions examined.

DISCUSSION

It was reasonable to hypothesize that technological advances would increase the citations to social science authority. With more online resources to acquire scientific articles from, Supreme Court justices would have greater and easier access to social science research for inclusion in opinions. However, the current study has not demonstrated support for this expectation. The use of social science remains as scarce as it did when Acker (1990) conducted his research on Supreme Court legal decisions.

Table 5. Acker's Study Overview

TERMS OF COURT	NUMBER OF CASES	NO. OF CASES WITH 1+ SOC. SCIENCE CITATIONS	TOTAL SOC. SCIENCE CITES
1958-1962	40	4	11
1963-1967	40	1	1
1968-1972		10	150
1973-1977	40	4	10

TERMS OF COURT	NUMBER OF CASES	NO. OF CASES WITH 1+ SOC. SCIENCE CITATIONS	TOTAL SOC. SCIENCE CITES
2013-2017	40	5 (12.5%)	26
1978-1982	40	9	120
1983-1987	40	5	18
TOTAL	240	33 (13.8%)	311

Table 6. Current Study Overview

The current findings from cases decided from 2013-2017 show lower rates of citations (12.2%) compared to the findings of Acker (13.8%). If the social science data and authority is now readily available and widely accessible due to technological innovation, it begs an important question: Why not cite social science? Further, what steps might increase the use of social science in legal decision-making?

Some scholars have suggested social science may be too complicated, thus reducing its use by justices and lawmakers.[228] David Faigman, a Professor of Law at the University of California Hastings College of the Law, noted that "judges fear treading in areas that can only lead to uncomplimentary commentary in the legal literature."[229] Increased accessibility of social science research will not result in its use if justices do not understand the research. Faigman proposed that legal professionals and social scientists must play roles to increase social science research use by the Court.[230] Judges and others legal professionals, Faigman asserts, have not expressed a serious need for empirical support in decision-making, while, simultaneously, social scientists do not make their data and findings easily comprehensible.[231] Therefore, legal professionals and social scientists should come to a mutual understanding on how social science data should best be communicated.[232]

Faigman (1989) proposed that social scientists can begin by employing less scientific jargon in their research.[233] When scientific jargon is used, it unnecessarily keeps research from being understood by others, such as justices, who are not experts in the social science field.[234] Faigman also recommended that studies could be published

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[228] David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1080 (1989).
[229] *Id*.
[230] *Id.* at 1081.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*

in a single journal rather than spreading them out among many.[235] Today, online databases make finding studies in different journals easier but additional, extraneous research is still necessary. The goal would be to ensure access to social science research by Supreme Court justices is easier and understandable so there are fewer justifications to avoid citing social science.

Social Science and Amicus Briefs

Social scientists are progressively using the submission of amicus briefs to expose the Court to social science in relevant cases.[236] In the amicus briefs submitted in the forty cases under study, the results demonstrated that social science is more often cited in amicus briefs than in the opinions themselves. Of the 240 total amicus briefs reviewed, 102 of the briefs cited social science (42.5%). A total of 404 social science references were cited in the amicus briefs. This is compared to five of forty cases citing social science (12.5%) and twenty-six social science citations. This finding was expected, as the purpose of amicus brief is to submit additional information or research to the Court and empirical evidence is a common source of such additional research.

Despite the increased number of social science citations in amicus briefs, social science was referenced in only five of the forty cases. Thus, even though social science research is expressly provided to the Court, it remains unutilized. One explanation might be that justices are uncomfortable with venturing outside of legal sources. Also interesting and consistent with Rosenblum's (1978) hypothesis is the observation that when social science from amicus briefs was cited, it was most often found in dissenting opinions.[237] Rosenblum asserted that social science might be more accepted by

[235] *Id.* at 1082.
[236] Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 1 (1991).
[237] Rosenblum, *supra* note 32, at 38.

dissenting justices looking for any source to bolster their view.[238] The readily availability of the social science research by amici likely increases the chance of citation by justices.

Citations Importance to Judicial Decision-Making

Consistent with prior research, the current study was limited by available data (i.e., the availability of written opinions to discern or reflect use of social science). There is no practical way to measure whether cited social science authorities factored into justices' decisions. Illustrative is the case of *Birchfield v. North Dakota* (2016), the Fourth Amendment challenge to forced blood-alcohol testing) in which the most social science citations were found.[239] Justice Alito referenced government reports showing the rate of drunk driving and the impact of blood-alcohol testing.[240] The citation supported the argument that blood alcohol tests were necessary and preventative. Even though the statistical data was cited for this perspective, it remains unclear whether the statistical research factored into or influenced the decision interpreting the Fourth Amendment.

CONCLUSION

The objective of this study was to continue Acker's research and to assess whether legal decision-making had evolved since the 1990s to include a greater use of social science. Consistent with prior research, the current study took a quantitative approach to understanding and evaluating the use of social science in the legal system. Another focus of the current study was to address the lack of accessibility of social science research for judicial use.

There are some notable weaknesses in the current study that should be addressed by future research. First is the study's sample

[238] *Id.*
[239] Birchfield, 136 S. Ct. at 2160-2198.
[240] *Id*. at 7-9.

size. Due to time constraints, the current study identified cases decided during a five-year interval and systematically selected 40 cases for analysis. This narrow selection does not offer a complete picture of the prevalence and use of social science over time. Second, the current study did not incorporate internal reliability of the identified citations. In other words, the author identified and labeled citations as social science or not and identified their sources. Future research should adopt a methodology in which more than one reader annotates the case decisions and briefs, and their findings are then compared to establish internal reliability of the data points (i.e., whether the two agree on the designated categorizations of the data).

Technology and society's acceptance of science and empirical evidence have advanced to the point where using social science research routinely in the legal system seems like the obvious next step. The law is expressly written to influence human behavior, so judicial decisions should be consistent with research focused on human behavior. It can be seen that the two are closely related, and consequently, social science should influence more than just landmark decisions, also contributing to legal decisions that affect every day human behavior and interactions.

A PSYCHOLOGICAL EXPLANATION FOR THE UNEQUAL APPLICATION OF TERRORISM LEGISLATION UPON ARAB AMERICANS

Scott Buksbaum

Introduction

Doctor, Banker, Lawyer. These titles apply without bias to anyone who fits the objective definition as having been educated in the field. Yet, over time, certain characteristics have become associated more with these titles to the point that the title itself connotes the stereotype.[1] Stereotypes are an aftereffect of the human brain grouping social information together into categories to make future thinking processes more efficient.[2] The human brain if nothing else is efficient. Stereotypes are just one of many shortcuts, also called *heuristics*, which are neutral and harmless at a base level, but can become positive or negative through extreme and overly broad application.[3] A conspicuous example of this in America right now is the use of the title "alien." Legally, an "alien" is any person who is not a citizen or national of the United States, which objectively *does not indicate* any specific race or ethnic group.[4] Yet over time, in America, this term has become ethnically skewed to be applied mainly towards people of Latin heritage and has even evolved into

[1] Jack P. Lipton et al., *Neutral Job Titles and Occupational Stereotypes: When Legal and Psychological Realities Conflict*, 125 J. PSYCHOL. 129–151 (1991).
[2] Jillian Gilmour, *Formation of Stereotypes*, 2 BEHAV. SCI. UNDERGRAD. J. 67–73 (2015).
[3] Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCHOL. SCI. 319–322 (1990).
[4] Kevin R Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons* 31 (2021) 264.

derogatory uses over time.[5] This same danger exists for the title of "terrorist" and people of Arab ethnicity.

Terrorism has been around since the beginning of history itself with the Sicarii in ancient Judea, Jewish citizens who rebelled against Roman rule of the holy land, assassinating and kidnapping their oppressors to try and incite a rebellion.[6] The Sicarii are credited with the origins of terrorism[7], but since then, terrorism has taken new forms. The most recent wave of terrorism, beginning with the Iranian revolution in 1978, was deemed the "religious wave."[8] While this "religious wave" designation applies to all religious movements, ranging from Buddhist separatists to Christian terrorists, Islam has taken center stage, and is becoming synonymous in American society with religious terrorism.

The title "terrorist" is objectively applied based on the American legal definition. Yet the application of this title, as with other legal titles, can be over-applied or under-applied to various groups based on societal pressure. Law is society's way of taking out the subjectivity of public opinion in the immediate instance of criminal justice, establishing structure to designate issues and solve problems; this does not mean that society cannot affect law, rather that its effect is only diminished. There are certain universal thought processes that, when applied under specific circumstances, will lead to the biased application of the title of "terrorist" along ethnic or stereotypical lines instead of along legal lines. Through these same thought processes of mentally categorizing people of specific ethnicities as "terrorists," individuals will also establish what they deem to be non-terrorist criminals along ethnic lines. People tend to

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[5] Judith Ann Warner. *The social construction of the criminal alien in immigration law, enforcement practice and statistical enumeration: Consequences for immigrant stereotyping*. Journal of Social and Ecological Boundaries (2005): 56.
[6] Stewart J. D'Alessio & Lisa Stolzenberg, *Sicarii and the Rise of Terrorism*, 13 TERRORISM 329–335 (1990).
[7] *Id.*
[8] ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY, (Audrey Kurth Cronin, James M. Ludes, & Georgetown University eds., 2004).

use different nomenclature to differentiate similar criminal activities based on how we perceive the group that we deem to be most likely to commit them. This leads to the unequal application of the law and other legal ramifications that the United States thought to have evolved from in the 1960s.

This article will first explore the psychological theory of mental processes that lead to social categorization and grouping along with the factors that increase mental efficiency at the expense of accuracy. Then it will examine the multi-faceted and bidirectional relationship between society and terrorism. We will explore the social effects of this phenomenon, as well as its cyclical nature, and will propose several solutions using the disciplines of psychology and law. The various laws for the crime of terrorism, while constitutional as written, are able to be applied in a subjective manner that single out individuals based on their ethnicity due to either their breadth or overly specific intent. This pattern of legal behavior results in our society attributing the title of "terrorist" unequally across ethnic lines, leading to inequality in our justice system.

Overview of the In-group, Out-group Relationship:

Humans create categories in order to make sense of the social world around them to which they can assign values and traits.[9] Through this assessment, humans are able to establish comparisons and make judgements to identify a multitude of complex groupings. With their "knowledge" of the social groupings, humans can extrapolate various information about the members of the group, ranging from social roles to abilities, using these judgments to determine how they fit into their social world.[10] This is known as the individual's social identity, which is an extension of their self-image and self-esteem. The comparisons of one's own group to another group therefore impact the evaluation of one's own self-image, either

[9] Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* ORGANIZATIONAL IDENTITY: A READER 56–65 (2004).
[10] Id.

in a positive or negative way. It is because of this concept that when a person's nation does well in an international competition, they feel a sense of pride and joy.

A human's social identity leads to being a member of multiple complex groupings, but one's social identity can be simplified into two major categories and groups: the in-group and the out-group. "In-group" is a term that denotes, in the broadest sense, the large quantities of similar groupings with which the majority of people in a given population are associated and identify. These are the adjectives that people use to describe themselves as they relate to being a part of a group. Whether ethnic, religious, or even academic, all of these that overlap with the majority of the American population, are a part of the in-group. "Out-group" denotes the people who are not associated with the in-group. For the purpose of this article, as demonstrated by the majority of public opinion, the out-group are people of Arab ethnicity.

Evolutionarily, people act to maintain or improve their self-image, in order to survive in society as a positive self-concept justifies their past behavior, persuading them to repeat it in the future.[11] Essentially, in order to learn and further the social skills necessary to survive in the world, an individual must do and repeat actions that they saw someone else do. A positive self-concept teaches the individual that the action they repeated was correct by social standards and thereby incentivizes them to repeat it in the future.

Positive self-concepts are also based upon favorable comparisons between the in-group and out-groups. These premises have led to many theorized motivations behind human behavior. First, the idea that if the self-concept is not positive, then the individual will either attempt to leave the group and join a more favorable group by adjusting behavior to match the more favorable group, or the individual will attempt to establish a more positively

[11] Id. at 58.

distinct comparison between the two groups by either attempting to bolster the in-group or derogate the out-group.[12]

The non-positive self-concept does not need to be a persisting perception; it can simply be a single event that results in a temporary perception. For example, should the individual's favorite football team lose a game, the individual may claim that some extraneous factors caused their team to perform poorly thereby providing an excuse for the negative perception and bolstering the in-group and self-concept; the individual may claim that the opposing team was engaged in cheating, thereby providing an excuse for the negative perception and derogating the out-group and bolstering the self-concept.

It is important to note that this phenomenon is both bidirectional and a zero-sum game. In order for a positive comparison to exist in one manner, it must be negative in the opposite direction. The use of prejudice and out-group stereotypes may be beneficial for the in-group in bolstering their self-concept but it is detrimental for the out-group in derogating their self-concept. While a member can justify the action internally, the overall social pressure is what takes effect on the self-concept as if the majority of the resident population believes the negative comparison to be accurate, then an individual can rationalize it internally but not mitigate the harm to their self-concept. This is only noticeable in society when the harm is to a large degree. It takes an extremely bad event for an individual to have their social identity threatened.

Identity salience helps to explain the large variety of social groups that one can belong to and the apparent lack of interference that it has in an individual's social identity. Identity salience is the idea that the social group that is represented in one's social identity at any given time is the most relevant social group for the situation and therefore is boosted when activated in a situation that may be

[12] Id. at 60.

aggressive.[13] An aggressive situation can either be through a derogatory environment or simply the presence of the complementary out-group. For example, in the instance of a terrorist attack, especially when the espoused ideology is contrary to the individual's social group, whether it be American or your race, that membership is what will dominate the individual's social identity and will be used to determine their behavior in that situation.

The information an individual associates with a specific category or social group is a stereotype.[14] At its base level, it is not negative or positive but simply neutral information. When a stereotype is combined with a negative comparison, it is deemed a prejudicial stereotype, which is commonly known as prejudice. The use of stereotypes is based on the belief that all traits and behaviors are shared by all members of social groups.[15] This belief helps an individual efficiently determine how to act in novel situations by referring to similar situations with people of the same social group.

Other factors that can increase the likelihood of relying on automatic mental processes is either overthinking or being preoccupied.[16] An individual has a finite amount of mental capability to think about multiple things simultaneously.[17] The more cognitive resources that someone is using, the more likely that the human

[13] Ali Mashuri & Esti Zaduqisti, *The role of social identification, intergroup threat, and out-group derogation in explaining belief in conspiracy theory about terrorism in Indonesia*, 3 INT. J. RES. STUD. PSYCHOL. (2013), http://consortiacademia.org/10-5861ijrsp-2013-446/ (last visited Feb 10, 2021).
[14] Gilmour, *supra* note 2.
[15] Tajfel and Turner, *supra* note 9.
[16] Anastasiya Pocheptsova et al., *Deciding without Resources: Resource Depletion and Choice in Context*, J. MARK. RES. 12 344 (2009).
[17] Ulf Böckenholt, *The Cognitive-Miser Response Model: Testing for Intuitive and Deliberate Reasoning*, 77 PSYCHOMETRIKA 389 (2012).

brain will rely on automatic thinking to analyze the situation and determine appropriate action.[18]

Stereotypes are also not always objectively accurate. Studies have shown that stereotypes for outgroups, rather than provide accurate information, tend to "sustain the social order and justify existing social arrangements."[19] Stereotypes, while not always negative, do not often serve the best interest of truthful intergroup interactions, instead they just provide information that matches what is presented by way of cultural and social influences. This establishes a perpetuating nature as the use of stereotypes only goes to further support both itself and the power of the social hierarchies that established them.

The primary purpose of these stereotypes follows the same guiding premise of human social behavior: to maintain or improve self-concept. Stereotypes achieve this by maximizing the perceived intragroup similarity and intergroup differences.[20] The more alike members of a group are, the more solidarity they feel. The more distinct two groups are from one another, the more internal solidarity is felt due to the perceived presence of deviant behaviors. The drive to unite with similar individuals is strong so they can face the unknown threat of the other group.

Due to the large number of individuals in the world, there is simply too much variance between individuals to find identical groupings, leading to a "blind-spot" deficiency. People confirm groupings that best maximize intergroup differences and intragroup similarities, and the contemporary impossibility of that task leads to

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[18] Saul L. Miller, Jon K. Maner & D. Vaughn Becker, *Self-protective biases in group categorization: Threat cues shape the psychological boundary between "us" and "them"*., 99 J. PERS. SOC. PSYCHOL. 62–77 (2010).
[19] Hélène Joffe & Christian Staerklé, *The Centrality of the Self-Control Ethos in Western Aspersions Regarding Outgroups: A Social Representational Approach to Stereotype Content*, 13 CULT. PSYCHOL. 395–418 (2007).
[20] Tajfel and Turner, *supra* note 9.

the "blind-spot."[21] Individuals now are more likely to look over singular or small differences between the members of the in-group in order to justify similarities and look over singular or small similarities with members of the out-group in order to justify distinctiveness.[22] This blind-spot, while normally harmless, can be exploited and used to set a precedent of in-group favoritism that transforms into prejudice, where members of the in-group criticize and derogate out-groups as a whole for similar behaviors perpetrated by individual members of the in-group.[23] This is what is occurring currently with the application of the title of "terrorist" to people of Arab ethnicity but not to in-group members who commit similar crimes.

Being an immigrant almost always registers the individual as a member of an out-group. However, out-group derogation is not true to the same extent for all immigrants and foreigners, this process exists on a hierarchical level. The immigrants with the least similar social identities receive the worst of the prejudice. Immigrants who are members of dominant racial or ethnic groups in the place to which they relocated may feel more integrated in the new society than minority members, resulting in less prejudicial action against them.[24] As a result, the similar immigrants will have more positive interactions with the in-group while the more distinct immigrants will have more negative interactions, resulting in a more negative self-concept as they compare their own situation to that of the other immigrants. Arab immigrants face a higher level of derogation on this scale due to the perceived incompatibility between the cultures.[25]

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[21] Matthew J. Hornsey, *Social Identity Theory and Self-categorization Theory: A Historical Review: Social Identity Theory and Self-categorization Theory*, 2 SOC. PERSONAL. PSYCHOL. COMPASS 204–222 (2008).
[22] Dominic Abrams et al., *Pro-Norm and Anti-Norm Deviance Within and Between Groups* 7.
[23] J. J. Jordan, K. McAuliffe & F. Warneken, *Development of in-group favoritism in children's third-party punishment of selfishness*, 111 PROC. NATL. ACAD. SCI. 12710 (2014).
[24] Bruce A. Bracken & M. Susan Lamprecht, *Positive self-concept: An equal opportunity construct.*, 18 SCH. PSYCHOL. Q. 120 (2003).
[25] *Id.* at 119.

When meeting new individuals for the first time, stereotypes are more commonly drawn on because an individual can use previous information to give themselves a rough idea of how to act. This situation is important for another reason. Humans have an adversity to the unknown, as their priority is their own security and survival, and an unknown means unknown threats with no way to prepare.[26] In meeting new individuals or being in new situations, the anxiety caused by the uncertainty makes the activation of base automatic mental processes more likely.

In the modern world, however, some argue that it is almost impossible to come across a truly unknown and new situation or person due to the globalization of society. While this is true, and thus decreases the likelihood of stereotype activation, the situation does not have to be conceptually new. It only has to be personally new. For example, racism and out-group hostile tendencies have been correlated in youth who lack exposure to individuals in the out-groups.[27] In relation to the Arab ethnicity, the lack of personal exposure or the abundance of biased exposure color the perception of the public, and make hostile stereotypes more abundant during interactions.

Psychological distress increases the chance of stereotype activation as well, due to certain mental conditions and various mental states occupying cognitive resources, which force the individual to rely more on automatic mental processes such as stereotypes. Stereotype amplification is linked to the availability heuristic, another mental shortcut the brain employs whereby individuals judge the probability of events based on the ease in which they can imagine the event itself.[28] This means that any actions or behavior that makes the event or behavior more easily imagined will

[26] Mashuri and Zaduqisti, *supra* note 13.

[27] MATTHEW J. HORNSEY, SOCIAL IDENTITY THEORY AND SELF-CATEGORIZATION THEORY: A HISTORICAL REVIEW, 2 SOCIAL AND PERSONALITY PSYCHOLOGY COMPASS 208 (2008).

[28] Murat Haner et al., *Safe Haven or Dangerous Place? Stereotype Amplification and Americans' Perceived Risk of Terrorism, Violent Street Crime, and Mass Shootings*, BR. J. CRIMINOL. azaa045 (2020).

increase the likelihood of stereotype activation. Additionally, the more an individual is exposed to the idea of a specific behavior or event, the more an individual believes that the event or behavior is likely, therefore amplifying the unconscious stereotypes. The more that the public is exposed to the biased stereotype in a theoretical manner without any evidence of the contrary in reality, the public is more likely to apply the stereotype upon being exposed to the subject of the stereotype. This means that the media plays an important role in the application of the title "terrorist" both in legal and social terms. Victims, whether directly or indirectly, of terrorist attacks suffer from emotional distress, so when the media constantly portrays the stereotype of an Arab terrorist, the abundancy makes the vulnerable extremely likely to accept the biased point of view.

Stereotypes, especially biased ones, are examples of behaviors that favor the in-group. Certain factors lead to an increase of these behaviors and then by extension, to stereotypes.[29] One such factor is identity strength. The more that an individual personally identifies with their in-group, the more likely they are to participate in in-group favoritism and out-group stereotyping.[30] This is why in modern society, we see that those who are more inclined to outwardly display biased stereotypes in the form of xenophobia or Islamophobia also outwardly over-display behaviors that are concurrent with their definition of "patriotism."

Identity salience plays a key role in stereotype amplification. Specifically, if a situation triggers the individual to adopt a specific social group for reference to their social identity, then it will amplify and activate any out-group stereotypes that exist in regards to the complementary out-group.[31] For instance, after a terror attack, the national identity takes over the social identity. From this, in-group

[29] Mashuri and Zaduqisti, *supra* note 13.
[30] Milan Obaidi et al., *Living under threat: Mutual threat perception drives anti-Muslim and anti-Western hostility in the age of terrorism: Living under threat*, 48 EUR. J. SOC. PSYCHOL. 567–584 (2018).
[31] Mashuri and Zaduqisti, *supra* note 13. at 44.

members determine their future action to be that which supports in-group affirming and out-group derogating stereotypes. This means that in the wake of an act of terror, American citizens act more warily and defensive against foreigners and other "out-group" members, and Arabs specifically due to the stereotypical connection with terrorism as a whole. Stereotypes also teach and reinforce behavior such as stereotypical derogation.

Historical Precedent of Legal Ostracization:

Nations all over the globe and throughout history have wielded their criminal justice system to ostracize "undesirable" social groups from the rest of society.[32] There are many historical examples of the explicit use of law to ostracize a specific group, codifying hostile out-group stereotypes, especially under perceived threat. History shows that criminal justice systems have moved from more overt, explicit legal ostracization into more subversive and implicit attempts to accomplish the same effect.

The ancient Greeks, Romans and Persians all levied taxes upon various groups to denote their social status within society.[33] The best example illustrating the psychological processes under review in this article is the tax of Jizya, which was collected by the Islamic rulers in the golden Age of Islam during the rule of the caliphates.[34] This tax was imposed only on those who were not Muslim and living under caliphate rule.[35] It was termed by the rulers as a tax owed to the government for providing security to the non-Muslim citizens of the nation as a form of religious mercy.[36] It was termed by the citizens as a badge of humiliation for their unbelief.[37] The populus of the caliphates wanted to extend this even further to require a physical

[32] Frances L Edwards & Grayson Bennett, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws* 24.
[33] Ziauddin Ahmed, *THE CONCEPT OF JIZYA IN EARLY ISLAM* 14 (2021).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 293.

badge and other limitations on the clothing that the non-Muslims would be required to wear.[38] These legal policies show the negative attitudes that the in-group expressed towards the out-group as well as the negative stereotypes that were associated with the out-group. The in-group perceives the out-groups as beneath them and weak, therefore constructing a set of legal policies that capitalizes and reinforces this dynamic by making it relevant on a daily basis.

This type of legal system has also served as a tool to reinforce the social identity and self-concept of the in-group. Ancient Greece coined the term "barbarian," which roughly meant "not Greek."[39] This was a title of legal exclusion, separating the domestic Greek citizens from the foreign non-Greeks while also fostering a sense of community and national cohesion within all Greek speaking cities.[40] This example shows the salience of different social memberships, as the citizens were loyal to their own city-state normally, but in the face of impending cultural and physical imperialism from the Persian, the Greek group membership took priority of their social identity.

The term "barbarian" still holds sway in the way individuals view the recipient of the title in modern society. Certain stereotypes associated with this term lead to expectations in the recipient's behaviors and interactions. We can see the evolution of this title from one that served to establish a positive self-concept of the members of the in-group in the face of a violent threat to a term used to derogate out-groups and eventually become synonymous with hostile out-group stereotypes.

The United States is not new to the idea of enforcing the divisions of society through the use of law and legal titles. The nation's history shows the pattern of an evolution from explicit legal ostracization to implicit ostracization under the power of broad laws.

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[38] *Id.*

[39] Michael V Bhatia, *Fighting words: naming terrorists, bandits, rebels and other violent actors*, 26 THIRD WORLD Q. 11 (2005).

[40] *Id.*

Jim Crow laws, for example, were legal mandates that required segregation of various utilities and industries to prevent interactions between African Americans and white Americans. These legal mandates were meant for the sole purpose of separating the in-group from the perceived out-group which they also perceived to be a threat, either to their safety or to their culture.[41]

Of course, these laws were used as justification for the hostile out-group stereotypes that the in-group associated with the African American community, and any event that supported these stereotypes was used as further justification for the laws. In the end, this circle of rationalization only allowed for society to provide less resources or subpar standards of care to the members of the out-group. These stereotypes and laws originated in a misguided cultural hierarchy from the pre-abolition era, and a dynamic of power and superiority that the members of the in-group did not want to forfeit. The in-group members felt threatened by the introduction of the new class of people to society and took the psychological steps in order to ease their minds of the fear.

The next phase in the evolution was the series of legal precautions and resulting social effects that came out of the attempted Communist purge. The Red Scare is a part of United States history, where society returned to the guilty until innocent legal standard that was epitomized during the Salem Witch Trials. During this time, it became illegal to be un-American, which was a subtle yet explicit way of stating that the individual was Communist. This same standard is being applied to Arab Americans in regard to being "terrorists."

This legal title was used to punish those that the in-group felt threatened by, solely due to the fact of their differing ideals that they

[41] Edwards and Bennett, *supra* note 57.

felt were culturally incompatible with their own.[42] Being found guilty meant that the individual was charged with espionage, but the suspicion or the unwillingness to testify meant a label as un-American, or "Red." This title was used to ostracize those that the in-group members perceived as a threat, individuals who could have been connected to their international enemy of the time that believed in the incompatible ideas.

While there was no official and direct legal ostracization, the use of the legal title led to social discrimination, which was directly connected to the legal implications of the title. This legal title was established in relation to the threat of violence from an out-group, and the use of it only furthered the hostile out-group stereotypes applied to the members of the out-group.

The most modern example is the Muslim Nation Travel ban. This modern attempt has never come to full fruition but is a prime example of the implicit use of law and policy to designate a perceived out-group and substantiate their threat to the members of the in-group. The Muslim Nation Travel ban established a list of nations deemed to be a threat to the in-group on it, and citizens of these nations were not allowed to travel to the United States. This policy epitomizes the modern version of this concept of legal ostracization.[43]

It has become impossible to explicitly segregate and forbid the out-group from interacting with the in-group. Instead, the policies attack someplace else, like the idea of hassle-free traveling, which has the after-effect of preventing intergroup interactions. The implicit nature of these policies is even more harmful regarding the amplification of stereotypes because the in-group members cannot blatantly justify their existence under the guise of combating threats. Instead they must further employ the hostile out-group stereotypes

[42] Elizabeth Pontikes, Giacomo Negro & Hayagreeva Rao, *Stained Red: A Study of Stigma by Association to Blacklisted Artists during the "Red Scare" in Hollywood, 1945 to 1960*, 75 AM. SOCIOL. REV. 456–478 (2010).
[43] Haner et al., *supra* note 29.

to rationalize the existence of these laws, which in turn not only propagates the idea that these out-group members pose threats but also justifies and promotes the hostile out-group stereotypes to the rest of the in-group members. It is impactful as it does not just prevent new out-group members from entering the nation, but also impacts the way that current out-group members within the nation are treated. These laws are distinct from other versions of policies that limit immigration, which is a real power and obligation of the government for the protection and development of the nation, in that these policies are based on subjective standards that directly target an out-group that is perceived to be a threat under subjective and emotional evidence. Other policies are soundly protected from this form of prejudice as they employ strict standards of scientific evidence to back their processes.

Definition of Terrorism and Other Similar Crimes:

Terrorism is a broad term as it can mean many different things and apply to many distinct situations. The term is so broad that the United Nations has failed to come to a consensus to define terrorism specifically, instead choosing to fall back on the fact that by international law, the killing of civilians is illegal.[44] This appears to be almost the only agreed upon stipulation. Of course, in order to take legal action nationally, it must be defined.

Organizational definitions can differ from federal statutes. The FBI broadly defines terrorism as to allow a wide berth for them to provide security.[45] Statutes more narrowly define terrorism, though still do not have a specific definition, instead choosing to provide examples of other crimes that would be considered terrorism.

[44] Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985–2004*, 4 CHIN. J. INT. LAW 142 (2005).
[45] Gregor Bruce, *Definition of Terrorism Social and Political Effects*, 21 (2013) 26.

18 U.S.C. § 2331(1) explains that international terrorism is any activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State, as well as be perceived as accomplishing one of three goals: to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion or affect the conduct of a government by mass destruction, assassination, or kidnapping. It also requires that the activities occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. [46]

In comparison, the FBI defines International Terrorism as violent or criminal acts committed by individuals or groups who are inspired by or associated with designated foreign terrorist organizations (FTO) or nations.[47]

The United States statute that defines "domestic terrorism," 18 U.S.C § 2331(5) is almost identical to the statute for international terrorism, with the same subjective diction, but instead of the requirement for a foreign connection, the activities must occur primarily within the territorial jurisdiction of the United States.[48]

The FBI defines "domestic terrorism" as violent or criminal acts committed by individuals or groups to further ideological goals

[46] 18 U.S.C § 2331(1).
[47] Terrorism | Federal Bureau of Investigation, Federal Bureau of Investigation (2021), https://www.fbi.gov/investigate/terrorism (last visited Feb 10, 2021).
[48] 18 U.S.C § 2331(5).

stemming from domestic influences, such as those of a political, religious, social, racial, or environmental nature.[49]

Hate crimes have a similar "multiple definitions dilemma." 18 U.S.C. § 249(a) defines hate crimes as offenses involving actual or perceived race, color, religion, or national origin, actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.[50] The important distinction to make note of in this definition is the fact that the perceived difference can be simply perceived and is not required to be real.

The FBI defines hate crimes as criminal offenses against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.[51]

The international terrorism statute allows for individuals to be connected to international means by its broad standards, where the attorney can determine whether the requirement for international connection is satisfied. This lack of standardization in the determination of what connection satisfies the requirement allows for the over-application of the international terrorism statute to various individuals based on loose correlations. The FBI standard for international terrorism requires simply a connection to a FTO, which is already skewed with approximately two-thirds of the list being made up of organizations that identify as Arab or Muslim,[52] which has been utilized interchangeably in American society despite the differences.[53] With this, it means that a large population of people

[49] Terrorism | Federal Bureau of Investigation, Federal Bureau of Investigation (2021), https://www.fbi.gov/investigate/terrorism (last visited Feb 10, 2021).
[50] 18 U.S.C. § 249(a).
[51] Hate Crimes | Federal Bureau of Investigation, Federal Bureau of Investigation (2021), https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Feb 10, 2021).
[52] Dana M. Janbek, *Terrorism in the Age of the Internet: The Case of Muslim Arab Foreign Terrorist Organizations*, 10 J. RELIG. THEOL. INF. 9 (2011).
[53] *Id.* at 5.

perceived as Arab, whether members of the out-group or not, are subject to a variety of investigative procedures that are not necessarily directly connected to prosecuting the crime of terrorism.

The statute for terrorism also has an intention requirement which despite the clear designation of what intention is needed for a terrorism classification, the subjective perception of whether the intention is present has no standard for the determination. The application of this statute is subjective to the interpretation of those involved in the trial, whether the prosecutor, judge or jury, which takes away from the objective language of the statute. The prosecutor can decide to not to charge individuals with terrorism due to the lack or presence of the intent. The subjective application of the domestic terrorism and international terrorism statute coincide with the psychological trend where most solo incidents of domestic terrorism are attributed most to individuals with mental health issues, which would not satisfy the intent requirement of the statutes.

However, on the other side, incidents of international terrorism, whether perpetrated by individuals or groups, are connected to larger organizations, which is used as satisfying the intent requirement because the larger organizations profess larger ideas that meet the terrorist intent. This same automatic association cannot be applied to domestic terrorism statutes for two reasons. First, classification as a terrorist organization implies terrorist intent, but since there exists no overarching database of domestic terrorist organizations, no automatic connection and assertion of intent is possible. Second, incidents of domestic terrorism that have been associated with larger organizations are less collectively associated with terrorist intent, instead attributing the demographics of the victims to the cause of the offense and therefore being labelled as hate crimes. It is worth noting that the incidents that are labeled as hate crimes under federal statute are also applicable for investigation under the domestic terrorism definition of the FBI. The resulting investigation's focus is subjectively determined by the FBI and

dictates the socially acceptable action they can take in the pursuit of justice. Such a determination is dependent on whether the administration believes there to be an impact from the bias of the offender.

The similarities between hate crimes and terrorism are the *intent* and the *purpose*. These activities are both founded upon ideological differences that utilize extreme violence to pressure either the target society or population to change to meet the standards of the perpetrators.[54] The similarities between hate crimes and terrorism has led to many domestic incidents by perpetrators espousing extremist ideologies to be classified as hate crimes when a terrorist label would be more apt.[55]

The United States statute for international terrorism and subsequent investigations and trials are supported by Material Support Laws under 18 U.S.C. § 2339A and 18 U.S.C. § 2339B which make it a crime to provide material support to either a terrorist or a terrorist organization.[56] In terrorism prosecutions, these statutes are used frequently to the point where they are seen as imperative tools in the "war on terror."[57]

There have been several attempts to challenge material support, mostly under the claim that it criminalizes association unconstitutionally, however, the Supreme Court has failed to accept this view,[58] claiming that despite its breadth, it specifically criminalizes clear actions.[59] The Supreme Court has defended the

[54] Helen Taylor, *Domestic terrorism and hate crimes: legal definitions and media framing of mass shootings in the United States*, 14 J. POLIC. INTELL. COUNT. TERROR. 227–244 (2019).
[55] *Id.*
[56] 18 U.S.C. § 2339.
[57] Wadie E. Said, *Terrorism Prosecutions, Material Support, and Islamophobia*, 40 COMP. STUD. SOUTH ASIA AFR. MIDDLE EAST 245 (2020).
[58] Rachel E VanLandingham, *JAILING THE TWITTER BIRD: SOCIAL MEDIA, MATERIAL SUPPORT TO TERRORISM, AND MUZZLING THE MODERN PRESS*, 39 CARDOZO LAW REV. 55.
[59] Holder v. Humanitarian Law Project, 561 U.S. 1, 8 (2010).

statute itself for its constitutionality, yet it has failed to address the biased application of the law disproportionately against specific groups of individuals. "Material support" is an extremely broad term which is used to indicate providing any aid or having a connection or suspected connection to a terrorist or terrorist organization. The Congressional intent behind the Material Support legislation is to prevent terrorist organizations from financing their criminal activity under the guise of charitable fundraising.[60] While this reasoning is sound, its application overextends into areas of legitimate association that does not further the illegal aims of the organization, such as support to organizations that participate in legitimate charitable development in war-torn areas, or instructional support in legal methods to advocate their organizational goals.[61] This overreach taints the designated organizations, already skewed against Arabs,[62] and applies the "terrorist" title and resulting psychological effect to all associated members and programs, damaging the legitimate causes of an already marginalized group.[63] This ethnic-based designation in turn creates self-perpetuating law enforcement bias and prosecutorial outcome[64] and no means by which the Arab ethnicity can legally defend themselves. The Supreme Court has adopted a precedent of selective application of the statutes, meaning that unless there is direct evidence of biased prosecution in the defendant's specific case, then there is no recognized validity to their challenge.

Material Support statutes are not subjective as written, instead the subjective nature stems from the list of designated terrorist organizations and its sole focus on foreign organizations. In order for these statutes to be applied during prosecution, there must be some connection to a designated terrorist organization. Domestic terrorism does not fall under these material support laws solely due to the lack of an overarching list of groups designated as terrorist

[60] Said, *supra* note 77 at 244.
[61] *Id.* at 245.
[62] *Id.* at 244.
[63] *Id.* at 245.
[64] *Id.* at 246.

organizations. This pattern is evident of the bias against the out-group and its members.

Mass violence is not an official legal title, but is applied to a class of activities that, from a legal sense, are just considered murder or sometimes hate crimes. Mass violence activities are defined by Substance Abuse and Mental Health Services Administration (SAMHSA), a sub organization of the United States Department of Health and Human Services, as violent acts typically targeting defenseless citizens with the intent to harm or kill.[65] This definition is also extremely broad, and there are no specific requirements used by this government agency for determining which activities are to be classified as mass violence.

The public and the justice system take a similar approach, as the distinction between incidents of mass violence and terrorism determines the approach to the action in terms of response and investigation; but both entities take a liberal approach in defining and classifying these activities, resulting in almost completely subjective determinations.

The similarities with terrorism involve the victim types and a small overlap with intent, as both classifications require that the victims be citizens or non-combatants and the intent be perceived as instilling fear of some kind through using violence and harm. If anything, the definition for mass violence is narrower than the definition for terrorism as there are certain non-violent actions that can be considered terrorism. Despite the appearance of all mass violence falling under the umbrella of terrorism, certain activities, like mass shootings, do not fall under the current terrorist framework simply because gun use is not considered applicable for the

[65] Incidents of Mass Violence, Samhsa.gov (2020), https://www.samhsa.gov/find-help/disaster-distress-helpline/disaster-types/incidents-mass-violence (last visited Feb 10, 2021).

designation of terrorism.[66] Terrorism requires the perception of greater weapons of mass violence.[67]

Effect of Violence on Perception of Out-Groups:

Stereotypes are used primarily for immediate quick reactions. Certain factors can cause the automatic mental processes, stereotypes, to take over more easily. This section will focus more specifically on the effect of factors such as the fear of threats, stereotyped hostile intergroup interactions and fear in general. At the core of this concept is the general effect that having negative stereotypes has on the perception of outgroups. Merely by these negative stereotypes existing, coupled with the fact that the majority of people know about them, the perception of threat exists on some level and serves as an unconscious basis for negative expectations regarding the out-group members' behavior when interacting. These negative expectations make the individual anticipate hostile or unpleasant interactions, which may make the individuals of the in-group feel threatened merely at the prospects of interacting with the out-group.[68] It makes no difference whether the individual believes in the negative stereotypes. The foundation for threat-based perception is still present because being aware of the stereotypes provides information to the automatic brain, which utilizes all available information to think about every possible situation and how it might impact survival. Simply put, it is a less costly error to an individual's survival to react to a possible threat when none in fact exists than to not react to a threat when one is present.[69]

Two main types of perceived threats will be discussed in this section: realistic threats and symbolic threats. Realistic threats are perceived threats to the political and economic power of the in-group as well as general threats to the well-being of the members of the in-

[66] Taylor, *supra* note 79.
[67] *Id.*
[68] Stephan et al., *supra* note 24.
[69] Miller, Maner, and Becker, *supra* note 18.

group.[70] This type of threat can take many forms, ranging from attacks on a large gathering of people, to directly attacking the government, to hacking and interfering with the US banking system. Symbolic threats are perceived threats to the worldview of the in-group.[71] These can take the form of differing values, beliefs, morals or attitudes.[72] Symbolic threats are often associated with racism and general xenophobia, which has on occasion been enshrined in law. The legal efforts to codify racism in the modern age do not normally last due to the fragility of the automatic processing of a symbolic threat. True symbolic threats are those that seek out to destroy the worldview of the in-group, making them essentially physically harmless. This is why normally symbolic threats are usually coupled with realistic threats.

Studies have shown that in the presence of symbolic or realistic threats, there is an increase in negative attitudes and application of out-group stereotypes on individuals of the perceived out-group. These increases are almost negligible in comparison to when there is a presence of both symbolic and realistic threats, at which point there are significant negative attitudes and applications of out-group stereotypes to individuals of the perceived out-groups.[73] These threats do not need to be real. In fact, they only need to be felt by the individual, and they do not need to be supported by any evidence whatsoever. This behavior pattern may appear risky, but it is considered an acceptable risk by the human brain because it is more acceptable to overreact in the case of a false threat then to underreact in the case of a true threat. Terrorism maintains a coupling of symbolic and realistic threats. The fear of terrorism therefore increases the use of hostile out-group stereotypes towards the Arab population due to the stereotypical association.

[70] Stephan et al., *supra* note 24.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 6.

Social groups, and by extension nations, were formed to provide security to the individual. Therefore, national safety benefits its citizen's self-concept.[74] On the other hand, this national self-identity can lead to the further derogation of out-groups through the extreme application of the national self-identity. The more that an individual identifies with their national identity (identification strength), the more likely it is that they will associate their national identity with personal safety and the more threats they will perceive from out-group members.[75] The most modernly applicable example of this is the correlation between those that spout "patriotism" and xenophobia. Out-group derogation in a form of hostile out-group stereotypes serves as a tactical and defensive strategy for the in-group members to secure their positive self-concept. This behavior is only heightened and increase in the presence of perceived threats, such as terrorism.

One of the main factors that impacts the effect of violence and threats on the in-group's perception of out-group members is the proximity of the threat, either in physical or psychological terms. The closer a threat seems to the individual the more likely the individual is to perceive the out-group negatively and apply biased stereotypes to its members. Physical proximity is the likelihood or chance that the threat could occur to the individual.[76] Studies have shown that internationally, individuals are generally adequate at estimating the likelihood of violence, like the probability of war breaking out or threats from foreign bodies.[77] Domestically, individuals are much less reliable. People can correctly identify their risk of job loss or other soft events, but they severely overestimate the likelihood of criminal victimization in general.[78] An individual solely focused on their risk from threats feels heightened anxiety and continuous application of intergroup anxiety and the general anxiety that controls our social

[74] Tajfel and Turner, *supra* note 9.
[75] Obaidi et al., *supra* note 31.
[76] Das et al., *supra* note 35.
[77] Haner et al., *supra* note 29.
[78] *Id.*

interactions.[79] Psychological distress causes individuals to overestimate threat and perceive danger wherever in spite of evidence to the contrary.[80] Therefore after a proximal act of terror, such as the September 11th terrorist attack of 2001 (9/11) or the Oklahoma City bombing of 1995, people are more likely to overestimate the likelihood of future terrorism in the United States and therefore apply hostile out-group stereotypes out of unfounded concerns for their safety.

Blascovich's biopsychosocial model of challenge and threat supports this. The theory states that when perceived threats are coupled with limited cognitive resources, which are being occupied by the fixation on the psychological distress, then the situation will promote destructive avoidance behaviors. Such behaviors normally take the form of hostile out-group stereotypes, so that the in-group can rationalize the lack of interactions and ensure the façade of security.[81]

Psychological proximity is the likelihood or closeness that an event would affect the worldview of the individual.[82] For example, it is those events that upon hearing about them on the news, "shake you to your very core." These are not general incidents of crimes but incidents that go against what an individual would believe to be decent or humane or even acceptable, such as 9/11. This also applies to events in which the factors of the situation and features of the individuals involved are closely mirrored. For example, foreign acts of terror against American citizens. Both physical and psychological proximity correlate respectively with realistic and symbolic threats. Therefore, the closer that an event is both physically and psychologically, the more likely the threat is to invoke the use of hostile out-group stereotypes.

[79] Miller, Maner, and Becker, *supra* note 18.
[80] Haner et al., *supra* note 29.
[81] Mashuri and Zaduqisti, *supra* note 13.
[82] Das et al., *supra* note 35.

This overestimation in general is most closely linked with the availability heuristic as well as the negativity bias. The media spends more time covering violent tragedies than other events in society, leading to an overabundance of examples for the automatic brain to use in order to justify its actions, triggering the availability heuristic.[83] Negativity bias is a tendency for humans to remember negative events more clearly and more often and on a graded scale.[84] This is due to the fact that successes are not often very good instructors for behaviors. Instead, an individual is more likely to remember a bad situation and prevent the same event from occurring in the future. Therefore, under the negativity bias, people more often remember the truly horrific events than the good events, leading to an overwhelming presence of negative expectations and thoughts in one's mind when interacting with the specific person that has some similarity to the factors of the memory. With these two things together, it is often said that fear is a political construct that is publicly-maintained and an exaggeration of the public's anxieties made real.[85]

Violence is often viewed by society under an outwards lens to the detriment of out-groups and theoretically to the detriment of the in-group. The presence of out-group stereotypes limits the focus of the in-group so that they use tunnel-vision to see the threat of specific types of violence from specific out-groups, but are blind to the same threat of violence from members of the in-group.[86] In modern society, the in-group gets so focused on what they deem to be their scourge that they will overlook the internal actions for the sake of unity. In the end, it becomes less about the actual threat of violence, and more about the threat of the out-group. Transgressive behavior from members of the in-group is viewed as deviant, while the same behavior from members of the out-group is deemed systematic,[87] which only provides support and further inflexibility to

[83] Haner et al., *supra* note 29.
[84] *Id.* at 1618.
[85] *Id.* at 1610.
[86] *Id.* at 1619.
[87] D'Orazio and Salehyan, *supra* note 33.

the very same negative stereotypes which initially induced the tunnel-vision.

Effect of Terrorism on the Public:

From a psychological standpoint, terrorism serves to reinforce the fears and threats that the in-group members feel from the out-groups. This leads to further employing the out-group stereotypes that are hostile to intergroup interactions.

After an act of terrorism, the members of the targeted community hold a relatively negative self-concept, in an attempt by their psychology to try and prevent future similar events from occurring.[88] This negative self-concept amplifies the self-defensive qualities inside the individuals of the in-group, causing them to exhibit more hostility against the threatening out-group. This also makes the members of the in-group more susceptible to manipulation, under the guise of protecting their society from the threat of the out-group, which has in the past led to biased and ethnically motivated laws such as travel bans and no-fly lists.[89]

The main after effect of a terrorist attack is a push, not for a solution or compromise or mediation for the issues that caused such an extreme form of violence to occur, but rather for a return to "how it was before," despite the obvious detriment to the out-group. The public demands from the government more policies that reinforce the existing hierarchies rather than solve the problem for future times.[90] An example of this from our nation's history is the AEDPA passed after the Oklahoma City bombing in 1995. The anti-terrorist act was passed in an attempt to ease the minds of the population and provide security, however, this legislation was aimed against immigrants, implying terrorist behavior and taking the form of

[88] Das et al., *supra* note 35.
[89] Haner et al., *supra* note 29.
[90] *Id.* at 1620.

immigration law reform.[91] The AEDPA did little to impact terrorism chances, showing how the public was satisfied with legal action that repaired the resulting fear of out-group members by solidifying an advantageous position, but did not address the instigating incident.[92]

Media coverage is an important aspect to consider when analyzing the relationship of terrorism and its effects on the public. The purpose of news in modern society is less about providing objective stories about all aspects of life, but instead curating the information to tell the target audience exactly the stories that they want to hear. This is detrimental regarding terrorism and the biased application of terrorist legislation.

Studies have shown that attacks committed by individuals of Arab ethnicity receive 44% more media coverage than attacks committed by individuals with non-identified or non-Arab ethnicities.[93] This relates back to the availability heuristic, in which the more examples that are available to the unconscious mind, the more likely it is to apply the correlating stereotypes to intergroup interactions as well as the belief of the threat from the out-group.[94] The media coverage of terrorism amplifies the activation of these hostile out-group stereotypes. Media's selective focus causes the public to lump all individuals of the similar social group, in this case the Arab ethnicity, together under the guise and stereotypes of the terrorists, which increases the intergroup tension and hostility of intergroup interactions.

Media also use frames that subtly implant a specific story or correlation of facts into the minds of viewers without explicitly stating it. A 2011 study of media framing found that incidents committed by individuals that could be perceived as domestic terrorists were unconsciously portrayed as minor threats with a correlation to the

[91] Solbakken, *supra* note 82, at 1399.
[92] Whidden, *supra* note 101.
[93] Taylor, *supra* note 79.
[94] Haner et al., *supra* note 29.

individual's mental health problems, while incidents involving individuals connected to the Arab ethnicity and Jihadist ideology were unconsciously portrayed as a coordinated threat with a correlation to a hostile outside invader.[95] This media framing not only serves to further ostracize the members of out-groups by perpetuating hostile stereotypes but also victimizes in-group offenders so that it develops stereotypes that the in-group members that commit similar crimes are not guilty but instead sick.

Media were found to be intrinsic to the United States legal system as they set expectations about policy content, authority, and control.[96] The effect of the media on the application law is one of the most important relationships in establishing the ethnically biased application of the title terrorist in the legal system. Constituents who do not agree with the application of the terrorism legislation and the title "terrorist" will elect and put into power individuals who think similarly to them or that can best satisfy their desire for security, potentially leading to or preventing a governmental paradigm shift. This is what occurred in the 2004 election, where despite the issues with the economy and Iraq, the United States population believed in President Bush more to deal with the terrorist threat than John Kerry.[97]

Application of "Terrorism" Along Ethnic Lines:

The majority of incidents that have been associated with members of the in-group are designated as either murder or hate crimes, not domestic terrorism. This can be linked to the trend of mass violence committed with methods that are not generally considered under the definition of terrorism, such as a gun. However, this legal trend can also be linked with the psychological preference

[95] Taylor, *supra* note 64, at 228.
[96] *Id.* at 233.
[97] Paul R Abramson et al., *Fear in the Voting Booth: The 2004 Presidential Election*, POLIT BEHAV 24 (2007).

of the in-group to distinguish themselves from the members of the out-group.

The targeted out-groups have changed over time, but the current out-group from which the in-group members feel the greatest threat is those of Arab ethnicity. This fear goes against the statistical and governmental trends, demonstrating that there are greater incidents of mass violence or supposed domestic terrorism than international terrorism.[98] Yet members of the American public overestimate the threat of international terrorism and desire to see greater policy change to combat this threat.[99]

An imperative tenet to this ethnically-biased application of law is the material support laws. These laws are subjective in their application due to the broad definition of material support. Recent reports have indicated a pattern of these laws being utilized as pre-emptive prosecutions, for law enforcement to target individuals that they perceive to have an ideology, religion, or ethnicity that they believe to threaten national security.[100] This maintains support from the effect of stereotype amplification, as the members of the in-group, even those put into positions of law enforcement, are subject to the influence of hostile out-group stereotypes.[101] This makes them more likely to believe that a member of out-group is capable of specific crimes of violence that members of the in-group are not capable of.[102] This effect is two-fold if the violent action is consistent with the out-group stereotypes. For example, with terrorism, law enforcement would have an easier time monitoring an Arab individual based on suspicion to commit terrorism or under material support laws than the same situation involving a non-Arab individual. This effect is increased if the violent crime has some connection to race or ethnicity because it induces the context-dependent tenet of

[98] *Id.* at 228.
[99] *Id.*
[100] *Id.* at 231.
[101] Haner et al., *supra* note 29.
[102] *Id.*

social identity, and makes individuals think along the lines of their own ethnicity, therefore activating all ethnicity-based stereotypes for the out-group.

A study done in 2014 has shown that, at the time the study was conducted, the material support laws were utilized preemptively in 94% of prosecuted international terrorism cases.[103] It is impossible to determine the efficacy of material support laws should they be applicable to domestic terrorism because they work off of a list of designated terrorist groups. This list exists for foreign organizations, a majority of which are Arab organizations, while the same such list does not exist for domestic terrorist organizations.[104] This epitomizes the reluctance of the in-group to classify their fellow members in categories that can deem them similar to the members of the out-group.

This trend of ethnically-biased application of the "terrorist" title began with the 9/11 attack. This was the first domestic terror attack to strike such extreme fear into the population, through both physical and psychological proximity.[105] From that point, there has been a perceived evident threat from an out-group. As similar events kept occurring, the public became more likely to attach blame to the Arab ethnic group, as it was consistent with the hostile out-group stereotypes that served to protect them, either through protection from actual threat or from a negative self-concept.

This blame took the form of legal prosecution. The politicians that rise to power after terrorist attacks tend to have a more aggressive stance on prosecuting terrorism, which, by extension, likely reflect similar hostile out-group stereotypes held by the voters who elect them.[106] This trend is best seen following the Oklahoma

[103] *Id.*
[104] Taylor, *supra* note 79.
[105] Das et al., *supra* note 35.
[106] Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, *in* BIOTERRORISM: THE HISTORY OF A CRISIS IN AMERICAN SOCIETY

City bombing in 1995. Despite being an incident of domestic terrorism, the feelings of insecurity and resulting desire for action immediately following the attack led to a bipartisan Congressional effort that led to the Anti-Terrorist and Effective Death Penalty Act (AEDPA) being passed in 1996.[107] The feeling of insecurity in the safety of the public, despite being brought on by an incident of blatant domestic terrorism, was aimed towards members of the out-group, with the AEDPA doing nothing to prevent general terrorism, instead being aimed directly at international terrorism, through adjusting immigration law and procedure.[108] One study examined almost 300 cases of right-wing extremism, the most prominent cause of domestic mass violence and domestic terrorism, and found that the Justice Department only applied anti-terrorist legislation to 34 of the cases, instead preferring other criminal charges such as murder or conspiracy.[109] This distinction is most relevant when we look at the penalties for these actions. Excluding the 34 terrorist cases, unless charged with murder, the majority of the cases will likely be paroled at some point, or at least there is the chance of release due to the belief that they can be reformed. This stems from the idea that their deviant behavior is not systematic of their identity. On the other hand, those charged with terrorism have no hope of release or reform, as their deviant behavior is deemed to be systematic of their identity.

It is important to examine how even though there is no legal title for a "mass shooting" or incident of "mass violence," these titles can still be seen throughout the reporting of the relevant crimes. This title is primarily applied to instances where the perpetrator is a member of the in-group. To choose a different title to classify actions

253–282 (David McBride ed., 1 ed. 2020), https://www.taylorfrancis.com/books/9781000289602/chapters/10.4324/9781003123682-25 (last visited Mar 21, 2021).

[107] Lisa C Solbakken, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOKLYN LAW REV. 31.

[108] Whidden, *supra* note 101.

[109] Taylor, *supra* note 79.

that closely mirror acts of terrorism is to diminish their severity and equivocate such horrendous actions with less psychologically inducing crimes.

Even though government analysts deem domestic terrorism and incidents of mass violence to be a significantly greater threat to the citizens of the United States than incidents of international terrorism,[110] downplaying such incidents as murder does not evoke the media attention or psychological proximity needed to bring them to the attention of the in-group members. This prevents in-group members from invoking the availability and negativity biases in their thinking processes, making it less likely for them to see the threat that domestic terrorists pose. In-group members are therefore more likely to ignore the "deviant" behavior in favor of unity, and less likely to attribute the same title as members of the out-group in future similar events.

Effect of Legal Application of the Title "Terrorist":

The overarching effect of the use of the title "terrorist," in society and law by extension, or vice versa, is that it reinforces the segregating principles between the in-group and out-group, under the guise of security, further widening the chasm between the two parties. By showing negative perceptions and actions towards people of Arab ethnicity, we are only decreasing their negative self-concept.

The use of this title only serves to further widen the chasm that spans between the two groups, reinforcing negative stereotypes and behaviors against the out-group.[111] The use of the title "terrorist" entrenches the fear that the in-group has of the perceived out-group, which can cause the creation or maintenance of discriminatory policies. The fear is mainly directed at those of the threatening out-group, but this is not an isolated fear. The fear is also directed at

[110] *Id.* at 228.
[111] Bracken and Lamprecht, *supra* note 25.

other perceived out-groups, which can have detrimental effects for communities within the in-group that are already marginalized.[112]

There is an increase in all out-group stereotypes and hostilities in response to terrorism, though at different levels, which is why there can be small groups within the in-group, as determined by their identification strength and saliency, that exhibit racist and general xenophobic tendencies. These groups overgeneralize the threat they fear from the individuals of Arab ethnicity to other perceived distinct groups. Once the title of "terrorist" is assigned, regardless of how subjective or objective the determination is made, it is swept up in a tide of media priming and other general acquiescence to the traits and behaviors associated with the stereotyped title. When an ethnic group is associated with such a title, there is little effort to associate the ethnic group as a whole to the title and associated stereotypes. This will only go to further strengthen and solidify feelings of intergroup tension and out-group hostility.

In response to this prejudice, the out-group responds with their own self-defensive prejudice against the in-group. This pattern of biased application of the title "terrorist" along ethnic lines not only makes it more likely that future similar incidents involving people of Arab ethnicity will be deemed as terrorism, with less required evidence to convince the public. Ethnically applying the title also makes it less likely that future similar incidents involving people of non-Arab ethnicity will not be deemed as terrorist acts, instead opting for less psychologically charged titles like murder or mass violence. Ethnically applying the title reinforces the hostile out-group stereotypes against the out-group, increasing the perceived threat, but also does the opposite to members of the in-group. It reinforces unifying in-group stereotypes and in-group favoring behaviors that result in decreasing the level of perceived threat.

[112] Taylor, *supra* note 64, at 238.

The most modern expression of this pattern began with the attack on September 11th of 2001, and some theories state that the fear of the threat of terrorism that currently overwhelms the public may be a part of the same wave of fear resulting from the attack, due to the perpetuation and reinforcement by society and its behaviors.[113] This has resulted in society engaging in ethnically biased behavior, which has the potential to dangerously evolve as the threat persists. Studies have shown that a patriotic or heroic mythos created in the face of immense threat is used to justify or excuse the actions of individuals that under normal circumstance would be inexcusable; but in contrast to the greater evil of the perceived out-group, such actions become acceptable.[114] This can be seen in the trend of various right-wing political groups calling specific individuals charged with hate crimes against the Muslim and Arab community as heroes in their own regard for their actions that further the "security of the nation and its people."[115]

To be labeled a "terrorist" is a governmental and political tool to deny the legality of their cause and emphasize the necessity of law and order no matter the cost.[116] This thought process is a slippery slope as it permits inhumane and other controversial treatment to individuals that are subjectively determined to be a threat to the nation. The "enhanced interrogation techniques" employed at Guantanamo Bay are one of the most well-known examples of how far the law can be stretched against a specific group of people. Such supposed "terrorists" were denied representation and held without firm evidence, with the stated purpose of protecting national security. The Supreme Court has already ruled against this trend, as the social belief in the distinctive nature of out-group members and

[113] Bhatia, *supra* note 64.
[114] *Id.* at 19.
[115] Jason Burke, Norway mosque attack suspect 'inspired by Christchurch and El Paso shootings' The Guardian (2019), https://www.theguardian.com/world/2019/aug/11/norway-mosque-attack-suspect-may-have-been-inspired-by-christchurch-and-el-paso-shootings (last visited Apr 13, 2021).
[116] Bhatia, *supra* note 64, at 14.

the desire to deny them the same benefits and protection as members of the in-group, being ultimately found unconstitutional in cases such as Rasul v. Bush,[117] Hamdan v. Rumsfeld,[118] and Boumediene v. Bush.[119]

These court cases corrected a pattern of denial of justice to foreigners in blatant violation of international law.[120] The explicit violation of human rights to foreigners in the face of terrorist fear is a slippery slope that was destined to eventually erode the same civil liberties for United States citizens.[121] The AEDPA shows how this pattern, though corrected on an explicit level, bled into the civil liberties of citizens, in an implicit, as applied manner. While the AEDPA has not come before the Supreme Court yet, various lower-level courts have attempted to interpret the legislation and found that while the application is suspect, the legislation itself is constitutional.[122] All previous challenges have been brought with respect to the Fifth Amendment due process or separation of power principle of Article III,[123] yet some theorize that a challenge to the Suspension Clause would illuminate the constitutional friction that

[117] Rasul v. Bush, 542 U.S. 466 (2004). The right to habeas corpus was not found to be reliant on citizenship status, as individuals detained in Guantanamo Bay were not able to be forbidden from challenging the constitutionality of their detention.
[118] Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Due to the lack of express authorization from Congress, the military tribunals that reside over issues in Guantanamo Bay had to comply with the ordinary laws of the United States and the laws of war. The Geneva Convention was held to be part of the ordinary laws of war and enforceable by the Supreme Court in Guantanamo.
[119] Boumediene v. Bush, 553 U.S. 723 (2008). Detainees held at Guantanamo Bay were not able to be forbidden from seeking habeas or invoking the Suspension Clause merely because they have been labeled as enemy combatants.
[120] Johan Steyn, Guantanamo Bay: The Legal Black Hole1, 53 International and Comparative Law Quarterly 12 (2004).
[121] *Id.*
[122] Karen Regan, *King Sang Chow v. Immigration and Naturalization Services: The Constitutionality of Section 440(a) of the Antiterrorism and Effective Death Penalty Act* 36.
[123] *Id.*

the AEDPA creates as it applies to immigrants.[124] This pattern of unconstitutional legal application is even more apparent when taken into consideration that the AEDPA has been applied exclusively to people of Arab ethnicity and not all immigrants equally.[125]

Such treatment can be compared to the medieval mental asylums, where individuals were admitted based on loose definitions and criteria, and any behavior was only further evidence to support the diagnosis, using the reasoning that a doctor cannot believe an insane person who states they are not insane. Who would believe a terrorist claiming that they are not a terrorist? It is this mentality that had allowed such suspect legislation in the past. The establishment of the Combatant Status Review Tribunal (CSRT) in response to the holding of Hamdan laid out procedure for determining the combatant status of detainees.[126] The CSRT functioned off of a set of rigged procedural rules that allow specialized prosecutions normally not permitted in the standard federal court system.[127] The mentality behind the CSRT is the shared idea in policymakers that guilt has been predetermined, and any judicial bureaucracy that needed to be bypassed must be constructed in a beneficial manner to ensure that those who claim to be innocent, but are believed to be guilty, are found guilty.[128]

This standard is only further discriminatory in application when the majority of the detainees are Arab or Muslim,[129] due to little more than the mental connection to the concept of terrorism. The use of CSRT to designate individuals as combatant for the United

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[124] Nathan Nasrallah, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE WEST. RESERVE LAW REV. 1149.
[125] Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM LAW REV. 460.
[126] Brian J. Foley, Guantanamo and Beyond: Dangers of Rigging the Rules, 97 J. Crim. L. & Criminology 1012 (2006-2007).
[127] Brian J Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 63. at 1019.
[128] *Id.* at 1020.
[129] Steyn, *supra* note 124.

States' "War on Terror" is a subtle manner of designating Arab people as "terrorists" based solely on hostile out-group stereotypes, which fuel the ethnically-specific use of legislation in a style that sacrifices accuracy for support to the premature belief of guilt, in turn solidifying the public perception and validity in the hostile out-group stereotypes which instigated the designation. While the use of CSRT has been found to be unconstitutional,[130] there are still legislative statutes used that operate under the guise of constitutional, while achieving the same effect in legal application, such as the use of material support laws and the AEDPA.

Concluding Remarks:

The more that a specific correlation or concept is used, including stereotypes, the stronger and more prevalent it becomes in the future. If this behavioral pattern continues to progress unchecked, then it could very easily transition into society-backed and state-sponsored explicit stereotyping and discrimination, leading to an almost permanent feeling of mutual threat between the two social identities and continuous hostility. An analytic comparison into the origins of the internal Middle East policies that perpetuate the Arab-Israeli hostilities may be beneficial to further understand the growing trend in the United States against the Arab ethnicity.

Looking at our historical and contemporary policies, the United States is not blind to this detrimental behavior pattern. America seems to have evolved as a society as we kept fixing these discriminatory behavior patterns. However, it appears as though the out-group is simply constantly shifting to different social identities. For example, the out-group prior to the Arab ethnicity were Latino immigrants, and while their discrimination is far from over, these transitions are not cut on sharp lines. We are in a transition period, where the hostility is shifting more and more from the Hispanic immigrants or "aliens" to the Arab immigrants or "terrorists." This

[130] Boumediene v. Bush, 553 U.S. 723 (2008).

trend is evident in 2021 as the President Biden is making strides towards striking the word “alien” from the United States statutes.[131] This is a move in the direction of integration and accepting the previous out-group into the dominant culture and population by getting rid of distinguishing and stereotypically laden titles.

While the use of the title “terrorist” has devolved into stereotypical application of the term along ethnic lines in response to perceived out-group hostility, and increases the very same perceived out-group hostility which is causal to the phenom, it is important to note that not all psychological examples of intergroup relations in the legal system are negative. The intergroup relations are foundational to our very own society, and while they can be used negatively, they are still imperative to the social development of everyone, teaching appropriate social behavior from deviant social behavior.

A prime example of this is in the criminal justice system as a whole. Through the legal system, the United States has codified behavior that is acceptable and behavior that is deviant. The intergroup relations come into play regarding the title of “criminal.” We designate those in the out-group within our society as “criminals” when they have been proven to engage in deviant social behavior. The chance for abuse with this title comes from either the subjective application of this title upon specific social groups without firm evidence or from the perpetuation of the title past the time of reformation.

Several steps can be taken to move towards a less ethnically-biased use of the legal title “terrorist,” which can result in better relations between the in-group and out-group, and allow for the government and justice department to direct their focus away from maintaining internal order. The first proposed step is to determine a

[131] Sarah Al-Arshani, As a symbolic gesture to reframe America as a land of immigrants, Biden wants to remove the word 'alien' from immigration laws, Business Insider (2021), https://www.businessinsider.com/biden-wants-to-remove-the-word-alien-from-immigration-laws-2021-1 (last visited Feb 10, 2021).

specific definition and a set of objective criteria for both international and domestic terrorism. These have been kept broad due to the many distinct forms that they can take, but a specific definition and set of criteria will move towards the equal application of the title before it becomes permanently ethnically synonymous. There also needs to be set of objective criteria to determine the terrorist intent required for the application of terrorism legislation. This can either take the form of Congressional legislation or a Supreme Court litmus test as was done with communist association and the degree of membership established in *United States v. Robel*.[132]

Another step is the expansion of the material support laws to domestic terrorism or the removal of the material support laws in general, as they are a tool for threat determination that is specifically limited in a subjective and biased direction. Analysis of their true use and effectiveness is an important potential future course of research, but they ought to also be applied to domestic terrorism as to allow law enforcement to take the same precautionary steps as they do with international terrorism. The one-sided appearance of precaution against international but not domestic terrorism gives the perception of a greater risk from international terrorism, which has many harmful effects.

Additionally, working with the international community to develop a strict definition for terrorism is imperative, as it will foster cooperation and prevent terrorists from seeking asylum in the international community without severe international repercussions. The purpose of this step is that most Foreign Terrorist Organizations (FTO) take asylum in nations that are not on the best terms with the United States politically, which tend to be mainly Arab nations, and therefore gives the appearance of a correlation between the terrorist nomenclature and the Arab ethnicity.

[132] United States v. Robel, 389 U.S. 258 (1967).

From a psychological standpoint, the best course of action is both exposure and education. Both of these strategies will work towards moving the judgement of individuals of Arab ethnicity to the manual side of cognitive processes, which bypass the automatic brain and decrease the likelihood of unconscious stereotype activation. Through these manual cognitive processes, intergroup interactions will occur that do not meet the stereotypical framework that is constructed with the hostile out-group stereotypes. These steps overall will move towards an equal application of terrorism legislation to all groups.

AMERICAN INDIANS' HARDSHIPS IN CONNECTION TO THE FAILINGS OF THE WHEELER-HOWARD ACT

Alyssa Thomas

INTRODUCTION

Although there have been numerous efforts to fight the unsightly political, social, and economic challenges American Indian tribes face today, they continue to suffer disproportionately from poor education, health, and employment levels.[133] For example, 26.8% of American Indians in 2017 were living in poverty compared to 14.6% of those in poverty in the nation combined.[134] Furthermore, in 2016, there were 161,000 miles of existing and prospective roads that qualified for federal funding on tribal land.[135] However, 75% of those roads are not paved, and that lack of infrastructural development has contributed to low school attendance rates by students.[136]

Hence, American Indian tribes have continuously been subject to numerous hardships at the hand of the federal government.[137] The federal government's role in placing hardships on American Indians is found throughout American Indian law.[138] In particular, analyzing the General Allotment Act and the Wheeler-Howard Act will showcase how the federal government's actions contributed to American Indian

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[133] Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 398 (2017).

[134] *Indian Country Demographics*, NAT. CONG. AM. INDIANS (updated Jun. 1, 2020), https://www.ncai.org/about-tribes/demographics.

[135] *Indian Country Demographics*, *supra* note 2.

[136] *Tribal Nations & the United States: An* Introduction, NAT. CONG. AM. INDIANS (Feb. 2020), https://www.ncai.org/about-tribes/demographics.

[137] Jill E. Martin, *Special Feature: The Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights*, 23 AM. INDIAN L. REV. 165, 176 (1998/1999). Martin comments on Cohen's views on fighting for Indian rights stating that the essence of the fight was that the "Government was not the enemy of the Indians, even though the Federal government had oppressed the Indian." This proves the federal government has played a role in the oppression of American Indians in the context of fundamental American Indian law.

[138] *Id.* at 177.

hardships in law. Before the Wheeler-Howard Act was enacted, the General Allotment Act wreaked havoc on reservations through the selling of land allotments, which disunified tribes and promoted assimilation.[139] To redeem itself, Congress passed the Wheeler-Howard Act.[140] Although the Act was meant to compensate for past wrongdoings, the opposite was done as American Indians are still burdened by the federal government, for example, limiting tribal governments' sovereignty.[141]

This paper aims to answer a series of questions: How has the Wheeler-Howard Act contributed to the adversities American Indians face in law? Is the federal government living up to its federal trust responsibilities, and if not, how is it not living up to such responsibilities? Was the Wheeler-Howard Act a genuine act of redemption or a façade? Are American Indians truly engaging in self-determination through tribal sovereignty? To answer these questions, I begin in section one by analyzing the history of the General Allotment Act and the consequences that stemmed from its passage. Then, I analyze how those consequences led to the enactment of the Wheeler-Howard Act. In section two, I focus on how the Trust Doctrine, or Section Five of the Wheeler-Howard Act, imposes hardships on American Indian reservations by highlighting how the federal government is in breach of its trust responsibilities. As for Section Sixteen of the Wheeler-Howard Act, which grants tribal sovereignty, the limitations of such sovereignty makes the label in and of itself an oxymoron as it is contradictory, and the connection these limitations have on tribal community's success will then become apparent. In sum, this paper will argue that the Wheeler-Howard Act was not an act of redemption, but rather a continuing source of hardship for American Indians in law.

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[139] Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 714 (1989).
[140] Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler- Howard Act As a Reconciliation of the Indian Law Civil War*, 14 U. PUGET SOUND L. REV. 211, 270 (1991).
[141] *Id.* at 223.

I. ANALYZING THE HISTORY BEHIND THE RATIFICATION OF THE WHEELER-HOWARD ACT AND WHAT TRIGGERED ITS RATIFICATION

In order to fully understand how the Wheeler-Howard Act was ratified, the General Allotment Act, also referred to as the Dawes Act, is where it begins. In other words, the Allotment Act was a separate piece of legislation that triggered the passage of the Wheeler-Howard Act.[142] The purpose of the General Allotment Act was to promote assimilation and reduce poverty by dividing tribal lands into individual allotments that could also be sold to White Americans.[143] This Act caused disunification amongst tribes and stripped American Indians of their culture by forcing assimilation in the hope that White Americans who bought surplus lands would interact with American Indians.[144] Fast forward forty-seven years to the Great Depression under the Roosevelt administration, there was much support to attempt to undo the wrongdoings American Indians suffered under the Allotment Act.[145] As a response, the Wheeler-Howard Act was adopted to develop tribes' economic state and promote self-governance, also referred to as self-determination.[146] However, the Wheeler-Howard Act casts the façade that American Indians have tribal sovereignty, when in reality, the federal government is consistently involved in American Indian affairs. Section Sixteen, the

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[142] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995).
[143] *Id.* at 9.
[144] *Id.* at 13.
[145] Sarah Washburn, *Distinguishing Carcieri V. Salazar: Why the Supreme Court Got It Wrong And How Congress And Courts Should Respond To Preserve Tribal And Federal Interests In The Ira's Trust-Land Provisions*, 85 WASH. L. REV. 603, 621 ("The 1928 Meriam Report, a detailed study of federal Indian policy, described the problems of the allotment era: massive loss of tribal land and corresponding poverty, culture loss, disruption of tribal governments, and reliance on the federal government for basic survival needs. In response, Congress passed the IRA of 1934.")
[146] *See generally* Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934). The purpose reads: "To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes."

stamp of approval of the Secretary of the Interior to amend tribal legislation.[147]

A. The General Allotment Act and the Surplus Land Program

In 1887, the General Allotment Act was ratified and served the Government's main purpose during that time period: assimilate American Indians and reduce poverty within American Indian reservations.[148]

The Allotment Act allowed for the carving and division of reservations into allotments, each of which would be granted to qualifying families or individuals.[149] The Act authorized the President of the United States, "whenever in his opinion," to survey or resurvey reservation land that is seen as advantageous for agricultural and grazing purposes.[150] Facially, the Act's purpose was to assist American Indians by providing individuals with parcels of arable land to promote agriculture and inevitably the economy.[151]

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[147] *Id.* §16.

[148] Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 520 (2013).

[149] *See generally* General Allotment Act, ch. 119, 24 Stat. 388 (1887). The section reads: ". . .to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each bead of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section."

[150] *Id.* The section states: ". . .whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows."

[151] *Id.*

But while that purported purpose may seem noble, the execution of such purpose only worsened the conditions of American Indian reservations, as the allotting of land to individuals within the reservation was a gateway for disunification. There was a feeling of broken harmony, since it encouraged individualization[152] within the reservation, while American Indian reservations are unified; "domestic independent nations."[153] Furthermore, the Act transitioned the land from being tribally-owned to individually-owned.[154]

The social decline of American Indian reservations can be attributed not only to the provisions of the Act, but also to the surplus lands program created pursuant to the Act.[155] The surplus lands program established that it was up to the President's discretion that once reservation lands were allotted in severalty, any remaining "surplus lands" would be opened up for sale to non-American Indians.[156] This was another method to assimilate American Indians, through the hope that the White Americans who purchased these "surplus lands" would interact with American Indians living on the reservation.[157]

The surplus lands program set forth in the Allotment Act caused American Indian reservations to lose around sixty million acres of land.[158] To make matters worse, the Supreme Court decision in *Lone Wolf v. Hitchcock* held that tribal consent was not required when it came to the sale of surplus lands.[159] This holding opened up the floodgates to American Indian land.[160] Two years later, Congress

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[152] Larry A. DiMatteo & Micahel J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 HAWAII L. REV. 1, 26 (1997).
[153] Royster, *supra* note 10, at 1.
[154] Pommersheim, *supra* note 16, at 521.
[155] Royster, *supra* note 10, at 13.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 567-568 (1903); *supra* note 10, at 14.
[160]. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 14 (1995).

enacted six surplus land acts without tribal consent[161] and four reservations were available to White American settlement.[162]

The General Allotment Act and the Program caused those devastating effects to American Indian reservations all in the name of assimilation and colonialism through Manifest Destiny.[163] The proclaimed purpose of the General Allotment Act states that this was a means to extend the protection of United States law to reservations.[164] Additionally, the Act described the severalty of reservation land in individual allotments as "advantageous" for the purposes of agriculture and grazing.[165] Blanketing the purposes of the Act as advantageous was, nevertheless, a method to pull the wool over American Indians' eyes. Although those may be the proclaimed purposes, however in practice, the Act disrupted tribal unity as a means to assimilate and eventually eradicate American Indian culture.[166]

B. The Wheeler-Howard Act as Repudiation for the General Allotment Act

The Wheeler-Howard Act, also known as the Indian Reorganization Act, was a course of action taken by Congress to redeem themselves from the disastrous consequences that resulted from the enforcement of the General Allotment Act.[167] Thus, the Wheeler-Howard Act includes Section Five, which discusses acquisitions for providing American Indians with land and establishes the Trust Doctrine.[168] Additionally, the Act includes Section Sixteen, which grants reservations tribal sovereignty.[169]

The catalyst in bringing those sections to fruition was Indian Affairs Commissioner, John Collier, whose primary goal was to

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[161] *Id.*
[162] *Id.*
[163] Furber, *supra* note 8, at 235.
[164] *See generally* General Allotment Act, ch. 119, 24 Stat. 388 (1887).
[165] *Id.*
[166] Furber, *supra* note 8, at 229.
[167] Washburn, *supra* note 13.
[168] *See generally* Indian Reorganization Act, §5, ch. 576, 48 Stat. 984, 985 (1934).
[169] *Id.* at 987.

overturn the Allotment Act.[170] But, before reaching the Wheeler-Howard Act that is known today, Collier's first proposal included a consolidation of multiple bills that would reorganize the structure of American Indian governments by changing the education system, improving economic infrastructures, securing land holdings, and creating a uniform court system.[171] Although Collier's proposition was trailblazing, Congress expressed opposition to his proposal[172] And as such, the proposed bill was substantially shortened from sixty sections to a mere nineteen.[173] For instance, provisions advocating for an Indian court system were among the sixty provisions removed.[174] As a result, only about 59% of the 574[175] federally recognized American Indian tribes have a tribal judicial system.[176] The sizeable reduction is attributed to the fact that senators and representatives in Congress claimed the bill lacked "clarity" and was "confusing."[177]

While the Wheeler-Howard Act may, on its face, grant many benefits, it is still constraining American Indians and causing turmoil within reservations.[178] Having said, this paper will move to Section Five, as it is well-known to reservations due to the fact that the Trust Doctrine was conceived through its ratification, and then follow with addressing Section Sixteen, which grants tribal sovereignty.

II. REVIEWING THE WHEELER-HOWARD ACT AND ITS RESPONSIBILITIES

A. Section Five: The Trust Doctrine

[170] Pommersheim, *supra* note 16, at 525.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 526.
[174] *Id.*
[175] *Tribal Nations & the United States: An Introduction*, *supra* note 4.
[176] *Indian Country Demographics*, *supra* note 2.
[177] Pommersheim, *supra* note 16, at 525.
[178] Washburn, *supra* note 13.

Section Five of the Wheeler-Howard Act establishes the long-coveted Trust Doctrine.[179] The Doctrine was a milestone for American Indian reservations[180] because it provided a sense of protection over reservations and played a key role in self-determination for these reservations.[181] In summation, the Doctrine established that any lands acquired pursuant to the Wheeler-Howard Act are put in trust under the United States, whether it be for a tribe or individual.[182] Though the purpose of the Doctrine may seem feasible, it is only another route for American Indians to receive the short end of the stick, to no avail.

Additionally, as such, the Trust Doctrine reinforces the long-held cultural misconception that American Indians are uncivilized and thus incompetent to manage their own affairs under the assertion of plenary power that Congress has when dealing with American Indian affairs.[183] The concept of plenary power dates back to medieval-era traditions of Christian cultural racism and then solidified in United States jurisprudence to allow the "superior" race, in this case the federal government, to demonstrate whatever power necessary to "civilize" indigenous peoples.[184]

With reservations in that relationship with the federal government, the Government now has federal trust responsibilities owed to American Indian tribes that is set forth by Section Five, which

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[179] *See generally*, 48 Stat. 984, 985 (1934).
[180] Washburn, *supra* note 13, at 616. ("The trust doctrine represents 'one of the cornerstones of Indian law' and serves as recognition of the federal government's special "obligation to protect tribal sovereignty and property.")
[181] Pommersheim, *supra* note 16, at 526. ("Securing the land holdings in trust for the native population was seen as the key component for both economic security and self-determination for Indians.")
[182] *See generally*, 48 Stat. 984, 985 (1934). ("Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.")
[183] William Bradford, Symposium: Tribal Sovereignty And United States v. Lara: "Another Such Victory And We Are Undone": A Call To An American Indian Declaration Of Independence, 40 TULSA L. REV. 71, 80 (2004).
[184] Id. at 81.

imposes "strict" fiduciary standards on the federal government.[185] In essence, these responsibilities consist of good faith, loyalty, and protection.[186] These enumerated duties are also established by various treaties.[187]

It is the federal government's duty to practice in good faith as the trustee of American Indian reservations. But, the federal government has ignored or accepted a low standard as it pertains to upholding their duty of good faith. For instance, in *Lone Wolf v. Hitchcock*, Lone Wolf filed for a permanent injunction against the enforcement of an agreement that detailed the cession of commonly held land.[188] Lone Wolf argued that the cession was a violation of Article 12 of the Medicine Lodge Treaty, which required that three-fourths of all adult males occupying the land cede their occupation by execution and signature.[189] Thus, Congress cannot divest tribes of their interests in land held in common by any manner other than those laid out in the Treaty.[190] Though that argument is logical and sound, the Court rejected it,[191] stating that the argument ignored the federal-Indian contractual relationship, a relationship that thrives off of tribal dependency on the United States government.[192] Furthermore, the Court backed such statement with the fact that Congress holds plenary power, because the inception of this contractual relationship born from the Trust Doctrine establishing that reservations are held in trust by the federal government.[193] The possession of this power is deemed a political power that cannot be

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[185] Janice Aitken, The Trust Doctrine in Federal Indian Law: A Look at its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope, 18 N. ILL. U. L. REV. 115 (1997). Defining native separatism as secession advocating for American Indian reservations completely separating from the United States.

[186] Rey-Bear & Fletcher, *supra* note 1, at 339.

[187] *Id.* at 403.

[188] *Id.* at 125.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

controlled by the judicial branch.[194] To further disregard American Indian tribulations, the Court harped on a presumption of "perfect good faith in [Congress'] dealings with the Indians."[195]

That presumption can also be found in a preceding case, *Cherokee Nation v. Hitchcock.*[196] In *Cherokee,* the Tribe challenged the Secretary of the Interior's decision, which he made via the authority granted to him by Congress, to issue mineral and oil leases for deposits on land held in trust that the Tribe resides on.[197] The granted authority was in direct conflict with the Treaty of New Echota, providing that the Cherokees hold "the exclusive right to the use, control, and occupancy of tribal lands," which should have made the Secretary's decision void.[198] In response, the Court recognized the good faith trust obligation the Government owes to tribes.[199] However, the Court then failed to implement their recognition. Instead, the Court stated that it is not concerned with whether the Secretary of the Interior's decision to grant the leases was sensible nor are they concerned that the decision was "calculated to operate beneficially to the interests of the Cherokees."[200] Again, their reasoning for coming to that determination was that the power vested in Congress to make decisions for tribes is political and is a question for the legislative branch, not for the courts.[201]

These two cases show the lack of accountability that the Government is held to when upholding their duty of good faith. In *Cherokee,* there is a disregard for how certain decisions directly affect tribes and the lackluster performance on the Government's part to ensure that these decisions are in the best interests of their trustor, American Indian tribes. The same analysis applies to *Lone Wolf* as the Government failed to honor the Medical Lodge Treaty. By not

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[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 125-126.
[198] *Id.* at 126.
[199] *Id.*
[200] *Id.*
[201] *Id.*

obtaining three-fourths of male tribal member signatures, the Government is, without a doubt, turning a blind eye to the consent of members. Therefore, the Government cannot possibly act in good faith on behalf of tribes if there were no measures taken to receive signatures granting consent; requiring signatures is the bare minimum the Government must do to act in good faith.

Aside from acting in good faith, the federal government must also display loyalty. Displaying loyalty means committing to fair dealing, meaning honesty-in-fact in conduct, faithfulness, and consistency with justified expectations of the other party.[202] In a recent case, *United States v. Jicarilla Apache Nation*, the Supreme Court held that the fiduciary exception to the attorney-client privilege does not apply to the federal-tribal trust relationship including tribal trust fund management.[203] In that case, the Executive Branch argued that common law fiduciary duties do not apply. Adding onto this argument, the Executive Branch went as far to assert that the United States does not represent tribal interests and does not have the duties of loyalty nor disclosure in regard to managing American Indian trust assets.[204] These are bold, dismissive statements. By the Executive Branch making these arguments, the Branch is disregarding the Trust Doctrine and retreating from their duty of loyalty.[205] Furthermore, finding reason to keep communications between them and the attorney confidential from American Indian tribes is the opposite of fair dealing. This opposition also illustrates that Congress is forgetting, although avoidance is much more likely, that they are on the "same team" as American Indian tribes and must operate in the best interests on behalf of tribes.

Lastly, the federal government must also fulfill its duty of protection. And just as the federal government failed to produce good faith and loyalty, that failure also bleeds into its duty to protect.[206] Although opposing viewpoints may inquire as to why

[202] Rey-Bear & Fletcher, *supra* note 1, at 401.
[203] *Id.* at 436.
[204] *Id.*
[205] *Id.*
[206] *Id.* at 399.

American Indian tribes accept the Government's duty of protection, if the protection is viewed insufficient by them. But, this can be attributed to the fact that "a weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."[207] This demonstrates that American Indian tribes have no choice but to fall under this protection in order to strengthen the safety of their nation. Additionally, even though the statement advocates for tribal sovereignty case law reads otherwise; but that will be discussed in the latter section. Yet, the federal government's actions constitute a breach of its responsibility to protect American Indian tribes,[208] and looking to the Government's interactions with the Nez Perce Reservation will illustrate the extent of this breach.[209]

Going back as early as 1857, the federal government began proving that breach as a high-ranking military official advocated for a proposed prospecting expedition on the Nez Perce Reservation.[210] The military official included a promise "to aid and protect" the Reservation, even though the Official was defiant in honoring numerous requisitions ordering troops to remove miners, prospectors, and settlers from the Reservation.[211] Furthermore, in 1861, the Government entered into an agreement with the Nez Perce.[212] The agreement stated that if the American Indians agreed to grant a portion of the Reservation to prospecting and mining by White Americans, the military would, in return, protect the remainder of the Reservation from unlawful invasion.[213] Unsurprisingly enough, the Nez Perce were persuaded to uphold their end, all whilst the federal government did not supply the military aid promised.[214] In

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[207] Lincoln L. Davies, *Article: Skull Valley Crossroads: Reconciling Native Sovereignty and The Federal Trust*, 68 MD. L. REV. 290, 307, 308 (2009).
[208] Julia E. Sullivan*, Legal Analysis Of The Treaty Violations That Resulted In The Nez Perce War Of 1877*, 40 Idaho L. Rev. 657, 682 (2004).
[209] *Id.* at 687.
[210] *Id.*
[211] *Id.* at 688.
[212] *Id.*
[213] *Id.*
[214] *Id.*

addition, during that same year, the Government ceased survey work, a requirement expressed under the terms of an 1855 treaty. Regardless of not completing the survey work, Congress kept the funds.[215] Failing to survey the Nez Perce Reservation caused it to fall under the purview of federal "preemption laws," which consequently invited White American settlers to claim unsurveyed land, despite a preexisting American Indian title.[216] The Nez Perce Reservation's interaction with the federal government paints the undeniable picture that the Government failed to sanction White Americans for trampling on American Indians' rights.[217] What is more alarming is the fact that the federal government is in breach of not only agreements, but its duty to protect. In each of the three interactions with the Nez Perce, the federal government failed to protect the Reservation, resulting in the trustee reaping any and all benefits without regard to how the trustor, the Nez Perce, would be affected.

In sum, those interactions only go to further prove that the federal government has failed to uphold their federal trust responsibilities without any repercussions. Thus, it is pertinent to highlight that an act of Congress against American Indian tribes has never been found unconstitutional as the United States Supreme Court has never declared such.[218] This unsavory failure to exhibit good faith, loyalty, and protection is inherently dangerous to the success reservations could have had without the unduly disregard the federal government has continuously displayed through its breaches of trust.

B. Section Sixteen: Tribal Sovereignty

Aside from establishing the Trust Doctrine, the Wheeler-Howard Act also granted tribal sovereignty to American Indian reservations.[219] The Section was conceived to promote tribal sovereignty, self-

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[215] *Id.*
[216] *Id.*
[217] *Id.* at 687.
[218] Christina D. Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 279 (1993).
[219] *See generally* Indian Reorganization Act, §16, ch. 576, 48 Stat. 984, 987 (1934).

governance, and economic independence.[220] Although this was seen as a milestone in tribes finally being allowed to operate as they deem fit in order for their reservation to prosper to the best of its ability, the label, tribal sovereignty, in and of itself is contradictory in nature. The federal government cannot promote self-governance if only they have the power of approval.[221] Per the verbiage of Section Sixteen, American Indian tribes do not truly have sovereignty.[222] Additionally, case law has consistently proven that tribal sovereignty indeed has limitations.[223] Thus, how can one truly have sovereignty if the federal government is constantly meddling in American Indian government affairs and if the Supreme Court consistently holds that American Indian reservations have only a limited amount of sovereignty? Therefore, the term "tribal sovereignty" is clearly an oxymoron as tribal sovereignty comes with inherent limitations and is not the textbook definition of sovereignty.

Section Sixteen begins by stating that any American Indian tribe has the right to organize for the welfare of its people and may adopt an "appropriate" constitution and bylaws.[224] The proviso to granting that right is that the Secretary of the Interior must authorize and call the special election to vote for the proposed constitution and bylaws.[225] Additionally, the Secretary of the Interior must approve the ratification of such constitution and bylaws.[226] Moreover, if there were a need to amend the original constitution and bylaws the Sectary of the Interior must, to no surprise, approve the amendments.[227] Furthermore, Section Sixteen also provides that the Secretary of the Interior shall advise tribes or tribal council of all appropriation interests and Federal projects only for the benefit of

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[220] *Id.* at 987.
[221] Id.
[222] Id.
[223] David M. Schraver and David H. Tennant, Article: Indian Tribal Sovereignty - Current Issues, 75 ALB. L. REV. 133, 156 (2011/2012).
[224] See generally Indian Reorganization Act, §16, ch. 576, 48 Stat. 984, 987 (1934).
[225] *Id.*
[226] *Id.*
[227] *Id.*

the tribe.[228] It is apparent that Section Sixteen, per the language of the Section, grants tribal sovereignty. However, regardless of the "sovereignty" that this Section may grant, the Secretary of the Interior still has the final word due to the fact that the Secretary must approve anything that the tribal government may want to enact or amend in its legislation. It is clear that the federal government still has a grip on American Indian tribes, notwithstanding the supposed granting of tribal "sovereignty."

For example, this granting of tribal sovereignty was infringed upon through the ratification of the Indian Civil Rights Act.[229] The Act was prompted by complaints that American Indian tribes were violating civil rights.[230] Even though tribes voiced their concerns that the Indian Civil Rights Act would conflict with tribal traditions and impose unreasonable burdens, Congress still passed the Act with the guarantee that certain constitutional rights be available to persons under tribal authority, so that American Indian tribes do not violate most of the rights guaranteed under the Bill of Rights.[231] The Act was viewed as "a limited intrusion on tribal sovereignty."[232] Many American Indian tribal advocates even define the Act as a "significant intrusion by the federal government into the internal affairs of tribes."[233]

In addition to the limiting nature of the Indian Civil Rights Act, is the Indian Gaming Regulatory Act.[234] This Act stems from the Supreme Court holding in *California v. Cabazon Band of Mission Indians*.[235] The Court held that state regulation of Indian bingo "would impermissibly infringe on tribal government."[236] A year after this ruling, Congress passed the Indian Gaming Regulatory Act after finding that "existing federal law [did] not provide clear standards or

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[228] *Id.*
[229] Schraver and Tennant, *supra* note 91, at 144.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.* at 133.
[235] *Id.*
[236] *Id.*

regulations for the conduct of gaming on Indian lands."[237] The Act provided a statutory basis and regulation for American Indian tribes operating gaming on reservation land.[238] Per the provisions of the Act, tribes could only engage in Class III gaming, or casino gambling, if the tribe and state in which such gaming is taking place enter into a Tribal-State compact. The compact would govern the conduct of gaming activities and is subject to approval by the Secretary of the Interior.[239] Thus meaning, the federal government and states play a significant role in regulating tribal gaming on Indian lands.[240]

The enactment of the Indian Civil Rights Act and the Indian Gaming Regulatory Act succinctly expresses the lack of tribal sovereignty that is actually afforded to American Indian tribes and how limited tribes' power to practice sovereignty indeed is. In contrast to the federal government's actions, federal statutes include findings that state, that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government" and that "Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes."[241] These findings are in direct conflict with the actions of the federal government. In both Acts, the federal government inserted itself into tribal affairs, rendering tribal sovereignty vulnerable. Additionally, as it pertains to the Indian Gaming Regulatory Act, the federal government has failed to recognize tribes' self-determination by going as far to allow even states to regulate American Indian economic dealings through Class III gaming. This boils down to the simple fact that the Supreme Court held that state regulation of Indian bingo would greatly infringe on tribal sovereignty, and therefore in order for state regulation to prevail the federal government granted the states that regulation without regard to respecting and affirming tribal sovereignty. The

[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*

only reason that the federal government was allowed to grant states power to regulate gaming is that "[the Constitution] confers on Congress the power. . .of regulating commerce. . .with the Indian tribes."[242] Thus, although tribes may not be subject to the United States Constitution, the federal government is.[243] That alone allowed for the regulation of gaming by states through Congress' assertion of its unrestricted plenary power. Although, in essence, the federal government is still inconsistent with their actions showing its deference to honoring tribal sovereignty and statements saying otherwise.

Such inconsistency is attributed to the fact that the Wheeler-Howard Act provides both the Trust Doctrine that facilitates the trustor-trustee relationship between American Indian tribes and the federal government, which bore the plenary power afforded to Congress, while Section Sixteen provides tribal sovereignty, granting self-determination to American Indian tribes.[244] These two Sections coexisting with each other is a contradiction since the tribes can hardly do anything without federal government approval.[245] Furthermore, even though the parameters of sovereignty have never been extinguished, the existence of tribal sovereignty "exists only at the sufferance of Congress,"[246] where only Congress has the authority to determine the extent of sovereignty American Indian tribes possess.[247]

In short, it is evident that Congress' access to indefinite plenary power will always infringe upon American Indian tribal sovereignty. Additionally, the language in Section Sixteen of the Wheeler-Howard Act stipulates that although tribes may be granted sovereignty, the Secretary of the Interior has the final word in whether a proposed amendment or piece of tribal legislation is approved.

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[242] Furber, *supra* note 8, at 232.
[243] *Id.* at 264.
[244] *Id.*
[245] *Id.*
[246] Ferguson, *supra* note 86, at 279.
[247] *Id.*

CONCLUSION

American Indians have been repeatedly ignored and oppressed from the federal government's perceived intentional avoidance. First, the Allotment Act carved up American Indian reservations to the point where reservation land resembled a checkerboard. In addition, the Act not only divested American Indian land, but it attempted to forcibly assimilate the remaining American Indian culture in hopes of eradicating the culture in totality. Furthermore, regardless of the federal government recognizing its past misdeeds in regard to the Allotment Act, enacting the Wheeler-Howard Act as repudiation for such misdeeds stemming from the ratification of the Allotment Act seemingly fell through the cracks. The Trust Doctrine was routinely overlooked with the federal government in breach of their trust responsibilities but facing no revocations for its breaches. Moreover, tribal sovereignty is rarely, if ever, honored, and was doomed from being honored since Congress's granting of plenary power. All of these legislative shortcomings can be attributed to the federal government not holding up its end of the bargain with American Indians being affected by the lack of accountability on the federal government's end in all aspects.

LEGAL PERSONHOOD AND ANIMALS

Nicole Chatt González

In 2008, photographer David Slater traveled to Indonesia to take photographs of Celebes crested macaques, an endangered monkey species.[1] While he was there, multiple monkeys were able to take control of the remote shutter of Slater's camera while it was mounted on a tripod, and took "selfies" as they looked at their reflection in the camera lens.[2] It almost seemed as if the monkeys were posing, with one of the more infamous images capturing a grinning macaque monkey who was later named Naruto.[3] Initially, this interaction gave the impression of a very heartfelt and almost comical moment of wild animals curiously engaging with unfamiliar human technology.

In 2011, the viral photo of Naruto was uploaded on Wikipedia, automatically adding it to Wikimedia Commons as public domain material.[4] The licensing information reads, "This file is in the public domain, because as the work of a non-human animal, it has no human author in whom copyright is vested."[5] The licensing information attributed the production of the photograph to Naruto.[6] Slater claimed to have requested Wikipedia to remove the image, but a 2014 transparency report from the site showed that all requests were denied, with the editors deciding that Slater had no claim on the

[1] Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, Newsweek (Aug. 21, 2014, 9:31 AM), https://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961.
[2] David Slater, *Sulawesi Macaques…* (Aug. 22, 2017), http://www.djsphotography.co.uk/Tropical%20Forests/Sulawesi%20Macaques.htm .
[3] Andrés Guadamuz, *The monkey selfie: copyright lessons for originality in photographs and internet jurisdiction*, 5 Internet Pol'y Rev. 1, 1-2 (2016).
[4] Stewart, *supra* note 1.
[5] Guadamuz, *supra* note 3.
[6] *Id.*

image.[7] That same year, the United States Copyright Office issued a copyright law compendium stating, "The Office will not register works produced by nature, animals, or plants."[8] The compendium also specifically cited "a photograph taken by a monkey" as an example of that type of work.[9] The photograph is still available on Wikipedia's website and listed as public domain material as of April 2021.[10]

After the dispute between Wikipedia and Slater, in September 2015, People for the Ethical Treatment of Animals (PETA), an animal rights group, and Dr. Antje Engelhardt sued Slater on behalf of Naruto, as Naruto's "Next Friends."[11] They claimed that Slater, along with Wildlife Personalities Ltd. (a company that claimed authorship of the "selfie" along with Slater) and Blurb Inc. (the publisher of Slater's book containing the image), violated Naruto's copyright by "displaying, advertising, and selling copies of the Monkey Selfies."[12] The defense's motion to dismiss was ultimately granted by the California District Court, on the basis that "the Copyright Act does not confer standing upon animals like Naruto."[13] However, the court still accepted that Naruto "authored the Monkey Selfies" by "independent, autonomous action," and that Naruto also "understood the cause-and-effect relationship" between the camera's mechanisms and how his reflection would change in the camera lens.[14] PETA then appealed, with the Court of Appeals affirming the lower court's decision, holding that Naruto lacked standing under the Copyright Act due to Naruto being a non-human.[15]

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[7] Matthew Sparkes, *Wikipedia refuses to delete photo as 'monkey owns it'*, The Telegraph (Aug. 6, 2014, 12:03 PM), https://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html

[8] U.S. Copy. Off., Compendium of U.S. Copy. Off. Prac. 68 (4th ed. 2014).

[9] *Id.*

[10] *Macaca Nigra Self-Portrait,* Wikimedia.org, https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_large.jpg

[11] *Naruto v. Slater*, 15-CV-04324-WHO, 2016 WL 362231 1 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418 (9th Cir. 2018).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018).

This article will explore the status of animals under United States law by examining the hierarchy of human and animal interests within the law, as well as how the concept of legal personhood is defined within the legal realm and its implications for animals. International perspectives relating to the topic of legal personhood for animals will also be analyzed and included. This article does not intend to provide an answer as to what *should* be the leading perspective on legal personhood for animals, but rather intends to give insight on what might be considered a more obscure, abstract concept in the realm of legal scholarship.

The Animal-Human Interest Hierarchy

Despite certain species of animals having human-like mental cognition and advanced technical skills,[16] animals of all types are still considered property under United States law and are typically defined by how useful the animals are to humans.[17] Even though animals are afforded certain protections under the law,[18] their status under the law does not allow them to assert those protections on their own.[19] A legal person would have to sue on the animal's behalf.[20] This is clear in *Cetacean Community v. Bush*.[21] In the lower court case, a suit was brought against the government on behalf of all whales, dolphins, and porpoises, claiming that usage of Low Frequency Sonar by the United

[16] *E.g.,* Bottlenose dolphins have demonstrated complex mental cognition related to social relationships, like humans. Further, studies involving monkeys have demonstrated the possibility of humans and chimpanzees sharing aspects of cognitive control, as well as advanced technological skills compared to other animals. *See* Richard C. Connor, *Dolphin Social Intelligence: Complex Alliance Relationships in Bottlenose Dolphins and a Consideration of Selective Environments for Extreme Brain Size Evolution in Mammals*, 362 Transactions: Biological Sciences 587, (2007) (social relationships); Michael J. Beran, *Chimpanzee Cognitive Control*, 24 Current Directions in Psychological Science 352, (2015) (cognitive control); Christophe Boesch, *Chimpanzees' technical reasoning: Taking fieldwork and ontogeny seriously*, 43 Behavioral and Brain Sciences, (2020) (technical skills).
[17] Alexandra B. Rhodes, *Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System*, 20 Animal L. Rev. 191, 195 (2013).
[18] *See infra* note 28-29.
[19] Rhodes *supra* note 17.
[20] *Id.*
[21] Cetacean Community v. Bush, 249 F. Supp. 2d 1206, 1209 (D. Haw. 2003), aff'd, 386 F.3d 1169 (9th Cir. 2004).

States Navy "presents a direct threat to the well being, health, and continued existence of members of the community," and violated the Endangered Species Act (ESA).[22] The case was dismissed under the guise that the animals lacked standing to sue under the ESA.[23] The plaintiff appealed, but the lower court's holding was affirmed.[24] Upon appeal, it was further established that, under the ESA, "animals are the protected rather than the protectors," and that if "Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[25]

Further, in the U.S. Supreme Court case *Lujan v. Defenders of Wildlife*,[26] the Court provided clarification on what is necessary for an organization/representative to have in order to establish standing when suing on behalf of an animal, and the requirements proved to be strenuous. The plaintiff needed to suffer an "injury of fact," further explained as "an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical;" with there being "a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court."[27]

A review of cases and statutes reveals that human needs and desires are prioritized above animal interests, even if the animal interests are deemed important at face value. For example, Florida's Animal Cruelty statutes classify "every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused" as "torture," "torment," and "cruelty," "except when it is done in the interest of medical science."[28] On a larger level, the ESA contains

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[22] *Id.* at 1208.
[23] *Id.* at 1214.
[24] *Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).
[25] *Id.* at 1177-79.
[26] *Lujan v. Defs. of Wildlife*, 112 S. Ct. 2130, 2134 (1992)
[27] *Id.* at 2136.
[28] Fla. Stat. Ann. § 828.02 (West).

exceptions[29] that push human interests to the forefront, despite the Act's stated purpose being conservation of endangered and threatened species, with endangered species having the highest level of protection.[30] However, human interest has led to different regulations and exceptions for the same animal species just because the species is used for human-centered advancement. An example of this can be seen with chimpanzees.[31] "Wild" chimpanzees are classified as endangered and "captive" chimpanzees are placed in the lower "threatened" tier.[32] This is known as "split listing."[33] The "threatened" status of captive chimpanzees facilitates their usage (essentially as property) in biomedical research and even for-profit, such as in the entertainment industry, despite their wild counterparts being classified as "endangered."[34]

With this context, one can see the hierarchy within the law when it comes to human and animal interests. The general idea of animals being considered property remains prevalent even in conservation and protection laws. While these laws can promote and sustain animal *welfare*, establishing independent animal rights is an entirely different story.

Animal Rights (Person) verses Animal Welfare (Property)

Within the field of animal law, there appear to be two "objectives" relating to animal advocacy: promoting animal *welfare* and establishing animal *rights*.[35] Despite both being used interchangeably among the general population, all animal-related laws are focused on the welfare objective.[36] Because animals are property, not people (the only two classifications something or someone can have under the law), it is theoretically impossible for

[29] *See infra* note 32-33.
[30] Rhodes, *supra* note 17, at 202.
[31] *Id.* at 203.
[32] Id.
[33] Id.
[34] Id.
[35] Id. at 198.
[36] Cara Feinberg, Are Animals Things?, Harv. Mag., Mar.-Apr. 2016.

them to have explicit rights under the law as persons.[37] Animal welfare activists usually operate working around this obstacle, attempting to improve protections within the property-based system.[38]

This method has proven feasible, as seen in *Humane Society of the U.S. v. U.S. Postal Service*.[39] In this case, the plaintiff sought judicial review after the United States Postal Service (USPS) denied their petition "to declare nonmailable" *The Feathered Warrior*, an animal fighting periodical, under the Animal Welfare Act.[40] The plaintiff was able to establish standing by framing the crimes against animals (in this case, the mailing of the periodical) as causing financial injury to themselves.[41] The court found "'substantial evidence of a causal relationship' between the continued mailing of *The Feathered Warrior* and illegal animal fighting."[42] Further, "the need to care for animals on an emergency basis" would be increased by the circulation of the periodical, causing financial injury to the plaintiff.[43]

While the plaintiff's motion was ultimately denied, the denial was due to "the changes in governing law [that] counseled remand of the question of *The Feathered Warrior's* mailability"[44] (the Animal Welfare Act was amended in June of 2008 to include an "express ban on mailing 'advertising' materials for fighting animals and cockfighting weapons," after the lawsuit had been initiated).[45] The court determined that "the Humane Society has standing to complain of the Postal Service's rejection of its petition," but wanted to give the USPS an opportunity for "further consideration," and the case was remanded back to the USPS under the new legal context.[46] Shortly

[37] Id.
[38] Rhodes, supra note 17, at 216.
[39] Humane Society. of United States. v. United States Postal Service, 609 F. Supp. 2d 85 (D.D.C. 2009).
[40] Id. at 88.
[41] Id. at 91.
[42] Id. at 92.
[43] *Id.* at 91.

[44] *Id.* at 97.
[45] *Id.* at 90.
[46] *Id.* at 97.

after the ruling, in August of 2009, the USPS announced amendments to its mailing standards prohibiting the shipment of publications containing advertisements of animal fighting content, consistent with the changes made to the Animal Welfare Act.[47]

Working around the property-based system can also make animal issues more appealing to the general human population.[48] While certainly not the most advocated idea on the issue, some opine that extending person-exclusive rights to animals can degrade human dignity.[49] One of these voices is Colin Blakemore, a professor at Oxford University and an advocate of experimentation on animals.[50] When the United Kingdom banned great ape research, Blakemore thought that the ban made "no moral sense because it degrades the clear boundary between humans and animals."[51] There have also been speculated risks that would come with assigning legal personhood to animals, such as allowing animals to be sued in a similar way to individuals bringing suit against corporations.[52]

However, on the opposite side of the property-based debate are those who focus on the "rights" objective.[53] A main goal of this group is to shift the legal view to one where animals are recognized as "sentient beings" with "inherent rights."[54] Some animal rights-centered activists also oppose working around the property-based

[47] Wayne Pacelle, *De-Feathered Warrior,* A Humane World (Aug. 7, 2009), https://blog.humanesociety.org/2009/08/postal-service.html.
[48] Rhodes, *supra* note 17, at 216.
[49] *Id.* at 214; *see also* Damon Linker, *No, animals don't have rights*, The Week (Jan. 17, 2014), https://theweek.com/articles/452715/no-animals-dont-have-rights (author argues certain traits are "distinctively human" and linked to human dignity); Fr. Michael P. Orsi, *Human Dignity Still Higher Than Animals*, Catholic Exchange (Nov. 29, 2013), https://catholicexchange.com/dignity-animals (Catholic priest presents the concept of "human exceptionalism," a religion-based doctrine that holds that humans hold a unique status in comparison to other creatures).
[50] *Id.*
[51] *Id.*
[52] *Id.* at 217.
[53] *Id.* at 198.
[54] *Id.* at 199.

system, claiming that it perpetuates the deeper problem of not giving animals further protections due to their legal status as property.[55]

However, the realm of animal rights is uncharted territory compared to animal welfare.[56] According to law professor Kristen Stilt, the issue of what rights would be assigned, and which animals should have them, is "wide open."[57] If animals are no longer property, where should the line of legal personhood be drawn? Would primates have the same rights as humans? If not, would primates and dogs have the same hypothetical rights? Would ants and butterflies even be considered?

This sector is so "wide open" because these questions have, simply put, not been a priority to answer.[58] Professor Stilt states that "the law remains unwavering: animals are property — albeit with certain protections."[59] However, it is important to note the acknowledgment among the legal profession that this appointed descriptor of animals as property is not something that should be taken at face value.[60] A prime example of this can be seen in the Texas Supreme Court case of *Strickland v. Medlen*, a case where dog owners were seeking non-economic damages for what they alleged was the negligent euthanization of their pet dog by a shelter employee.[61] The county court dismissed the case on the basis of not recognizing "intrinsic damages" but was reversed and remanded on appeal.[62] The shelter employee then petitioned for review.[63] Justice Don Willett delivered his opinion stating that, despite the case being ultimately reversed, "a beloved companion dog is not a fungible, inanimate object like, say, a toaster. The term 'property' is not a

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[55] *Id.* at 216; *see also Animals' Legal Status,* Animal Legal Defense Fund, https://aldf.org/issue/animals-legal-status/ (last updated Apr. 12, 2021).

[56] Feinberg, *supra* note 36.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013).
[62] *Id.*
[63] *Id.*

pejorative but a legal descriptor, and its use should not be misconstrued as discounting the emotional attachment that pet owners undeniably feel."[64]

Even with animals being "property," legal professionals still recognize and differentiate the inherent qualities that make animals sentient and unlike other tangible objects.[65] The general issue within animal law is how much *weight* do those qualities hold in giving animals unique protections, recognizing their existence as living beings and, perhaps eventually, legal persons.[66] Despite the advancements towards recognition, progress has been made strictly working around the property model (towards animal *welfare*), leaving the animal *rights* sector in a chasm of unanswered questions.[67]

International Perspectives on Legal Personhood for Animals

Despite the United States refraining from assigning animals legal personhood, other countries have made their own ventures into animal *rights* activism, and assign specific rights and/or legal personhood to animals, whether it be a certain individual, species, or animals in general. One of the first countries to do this was Germany in 2002, adding the phrase "and animals" to a clause in its Constitution that obliged the state to respect and protect the dignity of humans.[68] While this addition did not explicitly grant legal personhood, nor did it outlaw researching on animals or having them in captivity,[69] it did create a certain protection with constitutional

[64] *Id.* at 185.
[65] Feinberg, *supra* note 36.
[66] *Id.*
[67] *Id.*

[68] *Germany guarantees animal rights in constitution*, The Associated Press (May 18, 2002, 7:27 AM), https://usatoday30.usatoday.com/news/world/2002/05/18/germany-rights.htm.
[69] *Id.*

weight that needs to be weighed in a legal context when issues arise (animal interests being weighed evenly against human interests).[70]

When it comes to explicit legal personhood, the first country to pass any sort of legislation concerning it was the Balearic Islands, a small autonomous region of Spain, in 2007.[71] Legal personhood was granted to gorillas, orangutans, chimpanzees, and bonobos by the Spanish Parliament under the leadership of former Prime Minister Jose Luis Rodriguez Zapatero.[72] Supporters of the legislation argued that these animals possess unique mental capabilities, socially and emotionally, that are on par with human children.[73] Therefore, they should be afforded the same legal protections and rights as human children, including legal personhood.[74] With this, apes are granted the right to life, freedom, and protection from torture and abuse.[75] The new legislation made private ownership of these apes, such as ownership for circus entertainment or media filming, illegal.[76] While apes can still be kept in zoological captivity, the conditions of their enclosures had to meet certain standards, so their newly endowed legal person rights are not infringed upon.[77]

There is even a country in the world that has granted legal personhood to animals on a general basis (not limiting it to a certain species).[78] In 2019, Justice Rajiv Sharma, of the Punjab and Haryana

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[70] Kate M. Natrass, *"…Und Die Tiere" Constitutional Protection for Germany's Animals*, 10 Animal L. Rev. 283, 302-03 (2004); *see also* Germany *guarantees animal rights*, CNN (June 21, 2002, 10:00 AM), http://edition.cnn.com/2002/WORLD/europe/06/21/germany.animals/index.html.

[71] Martin Roberts, *Spanish parliament to extend rights to apes*, Reuters (June 25, 2018, 4:32 PM), https://www.reuters.com/article/scienceNews/idUSL256586320080625.

[72] *Id.*

[73] Thomas Rose, *Going ape over human rights*, CBC News (Aug. 2, 2007), http://www.cbc.ca/news/viewpoint/vp_rose/20070802.html.

[74] *Id.*

[75] *Id.*

[76] Roberts, *supra* note 71.

[77] *Id.*

[78] Radhika Agarwal, *Punjab and Haryana High Court according legal person status to animals a step forward to stop cruelty against them*, Firstpost (June 14, 2019, 2:44 PM), https://www.firstpost.com/india/punjab-and-haryana-high-court-according-

High Court in India, stated that animals are "entitled to justice" and "cannot be treated as objects or property."[79] The case arose out of an animal cruelty incident, where twenty-nine cows were transported on two trucks.[80] Justice Sharma elaborated that corporations and other non-persons have been "declared legal entities." Further, due to that, "in order to protect and promote greater welfare of animals including avian and aquatic, animals are required to be conferred with the status of legal entity/ legal person" being granted the "corresponding rights, duties, and liabilities of a living person."[81] Similarly to the argument made in the Balearic Islands initiative, animals are legally seen as equal to children and, in India specifically, the citizens are deemed "persons in *loco parentis"* (acting as a parent) to the animals, and serve as a face for their welfare, making sure that the newly issued guidelines by Justice Sharma are being followed.[82] These include adding reflectors and weight limits to animal-pulled carts,[83] as well as not parading elephants for more than five continuous hours.[84]

Closing Thoughts

Aristotle believed that animals did not and could not possess a human's rationality and moral equality.[85] One can argue that the same logic is utilized when denying an animal's ability to function as a legal person. For example, the premise of an animal not being able to think rationally or empathetically the way a "legal person" can, or the premise of an animal not fully comprehending what is complying with

legal-person-status-to-animals-a-step-forward-to-stop-cruelty-against-them-6812081.html.

[79] Sofi Ahsan, *High Court declares all animals in Haryana to be 'legal persons'*, The Indian Express (June 2, 2019, 4:32 AM), https://indianexpress.com/article/india/punjab-and-haryana-high-court-declares-all-animals-in-haryana-to-be-legal-persons-5760741/.
[80] Agarwal, *supra* note 78.
[81] Ahsan, *supra* note 79.
[82] Agarwal, *supra* note 78.
[83] Ahsan, *supra* note 79.
[84] Agarwal, *supra* note 78.
[85] Gary Francione, *Animals, Property, and the Law* 37 (1995).

legal norms, the way a "legal person" can.[86] However, the question remains as follows: objectively, what is the concept of legal personhood? According to Dillard, a conception of legal personhood can include an ideal "legal person."[87] Besides having all the abilities and privileges a legal person has (the capacity to sue and be sued, to own property, and to be a party to a contract), the ideal legal person "would be one who embodies all of the abilities we intuitively think (when thinking about every day and commonly accepted notions of 'the law') ideal legal persons ought to have."[88] This includes the ability to read, since the American legal system is based on written language, be fluent in the English language, since most of the documentation of the American legal realm is written in English, and actually *understand* what the law says, which can require an advanced reading level.[89]

It would be unrealistic to think that every human being possesses these qualities, but every human is still designated the status of a legal person, just with a different "bundle" of rights as Dillard calls them.[90] Legal persons that are minors are afforded the bundle of one degree, corporations have the bundle of another degree, et cetera.[91] Legal personhood is not an "all or nothing" situation.[92] Even with this, animals have not been placed on any spot on the degree of legal personhood in the United States' legal system, despite contrary opinions in legal spheres around the globe.[93] Only time will tell if attitudes within the American legal realm shift towards legal personhood and animal rights, or working within the property-based model remains the only option for the sake of animal welfare, at the very least.

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[86] Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?*, 19 Animal L. Rev. 1, 5 (2012).
[87] *Id.*
[88] *Id.*
[89] *Id.* at 6.

[90] *Id.* at 5.
[91] *Id.*
[92] *Id.* at 2.
[93] Rhodes, *supra* note 17, at 195.

THE SPACE FORCE: CONSTITUTIONALITY AND INTERNATIONAL LEGALITY

Jasmine Masri

Introduction

With the unveiling of the United States' Space Force logo on January 24, 2020,[1] and the Twitter disclosure of the new military branch's uniform a week prior,[2] the notion of a world in which conflict is taken to outer space is no longer limited to fictional narratives seen in literature or films. Before the Space Force became a new military branch on December 20, 2019,[3] it was preceded by the Air Force Space Command (AFSPC), which was established in 1982 under the Department of the Air Force.[4] The AFSPC served to help the United States Air Force with fulfilling its responsibilities among which were not only defending the nation through close air support and precision airstrikes, but also engaging in defensive actions in space and cyberspace with operations including, among others, space surveillance, launch operations, and satellite control.[5] In comments made in March 2018, former President Donald Trump explained his intentions of establishing the Space Force as a separate military branch, stating, "space is a war-fighting domain, just like the land, air,

[1] Dartunorro Clark, *Trump Tweets New Space Force Logo. 'Star Trek' Fans Think it Looks Familiar*. January 24, 2020. https://www.nbcnews.com/politics/politics-news/trump-tweets-new-space-force-logo-star-trek-fans-think-n1122486.
[2]Jason Hanna & Alta Spells, *The US Space Force has Revealed its Utility Uniform, and the Internet has Things to Say about It,* January 18, 2020. https://www.cnn.com/2020/01/18/politics/space-force-uniforms-trnd/index.html.
[3] 116th Congress (2019-2020) H.R.2500 - *National Defense Authorization Act for Fiscal Year 2020.*
[4] Air Force Space Command, *Air Force Space Command* History, https://www.afspc.af.mil/About-Us/AFSPC-History/ (last visited Feb 14, 2020).
[5] *Id.*

and sea."[6] Such a statement merits questions regarding the motivations behind creating the Space Force as its own distinct branch. It is still unclear to what extent the Space Force would differentiate from AFSPC as its own department. This delineation brings many other issues into scope regarding limits on international activity in space, the militarization of outer space, and space as a separate legal domain.

While some argue for the necessity of a separate branch dedicated to United States capabilities in space and defense against adversaries such as Russia and China,[7] others argue that the implementation of the Space Force as a separate military branch is unnecessary since it would duplicate the work of the already established AFSPC.[8] Nevertheless, both arguments raise questions about the legality of creating a military branch devoted to space activities. More specifically, does American constitutional law allow for the formation of a Space Force? Do rules that address the use of outer space by a country's military exist in international law? In the first section of the writing, I will address issues that must be considered in dealing with creating a new military branch in the United States. Next, the section on International Space Law will address the limitations of military space activity in International Law. Finally, I will discuss contemporary issues of International Space Law relating to outer space activity and the militarization of outer space.

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[6] Everett C. Dolman, "Space Force Déjà Vu." *Strategic Studies Quarterly*, vol. 13, no. 2, 2019, pp. 16. *JSTOR*, www.jstor.org/stable/26639671. Accessed 14 Feb. 2020.

[7] Lt Col Jonathan Whitney, U.S.A.F. Maj Kai Thompson, U.S.A. Maj Ji Hwan Park, Republic of Korea Marine Corps (R.O.K.M.C.), *A Plan for a U.S. Space Force The What, Why, How, and When*, Air and Space Power Journal (2019), https://www.hsdl.org/?view&did=828938.

[8] Dave Deptula, *Yes To A U.S. Space Command But No To A Separate Space Force*, Forbes (April 10, 2019), https://www.forbes.com/sites/davedeptula/2019/04/10/u-s-space-command-yes-separate-u-s-space-force-no/#28bf15f8e3e9.

What is the Space Force?

With the enactment of the Fiscal Year 2020 National Defense Authorization Act on December 20, 2019, the Space Force was officially established.[9] Much of what is publicly known about the Space Force's goals can be found on the Space Force website. The mission, as described by the website, is:

> The USSF is a military service that organizes, trains, and equips space forces in order to protect U.S. and allied interests in space and to provide space capabilities to the joint force. USSF responsibilities include developing Guardians, acquiring military space systems, maturing the military doctrine for space power, and organizing space forces to present to our Combatant Commands.[10]

The website emphasizes the necessity of the Space Force for the "security and prosperity of our country."[11] Members of the Air Force Space Command and the United States Air Force will transfer to support space activity as members of the Space Force.[12] Thus, what was formerly known as the Air Force Space Command is now the Space Force, and personnel who worked for AFSPC are currently being assigned to space-related jobs within the Space Force instead.[13]

Constitutional Law

Constitutionality is an area of concern whenever a significant new addition is made to the United States' military. Under Article I, Section 8, Clause 12 of the United States Constitution, only Congress

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[9] United States Space Force, *About Us FAQ*, https://www.afspc.af.mil/About-Us/AFSPC-History/ (last visited Feb 01, 2021).
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.

has the authority to "raise and support armies"[14] and cover the costs that entail creating a sixth military branch[15] under Title 10 of the United States Code. Congress is also granted the authority "to provide and maintain a Navy" and "to make rules for the Government and Regulation of the land and naval Forces."[16] Those enumerated powers granted to Congress seem only to include the ability to regulate land and naval forces, so how would it be constitutionally acceptable to establish an Air Force, let alone a Space Force? In order to answer this question, it is necessary to analyze the creation of the Air Force and how it has come to be accepted as a constitutionally valid extension of Congressional authority.

Despite the broader debate between scholars, the United States Congress enacted the National Security Act of 1947, which restructured its intelligence agencies and military.[17] One of the most significant results of this law was creating the Air Force as its own independent department. Relying on strict interpretations of the Constitution makes it more difficult to justify the legality of Congress's creation of the Air Force; however, it appears that a broader interpretation has become accepted. In *Laird v. Tatum*, Justice Douglas, in a dissenting opinion, seems to argue for a broader interpretation of the word "armies."[18] Douglas asserts that "the Army, Navy, and Air Force are comprehended in the constitutional term "armies." Article I, section 8 of the Constitution provides that Congress may "raise and support Armies," "provide and maintain a Navy," and make "rules for the Government and Regulation of the land and naval forces."[19] It seems that a less literal interpretation of

[14] U.S. Const. art. I, § 8, cl. 12.
[15] The five other branches of service of the U.S. military are the Army, Navy, Air Force, Coast Guard, and Marine Corps.
[16] U.S. Const. art. 1, § 8, cl. 13-14.
[17] 80th Congress*, The National Security Act of 1947.*
[18] Laird v. Tatum, 408 U.S. 1, 16, 92 (1972).
[19] *Id*.

the Constitution has been generally accepted as legal disputes over the Air Force's constitutionality have yet to arise.

A literal reading of Article I, section 8 indicates that Congress does not have any authority to create an Air Force as only land and naval forces are mentioned. However, Professor Michael Dorf of Cornell Law highlights how constitutional originalists, those who read the Constitution literally, have offered several ways in which a strict interpretation of the Constitution allows for the existence of an Air Force.[20] Understanding the creation of the Air Force in 1947 following the passing of the National Security Act of 1947[21] is critical to defending the Space Force, considering that it can stand as precedent. Ilya Somin, a law professor at George Mason University, presents two arguments supporting an originalist interpretation of these clauses.[22] Such statements can be used to support the creation of the Space Force. First, Somin argues that "armies" would have a broader meaning than just land forces, pointing to the fact that historically, air forces have been permissible as part of the Army and Navy, as seen in World War II. [23] Second, he justifies creating an independent Air Force by relying on the Necessary and Proper Clause of the Constitution.[24] Somin explains that, "if under modern conditions, it is militarily important to have an independent air service, then the creation of an independent air force is "necessary" to the implementation of Congress' other Article I powers."[25]

Necessary and Proper Clause

[20]Michael Dorf, *Originalists in Space*, Dorf on Law (Aug. 15, 2018), http://www.dorfonlaw.org/2018/08/originalists-in-space.html.
[21] 80th Congress, The National Security Act of 1947.
[22] Scott Bomboy, *The Space Force and the* Constitution, National Constitution Center, (Aug. 22, 2018), https://constitutioncenter.org/blog/the-space-force-and-the-constitution.
[23] Ilya Somin, *The Air Force and the Constitution*, (Jan. 28, 2007), http://volokh.com/posts/1170032632.shtml.
[24] *Id*.
[25]*Id.*

Further exploration of the Necessary and Proper Clause is warranted because of the manners in which the clause is interpreted. The Necessary and Proper Clause, found in Article I, section 8 of the United States Constitution, states that Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."[26] Of critical importance would be the interpretation of the clause in *McCulloch v. Maryland*.[27] In deciding whether Congress had the power to incorporate the Second Bank of the United States, Chief Justice Marshall, writer for the majority, stated that nothing in the Constitution prevents "incidental or implied powers."[28] Furthermore, the Supreme Court held that pursuant to the Necessary and Proper Clause, if the ends are "legitimate" and the means "appropriate," Congress may carry out powers not explicitly stated in the Constitution.[29]

Ruling off that precedent, an interpretation by Chief Justice Roberts writing on behalf of the majority opinion in *National Federation of Independent Business (N.F.I.B.) v. Sebelius*[30] relied on language in *McCulloch v. Maryland* to argue that there is a limit to Congressional use of the Necessary and Proper Clause. In *McCulloch v. Maryland,* certain powers such as making war, levying taxes, and regulating commerce were described as "great substantive and independent power(s)" that "cannot be implied as incidental to other powers."[31] Chief Justice Roberts interpreted that language to mean that such powers cannot be "exercised beyond those specifically enumerated."[32] In his conclusion, these powers can only be granted

[26] Necessary and Proper Clause, U.S. Const. art. I, § 8.
[27] McCulloch v. Maryland, 17 U.S. 316, 400 (1819).
[28] *Id*.
[29] *Id*.
[30] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[31] McCulloch v. Maryland, 17 U.S. 411 (1819).
[32] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

explicitly and not by the Necessary and Proper Clause implications.[33] Still, with the establishment of the Air Force and general acceptance of it as a unique military branch, its creation stands as precedent for establishing the Space Force under American Constitutional Law.

International Space Law

With the Space Force and other international space missions inevitably taking their activities beyond their states' borders, international law must be considered in legal discussions. Space Law is a relatively new domain, and as such, there is limited discussion and a small number of legal decisions regarding the topic. Space is regulated to a small degree as it relies primarily on international treaties, general principles of the law, and norms that have been a product of tradition (customary law).[34] Some of the more well-known and followed international agreements include the Rescue Agreement,[35] Liability Convention,[36] Registration Convention,[37] and the Moon Agreement,[38] all of which expand on individual articles detailed in the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty).[39]

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[33] *Id*.

[34] Justia, International Law, February, 2020, , https://www.justia.com/international-law/.

[35] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, (1967): https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/rescueagreement.html.

[36] Convention on International Liability for Damage Caused by Space Objects 2777 (XXVI). https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/liability-convention.html.

[37] Convention on Registration of Objects Launched into Outer Space 3235 (XXIX), (September 15, 1976). https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/registration-convention.html.

[38] United Nations, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html.

[39] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18

To deal with the uncertainties of space exploration in the late twentieth century, significant actors in the international community, with United Nations' approval, enacted the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.[40] The Treaty, also known as the Outer Space Treaty, is the principal legal framework governing Space Law. To understand what implications Space Law may have on global space activity, an understanding of its basic principles is necessary.

Defining Outer Space

A fundamental principle of international law and Air Law is that each state has "complete and exclusive sovereignty" over the air space above its territory.[41] However, air space does not include outer space, which according to Article I of the Outer Space Treaty, "shall be free for exploration and use by all States."[42] So, what exactly is outer space? The Outer Space Treaty does not define the altitude that separates outer space from air space. Knowing the distinct boundaries is critical to international law because laws that govern air space are unique to those that govern outer space.[43] Although several positions have been taken in determining where to draw the line, a generally accepted boundary, used by the Federal Aviation Administration, the United States Air Force, the National Oceanic and Atmospheric Administration (NOAA), and NASA, is 50 miles (80 kilometers) above the Earth's surface.[44] Understanding the boundary is paramount to understanding what activities the Space Force is lawfully allowed to carry out since existing laws for each

U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].2410, 610 U.N.T.S. 205.

[40] *Id*.

[41] Convention on International Civil Aviation (the Chicago Convention), signed on 7 December 1944 by 52 States.

[42] Outer Space Treaty *supra* note 38, art. I.

[43] Nadia Drake, *Where, exactly, is the edge of space? It depends on who you ask.*, National Geographic (Dec. 20, 2018), https://www.nationalgeographic.com/science/2018/12/where-is-the-edge-of-space-and-what-is-the-karman-line/#close.

[44] *Id*.

realm are different. Generally, Air Law is more regulated, with the 1944 Chicago Convention imposing liability on the party operating the aircraft and requiring States to register aircraft and follow environmental regulations.[45] Air Law also "requires States to regulate safety, navigation, and security; it also States requires to regulate noise and emissions."[46] Meanwhile, Space Law prohibits sovereignty of outer space and imposes liability and oversight responsibility upon the state rather than the party operating the aircraft.[47] Additionally, it established an international registration regime. Unlike Air Law, safety, navigation, or security standards are not universally established.[48]

Principles of the Outer Space Treaty

The Outer Space Treaty outlines a comprehensive framework delineating several principles of International Space Law. Relevant to the militarization of outer space are the principles detailed in Article IV of the Treaty, which forbids states from placing "nuclear weapons or other weapons of mass destruction in orbit or on celestial bodies or station them in outer space in any other manner."[49] Although the term "weapons of mass destruction" is not defined, it is generally understood to mean "nuclear, chemical, and biological weapons."[50] The Treaty goes on to prohibit "the establishment of military bases, installations, and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies."[51] As such, if the United States or other states, having ratified the Outer Space Treaty, were to partake in any of these activities

[45] Louis de Gouyon Matignon, The Delimitation between Airspace and Outer Space, July 23, 2019, https://www.spacelegalissues.com/the-delimitation-between-airspace-and-outer-space/.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] Outer Space Treaty *supra* note 38, art. IV.
[50] Daryl Kimball, The Outer Space Treaty at a Glance, October, 2020. https://www.armscontrol.org/factsheets/outerspace.
[51] Outer Space Treaty *supra* note 38, art. IV.

through the implementation of Space Force duties, they would be in direct violation of international law.

Outer Space for Peaceful Purposes

The Outer Space Treaty does not exclusively forbid all military activity in outer space, however. Under Article IV of the Outer Space Treaty, an exception is granted to state use of military personnel in a limited context.[52] The Treaty permits the use of "the moon and other celestial bodies... by all States Parties to the Treaty exclusively for peaceful purposes."[53] To further elaborate, the Treaty provided that using military personnel for scientific research or using equipment or facilities for peaceful exploration of states is not prohibited.[54] Now, what constitutes "peaceful purposes" constitutes its own discussion.

The Treaty itself does not define "peaceful purposes;" however, there has been a general agreement to the interpretation of those words. An interpretation by the United States and other Western states is that "peaceful" means "non-aggressive." [55] Still, some authors argue that "peaceful" is understood as "non-military."[56] Such an interpretation, however, would completely prohibit all military activity in space. As discussed by A. Ferreira-Snyman, this interpretation would be "too broad" for the Outer Space Treaty since it explicitly allows "for the use of military personnel in outer space for scientific research or any other peaceful purposes."[57] Furthermore, such an interpretation would invalidate modern use of military or dual-use communications in space, as seen with concurrent use of

[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] Francis Lyall and Paul B. Larsen, *Space Law: A Treatise*, pp. 524 (2017).
[56] *Id*.
[57] M.P. Ferreira-Snyman, *Selected Legal Challenges Relating to the Military Use of Outer Space, with Specific Reference to Article IV of the Outer Space Treaty*, Potchefstroom Electronic Law Journal, Vol. 18, No. 3, 2015.

satellites and other technologies in space, which are generally accepted practices.[58]

The United States Space Force Objectives and Issues

It is still uncertain what activities are expected from the creation of the Space Force as its own branch or whether they will even differentiate from those carried out by the Air Force in their space endeavors. As of now, the most accurate image of what potential space undertakings will look like can be predicted by the Trump administration's 2018 National Space Strategy (NSS).[59] The NSS sets forth four main pillars to national security in space.[60] These four pillars are "transforming to more resilient space architectures, strengthening deterrence and war-fighting options, improving foundational capabilities, structures, and processes, and fostering conducive domestic and international environments."[61] Furthermore, documents released in February 2020 have revealed a 15.4 billion dollar budget request for the United States Space Force during the 2021 fiscal year.[62] A majority of that budget, $10.3 billion, is slated to financially support "space research, development, testing and evaluation of technologies and weapon systems," while the remaining amount is sought out for satellites, launch services, and war-related satellite services and space operations.[63] More recently, the Biden administration expressed its support of the Space Force, with White House spokeswoman Jen Psaki explaining that "they are not revisiting

[58] Michel Bourbonnière and Ricky J. Lee*, Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict*, The European Journal of International Law Vol. 18 no. 5, 877.

[59] The White House, *President Donald J. Trump is Unveiling an America First National Space Strategy*, (March 23, 2018) https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unveiling-america-first-national-space-strategy/.

[60] *Id*.

[61] *Id*.

[62] Harry Lye, *US Space Force lifts off with first budget request*, Air Force Technology, (Feb. 12, 2020) https://www.airforce-technology.com/features/us-space-force-lifts-off-with-first-budget-request/.

[63] Sandra Erwin, *Trump seeks $15.4 billion for U.S. Space Force in 2021 Budget*, (Feb. 10, 2020) https://spacenews.com/trump-seeks-15-4-billion-for-u-s-space-force-in-2021-budget/.

the decision to establish the Space Force."[64] In attempts to establish United States dominance in space, the United States must consider whether the details of such activities will constitute acceptable behavior as set out by the Outer Space Treaty.

A New Space Race? Issues to Consider

With several nations such as Russia, France, and China moving quickly to become leading space powers,[65] there is little doubt that a new race for space domination is on the horizon. However, with the Outer Space Treaty outlining limitations on space activity, a sense of law and order must be present in the furtherance of nation-state presence in space. In a discussion about the United States Space Force and the Outer Space Treaty, writer Becky Ferreira questions whether or not the United States and other countries could potentially violate the Outer Space Treaty.[66] Henry Hertzfeld, a professor at George Washington University, asserts that because the Outer Space Treaty sets up principles, it is ambiguous.[67]As a result, many of these "voids" are resolved by national interpretations through various treaties.[68] In an article for the Denver Journal of International Law and Policy, James wrote that since the United States' interpretation of "peaceful purpose" includes military activity, entities like the Space Force can be considered legal under international law.[69] With other states having different definitions of

[64] Biden decides to stick with SPACE force as branch of U.S. military. (2021, February 03). Retrieved from https://www.reuters.com/article/us-usa-biden-spaceforce-idUSKBN2A32Z6.

[65] The Economic Times, France Conducts First Military Drills in Space, March 10, 2021. https://economictimes.indiatimes.com/news/defence/france-conducts-first-military-drills-in-space/articleshow/81416734.cms?from=mdr.

[66] Ferreira, Becky. The new Space Race, and the desperately outdated laws that govern it, Document Journal (May 28, 2019), https://www.documentjournal.com/2019/05/the-new-space-race-and-the-desperately-outdated-laws-that-govern-it/.

[67] *Id*.

[68] *Id*.

[69] Fukazawa, J. (2020). Does the U.S. space force violate the outer space treaty? Denver Journal of International Law and Policy, Retrieved from https://djilp.org/does-the-u-s-space-force-violate-the-outer-space-treaty/#post-9754-footnote-ref-22.

the term “peaceful purpose,” it is no surprise that any discrepancies can be problematic. For example, if one country views creating an Air Force as not “peaceful,” and another considers a military branch in space as “peaceful,” conflict could emerge.

Relevant to the discussion is the rapid expansion of private companies and their involvement in space. There is no mention of private organizations in the Outer Space Treaty. However, there are to non-governmental entities. The role of these space-related NGOs, such as the Space Generation Advisory Council and the Planetary Society and Secure World Foundation, includes capacity building in developing countries.[70] In Article VI of the Outer Space Treaty, non-governmental entities in outer space are said to be under the “authorization and continuing supervision by the appropriate State Party to the Treaty.”[71] It is assumed that states are responsible for the space activities of private organizations within their jurisdiction. With Article I of the Treaty outlining that space activity must “be carried out for the benefit and in the interests of all countries…and shall be the province of all mankind,” it can also be argued that a private entity’s activity in space cannot be “entirely selfish.” Writer Zach Meyer asserts as much, arguing that private commercial companies may be able to appropriate outer space since the Outer Space Treaty prohibits appropriation, but only “national appropriation.”[72] Lastly, Meyers claims that private enterprises can exploit resources of the Moon according to the Moon Treaty, which states that such exploitation of natural resources is permissible “provided that an appropriate international regime governs the

[70] A. Lukaszczyk & R. Williamson, The Role of Space Related Non-Governmental Organizations (NGOs) in Capacity Building, 45 Advances in Space Research 468 (2010), available at https://www.sciencedirect.com/science/article/pii/S0273117709006619.

[71] Outer Space Treaty supra note 38, art. VI.

[72] Meyer, Z. (2010). Private commercialization of space in an international regime: A proposal for a space district. Northwestern Journal of International Law and Business, 30(1) Retrieved from https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1705&context=njilb

process."[73] Such conflicting policies regarding state and private state enterprises in the era of companies such as SpaceX, Blue Origin, Virgin Galactic, and Virgin Orbit is expected to make the space legal realm increasingly complicated and problematic.

Proposals

There has been frequent discussion regarding the insufficient nature of International Space Law.[74] From articles pointing out the lack of law addressing space debris[75] to conversations about its failure to govern private companies or individuals,[76] the adequacy of Space Law has been criticized. Legal professionals have argued that the Outer Space Treaty itself is insufficient to deal with the upcoming challenges dealing with space activities, one being its inapplicability to private entities and, two, the failure of legal action against states that explicitly violate the Treaty.[77] As such, the international community must come together to develop legislation to address modern problems growing out of technological development and increased commercial activity in space. Such legislation must clearly define

[73] *Id*.

[74] Jill Stuart, The Outer Space Treaty has been Remarkably Successful – but is it Fit for the Modern Age? , January 27, 2019, https://theconversation.com/the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381; The Economic Times, France Conducts First Military Drills in Space, March 10, 2021, https://economictimes.indiatimes.com/news/defence/france-conducts-first-military-drills-in-space/articleshow/81416734.cms?from=mdr; The Economist, Space Law is Inadequate for the Boom in Human Activity There, July 20, 2019, , https://www.economist.com/international/2019/07/18/space-law-is-inadequate-for-the-boom-in-human-activity-there.; Molly Quell, Lack of Space Law Complicates Growing Debris Problem, August 28, 2020, https://www.courthousenews.com/lack-of-space-law-complicates-growing-debris-problem/.

[75] Molly Quell, Lack of Space Law Complicates Growing Debris Problem, August 28, 2020, https://www.courthousenews.com/lack-of-space-law-complicates-growing-debris-problem/.

[76] Jill Stuart, The Outer Space Treaty has been Remarkably Successful – but is it Fit for the Modern Age? , January 27, 2019, https://theconversation.com/the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381.

[77] *Id*.

terms such as “peaceful purpose” and “weapons of mass destruction.” Additionally, there must be discussions about “dual-use” technologies such as satellites that can have both peaceful and malevolent uses. Lastly, the law must develop to address the growing role of private organizations in space and their monitoring and liability.

Conclusion

Upon close examination of the legal framework surrounding the United States Space Force, focusing on the following two dimensions was imperative: constitutional law and its international counterpart. With the existence of the Air Force and its previous space-related institutions under its command, it becomes clear that arguments against the constitutionality of these departments have not prevailed. Military air and space activity have been a focus of United States security and defense for years, and as countries enter a new age of space travel and innovation, the fight for dominance in space will only expand air and space pursuits. On the other hand, international law agreement on such activities is less conclusive. With their continued development of the Space Force, the United States and other countries must consider their commitment to international rules and treaties. Determining whether space activity would conflict with agreements like the Outer Space Treaty will require more clarity on what the mission will be and how that mission will be carried out. Language in the peaceful purpose clause of the Outer Space Treaty provides some room for interpretation of what kind of military activity is permissible. However, the debate is far from settled. As a result, it is inevitable that as state ambitions in outer space increase, International Space Law will gain a more prominent role in discussions of international relations regarding the legality of military space activity. With the inevitable growth in space activity from both national and private actors, there is no doubt that the international community must address gaps in the law, reevaluate current legislation, and establish new rules and regulations.

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that I intend to uphold throughout my path of becoming a civil attorney practicing what exactly? Well, that is still in the works."