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The Sexualization of African-American Women Inmates in America's Prisons

By Jessica A. Lordi

ABSTRACT

The sexual abuse of women in prison began in the nineteenth century and continues today. Many of the racial justifications or rationales for the earlier abusive practices still operate today, albeit in different forms. Civil death, slavery, common law marriage, and the common law crime of rape each have a contemporary parallel in prison law, including: (1) status based preclusions to litigation; (2) non-enforcement of criminal bans on status violence; and (3) status based evidentiary and procedural rules. Race continues to structure the lives of African-American women in prisons.

The Sexualization of African-American Women Inmates in America's Prisons

By Jessica A. Lordi[*]

INTRODUCTION

"Prison law intensifies the racial and gender subordination of women prisoners in ways that evoke the discriminatory legal and social practices of an earlier era."[1] The sexual abuse[2] of African-American women in prison began in the nineteenth century. Such abuse has survived to today, and we can think of this abuse as a historical phenomenon. Many of the racial justifications or rationales for the earlier abusive practices still operate today, albeit in different forms. Civil death,[3] slavery, common law marriage, and the common law crime of rape each have a contemporary parallel in prison law, including: (1) status based preclusions to litigation; (2) non-enforcement of criminal bans on status violence; and (3) status based evidentiary and procedural rules.[4]

Part II of this note discusses the current U.S. women's prison system as a sexualized environment, sexual abuse against women in prison as a pervasive problem, the legal structure criminalizing sexual conduct in prisons, and the role of race and sexual abuse in women's

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[1] Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons, 42* HARV. C.R.-C.L. L. REV. 45, 50 (2007).

[2] "[M]ost sexual assaults on male prisoners are committed by fellow prisoners"; female guards committing custodial abuses are significantly less common than custodial sexual abuse by male guards. Teresa A. Miller, *Keeping the Government's Hands off our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches,* 4 BUFF. CRIM. L. REV. 861, 868 n.29 (2001).

[3] "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights." In re Estate of Donnelly, 125 P.3d 417, 419 (Cal. 1899).

[4] Buchanan, *supra* note 1, at 57.

prisons. Part III of this Note discusses the history of sexual abuse of African-American women inmates, including the origin of their sexual abuse in prisons, and historical trends revealing parallels between nineteenth-century exclusionary legal practices used against African-American women and the present day sexual abuse of African-American women inmates in U.S. prisons.

I. U.S. WOMEN'S PRISONS AS A SEXUALIZED ENVIRONMENT TODAY

A. Sexual Abuse in Women's Prisons is a Pervasive and Present Problem

"You get the impression from the [prison] staff . . . that it was a sexual smorgasbord and they could pick and choose whom they wanted."[5] Sexual abuse[6] of inmates by guards in women's prisons[7] is so rampant in the United States that some have called it "an institutional component of punishment behind prison walls."[8] Women inmates are subjected to multifarious forms of sexual abuse, including: rape, forced oral sex and digital penetration, quid-pro-quo compulsion of sex for contraband, favors, or protection,[9] abusive pat and strip searches, male

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5 Amy Laderberg, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse,* 40 WM. & MARY L. REV. 323, 342 (1998) (quoting THOMAS BARKER & DAVID L. CARTER, POLICE DEVIANCE 144 (2d ed. 1991)).

6 This note refers all sexual conduct in prison as abuse because women inmates rarely have a complete free choice to submit voluntarily to sexual advances in prison.

7 The term "prison" in this note refers to "all forms of institutional criminal incarceration, including federal and state prison and local jails." Buchanan, *supra* note 1 at 45 n.2.

8 Buchanan, *supra* note 1, at 45 (quoting Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998)); "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." Farmer v. Brennan*,* 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman*,* 101 S. Ct. 2392 (1981)); *see* Heidi Lee Cain, *Women Confined by Prison Bars and Male Images*, 18 TEX. J. WOMEN & L. 103, 109 (2008) ("Human Rights Watch reported that the sexual abuse of female inmates by male prison guards is common and takes place virtually without punishment.").

9 Guards and prisoners alike do not conceal these relationships, unreservedly joking about their prisoner "girlfriends" and guard "boyfriends." Buchanan, *supra* note 1 at 45, 45–46.

guards' observations of women inmates naked while showering or toileting, groping, verbal harassment, and sexual threats.[10]

The prison system should provide its inmates with a legal duty to protect them against sexual abuses.[11] Forty-four states and Congress have made criminal, any sexual contact between prisoners and guards, regardless of consent.[12] Still, prison guards regularly break these laws,[13] and abuse against women in custody persists without proper prevention or mitigation procedures in place.[14]

While most workplaces would fire an employee for engaging in sexual activity at work, in prison, custodial sex with inmates typically results in punishment or retaliation against the prisoner without punishment for the prison guard.[15] Although one might expect the law to

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[10] *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women,* AMNESTY INT'L (2001), http://www.amnestyusa.org/women/custody/custody_all.pdf.

[11] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being."); *see also* Logan v. United States, 144 U.S. 263, 284 (1892); Helling v. McKinney, 509 U.S. 25, 32 (1993); Estelle v. Gamble 429 U.S. 97, 103–04 (1976).

[12] *See generally* BRENDA V. SMITH, AM. UNIV., FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF PRISONERS (2001), *available at* http://www.wcl.american.edu/endsilence/documents/50StateSurvey-SSMLAWS2013Update.pdf.

[13] *See* Everson v. Mich. Dep't of Corr., 391 F.3d 737, 741 (6th Cir. 2005); Morris v.Eversley, 343 F. Supp. 2d 234, 242 (S.D.N.Y. 2004); Fisher v. Goord, 981 F.Supp. 140, 149 (W.D.N.Y 1997); Nunn v. Mich. Dep't of Corr., NO. 96-CV-71416, 1997 WL 33559323 at *1 (E.D. Mich. Feb. 4, 1997).

[14] Buchanan, *supra* note 1, at 47.

[15] U.N. Econ. & Soc. Council, Sub-Comm. on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women,* U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999).

incentivize prisons to curtail their employee's unlawful conduct, the law does not.[16] Such dismissal or ignorance of custodial sexual abuse creates a "sexualized environment" within women's prisons.[17]

This "sexualized environment," unlike isolated incidents of sexual abuse, surrounds and defines prison life for women.[18] In women's prisons, "surveillance is power and power is sexualized."[19] Prison guards hold supreme surveillance power over their inmates who depend on them for basic necessities.[20] Sexual abuse, harassment, and the perpetual, unannounced presence of male guards in women's cells represent a present and real reminder of exposure to abuse.[21]

In prison, the woman inmate is comparable to a sexually abused child victim.[22] In both situations, two principle factors of sexual abuse are present: (1) a more powerful person asserts

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[16] *See* Prison Rape Elimination Act of 2003, 42 U.S.C § 15601.

[17] Laderberg, *supra* note 5, at 341; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 290 (1996).

[18] Laderberg, *supra* note 5, at 357.

[19] Teresa A. Miller, *Sex and Surveillance: Gender, Privacy and the Sexualization of Power in Prison,* 10 GEO. MASON U. C.R. L.J. 291, 291 (2000).

[20] Cain, *supra* note 8, at 109.

[21] Laderberg, *supra* note 5, at 357. However, some inmates seek out relationships with guards. Delia calls them the spider women, "because they're always out to seduce and destroy." One of the women got a nurse at the medical unit to fall in love with her. The nurse, who used to bring the inmate grinders and cocaine, got fired. The same inmate had an affair with a maintenance man. Then her roommate, spider woman number two, fell in love with a female [guard], who ended up leaving her husband and two children. The [guard] got fired but still comes to visit the inmate. "These people can be very crafty if you're crazy enough to believe them." She says. "They're real scroungers." Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse,* 88 MARQ. L. REV. 751 n. 191 (2005).

[22] Laderberg, *supra* note 5, at 351.

his or her authority and strength over a weaker and more vulnerable person; and (2) the victim is unable to resist and thus has no genuine choice but to submit to the advances.[23]

Prison guards exercise their power over the women inmates by bribing or even compelling the women to submit to sex.[24] Reports indicate that guards demand sexual favors in exchange for basic necessities such as food and medical attention.[25] Women inmates even exchange sex with guards for as little consideration as perfume or a package of gum.[26] Women prisoners who do not voluntarily submit to the guards' sexual advances are continually harassed to do so.[27]

Despite the regularity that these crimes are committed, there is little investigation.[28] A former medical director for the Valley State Prison justified the lack of internal prison

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[23] Laderberg, *supra* note 5, at 351.

[24] Cain, *supra* note 8 at 109; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996).

[25] Cain, *supra* note 8, at 109–10. In Dorothy's prison housing unit, one particular correctional officer began singling her out and asking for sexual favors in exchange for providing her with food or her normal share of personal hygiene products. At first, Dorothy thought he was not serious, but then his threats became real; he started withholding about half of her meals, as well as soap and toilet paper . . . One day, the guard found Dorothy alone in the laundry room. He locked the door from the inside, and although Dorothy struggled, he raped her. The guard told her that if she complained, no one would believe her. The sexual assault brought up all of Dorothy's experiences of violence at the hands of her husband. The feelings of despair, worthlessness, and total helplessness washed over her again. Now, more than ever, Dorothy could see no escape. *Words From Prison: Sexual Abuse in Prison,* ACLU (June 12, 2006), http://www.aclu.org/womens-rights/words-prison-sexual-abuse-prison.

[26] Cain, *supra* note 8, at 110; Dan Morain, *Sex in Prison – Too Often a Guard Plays a Role in the Affair*, LOS ANGELES TIMES (Feb 8, 1988) at A3 (discussing a woman and former inmate's experiences with a prison guard raping her).

[27] Cain, *supra* note 8, at 111. With the power disparity between guards and inmates, guards have a responsibility to ensure that their power is not wantonly abused. *Id.* at 110–11.

[28] *Id.* at 110–11.

investigations stating, "[i]t's the only male contact (the women) get."[29] Further, when inmates report these abuses, officials rarely investigate because they believe that the inmates lack credibility – an inmate's word alone is insufficient to prompt an internal investigation or discipline of a staff member.[30] Internal investigations resulting in discipline of a staff member are incredibly rare, save in the most contemptible cases.[31]

The impact on women prisoners is multifold. One effect concerns the defensive tactics that women employ in prison to avoid abuses.[32] Entries from one female inmate's diary described fellow female inmates who refused to shower as it required them to expose themselves to guards a few feet away who were yelling sexual obscenities, insults, and threats.[33] Further, some women inmates practice poor personal hygiene to reduce the risk of rape or sexual assault.[34]

B. Legal Structure Criminalizing Sexual Conduct in Prisons

Every state has criminalized sexual conduct in prisons except for Alabama, Minnesota, Oregon, Utah,[35] Vermont, and Wisconsin.[36] Significantly, Colorado, Missouri, and Wyoming

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[29] Cain, *supra* note 8, at 110-11.

[30] *Id.* at 111; *see* Dennis J. Opatrny, *3 Women Sue, Allege Sex Slavery in Prison: Warden, Guards at East Bay Facility Among the Accused*, S.F. EXAMINER (Sept. 29, 1996), *http://www.sfgate.com/bayarea/article/3-women-sue-allege-sex-slavery-in-prison-3121303.php*.

[31] Cain, *supra* note 8, at 111; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 3-4 (1996).

[32] Laderberg, *supra* note 5, at 342.

[33] *Id.*

[34] *Id.* at 342.

[35] In March of 2006, a bill criminalizing sex with inmates was passed in both houses in Utah and is awaiting the governor's signature. Buchanan, *supra* note 1, at 45, 46 n. 6.

permit prisoner consent to mitigate the offense; further, Arizona, California, Delaware, and Nevada punish both the prisoner and the guard for sexual conduct in prisons.[37] In some states, prison disciplinary rules specify that if a prisoner has sex with a guard, it is a disciplinary offense for which a prisoner can be punished.[38] Further, an amalgamate of prison laws, including the Prison Litigation Reform Act of 1995 ("PLRA"),[39] civil immunities, and constitutional deference, operate collectively to provide near immunity for violators against prisoners' claims.[40]

Between 1980 and the mid-1990s, there was a significant increase in prisoner litigation.[41] In 1995, nationwide, prisoners filed 41,679 civil rights actions (13% of all civil cases filed in the federal district courts), which was more than twice the amount filed in 1985.[42] These lawsuits

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[36] SMITH, *supra* note 12.

[37] *Id.*; *USA: "Not part of my sentence": Violations of the human rights of women in custody,* AMNESTY INT'L (Feb. 28,1999); *see generally* Lisa Schechtman, *Violence Against Women Is A U.S. Problem, Too*, AMNESTY INT'L (June 11, 2011), http://blog.amnestyusa.org/women/violence-against-women-is-a-u-s-problem-too/.

[38] Buchanan, *supra* note 1, at 46.

[39] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat.1321, 1321-66 to 1321-77 (1996) (codifed as amended at 11 U.S.C. § 523 (2000); 18 U.S.C.§§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A (2000); 42 U.S.C. §§ 1997a–1997f, 1997h (2000)). Buchanan, *supra* note 1, at 48 n.11 (2007) ("The misnamed Prison Rape Elimination Act of 2003 does not adequately punish or eliminate sexual abuse. It establishes no sanctions for guards who rape prisoners or for institutions that look the other way when prisoners are raped. Apart from threatening to name prisons that accept federal rape-prevention funds but subsequently fail to comply with as-yet-to-be-adopted national standards, the statute does not take any steps to limit the incidence of sexual abuse in prison. Instead it establishes procedures for compiling prison rape statistics and allots funds to support prison rape prevention policies. The best that can be said of this legislation is that it at least acknowledges in the congressional findings that prison rape is unconstitutional."); Prison Rape Elimination Act of 2003 42 U.S.C § 15601.

[40] Buchanan, *supra* note 1, at 48.

[41] Margot Schlanger, *Inmate Litigation,* 116 HARV. L. REV. 1555, 1558 (2003).

[42] Denise M. Pennick, *Limitations on Relief; Prisoner Litigations,* 1 HAW. BUS. J. 6 (1997).

cost an estimated $81 million.[43] A Republican-controlled Congress and President Clinton passed the PLRA to deter frivolous prisoner lawsuits by reconstructing the remedies that are available to prisoners in both state and federal court, making prospective relief more challenging to obtain, limiting the duration of preliminary relief, and mandating that, in the absence of specific findings, existing consent decrees that govern prison conditions automatically terminate.[44] Further, PLRA reduces the frequency that prisoners may sue by limiting the availability of proceedings *in forma pauperis*.[45]

Along with the intent to halt jailhouse lawyers' frivolous claims that burdened the courts, PLRA was intended to ensure that meritorious claims from prisoners, particularly those claims of sexual abuse from female prisoners and juvenile prisoners are considered.[46] To strike this precarious balance, PLRA drafters established that physical injury is a proxy for these civil rights claims.[47] Thus, PLRA drafters did not include a right to sue for mental and emotional injuries

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[43] Pennick*, supra* note 42.

[44] *Id.;* Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 Harv. L. Rev. 1661, 1662 (2004) (discussing that "The PLRA emerged from this general anti-litigation sentiment through a political process that political scientist E.E. Schattschneider famously describes as the 'displacement of conflicts.' Republicans in Congress responded to fierce Democratic opposition to their across-the-board litigation reforms by channeling the congressional debate toward the narrower and politically more feasible issue of inmate litigation reform").

[45] Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1190 (1997); Pennick, *supra* note 41, at 10 ("After only a year, it appears that the PLRA has been successful in [limiting the amount of prisoner frivolous lawsuits]. The Administrative Office of the United States Courts estimates that the number of prisoner petitions filed in the fiscal year 1997 will show a dramatic 17.4 percent decline below fiscal year 1996. While this number is expected to rise again due to the increasing prisoner population, it is clear that the numbers of frivolous filings has decreased.").

[46] O'Bryan, *supra* note 45, at 1195.

[47] *Id.* at 1196.

without a showing of a physical injury, but kept judicial oversight "for cases where it is needed while curtailing its destructive use."[48] But this rule has limited remediation for prison victims of coerced sex.[49] Further obstacles to judicial relief are included in PLRA's provision barring federal lawsuits from prison plaintiffs who have not filed with the prison grievance system "no matter how difficult, futile, or dangerous such compliance might be for them."[50]

Although PLRA was intended to bar prisoner litigants' frivolous claims, not to obstruct women prisoners' lawsuits for sexual abuse,[51] PLRA essentially precludes all prisoner claims, including legitimate claims of sexual abuse by women prisoners.[52] Similar to the historical doctrines precluding African-American witness testimony in court and common law rape laws, PLRA presents unique barriers to the court system for today's prisoner plaintiffs to overcome.[53]

There are several civil immunities that preclude prisoners' claims for sexual abuse.[54] Inmates' civil suits against prisons for toleration of sexual abuse have historically been successful only when a large group of women inmates testify to pervasive abuses corroborated

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[48] O'Bryan, *supra* note 45, at 1196.

[49] Margo Schlanger and Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008).

[50] Schlanger and Shay, *supra* note 49.

[51] Buchanan, *supra* note 1, at 71.

[52] *See* Jamie Ayers, Comment, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?,* 39 U.C. DAVIS L. REV. 247, 248 n.2 (2005) (explaining discussions by Congress of frivolous claims by male prisoners).

[53] Buchanan, *supra* note 1, at 71–72.

[54] *Id.* at 69.

by guard witnesses, who break ranks to testify.[55] Although appellate courts have upheld institutional policies restricting male guards' access to women inmates to prevent sexual abuse, most prisoner civil claims are rejected.[56] Even when inmates can prove rape in prison in a civil action, juries "lowball" damage awards.[57] For instance, in *Butler v. Dowd*, the jury awarded one dollar against a prison administration for not protecting prisoners against inmate rape.[58] Prior to these awards, the courts took a "hands off" policy with respect to prison rape.[59] The hands off approach represented the courts' policy of not intervening in prison policies or conditions except for in egregious cases.[60] Outside of the prison context, damage awards for sexual assault can

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55 Buchanan, *supra* note 1, at 69.

56 Fisher v. Goord, 981 F.Supp. 140, 145–48, 150 (W.D.N.Y. 1997) (describing an alleged sexual abuse incident and denying a motion to transfer the alleged victim inmate to another facility); Buchanan, *supra* note 1, at 69.

57 Buchanan, *supra* note 1, at 70 n. 205.

58 Bulter v. Dowd, 979 F.2d 661, 669 (8th Cir. 1992); *see e.g*. Morris v. Eversley, 343 F.Supp.2d 234, 238 (S.D.N.Y. 2004) (holding a convicted guard responsible for sexually assaulting a woman inmate. The jury awarded the prisoner $500 in compensatory damages and $7500 in punitive damages. The district court judge ordered a new trial because he found the verdict inadequate. In the new trial, the jury awarded $1,000 compensatory damages and $15,000 in punitive damages.); Buchanan, *supra* note 1, at 70 ("Such inadequate jury awards reflect the discredited prejudicial racial and gender stereotypes by which low-status women, especially black women, prostitutes, and prisoners, are viewed as less likely to be harmed by sexual assault.").

59 James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 n. 3 (2003).

60 *See* Bethea v. Crouse, 417 F.2d 504, 505–06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands-off' policy."); Sarshik v. Sanford, 142 F.2d 676, 676 (5th Cir. 1944) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.").

award one million dollars, and in cases involving institutional liability, "a significant number of cases award compensatory damages of $100,000 to $200,000."[61]

Prisons owe some Constitutional duties towards prisoners. *DeShaney v. Winnebago County Dep't of Soc. Services* held that when the State takes a person into its custody, "the Constitution imposes upon the State an affirmative duty of protection."[62] Furthermore, in *Logan v. United States*, the Court held that the government owes the prisoners a duty to protect against "assault or injury from any quarter," and prisoners have a due process right to that protection.[63]

Regardless of the government's affirmative duty to protect the vulnerable prisoners, the Supreme Court "has adopted a status-based principle of deference that ensures that prisoners' constitutional rights are substantially diminished by their incarceration."[64] When a prisoner brings a claim of a government violation of a fundamental right, courts apply a lower standard of rational basis review to assess the government's actions.[65] Thus, a court will uphold any conduct by a prison or a guard if the action is "reasonably related to a legitimate penological interest."[66] Essentially a federal court will only intervene in a case of sexual abuse against a prisoner if "the government conduct is so irrational that no plausible justification can be offered in its defense."[67]

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[61] Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies,* 59 SMU L. REV. 55, 96–97 (2006).

[62] DeShaney v. Winnebago Cnty. Dep't of Soc. Serv., 489 U.S. 189, 199–200 (1989).

[63] Logan v. United States, 144 U.S. 263, 284 (1892).

[64] Buchanan, *supra* note 1, at 79.

[65] *See* Turner v. Safley, 482 U.S. 78, 89-90 (1987).

[66] *See id.* at 89.

[67] Buchanan, *supra* note 1, at 79.

Further, the ironically titled Prison Rape Elimination Act of 2003 ("Act") does not sufficiently punish or eliminate sexual abuse in prisons.[68] The Act neither sanctions guards who rape prisoners, nor does it punish institutions that ostensibly ignore when prisoners are raped.[69] Beyond a threat to name prisons accepting federal rape-prevention funds but fail to follow national standards, the Act does not effectively limit the occurrence of sexual abuse in prisons.[70]

C. Race and Sexual Abuse in Women's Prisons

Two thirds or more of women in U.S. prisons are African-American or Latina.[71] Over a five-year period, African-American women have been incarcerated at an increased rate of

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[68] Prison Rape Elimination Act of 2003, 42 U.S.C § 15601.

[69] 42 U.S.C § 15601; *see* Matt Clarke & Alex Friedmann, *State-by-State Prisoner Rape and Sexual Abuse Round-up,* PRISON LEGAL NEWS, https://www.prisonlegalnews.org/displayArticle.aspx?articleid=24298&AspxAutoDetectCookieSupport=1 (last visited Apr. 8, 2014) (describing incidents of guard-prisoner rape and sexual assault across the United States and the civil and criminal outcomes of those incidents).

[70] *See* Buchanan, *supra* note 1, at 48 n. 11 ("Instead it establishes procedures for compiling prisons rape statistics and allots funds to support prison rape prevention policies. The best that can be said of this legislation is that it at least acknowledges in the congressional findings that prison rape is unconstitutional."). *See* 42 U.S.C § 15601.

[71] Buchanan, *supra* note 1, at 48 n. 14 ("Reports differ with respect to the exact rates of incarceration by race, but the majority of U.S. women prisoners are black, and Latinas are overrepresented in relation to the prison population."). *Compare* AMNESTY INT'L, UNITED STATES OF AMERICA: "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* http://www.amnestyusa.org/node/57783?page=show (stating that more than 52% of U.S. female prisoners are African American), *and* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), *available at* http://www.hrw.org/legacy/reports/1996/Us1.htm (describing "Hispanic" women as grossly overrepresented), *with* LAWRENCE A. GREENFIELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 5–6 (1999) (revised 2000), *available at* http://www.bjs.gov/content/pub/pdf/wo.pdf (federal prisons are made up of 35% black women, 48% of state prisons, and 44% of prisoners in local jails while Hispanic women make up 32% of federal prisons, 15% of state prisons, and 15% of local prisons. White women encompass 29% of federal prisons, 33% of state prisons, and 36% of local prisons. Further, other women make up 4% of federal, 4% of state, and 5% of local prisons).

828%.[72] An African-American woman is eight times more likely than a European-American woman to be imprisoned.[73] Half of America's female prison population is comprised of African-American women, most of whom are serving their sentences for nonviolent drug or property related offenses.[74]

Today, African-American female inmates are deterred from reporting or speaking about custodial sexual abuse perpetrated by African-American men in particular.[75] Speaking out against this sexual abuse "reinforce[s] negative racial stereotypes about Blacks in general and about Black men in particular."[76] This censorship limits knowledge and resistance to African-American women's oppression in exchange for protecting African-Americans, principally African-American men, from sexualized, racial stereotyping.[77]

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[72] AMNESTY INT'L, WOMEN IN PRISON: A FACT SHEET, *available at* http://www.prisonpolicy.org/scans/women_prison.pdf (last visited Sept. 28, 2013).

[73] *Id.*

[74] *Id.* "State and federal laws mandate minimum sentences for all drug offenders. This eliminates from judges the option of referring first time non –violent offenders to financially strapped drug treatment, counseling and education programs. The racial disparity revealed by the crack v. powder cocaine sentences insures that more African American women will land in prison. Although 2/3 of crack users are white or Hispanic, defendants convicted of crack cocaine possession in 1994 were 84.5% African American. Crack is the only drug that carries a mandatory prison sentence for first time possession in the federal system." *Id.*

[75] *Id.*

[76] Kimberle Crenshaw, *Race, Gender, and Sexual Harassment,* 65 S. CAL. L. REV. 1467, 1472 (1992).

[77] *See* Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse,* 88 MARQ. L. REV. 751, 779 (2005).

Racially marginalized women's fates in the criminal justice system are over-determined by stereotypes and through punishment.[78] African-American women are stereotyped as promiscuous, criminal, and violence-prone. Because African-American women are scrutinized as sexual deviants and potential criminals, society does not easily identify these women as victims.[79]

II. HISTORY OF SEXUAL ABUSE OF AFRICAN-AMERICAN WOMEN INMATES AND TRENDS OF TREATMENT FROM THE PAST

Inside today's prisons, "it is as though the clock has been turned back to the nineteenth century."[80] Women, specifically African-American women, are exposed to custodial sexual abuse by guards who commit these crimes with near reckless abandon.[81] While many guards carry out their duties appropriately, "[a] few . . . abuse their power appallingly and literally rape at will.'"[82]

A. The Origin of Sexual Abuse of African-American Women Inmates

"Early in American history, women were not subject to long-term imprisonment."[83] Most women who committed crimes during that time were punished by capital or corporal

78 *See generally* HUMAN RIGHTS WATCH, UNITED STATES: PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (2000), *available at* http://www.hrw.org/reports/2000/usa/.

79 *See generally id.*

80 Buchanan, *supra* note 1, at 55.

81 *Id.*

82 *Id.*

83 *Punishing Women: A Very Short History 1600s -1873,* PRISON CULTURE (Dec. 19, 2010), http://www.usprisonculture.com/blog/2010/12/19/punishing-women-a-very-short-history-1600s-1873/.

punishment.[84] Beginning in the nineteenth-century, a small number of women were imprisoned. The conditions were harrowing; the women were confined to filthy, overcrowded cells and were at risk of sexual abuse and violence from the male guards who watched over them.[85]

The most common crimes committed by early women inmates were violations of sexual norms and domestic duties including prostitution, violations of decency, and public drunkenness.[86] Early punishment of women focused on imposing proper roles on those who fell short of society's ideal domesticated and submissive woman.[87] "Considered more naturally docile and moral than men, a woman who fell into a life of crime had fallen far indeed, if she was redeemable at all."[88] Punishment for women criminals was grounded in both punishing the woman for her crimes and reforming her to meet the standard of submissive domesticity to which she was held.[89] These public punishments were an extended arm of private, moral, and domestic punishments.[90] When husbands and fathers could not enforce the requisite domestic

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[84] PRISON CULTURE, *supra* note 83.

[85] *Id.* (For instance, one inmate at Auburn State Prison in New York, Rachel Welch, became pregnant while serving her sentence in solitary confinement. A prison official flogged her so severely during her pregnancy that she died during childbirth. The prison official was fined $25 and was permitted to keep his job).

[86] Cain, *supra* note 8, at 105; Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth,* 14 WM. & MARY J. WOMEN & L. 363, 368 (2008).

[87] Cain, *supra* note 8, at 105.

[88] Doetzer, *supra* note 86, at 368.

[89] *See id.* at 368-69.

[90] LUCIA ZEDNER, *Wayward Sisters: The Prison for Women, in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 341 (Norval Morris & David J. Rothman eds., Oxford Univ. Press 1995).

and submissive roles on their women, the state descended into the home to buttress the objective.[91]

To illustrate, nineteenth century Texan prisons turned to antebellum customs and domestic punishments when punishing African-American women.[92] African-American women prisoners were sent out to local families to serve as live-in domestics.[93] While some African-American women were hired out to local residents, others were incarcerated with the men, which resulted in both consensual and nonconsensual sexual relations.[94] One African-American inmate, Charlotte Green, corroborated by prisoners, guards, and townspeople, asserted that prison officials in her prison would regularly engage in sex with inmates.[95] Green stated, "Ward has intercourse with that 'yellow' girl often . . . [and sometimes had] two or three of them . . . down to their cells."[96]

"During the late nineteenth century, the 'reformatory model' emerged from the custodial prisons and was defined by Victorian American paternalistic attitudes."[97] The reformatories

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[91] Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women,* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 340 (1998).

[92] ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 89 (2009). In Texas, there were prison rodeos where African-American women could "sign up for the sexualizing 'greased pig sacking contest,' in which participants hitched up their skirts and rolled around in the mud in pursuit of ornery swine, all to the hooting delight of spectators, free and convict alike. In this way, the Texas Prison Rodeo exhibited nostalgia for not just the frontier but the Old South. It brought the minstrel show to the cattle drive." *Id.* at 207.

[93] PERKINSON, *supra* note 92, at 89.

[94] *Id.* at 93.

[95] *Id.* at 94.

[96] PERKINSON, *supra* note 92, at 94.

[97] Doetzer, *supra* note 86, at 368.

housed white female prisoners.[98] In reformatories, there was a “cottage system” instead of cellblocks in which women inmates lived in “houses” with a matron to govern them.[99] In their small houses, these women performed domestic duties that prepared them for future work as maids and, eventually wives.[100] While African-American inmates were serving local residents or being assaulted in custodial prisons, their white counterparts were donning “their neatest and best attire and [assembling] in [the prison] parlor to sip tea and [listen] to poetry read aloud.”[101] In New York, these housing environments looked like family cottages and were surrounded by forests and farmland, while the prisons the African-American women lived in were essentially concrete fortresses.[102]

In one prison in Texas, reports state that African-American women were herded like animals and subjected to inadequate food, ghastly sanitation, and nonexistent schooling.[103] The prison “housed both white and black women, but they lived in different worlds, one bad, one worse.” One inmate reported that “the white women are paid very little attention . . . [w]e are set out here in this house and absolutely forgot.”[104] On the other hand, African-American women “hardly relished the attention they received.”[105] These women worked in the fields, were

[98] Doetzer, *supra* note 86, at 368.

[99] *Id.* at 369.

[100] *Id.*

[101] PERKINSON, *supra* note 92, at 109.

[102] *Id.* at 110.

[103] *Id.* at 180.

[104] *Id.*

[105] *Id.*

subjected to more frequent and severe punishments, "and contended with the same sort of sexual predation that had characterized Texas women's imprisonment for decades."[106] Inmates reported during a legislative inquest in 1921 that [one official] passed secret notes to his favorite women, telling one inmate "he loved her for his own use."[107] This same official made female inmates feel around in his front pocket for cigarette papers when he wanted to go on a smoke break.[108]

Historically in custodial prisons, women prisoners were regularly and openly sexually abused by male prison guards, prison officials, and other male inmates.[109] Remedial efforts were

[106] PERKINSON, *supra* note 92, at 109.

[107] *Id.*

[108] *Id.*

[109] ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA,* 1830–1930 15–16 (1981). During the prison reform, the reform movements concentrated on teaching proper morals on female inmates—treating those inmates as though they were mentally ill. Thus, these treatments reinforced "the social perception of the fallen female's mental inadequacy." One reform movement involved separate female facilities, but the rationale was not to punish the women but to reform them, which justified giving them longer sentences than their male counterparts. These facilities for women focused on teaching women prisoners domestic skills and "restoring them to womanliness." Female inmates in women's prisons were considered to be much more of a disciplinary problem than their male counterparts. "It is unknown whether this was because they were required to live up to the unreachable ideal of female behavior." These movements brought to surface the female inmate's plight, but none of the movements brought about fundamental change. Cain, *supra* note 8, at 107–08.

only made in high-profile scandals.[110] Sexualizing early women inmates to restore them to their proper societal roles, or simply to abuse them, were central methods of state punishment.[111]

These ideals persisted throughout the prison reform of the 1960s.[112] Although conditions in women's prisons improved, reformers continued to concentrate on "re-engendering the depraved female, who is perceived to have fallen from her proper feminine role."[113] Despite positive changes in prison life for women, specifically gender segregated facilities and gender-specific treatment for women; these changes did not alter the real risk and sexualized atmosphere of prison life for women.[114] Further, in the 1960s, criminologists and prison officials considered women inmates mentally disturbed and thought that many of them required psychiatric help.[115] These views informed the construction of women's prisons today.[116] In the 1960's, the

[110] Cain, *supra* note 8, at 106. The female reformers, advocating separate structures for the sexes, believed that women prisoners must be treated differently from men. Publicized prison scandals, such as female prisoner pregnancies and beatings, however, were more likely the impetus for the development of separate women's facilities rather than an actual concern for the abuse of men prisoners or zeal to reform them. Further, the moral standards set by these concerned reformers presumed a social and familial status remote from the life of imprisoned women. The ideal of the pleasant domestic female was a far cry from the realities of the woman prisoner's life outside the prison walls. *Id.* at 106–07.

[111] *See* FREEDMAN, *supra* note 109, at 15–16.

[112] Cain, *supra* note 8, at 109.

[113] *Id.*

[114] *Id.*

[115] ALISON MORRIS, WOMEN, CRIME, AND CRIMINAL JUSTICE 109 (1987).

[116] Cain, *supra* note 8, at 109.

psychotropic drugs that are distributed in prison solidify the continuing belief that criminal women are mentally inadequate.[117]

B. Historical Trends Revealing Parallels from Nineteenth Century Exclusionary Legal Practices Against African-American Women and Modern Sexual Abuse of African-American Women Inmates in U.S. Prisons

Once inside prison, African-American women have found themselves the victims of sexual abuses much along the lines of their nineteenth-century sisters, all while their abusers enjoy similar impunity.[118] Contemporary prison law and its justifications show women's vulnerability to sexual and gender violence. The law stems from nineteenth-century systems of civil death, slavery and its resultant effects after abolition, and the common law institutions of marriage and rape.[119] These regimes exposed African-American women to sexual abuses and prevented them from gaining access to courts to seek redress.[120] Civil death, slavery, common law marriage, and the common law crime of rape each have a contemporary parallel in prison law including: (1) status based preclusions to litigation; (2) non-enforcement of criminal bans on status violence; and (3) status based evidentiary and procedural rules.[121]

1. Status-Based Preclusions to Litigation

Today, prisoners under PLRA are treated similarly to nineteenth-century African-American slaves and prisoners who were denied access to justice based on status-based bars to

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[117] LUCIA ZEDNER, *Wayward Sisters: The Prison for Women, in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 329, 360 (1995); Cain, *supra* note 8, at 106–07.

[118] Buchanan, *supra* note 1, at 57.

[119] *Id.*

[120] *Id.*

[121] *Id.*

litigation.[122] One sociologist argued that the modern system of mass incarceration is an outgrowth of the old slave system.[123] With respect to slavery, modern mass incarceration of African-Americans extends a history of controlling African-Americans. This history includes: slavery from 1619-1865, the Jim Crow system in the South from 1865-1965, the Northern American urban ghetto from 1915-1968, and the large-scale prison compound "formed by the vestiges of the ghetto."[124]

The most evident example of this status-based institutional denial of access to justice for African Americans is slavery, because African Americans were treated as noncitizens and denied the right to bring claims before the court system.[125] The master-slave relations were considered private matters by nineteenth-century courts.[126] *State v. Mann* is illustrative, holding that "[w]e cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master: that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God." [127]

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[122] Buchanan, *supra* note 1, at 57.

[123] PERKINSON, *supra* note 92, at 133-34.

[124] Buchanan, *supra* note 1, at 57; Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,* 3 PUNISHMENT & SOC'Y 95, 118 (2001).

[125] Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[126] MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE 25 (2003).

[127] State v. Mann, 13 N.C. (2 Dev.) 263 (1829).

After slavery was abolished, courts were used as a vehicle to re-enslave African Americans.[128] Specifically, the Southern states developed procedural and other legal rules that prohibited African Americans from gaining access to the courts. In 1872, the Supreme Court held valid a Kentucky statute excluding any "slave, negro, or Indian" from testifying in a criminal or civil action involving a white person.[129] This exclusion upheld the Southern whites' racial superiority and authority over the African-American former slaves.[130] These Southern whites "perceived the necessity of answering charges brought by former slaves as an indignity" and were horrified that the Freedmen Bureaus "listened to the slightest complaint of the Negros, and dragged prominent white citizens before [the] court upon the mere accusation of a dissatisfied negro."[131] These same Southern whites protested that African Americans could "ha[ve] white men arrested and carried to the freedmen's court . . . where [former slaves'] testimony is taken as equal to a white man's."[132]

Although African Americans were given the legal status of citizens, the right to sue, and the right to vote through the Reconstruction Amendments, prisoners were excluded from these rights[133] Nineteenth-century prisoners were subject to "civil death."[134] A prisoner's civil death

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[128] W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 200–01 (Signet Classics 1969) (1903). The Thirteenth Amendment effectively allows this prohibiting involuntary servitude and slavery "except as a punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII, § 1.

[129] Blyew v. United States, 80 U.S. (13 Wall.) 581, 592–93 (1872).

[130] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, 593–94 (1988).

[131] FONER, *supra* note 130, at 150.

[132] *Id.* at 151.

[133] Buchanan, *supra* note 1, at 59.

prohibited him from citizenship and from challenging his treatment in court.[135] A prisoner "ha[d], as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the first time being a slave of the State."[136]

By the mid-twentieth century, the hands-off doctrine had replaced civil death.[137] Under the hands-off doctrine, constitutional claims filed by prisoners against the prision administration were beyond the scope of judicial review.[138] Unlike civil death, the hands-off doctrine did not function as a complete bar to prisoners' claims in court.[139] Rather, under the hands-off doctrine, "all that a court in effect determines is that the complainant is a legally convicted prisoner. It then follows that his grievance is beyond the ken of judicial authority or competence."[140] Thus,

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[134] *See* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia,* 46 UCLA L. REV. 1895, 1899 (1999) (discussing "felons, by virtue of their crime and their conviction, forfeit their right to participate in the political process. They are simply not entitled to the ordinary rights of political participation enjoyed by other people. They suffer a change of statues that is sometimes called 'civil death.' This is the modern version of the idea of infamia as applied in Roman law.").

[135] Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons,* 51 UCLA L. REV. 1505, 1509 (2004).

[136] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[137] Buchanan, *supra* note 1, at 58.

[138] *See* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L. J. 506, 506, 508–09, 515–16 (1963).

[139] Buchanan, *supra* note 1, at 58.

[140] Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L. J. 506, 507 (1963).

the hands-off doctrine left prisoners' rights in the hands of prison administrations, which may have left those prisoners with no rights at all until the twentieth century.[141]

In sum, slavery operated as a device for racial control by excluding African Americans from the justice system and assigning them an inferior status. Even though the institution of slavery ended with the Thirteenth Amendment, the attitudes and mechanisms for racial control continued. These attitudes persist today through the vehicle of "criminal" status for African-American women, which provides a modern method for status-based preclusions.

2. The Problem of Non-enforcement of Criminal Bans on Status Violence

During Reconstruction in the South, violence against African-Americans typically went unpunished, and lynching was pervasive and tolerated.[142] Historically, status-based laws have established "hierarchies between husbands and wives, men and women, slaveholders and slaves, and whites and blacks, in part by ignoring the prohibition of violence by the former against the latter."[143] Similar to modern criminal laws prohibiting prison sexual abuse, these post-feudal laws recognizing a master-servant relationship and subordination were enforced to maintain a master's authority.[144]

The justifications of prison law impunity maintain similarities to the justifications of old domestic violence laws.[145] The strongest link between domestic violence laws and prison law

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[141] Buchanan, *supra* note 1, at 58.

[142] PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 23–24 (2003).

[143] Buchanan, *supra* note 1, at 60.

[144] *Id.*

[145] *See id.*

impunity is that the "institutional needs require the courts to disregard violence committed by men in positions of authority."[146]

At common law, gender roles in a marriage were distinct and grounded in the law of chastisement.[147] In marriage, as a legal construct, husbands were obliged to financially support their wives and children and to refrain from physically abusing their wives (too severely).[148] At the same time, wives had an obligation to obey and serve their husbands, who retained rights to physically "chastise" their wives to enforce that duty.[149]

For nineteenth-century women's rights activists, the law of chastisement was tantamount to civil death.[150] Although nineteenth-century courts progressed towards abrogating the law of chastisement, these same courts rejected wives' claims to uphold their husbands' financial support obligations and claims that sought protection from their violent husbands.[151] To justify this inaction, the courts maintained that the family was a home of love in which "violence was foreign and state intrusion unnecessary, where the man was the unchallenged king, and the wife's altruistic love led to dutiful forbearance."[152]

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[146] Buchanan, *supra* note 1, at 60; *see* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 2117, 2153–60 (1996).

[147] *See* Buchanan, *supra* note 1, at 61.

[148] *See id.*

[149] *See id.*; *see* Siegel, *supra* note 144, at 2122–23.

[150] Buchanan, *supra* note 1, at 61.

[151] *See id.*; *see* Siegel, *supra* note 144, at 2154.

[152] Buchanan, *supra* note 1, at 61.

Consequently, the white husband and slaveholder had sovereignty, and the criminal laws banning status violence were minimally enforced.[153] Similarly, if a wife murdered her husband or a slave murdered his master, the crime was "petty treason."[154] Notwithstanding, if a husband murdered his wife or a master murdered his slave, the crime was mitigated by defenses such as provocation and "crimes of passion."[155] Further, when a husband beat his wife, the crime was private and safe from court intervention; and, when a master beat his slave, no matter the severity or provocation, it was not a crime at all.[156]

Like the state laws against prison sex, the nineteenth and twentieth century rape laws were selectively enforced to maintain hierarchical values in race and gender.[157] For instance, if a black man was alleged to have raped a white woman, the public lynched him, which rarely resulted in prosecution for the perpetrators.[158] If the black man escaped the lynching and was tried, he would likely receive the death penalty.[159] Conversely, a white man charged with the same crime of rape was only penalized if the victim was a respectable white woman, who was not his wife or acquaintance.[160] Similarly today, if a prison guard rapes or sexually assaults an

[153] *See* Buchanan, *supra* note 1, at 62.

[154] *Id.*

[155] *See id.*; *see* Zanita E. Fenton, *Mirrored Silence, Reflections on Judicial Complicity in Private Violence,* 78 OR. L. REV. 995, 1021-22 (1999).

[156] Buchanan, *supra* note 1, at 62.

[157] *See id.*

[158] *See id.* For a historical discussion of duel-system of justice, see STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2003).

[159] *See* Buchanan, *supra* note 1, at 62.

[160] *See id*.

African-American female inmate, there are little to no repercussions for the guard; instead, the victim may be either punished or not offered redress. Thus, like selective enforcement of rape laws in the nineteenth and twentieth centuries, custodial abuse laws are rarely enforced and the result of looking the other way when African-American women inmates become victims perpetuates racism and sexism in the twenty-first century.

3. Status Based Evidentiary and Procedural Rules

Jury instructions restricting women's testimony in court "eerily resemble[d] the infamous Black Codes that forbad the conviction of whites on the testimony of blacks."[161]

Traditional rape laws instilled a status regime to shelter the judicial system and defendants against a deluge of "false and frivolous claims by a class of litigants believed to harbor a unique propensity to lie, as well as a penchant for wasting courts' time with complaints about 'trifles' inflicted by their social betters."[162]

These traditional rape laws treated rape as "an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."[163] As a result, courts crafted distinct legal rules for women "declar[ing] that they, uniquely in our criminal justice system, were not fully reliable witnesses."[164] These rules included resistance requirements and jury instructions making clear the perils of convicting a defendant based on "the unreliable

[161] Akhil Reed Amar, *Concurring in Roe, Dissenting in Doe, in* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 152, 165 (Jack M. Balkin ed., 2005); *see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

[162] Buchanan, *supra* note 1, at 63.

[163] MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1736).

[164] Amar, *supra* note 158, at 165.

word of a woman."[165] The statutes exclude African-American women inmate's testimony as unreliable due to credibility issues when these women attempt to bring claims of sexual abuse in prison today.[166]

CONCLUSION

The sexual abuse of women in prison began in the nineteenth century and continues today. Many of the racial justifications or rationales for the earlier abusive practices are still currently in use, albeit in different forms. Civil death,[167] slavery, common law marriage, and the common law crime of rape each have a contemporary parallel in prison law, including: (1) status based preclusions to litigation; (2) non-enforcement of criminal bans on status violence; and (3) status based evidentiary and procedural rules.[168] Race continues to structure the lives of African-American women in prisons today.

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[165] Buchanan, *supra* note 1, at 63.

[166] *See id.* at 63–64.

[167] "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights." In re Donnelly's Estate, 58 P. 61 (Cal. 1899).

[168] *See* Buchanan, *supra* note 1, at 57.

Designing Democracy:
Women's constitutional rights after the Arab Spring

By Bridget C. McCullough

ABSTRACT

In the early months of 2011, dictatorial rulers were overthrown in Tunisia, Egypt, and Libya. The events that unfolded marked the beginning of what has become known as the Arab Spring, a pro-democratic wave of revolutions across the Middle East. Despite the promising opportunity, a trend toward implementing Islamic religious law, shari'a, has emerged in the reconstruction of these governments. Shari'a is thought by many to be in tension with women's fundamental human rights as defined by international law. Under shari'a law, women lack basic social, legal and sexual autonomy. Is shari'a law compatible with the ideals enshrined in the institution of democracy? Furthermore, can it be interpreted to ensure that women are treated equally and afforded the basic fundamental rights to which they are entitled under international law? These are the difficult questions faced by both the emerging governments and the international community.

This note will trace the origins of the oppression of women in the Muslim world, give a generalized overview of women's rights under shari'a law, and then highlight the achievements that have been made over the last century in strengthening and securing women's rights in both the domestic and international spheres. It will also critically examine the revolutions and the constitutional drafting processes that are underway in Tunisia, Egypt, and Libya, focusing on the role that shari'a law will play in each. In conclusion, the note will argue that while shari'a law can comply with basic human rights and international legal obligations, this can only be so through a moderate interpretation.

Designing Democracy: Women's constitutional rights after the Arab Spring

By Bridget C. McCullough

INTRODUCTION

"The fall of a dictator does not mean democracy."[1]
-Shirin Ebadi, Nobel Peace Prize Laureate

On December 17, 2010, a young grocery vender by the name of Mohammed Bouazizi set himself on fire after being ignored by Tunisian authorities.[2] Bouazizi, the breadwinner for a family of eight, had his unlicensed vegetable cart confiscated after refusing to pay a bribe to municipal inspectors.[3] According to local bystanders, when Bouazizi tried to take back the apples that one of the inspectors was trying to confiscate, she slapped him, spat in his face, and insulted his dead father.[4] Bouazizi then walked a few blocks to the municipal building and requested the return of his property.[5] There, authorities again assaulted him.[6] After he was denied

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[1] WOODROW WILSON INT'L CENT. FOR SCHOLARS, REFLECTIONS ON WOMEN IN THE ARAB SPRING 2 (Kendra Heideman & Mona Youssef eds., 2012), *available at* http://www.wilsoncenter.org/sites/default/files/International%20Women%27s%20Day%202012_4.pdf (last visited Jan. 2, 2014).

[2] Rania Abouzeid, *Bouazizi: The Man Who Set Himself and Tunisia on Fire*, TIME (Jan. 21, 2011), http://www.time.com/time/magazine/article/0,9171,2044723,00.html (last visited Jan 2., 2014).

[3] *Id.;* Kareem Fahim, *Slap to a Man's Pride Set Off Tumult in Tunisia,* N.Y. TIMES (Jan. 21, 2011), http://www.nytimes.com/2011/01/22/world/africa/22sidi.html?pagewanted=all&_r=0 (last visited Jan. 2, 2014).

[4] Fahim, *supra* note 3; Abouzeid, *supra* note 2.

[5] Fahim, *supra* note 3.

[6] *Id.*

entry into the governor's office, he left, but returned shortly thereafter.[7] He stood outside the gates, drenched himself in paint thinner, and lit a match.[8]

When Bouazizi's death was announced in early January 2011, riots escalated in the streets of Sidi Bouzid.[9] Hundreds were killed, injured, and arrested as protests spread across Tunisia and eventually reached the capital city of Tunis.[10] High unemployment, inflation, and lack of political reforms had long been feeding social tensions in the country.[11] The events that unfolded throughout the next several weeks marked the beginning of what has come to be known as the Arab Spring, a pro-democratic wave of revolutions that erupted across the Middle East.

Over the next several months, dictatorial rulers were overthrown in Tunisia, Egypt, and Libya. Men and women stood side by side as they marched in the streets, organized protests, and led revolts. Now, as these countries face the challenges of transitioning from dictatorships to representative governments based on both democratic and Islamic principles, each has undertaken to rewrite their respective constitutions. In doing so, women have an opportunity to be recognized as men's equals and to rid themselves of their longstanding second-class citizenship by protecting their basic freedoms and rights in the new constitutions.

Despite the promising opportunity, a trend toward implementing Islamic religious law, or shari'a, has emerged in the reconstruction of governments over the past several months. Shari'a

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[7] Fahim, *supra* note 3.

[8] *Id.*

[9] Frank Gardner, *Tunisia One Year on: Where the Arab Spring Started,* BBC NEWS (Dec. 17, 2011), *available at* http://www.bbc.co.uk/news/world-africa-16230190 (last visited Jan. 2, 2014).

[10] *Id.*; Julian Borger, *Tunisian President Vows to Punish Rioters After Worst Unrest in a Decade,* GUARDIAN (Dec. 29, 2010), *available at* http://www.guardian.co.uk/world/2010/dec/29/tunisian-president-vows-punish-rioters (last visited Jan. 2, 2014).

[11] Borger, *supra* note 10.

is thought by many to be in conflict with women's fundamental human rights as defined by international law.[12] Under shari'a law, women lack basic social, legal, and sexual autonomy.[13] Is shari'a law compatible with the ideals enshrined in the institution of democracy? Furthermore, can it be interpreted to ensure that women are treated equally and afforded the basic fundamental rights to which they are entitled to under international law? These are the difficult questions faced by both the emerging governments in the Middle East and the international community.

This note will trace the origins of the oppression of women in the Muslim world, give a generalized overview of women's rights under shari'a law, and then highlight the achievements that have been made over the last century in strengthening and securing women's rights in both the domestic and international spheres. It will also critically examine the revolutions and the constitutional drafting processes that are underway in Tunisia, Egypt, and Libya, focusing on the role that shari'a law will play in each. In conclusion, the note will argue that while shari'a law can comply with basic human rights and international legal obligations, this can only be so through a moderate interpretation.

Section II offers a brief overview of the roots of shari'a law in the pre-Islamic period. It then gives a general overview of women's rights under shari'a law in the areas of marriage, maintenance, divorce, child custody, inheritance, and dress. Section II concludes by reviewing the major gains that have been made in achieving equality for women across the region and the

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[12] Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949 (1995), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1512&context=aulr (last visited Mar. 11, 2014).

[13] PRISCILLA OFFENHAUER, WOMEN IN ISLAMIC SOCIETIES: A SELECTED REVIEW OF SOCIAL SCIENTIFIC LITERATURE 34 (2005), *available at* http://www.loc.gov/rr/frd/pdf-files/Women_Islamic_Societies.pdf (last visited Mar. 23, 2014).

resulting international legal obligations that are potentially threatened by the implementation of a hardline interpretation of shari'a law.

Section III provides a summary of the revolution that occurred in Tunisia and the results of the ensuing elections. It then looks at the status of both women's equality and international law under the proposed draft constitution. The section concludes by providing an update on the current state of Tunisia at the time of submission of this note.

Section IV highlights the overthrow of Egyptian president Hosni Mubarak. It then explores the active exclusion of women from the reform process and consequently, how this has affected their equality under the new constitution. The section also discusses the current political and economic crisis Egypt is facing.

Section V summarizes the uprisings in Libya that lead to the ousting and eventual death of Muammar al-Gaddafi and comments on the possible consequences that the implementation of shari'a law will have on women's equality in the country.

Finally, section VI analyzes the consequences of the revolutions and puts forth suggestions in order to recognize women as fully equal to men, and to protect the gains that women have made in strengthening their rights. This note ultimately postulates that if the new governments implement shari'a law, they must moderately interpret it in order to support women's equality, the basic human rights of women recognized under international law, and the fundamental principles of democracy.

II. WOMEN IN THE ARAB WORLD

For millennia, Arab culture has been "patriarchal in nature," with power and authority centralized in the hands of men.[14] During the Pre-Islamic period, nomadic tribes of the Arabian Peninsula were concerned about "genealogical purity and family control over women's sexuality."[15] It was preferred for women to marry paternal cousins, thus placing greater significance on the male (agnatic) line than the marital relationship itself in order to preserve familial property.[16] Women were valued for the number of sons they produced, making purity of lineage of the utmost importance.[17] The wife, and any children born to her, would become the husband's property.[18] Female virginity at the time of marriage and fidelity during marriage were, and continue to be, emphasized, as a man's honor was dependent on his wife's chastity and fidelity.[19] These early ideologies served as the foundation for the development of Islamic law in the Arab world.

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[14] Rowaida Al Maaitah et al., *Arab Women and Political Development,* 12 J. INT'L WOMEN'S STUD. 19 (2011), *available at* http://vc.bridgew.edu/cgi/viewcontent.cgi?article-1110&content-jiws (last visited Jan. 2, 2014).

[15] NIKKI R. KEDDIE, WOMEN IN THE MIDDLE EAST: PAST AND PRESENT 16 (2007).

[16] *Id.* at 16 -17.

[17] *Id.* at 17.

[18] JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 13 (2d ed. 2001).

[19] KEDDIE, *supra* note 15, at 17.

A. Women's Rights Under Islamic Shari'a Law

Shari'a is the divine religious law of Islam. Shari'a literally means "the path or the road leading to the water."[20] In religious settings, shari'a is often interpreted to mean "the good way of life."[21] Shari'a often functions as the basis of specific legal rules and as a general framework for societal norms and values.[22] Shari'a law privileges men in areas such as marriage, maintenance, divorce, child custody, inheritance, and dress.[23] These points will be discussed in the following sections. Although there are differing Islamic schools of thought (*Hanafi, Maliki, Shafi'i, and Hanibali*),[24] and each Muslim nation has accordingly implemented their own laws, the following serves a general overview of women's rights under shari'a law.

1. *Marriage*

Under shari'a law, the marriage contract is not one of equality. Women are made to be "dependent, vulnerable, and weak" while men are privileged as "authoritative, worldly, and strong."[25] A wife is legally obligated to submit to her husband's authority as long as he fulfills

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[20] EKATERINA YAHYAOUI KRIVENKO, WOMEN, ISLAM AND INTERNATIONAL LAW: WITHIN THE CONTEXT OF THE CONVENTION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 47 (Graduate Inst. Int'l Dev. Studies, Nov. 8, 2009).

[21] *Id.*

[22] Lisa Hajjar, *Domestic Violence and Shari'a: a Comparative Study of Muslim Societies in the Middle East, Africa and Asia*, *in* WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 243 (Lynn Welchman ed., 2004).

[23] Deniz Kandiyoti, *Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing, in* FAITH & FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 22 (Mahnaz Afkhami ed., 1995).

[24] RODOLPHE J.A. DE SEIFE, THE SHARI'A; AN INTRODUCTION TO THE LAW OF ISLAM 36 (1993).

[25] JUDITH E. TUCKER, WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW 221 (Wael B. Hallaq ed., Themes in Islamic Law Ser. Nov. 3, 2008).

his obligations within their marital relationship.[26] A wife has duties to maintain the home, care for the children, obey her husband, and satisfy his sexual needs.[27] If a wife refuses to have sex with her husband, her husband can interpret her refusal as "a defiance of her duties," and thereby has the justification to beat her.[28] Marital rape is not viewed as a crime, and consent to sexual intercourse at the husband's request is implied in the marriage contract.[29] Furthermore, a husband has the power to restrict his wife's activities, such as prohibiting her from going out in public without his permission.[30] Thus, in return for her maintenance - i.e., a husband provides his wife with food, clothing, and accommodation - a wife is placed in a position much like that of a domestic servant or slave.[31]

Moreover, shari'a permits a man to practice polygamy and to marry up to four wives simultaneously without the need for permission from first his wife or from state authorities.[32] Polygamy, however, victimizes women and is in conflict with the fundamental ideals of human dignity.[33] Polygamous marriages also have negative effects on children.[34] Children are

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[26] Hajjar, *supra* note 22, at 246.

[27] Yakare-Oule Jansen, *Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?,* 5 N.W. J. INT'L L. & HUM. RTS. 181, 187 (2007).

[28] Hajjar, *supra* note 22, at 245.

[29] *Id.*

[30] *See* EPOSITO & DELONG-BAS, *supra* note 18, at 22.

[31] KRIVENKO, *supra* note 20, at 64, 71.

[32] *See* RAJ BHALA, UNDERSTANDING ISLAMIC LAW 890 (2011).

[33] BHALA, *supra* note 32, at 894-95.

[34] *Id.* at 894.

sometimes used as pawns in power struggles and in bickering amongst wives and in between wives and the husband.[35] Children often become confused and uncertain as to paternal and maternal love.[36] They can also become emotionally injured by the belief that one mother loves them more than another, or that their father loves a different mother more than their own biological mother.[37] Finally, polygamous marriages can lead to family sizes that are "not sustainable with respect to resource consumption."[38]

2. *Dissolution of Marriage*

Divorce, generally referred to as *talaq* meaning "repudiation," is highly gendered and extremely discriminatory.[39] Divorce is easy for the husband to attain, however, near impossible for the wife.[40] Under shari'a law, a man has an "original right" to divorce his wife.[41] A husband can dissolve a marriage at his discretion simply by announcing to his wife, "You are divorced," or, "I have divorced you."[42] He can do so for almost any reason he pleases, such as if his wife leaves the house without his permission, speaks to another man, or gives birth to a girl.[43] Furthermore, when a woman leaves the home after a divorce, she is entitled to support for only a

[35] BHALA, *supra* note 32, at 894.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 895.

[39] ESPOSITO & DELONG-BAS, *supra* note 18, at 28.

[40] KRIVENKO, *supra* note 20, at 68.

[41] *Id.* at 67.

[42] ESPOSITO & DELONG-BAS, *supra* note 18, at 29.

[43] TUCKER, *supra* note 25, at 90.

temporary period.[44] Women, on the other hand, do not have a reciprocal right of divorce.[45] This practice is not only extremely degrading, but also undermines the entire institution of marriage itself by minimizing the martial bond and allowing it to be easily broken.[46]

3. Custody of Children

Men enjoy greater power as the guardians of their children.[47] Divorced women are only entitled to custody of male children until they reach seven years of age and female children until they reach nine years of age, at which time the father receives full custody.[48] At all times, the father is considered to be a child's natural guardian and continues to support and supervise him or her.[49] He remains the sole decision-maker in all of the important aspects of the child's life.[50] If a mother remarries, she immediately loses her limited custody rights on the assumption that fulfilling her duties to her new husband will leave her too preoccupied to care for her children.[51] The father will then receive the children regardless of their ages.[52] The justification for these rules is the belief that a woman is inherently weak and, thus, unable to protect her child in the

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44 TUCKER, *supra* note 25, at 131.

45 *Id.* at 91.

46 *Id.* at 116.

47 Abbas Hadjian, *The Children of Shari'a*, LOS ANGELES LAWYER, Apr. 2013, at 32, 36.

48 ESPOSITO & DELONG-BAS, *supra* note 18, at 35.

49 *Id.*

50 KRIVENKO, *supra* note 20, at 69.

51 *Id.* at 69-70.

52 *See id.* at 69.

same way that a man can and, moreover, a woman is thought to lack the intellectual capacities needed to properly educate children.[53]

4. Inheritance

"The system of inheritance is the science of duties and obligations (*ilm al-faraid)*, specifically, religious obligations."[54] Under shari'a law, a woman's inheritance is different from that of a man's in both quantity and attached obligations, and "is viewed under international human rights law as being inconsistent with the principle of equality for women."[55] A woman is given only one-half of the shares of a man who inherits in the same capacity.[56] Furthermore, when a woman is successful in inheriting real property, it is commonplace for family members to attempt to persuade her to renounce her share in order to keep the property in the agnatic line for "the greater good of the family."[57]

5. Women's clothing

Under shari'a law, the purpose of clothing is to enhance human dignity.[58] It serves to cover private parts, to adorn the body, and to protect from atmospheric hazards.[59] As adultery and fornication are prohibited under shari'a law, both men and women are required to dress

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[53] KRIVENKO, *supra* note 20, at 70.

[54] ESPOSITO & DELONG-BAS, *supra* note 18, at 38.

[55] MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 145-46 (Ian Brownlie & Vaughn Lowe, eds., Oxford Monographs in Int'l Law Ser. Nov. 7, 2003).

[56] ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS 99 (3d ed. 1999).

[57] TUCKER, *supra* note 25, at 165.

[58] BADERIN, *supra* note 55, at 64.

[59] *Id.*

conservatively and are prohibited from exposing sensuous parts of their body in public.[60] While different Islamic sects have different understandings as to what constitutes appropriate coverage, the Qur'an instructs "women to 'draw veils over their bosoms'" and forbids them from publicly displaying "their beauty [,] 'except for what must ordinarily appear.'"[61] The *Shafi'i* and the *Hanibali* schools of Islamic jurisprudence command that women "veil up their whole person in public."[62] The *Hanafi* and *Maliki* schools of jurisprudence permit "exposure of the face, the hands up to the wrists, and the feet up to the ankles."[63] The rationale put forth for such conservative interpretations is that the veiling of women ensures stability and harmony within the community.[64]

B. Advancement of Women's Rights

Over the last several decades, major gains have been made across the Middle East region in strengthening women's rights. For example, the Arab Nations, with the exception of Sudan, Iran, and Somalia, have signed the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[65] CEDAW has been described as the

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[60] BADERIN, *supra* note 55, at 64.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] TUCKER, *supra* note 25, at 215.

[65] G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979). The treaty was written in 1979 and entered into force in 1981. It has been ratified by 187 nation states. Each Arab state that has ratified the treaty, however, has done so with "substantial reservations." Women's Learning P'ship, *Women's Rights and the Arab Spring: Middle East/North Africa Overview and Fact Sheet, available at* http://www.foreign.senate.gov/imo/media/doc/ Mahnaz_Afkhami_Testimony_Appendix.pdf (last visited Jan. 2, 2014). For example, Egypt and Libya submitted that its accession was "subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shari'a*." U.N. Div. for

"international bill of rights for women."[66] While CEDAW recognizes the significance of culture and tradition in forming gender roles and familial relations, it compels States to "take all appropriate measures" to correct social and cultural patterns of conduct that are discriminatory or harmful to women.[67] CEDAW acknowledges that gender stereotyping is a barrier to realizing full equality for women and calls on governments to confront the views and practices that stereotype women as second-class individuals whose very being prohibits them from enjoying the same freedoms as men.[68]

Arab leaders discussed the advancement of women in the "political, economic, social, cultural and educational fields" at the Arab Summit in Tunisia in May of 2004.[69] It was at this time that the most recent version of the Arab Charter on Human Rights was adopted.[70] The Charter affirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the Cairo Declaration on Human Rights in Islam.[71]

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the Advancement of Women, *Declarations, Reservations and Objections to CEDAW*, *available at* http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last visited Jan. 2, 2014).

[66] Hajjar, *supra* note 22, at 247.

[67] *Id.* at 247.

[68] MAYER, *supra* note 56, at 125.

[69] *Tunis Declaration of the 16th Arab Summit*, ROYAL EMBASSY OF SAUDI ARABIA (May 24, 2004), *available at* http://www.saudiembassy.net/archive/2004/statements/page13.aspx (last visited Jan. 2, 2014).

[70] MALCOLM SHAW, INTERNATIONAL LAW, 395 (6th ed. 2008).

[71] *Id.*

Furthermore, the Arab Women Organization ("AWO") was established as a branch of the League of Arab States in 2003. Since the organization's founding, the AWO has "revised the legislations of member countries and issued recommendations to improve the legal status of Arab women."[72] As a result, more women participate in higher education, hold political offices, and run businesses. Despite these advances, however, women continue to be "harassed, beaten, … chased out of public spaces,"[73] and viewed as second-class citizens as compared to men.

Although the popular uprisings have resulted in the downfall of harsh dictators, women will enjoy equal rights only if true democratic governments emerge from the revolutions.[74] As it stands, the reforms that have been undertaken have not offered much hope that women will become equal partners to men as opposed to remaining their subordinates.[75] Recently empowered Islamist groups are advocating for changes in women's legal status that could go so far as to retract existing rights.[76]

C. Obligations Under International Law

It must be noted that as members of the United Nations, as state parties to the treaties discussed above, and as state parties to the International Covenant on Civil and Political Rights in the Light of Islamic Law, Tunisia, Egypt, and Libya have formally accepted human rights as defined by international law. Therefore, they are bound by these norms and their conduct may be

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[72] Econ. & Soc. Council, Comm'n. on Women, Consol. Arab Rep. on the Implementation of the Beijing Platform for Action: +15, ¶ 11, U.N. Doc. E/ESCWA/ECW/2009/IG.1/3 (Nov. 3, 2009).

[73] WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1, at 1.

[74] *See id.* at 2.

[75] *Id.* at 3.

[76] *Id.* at 8.

judged against them.[77] Generally, countries are not permitted to opt out of their international legal obligations by citing domestic law.[78] Muslim countries, however, often justify their failure to grant full equality to women by claiming, "their domestic laws are not manmade, but rather, divinely prescribed."[79] In essence, these countries assert that these divine prescriptions qualify as an exception to the normal prohibition against the use of internal rules to ignore international responsibilities.[80]

While international law recognizes that many protected rights are not absolute and may be suspended or qualified in exceptional circumstances such as war or public emergency, or under normal circumstances for "certain overriding considerations," these "overriding considerations" have never been held to include the requirements of any particular religion.[81] International law does not provide any authorization for depriving Muslim women of human rights on the basis of Islamic criteria.[82] Therefore, despite the reservations made by Muslim countries that their ratification of the treaties discussed above cannot conflict with shari'a, it is unlawful to use shari'a to restrict or dilute fundamental human rights recognized by international law.

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[77] *See* MAYER, *supra* note 56, at 12.

[78] *See id.* at 18. This principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties. "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

[79] Ann Elizabeth Mayer, *Rhetorical Strategies and Official Policies on Women's Rights: The Merits and Drawbacks of the New World Hypocrisy, in* FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 105 (Mahnaz Afkhami ed., 1995).

[80] MAYER, *supra* note 56, at 105.

[81] *Id.* at 66.

[82] *See id.*

III. TUNISIA

On January 14, 2011, just days after the death of the Mohammed Bouazizi, Tunisian President el-Abidine Ben Ali [hereinafter "Ben Ali"] fled to Saudi Arabia, ending twenty-three years of authoritarian rule.[83] Despite his attempts to quell ongoing riots, protestors had continued to flood the streets.[84] This event marked the first time that street protests had successfully overthrown an Arab leader.[85]

A. Democratic Elections of 2011

The country held its first democratic election in October of 2011 to elect representatives to a 217-member Constituent Assembly responsible for drafting a new constitution and appointing an interim president and government to run the country.[86] The moderate Islamist party, Ennahda, won the majority (eighty-nine) of the seats.[87] Ennahda's win was an extraordinary turnaround for the party, as it had previously been operating underground after being banished by Ben Ali's government.[88] The runner-ups in the election were the Congress for

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[83] David D. Kirkpatrick, *Tunisia Leader Flees and Prime Minister Claims Power,* N.Y. TIMES (Jan. 14, 2011), http://www.nytimes.com/2011/01/15/world/africa/15tunis.html?pagewanted=all (last visited Feb. 7, 2014).

[84] Kirkpatrick, *supra* note 83. Ben Ali fired his interior minister, promised to investigate corruption, pledged new freedoms and dismissed his whole cabinet. *Id.*

[85] *Id.*

[86] Tarek Amara & Andrew Hammond, *Islamists Claim Win in Tunisia's Arab Spring Vote*, REUTERS (Oct. 24, 2011), http://www.reuters.com/article/2011/10/24/us-tunisia-election-idUSTRE79L28820111024 (last visited Feb. 7, 2014).

[87] *Final Tunisian Election Results Announced,* ALJAZEERA (Nov. 14, 2011), http://www.aljazeera.com/news/africa/2011/11/20111114171420907168.html (last visited Feb. 7, 2014).

[88] Amara & Hammond, *supra* note 86.

the Republic, winning twenty-nine seats, and the Popular Petition, winning twenty-six seats.[89] In total, women now occupy forty-nine of the assembly seats, forty-two of which are representatives from the Ennahda party.[90]

Ennahda, who was initially influenced by the Muslim Brotherhood in Egypt, advocates for an Islamic identity and society for Tunisia.[91] The party's leader, Rachid Ghannouchi, was part of a group of intellectuals who founded the party in 1981 under the name the Islamic Tendency Movement.[92] The party changed its name to Ennahda, meaning "Renaissance," in 1989.[93] Shortly after, in 1992, then-President Ben Ali banned the group.[94] The party regained its legal status in March 2011.[95] In a statement released to the press soon after, Mr. Ghannouchi declared, "[w]e believe that all Tunisian people can survive peacefully within a moderate vision of Islam which can be compatible with democracy."[96] Ennahda has announced that it will respect women's rights and will not impose a Muslim moral code on Tunisian society.[97]

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89 *Final Tunisian Election Results Announced, supra* note 87.

90 Intissar Kherigi, *Tunisia: The Calm After the Storm,* ALJAZEERA (Nov. 28, 2011), http://m.aljazeera.com/SE/2011112894152877351 (last visited Feb. 7, 2014).

91 Aiden Lewis, *Profile: Tunisia's Ennahda Party,* BBC NEWS (Oct. 25, 2011), http://www.bbc.co.uk/news/world-africa-15442859 (last visited Feb. 7, 2014).

92 Lewis, *supra* note 91.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 Tarek Amara & Andrew Hammond, *Violence Erupts After Tunisian Islamists Win Vote*, REUTERS (Oct. 27, 2011), *http://mobile.reuters.com/article/worldNews/idUSTRE79Q32V20111027?i=1* (last visited Mar. 24, 2014).

B. Women's Equality Under the Draft Constitutions

The first draft of the constitution was released on August 8, 2012.[98] In order for each article in the draft to be adopted, each article needed approval by an absolute majority of the Assembly, 109 out of 217 votes.[99] After this process, the Assembly then had to approve the entire constitution in a separate vote, by a two-thirds majority.[100]

A major area of contention in the first draft constitution was Article 28 [hereinafter "Article"], which, when translated into English, labeled women as "complementary" to men.[101] Activists claimed that "[t]he description [fell] short of recognizing men and women as equal[s]," and was "gratuitous, humiliating, and a threat to women's rights."[102] They further asserted that the text, as it stood, categorized women as unequal to, or incomplete without men.[103] The U.N. Working Group on Discrimination Against Women released a statement criticizing the Article for placing "women on unequal footing with men[,]" and not considering them to be

[98] *Tunisia: Fix Serious Flaws in Draft Constitution*, HUM. RTS. WATCH (Sept. 13, 2012), http://www.hrw.org/news/2012/09/13/tunisia-fix-serious-flaws-draft-constitution (last visited Feb. 7, 2014).

[99] *Id.*

[100] *Id.*

[101] Monica Marks, *"Complementary" status for Tunisian women*, FOREIGN POL'Y (Aug. 20, 2012), *available at* http://mideast.foreignpolicy.com/posts/2012/08/20/complementary_status_for_tunisian_women (last visited Feb. 7, 2014). "The Arabic word *yetekaamul* found in the middle of the text [of the article] has often been understood to mean 'complement one another.'" *Id.*

[102] Borzou Daragahi, *Term Used for Women in Tunisia's Draft Constitution Ignites Debate, Protests,* WASH. POST (Aug. 16, 2012), http://www.washingtonpost.com/world/middle_east/term-used-for-women-in-tunisias-draft-constitution-ignites-debate-protests/2012/08/16/c6045e24-e7bf-11e1-a3d2-2a05679928ef_story.html (last visited Feb. 7, 2014).

[103] Daragahi, *supra* note 102.

"independent, full individuals."[104] Instead, Article 28 portrayed their role as "complementary" to that of the men in their family.[105] The fear was that the Article's ambiguity would leave too much latitude for interpretation by future legislators and local judges, and consequently, inspire discriminatory legislation against women's rights.[106]

The assembly failed to adopt the draft and, consequently, the constitutional coordinating committee revised the text and resubmitted it to the assembly.[107] A second draft of the constitution, released on December 14, 2012, omitted Article 28.[108] Instead, Article 5 now provides that, "All citizens, males and females alike, shall have equal rights and obligations and shall be equal before the law, without discrimination of any kind."[109] The new draft also states that, "the state shall guarantee the protection of the rights of women and shall support the gains thereof."[110]

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[104] *Tunisia: UN Expert Group Calls on New Government to Protect and Strengthen Achievements on Equality and Women's Human Rights*, U.N. HUM. RTS. (Aug. 21. 2012), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12447&LangID=E (last visited Feb. 7, 2014).

[105] *Id.*

[106] Marks, *supra* note 101.

[107] *Tunisia: Fix Serious Flaws in Draft Constitution*, *supra* note 98; *Tunisia: Draft Constitution Still Slights Rights*, HUM. RTS. WATCH (Jan. 23, 2013), *available at hrw.org/news/2013/01/22/tunisia-draft-constitution-still-slights-rights* (last visited Mar. 24, 2014).

[108] *Letter to the Tunisian National Assembly on the Draft Constitution*, HUM. RTS. WATCH (Jan. 22, 2013), *available at* http://www.hrw.org/news/2013/01/22/letter-tunisian-national-constituent-assembly-draft-constitution (last visited Feb. 7, 2014) [hereinafter *Letter to TNA on Draft Constitution*].

[109] *Letter to TNA on Draft Constitution, supra* note 108.

[110] *Id.*

Unlike many other Middle Eastern countries, Tunisian women have traditionally enjoyed greater equality, and Tunisia has long been considered the most progressive country in the region.[111] After Tunisia won independence from France in 1956, the Personal Status Code was enacted.[112] The Code outlawed polygamy, gave women a say in divorce, and required that a marriage be performed only if both parties consented.[113] As a result, in "2004 only 3% of [females] between the ages of 15 and 19 were married, divorced or widowed."[114] Furthermore, an emphasis on education for girls and employment for women has resulted in Tunisia leading the way in the region for high female workforce participation.[115] It is the only Arab country that permits abortion,[116] and was the first country in the region to lift all of its key reservations to the CEDAW.[117] "Tunisia is one of only two countries in the region to adopt the Optional Protocol to

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[111] *Women in the Arab Spring: J. Hearing before the Subcomm. on Int'l Operations & Orgs., Hum. Rts., Democracy & Global Women's Issues & the Subcomm. on Near E. and S. & Cent. Asian Affairs of the S. Comm. on Foreign Relations*, 112th Cong. 7 (2011) (statement of Ambassador Verveer).

[112] *See* BADERIN, *supra* note 55, at 141.

[113] *See id.* at 141, 150-51.

[114] *Women and the Arab Awakening: Now is the Time,* THE ECONOMIST (Oct. 15, 2011), http://www.economist.com/node/21532256 (last visited Feb. 7, 2014).

[115] WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1, at 6. Although only 27% of the workforce is female, the literacy rate for women is over 70%. *Women and the Arab Awakening: Now is the Time, supra* note 114.

[116] Daragahi, *supra* note 102.

[117] *Tunisia: Government Lifts Restrictions on Women's Rights Treaty,* HUM. RTS. WATCH (Sept. 7, 2011), *available at* http://www.hrw.org/news/2011/09/06/tunisia-government-lifts-restrictions-women-s-rights-treaty (last visited Feb. 7, 2014) [hereinafter *Tunisia: Government Lifts Restrictions on Treaty*]. In doing so, however, Tunisia kept a general declaration that it "shall not take any organizational or legislative decision in conformity with the requirements of [the] Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution." *Id.* Significantly, Chapter I establishes that Tunisia is a state whose

CEDAW, which entitles individuals or groups of individuals to submit complaints on women's rights violations to the CEDAW Committee."[118]

Therefore, it comes as little surprise that Tunisian women are concerned that the new constitution, coupled with the rise of ultraconservative Salafist Islamist groups, may turn back the clock on their progress towards gender equality.[119] Since the revolution, the number of women represented in the media, politics, and high-level decision-making has decreased.[120] To combat this fear, the Tunisian Workers' Party created the Women's Organization at the end of December 2012, which will advocate for women's rights throughout the remainder of the drafting process[121]

C. The Status of International and Shari'a Law Under the New Constitution

Another concern is the status of international law under the new constitution. Article 38 of the constitution "stipulates [that] 'international conventions promulgated by the president of the Republic and ratified by the parliament have supremacy over domestic law,' while "[A]rticle 15 seems to contradict this by stating, 'respect for international law conventions is compulsory *if*

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religion is Islam. CONSTITUTION OF THE REPUBLIC OF TUNISIA 1 June 1959, *as amended* July 12, 1998.

[118] *Tunisia: Government Lifts Restrictions on Treaty, supra* note 117.

[119] Larbi Sadiki, *Tunisia: Women's Rights and the New Constitution*, AL JAZEERA (Sept. 21, 2012), http://www.aljazeera.com/indepth/opinion/2012/09/2012918102423227362.html (last visited Mar. 24, 2014).

[120] Roua Seghaier,*Workers' Party to Advocate Women's Rights in Draft Constitution,* TUNISIA LIVE (Jan. 2, 2013), *available at* http://www.tunisia-live.net/2013/01/02/workers-party-to-advocate-womens-rights-in-draft-constitution/ (last visited Feb. 7, 2014).

[121] *Id.*

they do not contravene this constitution.'"[122] This article is incompatible with the Vienna Convention on the Law of Treaties, ratified by Tunisia, which states in Article 27, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[123] Tunisia, therefore, has an obligation to make certain that its constitution and laws adhere to its international obligations.[124] The ambiguous wording of Article 15, however, might cause judges and legislators to disregard these obligations.[125] As it stands, the wording would give broad leeway to both legislative and judicial officials to limit human rights.[126]

In addition, as written, the Tunisian constitution risks weakening "the principle of equality between men and women as required by [A]rticle 2 of [CEDAW], ratified by Tunisia in 1985."[127] It also may contradict Article 5(a), which requires states to "modify the social and

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[122] Sarah Leah Whitson, *Letter from Human Rights Watch to the Tunisian National Assembly on the Draft Constitution*, HUM. RTS. WATCH (Jan. 22, 2013), *available at* http://www.hrw.org/news/2013/01/22/letter-tunisian-national-constituent-assembly-draft-constitution (last visited Feb. 7, 2014) [hereinafter "Whitson 2013 Letter"].

[123] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; Sarah Leah Whitson, *Letter from Human Rights Watch to Members of the Tunisian Constituent Assembly*, HUM RTS. WATCH (Sept. 13, 2012), *available at* http://www.hrw.org/print/news/2012/09/13/letter-members-tunisian-national-constituent-assembly (last visited Feb. 7, 2014) [hereinafter "Whitson 2012 Letter"]. *See also* Whitson 2013 Letter, *supra* note 122.

[124] Whitson 2012 Letter, *supra* note 123. *See also*, Whitson 2013 Letter, *supra* note 122.

[125] Whitson 2013 Letter, *supra* note 122.

[126] *Id.* A suggested remedy to this concern would be to "include a clause in the constitution stating that judges should always interpret the law, including the constitution, in a way that most favors the enforcement of a right or fundamental freedom, and specifically stating that they should take into account the interpretation of human rights treaties from any official treaty body, including courts and commissions, as the minimum acceptable standard." *Tunisia: Strengthen New Constitution's Rights Protection*, HUM. RTS. WATCH (July 24, 2013), *available at* http://www.hrw.org/news/2013/07/24/tunisia-strengthen-new-constitution-s-rights-protection-0 (last visited Feb. 7, 2014).

[127] Whitson 2012 Letter, *supra* note 123.

cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women."[128]

The new constitution does not mention shari'a as a source of legislation.[129] The drafting committee, however, preserved language from the previous constitution that established Islam as the state's religion and Arabic as its language.[130] The omission of shari'a law from the constitution was, "aimed at strengthening the national consensus and helping the democratic transition to succeed by uniting a large majority of the political forces to confront the country's challenges."[131]

Despite its shortcomings, the draft of the constitution upholds many key rights, including "the right not to be detained arbitrarily, the right to bodily integrity, a prohibition of torture… freedom to create political parties[,] freedom of movement[,] freedom to assemble and associate… the rights of persons who have been accused of breaking the law, arrested or detained[,]" the right to work, the right to health, and the right to education.[132] Furthermore, the

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[128] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46, Art. 5(a) (Dec. 18, 1979), *available at* http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (last visited Feb. 7, 2014); Whitson 2012 Letter, *supra* note 123.

[129] Kareem Fahim, *Tunisia Says New Constitution Will Not Cite Islamic Law,* N.Y. TIMES (Mar. 26, 2012), *available at* http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html?_r=0 (last visited Feb. 7, 2014).

[130] *Id.*

[131] *Id.* Statement by Ziad Doulatli, Ennahda party leader.

[132] Whitson 2012 Letter, *supra* note 123.

draft of the constitution provides for the formation of a constitutional court, which will ensure that Tunisian laws comply with the constitution.[133]

D. The Current State of Tunisia

Two years after the revolution, little progress has been made and the country stands in a political deadlock between elected conservatives and liberal forces refusing to compromise. Ennahda's commitment to democratic principles has started to waver and public opinion seems to be turning against Ennahda as a result of the party's failure to address Tunisia's critical economic and social problems.[134] Following the assassination of Chorki Belaid in front of his home on February 6, 2013,[135] Prime Minister Hamadi Jebali resigned.[136] Belaid was the leader of the Unified Democrat Patriot's Party and a prominent critic of Ennahda.[137] Shortly after the assassination, stones were thrown at Ennahda party leader Rached Ghannouchi's vehicle while

[133] Whitson 2012 Letter, *supra* note 123.

[134] Anthony Dworkin, *An Assassination in Tunisia*, EUR. COUNCIL FOREIGN REL. BLOG (Feb. 7, 2013), http://ecfr.eu/blog/entry/an_assassination_in_tunisia (last visited Feb. 7, 2014).

[135] Tristan Dreisbach, *Tunisia Marks One Year Since Chokri Belaid Assassination*, TUNISIA LIVE (Feb. 6, 2014), http://www.tunisia-live.net/2014/02/06/tunisia-marks-one-year-since-chokri-belaid-assassination/ (last visited Mar. 24, 2014).

[136] *See* Kiran Alvi, *Searching for Stability, Tunisia Stumbles*, NPR NEWS (Mar. 2, 2013), http://www.npr.org/blogs/thetwo-way/2013/03/02/173173569/searching-for-stability-tunisia-stumbles (last visited Feb. 8, 2014). Ali Larayedh from Ennahda has since been appointed as the new prime minister. *Id.*

[137] Henry Ridgwell, *Assassination Prompts Tunisian Opposition to Unite, Demand Elections,* VOICE OF AM. (Feb. 13, 2013), *available at* http://www.voanews.com/content/assassination-prompts-tunisian-opposition-to-unite-demand-elections/1603336.html (last visited Feb. 8, 2014).

he was visiting the northern town of Thala.[138] More recently, gunmen riding on a motorbike shot Parliamentarian Mohammed Brahmi multiple times outside of his home.[139]

Despite these events, Ennahda appears to have taken a permissive stance to the increasing acts of violence carried out by Salafist extremists.[140] Attacks on the U.S. Embassy, art galleries, and Sufi shrines have all been attributed to Salafist groups.[141] As the country proceeds in drafting a new constitution and setting a date for elections, Radwan Masmoudi, who heads the Study of Islam and Democracy in Tunis, underlined the fear held by many: "Democracy has to succeed in Tunisia or people will start to question its benefits… And then the real threat of Salafists will arise as they'll present themselves as the only alternative left."[142] As of August 6, 2013, however, all work on drafting Tunisia's constitution has been suspended by the National Constituent Assembly until the current government and opposition meet to work toward solutions to the growing political crisis.[143]

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[138] *Anger Strikes: Tunisia's Ennahda Leader Pelted with Stones*, AL ARABIYA (Mar. 3, 2013), *available at* http://english.alarabiya.net/articles/2013/03/03/269414.html (last visited Feb. 8, 2014).

[139] Margaret Coker, *Tunisian Politician Assassinated, Sparking Protests*, WALL ST. J. (July 25, 2013), http://online.wsj.com/article/SB10001424127887324110404578627660210949042.html (last visited Feb. 8, 2014).

[140] Dworkin, *supra* note 134.

[141] Alvi, *supra* note 136.

[142] *Id.*

[143] Richelle Harrison Plesse, *Work Suspended on Tunisian Constitution Amid Crisis*, FRANCE24 (Aug. 8, 2013), http://www.france24.com/en/20130806-tunisia-constituent-assembly-suspends-work-constitution-political-crisis (last visited Feb. 8. 2014).

IV. EGYPT

Anti-government protests began in Egypt on January 25, 2011, demanding the overthrow of then-President Hosni Mubarak, who had held the Egyptian presidency for twenty-nine years.[144] Despite his promises to step down at the next election on February 4, 2011, thousands gathered in Tahrir Square in Cairo in a "Day of Departure" calling for Mubarak's immediate resignation.[145] Not long after, on February 11, 2011, Mubarak resigned from office.[146] The Armed Forces of Egypt, Egypt's military council, assumed power.[147] The military immediately dissolved Parliament, suspended the constitution,[148] and lifted the unpopular "emergency law."[149]

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[144] *Timeline: Egypt's Revolution*, AL JAZEERA (Feb. 14, 2011), http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html (last visited Mar. 24, 2014).

[145] *See* Tony Karon, *Mubarak Vows to Restore Order: Will There be Blood?*, TIME (Feb. 4, 2011), http://www.time.com/time/world/article/0,8599,2046224,00.html (last visited Feb. 8. 2014).

[146] Chris McGreal & Jack Shenker, *Hosni Mubarak Resigns – and Egypt Celebrates a New Dawn*, THE GUARDIAN (Feb. 11, 2011), http://www.guardian.co.uk/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo (last visited Feb. 8, 2014); David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES (Feb. 11, 2011), http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html?pagewanted=all&_r=0 (last visited Mar. 24, 2014).

[147] *See* McGreal & Shenker, *supra* note 146.

[148] *Egypt's Military Leaders Dissolve Parliament, Suspend Constitution, New Strikes Begin*, PBS (Feb. 14, 2011), http://www.pbs.org/newshour/rundown/massive-demonstrations-in-cairo-draw-thousands/ (last visited Mar. 24, 2014).

[149] *Egypt Lifts Unpopular Emergency Law*, CNN (June 2, 2012), http://www.cnn.com/2012/05/31/world/africa/egypt-emergency-law (last visited Feb. 8, 2014). The emergency law, enacted in 1958, "gave authorities broad leeway to arrest citizens and to hold them indefinitely without charges." *Id.*

On November 28, 2011, voting began in Egypt's parliamentary election.[150] The election lasted over a period of several weeks and was concluded on January 11, 2012. The Muslim Brotherhood came out on top, winning almost half of the seats in the People's Assembly.[151] The Muslim Brotherhood, founded in 1928 by Hassan al-Banna, is the oldest Islamist movement in the Arab world; it is also now considered the largest.[152] The Brotherhood initially focused on education and charitable work, but quickly became known as a political organization as it blended Islamic, nationalist, anti-colonial, and social programs.[153] At present, the stated goal of the Muslim Brotherhood is to build an Islamist state ruled by Shari'a law.[154] On June 24, 2012, "Muslim Brotherhood candidate, Mohammed Morsi, was officially declared the winner of Egypt's first free presidential election with 51.7 percent of the vote."[155]

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150 *See* David D. Kirkpatrick, *After Second Day of Voting in Egypt, Islamists Offer Challenge to Generals*, N.Y. TIMES (Nov. 29, 2011), http://www.nytimes.com/2011/11/30/world/middleeast/voting-in-historic-egyptian-elections-enters-second-day.html (last visited Feb. 8, 2014).

151 *Profile: Egypt's Muslim Brotherhood,* BBC NEWS (Dec. 25, 2013), http://www.bbc.co.uk/news/world-middle-east-12313405 (last visited Feb. 8, 2014). "The ultraconservative Salafist Nour party came in second." Consequently, "Islamists controlled of 70% of the seats in the lower house." *Id.*

152 *Profile: Egypt's Muslim Brotherhood, supra* note 151.

153 Maurits Berger & Nadia Sonneveld, *Sharia and National Law in Egypt*, *in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 57 (Jan Michiel Otto ed., 2004).

154 *Profile: Egypt's Muslim Brotherhood*, *supra* note 151.

155 *Muslim Brotherhood-backed Candidate Morsi Wins Egyptian Presidential Election*, FOX NEWS (June 24, 2012), http://www.foxnews.com/world/2012/06/24/egypt-braces-for-announcement-president/ (last visited Feb 8, 2014). Morsi won "by a margin of only 800,000 votes" over Mubarak's last prime minister, Ahmed Shafiq. *Id.*

On November 22, 2012, in an attempt "to protect the revolution,"[156] Morsi announced a decree declaring that no judicial body could dissolve the 100-member Constituent Assembly until a new constitution had been ratified.[157] Prior to his announcement, rumors had started to circulate that the Supreme Constitutional Court had plans to disband the Assembly, which was close to completing a draft constitution, in the upcoming days.[158] Many of the high judges of the Supreme Constitutional Court feared a political takeover by the Islamist-dominated Constituent Assembly.[159] Although Morsi claimed his motives were grounded in preventing a crisis and the need to "bolster the country's transition," his decision was essentially an encroachment on the power of judicial review and was met with significant backlash.[160] "Tens of thousands" of people took to the streets to protest his decision, which threatened to tear Egypt apart between Islamist

[156] *Egypt's Stock Market Plummets After Morsi's Decree, While Clashes Continue in Cairo*, FOX NEWS (Nov. 25, 2012), http://www.foxnews.com/world/2012/11/25/opponents-egypt-islamic-president-clash-with-backers-over-new-powers/ (last visited Feb. 8, 2014).

[157] David D. Kirkpatrick, *Egyptian Judges Challenge Morsi Over New Power*, N.Y. TIMES (Nov. 24, 2012), http://www.nytimes.com/2012/11/25/world/middleeast/morsi-urged-to-retract-edict-to-bypass-judges-in-egypt.html?pagewanted=all (last visited Feb. 8, 2014). The Constituent Assembly, responsible for drafting Egypt's new Constitution, included only four women. "All four could be described as Islamists." Ayman Mohyeldin, *Who's Afraid of the Egyptian Constitution,* TIME (Dec. 5, 2012), http://ideas.time.com/2012/12/05/viewpoint-whos-afraid-of-the-egyptian-constitution/ (last visited Feb. 8, 2014).

[158] Kirkpatrick, *supra* note 157.

[159] *Id.*

[160] *Egypt's Stock Market Plummets After Morsi's Decree, While Clashes Continue in Cairo, supra* note 156.

and liberal political forces.[161] Despite the ongoing massive bouts of violence, Morsi did not recant his declaration until December 8, 2012.[162]

A mere two weeks after the draft constitution was completed, the country held a constitutional referendum.[163] The referendum had to be held in two rounds on December 15 and December 22, 2012.[164] The vote was held in two stages as a result of a boycott by several judges who were supposed to supervise the polling.[165] Although the constitution was officially approved, voter turnout was low and there were widespread allegations of ballot stuffing and fraud, which delayed the results for several days.[166] Furthermore, women's rights activists, opposed the constitution as it explicitly failed to include many basic rights for women, altered personal status laws, and threatened to further restrict rights to education and the right to work.

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[161] David D. Kirkpatrick, *Morsi Turns to His Islamist Backers as Egypt's Crisis Grows*, N.Y. TIMES (Dec 7. 2012), http://www.nytimes.com/2012/12/08/world/middleeast/egypt-islamists-dialogue-secular-opponents-clashes.html (last visited Feb. 8, 2014).

[162] David D. Kirkpatrick, *Backing Off Added Powers, Egypt's Leader Presses Vote*, N.Y. TIMES (Dec. 8, 2012), http://www.nytimes.com/2012/12/09/world/middleeast/egypt-protests.html?pagewanted=1&_r=0 (last visited Feb. 8, 2014).

[163] *See* Salma Abdelaziz, *Morsy Signs Egypt's Constitution into Law*, CNN (Dec. 26, 2012), http://www.cnn.com/2012/12/25/world/africa/egypt-constitution (last visited Feb. 8, 2014). The short period was heavily criticized on the basis that there was not enough "time for Egyptians to hold public readings, debate, and [sufficiently] educate themselves on how they [should] vote." Mohyeldin, *supra* note 157.

[164] Abdelaziz, *supra* note 163.

[165] Soraya Sarhaddi Nelson, *Egyptian Constitution Referendum Appears to Have Passed,* NPR NEWS, (Dec. 16, 2012), http://www.npr.org/blogs/thetwo-way/2012/12/16/167378009/egyptian-constitutional-referendum-appears-to-have-passed (last visited Feb. 20, 2013).

[166] *Egypt's Constitutional Referendum: A Dubious Yes,* ECONOMIST (Dec. 22, 2012), http://www.economist.com/news/middle-east-and-africa/21568756-flawed-constitution-will-be-endorsed-argument-far-ove (last visited Feb. 20, 2012); *Egypt Constitutional Referendum Result Delayed,* BBC NEWS, (Dec. 24, 2012), *available at,* http://www.bbc.co.uk/news/world-middle-east-20834904 (last visited Feb. 20, 2013).

Despite these concerns, then-President Morsi formally signed the constitution into law on December 25, 2012.[167]

A. Women's Active Exclusion from the Reform Process

Although women played a large role in organizing the uprising against Mubarak and "joined men in Tahrir Square calling for freedom, dignity, and social justice," they were not given much of a role in reconstructing the government and in drafting the new constitution.[168] On the contrary, they were actively excluded from the reform process.[169] This raises the question, was this revolution truly a pro-democratic revolution, or was this an Islamist revolution masked in democratic procedure?

In the 2011-2012 Parliamentary elections, only nine women won seats, as the Supreme Council of the Armed Forces had abandoned the quota that guaranteed that women hold 10 percent of the seats in parliament.[170] Prior to the revolution, women held over 50 of the 500 seats.[171] Further, when women protested their complete exclusion from the Constitutional Committee on International Women's Day in 2011, they were "vulgarly taunted and assaulted."[172] Numbers of women were picked up by the military, "beaten, subject to virginity

[167] Abdelaziz, *supra* note 163.

[168] *See* WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1.

[169] Women's Learning P'ship, *supra* note 65.

[170] WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1, at 1, 9.

[171] *Id.* at 4, 13.

[172] *Id.* at 12.

tests, and stripped of their clothes" in the very same Tahrir Square where they had helped lead the revolution.[173]

B. Women's Equality Under the Constitution

Having been actively excluded from participating in the drafting process, under the new constitution women are only granted rights that men chose to grant them. Furthermore, Article 2 of the constitution states that laws are to be based on the principles of shari'a.[174] As one scholar expressed, "[s]hari'a is only a convenient peg for the deeper instinct of male dominance,"[175] and moreover, concern about the safety and well-being of women is subordinated to other values such as "social stability, male superiority, and adherence to religion and tradition."[176]

On numerous occasions, foreign courts have held shari'a law to be in conflict with the basic principles of democracy. For example, in 1998, the Constitutional Court of Turkey banned and dissolved Turkey's Welfare Party (Refah) on the grounds that it sought to introduce shari'a law.[177] On appeal by the Welfare Party, the European Court of Human Rights determined that shari'a was "incompatible with the fundamental principles of democracy."[178] The Court asserted

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173 WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1, at 2.

174 *See Egypt's Constitutional Referendum: A Dubious Yes, supra* note 166; *Egypt Constitutional Referendum Result Delayed,* BBC NEWS (Dec. 24, 2012), http://www.bbc.co.uk/news/world-middle-east-20834904 (last visited Mar. 2, 2014).

175 Rend Al-Rahim, Executive Director of the Iraq Foundation. WOODROW WILSON INT'L CENT. FOR SCHOLARS, *supra* note 1, at 4.

176 Hajjar, *supra* note 22, at 251.

177 European Court of Human Rights, *Case of Refah Partisi (The Welfare Party) and Others v. Turkey*, GRAND CHAMBER, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936#{"itemid":["001-60936"]} (last visited Mar. 2, 2014).

178 *Id.* at ¶ 123.

that it was "difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia".[179]

In early versions of the Egyptian constitution, Article 68 provided "that equality for women would be subject to conformity with the rulings" of shari'a.[180] Although this section was not included in the ratified constitution, "some articles may [still] be interpreted in such a way as to enforce the domesticity of women rather than promote their presence in the workforce and the world beyond the hearth and home."[181] For example, Article 10, translated into English, reads as follows:

> The family is the basis of the society and is founded upon religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family, its cohesion and stability, and to protect its moral values as regulated by law. The State shall ensure maternal and child health services free of charge, and enable the reconciliation between the duties of a woman toward her family and work. The State shall provide special care and protection to female breadwinners, divorced women and widows.[182]

The fear held by many is that the text of Article 10 can and will be interpreted to reserve power and authority in the hands of men and limit the ability of women to make decisions about their sexual, legal, and social autonomy.

In the decade prior to the revolution, several advancements were made in Egyptian personal status laws. In 2000, women were given the right "to unilaterally divorce their husbands through

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[179] European Court of Human Rights, *supra* note 177, at ¶ 123.

[180] *Egypt: New Constitution Mixed on Support of Rights*, HUMAN RIGHTS WATCH (Nov. 30, 2012), http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights (last visited Mar. 2, 2014).

[181] Mohyeldin, *supra* note 157.

[182] Nariman Youssef, *Egypt's Draft Constitution Translated,* EGYPT INDEPENDENT (Feb. 2, 2012), http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated (last visited Mar. 2, 2014).

a court procedure known as *khul'"*.[183] Later that same year, women were given the ability to insert "substantive conditions" into a marriage contract.[184] Laws were also passed allowing women to "pass their nationality on to their children, and be treated equally under tax law."[185] Finally, women were granted the right to apply "for a passport without consent from their husbands," which meant that women had the right to travel without first having to obtain permission from their spouse.[186] Also noteworthy in January of 2003, Tehani al-Gebali became the first female judge to sit on the Supreme Constitutional Court.[187] As ratified, however, Article 10 of the constitution jeopardizes these gains if they are found to be in conflict with the "genuine character of the Egyptian family" or against the new government's "moral values."

Moreover, as written the constitution jeopardizes basic fundamental human rights. While Egypt's formal commitment to international human rights prior to the revolution could be characterized as commendable as the country has ratified numerous treaties and conventions, its actual human rights record has been deplorable.[188] One of the most striking examples is that female genital mutilation [hereinafter "FGM"], "an age-old custom that pre-dates Islam," is still carried out on more than 95 percent of girls in Egypt.[189] Although legislation passed in 2007

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[183] Berger & Sonneveld, *supra* note 153, at 71.

[184] *Id.* at 72.

[185] Kristen Chick, *In Egypt's Tahrir Square, Women Attacked at Rally on International Women's Day,* CHRISTIAN SCI. MONITOR (Mar. 8, 2011), http://www.csmonitor.com/World/Middle-East/2011/0308/In-Egypt-s-Tahrir-Square-women-attacked-at-rally-on-International-Women-s-Day/(page)/2 (last visited Mar. 2, 2014).

[186] Berger & Sonneveld, *supra* note 153, at 72.

[187] *Id.* at 72.

[188] *Id.* at 80.

[189] *Id.* at 81.

made performance of FGM a punishable crime, it seems to be scarcely enforced and the custom continues to be widespread.[190] As written, the new constitution could safeguard the practice. Additionally, Article 145 states, "No international treaty that contradicts the provisions of this [C]onstitution shall be signed."[191] This Article undermines the human rights treaties previously ratified by Egypt and calls into question any further international cooperation in advancing women's rights.

For all of the above reasons, the new constitution is discriminatory, does not provide for women's equality or fundamental human rights, and does not comport with the fundamental principles of democracy.

C. The Current State of Egypt

The promise of a better life has started to fade, as Egypt today is very much in a political and economic crisis. The entire country is in a state of emergency.[192] Morsi was assailed "Egypt's new pharaoh,"[193] and he and other members of the Muslim Brotherhood were accused of "mismanaging the country and seeking a monopoly on power," which sparked widespread protests and violent clashes.[194]

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[190] Berger & Sonneveld, *supra* note 153, at 81.

[191] *Egypt: New Constitution Mixed on Support of Rights*, *supra* note 180.

[192] Noah Raymond & Jacob Davidson, *RECAP: Egypt Declares State of Emergency as Security Forces Evict Morsi Suporters; Dozens Dead, Hundreds Injured*, TIME (Aug. 14, 2013), http://world.time.com/2013/08/14/live-blog-egypt-declares-state-of-emergency-as-security-forces-evict-morsi-supporters-dozens-dead-hundreds-injured/ (last visited Mar. 2, 2014).

[193] *Id.*

[194] *Egypt Court Suspends April Parliamentary Elections,* BBC NEWS (Mar. 6, 2013), http://www.bbc.co.uk/news/world-africa-21689545 (last visited Mar. 2, 2014).

In early March 2013, parliamentary elections originally scheduled to begin in April were suspended after the Cairo administrative court ruled that the Islamist-dominated parliament had improperly pushed through a law organizing the elections without allowing the Supreme Constitutional Court to review it to ensure it was in conformity with the constitution.[195] The Court also annulled a decree made by Morsi calling for the elections.[196]

The political crisis reached the zenith on July 3, 2013, when Egypt's armed forces deposed Morsi from power.[197] Morsi retreated to Republican Guard Barracks and denounced the action as a "military coup."[198] In the following days, scores of Morsi and Muslim Brotherhood supporters were shot dead by the armed forces.[199] On July 16, 2013, a thirty-three member interim cabinet led by interim head of state Aldy Mansour (the Chief Justice of the Supreme Constitutional Court) and made up of mostly liberals, was sworn in.[200] The bloodshed and violence, however, continue to plague the country, leaving many dead and thousands more

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[195] *Court Suspends Egypt's Parliament Election,* FOX NEWS (Mar. 6, 2013), http://www.foxnews.com/world/2013/03/06/court-suspends-egypt-parliament-election/ (last visited Mar. 2, 2014).

[196] *Id.*

[197] Ayman Mohyeldin & Alastair Jamieson, *Obama Condemns Egypt Over Violence, Cancels Joint Military Exercise*, NBC NEWS (Aug. 15, 2013), http://worldnews.nbcnews.com/_news/2013/08/15/20033815-obama-condemns-egypt-over-violence-cancels-joint-military-exercise?lite (last visited Mar. 2, 2014).

[198] *Timeline: Egypt in Crises*, REUTERS (Aug. 14, 2013), http://www.reuters.com/article/2013/08/14/us-egypt-protests-emergency-timeline-idUSBRE97D0TZ20130814 (last visited Mar. 2, 2014).

[199] *Id.*

[200] Hamza Hendawi, *Egypt's Interim President Swears in New Cabinet,* ASSOCIATED PRESS (July 17, 2013), http://www.thejakartapost.com/news/2013/07/17/egypts-interim-president-swears-new-cabinet.html (last visited Mar. 2, 2014).

injured.[201] The unrest in the country prompted interim Vice President Mohamed ElBaradi to resign on August 14, 2013, and Egypt remains in an extremely volatile state.[202]

V. LIBYA

On February 15, 2011, violent anti-government protests erupted in eastern Libya.[203] The protests were triggered by the uprisings in Tunisia and Egypt along with a series of arrests of government critics.[204] Government forces responded to the protests with excessive force, arresting and attacking peaceful demonstrators.[205] The uprising quickly turned into an armed conflict.[206] Over the next several months, rebel forces assisted by NATO air strikes began to take over Benghazi and other eastern cities.[207] France, the United States, and the United Kingdom led NATO forces in launching thousands of air strikes against pro-Gaddafi troops.[208] By late August, the National Transitional Council [hereinafter "NTC"] had taken control over the capital, Tripoli,

[201] *Egypt: At least 40 Killed, Thousands Injured as Security Forces Clear Sit-ins,* THE TIMES OF ISRAEL (Aug. 14, 2013), http://www.timesofisrael.com/at-least-15-killed-as-egyptian-police-begin-clearing-pro-morsi-sit-ins/ (last visited Mar. 2, 2014).

[202] *Mohammed Elbaradi, Egypt's Interim VP, Resigns After Violent Crackdown on Protests,* REUTERS (Aug. 14, 2013), http://www.huffingtonpost.com/2013/08/14/mohammed-elbaradei-resigns_n_3756080.html (last visited Mar. 2, 2014).

[203] *World Report 2012: Libya,* HUMAN RIGHTS WATCH, http://www.hrw.org/world-report-2012/world-report-2012-libya (last visited Mar. 2, 2014).

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). U.N. Resolution 1973, adopted on March 17, 2011, instituted a no-fly zone in Libyan airspace and authorized Member States to take "all necessary measures" to protect civilians. This led to Operation Unified Protector, with a mandate to protect civilians. The NATO mission expanded over time beyond its mandate to give air support for anti-Gaddafi forces. *World Report 2012: Libya, supra* note 203.

[208] *World Report 2012: Libya, supra* note 203.

and Gaddafi and his loyal supporters were forced into retreat.[209] Gaddafi was subsequently captured and killed by rebel forces on October 20, 2011 near his hometown, the city of Sirte.[210] Soon after, the NTC declared Libya officially liberated from Gaddafi's forty-two year term as leader of the country.[211]

Libya held its first nationwide election in over fifty years on July 7, 2012.[212] Gaddafi's regime had previously denied Libyans their most basic political rights, including the right to vote.[213] Over sixty percent of registered voters participated in electing two hundred members to the General National Council [hereinafter "GNC"].[214] The GNC, which replaced the NTC, was tasked with overseeing national government affairs, appointing a new cabinet, and determining the method of selecting a constitutional drafting committee.[215] The dominant parties in the election were the Alliance of National Forces, a coalition of civil society organizations, which

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[209] *Gaddafi Claims 'Tactical' Retreat from Compound,* CBC NEWS (Aug 23, 2011), http://www.cbc.ca/news/world/story/2011/08/22/libya-moammar-gadhafi-seif-rebels.html (last visited Mar. 2, 2014).

[210] *Video Surfaces of Muammar Qaddafi's Final Moments With Revolutionaries Before Death,* FOX NEWS (Oct. 20, 2011), http://www.foxnews.com/world/2011/10/20/muammar-qaddafi-captured-in-libya-commander-says/ (last visited Mar. 2, 2014).

[211] *NTC declares 'Liberation of Libya'*, ALJAZEERA (Oct. 24, 2011), http://www.aljazeera.com/news/africa/2011/10/201110235316778897.html (last visited Mar. 2, 2014).

[212] CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33142, LIBYA: TRANSITION AND U.S. POLICY, 1 (2012).

[213] CHRISTOPHER M. BLANCHARD, *supra* note 212, at 1.

[214] *Id.* at 2.

[215] *Id.* at 7. As of June 2013, the chairman of the GNC is Nouri Abusahmen, a member of the Berber minority that suffered discrimination under Gaddafi. *Libya Assembly Elects Berber Nouri Abusahmen as Head*, BBC NEWS (June 25, 2013), http://www.bbc.co.uk/news/world-africa-23054267 (last visited Mar. 2, 2014).

won thirty-nine of eighty "political entity" seats, followed by the Muslim Brotherhood-affiliated Justice and Construction Party, which won seventeen seats.[216] Women won a total of thirty-three seats, thirty-two of which were "political entity" seats.[217] Political entities were required to alternate male and female candidates on district lists as well as alternate their top list candidates by gender to better ensure female representation.[218]

Libya too has seen little progress since the country held elections in July of 2012. One of the largest setbacks in deciding how to go about writing the new constitution was disagreement over whether the sixty-member drafting committee should be elected or appointed by the GNC.[219] The GNC finally endorsed an election process in early February 2013.[220] Twenty experts will be elected from each of the nation's three regions: the west, east and south.[221] This decision came at a critical time, as there was a growing lack of confidence in the GNC.[222] No date for the elections has been announced, however, and one is not expected to be set in the near

[216] BLANCHARD, *supra* note 212, at 2.

[217] *Id.*

[218] *Id.* at 17.

[219] Jamie Dettmer, *Constitution Delay Frustrates Libyans,* VOICE AM. (Feb. 5, 2013), http://www.voanews.com/content/constitution-delay-frustrates-libyans/1597427.html (last visited Mar. 2, 2014).

[220] *Libya: UN Welcomes Decision on Formation of Constitution-Drafting Body,* UN NEWS CENTRE (Feb. 6, 2013), http://www.un.org/apps/news/story.asp?NewsID=44084&Cr1=#.USE1o80snEk (last visited Mar. 2, 2014).

[221] *Slow Rebirth for Post-Revolution Libya,* BBC NEWS (Feb. 16, 2103), http://www.bbc.co.uk/news/world-africa-21457879 (last visited Mar. 2, 2014).

[222] Christopher Stephen, *Libyans to Vote for Constitutional Drafting Committee,* BLOOMBERG (Feb 7. 2013), http://www.bloomberg.com/news/2013-02-07/libyans-to-vote-for-constitutional-drafting-committee.html (last visited Mar. 2, 2014).

future.[223] While the NTC has called for the committee to draft a new constitution within sixty days of its first meeting and for a national referendum thirty days thereafter, that timeline is highly unrealistic.[224] The delays in decision-making have resulted in hindering the foreign investment crucial for reconstruction and economic development, leaving Libya in an unsettled state.[225]

A. Shari'a Law Under the New Constitution

The vast majority of Libyans are Sunni Muslims whom endorse moderate approaches to shari'a under the *Hanafi* school of Islamic jurisprudence.[226] Islam is Libya's official religion, and the Qur'an is the official basis for the country's laws and social code.[227] Accordingly, one of the first proclamations made by the NTC was that any laws in conflict with shari'a would be declared invalid.[228] Although the majority of the NTC are liberals, it has many moderate Islamists and a handful of conservative Salafists.[229] While there are many uncertainties about how the new constitution will be drafted, under shari'a law women's rights will continue to be lesser than those of men.

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[223] *See* Stephen, *supra* note 222.

[224] Duncan Pickard, *Libya's Constitution Controversy,* FOREIGN POLICY (Sept. 5, 2012), http://mideast.foreignpolicy.com/posts/2012/09/05/libyas_constitution_controversy (last visited Mar. 2, 2014).

[225] *See* Stephen, *supra* note 222.

[226] BLANCHARD, *supra* note 212, at 6; BADERIN, *supra* note 55, at 37.

[227] BLANCHARD, *supra* note 212.

[228] Isobel Coleman, *Is the Arab Spring Bad for Women?,* FOREIGN POLICY (Dec. 20, 2011), http://www.foreignpolicy.com/articles/2011/12/20/arab_spring_women (last visited Mar. 2, 2014). This includes the law that had previously banned polygamy. *Id.*

[229] *Slow Rebirth for Post-Revolution Libya, supra* note 221.

CONCLUSION

As discussed above, conservative religious ideology has presented women as inferior to men, even going so far as to describe women as "devils," and merely a "tool for the sexual gratification of their husbands."[230] As a result, dominant culture in these societies has emphasized men's roles and superior social power while depicting women as their silent followers.[231] According to this view, the only role for a woman is that of a wife and homemaker.[232]

A real setback continues to be that many women accept these characterizations as the "proper" role that society has created for them. Consequently, some of the resistance at attempts to advance women's rights came from women themselves. Women may be fearful that without the support of their husbands, they will be unable to provide for themselves, or will have to abandon their religion entirely in order to achieve self-autonomy. Further, many women are unaware of their rights, and thus unable to properly assert them. Women have long been culturally conditioned to assume that the distinctions made between men and women under shari'a law are part of the natural order of things.[233] Women who do not believe that they have rights do not demand to exercise them.[234]

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[230] Essam Fawzy, *Muslim Personal Status Law in Egypt: the Current Situation and Possibilities of Reform through Internal Initiatives, in* WOMEN'S RIGHTS & ISLAMIC FAMILY LAW 24 (Lynn Welchman ed., 2004).

[231] *Id.* at 25.

[232] *Id.*

[233] MAYER, *supra* note 56, at 66.

[234] FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 5 (Mahnaz Afkhami ed., 1995).

A society that excludes women is not a true democracy, and the gains that women have achieved in advancing their rights are not adequately protected under the new governments. Under the new constitution in Egypt, the draft constitution in Tunisia, and the proposed constitution in Libya, there is a lack of any inclination to recognize women as fully equal, and who are worthy of the same rights and freedoms as men. Instead, discrimination against women continues to be looked upon as something that is part of the natural order. This will be amplified by the enforcement of shari'a law in Egypt and Libya, essentially re-adopting the values of Pre-Islamic Arabia.

Moreover, shari'a law is not feasible in today's world. The idea that men are the sole breadwinners while women stay at home to perform domestic duties, completely dependent on their husbands, is in actuality only realistic for the upper economic strata.[235] These upper class women are also the most likely to have completed their education, gone on to higher education, and pursued successful careers.[236] These ideals, therefore, set a society up for economic failure.

The difficulty then lies in incorporating Islamic principles into everyday living without regressing to conservative implementation of shari'a law as a means to that end. At the very least, these new governments need to use more moderate interpretations of shari'a law in order to better support women's equality and the basic fundamental human rights of women recognized under international law. "Islam and shari'a by their very nature presuppose, allow and even require the development of new interpretations."[237] Islamic law aims to "search for [the] best

[235] Kandiyoti, *supra* note 23, at 23.

[236] *Id.*

[237] KRIVENKO, *supra* note 20, at 72.

solutions in concrete situations rather than [formulate] and [impose] rigid rules."[238] The new governments should look to "Muslim scholars [who] have developed new understandings and interpretations of Islam, which if translated into legislation, would produce beneficial results to the promotion and respect of women, their interests and experiences."[239] The aim of the new governments should be justice and fairness for both men and women. Democracy is more than majority rule; democracy is equality for all.

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[238] KRIVENKO, *supra* note 20, at 72.

[239] *Id.* at 211.

The Failure Achieved by Rejecting S. 1925:
An Analysis of the Bill that the House Threw Out

By Connie Hong

ABSTRACT

In 2012, the Violence Against Women Act ("VAWA") was up for reauthorization. Although the legislation was ultimately renewed, the process was long and difficult mainly due to the conflicting views between the House of Representatives and the Senate. The VAWA, originally passed in 1994, is an important piece of legislation because it recognized and attempted to address the widespread suffering of Indian women. Due to the jurisdictional problem created by the federal government, Indian women suffer from violent sex crimes at a rate much higher than women on the whole in the United States. Although the VAWA authored in 1994 took a step towards alleviating the suffering of Indian women, it does not go far enough to extend them the protection they need.

Unable to agree on the terms for VAWA's renewal in 2012, the Senate and the House each authored their own version of the act. The main difference between the two proposals is that the Senate's version extends the protection of VAWA to Indian women, while the House's version does not. This note argues that the constitutional reasons the House cited in support of its refusal to extend VAWA's protection to Indian women are unfounded. In deconstructing the House's constitutional arguments, this note also recommends congressional change in order to further promote the protection of Indian women from violent sex crimes.

The Failure Achieved by Rejecting S. 1925: An Analysis of the Bill that the House Threw Out

By Connie Hong[1]

INTRODUCTION

"*The perpetrators are still walking around...I don't know why*."
– Rhea Archambault[2]

Leslie Ironroad was twenty years old when she decided to pack up her life and move from one side of the Standing Rock Sioux Reservation in the Dakotas to the other and start anew.[3] Although the town was very small, Ironroad had her eyes set on McLaughlin, South Dakota.[4] McLaughlin boasts of only one gas station and one diner,[5] but it was enough for her to call home. Perhaps this is so because she already had a home and a friend there waiting for her.[6]

Rhea Archambault, a resident of McLaughlin and Ironroad's friend, took her in after she made her journey to the small town.[7] Ironroad occupied one of the spare bedrooms in Archambault's house, living together with Archambault and her family.[8] The two friends led a

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[1] Syracuse University College of Law, Juris Doctor Candidate May 2014.

[2] *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*, AMNESTY INT'L 6 (2007), http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf.

[3] Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (July 25, 2007, 4:00 PM), http://www.npr.org/templates/story/story.php?storyId=12203114.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Sullivan, *supra* note 3.

tranquil lifestyle for a moment in time; Archambault made star quilts and Ironroad helped her make the patterns for the quilts.[9] This tranquility, however, did not last.

One night in 2003, Ironroad attended a party a few miles away from Archambault's house.[10] No one had heard from her that night; in fact, no one had heard from her until the next morning when she made a heart-wrenching phone call home.[11] Archambault's brother had picked up the call and heard her trembling voice over her tears, "Can [you] go get Rhea to come get me 'cause these guys are going to fight me."[12] When he asked for her location, she continued to cry and hung up the phone.[13]

The next time Archambault saw her friend, they were in a hospital.[14] Ironroad's body was covered in bruises; her face was beaten so severely that she could not open her eyes.[15] After Ironroad told Archambault that her condition was a result of being raped, Archambault immediately contacted the Bureau of Indian Affairs ("BIA") police, who dispatched an officer a few days later to retrieve a statement from Ironroad.[16] Even in her battered condition, Ironroad

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[9] Sullivan, *supra* note 3.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Sullivan, *supra* note 3.

[15] *See id.*

[16] *Id.*

"scratched out a statement" for the BIA officer.[17] Her desire to seek justice against her attackers gave her the strength to recount the horrific events of that night.[18]

Ironroad told the officer that she was raped and beaten, and then after the rape, the men locked her in the bathroom and told her that they would come back for her.[19] In response to their words, Ironroad consumed a large amount of anti-diabetic medication she found in the bathroom, hoping that the men would leave her alone if they found her unconscious.[20] She remained locked in the bathroom until someone found her the next morning and called an ambulance.[21]

Archambault was there when Ironroad told the officer her story; she heard her friend identify all the people that were present during her attack, including those that attacked her, by name.[22] No suspects, however, were ever arrested; in fact, no investigation was ever launched. It was as if Ironroad's case never existed.[23] People who knew the men that were likely to be responsible, or at least in some way connected to Ironroad's attack, claimed that they were never questioned.[24]

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[17] Sullivan, *supra* note 3.

[18] *See id.*

[19] Robert Siegel, *All Things Considered,* NPR NEWS (July 25, 2000), http://www.npr.org/templates/story/story.php?storyId=12203114.

[20] Sullivan, *supra* note 3.

[21] *Id.*

[22] *See id*.

[23] *See* DJ Harris, *Native American Sexual Assault: Amendments to the Violence Against Women's Act*, ALABAMA CIVIL RIGHTS (Sept. 5, 2012), http://alabamacivilrights.wordpress.com/2012/09/05/native-american-sexual-assault-amendments-to-the-violence-against-womens-act/.

[24] Sullivan, *supra* note 3.

Ironroad died from her injuries two weeks after her brutal attack.[25] Archambault was astonished that even her friend's death did not produce any results from the law enforcement, especially after all the information that Ironroad provided them before she died.[26] "She named all the people that were there, the ones that were hitting her, the ones that were fighting her, she named everybody – what more else?"[27] A year later, Archambault spoke to the police officer that interviewed Ironroad in her hospital bed and was told that her friend's "case" was closed.[28] Archambault could not understand how Ironroad's attackers walked free while her friend was dead.[29]

As tragic as Leslie Ironroad's story might be, she is only one of the many Indian women who have suffered, and continue to suffer, from sexual assault and physical violence on a daily basis in Indian territory. According to Amnesty International, a nongovernmental organization that seeks to promote human rights, Indian and Alaska Native women "are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general."[30] Furthermore, more than one in three of these women will be raped during their lifetime.[31]

While interviewing survivors for its research, Amnesty International realized the possibility "that [the] available statistics greatly underestimate[d] the severity of the problem"

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[25] Sullivan, *supra* note 3.

[26] *Id.*

[27] *Id.*

[28] *See id.*

[29] *Id.*

[30] AMNESTY INT'L, *supra* note 2, at 2, 4.

[31] *Id.* The figure for U.S. women, as a whole, is less than one out of five.

since many of the crimes often go unreported. [32] Furthermore, statistics provide only numbers and facts rather than the survivors' stories. Laura Sullivan of National Public Radio ("NPR") read Amnesty International's report and desired to learn about "the story behind the facts."[33] Sullivan and her team followed the case of Leslie Ironroad over the course of four months in order to find out more about her and the traumatic attack that led to her death.[34] The combination of both Amnesty International and NPR's research inspired others to tell and retell Ironroad's story in many articles, reports, and even classrooms. Many other women's stories, however, continue to remain in the shadows, and nothing is being done to prevent these women from being just another statistic or casualty. Just like Ironroad, their attackers walk free while they suffer a lifetime of emotional and physical scarring – *if* they survived the attack.

The Violence Against Women Act ("VAWA") is a piece of legislation originally enacted in 1994 to combat domestic violence, sexual assault, and stalking.[35] The work of VAWA was generally met with congressional approval, earning its reauthorization twice, once in 2000 and again in 2005.[36] It was recently up for reauthorization again in 2012, but disputes between the

[32] AMNESTY INT'L, *supra* note 2, at 2, 4.

[33] Mallary Jean Tenore, *Sex Abuse of Native Americans: The Story behind the Facts*, POYNTER (Mar. 3, 2011, 10:08 PM), http://www.poynter.org/how-tos/newsgathering-storytelling/diversity-at-work/87958/sex-abuse-of-native-americans-the-story-behind-the-facts/.

[34] *Id.*

[35] *Violence Against Women Act (VAWA)*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org/tenth/vawa.html (*last visited* Mar. 15, 2014).

[36] *See* FaithTrust Institute, *History of VAWA*, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/historyofvawa.pdf (*last visited* Mar. 9, 2014); *see also The Violence Act of 2005: Summary of Provisions*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, http://www.nnedv.org/docs/Policy/VAWA2005FactSheet.pdf (*last visited* Mar. 9, 2014).

Senate and the House of Representatives regarding its proposed scope rendered its passage extremely difficult.[37]

In response to hearing the voices and stories of victims like Ironroad, the Senate authored S. 1925, a bill that would replace the existing VAWA during its 2012 reauthorization.[38] The House, in reviewing the proposed amendments however, did not agree with the amount of congressional intervention that the Senate concluded was necessary from its findings.[39] As a result, the House rejected the Senate's version and drafted its own bill, H.R. 4970, which, among other differences, lacked the same protections for Indian women that existed within the Senate's version.[40] The House defended its decision to leave out protections for Indian women by identifying constitutional issues it believed to be alarmingly problematic with the bill.[41]

Part I of this article will address the legal obstacles that prevent victims of sexual violent crimes, particularly Indian women, from obtaining justice and relief. Part II will discuss the 1994 version of VAWA and its attempt to protect Indian women. Part III will analyze the two competing versions of VAWA proposed for reauthorization in 2012. Lastly, Part IV will argue that the constitutional issues cited by the House fail to justify a continuing tolerance for impunity in this country.

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[37] *See* Harris, *supra* note 23.

[38] *See id; see also* Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. (2012).

[39] *See id.*

[40] *See id; see also* Violence Against Women Reauthorization Act of 2012, H.R. 4970, 112th Cong. (2012).

[41] Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 ENGAGE 2, 41 (2012), *available at* http://www.fed-soc.org/doclib/20120806_GedeEngage13.2.pdf.

I. CREATING A BREEDING GROUND FOR IMPUNITY

"*Before asking 'what happened,' police ask 'Was it in our jurisdiction? Was the perpetrator Native American?*"
– Support worker for Native American survivors of sexual violence[42]

There are many factors that prevent Indian[43] women from obtaining justice and redress after suffering a sexual violent crime.[44] Tribal law enforcement is usually strained because it is responsible for covering large territories while being low on both staff and resources.[45] Often, they are forced to prioritize other crimes over crimes of sexual violence.[46] In some cases, it could take law enforcement over a month to respond to reports of sexual violence; some reports are not responded to at all.[47] When officers do respond, they often lack the training to handle cases of sexual violence and fail to perform routine tasks that are necessary for a successful prosecution, such as ensuring that the victim undergoes a medical exam and preserving inculpatory evidence of the crime.[48]

While poor law enforcement is certainly an aggravating factor that prevents Indian women from obtaining justice and redress, the core problem lies within the tribal court systems.

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[42] AMNESTY INT'L, *supra* note 2, at 8.

[43] A note regarding the terminology used in this paper: terms such as "Indian" and "Indian territory" are used within the legal context and scholarly discourse in the U.S. Since this paper examines the effects of several U.S. legislations, regulations, and case law, such terminology has been adopted for a consistent method of reference. This choice is not an attempt to minimize the diversity of Indigenous peoples in the U.S., nor is it an attempt to promote a particular usage of terms over others.

[44] AMNESTY INT'L, *supra* note 2, at 41.

[45] *Id.* at 42.

[46] *See id.*

[47] *Id.* at 44.

[48] *See id.* at 49-55.

Due to congressional interference, tribal courts often lack the jurisdictional authority to prosecute those who commit violent sex crimes against their tribe members.[49] A victim seeking justice is usually forced to wade through tribal, state, and federal law, a process that is confusing, frustrating, and often met with dead-ends.[50] As a result, victims seldom see justice brought upon those responsible for their attacks.[51] The likelihood that any justice can be achieved is so low that "[m]ost Indian women do not report such crimes,"[52] feeling that most, if not all, attempts would only lead to failure.

Although tribal governments possess inherent sovereignty, that sovereignty is subject to the federal government through Congress' plenary power.[53] Various federal directives exist to limit the sovereignty of tribal governments, and of those, four of them operate together to create "a complicated jurisdictional framework"[54] that make it extremely difficult for victims to find justice and redress for the crimes they suffered. Those four directives include: 1) the Major Crimes Act;[55] 2) Public Law 280;[56] 3) the Indian Civil Rights Act;[57] and 4) the U.S. Supreme Court decision in *Oliphant* v. *Suquamish Indian Tribe*.[58]

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[49] *See* AMNESTY INT'L, *supra* note 2, at 28.

[50] *See id.* at 31.

[51] *Id.* at 66.

[52] *Id.* at 2.

[53] *See generally* Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N. DAK. L. REV. 1 (2008), *available at* http://web.law.und.edu/lawreview/issues/web_assets/pdf/84/84-1/84NDLR1.pdf.

[54] *Id.* at 7.

[55] Offenses Committed Within Indian Country (Major Crimes Act), 18 U.S.C. § 1153 (1885).

[56] Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326 (1953).

A. *The Major Crimes Act*

In December 1883, the U.S. Supreme Court found that a federal district court lacked jurisdiction to convict an Indian for a murder of another Indian committed on tribal territory.[59] Displeased with the decision, Congress responded by passing the Major Crimes Act in 1885, which states that:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.[60]

There is a misconception that the Major Crimes Act forced selective tribal governments to surrender their authority to prosecute major crimes, when in actuality, they hold concurrent authority to prosecute those types of crimes.[61] The misconception unfortunately led both Indian victims and tribal governments to believe that relief for major crimes committed within tribal territory can only be sought through federal courts.[62] Since tribes came to view federal courts as the only available method of recourse for major crimes, the level of legitimacy of tribal courts

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[57] Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (1968).

[58] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[59] *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

[60] Major Crimes Act, 18 U.S.C. § 1153 (1885).

[61] AMNESTY INT'L, *supra* note 2, at 29.

[62] *Id.*

suffered a sharp decline within its tribes.[63] The chance that a federal court will pick up a tribal case, however, is extremely low. As a result, tribal members not only suffer by being deprived of adequate access to courts, but from a weakening court system as well.

In certain cases, the Major Crimes Act led tribal governments to shirk the responsibility that they owe to their members. For example, many tribes have not amended their tribal codes to reflect the current needs of their tribal members, relying on the fact that the Act already covers many crimes.[64] While it is true that the legislation does cover many crimes, tribal courts still need to develop their tribal codes in order to aid victims that were shut out of the federal court system.[65] Failing to do so reinforces the loss of legitimacy and effectiveness that tribal governments have established with their members.[66]

B. *Public Law 280*

The federal government enacted Public Law 280 in 1953, which effectively transferred its jurisdiction of crimes committed by Indians in Indian territories over to certain states.[67] As a result, California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska were all granted extensive criminal and civil jurisdiction over Indian affairs, while other states, Arizona, Florida,

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[63] *See* Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 177 (1999). The Mohawks have struggled with maintaining their views on the legitimacy of their government, as affected by federal and state intrusion. *See id.*

[64] Halldin, *supra* note 53, at 8.

[65] *Id.*

[66] *See* Porter, *supra* note 63, at 177.

[67] AMNESTY INT'L, *supra* note 2, at 29.

Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington, were given the choice of acquiring jurisdiction over the tribal territories within their state.[68]

Public Law 280 further prevents victims from receiving effective assistance for the offenses they suffered in two ways. First, the law added a new layer of confusion to the jurisdictional question. With the Major Crimes Act, the question of jurisdiction was between the federal government and the tribal government only. With the introduction of Public Law 280, states now also have to be considered whenever a jurisdictional question arises, but only in states where the law is in force.[69] The following is a summary provided by Amnesty International regarding the jurisdictional overlap between state, federal, and tribal government:

Tribal police, prosecutors and courts

- Tribal police and prosecutors can investigate and prosecute all crimes committed by Indian individuals in areas including but not limited to Indian Country.
- Tribal police and prosecutors have concurrent jurisdiction with federal police and prosecutors (or state police and prosecutors where Public Law 280 is applied) over major crimes by Indians on tribal land.
- Tribal police and prosecutors cannot investigate and prosecute crimes committed by non-Native perpetrators on tribal land.
- Tribal authority to sentence offenders is limited to a maximum of one year's imprisonment and a US$5,000 fine for each offence [sic].

Federal police and prosecutors

- Federal police and prosecutors have exclusive jurisdiction to investigate and prosecute crimes committed by non-Native perpetrators in Indian Country (except where Public Law 280 is applied).
- Federal police and prosecutors have concurrent jurisdiction with tribal police and prosecutors to investigate and prosecute major crimes committed by Indigenous people in Indian Country (except where Public Law 280 is applied).

State police and prosecutors

- Where Public Law 280 is applied, state police and prosecutors have exclusive jurisdiction to investigate and prosecute crimes committed by non-Native perpetrators on tribal land.
- Where Public Law 280 is applied, state police and prosecutors have concurrent jurisdiction with tribal police and prosecutors to investigate and prosecute crimes committed by Indigenous perpetrators on tribal land.

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[68] AMNESTY INT'L, *supra* note 2, at 29.

[69] *Id.*

- If a crime takes place on state land, state police and prosecutors have exclusive jurisdiction to investigate and prosecute.[70]

When officers respond to a crime, the jurisdictional question is not often solved with such clarity as the summary above provides.[71] Keep in mind that answering this question is only the first of many steps necessary in providing victims redress for the crimes they have suffered.

Public Law 280 also prevents tribal victims from receiving redress by forcing tribal dependency on state law enforcement.[72] In order to receive effective aid from state law enforcement, Indian tribes and the particular state ideally would need to have a good relationship built on mutual respect, tolerance, and understanding. This "good relationship" does not exist, however, as it has mostly been marred by racism perpetuated by state officers toward Indians.[73]

Racism is not the only aggravating factor that prevents tribal victims from receiving adequate aid from state law enforcement. The federal government does not provide funding to states affected by Public Law 280, which are now obligated under law to cover a broader area with their limited amount of resources.[74] Since tribal governments do not pay taxes or any other form of compensation to state governments, states are essentially unpaid for the extra work they have to do, and thus generally lack any incentive to provide their services to the tribes.[75] At the same time, the federal government felt that the Indian territories that are covered by Public Law 280 are now being "taken care" of by the state, and have thus reduced federal funding to those

[70] AMNESTY INT'L, *supra* note 2, at 31.

[71] *Id.* at 34.

[72] Halldin, *supra* note 53, at 9.

[73] *Id.*

[74] *Id.*

[75] *Id.*

tribes.[76] As a result of Public Law 280, not only have tribal governments' jurisdictional authority and sovereignty been usurped by the states, their chances of developing their tribal court system are greatly harmed by the reduction of federal funding under the law.[77]

Another non-racial related factor that prevents tribal victims from receiving adequate state services is the vast geographic distance between state and Indian territory. [78] Travel time and the lack of proper roads serve as a great impediment to quick response time from law enforcement.[79] With these racial and non-racial factors hindering states' abilities to provide law enforcement services to tribes, it does not make sense for the federal government to force state dependency onto the tribes. It is clear that states do not want to, and sometimes are simply incapable of, aiding tribal governments and their law enforcement efforts.

C. *Indian Civil Rights Act*

The Indian Civil Rights Act ("ICRA") was passed in 1968 in order "to protect tribal members and others subject to tribal jurisdiction from arbitrary and capricious acts by the tribal governing body and individual tribal officials."[80] The Act enforced a penalty ceiling on tribal courts, and as a result, tribal courts could not issue a punishment greater than one year of imprisonment, a fine of $5,000, or both, no matter how egregious the crime.[81] The ICRA, like the

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[76] *See* Halldin, *supra* note 53, at 9.

[77] *Id.*

[78] *Id.*

[79] *See* AMNESTY INT'L, *supra* note 2, at 41-42.

[80] Harold Monteau, *Indian Civil Rights Act Has Done Nothing for Individual Indians' Rights*, INDIAN COUNTRY (July 2, 2012), http://indiancountrytodaymedianetwork.com/opinion/indian-civil-rights-act-has-done-nothing-for-individual-indians-rights-121488.

[81] Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (1968).

two previous federal directives, implicitly sent a message that tribal courts are not equipped to handle serious cases that involved heavier criminal sentences.[82] Some tribal courts responded to the ICRA by avoiding the prosecution of more serious crimes,[83] while other courts were forced to classify serious crimes as lesser offenses.[84] For example, many tribal codes were forced to classify sexual assault as a misdemeanor, preventing it from being placed in the "serious category that it deserves."[85]

The impediment of a tribal court's ability to assist victims of sexual assault is obvious when the court chooses not to prosecute the attacker. The victims usually get shuffled to federal court, where they are forced to wait as their cases slowly develop, if they develop at all.[86] The harm however, is arguably greater where the tribal court chooses to punish the perpetrator of the sexual assault in accordance to ICRA guidelines.[87] Under the Act's guidelines, the perpetrator receives a sentence that is "too nominal to be effective against" the crime that was committed and reduces the tribal justice system into something of a farce.[88] The faith and trust that tribal members have in their court system would decline, leading them to look to the federal system as the only method for relief rather than feeling a desire to develop and invest in their own justice

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[82] AMNESTY INT'L, *supra* note 2, at 29.

[83] *Id.*

[84] Halldin, *supra* note 53, at 10.

[85] *Id.*

[86] AMNESTY INT'L, *supra* note 2, at 61-62.

[87] Halldin, *supra* note 53, at 10.

[88] *Id.*

system.[89] This potential breakdown of tribal sovereignty is only exacerbated by the fact that federal courts refuse to try nearly seventy-five percent of tribal cases presented to them.[90]

D. *Oliphant v. Suquamish Indian Tribe*

The fourth federal policy that significantly hindered the ability of tribal victims to obtain redress for the violent sex crimes they suffered was established in the U.S. Supreme Court case, *Oliphant v. Suquamish Indian Tribe*.[91] In *Oliphant*, the Court found that absent congressional authorization granting specific jurisdiction, tribal courts lack the authority to try cases involving non-Indians, even if the defendant was a member of that tribe.[92] Essentially, tribal courts found themselves unable to issue punishment to non-Indians who commit crimes against tribal members, no matter how heinous the crime.[93] *Oliphant* has a devastating impact on victims of violent sex crimes, since most of these crimes are perpetrated by non-Indians against Indian women.[94]

II. THE VIOLENCE AGAINST WOMEN ACT

"*A commitment to address the problem from the federal vantage point*."
– Martha Burt, The Urban Institute[95]

In recognition that domestic violence, sexual assault, and stalking are serious crimes

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[89] *See generally* Porter, *supra* note 63.

[90] Halldin, *supra* note 53, at 8.

[91] *Id.* at 10.

[92] *Id.* at 10-11.

[93] *Id.* at 10.

[94] *Id.* at 11.

[95] Martha Burt, et. al, *The Violence Against Women Act of 1994: Evaluation of the STOP Block Grants to Combat Violence Against Women*, THE URBAN INSTITUTE, 1 (1997), http://www.urban.org/uploadedPDF/vaw-act.pdf.

against women, Congress passed VAWA in 1994 to "improve criminal justice and community-based responses" to those crimes in the U.S.[96] The legislation provided victims with access to services designed to help address the crime they suffered.[97] More importantly, it reinforced the understanding that acts of domestic violence, sexual assault, and dating violence against women are unacceptable and punishable by law.[98]

VAWA brought a voice to many victims that were once without any recourse after suffering domestic violence, sexual assault, or stalking.[99] Recognizing that these crimes can (and do) happen to women from *any* group, framers of the act made sure not to limit its application only to women who are U.S. citizens.[100] In fact, the legislation explicitly devoted a section to focus on the needs of Indian women and aiding tribal governments in improving their responses to victims.[101]

Although VAWA's attention on Indian women was a good start in bringing change to the serious abuses that they face, it was not enough to bring the type of change that is needed in Indian territories. VAWA, in its initial 1994 and then subsequent 2000 and 2005 reauthorized versions, were all unable to provide a solution that would undo the harmful effects of the Major Crimes Act, the Indian Civil Rights Act, Public Law 280, and holding in *Oliphant.* Statistics continued to illustrate that more work needs to be done, and that VAWA needs to be expanded further in order to be effective against domestic violence and violent sexual crimes that Indian

[96] NATIONAL DOMESTIC VIOLENCE HOTLINE, *supra* note 35.

[97] *Id.*

[98] *See id.*

[99] *Id.*

[100] *Id.*

[101] NATIONAL DOMESTIC VIOLENCE HOTLINE, *supra* note 35.

women suffer.[102] Yet, when VAWA was up for reauthorization again in 2012, the House was unwilling to provide Indian women any additional protection through the new version of the legislation.[103] As a result of the contesting VAWA versions between the House and the Senate, the legislation failed to be reauthorized in 2012.

III. HOUSE V. SENATE

"*It is difficult to understand why people would come in here and try to limit which victims could be helped by this legislation.*"
– Senator Patrick Leahy (D-Vt.)[104]

VAWA was up for reauthorization in 2012, but the House and Senate could not agree on several key provisions of the bill.[105] One of the key provisions that they could not agree on was VAWA's effort to aid Indian women. The Senate recognized the need to extend more protection to Indian women, while the House saw fit to eliminate almost all protections that were given to Indian women in past versions of the legislation.[106] The two congressional bodies, failing to reach a compromise, eventually authored their own versions of VAWA.[107] The House pushed for its version, H.R. 4970, which lacked key provisions that the Senate included in its version of

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[102] *See generally* AMNESTY INT'L, *supra* note 2.

[103] *Violence Against Women Act Reauthorization*, MICHAEL E. CAPUANO, http://www.house.gov/capuano/news/recentvotes/rv051612.shtml (*last visited* Mar. 17, 2014).

[104] Jennifer Bendery, *VAWA Vote: Senate Overwhelmingly Passes Violence Against Women Act*, HUFFINGTON POST (Feb. 12, 2013, 3:02 PM), http://www.huffingtonpost.com/2013/02/12/vawa-vote_n_2669720.html.

[105] Harris, *supra* note 23. Aside from Indian women, the House also disagreed on extending protection to immigrants and LGBT victims. CAPUANO, *supra* note 103.

[106] CAPUANO, *supra* note 103.

[107] Harris, *supra* note 23.

VAWA, S. 1925.[108]

At the end of 2012, the House and Senate were still unable to resolve their disputes over the two bills.[109] Despite the overwhelming support the Senate received for its version, the reauthorization of VAWA fell through in 2012 due to the standstill between the two congressional bodies.[110] Although S. 1925 had been rejected,[111] it contained a few key provisions regarding Indian women that are crucial if any meaningful change is to be made regarding the victims of violent sex crimes. Thus, it is worth examining S. 1925 and the arguments of its opponents.

Sections 204(f)(1) – (4) of S. 1925 allocated funding to tribal governments to improve education, prosecution, and investigation of claims of violent sex crimes, such as the one Ironroad had suffered.[112] The aim of this provision was to aid tribal governments with the processes of investigating and prosecuting criminal offenses, processes that can be very expensive and are often left incomplete due to the tribal governments' lack of resources.

Although financial assistance is still needed, S. 1925 was not limited to only the allocation of monetary funding. Within the bill, the Senate also proposed an answer to the jurisdictional question that has confounded federal, state, and tribal actors for decades with the following language:

> Notwithstanding any other provision of law, in addition to all powers of self-government

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[108] Harris, *supra* note 23.

[109] *Id.*

[110] *See* Steve Benen, *House GOP blocks Violence Against Women Act*, THE RACHEL MADDOW BLOG (Oct. 31, 2013, 2:57 PM), http://maddowblog.msnbc.com/_news/2013/01/02/16305284-house-gop-blocks-violence-against-women-act?lite.

[111] *See id.*

[112] S. 1925, 112th Cong. §204(f)(1) – (4).

> recognized and affirmed by sections 201 and 203, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over *all persons* [emphasis added].[113]

This provision would have effectively given tribal courts the authority to try non-Indians who commit assault or sexual assault against Indian women, and thus, eliminate the problem created by *Oliphant* in regards to crimes of domestic violence, dating violence, and violations of protection orders committed by non-Indians.[114]

There are, of course, limitations to this proposed grant of jurisdiction. For example, tribal governments would still be required to share concurrent jurisdiction with the federal government or with a state where Public Law 280 is enforced.[115] Additionally, tribal governments would not have criminal jurisdiction of a crime that occurs on Indian territory if both the victim and defendant are non-Indian.[116] Although these limitations severely restricted the scope of this new grant of authority to tribal courts, the House still met it with unease.[117]

While the House was generally unsatisfied by S. 1925, its main issue with the proposed bill was that it allowed tribal courts to prosecute American citizens.[118] Since that provision potentially divests American defendants of their right to Due Process, a right given to all

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[113] S. 1925, 112th Cong. §204(b)(1). *See* S. 1925, 112th Cong. § 204(c) for a list of crimes that tribal governments can prosecute under the bill.

[114] Gede, *supra* note 41, at 40.

[115] S. 1925, 112th Cong. §204(f)(1) – (4).

[116] S. 1925, 112th Cong. § 204(b)(4)(A)(i).

[117] Benen, *supra* note 110. "But House Republicans insisted the bill is too supportive of immigrants, the LGBT community, and Native Americans -- and they'd rather let the law expire than approve a slightly expanded proposal. Vice President Biden, who helped write the original law, tried to persuade House Majority Leader Eric Cantor (R-Va.) to keep the law alive, but the efforts didn't go anywhere."

[118] Harris, *supra* note 23.

American citizens under the Constitution, the House viewed it as a constitutional threat.[119] Several Republican congressmen have commented that tribal courts "lack the resources and experience of providing the adequate due process rights of criminal defendants."[120]

IV. THE CONSTITUTIONAL DEBATE

"[*T*]*hey'd rather let the law expire than approve a slightly expanded proposal.*"[121]

Anticipating a constitutional argument, the Senate integrated two main provisional safeguards into S. 1925 in order to appease the bill's opposition. First, tribal courts were to provide a criminal defendant all the protections available under the Tribal Law and Order Act of 2010 when issuing a sentence of imprisonment of any length.[122] Second, any non-Indian that falls within the jurisdiction of a tribal court in accordance with the proposed bill had to be given "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant."[123]

These safeguards were dismissed by opponents of the bill as insufficient, claiming that what the bill was trying to achieve was "unprecedented, insufficiently studied, ill-advised, and premature."[124] Opponents pointed out that tribal governments, holding inherent sovereign

[119] Harris, *supra* note 23.

[120] *Id.*

[121] Benen, *supra* note 110.

[122] Gede, *supra* note 41, at 41.

[123] *Id.*

[124] *Id.*

authority, are not bound to the U.S. Constitution.[125] The Constitution's First, Fifth, and Fourteenth Amendments of the Bill of Rights have no force within tribal courts since those protections only exist as an echo of the Bill of Rights within the ICRA.[126] This means that if an American defendant's First, Fifth, or Fourteenth Amendment rights are violated, he or she will not be able to seek constitutional remedy.[127] Opponents of the bill were not ready to "subject non-Indian citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject."[128] The opponents essentially dismissed the Senate's safeguards because they believed that a piece of legislation modeled after the Constitution can never provide the same protections as the actual Constitution.[129]

Framing the issue in that way does the victims, who have already suffered enough at the hands of their attackers, a great injustice. Members of Congress who support this view ignore the real life practicalities of their decision and fail to acknowledge that their decision essentially leaves a whole set of people within the U.S. vulnerable to unchecked violence. Although the constitutional rights of criminal defendants are important, they should not be protected by sacrificing the safety, and even lives, of Indian women.

The issue of constitutional protection of a criminal defendant in the context of tribal governments is very different than constitutional protection of a criminal defendant in the context of the U.S. government. Within U.S. jurisdiction, because of the existence of a state prosecutor who brings claims on behalf of the state, affording a criminal defendant constitutional

[125] Gede, *supra* note 41, at 41.

[126] *Id.*

[127] *See id.* at 41.

[128] *Id.* at 44.

[129] *See id.* at 41.

protections might mean that it will take longer for a victim to receive redress and justice. Within tribal jurisdiction, because of *Oliphant* and the great jurisdictional maze, victims usually do not get redress or justice at all. That type of resolution, by both tribal and U.S. standards, is unacceptable.

It is often forgotten, as it must be in this case with the opponents of S. 1925, that the U.S. owes Indian tribes a federal trust responsibility.[130] This includes helping tribal governments to protect and ensure the safety of all their citizens.[131] The combined effect of the four main federal directives discussed above have taken away what little protection tribes are able to provide to their female members. [132] *Oliphant* has often been criticized as one of the most harmful of them all.[133] Recognizing this, the Senate crafted S. 1925 carefully to provide a limited fix for *Oliphant* in response.

A compromise can be struck between balancing the need for constitutional protection for American citizens and the need for protecting Indian women. One possibility of such compromise would be for Congress to approve a limited tribal criminal jurisdiction over non-Indians,[134] and then reserve the right for appellate review in federal courts.[135] This possibility is

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[130] Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 200 (2008).

[131] Hart & Lowther, *supra* note 130, at 220-22.

[132] See generally *id.* and Lindsey Trainor Golden, Note, *Embracing Tribal Sovereignty to Eliminate Criminal Jurisdiction Chaos*, 45 MICH. J. L. REFORM 1039 (2012), for a discussion on the need of an *Oliphant*-fix.

[133] See generally Hart & Lowther, *supra* note 130, and Golden, *supra* note 132, for a discussion on the need of an *Oliphant*-fix.

[134] Hart & Lowther, *supra* note 130, at 227.

[135] *Id.*

the best option for two reasons. First, this option would satisfy the constitutionality concerns of the opponents of S. 1925 because federal courts can provide constitutional remedies in a situation where the constitutional rights of a U.S. citizen have been infringed upon. Second, this option would lighten the caseload that the federal government has to manage.[136] The federal government has already shown neglect in cases of domestic violence in Indian territories, so this shift in legal responsibility should gain a favorable, if not outright welcomed, response.[137]

A compromise in that form had been suggested many times by scholars and advocates alike.[138] While it has not been put into effect with the past reauthorizations of VAWA, S. 1925 provided a framework in which such a formula is conceivable. An adoption of such a compromise will both help to preserve the constitutional rights of non-Indian criminal defendants, while at the same time, help save the lives of many Indian women.

CONCLUSION

"*...instead of revisiting the issue and/or working with the Senate on a compromise, GOP leaders simply decided the law was not a priority. The result was this week's outcome.*"[139]

Statistics have shown that Indian women suffer violent sex crimes, domestic violence, dating abuse, and stalking at a staggering rate of 2.5 times higher than the national average.[140] In recognition of the particular hardships and injustice that Indian women face, the Senate authored

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[136] Hart & Lowther, *supra* note 130, at 187.

[137] This proposition gives rise to the issue of harming the notion of tribal sovereignty and also raises the question of tribal court readiness to adopt criminal jurisdiction over non-Indians. Those questions are beyond the scope of this paper but are addressed in Hart and Lowther's article. *See* Hart & Lowther, *supra* note 130.

[138] *See generally* Hart & Lowther, *supra* note 130.

[139] Benen, *supra* note 110.

[140] AMNESTY INT'L, *supra* note 2, at 2.

S. 1925 in proposition for the reauthorization of VAWA.[141] The proposed bill, which included an increase of protection for Indian women, has been rejected due to the counter-efforts of the House.[142] Nevertheless, the goals of S. 1925 can be achieved by forging a compromise that would address the constitutional concerns of the bill's opponents, while simultaneously helping to save the lives of Indian women. The main question that should have been asked regarding the striking of this compromise is "what instrument most effectively and expeditiously permits the local prosecution and punishment of domestic violence and sexual assault and other crimes committed by non-Indians in Indian country."[143] What occurred in Congress in 2012, however, illustrates exactly how allowing politics to intervene can permit the continuance of rampant impunity.[144]

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[141] Harris, *supra* note 23.

[142] *Id.*

[143] Gede, *supra* note 41, at 44.

[144] In 2013, the Senate revised its proposal and drew up bill S. 47. *See* Valarie Jarrett, *No One Should Have to Live in Fear of Violence*, THE WHITE HOUSE (Mar. 7, 2013, 3:59 PM), http://www.whitehouse.gov/blog/2013/03/07/no-one-should-have-live-fear-violence. It was ultimately signed into law on March 7, 2013. *Id.* S. 47 was successful in upholding the key provisions discussed in this note, as it "[r]estore[d] tribal criminal jurisdiction over all persons committing domestic violence, dating violence, and violation of protection orders within Indian country," and "[a]uthorizes $5M in grants to tribes to build criminal justice infrastructure." *Summary of Changes*, 4VAWA (2013), http://4vawa.org/pages/summary-of-changes.

The Right of Succession: A Testator's Inability to Provide for His or Her Same-Sex "Spouse" Under a Civil Law Reserved Portion Regime

By Nicole Hurley

ABSTRACT

Many European countries entitle certain individuals to an automatic fixed share of a decedent's estate, known as a "reserved portion," regardless of a decedent's will. These individuals are known as "forced heirs" and include the decedent's spouse (husband or wife), children, and ascendants.

Many of these same countries requiring forced heirship, however, do not recognize same-sex marriage or civil unions. This means the spouse of a same-sex decedent is not entitled to recover the reserved portion from his or her partner's estate because the relationship is not recognized. Therefore, despite a decedent's will leaving his or her estate to a same-sex spouse, under the forced heir requirement, the wishes set forth in a will are not followed, and instead, the estate is divided amongst the remaining heirs entitled to the forced share.

This Note covers the countries of Italy and Malta, both of which require a reserved portion and do not legally recognize same-sex marriage. The goal of this Note is to analyze the impact of the reserved portion requirement on same-sex couples who are not legally recognized as "spouses" under the laws of these countries.

The Right of Succession: A Testator's Inability to Provide for His or Her Same-Sex "Spouse" Under a Civil Law Reserved Portion Regime

By Nicole Hurley*

INTRODUCTION

Many jurisdictions in the United States use the common law system, which places very few restrictions on contract law and, therefore, one is given great freedom in creating contracts and specifically in creating a will.[1] "Legal precedent" regulates common law where "court judges are bound in their decisions in large part by the rules and other doctrines developed."[2] In turn, common law jurisdictions are not forced to follow black letter law and instead make decisions on a case-by-case basis.[3] Alternatively, many European states use the civil law system, which is the most widespread type of legal system in the world and is derived mainly from the Roman *"Corpus Juris Civilus."*[4] Under this system, many provisions are put into contract law and one is usually not allowed to contract outside of those provisions, which provide much less contractual freedom.[5] Each of these systems has its own laws for the distribution of a decedent's property upon his or her death.

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[1] PPP in Infrastructure Resource Center, *Key Features of Common Law or Civil Law Systems* (2007), WORLD BANK, http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law#Common_Law_System.

[2] *Id.*

[3] Ryan McLearen, *International Forced Heirship: Concerns and Issues with European Forced Heirship*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 323 (2011).

[4] *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html?countryName=Iran&countryCode=ir®ionCode=me#2100.

Many European countries, such as Italy and Malta, follow the civil law system and in accordance with the increased provisions put into contract law, there are restrictions on their citizens' freedom to dispose of their estate by will.[6] One restriction, known as "forced heirship" or "reserved portion," requires certain portions of the decedent's estate go to decedent's spouse, descendants, or ascendants, despite what the decedent's will dictates.[7] Specifically, forced heirship restricts the rights of the decedent to decide to whom and how his or her assets should be distributed at death.[8] The exact rule for how the property is to be distributed, however, varies from country to country.[9]

In addition, since European judges have ruled that their member states do not have to grant same-sex couples the ability to marry, many European countries still do not acknowledge same-sex marriage.[10] Problems are consequently created in countries that do not acknowledge same-sex marriage and also require a "reserved portion." For example, a member of a same-sex couple who has held himself or herself out as the decedent's spouse is not entitled to inherit under a country's "reserved portion" which reserves that right for the decedent's spouse.[11]

To provide a thorough background and create an understanding of relevant law, this Note begins with a history of the reserved portion as it applies in Italy and Malta. Subsequently, this

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[5] *The World Factbook, supra* note 4.

[6] *Successions in Europe,* EUR. UNION (Oct. 1, 2012), http://www.successions-europe.eu.

[7] *Id.*

[8] *The World Factbook*, *supra* note 4.

[9] *Id.*

[10] *See* Donna Bowater, *Gay Marriage is Not a Human Right, According to European Ruling*, THE TELEGRAPH (Mar. 21, 2012), http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html.

[11] *Successions in Europe*, *supra* note 6.

Note focuses on the lack of recognition of, and the laws that govern, same-sex marriage in those same countries. Finally, this Note analyzes the impact a reserved portion requirement has on same-sex couples who are not legally recognized as "spouses."

I. THE RESERVED PORTION IN ITALY AND MALTA

Although applied in various forms, approximately 150 countries follow civil law, with the focus of this Note on the civil law system followed by Italy and Malta.[12] Generally, Italian and Maltese succession laws guarantee certain heirs a portion of the decedent's estate, known as an heir's "reserved portion."[13] The portion of the estate that is to be reserved depends on the heir's relationship to the decedent.[14] The decedent, under this requirement, is only allowed to devise the part of his or her estate not falling within the reserved portion.[15] The amount of freely disposable estate depends on the number of the decedent's forced heirs.[16] Although there seems to be many downsides to the forced heir requirement, including that it limits the testator's ability to dispose of his or her assets as he or she wishes, there are some advantages. For example, forced heirship minimizes the risk of confusion or conflicts amongst heirs at the time of the decedent's death.[17] Additionally, as long as the assets are left in accordance with the

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[12] *The World Factbook*, *supra* note 4.

[13] *Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, EUR. UNION, http://www.successions-europe.eu/en/spain/topics/restrictions-on-the-freedom-to-dispose-of-ones-succession-by-will/.

[14] *Id.*

[15] KATHRYN VENTURA LORIO, LOUISIANA CIVIL LAW TREATISE: SUCCESSIONS & DONATIONS § 10.3 (2d ed. 2012).

[16] *Id.*

[17] *Inheritance Law in Italy*, ANGLOINFO, http://italy.angloinfo.com/money/pensions-wills/inheritance-law/.

requirements, heirs pay less in taxes, and the actual cost of executing a will is lower because authorities understand the situation and requirements.[18]

A. Italy's Forced Heir Requirement

In Italy, succession law and the rights of heirs are governed by the Italian Civil Code. Under the Italian Civil Code, there are three scenarios for the distribution of property.[19] The first is legal succession where the deceased has not left a will.[20] Here, it is the law that decides who is and who is not to inherit from the decedent's estate.[21] The second form is testamentary succession where the deceased leaves a will, and dispositions set forth within the will follow the portion requirements mandated by law.[22] The final form is succession by necessity where the decedent has created a will but that will does not follow or distribute in accordance with the reserved shares as mandated by law.[23] Here, even if the deceased did not provide for the individuals who qualify for the reserved portion in his or her will or intentionally excluded one of them, the law, nevertheless, gives those individuals their mandated shares of the estate.[24] In other words, this form "recognizes and redirects a misappropriation by the deceased of the shares" which are required to go to certain heirs.[25]

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[18] *Inheritance Law in Italy*, *supra* note 17.

[19] *Italian Inheritance Basics – Italian Succession Law*, ITALIAN LEGAL LANGUAGE SERVS., http://www.italianlaw.net/services/inheritance-filings/.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Italian Inheritance Basics – Italian Succession Law*, *supra* note 19.

[25] *Id.*

The Italian notion of forced heirship is based on the belief that some protection to close family members should be afforded, even if it limits the right of the testator to choose how to dispose of his or her own assets.[26] This requirement or protection says the testator cannot exclude legal heirs completely from their inheritance abilities.[27] These legal heirs include the spouse, descendants, and ascendants of the deceased.[28] For example, if there is a child, he or she is entitled to half of the decedent parent's estate, and if there is more than one child, they are entitled to two-thirds of the estate to be distributed amongst them.[29] If a decedent has a spouse and a child, they are reserved two-thirds of the estate, and if there is a spouse and multiple children, the reserved portion is three-quarters of the estate.[30] If there is no spouse and no descendants, therefore leaving only ascendants such as one's parents or grandparents, their reserved portion is one-third of the decedent's estate.[31] Despite any other types of or numbers of other descendants the decedent has, the law stipulates that the spouse has the right to inhabit the family's home if owned by the deceased or other parties.[32] The remaining portion of the estate,

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[26] *Italian Inheritance Law Basics*, DE TULLIO L. FIRM INT'L L. PRAC., http://www.detulliolawfirm.com/italian-inheritance-law-basics.html.

[27] *Id.*

[28] *Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

[29] C.c. art. 537 (It.).

[30] C.c. art. 542 (It.).

[31] C.c. art. 538 (It.).

[32] *Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

which is usually not very large, can be distributed through the will to whomever and however the decedent wishes.[33]

Acceptance of one's inheritance can be made through an express or implied act.[34] Express acceptance occurs when the heir declares his or her willingness to accept the status as heir by a notarial or private deed.[35] Implied acceptance is assumed when the heir begins to manage the assets of the inheritance or acts in such a way that infers acceptance.[36] If the beneficiaries do not wish to accept their inheritance, the right to the reserved portion or any type of inheritance cannot be renounced until after the death of the testator.[37] In the case of refusal, the heir must give public notice of the refusal in front of a notary public or public officer.[38] The refusal cannot be made in a private document.[39]

B. Malta's Forced Heir Requirement

The Maltese Civil Code is the main form of legislation that governs inheritance issues in Malta.[40] Property may be disposed of by will (testate) or through the law (intestate).[41] Even

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[33] *Italian Inheritance Basics – Italian Succession Law*, *supra* note 19.

[34] *The Inheritance According the Italian Private International Law,* ITALIAN LEGAL ASSISTANCE, http://www.scoop.it/t/italian-legal-assistance/p/2310543105/the-inheritance-according-the-italian-private-international-law.

[35] *Id.; Accepting or Renouncing Succession*, ITALIAN INHERITANCE L. (Aug. 3, 2012), http://www.italianinheritance.it/accepting-or-renouncing-succession/.

[36] *Accepting or Renouncing Succession*, *supra* note 35.

[37] *Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

[38] *Accepting or Renouncing Succession*, *supra* note 35.

[39] *Id.*

[40] *Inheritance Tax and Law*, GLOBAL PROP. GUIDE (Aug. 5, 2011), http://www.globalpropertyguide.com/Europe/Malta/Inheritance#law.

though Maltese citizens have a right to dispose of their property by will, the law still protects the interests of heirs, particularly those of the spouse and children.[42] Specifically, the law ensures the spouse and children always take some of the inheritance, even if they were excluded from the testator's will.[43] This protection is translated into the reserved portion requirement which guarantees a fixed part of the decedent's estate is granted to the surviving spouse and children.[44] Article 616 of the Maltese Civil Code designates the specific portions of the decedent's estate required to go to descendants:

> (1) The reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.
> (2) The reserved portion is divided in equal shares among the children who participate in it.
> (3) Where there is only one child, he shall receive the whole of the aforesaid third part.[45]

If the dispositions made through the will exceed the disposable portions of the estate after the reserved portion is taken out, abatement occurs.[46] Abatement is the process where the disposable portion of the estate is calculated, and if it exceeds the reserved portion, the disposable portion is lessened proportionately.[47] If an individual dies intestate (without a will),

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[41] Krystyna Grima, *Inheriting Property - a Credit, a Headache, a Solution!*, FENECH & FENECH ADVOCS. (Jan. 26, 2011), http://www.fenechlaw.com/newsArticles/141.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] C.c. art. 616 (Malta).

[46] Grima, *supra* note 41.

[47] *Id.*

the property is allocated to potential heirs based on the law's reserved share requirements.[48]

Once it is determined who is eligible to receive a portion of the estate and how much of the estate those individuals are to receive, individuals can accept the inheritance. This acceptance "may be tacit, which warrants an act of acceptance, or express, which necessitates a public deed or private writing and may be done within ten years from the date of the decease."[49] In addition to accepting the inheritance, under the code, an individual who is entitled to inherit cannot renounce the right to succession or the reserved portion in advance.[50] Maltese law, however, is silent on the rights of heirs to renounce their reserved portion upon death. It has been interpreted, however, that like any other right held by the Maltese, the person who is entitled to that right can renounce it.[51]

II. CORRESPONDING LAWS ON SAME-SEX MARRIAGE

In both Italy and Malta, same-sex couples are currently not legally allowed to marry.[52] Although activists in both countries have tried to move their countries towards accepting same-sex marriage, it has so far been largely unsuccessful.[53]

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[48] *See* Grima, *supra* note 41.

[49] *Id.*

[50] Max Ganado, *Forced Heirship in Foundations and Trusts,* STEP J. (Dec. 2011), http://www.step.org/forced-heirship-foundations-and-trusts.

[51] *Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

[52] GAY MARRIAGE WATCH, http://purpleunions.com/blog/tag/italy; MALTA GAY RIGHTS MOVEMENT & ILGA-EUROPE, *Malta: The Status of Lesbian, Gay, Bisexual, and Transgender Rights*, http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MT/MGRM_ILGA-Europe_MLT_UPR_S5_2009_MaltaGayRightsMovement_ILGA-Europe_JOINT.pdf.

[53] *See* Elena Cesari, *Homosexuals' Rights and Civil Marriage in Italy*, IN OTHER WORDS (2012), http://www.inotherwords-project.eu/content/project/media-analysis/reading-between-the-lines/homosexuals-rights-civil-marriage-italy; Kurt Sansone, *Bill Based on 'What Our Society*

A. Same-Sex Marriage in Italy

Presently, same-sex marriage is not legal in Italy.[54] Although the discussion and fight for the rights of same-sex couples is still ongoing, it has been met with great opposition. Such opposition comes from many political officials and religious leaders.[55] Of these political officials, the UDC (Union of Christian and Center Democrats) party secretary sees allowing legal security for same-sex couples as a matter of civilization as same-sex marriage is "deeply uncivilized, a form of violence of nature and against nature."[56] Supporters of gay marriage liken Italy's failure to recognize same-sex marriage as similar to the failure to recognize African Americans as equal citizens under the law in United States during the mid-twentieth century. For example, they compare Italy's current failure to recognize homosexual marriage to the United States' during a time where water fountains were designated "whites only" and others were designated for African-Americans.[57] Specifically, David Provenzano, chairman of "Articolo3" and of "Arcifay Salamandra" in Mantova said:

> If we believe in the fundamental equality of all citizens before the law, as guaranteed by the Constitution, every institution, every recognition, every political choice not safeguarding this sacred right clearly, is discriminatory. Therefore, if the heterosexual population, before equal duties, is granted access to marriage while the homosexual population is denied, there is a problem.[58]

Accepts', TIMES OF MALTA (Aug. 29, 2012), http://www.timesofmalta.com/articles/view/20120829/local/Bill-based-on-what-our-society-accepts-.434759.

[54] *See* GAY MARRIAGE WATCH, *supra* note 52.

[55] *See* Cesari, *supra* note 53.

[56] *Id.*

[57] *Id.*

[58] *Id. citing* Davide Provenzano, *A Favore del Diritto al Matrimonio Civile*, VOCE DI MANTOVA, http://80.241.231.25/ucei/PDF/2012/2012-07-23/2012072322227864.pdf.

Many advocates blame the influence of the Vatican and Roman Catholic religion for Italy's extreme opposition to same-sex marriage.[59] Advocates cite specifically to statements made by Pope Benedict XVI where he discussed gay marriage as "a serious mistake to obfuscate the value and functions of the legitimate family based on marriage by attributing legal recognition to other forms of legal union for which there is no real social demand."[60]

During the 2006 elections, then leader Romano Prodi's campaign focused on giving legal rights to same-sex couples.[61] In 2007, following Prodi's influence, the Italian government approved a draft bill that would give unmarried couples, including same-sex couples, certain health and social benefits.[62] The benefits included the right to inherit if the couple lived together for at least nine years.[63] However, the bill never reached the floor of the Italian legislature after receiving backlash from the Roman Catholic Church.[64]

As recently as July 2013, Italy has been cited for doing very little to promote equality for the LGBT community.[65] In particular, Italy, which is still largely considered a catholic country,

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[59] *Italian Clash on Gay 'Marriage',* BBC NEWS (Jan. 14, 2006), http://news.bbc.co.uk/2/hi/europe/4612802.stm.

[60] *Id.*

[61] *Id.*

[62] Peter J. Smith, *Italian Government Approves Bill to Recognize Civ. Unions*, LIFE SITE NEWS (Feb. 9, 2001), http://www.lifesitenews.com/news/archive//ldn/2007/feb/07020908.

[63] *Id.*

[64] *Id*.

[65] Emily Annear, *Is Same-Sex Marriage Becoming Less of an Issue in Europe?,* HUFFPOST STUDENTS (July 10, 2013), http://www.huffingtonpost.co.uk/emily-annear/europe-samesex-marriage_b_4044495.html.

is a long way behind many other countries in the European Union.[66] However, while many still do little to promote equality, individuals such as Rome's current Mayor and the current President of the Chamber of Deputies, are putting their support behind homosexual marriage.[67] Additionally, with politicians working on an anti-homophobia bill Italy may someday join its counter parts in the European Union as a country that promotes equality and non-discrimination based on its citizens' sexual orientation.[68]

B. Same-Sex Marriage in Malta

Same-sex marriage in Malta is also illegal; however, a number of same-sex marriage bills are slated to be introduced.[69] Currently, there is no way for same-sex couples to register or legalize their relationship and Malta also does not accept partnership registrations from other countries recognizing same-sex relationships.[70] In August 2012, Justice Minister Chris Said passed a bill that created the idea of a "civil cohabitation partnership, [which is] essentially a registered contract between two people."[71] Despite creating this bill, Justice Minister Said believes the country does not want to put cohabitation on the same level as a family created by a legal marriage.[72]

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[66] Annear, *supra* note 65.

[67] *Rome Mayor Supports Gay Marriage*, THE LOCAL: ITALY'S NEWS IN ENGLISH (Nov. 15 2013), http://www.thelocal.it/20131115/rome-mayor-supports-gay-marriage.

[68] *Rome Mayor Supports Gay Marriage*, *supra* note 67; Annear, *supra* note 65.

[69] *Marriage Legalities Worldwide*, GAY WEDDING DESTINATIONS, http://www.gayweddingdestinations.com/information/gay-marriage-legalities-worldwide.aspx.

[70] MALTA GAY RIGHTS MOVEMENT & ILGA-EUROPE, *supra* note 52.

[71] Sansone, *supra* note 53.

[72] *Id.*

According to the Malta Gay Rights Movement group, the bill was a huge disappointment because the recognition and rights of same-sex couples are not on par with married couples.[73] Although this bill is seen as a step forward in same-sex couples gaining full rights, there is nothing in this bill or Maltese law in general that protects the position of same-sex couples in society.[74] Instead, the vast majority of laws "deny basic financial and work-related entitlements to same-sex couples in the fields of, for example, pensions, housing, inheritance rights and fiscal benefits and entitlements."[75] According to *Times of Malta* reporter Martin Scicluna, "the need for enacting more extensive and comprehensive legislation covering same-sex civil partnerships, or even possibly same-sex marriages, cannot long be postponed if the unfair discriminatory treatment of same-sex couples in Malta is to end."[76]

III. THE EFFECT OF THE RESERVED PORTION REQUIREMENT ON SAME-SEX COUPLES

In both Italy and Malta, same-sex spouses do not have the right to inherit from the will of their deceased spouse if the portion given in the will contradicts the forced shares mandated to certain individuals by law. Instead, same-sex spouses can only inherit in cases of testamentary succession and for portions of the estate falling within the available quota reserved by law.[77]

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[73] Sansone, *supra* note 53.

[74] Martin Scicluna, *Rights for Homosexual Couples*, TIMES OF MALTA (Mar. 17, 2012), http://www.timesofmalta.com/articles/view/20120317/opinion/Rights-for-homosexual-couples.411472.

[75] Scicluna, *supra* note 70.

[76] *Id*.

[77] *Succession Law and Marital Status,* ITALIAN INHERITANCE L. (2012), http://www.italianinheritance.it/succession-law-and-marital-status/.

As previously discussed, both of these countries allocate a percentage of the "reserved portion" to the decedent's spouse.[78] For example, in Italy, this portion is half the decedent's estate. However, since neither Italy nor Malta recognizes same-sex marriage, the same-sex decedent's partner is not recognized as a spouse under law.[79] This means same-sex couples are not entitled to the "reserved portion" share set aside for spouses. The decedent's estate is treated as if there is no spouse and divided amongst the remaining children, heirs, or ascendants in accordance with the reserved potion requirement.[80] Only once the minimum shares are divided amongst legally recognized heirs can the remainder of the estate be given to the same-sex partner as long as the deceased partner has created a will and designated that he or she would like the remainder of the estate to go to his or her partner.[81] If the individual does not have a will or the will is deemed to be invalid, then the general rules on intestate succession are applied.[82] This usually means that the closest relatives, not the unrecognized spouse, of the deceased are entitled to a share of the assets in accordance with forced heirship requirements.[83]

The only relief same-sex partners have for working around the forced heirship requirement is through other heirs renouncing their rights to the "reserved portion" of a decedent's estate.[84] Renunciation, however, can only be done retroactively after the decedent's

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[78] *See Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13; C.c. art. 615 (1) (Malta).

[79] *See* GAY MARRIAGE WATCH, *supra* note 52.

[80] *Disposing by Will/Inheriting and Italian Property*, *Italian Succession & Probate,* CLAUDIO DEL GIUDICE, http://www.delgiudice.clara.net/ENG/inheritance.htm.

[81] *See Italian Inheritance Basics – Italian Succession Law*, *supra* note 19.

[82] *Inheritance Law in Italy*, *supra* note 17.

[83] *Id.*

death.[85] To renounce in Italy, the heirs to the reserved portion must begin an action for renouncement within ten years.[86] In Malta, the actual law is silent as to whether or not forced heirs can renounce their reserved portion.[87] However, since the reserved portion is a right, it has been interpreted that the person is entitled to renounce a reserved portion like any other right.[88] In both of these countries, the right to renounce the reserved portion rests with the heir, not the unrecognized same-sex spouse.[89] Therefore, the still living partner is completely reliant on the willingness of heirs to renounce their portion so that the decedent's wishes to give his or her estate to a surviving partner can be followed. In Italy and Malta, where same-sex couples have a long history of discrimination and persecution, it seems unlikely that heirs would be willing to renounce their rights for a relationship that they likely did not support.[90] Therefore, the surviving spouse in a same-sex couple is given very little opportunity or ways in which to receive the portion of the estate that his or her deceased spouse wished for him or her to have.

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[84] *See Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *See Restrictions on the Freedom to Dispose of One's Succession by Will (Reserved Portion)*, *supra* note 13.

[90] *See generally History of Italian Gay Life,* ITALIA MIA (Feb. 17, 2013), http://www.italiamia.com/gay_lesbian_history.php#.USFn76X3DZs; *see also* Carmel Bayliss, *Malta: Where Gays are Second-Class Citizens*, TIMES OF MALTA (July 15, 2010), http://www.timesofmalta.com/articles/view/20100715/letters/malta-where-gays-are-second-class-citizens.317829 (describing same-sex couples as second class citizens).

CONCLUSION

This Note illustrated the requirements of European succession law as they apply and currently occur in Italy and Malta. These countries have what is known as "forced heirship" or a "reserved portion" where certain amounts of the decedent's estate must go to the decedent's spouse, descendants and ascendants, despite what the decedent's will dictates.[91] Specifically, forced heirship or the reserved portion restricts the rights of the decedent to decide to whom and how his or her assets should be distributed upon his or her death.[92]

In addition, this Note discussed how many of these same countries requiring the reserved portion for inheritance do not recognize same-sex marriage in any legal form. Presently, in both Italy and Malta, same-sex couples are not legally allowed to marry.[93] Although activists in both countries have tried to move their countries towards accepting same-sex marriage, it has so far been largely unsuccessful.[94]

Since same-sex marriage is not recognized in these countries, the decedent's "spouse" is not entitled to inherit from the reserved portion because the living "spouse" is not a legally recognized heir.[95] The reserved portion requirement, therefore, does not adequately take into account the succession wishes of same-sex couples regarding inheritance from a spouse's estate. The same-sex-spouse is consequently forced to rely upon the statutory heirs to relinquish their right to the reserved portion in order to inherit from his or her spouse, which is a rare event at

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[91] *Successions in Europe, supra* note 6.

[92] *The World Factbook*, *supra* note 4.

[93] GAY MARRIAGE WATCH, *supra* note 52; MALTA GAY RIGHTS MOVEMENT & ILGA-EUROPE, *supra* note 52.

[94] *See* Cesari, *supra* note 53; Sansone, *supra* note 53.

[95] *See generally* GAY MARRIAGE WATCH, *supra* note 52.

best. Thus, for the above reasons, it is imperative that the succession laws of many European countries, such as in Italy and Malta, be altered to take into consideration ever-changing family situations, specifically same-sex couples.

Our Time is Now

By Kayla McCall

ABSTRACT

This high school essay focuses on the importance of resisting and reacting to injustice in the world. The author's essay focuses on her personal experiences with bullying and the experiences of a few women who have inspired her to stand up for human rights worldwide.

Our Time is Now

By Kayla McCall[1]

I was never able to fully comprehend what the word "resistance" meant; it was not until I joined the 2013 Summer Institute for Human Rights and Genocide Studies that I learned the meaning of the word. It was here that I came to the realization that I have been subconsciously resisting for many years. I was a victim of bullying from the time I started fourth grade, up until the day I walked through the doors of my high school. Five years I was bullied; for five years I had to face cruelty on a day-to-day basis, and for five years my parents watched me cry, as their daughter wondered what was wrong with her.

Every day was a new struggle, where I had to stand at a bus stop with a group of kids that would glare and snicker at me. I remember my mother would ask me if I wanted her to drive me to school, and I would say no. Each day, I would have to fight to find a seat on the bus since nobody was willing to let me sit with them. If a person refused to move, I would sometimes have to literally hop over them just to take a seat. Again, after coming home feeling discouraged, my mother would ask me the next morning if I wanted her to drive me to school. I remember looking at her and saying, "Mom I can't. I can't let you drive me to school because if you do they'll win."

Resistance is to be passive physically, but to be a warrior both in spirit and in mind. Using violence as a weapon ultimately creates more problems. Violence leaves behind a trail of devastation and sorrow. To have the power of an educated mind, voicing what is unjust is the greatest weapon any individual can acquire. Through the Summer Institute I was privileged to meet so many amazing people who have peacefully resisted for a right that had been taken away

[1] Kayla McCall is a high school student at Lancaster Central High School and the winner of the 2013-2014 Impunity Watch Law Journal Essay Contest.

from them. Out of all the speakers that came to talk to us, there was one woman whose story and determination moved me the most.

Shabana Basij-Rasikh is twenty-two years old.[2] She grew up in a country where approximately six percent of women obtain a college degree.[3] With the support of her family Shabana graduated from Middlebury College in Vermont.[4] Shabana used her family's support as well as her past to fuel her success by co-founding Sola, the School of Leadership, Afghanistan, Inc., a non-profit with the goal of giving Afghan women access to education.[5] Sola is the first, and possibly the only, boarding school for girls in Afghanistan.[6]

When Shabana was six years old, the Taliban took over Afghanistan, and made it illegal for girls over the age of eight to attend school.[7] For five years, Shabana had to dress disguised as a boy in order to escort her older sister to a secret school.[8] This was the only way the two of them, as female students, were able to seek an education. Every day they feared for their lives.

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[2] *See* Shabana Basij-Rasikh, Transcript, *Dare to educate Afghan girls*, TED (Dec. 2012), http://www.ted.com/talks/shabana_basij_rasikh_dare_to_educate_afghan_girls/transcript [hereinafter TED Talk Transcript].

[3] Sara Van Wie, *Leading Change: Featuring Shabana Basij-Rasikh*, GEORGE W. BUSH INSITITUTE (May 7, 2013), http://www.bushcenter.org/blog/2013/05/13/leading-change-featuring-shabana-basij-rasikh.

[4] *See id.*

[5] *Id.*; *see* School of Leadership, Afghanistan, Inc., SOLA-AFGHANISTAN, http://www.sola-afghanistan.org./

[6] School of Leadership, Afghanistan, Inc., Shabana Basij-Rasikh, SOLA-AFGHANISTAN, http://www.sola-afghanistan.org/shabana.html.

[7] TED Talk Transcript, *supra*, note 1; see Bureau of Democracy, Human Rights and Labor, Report on The Taliban's War Against Women, U.S. DEPARTMENT OF STATE (Nov. 17, 2001), http://www.state.gov/j/drl/rls/6185.htm. "Since 1998, girls over the age of eight have been prohibited from attending school."

[8] Van Wie, *supra* note 2.

To be fearless does not mean to be unafraid. Being fearless is to have the courage to resist, and continue to look fear in the face in times of adversity. To avoid getting caught, Shabana and her sister took a different route to the school and would cover their books with grocery bags so it looked as if they went shopping.[9]

The school was held in a house which held more than one hundred girls.[10] Every day those girls, their parents, and their teachers risked their lives to ensure a brighter future for these young women.[11] When Shabana was beginning to lose hope, her father told her, "Listen my daughter; you can lose everything you own in your life. Your money can be stolen. You can be forced to leave your home during a war. But, the one thing that will always remain with you is [your education]."[12] Shabana is just one out of millions of others who have been, and still are, advocating for change and speaking out against injustice around the world.

Another remarkable woman whose name remains unfamiliar to many is Irena Sendler.[13] Irena was born in 1910, and died in 2008.[14] She was a Polish Catholic social worker that worked in Warsaw during World War II.[15] During that time, she became known for heading the children's bureau of Zegota, an underground organization that saved 2,500 Jewish children by pretending they were sick from typhus and smuggling them to safety in ambulances. The

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[9] TED Talk Transcript, *supra* note 1.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See* Dennis Hevesi, *Irena Sendler, Lifeline to Young Jews, is Dead at 98*, N.Y. TIMES (May 13, 2008), http://www.nytimes.com/2008/05/13/world/europe/13sendler.html?_r=0.

[14] *Id.*

[15] Hevesi, *supra* note 13.

organization also hid Jewish children in other things, such as trashcans, potato sacks, and even coffins.[16]

The Jewish children that were smuggled by Irena's organization were placed with families, orphanages, hospitals, or convents during World War II. Later, after the War, Irena tried to reunite these Jewish children with their surviving family members, if any. Here is a woman who is considered a hero by many, yet Irena did not think of herself as such: "I could have done more," she said, "this regret will follow me to my death."[17] Irena's story is inspiring, and shows how one person can truly make a difference. By educating people using life stories such as Shabana's and Irena's we can learn lessons that will help create a brighter future and an even better generation.

It is our moral duty as a global society to become the voice for those who dare not, or cannot, speak. Martin Luther King Jr. once said, "In the End, we will remember not the words of our enemies, but the silence of our friends."[18] Too many of us keep silent; hoping someone else will fix what is in the world which is found to be unjust. Our time is now! We cannot afford to remain voiceless for our brothers and sisters who have had their rights stolen. Find out about an ongoing conflict in the world and educate yourself about it. Find a problem that sparks an interest, and find small ways to resist, and make a difference.

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[16] Hevesi, *supra* note 13.

[17] *Irena Sendler: Social worker who saved 2,500 Jewish children in Warsaw and was tortured by the Gestapo*, THE TELEGRAPH (May 12, 2008, 11:11 PM), http://www.telegraph.co.uk/news/obituaries/1950450/Irena-Sendler.html.

[18] MARTIN LUTHER KING, JR., THE TRUMPET OF CONSCIENCE (1967), quote available at http://mlkday.gov/plan/library/communications/quotes.php.