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The ***STOP ACT*** Must Yield the Right-of-Way to Grandma's Antique Dream Catcher: A Call to Congress

(*Summum ius summa iniuria*)

By: Chief Justice Gregory D. Smith
St. Regis Mohawk Court of Appeals[1]

Introduction

Great ideas can lead to unfortunate, unforeseen, and unintended consequences.[2] The Safeguard Tribal Objects of Patrimony Act,[3] commonly known as the ***STOP ACT***,[4] is one such statute – laudable in intent, but unintentionally intrusive to the religious rights of Native Americans in another. Native Americans are justified in their frustration that religion; sacred objects of historic and cultural significance; and heritage are being disrespected and sold as museum trinkets.[5] In 1987, the United States General Accounting Office (GAO) found that "nearly 44,000 of the 136,000 archaeological sites on the Four Corners states of Arizona, Colorado, New Mexico, and Utah have experienced looting of Indian artifacts and cultural property."[6] Looting Native American graves for profit, which has impacted virtually every indigenous tribe in the United States,[7] can be judicially traced to at least one hundred years prior to the 1987 GAO report[8] and

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[1] Gregory D. Smith, J.D. (1988), Cumberland School of Law at Samford University. Chief Justice Smith is a jurist on six Native American tribal supreme courts (in AZ, CA, NY, OK, NE, and WI) and he is the Chief Judge of the United States Department of the Interior's Court of Indian Appeals (Miami Agency) based in Oklahoma. Chief Justice Smith teaches Federal Indian Law at the Lincoln Memorial University School of Law in Knoxville, TN and he teaches Ethics, Rural Courts, and Evidence for the National Judicial College, which is based at the University of Nevada-Reno. Chief Justice Smith is the tribal courts representative to the United States Sentencing Commission's Tribal Issues Advisory Group (TIAG), which reviews and comments on proposed amendments to the United States Sentencing Guidelines. ***Any statement made or presented in this essay reflects the sole opinions of the author and does not reflect the official positions of any court, TIAG, or any other organization with which the author has membership or association.***

[2] *See, e.g.*, Coleman v. Block, 663 F. Supp. 1315, 1329 (D. N.D. 1987); Lisa Vertinsky, *Pharmaceutical (Re) Capture*, 20 YALE J. HEALTH POL'Y L. & ETHICS 146, 199 n.245 (2021).

[3] 25 U.S.C. §§ 3071-79. S*ee also* Public Law 117-258 (2022).

[4] *See, e.g.*, B. Stephen Jones, Note, *Strengthening NAGPRA*, 41 CARDOZO ARTS & ENT. L.J. 883, 884 (2023). This ***Stop Act*** is not to be confused with another recent statute of the same name that addresses synthetic drug overdose issues. *See generally* U.S. Customs and Border Protection, Department of Homeland Security (DHS), *Mandatory Advance Electronic Informational Mail Shipments*, 86 Fed. Reg. 14245, 14259 (Mar. 15, 2021).

[5] *See* DAVID H. GETCHES ET AL, CASES AND MATERIALS ON FEDERAL INDIAN LAW 758 (W. Acad. Publ'g 6th ed. 2011). *See also* James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism*?, 50 S.D. L. REV. 244, 246-48 (2005).

[6] *See* Shannon Price, *Living Heritage, Stolen Meaning: Protecting Intangible Native American Cultural Resources Through the Right of Publicity*, 20 UIC REV. INTELL. PROP. L. 31 (2020). *See also* Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, ARIZ. ST. L. J. 809, 815-16 (2012) (discussing how looters would try to pass themselves off as "amateur archaeologists"*).*

[7] Craig W. Jerome, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA*, *and Hawai'i*, 29 HAWAII L. REV. 163, 166 n.28 (2006).

[8] *See, e.g.*, *The Louisa Simpson*, 15 F. Cas. 953, 957 (D. Ore. 1871).

arguably to the first contact Europeans had in North America.[9] Sadly, indigenous people's grave desecration offers a high dollar return on the Black Market.[10] The ***STOP ACT*** increases the criminal penalty for violations of the Native American Graves Protection and Repatriation Act (NAGPRA)[11] to a potential time of incarceration for up to ten years for individuals attempting to sell Native American artifacts to non-Native Americans for profit.[12] The bogus argument that Native American artifacts are abandoned by the original owners, and found by later individuals, allowing for resale without repercussion is not a novel concept.[13] Cases involving the pilfering of Native American cultural relics have made their way to the United States Supreme Court multiple times over the last one hundred years.[14]

This essay addresses the unsavory plight twenty-five tribal nations[15] that span or sit on America's national borders[16] face where ancient family artifacts, carried across national borders to

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[9] *See generally*, Jack F. Troupe & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 38-43 (1992); Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVT. L. 1, 2 n.5 (2002).

[10] Alston V. Thoms, *Beyond Texas' Legacy: Searching for Cooperation Without Submission*, 4 TEX. F. OF C.L. & C.R. 41, 42 (1998); Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 ECOLOGY L.Q. 137, 160 n.152 (2009).

[11] 25 U.S.C. §§ 3001-3013. The NAGPRA was originally enacted to "prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors." Thorpe v. Borough of Jim Thorpe, 770 F.3d 255, 259-61, 266 (3rd Cir. 2014).

[12] 25 U.S.C. § 3071(2); 18 U.S.C. § 1170.

[13] *See, e.g*., Oregon Iron Co. v. Hughes, 81 P. 572, 574 (Ore. 1905) (rejecting the abandonment or "finders/keepers" argument regarding Native American artifacts).

[14] *See, e.g*., Pittsburgh, C., C., & S. L. R. Co. v. Fink, 250 U.S. 577, 580 (1919); Andrus v. Allard, 444 U.S. 51, 54-55 (1970); *See also*, Stephen J. Massey, *Justice Rehnquist's Theory of Property*, 93 YALE L. J. 541, 556 n.88 (1984).

[15] There are seven tribal nations that cross the United States/Mexico border: Yaqui/Yoeme, the Tohono O'odham, the Cocopah/Cucapá, the Kumeyaay/Kumiai, the Pai, the Apaches, and the Kickapoo/Kikapú. Christina Leza, *Handbook on Indigenous Peoples' Border Crossing Rights Between the United States and Mexico*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R,, https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Call/IndigenousAllianceWithoutBorders.pdf, (last visited on Feb. 21, 2024). For a list of the tribal nations that overlap the United States/Canada border, *see* FRED CARON, GOVERNMENT OF CANADA, REPORT ON FIRST NATION BORDER CROSSING ISSUES, Annex B (2017), https://rcaanc-cirnac.gc.ca/eng/1506622719017/1609249944512 (last visited on Feb. 21, 2024). For a discussion on the documentation requirements for Native Americans crossing into the United States from Canada, *see generally*, The North American Indian Center of Boston, *Rights of First Nation Members in the United States,* http://www.naicob.org/uploads/4/6/9/1/46918873/jay_treaty_guide__1_.pdf, (last visited on Feb. 21, 2024).

[16] Rachael Marshbanks, *The Borderline: Indigenous Communities on the International Frontier*, 26 TRIBAL COLL. J. OF AM. INDIAN HIGHER EDUC. 276 (2015). Examples of cross-border Native Nations include the Kootenai Tribe in Idaho/Canada; the Gwitchin people of Alaska/Canada; and the arguably the Ysleta Del Sur Pueblo on the Texas/Mexico border. *See* McCoy v. Lyons, 820 P.2d 360, 361 (Idaho 1991); Angelique Eaglewoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81, 82-3 (2009); Northern Lights, Inc., 39 F.E.R.C. P61352, 62102 n. 4 (June 25, 1987); Gregory Scruggs & Thomas Reuters Foundation, *How Restrictions Along U.S.-Canada Border Divide an Indigenous Arctic People,* ARCTIC BUS. J. (May 2, 2019), https://www.arctictoday.com/how-restrictions-along-u-s-canada-border-divide-an-indigenous-arctic-people/; Reuters, *American Indians Fear US-Mexico Border Wall Will Destroy Ancient Culture*, VOICE OF AM. (June 25, 2018) https://www.voanews.com/a/american-indians-fear-us-mexico-border-wall-will-destroy-ancient-culture/4454218.html.

facilitate participation in tribal cultural and religious events, could violate the ***STOP ACT***.[17] The prospect of a Native American tribal member being prosecuted for taking personal ancient family heirlooms to participate in cultural or religious gatherings is repugnant to both the First Amendment to the United States Constitution's Freedom of Religion and Assembly Clauses and/or the Indian Civil Rights Act's Freedom of Religion and Assembly Clauses.[18] One should be aware that community assembly of tribal members is actually part of their religious experience.[19] "Thus, for Indian people, it is important that they be allowed to maintain the special character of their social relationships through traditional spiritual activities in concert with Mother Earth and the sacred plants she offers."[20] No person should be forced to choose between their faith and criminal sanctions.[21] Here, the ***STOP ACT*** must yield to sincere religious rights.[22]

The current United States Sentencing Guidelines do not exempt potential prosecution for tribal members from taking their own family heirlooms across either the United States/Canada or United States/Mexico borders for the purposes of exercising sincerely held religious or cultural rituals.[23] This is unfortunate because, "[i]n many cases, a cultural object is required for the continuation or revitalization of an important ceremony" of Native American worship.[24] The author of this essay presides over the appellate court of one of the tribal nations that overlap the United States/Canada border whose members are impacted with the statutory glitch created by the ***STOP ACT***.[25] Reputations can be quickly ruined by unfounded criminal charges.[26] One court, long ago, warned that, "a person not of strong character, overawed and subdued by a criminal charge, involving the ruin of himself and all dependent upon him, may, under *influence*, confess himself guilty, when in fact he is innocent."[27] Standing, respect, and reputation is especially important in Native American communities.[28] Likewise, honoring the land and spirits is a central

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[17] Kayla Molina, "*The Desert Is Our Home*," 45 AM. INDIAN L. REV. 125, 129-30 (2021).

[18] U.S. CONST. amend. I; 25 U.S.C. § 1302(a)(1).

[19] *See* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 360 (1994).

[20] *Id*. at 360-61.

[21] Hodges v. Thomas, No. 22-00132, 2023 U.S. Dist. LEXIS 58200, at *11 (D. Ariz. Mar. 3, 2023).

[22] *See generally*, Bacher v. North Ridgeville, 352 N.E.627, 630-31 (Ohio App. 1975).

[23] *See Sentencing Guidelines for the United States Courts*, 88 Fed. Reg. 89142(5) (proposed Dec. 26, 2023).

[24] FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1268 (Nell Jessup Newton et al. eds., 2012 ed. 2012). *Accord* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L. J. 299, 300 (2002).

[25] St. Regis Mohawk Court of Appeals. The St. Regis Mohawk Tribe's reservation is located in Akwesasne, NY and southeastern Ontario, Canada. *See* https://nyheritage.org/organizations/saint-regis-mohawk-tribe (last visited on Feb. 16, 2024).

[26] *See, e.g.*, Medina v. Toledo, 718 F. Supp. 2d 194, 209 (D. P.R. 2010); Kendall v. Russell, 572 F.3d 126, 146 (3rd Cir. 2009); People v. Cunningham, 195 Misc. 2d 295, 297 (N.Y. Sup. Ct. Nassau Co. 2002).

[27] Deathridge v. State, 33 Tenn. 75, 79 (1853) (emphasis in original text).

[28] *See generally*, Justin Seigler, *Injustice in Indian Country: The Need for a Serious Response to Native American Elder Abuse*, 19 ELDER L.J. 415, 416-17 (2012). *But see*, Suzannah Linton, *Reflections on a Decade of International Law: International Legal Theory*: *Snapshots from a Decade of International Legal Life: Rediscovering the War Crimes Trials in Hong Kong, 1946-48*, 13 MELBOURNE J. OF INT'L L. 284, 301 (2012), *for proof that Native Americans are not exclusive when placing high regard on not disgracing oneself or family (discussing Japanese prisoners of war).*

tenant to Native American culture.[29] This essay suggests that tribal members exercising sincerely held religious or cultural beliefs should be directly and fully exempt from prosecution under the ***STOP ACT*** and 25 U.S.C. § 3071 *et seq*. should be amended to clearly declare this exemption.

Background

Native American tribal nations are sovereign bodies that pre-existed the United States Constitution.[30] The sale of stolen or improperly obtained Native American "Indian"[31] artifacts[32] is a problem that spans both the United States[33] and the world.[34] "International law defines 'cultural property' to include any property of great importance to the cultural heritage of a people."[35] As a matter of fact, the United Nations Declaration on the Rights of Indigenous People declares that "Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions…"[36]

Several Native American tribes define cultural artifacts as follows:

> **(a)** An "**artifact**" is defined as
> **(1)** A usually simple object (as a tool or ornament) showing human workmanship or modification;

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[29] *See, e.g*., Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement,* 32 HARV. ENVT'L. L. REV. 373, 380-81 (2008).

[30] Denezpi v. United States, 596 U.S. 591, 598-99 (2022); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2015); Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers, 46 F.4th 552, 556-57 (7th Cir. 2022); Grondal v. United States, 37 F.4th 610, 616-17 (9th Cir. 2022); Spurr v. Pope, 936 F.3d 478, 483 (6th Cir. 2019) (court praising a tribal supreme court that included the author of this essay as Chief Justice); *But see* Miccosukee Tribe of Indians v. United States, 698 F.3d 1326, 1331 (11th Cir. 2012); MacArthur v. San Juan County, 497 F.3d 1057, 1067-68 (10th Cir. 2007) (for the reminder that Congress' plenary power makes Native American tribal sovereignty subject to the will and whims of Congress).

[31] The term "Indian," referring to Native Americans, is a term of art used in the United States Code and is not being used here as a derogatory term. *See, e.g*., 25 U.S.C. §§ 1301(4) and 3703(10).

[32] While there are various definitions of "artifact" in state and federal statutory codes and regulations, a common thread for the definition includes an item that is usually over 100 years old that is "nonportable evidence of past human behavior or activity" that is "found on or in the ground, including structural remains." Ind. Code Ann. § 14-21-1-2 (2024). *Accord* MINN. STAT. § 307.08(13)(c). *See also*, 16 U.S.C. §§ 431-433 (repealed 2014).

[33] *See, e.g*., State v. Syed, 204 A.3d 139, 150 (Md. 2019); Estate of Redd v. Love, 848 F.3d 899, 902 (10th Cir. 2017); State v. Taylor, 269 P.3d 740, 748 (Hawaii 2011); State v. McDonald, 2002-Ohio-3326, ¶ 2 (Ohio App. 2002); United States v. Taylor, 176 F.3d 331, 336 (6th Cir. 1999); United States v. Gerber, 999 F.2d 1112, 1115 (7th Cir. 1993); Grooms v. Solem, 923 F.2d 88, 89 (8th Cir. 1991); State v. Grooms, 399 N.W.2d 358, 361 (S.D. 1987); Church of Scientology v. U.S. Dep't. of Justice, 612 F.2d 417, 427 (9th Cir. 1979).

[34] *See, e.g*., U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS AUCTIONS (2018); Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains,* 60 B.C. L. REV. 2347, 2357-59 (2019).

[35] COHEN, *supra* note 24, § 20.01[1], at 1267.

[36] G.A. Res. 61/295, Art. 31(1) (Sept. 13, 2007). *See also,* COHEN'S, *supra* note 24, § 20.01[1], at 1267; Gregory A. Smith & Ann Berkley Rogers, *Who Stole the Acoma Shield*, 43 HUM. RTS. 17, 19-20 (2017).

(2) A product of civilization;
(3) A product of artistic endeavor.[37]

Other tribal nations use interchangeable terms to the above definition of artifact such as "antiquities" to include "…any relic, artifact, fossil, or any object which represents the past culture of the Standing Rock Sioux Tribe or any hardened remains of a plant or animal of a previous geological age preserved in the earth's crust."[38] There is a congressionally enacted public policy to protect Native American's right "to believe, express, and exercise" their traditional cultural religious views.[39] The point to be made is that the treasures and traditions of a tribal nation should remain with the tribe, not at an auction house,[40] museum,[41] or in a non-Native American's personal history collection.[42]

Probably the best known of the twenty-five Native American tribal nations that cross the United States' national borders of Canada and Mexico[43]are the St. Regis Mohawk Tribe in New York and Canada,[44] the Tohono O'odham Nation in Arizona and Mexico,[45] and the Blackfeet

[37] MILLE LACS BAND OF OJIBWE CODE tit. 10, § 1001(a) (2023) (parentheticals in original); *see, e.g.,* WHITE EARTH TRIBAL HISTORICAL PRESERVATION ACT: PROTECTION OF BURIAL GROUNDS CODE § 3.03 (1997).

[38] STANDING ROCK TRIBAL LAW § 9-201(4) (2024).

[39] American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996.

[40] State v. Baker, 867 P.2d 1392, 1393-1394 (Or. Ct. App. 1994).

[41] *See, e.g.*, 20 U.S.C. § 80q-9 (2023); Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 46-47, 53 (2009); Miss Op. Att'y Gen. 94-0499 (1994).

[42] *See, e.g.*, U.S. Fish & Wildlife Serv. v. Bush, 1979 NOAA Lexis 3 (U.S. Dept. of the Interior Hearings & Appeals 1979); N.C. GEN. STAT. § 70-2 (2023).

[43] *See* Marshbanks, *supra* note 16; *See also*, United States v. Conigliaro, 384 F. Supp.3d 145, 156 (D. Mass. 2019); *See also*, G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty*," 76 MARQ. L. REV. 401, 425 n.165 (1993); *Cf*., Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L. J. 315, 358 n.182 (2005) (discussing how Native American tribes that have lands overlapping national borders are economically impacted by geography).

[44] *See* People v. Chaney, 2019 N.Y. Misc. LEXIS 4635, at *2-4 (Franklin Cnty. Ct. Aug. 28, 2019); *See also* United States v. Wilson, 699 F.3d 235, 238 (2nd Cir. 2012). The author of this essay is the Chief Justice of the St. Regis Mohawk Court of Appeals. The St. Regis Mohawk Tribe (SRMT) Reservation has been accused of being a haven for drug trafficking because tribal members can cross the United States/Canada boundary without traveling through an international border checkpoint. *See* Sarah Kershaw, *Drug Traffickers Find Haven in Shadows of Indian Country* N.Y. TIMES (Feb. 19, 2006), https://www.nytimes.com/2006/02/19/us/drug-traffickers-find-haven-in-shadows-of-indian-country.html.

[45] Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U REV, L. & SOC. CHANGE 707, 737 n.229 (2019); Gregory D. Smith & Bailee L. Plemmons, *The Court of Indian Appeals: America's Forgotten Federal Appellate Court*, 44 AM. INDIAN L. REV. 211, 212 n.1 (2020). The author of this essay is the Alternate Appellate Judge for the Gila River Indian Community, which is historically a part of the Tohono O'odham Tribe. *See* OFF. WEB SITE OF THE TOHONO O'ODHAM NATION, http://www.tonation-nsn.gov/history-culture/, (last visited on Feb. 16, 2024). The Tohono O'odham Nation is best known for being the tribe that was split in two by "Trump's Wall," that was placed at the United States/Mexico border. *See* Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV., 115 (2021).

Nation which overlaps the Montana/Canada Border.[46] Many tribal nations that have land and members on separate sides of a national border, such as the Tohono O'odham Nation, frequently interact for cultural, educational, and religious reasons.[47] The exercise and practice of Native American religious and cultural rights sometimes conflict with non-Native American values and "progress."[48] An example of a religious gathering that brings Native Americans together in a single location is a pow-wow.[49] The application of the ***STOP ACT*** is one of the areas of American law where a strict reading produces a stumbling block for Native Americans exercising their religious beliefs.[50]

Freedom of Religion and Freedom of Assembly

The terms of the United States Constitution do not automatically apply to Native Americans because tribal nations pre-exist the creation of the United States.[51] In 1924, all Native Americans born on United States soil were declared citizens of the United States of America.[52] Irrespective of the logic that the United States Constitution's Bill of Rights applied to Native Americans after 1924, the Indian Civil Rights Act of 1968 (ICRA) incorporated most of the Bill of Rights to Native Americans.[53] Both the First Amendment of the United States Constitution's Freedom of Religion and Assembly Clauses and the ICRA's similar clauses provide protection for Native Americans'

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[46] America's federally recognized Blackfeet Tribe of Montana has a sister tribe just over the international border in Canada. *See In re* L.S. 179 Cal. Rptr. 3d 316, 327 (Cal. Ct. App. 2014); *see* Ashleigh Breske, *Politics of Repatriation: Formalizing Indigenous Repatriation Policy*, 25 INT. J. OF CULTURAL PROP. 347, 359 n.81 (2018).

[47] *See* Molina, *supra* note 17; State v. Hanapi, 970 P.2d 485, 486 (Haw. 1998). *See also*, State v. Pratt, 243 P.3d 289, 322 (Haw. 2010) (Nakamura dissenting).

[48] *See, e.g.*, NW. Indian Cemetery Prot. Ass'n. v. Peterson, 552 F. Supp. 951, 957 (N.D. Calif. 1982); United States v. Bresette, 761 F. Supp. 658, 659, 664-65 (D. Minn. 1991).

[49] *See, e.g.*, Orso v. Shumate, No. 3:10-cv-1069, 2011 US Dist. LEXIS 10706, *5-7 (W.D. La. Feb. 3, 2011); Daniel Donovan & John Rhodes, *To Be or Not to Be: Who is an "Indian Person"?*, 73 MONT. L. REV. 61, 80 (2012). *Accord*, Vialpando v. State, 640 P.2d 77, 81 (Wyo. 1982) and Michelle Vann and Mass. Comm. Against Discrimination v. Walcare, Inc., d/b/a Diamante Sports Restaurant, Inc., 2006 Mass. Comm. Discrim. Lexis 26, *3 (Mass. Discrim. Comm. Apr. 28, 2006).

[50] *See generally*, E. Tex. Baptist Univ. v. Burwell, 807 F.3d 630, 634 n.6 (5th Cir. 2015).

[51] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Long v. Snoqualmie Gaming Comm'n, 435 P.3d 339, 343 (Wash. Ct. App. 2019); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 84 (2006). The author had the honor of serving as a tribal court appellate justice with Professor Fletcher, of the University of Michigan School of Law, on the Nottawaseppi Huron Band of the Potawatomi Supreme Court for six years. In this author's opinion, Matthew L.M. Fletcher is the world's top living scholar in the field of Federal Indian Law. While this author was the Chief Justice of that court, my friend "Matthew L.M." was the face of that court.

[52] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 236 n.1 (2023), (Thomas concurring); Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1019-20 (9th Cir. 2020), *rev'd on appeal on other grounds in* Brnovich v. Democratic Nat'l Comm.,141 S. Ct. 2321, 2329 (2021); Granite Valley Hotel Ltd. P'shp. v. Jackpot Junction Bingo & Casino, 559 N.W. 2d 135, 160 (Minn. Ct. App. 1997).

[53] 25 U.S.C. §§ 1301; *Accord*, Fort Peck v. Charette, 1988 Mont. Fort Peck LEXIS 9, *4 (Ft. Peck App. Feb. 21, 1989). For a discussion of the selective incorporation of the Bill of Rights into the ICRA, and the reason for an incomplete adoption of the Bill of Rights, *see* Pueblo, *supra* note 51, at 63 n.14; *See also* Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 61, 115 (2005).

right to worship and facilitation of cultural events such as pow-wows.[54] The First Amendment states the following:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[55]

25 U.S.C. § 1302(a)(1), the ICRA's version of the First Amendment, states the following:

> No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;[56]

The American Indian Law Deskbook (AILD), published by the Conference of Western Attorneys General, describes the importance of Native American spiritual beliefs being tied to geographic locations and religion as being "inextricably bound to the use of land."[57] Specifically, the AILD says:

> An important feature of Indian cultural identity is the unique relationship Indians have with the natural world. Spiritual beliefs of most Indians are site-specific and "inextricably bound to the land." There is a "sacred and indissoluble bond" between Indians and areas within their aboriginal lands.[58]

An example of a Native American religious belief that is sincerely held as a central and fundamental tenet for many tribal religions is the sweat lodge.[59] Longer hair on men is also frequently associated with Native American religious traditions and expressions of culture.[60] A common example of articles used in traditional Native American religious festivals are prayer

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[54] Milo Colton, *Texas Indian Holocaust and Survival: McAllen Grace Brethren Church v. Salazar*, 21 SCHOLAR 51, 96 n.242 (2019).

[55] U.S. CONST. amend. I

[56] 25 U.S.C. § 1302(a)(1); *Accord*, Acres v. Marston, 2022 Cal. Super. LEXIS 69649, *12-*13 (Sacramento Super. Ct. Oct. 21,2022).

[57] CONF. W. ATTY. GEN., AM. INDIAN LAW DESKBOOK, § 3:18, at 215 (2016 ed., Thomas Reuters 2016) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 460-1 (1988)).

[58] CONF. W. ATTY. GEN., *supra* note 57.

[59] *See, e.g.,* Pevia v. Hogan, 443 F. Supp. 3d 612, 638 (D. Md. 2020). A sweat lodge is a sacred religious structure that Native American tribal members use to facilitate meditation for a spiritual cleansing that works like a sauna. Wilson v. Moore, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003). *See generally*, Spurr v. Tribal Council, 12-005APP, 2012 Nottawaseppi Huron Band Supreme LEXIS 3, at *8-9 (NBBP Sup. Ct. Feb. 21, 2012) (for a discussion on various types of sweat lodges).

[60] *See, e.g.*, New Rider v. Bd. of Educ., 414 U.S. 1097, 1097-98 (1973) (*Douglas dissenting from the denial of cert.*); Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990); and A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 254 (5th Cir. 2010).

sticks and feathers.[61] Prayer sticks are also called dream catchers.[62] This final example leads to potential conflicts with the ***STOP ACT.***[63]

The ***STOP ACT***

The ***STOP ACT***[64] is congressional legislation introduced in 2017 to address the sale of Native American[65] cultural and religious artifacts by French auction houses that ignored pleas by Native American tribes to return the cultural items because no international law existed to protect indigenous peoples.[66] The United States Department of the Interior (DOI) explains the ***STOP ACT*** as "The ***STOP ACT*** of 2021 (P.L. 117-258) aims to prevent the international export of cultural items prohibited from trafficking under the Native American Graves Protection and Repatriation Act (NAGPRA)[67] and the Archeological Resources Protection Act (ARPA)."[68] The USSC invited comments on pending proposed amendments to the United States Sentencing Guidelines, to include the ***STOP ACT***, from tribal nations.[69] Multiple tribes publicly declared their support for

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[61] *See, e.g.*, Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1099 (9th Cir. 2008)(*en banc*)(*Fletcher dissenting)*; United States v. Tawahongva, 456 F. Supp. 2d 1120, 1126 n.6 (D. Ariz. 2006); United States v. Kramer, 168 F.3d 1196, 1198 (10th Cir. 1999); United States v. Corrow, 119 F.3d 796, 799 (10th Cir. 1997); Hamilton v. Schriro, 863 F. Supp. 1019, 1021 (W.D. Mo. 1994); Zuni Tribe v. United States, 12 Cl. Ct. 607, 631 & 633 (1987); Healing v. Jones, 210 F. Supp. 125, 160 n.45 (D. Ariz. 1962).

[62] *See* Photograph of a dream catcher listed for sale *in Native American Prayer Stick 7" Dream Catcher (nas1)*, MISSION DEL REY SW., https://www.missiondelrey.com/native-american-prayer-stick-7-dream-catcher-nas1/ (last visited Feb. 18, 2023).

[63] Current legislation grants governmental entities, such as the United States Department of Justice or a tribal nation, standing to sue over stolen Native American cultural items, but does not grant the same standing for individuals wronged by stolen culture. *See* CONF. W. ATT'YS GEN., *supra* note 57, at § 3:18, at 216; *See* Kristen A. Carpenter, *A Human Rights Approach to Cultural Property: Repatriating the Yaqui Masso Kova*, 41 CARDOZO ARTS & ENT. L.J. 159, 161 n.10 (2022); *Cf*., COHEN, *supra* note 24, at § 20.01[2].

[64] 25 U.S.C. §§ 3071; *Compare*, United States v. Tidwell, 191 F. 3d 976, 980 (9th Cir. 1999) *with* United States v. Aubrey, 800 F.3d 1115, 1125-26 (9th Cir. 2015), for a discussion on what constitutes "Indian property."

[65] The ***STOP ACT*** equally applies to items related to Native Hawaiian and Native Alaskan heritage. *See* Robert Alan Hershey, *Repatriation of Sacred Native American Cultural Belongings from Historic Racism,* 56 ARIZ. ATT'Y 40, 46 n.3 (July/Aug. 2020); Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1470-71, 1476 (9th Cir. 1989); Rebecca Kitchens, *Insiders and Outsiders: The Case for Alaska Reclaiming Its Culture,* 29 ALASKA L. REV. 113, 136-39 (2012).

[66] *See* Aaron Haines, *Will the* ***STOP ACT*** *Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad*, 39 CARDOZO L. REV. 1091, 1092-94 (2018). *See also*, In the Senate, *Tribes: Senators Float Bill to Stop Trafficking of Cultural Objects*, ENV'T & ENERGY DAILY (July 7, 2016), https://subscriber.politicopro.com/article/eenews/1060039881.

[67] 25 U.S.C. §§ 3001-3013.

[68] 16 U.S.C. § 470aa; *See also*, *Safeguard Tribal Objects of Patrimony (STOP) Act draft regulations*, U.S. DEPT. INTERIOR INDIAN AFFAIRS, https://www.bia.gov/service/tribal-consultations/safeguard-tribal-objects-patrimony-stop-act-draft-regulations#:~:text=The%20STOP%20Act%20of%202021,Resources%20Protection%20Act%20(ARPA) (last visited on Feb. 18, 2024).

[69] U.S. SENT'G COMM'N, NOTICE: SENTENCING GUIDELINES FOR UNITED STATES COURTS, 2023-28317, (Dec. 26, 2023) at 89156; *See also*, U.S. DEPT. INTERIOR, *supra* note 68; *Accord,* 25 U.S.C. § 3078.

the original ***STOP ACT***.[70] The ***STOP ACT*** is the first explicit export control on Native American cultural heritage that protects and prevents trafficking of Indian objects being taken beyond the borders of the United States for sale to non-Native American buyers via glorified French (or other non-indigenous) auction house looting.[71] The DOI is authorized and funded by Congress to implement the ***STOP ACT*** and to enact regulations that support the intent of this landmark legislation.[72]

The ***STOP ACT*** breaks down into seven statutes, (absent the funding and reg provisions discussed above), which sets out the following paraphrased laws:

> **25 U.S.C. § 3071** (Purpose): ***1}*** carry out the federal government's trust relationship with Native Americans; ***2}*** increase criminal penalties for taking Native American cultural objects outside of the United States as a deterrence for stealing or fencing tribal objects; ***3}*** stop the export of tribal cultural and historic objects outside the United States and facilitate their return from foreign countries; ***4}*** encourage the voluntary return of Indian objects to tribes through an amnesty program; and ***5}*** create a structure for implementing the act.
>
> **25 U.S.C. § 3072** (Definitions): Definitions in the statute include "cultural items" (*e.g.*, funeral objects, sacred objects, and culturally historic objects),[73] "items protected from exportation" (*e.g.*, cultural items and archaeological resources), and tangible cultural heritage (*e.g.*, human remains and historically significant objects).[74]
>
> **25 U.S.C. § 3073** (Export Regulations): Sets regulations and a potential ten-year incarceration penalty for violations of illegally selling Native American tribal objects. This statute allows voluntary return of illegally exported items and authorizes country-to-country agreements to discourage commerce in stolen or improperly exported Native American historically significant items.
>
> **25 U.S.C. § 3074** (Voluntary Return of Items): Encourages the return of Native American items obtained in violation of the ***STOP ACT*** via a *de facto* amnesty process and offers a potential tax benefit for collectors and dealers of historic items for returning culturally significant Native American historical items improperly or illegally obtained.

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[70] Haines, *supra* note 66, at 1094 n.14; Casey J. Snyder, *Law, Cultural Heritage, and Climate Change in the United States*, 36 PACE ENV'T L. REV. 95, 132 (2018).

[71] Snyder, *supra* note 70, at 132.

[72] 25 U.S.C. §§ 3078, 3079.

[73] 25 U.S.C. § 3072 (cross-referencing 25 U.S.C. § 3001, the Native American Graves Protection and Repatriation Act (NAGPRA) for definitions).

[74] 25 U.S.C. § 3072; *Accord*, Pueblo of San Ildefonso v. Ridlon,, 103 F.3d 936, 938 (10th Cir. 1996).

> **25 U.S.C. § 3075** (Interagency Cooperation): This statute sets up a working group between the United States Departments of Interior, Justice, State, and Homeland Security to facilitate the intent of the ***STOP ACT***.
>
> **25 U.S.C. § 3076** (Native Working Group): This statute creates a working group of twelve Native American tribes that will work with the agency group created in 25 U.S.C. § 3075.
>
> **25 U.S.C. § 3077** (Exemption from F.O.I.A.): This statute exempts proceedings related to the ***STOP ACT*** from general inquiry under the Freedom of Information Act.

The application of the new enhanced ten-year sentence for ***STOP ACT*** violations[75] demanded consideration of how the new statute impacts the United States Sentencing Guidelines (USSG),[76] which brings the discussion of the Tribal Issues Advisory Group (TIAG) to the United States Sentencing Commission (USSC).

TIAG

The United States Sentencing Commission invited comments to the proposed amendments to the United States Sentencing Guidelines.[77] Among the proposed amendments, USSG § 2B1.5 asked for comments regarding how federal courts should address violations of the ***STOP ACT***.[78] Among the groups that provided comments on the ***STOP ACT*** to the USSC was the Tribal Issues Advisory Group (TIAG).[79] There are nine members of TIAG that represent the federal judiciary, federal prosecutors, federal defenders, tribal interests, tribal authorities, and tribal courts.[80] Neither

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[75] 25 U.S.C § 3073(a)(2); 18 U.S.C. § 1170.

[76] *See, e.g.*, 28 U.S.C. § 944(g), and *Report: United States Sentencing Commission Crimes Policy Team*, U.S. SENT'G COMM'N (Dec. 1, 1999) https://www.ussc.gov/research/research-and-publications/united-states-sentencing-commission-economic-crimes-policy-team .

[77] *See Proposed 2024 Amendments to the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines#:~:text=A%20two%2Dpart%20proposed%20amendment,an%20amendment%20to%20%C2%A75H1 (last visited on Feb. 18, 2024).

[78] *Id.*

[79] TIAG is one of four named standing advisory groups to the United States Sentencing Commission. *Advisory Group*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/advisory-groups, (last visited on Feb. 18, 2024). TIAG is authorized under 28 U.S.C. § 995 and U.S.S.C. Rules of Prac. & Pro. 5.4. *Tribal Issues Advisory Group*, U.S. SENT'G COMM'N, https://www.ussc.gov/new/tribal-issues-advisory-group, (visited on Feb 18, 2024).

[80] *See Tribal Issues Advisory Group Members*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/advisory-groups/tribal-issues-advisory-group-members (listing thecurrent TIAG members)(last updated on Jan. 2024).The members of TIAG, as of February 19, 2024, are as follows: Hon. Ralph R. Erickson (Circuit Judge, U.S. Court of Appeals for the Eighth Circuit); Hon. Jesse Laslovich, (U.S. Attorney for the District of Montana); Hon. Tricia Tingle (Associate Director, Tribal Justice Support, U.S. Dept. of the Interior); Hon. Manny Atwal, *esq*., (Asst. U.S. Federal Defender for the District of Minnesota); Hon. Carla R. Stinnett, *esq*. (At-Large Member); Hon. Tim Purdon, *esq*. (At-Large Member); Hon. Neil Fulton, *esq*., Dean of the University of South Dakota Knutson School of Law (At-Large

the USSC (nor TIAG) have the authority to negate legislative acts of Congress,[81] but the USSC can set reduced sentencing guidelines for violations of congressional statutes, like the ***STOP ACT***, that are deemed criminal acts.[82] For this reason, TIAG recommended to the USSC that the United States Sentencing Guidelines for Native Americans facing prosecution under the ***STOP ACT*** for taking cultural or religious icons across national borders for personal or tribal use receive a starting Guideline of "2/Zone A," which is at the low end of the sentencing chart, presuming a sentence of six months or less and probation.[83] While the intent of the ***STOP ACT*** is clear, the application of a ***STOP ACT*** investigative stop, which often involves a remote location at the Mexican or Canadian borders of the United States, between the United States Border Patrol, Homeland Security Officer, or local law enforcement and Native Americans, creates a conundrum of policing policies that interweave with civil, social, and religious rights.[84]

The Conundrum Within the ***STOP ACT***

Border tribal lands are frequent points of entry/export for illegal activity such as drug smuggling, and contraband alcohol and/or cigarette tax evasion actions.[85] An example of the daunting task that tribal land border patrols face is trying to thwart schemes "to smuggle significant amounts of alcohol and tobacco from the United States into Canada through the [St. Regis] Reservation, which straddles the border between the two nations."[86] One Border Patrol agent, Brian Hotz, testified that his duties at the St. Regis Mohawk international border "involves detection and arrests for alleged cross-border smuggling, cigarettes and illegal aliens, the St. Regis

Member); Hon. Jami Johnson, *esq*., (Asst. U.S. Federal Public Defender for the District of Arizona); Hon. Gregory D. Smith, *esq*., Chief Justice, St. Regis Mohawk Tribal Court of Appeals (Tribal Court Member).

[81] *See generally*, Mass v. United States Fidelity & Guaranty Co., 610 A.2d 1185, 1194 (Conn. 1992); Black v. United States, 25 Cl. Ct. 268, 273 (1992); Jones v. Commissioner of I.R.S., 743 F.2d 1429, 1432 (9th Cir. 1984); Hachiya v. Bd. of Education, 750 P.2d 383, 387 (Kan. 1988).

[82] United States v. Schetz, 698 F. Supp. 153, 155 (N.D. Ill. 1988); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2447 (1995).

[83] *See* U.S. SENTENCING COMM'N, United States Sentencing Guideline Chart for 2023, https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-5, (Last visited on Feb. 19, 2024); *See also* Letter from the Hon. Ralph Erickson, Chair of TIAG, to the Hon. Carlton W. Reeves, Chair of the United States Sentencing Commission Feb. 20, 2024)(on file at the author's office for inspection)[Hereinafter "***TIAG Letter***"].(stating TIAG's official position on **STOP Act**.)Judge Erickson also testified before the USSC on TIAG's position regarding the 2024 proposed amendments to the USSG, following closely the format declared in the ***TIAG Letter***.

[84] *See e.g*., United States v. McCowan, 2018 U.S. Dist. Lexis 28576, *2 (D. Ariz. Feb. 1, 2018); United States v. March, 2014 U.S. Dist. Lexis 78869, *3 (D. Ariz. Mar. 12, 2014); Bates v. United States, 60 Fed. Cl. 319, 326-7 (2004); United States v. Renondo-Lemos, 754 F. Supp. 1401, 1405 (D. Ariz. 1990*), rev'd on appeal on other grounds in 955 F.2d 1296 (9th Cir. 1992).*

[85] *See e.g*., McCowan,2018 U.S. Dist. Lexis 28576 (*drugs – Mexican border*); Renondo-Lemos, 754 F. Supp. 1401(*drugs -- Mexican border*); New York v. UPS, 942 F.3d 554, 566 (2nd Cir. 2019) (*cigarettes – Canadian border*); United States v. Miller, 7 Fed. Appx. 59, 61 (2nd Cir. 2001) (*cigarettes and alcohol – Canadian border*); United States v. Pierce, 224 F.3d 158, 161 (2nd Cir. 2000) (*alcohol – Canadian border*).

[86] United States v. White, 237 F.3d 170, 171 (2nd Cir. 2001). (Parenthetical added for clarity and context).

Mohawk Reservation, known as Akwesasne Mohawk Reservation, known as Akwesasne."[87] The Jock court, where Agent Hotz was testifying, explained the reasoning behind roving border patrol stops as follows:

> When a Border Patrol agent refers a motorist to secondary inspection in the context of a border search, the intrusion on personal liberty has been held to be minimal. However, once the questioning at the checkpoint, whether at the primary or secondary station, satisfies the agent that the vehicle occupants are not illegal aliens and do not appear to have crossed the border illegally, and do not appear to be carrying contraband based on facts apparent to the agent at that moment in time, the basis for detaining the motorist ends. Absent reasonable suspicion of criminal activity, the agent has no permissible basis on which to detain the motorist or passenger further.[88]

There sadly exists a distrust between law enforcement, such as border patrol agents, minorities, and non-citizens.[89] This is the beginning of the ***STOP ACT*** conundrum.

The ***TIAG Letter***, while acknowledging the ***STOP ACT*** being a positive step for Native Americans, noted, "For hundreds of years, tribal communities have seen their cultural heritage stolen and exported for sale overseas, thereby depriving communities of their history and disrupting their sacred cultural traditions. The ***STOP ACT*** aims to curb their illicit trafficking in Indigenous cultural heritage, and TIAG agrees that U.S.S.G. § 2B1.5 is the appropriate Guideline for ***STOP ACT*** violations."[90] TIAG went further to declare to the USSC the following:

> Members of tribal communities who live along a border have sometimes come into conflict with federal law enforcement patrolling the border. These federal officials, generally tasked with preventing illegal movement of people and goods across the border, have at times acted without sufficient sensitivity to the treaty and other rights of tribal members to move freely around their historic lands. While patrolling the border, law enforcement agents have on occasion seized cultural and ceremonial objects. Once seized, these objects have not always been handled in culturally sensitive ways.
>
> TIAG hopes that the Department of Justice will not use the ***STOP Act*** to prosecute individual Native Americans crossing the border with objects of cultural patrimony for ceremonial or cultural use, but the express language of the ***STOP Act*** does not appear to foreclose such prosecutions.[91]

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[87] People v. Jock, 40 Misc. 3d 457, 458 (St. Lawrence Co. Ct. 2013).

[88] *Id.* at 462,(internal citations omitted).

[89] *See e.g.*, Elizabeth M. Rieser-Murphy and Kathryn D. DeMarco, *The Unintended Consequences of Alabama's Immigration Law on Domestic Violence Victims*, 66 U. of Miami L. Rev. 1059, 1082 and 1082 n.159 (2012); Theresa Nolan Breslin, *Fleeing Below the Poverty Line – Is it a Crime? C.E.L. v. State and Its Impact on Indigent Defense and Police-Citizen Relations*, 66 U. Miami L. Rev. 783, 785 (2012).

[90] ***TIAG Letter***, *supra* note 83, at 9-10.

[91] ***TIAG Letter***, *supra* note 83, at 10.

Native Americans should be treated differently from non-Natives when applying the ***STOP ACT*** to the unique situation that Native Americans face regarding worship and assembly.[92]

Examples of how the ***STOP ACT*** could undermine tribal sovereignty and culture come from the Seneca Nation of New York,[93] that owns land within walking distance of Niagara Falls.[94] The Senecas are part of the Haudenosaunee Confederacy[95] which has an international high level lacrosse team that considers lacrosse a spiritual religious experience.[96] If a Seneca elder, such as Leon Sam Briggs, took his 200 year old lacrosse stick to a match on the Canadian side of Niagara Falls,[97] that lacrosse stick would qualify as a ***STOP ACT*** cultural item because the stick is "an object of ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."[98] While a conviction of Mr. Briggs is unlikely under the ***STOP ACT***, because Mr. Briggs did not intend to sell his antique lacrosse stick, a criminal charge is possible.[99] Likewise, the Seneca-Iroquois Nation Museum has a tomahawk/peace pipe on display that President George Washington gave to Seneca Chief Cornplanter in 1792.[100] Sadly, putting that gift from Washington on display in Canada at the request of the Seneca Nation of Brantford, Ontario, Canada, (which also considers Chief Cornplanter as one of their most important leaders), could likewise violate the ***STOP ACT*** if a fee is charged to see the icon in Canada.[101]

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[92] ***TIAG Letter***, *supra* note 83, at 11.

[93] *Cf.*, *SNI Ct. of Appeals Legal Advisor,* **SNI,** https://sni.org/app/uploads/2022/03/FINAL-Legal-Advisor-Description-COA.pdf (last visited Feb. 19, 2024)(The author was the legal/technical adviser to the Seneca Nation of Indians Court of Appeals for a couple years).

[94] *See e.g.*, Sue/Perior Concrete and Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y. 3d 538, 542 (N.Y. 2014).

[95] *See* Perkins v. Comm'r of Internal Revenue, 970 F.3d 148, 151 (2d Cir. 2020); Oneida Indian Nation of Wis. v. New York, 731 F.2d 261, 263 (2d Cir. 1984)(The Haudenosaunee Confederacy is also known as the Iroquois Confederacy)(The Iroquois Confederacy was a six-tribe treaty association consisting of the Haudenosaunee, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora nations).

[96] *See* Haudenosaunee Nat'l Lacrosse Team, HAUDENOSAUNEE NAT'L, https://haudenosauneenationals.com/pages/our-history (last visited on Feb. 19, 2024)

[97] *See* Wilmington College, *Tonawanda Seneca Shares the Role of Lacrosse in Native American Life,* https://www.wilmington.edu/news/tonawanda-seneca-shares-the-role-of-lacrosse-in-native-american-life (last visited on Feb. 24, 2024).

[98] *See* 25 U.S.C. § 3001(3)(D) (2022).

[99] *Mens rea* intent must be proven by the prosecution to sustain a ***STOP Act*** conviction according to 25 U.S.C. § 3072(5)(A)(2022), but if Mr. Briggs is paid to show his lacrosse stick, it could be a violation of the ***STOP Act*** as a "use for profit."

[100] AP News Article, *Pipe tomahawk given by Washington in 1792 returned to Seneca Nation*, https://www.lockportjournal.com/news/local_news/pipe-tomahawk-given-by-washington-in-1792-returned-to-seneca-nation/article_5cb5227d-4b15-5bd7-b444-c8b424cbd0f2.html (Mar. 15, 2019), (last visited on Feb. 19, 2024).

[101] *See* The Canadian Encyclopedia, *Seneca*, https://www.thecanadianencyclopedia.ca/en/article/seneca, (last visited Feb. 19, 2024).

"It is easy to find fault in any guidelines."[102] "It is easy to find fault and poke holes in innovative ideas."[103] "But it is easy to find fault. It is more difficult to find the good."[104] Now, having addressed the problem, it is time to propose a solution.[105]

Fixing the ***STOP ACT***

The "fix" for the ***STOP ACT*** is a two-step process. **Part 1** is simply to modify the definition of a "Cultural item" in 25 U.S.C. § 3072(3) to specifically exclude personal items a Native American owns and/or possesses for religious or cultural use when crossing an international border. **Part 2**, the application of this exception is a bit trickier, but not overwhelming. Presume that the Kickapoo Traditional Tribe of Texas (KTTT), which straddles the Rio Grande at the United States/Mexico border,[106] plan to have a pow wow for all tribal members on the Mexican side of the tribe's land in Sonora, Mexico.[107] Often, when a tribal nation spans an international border such as the KTTT experience, the less affluent nation (Mexico) becomes a cultural or ceremonial place of retreat.[108] How would the United States Border Patrol be able to tell if an elderly female "Texas side" KTTT member was taking "Grandma's antique dream catcher" to the pow wow for prayer or to an auction house sale? First, one must acknowledge that even safeguards cannot guarantee that Grandma isn't planning to sell her religious icon, but that likelihood is low. One could follow the pattern below to meet the statutory mandate, and real intent, of the ***STOP ACT***, while allowing Grandma to take her dream catcher to the Kickapoo event in Mexico:

A) Create an Enhanced Tribal I.D. Card[109] like that used by the Pascua Yaqui Tribe (PYT) on the United States/Mexico border[110] or the Kootenai Tibe of

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[102] Phillip Areeda, *Justice's Merger Guidelines: The General Theory*, 71 Calif. L. Rev. 303, 307 (1983).

[103] Bob Willey and Melanie Knapp, *How to Increase Citations to Legal Scholarship*, 18 Ohio St. Tech. L.J. 157, 235 (2021).

[104] Condace L. Pressley, *A Diversity of Voices in a "Vast Wasteland*," 55 Fed. Comm. L.J. 565, 567 (2003).

105 The author was honored in 2023 by a request to propose solutions on how the country of Ukraine could restructure its small claims courts after completing its war against Russia. *See* Gregory D. Smith, *The Verkhovna Rada Should Establish Courts of Limited Jurisdiction With Both Civil and Criminal Jurisdiction as Part of Ukrainian Judicial Reform*, 10 Lincoln Mem'l. U. L. Rev. 128 (2023). To criticize without offering a proposal for the solution wastes time and effort. *Accord*, Nowell v. Medtronic, Inc., 372 F. Supp. 3d 1166, 1202 (D. N.M. 2019).

[106] *See* Kickapoo Traditional Tribe of Texas Homepage, https://kickapootexas.org/, (last visited on Feb. 20, 2024).

[107] *See* Explore-Sonora, https://explore-sonora.com/indigenous-peoples-of-sonora/kikapu/, (last visited on Feb. 20, 2024). (In two interesting notes, the Mexican spelling for this branch of the Kickapoo is "Kikapu." Also, in 1983, the United States Congress declared that the Mexican Kikapu would be considered a sub-group of *Oklahoma*'s Kickapoo Tribe, not the KTTT); *Id*.

[108] Elizabeth A. Mager Hois, *The Kickapoo of Coahuila/Texas Cultural Implications of Being a Cross-border Nation,* http://www.revistascisan.unam.mx/Voices/pdfs/9008.pdf, at 39 (Conclusions) (Dec. 1, 2009), (last visited on Feb. 20, 2024).

[109] *See e.g*., Round Valley Tribal Law & Order Code § 11.04 (Identification) (2023);Olga Bryana Gonzalez, *Cultural Appropriation: The Native American Artist Struggle for Intellectual Property Protection in Canada, Mexico, and the United States*, 42 T. Jefferson L. Rev. 1, 15 (2019).

[110] *See* Nell Jessup Newton, *et al*., *Cohen's Handbook of Federal Indian Law* §22.06[2][a] (Lexis/Nexis 2019 Supp.); Riley & Carpenter, *supra* note 45, at 134.

Idaho on the United States/Canada border.[111] The PYT Enhanced Tribal I.D. Card includes a photo and description of the tribal member, a unique tribal enrollment number, and fingerprint of the tribal member.[112]

B} Have the tribe notify both the Bureau of Indian Affairs (BIA)[113] and Homeland Security[114] of the time, date, and location of an anticipated tribal gathering outside of the boundaries of the United States and that the purpose of said gathering may include tribal members transporting cultural or religious icons. The BIA and Homeland Security would then notify local law enforcement officials and border patrols near the primary ingress/egress checkpoints of the upcoming event, as is commonplace for announcing government public meeting notices.[115]

C} Have the tribal member provide proof of ownership or verification of authority to possess the item in question.[116]

Canada is wrestling with this same issue with their version of Native Americans, called "First Nations," and similar recommendations to the one proposed here are being considered by the Canadian government.[117] Upon showing that the tribal member has a valid purpose to possess the item and travel, the inquiry should cease, and the traveler should be allowed to proceed in a manner like the vehicle checkpoint stop at a border crossing discussed above.[118] The details of this procedure could be set out in the Code of Federal Regulations (CFR) if Congress does not wish to address the minutia of how to implement the modified legislation itself.[119]

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[111] Caitlin C.M. Smith, *Kootenai Advanced Tribal Cards*, 1 Am. Indian L.J. 161, 166 n.29 (2017).

[112] *See*, Marshbanks, *supra* note 16;Press Release for DHS, *Dep't of Homeland Sec.;The Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card*, https://www.dhs.gov/news/2010/07/30/department-homeland-security-and-pascua-yaqui-tribe-announce-historic-enhanced (July 30, 2010), (last visited on Feb. 20, 2024).

[113] *See* Sault Ste. Marie, v. Andrus, 532 F. Supp. 157, 164 (D.D.C. 1980) (The Bureau of Indian Affairs (BIA) is a sub-part of the United States Department of the Interior)., *See*, Bureau of Indian Affairs (BIA), *History of BIA*, https://www.bia.gov/bia, (For a history of the BIA)(last visited on Feb. 20, 2024).

[114] *See*, 6 U.S.C. § 111; Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 Harv. J. on Legis. 277, 282-3 (2010)(For a discussion of the purpose, mission, goals, and history of the United States Department of Homeland Security,);Homeland Security, *Creation of the Department of Homeland Security*, https://www.dhs.gov/creation-department-homeland-security, (last visited on Feb. 20, 2024).

[115] *See e.g.*, C. Christine Fillmore, *Riding the Wave: Social Media in Local Government*, 52 N.H.B.J. 16, 17 & 17 n.8 (2012).

[116] There are many ways to prove ownership or an authorized trust bailment. *See generally*, Neb. Admin Code, tit. 46, ch. 12, §§ 008.02 & 008.03 (2024);Andrew Jack Van Singel, *Disaster Relief: The Calm After the Storm: 45 Years of ABA Young Lawyers Division's Disaster Relief Legal Services Program*, 35 Touro L. Rev. 1019, 1069 (2019). (This could be done as simply as providing a notarized letter (and perhaps a photograph of the item) from the tribe on tribal letterhead stating that a person owns an item).

[117] *See generally*, Caron, *supra* note 15.

[118] *See generally*, Elhady v. Kable, 993 F.3d 208, 224 (4th Cir. 2021).

[119] *See e.g.*, Mack v. Yost, 968 F.3d 311, 323 (3rd Cir. 2020) (discussing day to day administrative and operational prison procedures being left to the Bureau of Prisons under 28 C.F.R. § 545.23); Mulack v. Hickory Hills Police

Conclusion

The ***STOP ACT***, 25 U.S.C. §§ 3071-3079, is a statute designed to protect Native American culture, traditions, and religion.[120] Similar past efforts to protect Native American heritage have proven successful[121] at returning tribal objects of cultural, spiritual and historic significance to the rightful owners of those objects – the tribes![122] The ***STOP ACT*** needs to be slightly adjusted to ensure that Native Americans do not face prosecution for exercising legitimate acts of closely held religious and/or cultural assembly expressions of faith and heritage.[123] Instead of simply reducing potential criminal penalties for ***STOP ACT*** violations by Native Americans, the statute should expressly exempt Native Americans that are practicing their beliefs, instead of trying to sell their heritage, from prosecution.

Pension Bd., 625 N.E. 2d 259, 264 (Ill. App. 1993) (discussing how/when/if a Social Security disability claimant can refuse offered medical treatment under 20 CFR § 416.930(c)).

[120] *See generally* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law,* 121 Mich. L. Rev. 75, 142-3 (2022).

[121] *See e.g*., Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. Colo. L. Rev. 593, 617 (2012).(Sometimes, states have exceeded federal efforts in returning Native Americans' stolen cultural icons).

[122] *See e.g*., *Notice of Intent to Repatriate Cultural Items in the Possession of the Arizona State Museum, The University of Arizona, Tucson*, *AZ*, 64 Fed. Reg. 10161, 10162 (Mar. 2, 1999)*return of cultural items to Pasca Yaqui Tribe o/b/o Mexican Sonoran Yaqui Community* and *National Museum of the American Indian,* 135 Cong. Rec. S. 15517, at § 17 (Nov. 14, 1989), *where Senator Daniel Inouye, President Pro Tempore of the United States Senate, praises Walter Echo-Hawk (the lead attorney for the Native American Rights Fund and a professor at the Tulsa University School of Law) and others for brokering the deal where the Smithsonian Institute returned thousands of funeral, spiritual, or cultural items to tribal nations.* Estimates of the number of cultural items and human remains returned to tribes is 19,000). *See* Getches, *supra* note 5, at 760. (The author was appointed to the Pawnee Nation Supreme Court in 2015 to fill a seat being vacated by Justice Walter R. Echo-Hawk, a highly respected attorney and law professor. Later, as the author served as Chief Justice for the Pawnee Nation Supreme Court, retired Justice Echo-Hawk served as the President of the Pawnee Nation of Oklahoma. From working closely with President Echo-Hawk, this author can attest that President/Justice/Professor Walter Echo-Hawk is a true gentleman).

[123] ***TIAG Letter***, *supra* note 83, at 9-11.

The Death of Mahsa Amini: How to Hold Iran Accountable for a History of Human Rights Violations

By Amanda Zumpano[1]

Abstract

When twenty-two-year-old Mahsa Amini was allegedly killed by Iran's Morality Police for breaking Iran's hijab laws, people flooded the streets to protest the young woman's death. The protests were met with violence from the government of the Islamic Republic of Iran. Unfortunately, this exact situation has happened many times throughout Iran's history. Since the 1979 Iranian Revolution, people have taken to the streets to express their unhappiness with government decisions and have been met with violence every time.

This note examines what happened to Mahsa Amini, and how the government of Iran was not transparent about Amini's death. An examination of the protests which occurred after Amini's death will be discussed, along with the government's treatment towards protesters, which includes executions. In addition, I will analyze the action that has been and can be taken by the United States and the United Nations. This note will conclude with a recommendation on how the United States and the United Nations can hold Iran accountable by partnering together.

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I. Introduction

This Note examines the human rights violations that occurred in the Islamic Republic of Iran after the death of Mahsa Amini during 2022. The main issues this Note addresses are the facts of Mahsa Amini's death that were allegedly covered up, how protestors have been treated, and the lack of accountability of the Iranian Government. This paper proceeds in seven parts. Part I is the introduction of the issues, and Part II explains who Mahsa Amini was, and what allegedly led to her death. Part III highlights the harsh execution penalties Iran is imposing on citizens who protest. Part IV outlines the action that has been taken by the United States and the United Nations in response to the human rights violations happening in Iran, and Part V explains the historical background of protests in Iran. Part VI outlines how the United States and United Nations have attacked human rights issues together and suggests action that can be taken to remedy impunity issues in Iran. Finally, Part VII provides a conclusion and highlights action that can be taken by the United States and the United Nations.

Mahsa Amini was allegedly killed by Iranian law enforcement on September 16, 2022.[2] Amini was taken into police custody after she was arrested for allegedly wearing her headscarf too loosely.[3] Amini's death has sparked protests across Iran that have resulted in many deaths, including the deaths of women and children.[4]

The Iranian Morality Police, who allegedly are responsible for Amini's death, have been called on to be disbanded by protesters.[5] On September 22, 2022, Anthony Blinken, the United

[2] Anisha Kohli, *What to Know about the Iranian Protests Over Mahsa Amini's Death,* TIME (Sept. 24. 2022, 1:41PM), https://time.com/6216513/mahsa-amini-iran-protests-police/.
[3] *Id.*
[4] *Iran: UN condemns violent crackdown against hijab protests,* U.N.NEWS (Sept. 24, 2022), https://news.un.org/en/story/2022/09/1128111.
[5] Monir Ghaedi, *Who are Iran's 'morality police'?,* DW (Dec. 4, 2022), https://www.dw.com/en/who-are-irans-morality-police/a-63200711.

States Secretary of State, "impos[ed] sanctions on Iran's Morality Police and senior security officials who engaged in serious human rights abuses."[6] In the beginning of December 2022, an Iranian lawmaker said that the government was paying attention to peoples' demands and another official stated the Morality Police force was allegedly shut down.[7] Iranian officials have made clear that the hijab laws requiring women to cover their hair in public are to remain in place, which raises questions as to who will be enforcing these laws.[8]

The Morality Police have existed since 2006, and are tasked with enforcing the Islamic dress code in public.[9] Many of Iran's social regulations are interpreted by the state according to Islamic Sharia law.[10] This law states that men and women are required to dress modestly.[11] Although the law requires men and women to dress modestly, the Morality Police are known for primarily targeting women.[12] The United States imposed sanctions on the Morality Police on September 22, 2022, specifically for the Morality Police's practice of targeting women and called on them to "end [their] systemic persecution of women."[13] In addition to enforcing hijab violations, the government enforces different dress codes in schools, national media, and public events.[14] Some Iranian women push the boundaries of the conservative dress code by wearing tight fitting clothes and not covering all their hair.[15] There are no guidelines for anyone to follow on what qualifies as inappropriate clothing or too much exposed hair, and it leaves plenty of

[6] Anthony J. Blinken, *Designating Iran's Morality Police and Seven Officials for Human Rights Abuses in Iran*, U.S. DEP'T OF STATE (Sept. 22, 2022), https://www.state.gov/designating-irans-morality-police-and-seven-officials-for-human-rights-abuses-in-iran/.
[7] Ghaedi, *supra* note 5.
[8] Cora Engelbrecht & Farnaz Fassihi, *What Does Disbanding the Morality Police Mean for Iran?*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/world/middleeast/iran-morality-police.html.
[9] Ghaedi, *supra* note 5.
[10] Ghaedi, *supra* note 5.
[11] Ghaedi, *supra* note 5.
[12] Ghaedi, *supra* note 5.
[13] Blinken, *supra* note 6.
[14] Ghaedi, *supra* note 5.
[15] Ghaedi, *supra* note 5.

room for the Morality Police to decide arbitrarily when women should be detained for allegedly violating the dress code.[16]

The United Nations adopted a Resolution on December 16, 2021, asking Iran to implement its obligations under the human rights treaties they are signatories to.[17] Iran was also asked to release human rights defenders imprisoned for exercising their rights, including the right of freedom of expression and opinion.[18] Additionally, Iran was asked to take robust and practical steps to protect female human rights defenders. [19] In the wake of Mahsa Amini's death, it is clear Iran has not followed any of the guidelines issued by the United Nations, and there has been little accountability.

II. Mahsa Amini

As a twenty-two year old woman, Mahsa Amini was visiting Tehran, Iran's capital, with her family on September 13, 2022.[20] Amini was arrested by the Morality Police for not wearing her hijab properly.[21] The Morality Police are formally known as Gasht-e-Ersahd which translates to "guidance patrols."[22] The Morality Police is a unit of Iran's police force, and it enforces the country's laws on Islamic dress code in public, which includes the hijab laws.[23] Headscarves are mandatory to be worn in public by all women in Iran, regardless of their religion or nationality.[24] "All women above the age of puberty in Iran must have their head covered and wear loose

[16] Ghaedi, *supra* note 5.
[17] *See* G.A. Res. 76/178, (Dec. 16, 2021).
[18] G.A. Res. 76/178, ¶ 15-16 (Dec. 16, 2021).
[19] *Id.* ¶ 21.
[20] Kohli, *supra* note 2.
[21] Kohli, *supra* note 2.
[22] Ghaedi, *supra* note 5.
[23] Ghaedi, *supra* note 5.
[24] Kohli, *supra* note 2.

clothing in public".[25] Although not in all public places, when girls go to school they usually start wearing a hijab around age seven.[26]

According to Iran's security forces, Amini was taken to a security detention center to receive training on hijab rules.[27] Authorities say she died on September 16, 2022 when she collapsed of a heart attack.[28] Police say Amini suffered a heart attack after she was taken down to the station to be educated on hijab laws.[29] Amini's family says this is not true, and that they saw the police beating her in the patrol car when she was taken away.[30] Amini's father said she had bruises on her legs and believes the police are responsible for her death.[31] The family was not allowed to see her body in the hospital.[32]

There has been a lot of speculation over how Amini died and there seems to be no clear answers. Early reports indicated Amini died by a skull fracture caused by heavy blows to the head.[33] In October 2022, the Iranian Legal Medical Organization, which claims to be independent, but is part of the country's judiciary, released a report on what they claim was the cause of Amini's death.[34] They claimed that an underlying disease related to a surgery Amini had when she was eight caused her to lose consciousness, "after she developed disorder in her heart rhythm and suffered from a decrease in blood pressure".[35] Allegedly, resuscitation was

[25] Ghaedi, *supra* note 5.
[26] Ghaedi, *supra* note 5.
[27] Kohli, *supra* note 2.
[28] Kohli, *supra* note 2.
[29] *Timeline: Events in Iran Since Mahsa Amini's Arrest, Death in Custody,* REUTERS (Dec. 12, 2022, 8:51 AM), https://www.reuters.com/world/middle-east/events-iran-since-mahsa-aminis-arrest-death-custody-2022-10-05/
[30] Kohli, *supra* note 2.
[31] *Timeline: Events in Iran Since Mahsa Amini's Arrest, Death in Custody, supra* note 29.
[32] Kohli, *supra* note 2.
[33] Kohli, *supra* note 2.
[34] Hyder Abbasi, *Mahsa Amini Did Not Die from Blows to Body, Iranian Coroner Says Amid Widespread Protests*, NBC NEWS (Oct. 7, 2022, 12:25 PM), https://www.nbcnews.com/news/world/mahsa-amini-death-iran-morality-police-protests-coroner-report-rcna51169.
[35] *Id.*

attempted, but in the first critical minutes Amini suffered from hypoxia and resulting brain damage.[36] The autopsy said Amini's death was not caused by blows to her head, any organs, or any parts of her body.[37] Amini's family denied that she had a pre-existing condition, and firmly believes her death was caused by the beatings from the Mortality Police.[38]

Unfortunately, this treatment towards women by the Morality Police has been going on for a while.[39] In March 2019, human rights activist, Masih Alinejad, posted a series of videos online showing the Morality Police confronting women for defying the hijab laws.[40] One woman was sprayed in the face with pepper spray after being told to wear her hijab properly.[41] In another video, a woman can be heard screaming in response to being threatened with a stun gun.[42] It is hard to get an exact report on how many women the Morality Police have detained, and how many people have been injured in its custody, because of the tight control the Iranian government has on state media.[43]

III. Protests

A. The Iranian Government's Response

Since Amini's death, waves of protests have occurred throughout the country.[44] On September 25, 2022, state media had put the number of protestors killed at forty-one.[45] Non-

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Iran: Pro-government Vigilantes Attack Women for Standing Up Against Forced Hijab Laws,* AMNESTY INT'L (Mar. 12, 2019), https://www.amnesty.org/en/latest/news/2019/03/iran-pro-government-vigilantes-attack-women-for-standing-up-against-forced-hijab-laws-2/.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Spokesperson for the UN High Commissioner on Human Right, *Concern Grows Over Violence, Internet Restrictions in Iran* (Sept. 27, 2022), https://www.ohchr.org/en/press-briefing-notes/2022/09/concern-grows-over-violence-internet-restrictions-iran.
[44] U.N.NEWS, *supra* note 4.
[45] U.N.NEWS, *supra* note 4.

governmental organizations have reported an even higher number, which includes women and children.[46] In addition to deaths, hundreds of protestors have been arrested.[47] These arrests include lawyers, human rights defenders, and at least eighteen journalists.[48] In the province of Gilan alone, the police chief reported that 739 people, including sixty women, had been arrested in only three days.[49] Children have even been targeted for protesting while attending school.[50] School officials in Tehran tried to check students' phones to find information regarding the protests and when students refused, state officials came to the school and released tear gas.[51]

At the end of 2022, the protests had been ongoing for 100 days.[52] These are now the longest anti-government protests in Iran since the 1979 Islamic revolution.[53] At least 500 people have been killed, including sixty-nine children, according to the Human Rights Activists' News Agency.[54] Iranian celebrities have even risked arrest and exile to take part in the protests.[55] Pegah Ahangarani, a prominent Iranian actress who left the country said, "Iran cannot go back to pre-Mahsa Amini era."[56] This statement shows how serious these protests have become and how important they are to women and their rights. Ali Karimi, an Iranian footballer, supported the protests and said "Iranian intelligence agents threatened to kill him," forcing him to move to the United States.[57]

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[46] U.N.NEWS, *supra* note 4.
[47] U.N.NEWS, *supra* note 4.
[48] U.N.NEWS, *supra* note 4.
[49] U.N.NEWS, *supra* note 4.
[50] Parisa Hafezi, *Iran Security Forces Fire Tear Gas Near Tehran School After Dispute*, REUTERS (Oct. 24, 2022, 3:45 PM), https://www.reuters.com/world/middle-east/parents-tehran-schoolgirls-dispersed-by-teargas-twitter-2022-10-24/.
[51] *Id.*
[52] Parham Ghobadi, *Iran Protests: 'No going back' as unrest hits 100 days*, BBC (Dec. 26, 2022, 5:00 AM), https://www.bbc.com/news/world-middle-east-64062900.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Ghobadi, *supra* note 52.

The spokesperson for the U.N. High Commissioner for Human Rights, Ravina Shamdasani, made a statement about the government's violent response to these protests.[58] Shamdasani addressed the concern the United Nations has about the recurring deaths of protestors in Iran, including high numbers of deaths occurring in November 2019, July 2021, and May 2022.[59] The precise number of casualties and arrests cannot even be determined because of the government's restrictions on the internet.[60]

B. Prisoners and Executions

Since the protests have started, many Iranian citizens have been arrested and handed lengthy prison sentences for protesting and even seemingly innocent actions[61]. One example is an Iranian couple was sentenced to prison for ten and a half years each for posting a video of themselves on Instagram dancing in a main square in Tehran.[62] In the video, Astiyazh Haghighi was dancing without a headscarf with her fiancé Amir Mohammad Ahmadi.[63] The video was widely shared on Instagram, with their millions of followers.[64] The couple was charged with "spreading corruption and vice" and "assembly and collusion with the intention of disrupting national security."[65] According to Mizan, a news agency affiliated with Iran's judiciary, the couple was only charged with five year sentences and arrested for "assembly and collusion with the intention of disrupting national security."[66] Human Rights Activists News Agency reports that the couple is being denied access to a lawyer.[67]

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[58] *Concern Grows Over Violence, Internet Restrictions in Iran*, *supra* note 43.
[59] *Concern Grows Over Violence, Internet Restrictions in Iran*, *supra* note 43
[60] *Concern Grows Over Violence, Internet Restrictions in Iran*, *supra* note 43.
[61] Artemis Moshtaghian, *Iranian Couple Handed Prison Sentence for Dancing in the Streets,* CNN, (Feb. 1, 2023, 6:16 PM) https://www.cnn.com/2023/02/01/middleeast/iran-couple-dancing-prison-intl/index.html.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Moshtaghian, *supra* note 61.

Another instance involved the imprisonment of human rights defender Arash Sadeghi, whom the United Nations called for the release of when it learned of his deteriorating health situation.[68] Sadeghi suffers from bone cancer and has been deprived of the medication he requires.[69] Sadeghi is known for his work in defending human rights, and has been arrested on many occasions.[70] Most recently, he was arrested on October 20, 2022, but no reason was given for being placed in "indefinite detention."[71] Sadeghi was allegedly interrogated for eight hours and coerced by security officers.[72] Sadeghi continues his human rights activism despite the consequences of being arrested and risking his life during detainment.[73] The United Nations noted that Sadeghi's treatment is not an isolated incident and it "remains "gravely concerned about the safety of prisoners in Iran."[74] Sadeghi was finally released on January 25, 2023, after a one hundred day imprisonment.[75]

The first concrete number of prisoners to be reported came from Iran's supreme leader Ayatollah Ali Khamenei.[76] On February 5, 2023, Khamenei announced an amnesty reduction in prison sentences for "tens of thousands" of people detained in relation to the Amini protests.[77] The decree was part of a yearly pardoning by the supreme leader that he does "before the

[68] Press Release, Special Procedures, Iran must immediately release critically ill human rights defender Arash Sadeghi: UN experts, U.N. Press Release (Dec. 2, 2022) [hereinafter U.N. Special Procedures Press Release].
[69] U.N. Special Procedures Press Release, *supra* note 68.
[70] U.N. Special Procedures Press Release, *supra* note 68.
[71] U.N. Special Procedures Press Release, *supra* note 68.
[72] U.N. Special Procedures Press Release, *supra* note 68.
[73] U.N. Special Procedures Press Release, *supra* note 68.
[74] U.N. Special Procedures Press Release, *supra* note 68.
[75] *Rights Defender Arash Sadeghi Released from Unjust Imprisonment,* NIAC ACTION (Jan 25, 2023), https://www.niacouncil.org/human_rights_tracker/arash-sadeghi/

[76] Jon Gambrell, *Iran Acknowledges it has Detained 'Tens of Thousands' in Recent Protests*, ASSOCIATED PRESS (Feb, 5, 2023, 9:17 AM), https://apnews.com/article/iran-protests-and-demonstrations-government-ali-khamenei-8560e45570321ad08ef75f1f743f9b80.
[77] *Id.*

anniversary of Iran's 1979 Islamic Revolution".[78] A list was also published by the state media regarding caveats that would disqualify people with ties abroad or those facing spy charges.[79] Mahmood Amiry-Moghaddam, a member of the Oslo-based Iran Human Rights group, does not believe the pardon changes anything, and that all protestors should be released unconditionally.[80] Iranian authorities did not disclose any names of people who may have been pardoned or been subject to a shorter prison sentence.[81] According to Human Rights Activists based in Iran, more than 19,600 people have been arrested as of February 2023.[82]

In addition to mass arrests, the Iranian government has been threatening prisoners with executions. The first execution allegedly resulting from the Mahsa Amini protests occurred on December 8, 2022.[83] Mohsen Shekari, twenty-three, was arrested on September 25, 2022 when he was accused of injuring a police officer with a knife.[84] A confession video of Shekari shows that he was under severe duress and was probably forced into giving a false confession.[85] There has been significant criticism from international human rights bodies because of the methods used by law enforcement to achieve false confessions.[86] Shekari was officially convicted of "moharebeh", which is considered a severe crime in Iran, meaning "waging war against God".[87] Shekari was also denied the right to obtain a lawyer, even though crimes that are punishable by

[78] Gambrell, *supra* note 76..
[79] Gambrell, *supra* note 76.
[80] Gambrell, *supra* note 76.
[81] Gambrell, *supra* note 76.
[82] Gambrell, *supra* note 76.
[83] Somayeh Malekian, *Iran Executes 1st Protestor Sentenced to Death as Regime Intensifies Crackdown on Dissidents,* ABC NEWS (Dec. 8, 2022, 3:00 PM), https://abcnews.go.com/International/iran-executes-1st-protester-sentenced-death-regime-intensifies/story?id=94775369.
[84] *Id.*
[85] *See Id.*
[86] *Id.*
[87] *Id.*

death in Iran require convicts to have one.[88] Ned Price, a spokesperson for the State Department, warned Iran about issuing death sentences for protestors stating that "the world is watching."[89]

Another man came very close to being executed, but his appeal was accepted.[90] On December 24, 2022, Iran's Supreme Court accepted a Kurdish-Iranian rapper's appeal after he was sentenced to death..[91] Yasin was accused of attempting to kill security forces by setting a garbage can on fire and shooting in the air during an anti-government protest, but he denies these charges.[92] Another man, twenty-six year old Sahand Noormohammadzadeh says he was subjected to mock executions while he was in prison.[93] He was accused of blocking traffic on a highway while tearing down railings during a protest in Tehran.[94] He was sentenced to death in December, but Iran's Supreme Court ordered the case to be retried.[95]

As of January 2023, four men were hanged, and at least eight other men and boys were at risk of being executed.[96] Most of these men were charged with "waging a war on God".[97] These trials are being rushed, and the defendants are relying on government assigned lawyers.[98] A lot of the evidence presented at these trials is not very strong and usually contains coerced confessions and poor video footage.[99]

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[88] Malekian, *supra* note 83.
[89] Malekian, *supra* note 83.
[90] *Kurdish Rapper wins appeal against Death Sentence in Iran,* THE GUARDIAN (Dec. 24, 2022, 2:58 PM), https://www.theguardian.com/world/2022/dec/24/kurdish-rapper-wins-appeal-against-death-sentence-in-iran .
[91] *Id.*.
[92] *Id.*.
[93] Ghobadi, *supra* note 52.
[94] Ghobadi, *supra* note 52.
[95] *Iran's Supreme Court Accepts Protestors Appeal Against Death Sentence,* THE GUARDIAN ((Dec. 31, 2022, 4:35 AM), https://www.theguardian.com/world/2022/dec/31/irans-supreme-court-accepts-protesters-appeal-against-death-sentence.
[96] Farnaz Fassihi & Cora Engelbrecht, *The People Executed or Sentenced to Death in Iran's Protest Crackdown,* N.Y. TIMES (Jan. 12, 2023), https://www.nytimes.com/article/iran-protests-death-sentences-executions.html?.
[97] *Id.*
[98] *Id.*
[99] *Id.*

The treatment of these protestors after the death of Mahsa Amini not only exposes issues with the way Iranian officials arrest and treat their citizens, but also show the world the injustices the Iranian people continue to face while they are in the custody of government officials. Cases like that of Arash Sadeghi also show the world that the Iranian people and human rights activists will continue to fight for better human rights despite the well-known consequences.

IV. Action Being Taken

A. United Nations

On September 20, 2022, acting UN High Commissioner for Human Rights, Nada Al-Nashif, stated she is shocked by the death of Mahsa Amini.[100] Al-Nashif called for the repeal of all discriminatory laws and regulations that impose the mandatory wearing of a hijab.[101] Iran, a State party to the International Covenant on Civil and Political Rights, was called upon to "respect the rights of its citizens to exercise freedom of expression and assembly".[102]

On November 24, 2022, the United Nations Human Rights Council adopted a resolution to address the human rights violations happening in Iran.[103] This resolution established an independent international "fact-finding mission" to be appointed by the President of the Human Rights Council.[104] The resolution also dictated the criteria for the independent group that will lead the investigation.[105] The criteria includes thoroughly investigating all human rights violations in Iran related to the protests that began on September 16, 2022, especially ones involving women and children.[106]

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[100] Press Release, U.N. High Comm'r for Hum. Rts., Mahsa Amini: Acting U.N Hum. Rts. Chief Urges Impartial Probe into Death in Iran, U.N. Press Release (Sept. 20, 2022).
[101] *Id.*
[102] *Id.*
[103] *See* G.A. Res. S-35/1, (Nov. 24, 2022).
[104] G.A. Res. S-35/1, *supra* note 103, ¶ 7. .
[105] G.A. Res. S-35/1, *supra* note 103, ¶ 7.
[106] G.A. Res. S-35/1, *supra* note 103, ¶ 7(a).

One month later, the President of the Human Rights Council announced who would lead the independent fact-finding mission.[107] Sara Hossain of Bangladesh, Shaheen Sardar Ali of Pakistan, and Viviana Krsticevic of Argentina were chosen to lead the investigation.[108] Ms. Hossain is a "barrister in the Supreme Court of Bangladesh and practices constitutional law, public interest law, and family law".[109] Ms. Ali is a "law professor at the University of Warwick, United Kingdom, where she teaches Islamic law, the law of human rights, and women and child rights".[110] Ms. Krsticevic has litigated on behalf of human rights victims in Latin America and has an LL.M. from Harvard Law School.[111]

These three women will be tasked with establishing the facts and circumstances from all of the alleged human rights violations related to the protests that began on September 16, 2022.[112] They will do this by collecting and analyzing evidence of these violations and engaging with all relevant stakeholders.[113] These stakeholders include the "Government of the Islamic Republic of Iran, the Office of the United Nations High Commissioner for Human Rights, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, relevant United Nations entities, [and] human rights organizations and civil society."[114] This report will be orally presented to the Human Rights Council during its fifty-third session, which will meet in

[107] Press Release, Hum. Rts. Council, President of Hum. Rts. Council Appoints Members of Investigative Body on Iran, U.N. Press Release (Dec.. 20, 2022).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Independent International Fact-Finding Mission on the Islamic Republic of Iran*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/hrc/ffm-iran/index (last visited Mar. 14, 2023).
[113] *Id.*
[114] *Id.*

June or July 2023.[115] A comprehensive report will be presented to the Human Rights Council "during an interactive dialogue at its fifty-fifth session March 2024"[116]

In addition to the independent international fact-finding mission, Canada announced that it will issue sanctions against four individuals and five entities that were tied to the human rights violations that are "threatening international peace and security."[117] Shortly after the sanctions were announced, the UN Economic and Social Council adopted a resolution to remove Iran from the UN Commission on the Status of Women in December 2022.[118] The UN Commission on the Status of Women was established in 1946 and promotes women's rights and shapes global standards on gender equality.[119] United States Ambassador Linda Thomas-Greenfield said the Commission is unable to "do its important work if it is being undermined from within."[120]

The United Nations has taken many positive steps in response to the human rights violations occurring in Iran. The independent international fact-finding mission is very important in uncovering the real facts since Mahsa Amini's death, especially since there has been so much evidence of Iran trying to keep its citizens off the internet and social media sites to try to hide what is happening in the country.[121] The fact-finding mission is made up of three women with very prestigious resumes, and they should be able to make progress towards finding justice for Mahsa Amini and the people suffering in Iran.

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[115] U.N. HUM. RTS. COUNCIL, *supra* note 112.
[116] U.N. HUM. RTS. COUNCIL, *supra* note 112.
[117] *Canada Expands Iran Sanctions Over 'Human Rights Violations'-Statement,* REUTERS (Dec. 2, 2022, 9:43 AM), https://www.reuters.com/world/canada-expands-iran-sanctions-over-human-rights-violations-statement-2022-12-02/.
[118] *Iran Removed from UN Commission on the Status of Women,* U.N. NEWS (Dec. 14, 2022), https://news.un.org/en/story/2022/12/1131722.
[119] *Id.*
[120] *Id.*
[121] Office of the Spokesperson, *Joint Statement on Internet Shutdowns in Iran,* U.S. DEP'T OF STATE (Oct. 20, 2022), https://www.state.gov/joint-statement-on-internet-shutdowns-in-iran/.

B. United States

A bill has been introduced by the United States Congress, *The Iran Human Rights and Accountability Act* of 2021, H.R. 2117.[122] It calls on the Islamic Republic of Iran to immediately end violations of human rights and release all detained individuals, including peaceful protestors.[123] This was introduced to the House March 19, 2021, and as of February 2024, there has been no movement besides the bill being referred to the subcommittee on Immigration and Citizenship on October 19, 2021.[124]

In September 2022, Congressman Adam Schiff introduced the *Support for Iranian Political Prisoners Act, "*demanding Iran to end its human rights violations immediately and to release all arbitrarily detained individuals".[125] This was in response to the death of Mahsa Amini and more than fifty protestors in September, 2022.[126] This bill would hold Iranian officials accountable for human rights abuses related to politically motivated imprisonment.[127] As of February 2024, this bill has not moved forward except for being introduced and referred to the House Committee on Foreign Affairs and the subcommittee on Middle East, North Africa, and Global Counterterrorism.[128]

Overall, the United States has not done much to directly help the people of Iran. This may be because the United States and Iran have a complicated history that dates back to the 1950s, and any action taken by the United States must be strategic.[129] The United States currently sees

[122] Iran Human Rights and Accountability Act of 2021, H.R.2117, 117th Cong. (2021-2022).
[123] Press Release, Adam Schiff, Congressman Schiff Introduces Legis. to End Iran's Hum. Rts. Violations Against Pol. Prisoners (Sept. 29, 2022) (on file with author).
[124] *Id.*
[125] Schiff, *supra* note 123.
[126] *Id.*
[127] *Id.*
[128] Support for Iranian Political Prisoners Act*,* H.R.9075, 117th Cong. (2022).
[129] *See* David E. Sanger, *United States Enters a New Era of Direct Confrontation With Iran,* N.Y. TIMES (Nov. 24, 2022), https://www.nytimes.com/2022/11/24/us/politics/iran-protests-ukraine-nuclear-enrichment.html.

Iran as a nuclear threat, and although President Biden has been outspoken in support of the anti-government protests, his administration has not taken action so far to help the people of Iran due to the possible dangers associated with it.[130] It is unfortunate that this is the current position the United States is in, but the United States may be able to take more direct action by partnering with the United Nations.[131]

V. Historical Overview of Human Rights Protests in Iran

The current protests and treatment of protestors is nothing new to the people of Iran. Since 1979, when the Shah's government fell and the Islamic fundamentalist regime took over, Iran has faced many human rights issues.[132] The 1979 Iranian Revolution started in 1978 when thousands of students and Iranian youth took to the streets and began protesting the Shah's regime.[133] Many protestors were killed by government forces in response to the protests, with each death fueling further protests.[134] Martial law was imposed and troops opened fire on demonstrators in Tehran, killing approximately hundreds of people.[135] On February 11, 1979, Iran's armed forces declared their neutrality and the Shah regime was effectively ousted.[136]

As of 2009, activists had been leading a thirty year revolution.[137] Iran is one of a few countries that includes Myanmar, North Korea, and Turkmenistan that are closed to human rights organizations, which makes it difficult to monitor human rights violations occurring in the

[130] *Id.*
[131] *Id.*
[132] *The State of Human Rights in Iran,* NPR (Feb. 8, 2009, 3:08 PM), https://www.npr.org/templates/story/story.php?storyId=100396002.
[133] *Iranian Revolution,* BRITANNICA, https://www.britannica.com/event/Iranian-Revolution (last visited Feb. 23, 2024).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] NPR , *supra* note 132.

country.[138] Since the onset of the internet in the early 2000s, it has become easier for activists to raise awareness of the human rights situation in Iran.[139]

In 2009, people protested the election of Mahmoud Ahmadinejad, claiming that the election was rigged.[140] Millions of people nationwide took part in the protests which became known as the "Green Movement".[141] In response to the protests, Iran's Revolutionary Guard, together with their volunteer force known as the Basij, opened fire on protestors.[142] People were killed, jailed and tortured, and the leaders of the movement were put under house arrest.[143] Several of these protests happened in main cities including Tehran.[144] The protestors wanted greater social freedoms, the election overturned, and an end to the tight oppression by security forces.[145] Similar to the Amini protests, a twenty-six year old woman was shot to death and became an icon of the movement.[146] Videos of her death were widely shared on Twitter during the early years of social media.[147]

In 2018, Iran was once again faced with more protests. This time, they were fueled by anger over a poorly performing economy, unemployment rates, and corruption.[148] Instead of major cities, these protests were held in smaller cities and towns.[149] The first protest was sparked by a rise in egg and poultry prices, and spread into many mid-sized communities that had suffered

[138] NPR , *supra* note 132.
[139] NPR , *supra* note 132.
[140] Lee Keath, *2009 vs Now: How Iran's New Protests Compare to the Past,* AP (Jan. 3, 2018, 11:49 AM), https://apnews.com/article/ali-khamenei-ap-top-news-elections-international-news-mahmoud-ahmadinejad-ab649e2190834e19b1f006f76493645f.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Keath, *supra* note 140
[146] Keath, *supra* note 140.
[147] Keath, *supra* note 140.
[148] Keath, *supra* note 140.
[149] Keath, *supra* note 140.

heavily from the poor economy.[150] These protests were fueled by the rise of messaging apps like Telegram and WhatsApp, which allowed people to communicate over encrypted channels without surveillance from the government.[151] At least twenty-one people died, and more than one thousand people, including ninety students, were arrested.[152] A reporter from Amnesty International said investigations showed how inhumane prison conditions in Iran were because of overcrowding, poor ventilation, and the threat of being tortured.[153]

In November 2019, Iran faced another wave of protests fueled by the tripling of fuel prices.[154] In reaction to the protests, the government shutdown the internet almost entirely from November 15th to the 19th and "embarked on the most brutal crackdown against protestors in decades."[155] It has been hard to determine the total number of people killed during these protests due to the internet shutdown and the threats made by authorities against victims' families.[156] Interviews with victims and witnesses as well as photos and videos from the protest helped the Human Rights Watch conclude that unlawful lethal force was used on at least three occasions during the protests.[157] Many of the videos show that security forces shot at people fleeing from the protests, and some witnesses had knowledge of victims being killed from gunshots to the head and chest.[158] Reports from Amnesty International estimated that at least 304 people were killed, and the head of Iran's parliamentary National Security Committee said the number was

[150] Keath, *supra* note 140.
[151] Keath, *supra* note 140.
[152] Saeed Kamali Dehghan, *Iran Protests: Deaths in Custody Spark Human Rights Concerns,* THE GUARDIAN (Jan. 9, 2018, 12:00 AM), https://www.theguardian.com/world/2018/jan/09/iran-protests-deaths-custody-human-rights.
[153] *Id.*
[154] Ali Fathollah-Nejad, *The Islamic Republic of Iran Four Decades on: The 2017/18 Protests Amid a Triple Crisis,* BROOKINGS (Apr. 27, 2020), https://www.brookings.edu/research/the-islamic-republic-of-iran-four-decades-on-the-2017-18-protests-amid-a-triple-crisis/.
[155] *Iran: No Justice for Bloody 2019 Crackdown,* HUM. RTS. WATCH (Nov. 17, 2020, 12:01 AM), https://www.hrw.org/news/2020/11/17/iran-no-justice-bloody-2019-crackdown.
[156] *Id.*
[157] *Id.*
[158] HUMAN RIGHTS WATCH, *supra* note 155.

around 230.[159] Iran's Supreme Court also upheld the death sentences of three young men who took part in the protests for "taking part in destruction and burning, aimed at countering the Islamic Republic of Iran."[160] Lawyers were able to halt the case with an awarded appeal after domestic backlash.[161]

It is clear the citizens of Iran are unhappy with the cruel treatment of their people and are not going to let their voices be drowned out. There has been a pattern that the Iranian people will continue to appear, gather, and protest the human rights violations that are occurring in their country, all while knowing they are likely going to be treated with violence in response to their protests.

VI. Argument

The reaction to Mahsa Amini's death is not the first time Iran has been faced with this kind of protesting.[162] There have been recorded incidents throughout Iran's history of clear human rights violations by the Iranian government.[163] In late November 2022, an Iranian general announced that more than 300 people had been killed in the nationwide protests.[164] This is a considerably lower number than what Human Rights Activists in Iran are reporting.[165] They estimate 451 protestors and sixty security forces have been killed.[166] They also estimate the number of people who have been detained since November 2022 sits at around 18,000.[167] It is

[159] HUMAN RIGHTS WATCH, *supra* note 155.
[160] HUMAN RIGHTS WATCH *supra* note 155.
[161] HUMAN RIGHTS WATCH *supra* note 155.
[162] Armani Syed, *Iran Has a Long History of Political Activism and Protest. Here's What to Know,* TIME (Nov. 22, 2022, 1:15 PM), https://time.com/6234429/iran-protests-revolution-history/.
[163] *Id.*
[164] *Iran Acknowledges More Than 300 are Dead from Unrest from Nationwide Protests,* NPR (Nov. 28, 2022, 11:50 PM), https://www.npr.org/2022/11/28/1139625631/iran-acknowledges-more-than-300-are-dead-from-unrest-from-nationwide-protests [hereinafter Nationwide Protests].
[165] *Id.*
[166] *Id.*
[167] *Id.*

difficult to get an accurate number because media coverage of the protests has been heavily restricted by state media.[168] State linked media platforms are allegedly not reporting an overall death toll at all.[169] Without truthful media coverage, the world will not truly know about the human rights violations going on in Iran, which will make it harder to provide the proper assistance.

Considering the history Iran has with responding violently to its citizens protesting, concrete action needs to be taken to hold the government accountable.[170] The United Nations is currently taking direct action by going forward with an independent fact-finding mission.[171] It will be crucial that the findings of this report are implemented into a direct action plan that holds Iran accountable and also helps the Iranian citizens that have suffered injustice caused by the Iranian government.

A. United States and United Nations Partnership

If the United States and the United Nations work together, it is likely they will be able to make a strong impact on combating the human rights violations happening in Iran. In 1999, the United States and the United Nations launched a partnership called The Better World Campaign (BWC).[172] The goal of this campaign is to form an effective relationship between the United States and the United Nations to build a more prosperous world.[173] A goal of the BWC is to foster a strong partnership between the United Nations and the United States.[174]

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[168] Nationwide Protests, *supra* note 164.
[169] Nationwide Protests, *supra* note 164.
[170] *The State of Human Rights in Iran, supra* note 132.
[171] *Independent International Fact-Finding Mission on the Islamic Republic of Iran,* U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/hrc/ffm-iran/index (last visited Mar. 23, 2023).
[172] *See About the Better World Campaign,* BETTER WORLD CAMPAIGN, https://betterworldcampaign.org/about-bwc (last visited Mar. 23, 2023).
[173] *About the Better World Campaign, supra* note 172.
[174] *See Our Mission,* BETTER WORLD CAMPAIGN, https://betterworldcampaign.org/about-bwc/our-mission. (last visited Feb. 23, 2024).

The BWC helped the United Nations take a historic step on April 7, 2022 by suspending Russia from the United Nations Human Rights Council because of the invasion of Ukraine.[175] It was "the first time that any permanent member of the Security Council had its membership revoked from any United Nations body".[176] This move shows the United Nations Human Rights Council has legitimacy when it speaks out against violations.[177] The United States was also backed by Congress in this decision, "as a dozen members of the U.S. Senate Foreign Relations Committee expressed their support for this action".[178]

The United States and United Nations partnership was also strengthened by the proposal of the State, Foreign Operations, and related Programs Appropriations bill.[179] On June 21, 2022 it was announced that the State, Foreign Operations and Related Programs Subcommittee approved a bill for nearly $65 billion that would be used towards the United States' international affairs budget[180]. If the bill is passed, the money will help fully fund the United Nations regular and peacekeeping budgets by including a $1 billion down payment towards UN peacekeeping.[181] The United States has been behind on peacekeeping dues since the fiscal year 2017.[182] By making this payment, it will strengthen American credibility at the United Nations and will position the United States to be a better advocate for peacekeeping reforms.[183] This bill would

[175] *U.S.-UN Partnership Led to Historic Vote on Russia,* BETTER WORLD CAMPAIGN (Apr. 7, 2022), https://betterworldcampaign.org/press-release/united-nations-partnership-russia-vote-human-rights-council.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Appropriations Bill Prioritizes UN Investments; Peacekeeping, Global Health, Climate, Humanitarian Needs Addressed,* BETTER WORLD CAMPAIGN (June 22, 2022), https://betterworldcampaign.org/press-release/appropriations-peacekeeping-clinate-global-health-climate.
[180] *Id.*
[181] *Id.*
[182] *President's Budget Gets Us Back on Track at UN, Sets Plan to Pay Overdue UN Peacekeeping Bills,* BETTER WORLD CAMPAIGN (Apr. 9, 2021), https://betterworldcampaign.org/press-release/president-biden-budget-peacekeeping.
[183] *Id.*

also give the United States a larger presence in relation to United Nations matters, and the funding that the United States has clearly shows there is an opportunity for the United States to assist with the crisis going on in Iran.[184]

B. Examples of the United States and the United Nations Resolving Human Rights Issues

The United States has worked with the United Nations since the 1940s to resolve human rights issues. The United States was heavily involved in the creation of the United Nations War Crimes Commission (UNWCC), which operated from 1943-1948.[185] In 1993, The United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[186] The United States was an important supporter of the ICTY's creation and provided significant resources for its operations over the years.[187] After the creation of the ICTY, it brought back the idea of an international criminal tribunal.[188]

In 2011, the United States worked with the United Nations to establish a no-fly zone to protect the people of Libya.[189] The United Nations Security Council imposed a ban on all flights in the country's airspace to protect civilians in the country from attacks.[190] Susan Rice, the United States Ambassador to the United Nations at the time, stated that an earlier resolution that the Council passed had sent a strong message, but that the Libyan people's rights were still being

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[184] *Id.*
[185] *The US-ICC Relationship,* INT'L CRIM. CT. PROJECT, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Mar. 23, 2023).
[186] *Id.* (scroll to bottom of the page; then click the right arrow to move the timeline until reaching "International Criminal Tribunal for the former Yugoslavia") (last visited Mar. 23, 2023).
[187] *Id.* (scroll to bottom of the page; then click the right arrow to move the timeline until reaching "International Criminal Tribunal for the former Yugoslavia") (last visited Mar. 23, 2023).
[188] *Id.* (scroll to bottom of the page; then click the right arrow to move the timeline until reaching "International Criminal Tribunal for the former Yugoslavia") (last visited Mar. 23, 2023).
[189] Press Release, Security Council. Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011). [Hereinafter No-Fly Zone]
[190] *Id.*

violated.[191] The no-fly zone was an important step that needed to be done to address the situation.[192]

In 2022, the United States worked with the United Nations to provide aid to the people of Syria.[193] U.S. Ambassador to the United Nations, Linda Thomas-Greenfield announced the United States gave Syria $808 million in humanitarian assistance.[194] Up to 14 million Syrians were displaced, and more than 12 million Syrians did not have enough to eat.[195] Civilians continue to be killed by airstrikes and artillery, and need more aid now than at the start of the war.[196] The United States remains the largest donor to Syria and has provided almost $15 billion in assistance since the start of the war eleven years ago.[197] The United States continues to work with the United Nations Security Council to maintain access through the UN-approved border crossing.[198]

C. Action That Can Be Taken Now

The United States and its partners at the UN Human Rights Council should coordinate an effort to stop these human rights violations in Iran. Removing Iran from the UN Commission of Women was a step in the right direction. This shows that the United Nations is serious about promoting the rights and interests of women by not allowing a country committing crimes against women to be part of this Commission. The United States also has a stronger presence

[191] *Id.*
[192] *Id.*
[193] Press Release, USAID, The U.S. Provides Nearly $808 Million in Emergency Humanitarian Assistance for Syria (May 10, 2022), https://www.usaid.gov/news-information/press-releases/may-10-2022-united-states-provides-nearly-808-million-emergency-humanitarian.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] The U.S. Provides Nearly $808 Million in Emergency Humanitarian Assistance for Syria, *supra* note 193. [Hereinafter Humanitarian Assistance]

within the United Nations than it had in the past. The United States should use this presence to rally other countries to provide help to the Iranian people, especially women in the country.

In December 2022, The United States issued three separate sets of sanctions that targeted Iran.[199] One of those sanctions addressed the human rights violations happening due to protests.[200] A joint statement which condemned targeted online harassment and abuse by Iranian authorities against female protestors was also signed by the United States, Australia, Canada, Chile, Iceland, New Zealand, Republic of Korea, Sweden, and the United Kingdom.[201]

The timeline of events after Amini's death do not indicate that anything concrete will be happening in Iran for a while.[202] On September 30, 2022, the UN Human Rights Council delivered a joint statement on behalf of several countries asking Iran to conduct independent, thorough, and transparent investigations into the death of Mahsa Amini and to refrain from using force against citizens who were peacefully protesting.[203] Two months later, at the end of November, the UN Human Rights Council held a special session discussing the excessive force being used against protestors.[204] Shortly after, a resolution was adopted by the UN General Assembly condemning Iran's human rights abuses, specifically, the excessive use of force against protestors.[205]

History has shown that Iran has been dealing with protests for many years, and the only reaction the country has for that is excessive force. The United Nations has taken an important

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[199] *Statement by National Security Advisor Jake Sullivan on UN Vote to Remove Iran from the Commission on the Status of Women,* THE WHITE HOUSE (Dec. 14, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/14/statement-by-national-security-advisor-jake-sullivan-on-un-vote-to-remove-iran-from-the-commission-on-the-status-of-women/.
[200] *Id.*
[201] *Id.*
[202] *Iran,* HUM. RTS. WATCH, https://www.hrw.org/world-report/2023/country-chapters/iran (last visited Mar. 23, 2023).
[203] *Id.*
[204] *Id.*
[205] *Id.*

concrete step by putting together an independent investigation to examine the human rights violations going on in relation to the protests that began on September 16, 2022.[206] After these findings are presented in the summer of 2023, the United Nations must hold the appropriate people accountable. The United Nations states that accountability has "three dimensions."[207] This means that authority figures must take responsibility for their actions, provide answers to those who have been affected, and be subject to some form of enforceable sanction if their conduct warrants it.[208] Authority figures can be responsible for their behavior by having clearly defined duties and having their behavior assessed transparently.[209]

The first person that needs to be held accountable is Iran's supreme leader, Ayatollah Ali Khamenei. Khamenei's actions need to be examined by the United Nations to determine his involvement with the excessive force being used on protestors. The history of protests and the excessive force being used in response to them, shows that the Iranian people have been asking for change and their pleas are not being heard. If the Iranian government is not going to listen to its people, the United Nations needs to listen and help remedy the situation.

The first solution that is needed is a system of accountability that will protect human rights in Iran.[210] Protests keep happening because no one is being held accountable, and the Iranian people keep asking for help. The legal system in Iran needs to be reformed to put an end to impunity.[211] The Human Rights Council can be the key in getting these solutions for the

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[206] *President of Human Rights Council appoints members of investigative body on Iran,* U.N. (Dec. 20, 2022), https://www.ohchr.org/en/press-releases/2022/12/president-human-rights-council-appoints-members-investigative-body-iran.
[207] U.N. Hum. Rts. Off. of the High Comm'r and Ctr. for Econ. and Soc. Rts., *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda,* at ix, U.N. Doc. HR/PUB/13/1 (2013).
[208] *Id.* at ix-x.
[209] *Id.* at x.
[210] *See* Special Procedures, Iran: Fundamental legal and institutional reforms needed to curb impunity, says UN expert (Mar. 17, 2022), https://www.ohchr.org/en/press-releases/2022/03/iran-fundamental-legal-and-institutional-reforms-needed-curb-impunity-says.
[211] *Id.*

Iranian people. It can also be strengthened with the help of the United States.[212] The United States should work with the Human Rights Council to hold Iranian officials accountable and give a voice to the Iranian people.

On July 14, 2022, Hamid Nouri, a former Iranian government official, was convicted by a Swedish court for committing war crimes, torture, and murder.[213] He was sentenced "to life in prison for his involvement in the torture and mass execution of thousands of Iranian prisoners in what is known as the massacre of 1988."[214] Nouri was able to be convicted in Sweden because he was lured there and arrested promptly on his arrival.[215] This shows the difficulty the world is faced with holding Iran and its principals accountable because it is difficult to prosecute any official that is in the country. This verdict was seen as a major success for human rights though, and the executive director of the Center for Human Rights in Iran said the trial "sets a precedent for holding other officials from Iran, and there are many, accountable for their killings of political prisoners and opponents of the state."[216] This court decision "raises the possibility that other Iranian officials could be tried abroad."[217]

VII. Conclusion

Concrete action needs to take place in Iran, or it will continue its history of violently abusing and detaining protestors. Bills in the United States are not progressing, and do not look like they will be a viable solution. The best course of action would be a strong partnership

[212] Ted Piccone, *Assessing the United Nations Human Rights Council,* BROOKINGS (May 25, 2017), https://www.brookings.edu/testimonies/assessing-the-united-nations-human-rights-council/.
[213] Hasti Aryana Rostami, *Europe's efforts to hold Iranian officials accountable for their crimes*, MIDDLE EAST INSTITUTE (Aug. 18, 2022), https://www.mei.edu/publications/europes-efforts-hold-iranian-officials-accountable-their-crimes.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*

between the United Nations and the United States to provide direct help to the people in Iran and to help people who have been wrongfully detained seek safety.

An important factor in holding Iran accountable will be the independent fact-finding mission that the United Nations organized. After the mission is conducted and the findings are reported back to the United Nations in the summer of 2023, this information should be used to issue warrants and arrest the appropriate people that were involved in the human rights violations that have happened in Iran. This will most importantly include the people that were involved in Mahsa Amini's death, including members of the Morality Police. The Treasury Department's Office of Foreign Assets Control (OFAC) named Haj Ahmad Mirzaei and Mohammad Rostami Cheshmeh Gaci as senior officials of the Morality Police, and it will be important that these specific individuals are held accountable.[218]

Through the International Criminal Court (ICC), the United Nations can issue warrants and hold leaders accountable. The ICC has shown that no leader is immune from being held accountable. A warrant was issued for the arrest of Vladimir Putin, President of the Russian Federation, on March 17, 2023 for the unlawful deportation and transfer of children.[219] If the ICC can hold the President of Russia accountable, they can hold the people responsible for human rights violations in Iran accountable.

The independent fact-finding mission is a great step the United Nations has taken, and it is important that action is taken when the information is presented. The United States' involvement would show the world how important holding Iran accountable is, and it will encourage other countries to help the United Nations and act as well. Once the appropriate

[218] Blinken, *supra* note 6.

[219] *Statement by Prosecutor Karim A.A.Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova,* I.C.C. (Mar. 17, 2023), https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin.

people are held accountable, it will be important that the Human Rights Council assists Iran in shaping a system that can be used to hold people in the country accountable for committing human rights violations. Unfortunately, these crimes have been happening in Iran for a large part of their history, but now is the time to hold the proper people accountable and respond to the Iranian people's cries for help.

PUTTING THE "CARE" BACK INTO LONG-TERM CARE:

AMELIORATING POLICY VULNERABILITIES IN THE LONG-TERM CARE SECTOR AS EXPOSED BY CANADA'S COVID-19 RESPONSE

Megan Gamache

ABSTRACT

This note addresses problems in the Canadian Long-Term Care (LTC) sector that arose or were made worse during the Covid-19 pandemic. While Canadian LTC facilities have never been perfect, they exposed themselves to be quite lethal during the brunt of the Covid-19 pandemic. This note will examine four major issues brought to light during this time: ageism and its tangible effects on seniors, the failures of the physical LTC institutions themselves, the deficits of the for-profit LTC scheme and other funding issues, and the lack of employee regulation. This note will highlight major policy changes that need to be made to address each of these issues in turn.

The importance of making changes in Canadian LTC facilities cannot be understated as Canada's population continues to age. The disparate condition of LTC facilities during the Covid-19 pandemic should be used as the requisite spark to light the fire of policy changes needed in LTC and LTC facilities. No Canadian should be forced to live in the way that LTC residents did during the early stages of the Covid-19 pandemic.

Introduction

It is no secret that long-term care (LTC) facilities were among the institutions hit hardest by the Covid-19 pandemic across the world.[1] Canadian LTC facilities are no exception to this. In fact, Canadian LTC facilities have dramatically higher mortality rates of Covid-19 than LTC facilities of other countries.[2] Nora Loreto, an independent journalist who collected Covid-19 death data in LTC facilities, reported in January of 2023 that 21,979 of the 50,248 Covid-19 deaths in Canada occurred in connection to LTC facilities.[3] This is after three years of "improvement" since the first wave of Covid-19 in which LTC facilities accounted for approximately 80% of all Covid-19 fatalities in Canada.[4] These high death counts might even be inaccurately low because not every LTC death was tested for Covid-19, and some death certificates were never submitted to family members because of the severe backlog of deaths.[5]

The media has reported that LTC facilities were hit hardest as an inevitable consequence of the frailty of LTC residents.[6] But that belief is misled and ageist. A more accurate explanation of the horrors that ensued in Canadian LTC facilities would describe the nature and functioning of the institutions themselves and how these have proven to be harmful and lethal during the Covid-19 pandemic.[7]

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[1] *See* Carole A. Estabrooks et al., *Restoring Trust: COVID-19 and the Future of Long-Term Care in Canada*, 5 FACETS 651, 651-91 (Aug. 27, 2020).

[2] *Id.* at 652.

[3] Nora Loreto (@NoLore), TWITTER (Jan. 22, 2023, 10:54 PM), https://twitter.com/NoLore/status/1617370082325266432.

[4] Shelley Lynn Tremain, *Philosophy of Disability, Conceptual Engineering, and the Nursing Home-Industrial-Complex in Canada,* 4 INT'L J. OF CRITICAL DIVERSITY STUDS. 10, 18 (2021).

[5] Karen Howlett, *Canadians died of COVID-19 in long-term care by the thousands. So why are there so few coroners' reports?*, THE GLOBE AND MAIL (Aug. 5 2021), https://www.theglobeandmail.com/canada/article-canadians-died-of-covid-19-in-long-term-care-by-the-thousands-so-why/.

[6] Tremain, *supra* note 4 at 17.

[7] Tremain, *supra* note 4.

Before we dive into the specific issues, let us set the stage for Covid-19 in Canadian LTC facilities by quickly considering Canada's history with pandemics and its history with its LTC facilities. First, Canada is no stranger to pandemics. The 2003 severe acute respiratory syndrome (SARS) epidemic hit Canada harder than any country besides Asian countries [8] and gave Canada what some have called "a high degree of pandemic preparedness."[9] Then in 2009, the H1N1 pandemic gave Canada a further opportunity to refine its official pandemic response plan; it based its 2018 revised plan on the principles of collaboration, evidence-informed decision-making, proportionality, and flexibility.[10] Second in setting the stage is the fact that Canada is no stranger to reported issues in its LTC facilities. Many studies have been published concerning the negative qualities of Canadian LTC facilities.[11] One study recounts that from 2015 to 2020, 85% of the 640 nursing homes in Ontario had repeatedly broken laws involving negligence and abuse of residents.[12] In a perfect world, Canada's history facing pandemics and their historically poor LTC facilities should mean that Canadians have ironed out these problems and are perfectly suited for the Covid-19 pandemic and the protection of LTC residents. But we know this is far from true.

We know that, instead, Canadian LTC facilities had the highest mortality rates of Covid-19 deaths compared to any other country.[13] We also know that the basic living situations for LTC residents were shameful for a country with ample resources such as Canada.[14] But if there can be

[8] Nola M. Ries, *The 2003 SARS Outbreak In Canada: Legal And Ethical Lessons About The Use Of Quarantine, in* ETHICS AND EPIDEMICS 43, 43-67 (John Balint et al. eds., 2006).
[9] Sarah Allin et al., *The Federal Government and Canada's COVID-19 Responses: From 'We're Ready, We're Prepared' to 'Fires are Burning'*, 17 HEALTH ECONS., POL'Y AND LAW, 76, 76-94 (2022).
[10] *Id.*
[11] Estabrooks et al., *supra* note 1.
[12] Tremain, *supra* note 4, at 20.
[13] Estabrooks et al., *supra* note 1, at 652.
[14] Estabrooks et al., *supra* note 1.

any positive result of the devastation of Covid-19 on Canadian LTC facilities, it would be using it as an undeniable call to action. Issues have long embedded themselves in the Canadian LTC system and the Covid-19 pandemic exposed them at their worst. The atrocities of the Covid-19 pandemic could, and should, act as a focusing event and push these long-standing LTC issues to the forefront of Canada's political agenda.[15] In this paper, I will investigate four of the major issues of Canadian LTC facilities: ageism, outdated physical facilities, problematic funding, and the lack of regulations. I will propose policy alternatives to ameliorate or resolve each in turn.

The Reality of Covid-19 in Canadian LTC Facilities

Given the atrocities incurred by real Canadian citizens, this article would be incomplete without discussing at least some of the qualitative and quantitative effects of the pandemic on Canadian LTC facilities. It is not enough to merely state that the living situation was unacceptable and so it ought to be fixed. I have chosen a few moments over the first year of the Covid-19 pandemic to begin to illustrate the situation.

Let us begin in March 2020, near the beginning of the pandemic. Understandably so, many Canadian LTC facilities began restricting or forbidding visitors to lower the spread of Covid-19 infections.[16] However, no distinction was made between general visitors and family caregivers.[17] A side effect of this attempt to curb infection was the lack of family caregivers providing help to their loved ones. Family caregivers are important to LTC residents' health.[18] Family caregivers provide up to 10 hours a week of personal care to LTC residents including

[15] *See* Daniel Béland & Patrik Marier, *COVID-19 and Long-Term Care Policy for Older People in Canada*, 32 J. OF AGING & SOC. POL'Y. 358, 358-64, (2020).
[16] Lorraine M. Thirsk et al., *#Morethanavisitor: Experiences of COVID-19 visitor restrictions in Canadian long-term care facilities*, 71 FAM. RELS. 1408, 1408-27 (March 5, 2020).
[17] *Id.*
[18] *Id.*

hygiene, feeding, social and emotional support, and advocacy.[19] When this familial caregiving was suddenly taken away from residents, they suffered. From a physical point of view, residents went without food, water, or the cues or coaxing they required for them to eat or drink, resulting in severe and even fatal dehydration and malnutrition.[20] From an emotional point of view, the sudden lack of family members caused over a third of residents to report moderate to severe depression.[21]

The restriction of family caregivers and visitors also contributed to seniors' social isolation. Outside of the pandemic, social isolation of seniors has been called a "serious public health problem" as it can lead to very real cardiovascular, autoimmune, and neurological effects.[22] During the pandemic, social isolation became exacerbated and unsurprisingly, seniors' mental and physical health suffered from it.[23] Before the pandemic, family caregivers were a solution to the social isolation of seniors and were important to residents' overall health.[24] However, the lack of distinction between family caregivers and regular visitors in LTC facilities disallowed family caregivers from giving their residents the requisite support, causing residents to die from Covid-19 without even getting it.[25]

By the middle of 2020, a whistleblower report from inside Ontario LTC facilities was extreme enough to require the intervention of military medical personnel.[26] The Canadian Armed Forces and Canadian Red Cross quickly found the state of the facilities dire. They found pest

[19] *Id.* at 1409.
[20] Thirsk, *supra* note 16, at 1415.
[21] Thirsk, *supra* note 16, at 1410.
[22] Kunho Lee et al., *Consideration of the Psychological and Mental Health of the Elderly during COVID-19: A Theoretical Review*, 17 INT'L J. OF ENV'T RSCH. AND PUB. HEALTH 8098 (Nov. 2020).
[23] *Id.*
[24] *See* Thirsk, *supra* note 16, at 1409.
[25] Thirsk, *supra* note 16, at 1415-16.
[26] Tremain, *supra* note 4, at 19-20.

infestations, residents being verbally abused, dirty or no linens on residents' beds, uncleaned and unsanitized rooms, fecal contamination, force-feeding of residents until they choked, and a general lack of infection control and infection control training.[27] Mere months later after the military medical aid ended, the situation in those LTC facilities of the Greater Toronto Area was back to the same horrific state. Residents were malnourished, dehydrated, and banging on their walls to get help from staff. [28] As many as 50 residents were under the care of a single staff member, and Covid-19 positive residents were not being isolated from their negative roommates.[29]

On January 28, 2021, Chris Gladders, a 35-year-old disabled man living in an LTC facility near Niagara Falls, engaged in a medically assisted suicide due in part to the squalid living conditions he was forced to live in.[30] The night before he engaged in a medically assisted suicide, Chris' brother came to visit to find Chris lying on dirty sheets, covered in his own urine and feces. Chris' brother noted the toilet was fully clogged and trash was strewn around his room. Chris rang the bell for staff aid, and by the time his brother left 45 minutes later, Chris had still not been attended to.[31] A year into the pandemic, the situation in Chris' LTC facility was horrible enough that Chris elected to end his own life rather than continue living in the facilities his brother described as "inhumane".[32]

While this only scrapes the surface of the stories and situations found in LTC facilities during the first year of the Covid-19 pandemic, this background provides a working

[27] Tremain, *supra* note 4, at 20.
[28] Tremain, *supra* note 4, at 20.
[29] Tremain, *supra* note 4, at 20.
[30] Tremain, *supra* note 4, at 21; Sue-Ann Levy, *Man says Brother, 35, with Rare Disease Died in Squalor at Retirement Home*, TORONTO SUN (Feb. 6, 2021), https://torontosun.com/news/local-news/levy-man-says-brother-35-with-rare-disease-died-in-squalor-at-retirement-home.
[31] Levy, *supra* note 30.
[32] Levy, *supra* note 30.

understanding of the urgency of changes needed in LTC facilities. Let us now dive into four of the main issues of Canadian LTC facilities that created the perfect storm for the devastation of the Covid-19 pandemic.

Issue One: Ageism in Canada

Ageism is the stereotyping, prejudicing, or discrimination against individuals based on age.[33] Ageism is one of the major issues that contributed to the harsh reality of Canadian LTC facilities during the Covid-19 pandemic. While intergenerational tensions have been somewhat common over time, ageism intensified during the Covid-19 pandemic, and it negatively impacted aid responses to the pandemic.[34]

One of the presentations of ageism was by governments. Internationally, as in Canada, governments depicted age division as the major impediment to curbing Covid-19 cases and deaths. For instance, the British government proposed isolating all adults over seventy for a period of four months while all other ages live as normal.[35] Similarly, the Italian College of Anesthesia issued a statement suggesting the necessity of putting an age limit on intensive care resources.[36] Most countries directed the Covid-19 narrative as an "us-versus-them" issue, portraying seniors as a threat to society and younger generations as innocent bystanders.[37] These viewpoints see age as the sole criterion for worth and see seniors as a homogenous group.[38] Seniors, however, are not a homogeneous group and, like any other age group, have different

[33] *Ageism is a Global Challenge: UN*, WORLD HEALTH ORG. (Mar. 18, 2021) https://www.who.int/news/item/18-03-2021-ageism-is-a-global-challenge-un [hereinafter *WHO*].
[34] Liat Ayalon, *There is Nothing New Under the Sun: Ageism and International Tension in the Age of the COVID-19 Outbreak*, 32 INT'L PSYCHOGERIATRICS 1221, (2020).
[35] *Id.* at 1221.
[36] *Id.* at 1222.
[37] *Id.* at 1221.
[38] *Id.* at 1222.

amounts of comorbidities for diseases such as Covid-19. This ageist culture supported by governmental responses has tangible impacts on seniors' health and well-being, especially during the pandemic. There are several substantiated psychosocial implications that had direct medical impacts on seniors' health, well-being, and especially their autonomy.[39] In other words, these ageist views from governments and political groups have directly negatively affected seniors during the pandemic.

Another major presentation of ageism was, unsurprisingly, on social media. One study examined Twitter communications for a four-month period in 2020.[40] 11.5% of daily tweets implied that the lives of older adults were less valuable or that the pandemic was not as severe because it predominantly harmed seniors.[41] A category of tweets emerged renaming the pandemic things such as "boomer remover," "the election-year virus," and "the karma virus," all glorifying the death of seniors.[42] While words alone may seem somewhat harmless, ageist communications have been comprehensively linked to physical, cognitive, and mental harm to their victims.[43] Ageism on social media does not stop at mere words either. Young people engaged in and posted about "corona parties," disregarding public health measures, to celebrate the pandemic and purposefully spread the disease.[44] This contributed to, and very likely directly caused, avoidable deaths during the Covid-19 pandemic.[45]

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[39] Ayalon, *supra* note 34, at 1221.
[40] Xiaoling Xiang et al., *Modern Senicide in the Face of a Pandemic: An Examination of Public Discourse and Sentiment About Older Adults and COVID-19 Using Machine Learning*, 76 J. OF GERONTOLOGY: SOC. SCIS., 190-200 (Aug. 12, 2020).
[41] *Id.* at 193.
[42] *Id.* at 193.
[43] *Id.* at 190.
[44] *Id.* at 191.
[45] Xiang, *supra* note 40, at 198.

Ageism has another direct impact on Canada as it has been proven to impair the healthcare system. [46] Ageism negatively affects clinical decision-making and clinical outcomes in seniors.[47] In Canada, ageism leads to undertreatment, overtreatment, misinterpreting cognitive impairments as functional impairments, and patronizing doctoring.[48] Physicians often refuse to differentiate between age-related impairments and pathognomonic impairments, associating every ailment that seniors complain of with old age.[49] Ageism is also ever-present in patient-physician encounters, as Canadian seniors spend less time talking to their doctors than any other age group.[50] Even the short communications that seniors do have with medical professionals are often patronizing, which discourages truthful and accurate reporting of symptoms, and furthers the cycle of poor doctoring.[51] This phenomenon was certainly present in Covid-19 doctoring, as seniors who were concerned about being judged based on age did experience indifference from health care professionals and a lack of young adults' concern about their health.[52]

Given the ageist obstacles in Canadian society and more specifically in the medical field, it is no surprise that almost the entire Canadian response to the pandemic was riddled with ageism. LTC facilities, homes where Canadian seniors lived, were left in deplorable conditions.[53] A Quebecois LTC facility was almost completely abandoned, leaving 47 residents to die of

[46] Xiang, *supra* note 40, at 190-91.
[47] Xiang, *supra* note 40, at 191.
[48] Neel Mistry et al., *Perspectives on Ageism: Understanding and Combating Age Discrimination in Healthcare*, UNIV. OF OTTAWA J. OF MED., 24-27, at 24 (April 2021). Neel Mistry et al., *Perspectives on Ageism: Understanding and Combatting Age Discrimination in Healthcare*, 10 UNIV. OF OTTAWA J. OF MED. 24, 24-27 (2021).
[49] *Id.* at 25.
[50] *Id.* at 24.
[51] *Id.* at 25.
[52] Molly Maxfield et al., *Age-Based Healthcare Stereotype Threat During the COVID-19 Pandemic*, 64 J. OF GERONTOLOGICAL SOC. WORK 571, 571 (2020).
[53] *See* Estabrooks, *supra* note 1.

thirst, malnourishment, and neglect.[54] Internationally, mortality counts in LTC facilities were disregarded, leaving the greater public to see these deaths as unimportant or inevitable.[55] One Canadian city began a "vulnerable person registry", recommending all adults over 70 to sign up.[56] Other Canadian citizens were harassed for being on the streets, being told they should not be outside due to their age.[57] Scholars even called for selective lockdown of all older people so that the remaining public can live normally– an incredibly unjust proposal to completely restrict the liberties of older people merely on the basis of age.[58]

The issue of ageism in Canada needs to be addressed through major policy changes. The value of life is not age-dependent, and Canadian media, politics, and culture should not treat it as such. A starting place for Canada is to look to the World Health Organization (WHO). WHO suggests three major strategies to combat ageism: intergenerational activities to reduce prejudice, education to increase knowledge and empathy, and legal reform to protect the rights of seniors.[59] Canadian politicians and citizens should take this to heart. Tangible changes to promote these three broad strategies should be acknowledged and enacted at federal, provincial, and local levels of government.

One such change needs to be implemented in public health messages and communications. Such communications should be analyzed carefully to avoid ageist discrimination. Public health messages have been a common means of communication during the

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[54] Tu Thahn Ha, *Herron Long-Term Care Residents Died of Thirst, Malnourishment, Quebec Coroner's Inquest Told*, THE GLOBE & MAIL (Sept. 14, 2021), https://www.theglobeandmail.com/canada/article-herron-long-term-care-residents-died-of-thirst-malnourishment-quebec/.
[55] Sarah Fraser et al., *Ageism and COVID-19: What Does Our Society's Response Say About Us?*, 49 AGE & AGING 692, 693 (2020).
[56] Fraser, *supra* note 55.
[57] *Id.*
[58] Hayden P. Nix, *Canadian Perspective on Ageism and Selective Lockdown: A Response to Savulescu and Cameron*, 48 J. MED. ETHICS 268, 268 (2022).
[59] *WHO*, *supra* note 33.

Covid-19 pandemic[60] and could be used to reframe the pandemic from a "young vs. old" issue to a societal issue regardless of age.[61] Changing the portrayal of the disease would unify the Canadian response, changing not only how people think of Covid-19 and its future waves, but also how we allocate resources in our response.

In terms of ageism, another policy change needs to happen in the Canadian healthcare system. Ageism, emboldened by the Covid-19 pandemic, has shown its negative tangible effects on the country's healthcare system. It is no surprise that ageism is present in Canadian healthcare, given that geriatric specialists in Canada are outnumbered by pediatric specialists tenfold in the medical industry, despite the Canadian population of older adults outnumbering young children.[62] In a society that is only continuing to age, we need to invest more time, money, and resources in geriatric specialists.

One option for such change would be increased geriatric training for medical students and current primary care providers, and begin to shift the doctoring meta from making assumptions about senior patients to getting the whole picture and making an accurate assessment of patients. An effort at Queen's University School of Medicine in Ontario has already had promising success with their geriatric extra-curricular program.[63] If such efforts were taught across Canada, medical students and professionals would be better informed and less likely to engage in ageist medical practices. This would also implement a shift in the medical

[60] Fraser, *supra* note 55.
[61] *See also* Loredana Ivan et al., *Mitigating Visual Ageism in Digital Media: Designing for Dynamic Diversity to Enhance Communication Rights for Senior Citizens*, 10 SOC'YS 76 (2020) (discussing collaborative ways to create digital media content with seniors rather than for them, to minimize ageism).
[62] Leah Nemiroff, *We Can Do Better: Addressing Ageism Against Older Adults in Healthcare*, 35 HEALTHCARE MGMT. F. 118, 119 (2022).
[63] Nemiroff, *supra* note 62, at 120.

culture, which would decrease ageism transmissions through the role-model-based teachings dominant in the medical industry.

Another policy change is to forbid the use of age alone as a sufficient basis for resource allocation. During the pandemic, hospital administrators rationed services to make beds available for younger patients, and some even outright prevented older people from accessing health services.[64] However, many studies prove that age alone is not a sufficient basis for clinical outcomes.[65] Age is not the sole dictator of frailty and should not be the only reason you get a hospital bed or not. Permitting the use of age as a sole factor in resource allocation equates to abuse through neglect and is considered by some to amount to senicide.[66] Senicide is not only actively culling of populations of seniors, but also includes the abandonment of seniors to their death.[67] Turning seniors away from hospitals based solely on their age equates to abandonment, and may equate to elder abuse. Canadian health facilities should forbid this practice, just as they forbid turning away any other group of people who need their care based solely on a category they fall into. Practicing ageism in this way permits lethal neglect and negatively affects other seniors who see or hear about it.[68] This concept expands beyond just health care or resource allocation during a pandemic to inevitably affect seniors', and others', perceptions of politics, leadership, and other governmental processes.[69]

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[64] Tracey McDonald, *Lethal Ageism in the Shadow of Pandemic Response Tactics*, 69 INT'L. NURSING REV. 249, 251 (2021).
[65] McDonald, *supra* note 64.
[66] *See* Avery Haines, *One Year Later: Why Canada's COVID-19 Crisis is Being Called a 'Senicide'*, CTV NEWS (Mar. 6, 2021), https://www.ctvnews.ca/w5/one-year-later-why-canada-s-covid-19-crisis-is-being-called-a-senicide-1.5332262?cache=lbaijlxg.
[67] Haines, *supra* note 66.
[68] McDonald, *supra* note 64, at 252.
[69] McDonald, *supra* note 64, at 252.

Ageism has been ever-present in the Covid-19 pandemic, from governmental-level decisions to social media posts to doctoring. Addressing ageism in social, policy, and legal changes will benefit the country not only in future Covid-19 waves but also by making the country a more inclusive one.

Issue Two: Physical LTC Facilities

Another major issue with LTC facilities is the physical facilities themselves, specifically the old age of facilities. Studies showed that the old age of LTC facilities was a factor in increasing outbreak severity.[70] Most Canadian LTC facilities are set up in older buildings that were built from 1950 to 1990, and most of them are large, ranging from 200 to 400 residents.[71] To no surprise, 400-person buildings from 1950 are generally not built for the recommended two-meter physical distancing policies encouraged during the brunt of the Covid-19 pandemic. However, more recently built LTC facilities generally accommodate 80-120 residents and are designed for residents' social needs.[72] In Ontario, LTC facilities built after 1999 must follow even stricter standards with a maximum of 40 residents and a maximum room occupancy of two residents.[73] However, such facilities are few and far between in Canada as compared to their older, more dated counterparts.

As a result of the outdated facilities, overcrowding became a dominant issue for Canadian LTC facilities during the Covid-19 pandemic. While the chance of infection entering an LTC facility does not appear to be dependent on facility size, the spread and mortality rates do appear

[70] R. Vijh et al., *Factors Associated with Transmission of COVID-19 in Long-Term Care Facility Outbreaks*, 119 J. OF HOSP. INFECTION 118, 118 (2022).
[71] Estabrooks, *supra* note 1, at 665.
[72] Estabrooks, *supra* note 1, at 665.
[73] Kevin A. Brown et al., *Association Between Nursing Home Crowding and COVID-19 Infection and Mortality in Ontario, Canada*, 181 JAMA INT'L MED., 229, 231 (2021).

to have some correlation to facility size.[74] In an Ontario study, Covid-19 was found to have spread at a rate of 9.7% in "high-crowding" LTC facilities, defined as having rooms of two-to-four-person occupancy, compared to a rate of 4.5% in "low-crowding" LTC facilities, defined as mainly single-occupancy rooms.[75] Covid-19 was also found to have almost double the mortality rate in high-crowding LTC facilities versus low-crowding LTC facilities.[76] It is estimated that 19% of Covid-19 infections and 18% of LTC deaths could have been prevented if all 4-person rooms had been converted to double occupancy.[77] And if Canada had taken things a step further and converted all 4-person rooms to single occupancy rooms, a hypothesized 31% of infections could have been prevented and 30% of deaths prevented.[78]

The requisite change for LTC facilities here is evident: improved spaces. More socially distanced units is not the only improvement that LTC facilities should make to further curb communicable diseases. LTC facilities would benefit from private rooms, communication systems, enough space for in-house food preparation and in-house laundry, and staff rooms for changing from street clothes to reduce virus transmission.[79] Another way to improve the physical spaces of LTC facilities is to add accessible outdoor spaces. This would benefit residents during respiratory pandemics to reduce transmission of disease[80] and it would do good to residents generally as outdoor spaces are proven to benefit the mental health of seniors.[81] And in

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[74] *See Id.* at 229–36.
[75] *Id.* at 233.
[76] Brown, *supra* note 73, at 234.
[77] Allin, *supra* note 9, at 12.
[78] Allin, *supra* note 9, at 12.
[79] Pat Armstrong et al., *Re-Imagining Long-term Residential Care in the COVID-19 Crisis,* CAN. CTR. FOR POL'Y ALTS., 1, 12 (2020) https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2020/04/Reimagining%20residential%20care%20COVID%20crisis.pdf.
[80] *Id.*
[81] *See* Wu Zhifeng & Ren Yin, *The Influence of Greenspace Characteristics and Building Configuration on Depression in the Elderly*, 118 BLDG. AND ENV'T 107477 (2021).

preparation for future Covid waves or other pandemics, LTC facilities would greatly profit from extra space for surge capacity and convertible spaces for crises.[82]

It is important to note that a redesign of LTC facilities will require a balance of infection prevention, control considerations, the needs and wants of residents to create facilities that are not only safe, but worth living in.[83] One important theory for bettering physical LTC facilities in a post-Covid-19 world is to build facilities with a dementia-friendly design.[84] People with dementia account for over half of the global LTC residents.[85] The importance of well-designed facilities is quite real; poorly designed facilities reduce residents' visual clarity, increase fall risks, reduce sleep, increase neuropsychiatric symptoms, increase confusion, decrease memory, and increase mortality for people with dementia.[86] As such, experts have come up with eight "Universal Design guidelines" for creating an environment with a high quality of life for people with dementia in institutional care facilities: "1) participatory design; 2) familiar design; 3) personalization of design; 4) easy-to-interpret and calm environments; 5) safe and accessible outdoor spaces; 6) distinct spaces; 7) unobtrusive safety measures and technologies; and 8) good visual access."[87] Following these dementia-friendly design rules results in facilities that conveniently already have many Covid-19 safety measures: smaller facilities, consistent and specialized staff, private bedrooms and bathrooms for residents, temperature control and better ventilation to reduce temperature changes, reduced overall clutter, and accessible outdoor

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[82] *See* Armstrong, *supra* note 79.

[83] Amy Hsu, *Designing the Future of Long-Term Care and Retirement Homes*, ONT. HOSP. ASS'N, https://www.oha.com/news/designing-the-future-of-long-term-care-and-retirement-homes (last visited Apr. 14, 2024).

[84] *See* Nancy L. Olson & Benedict C. Albensi, *Dementia-Friendly "Design": Impact on COVID-19 Death Rates in Long-Term Care Facilities Around the World*, 81 J. OF ALZHEIMER'S DISEASE 427, 427–50 (2021).

[85] Olson & Albensi, *supra* note 84, at 429.

[86] Olson & Albensi, *supra* note 84, at 440.

[87] Olson & Albensi, *supra* note 84, at 441.

spaces.[88] Consequently, a dementia-friendly design not only improves residents' overall health but very likely would have decreased Covid-19 deaths and infections.[89]

Some have called for the complete removal of LTC facilities and their replacement with home care, but this likely is not a feasible option.[90] Assuming in the first place that the individual needing care has a home, a problematic assumption to begin with, many existing private homes are not accessible for providing care or for seniors to live in.[91] The time and cost to make every private home accessible would be prohibitive for the individual needing care and/or their family. Further, many individuals that go to LTC facilities require 24-hour skilled care, the staffing of which would likely be an impossible task given the severe understaffing of LTC facilities as it is.[92] Thus, while LTC facilities are far from perfect, calls for their eradication are too radical without a very dramatic change from the federal government calling for, and financially supporting, the deinstitutionalization of LTC facilities.

A dramatic change is needed in the physical infrastructure that we provide our LTC residents. Not only will this improve the quality of life and quality of care that residents receive, but it would have very likely saved lives in the Covid-19 pandemic.

Issue Three: For-Profit LTC Facilities and Funding

[88] Olson & Albensi, *supra* note 84, at 443–45.
[89] Olson & Albensi, *supra* note 84, at 445.
[90] Pat Armstrong & Hugh Armstrong, *Is There a Future for Nursing Homes in Canada?,* 35 HEALTHCARE MGMT. F., 17, 17 (2022).
[91] Armstrong & Armstrong, *supra* note 90.
[92] Armstrong & Armstrong, *supra* note 90, at 17–18.

The LTC structure of Canada is composed of a mixed welfare model made up of non-profit, for-profit, and government-run facilities.[93] The federal Canada Health Act defines LTC as an "extended service" and as such, it is neither covered by federal health insurance nor federally regulated.[94] Because LTC remains outside the federal jurisdiction, and provinces often do not spend adequate provincial resources on LTC facilities, many LTC facilities are subject to for-profit ownership.[95] Ontario has the largest amount of for-profit LTC facilities, with a total of 55% of homes being for-profit.[96] Further, Ontario's competitive bidding process favors large corporations as LTC owners.[97] There is nothing inherently wrong with for-profit facilities or large corporations owning them, however the execution and quality of care of for-profit facilities proves to be problematic.

Even before the Covid-19 outbreak, Canadian for-profit LTC facilities had many red flags. For-profit LTC facilities had significantly higher rates of mortality and hospital admission.[98] For-profit LTC facilities had documented lower levels and quality of staffing, and more complaints from both residents and family members.[99] Accordingly, it should come as no surprise that for-profit LTC facilities had a negative showing during the pandemic, performing worse than non-profit and government-run LTC facilities in terms of outbreak management.[100] A 2020 Ontario study showed that the Covid-19 case distribution was highest in for-profit facilities

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[93] Kristen Pue et al., *Does Profit Motive Matter? COVID-19 Prevention and Management in Ontario Long-Term-Care Homes*, CAN. PUB. POL'Y 421, 422 (2021) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9400825/pdf/cpp.2020-151.pdf.

[94] Béland & Marier, *supra* note 15, at 360.

[95] *See* Estabrooks et al., *supra* note 1, at 669.

[96] Pue, *supra* note 93, at 423.

[97] Armstrong et al., *supra* note 79, at 5-6.

[98] Peter Tanuseputro et al., *Hospitalization and Mortality Rates in Long-Term Care Facilities: Does For-Profit Status Matter?,* 16 J OF THE AM. MED. DIRS. ASSOC. 874, 874-83 (2015).

[99] Nathan M. Stall et al., *For-Profit Long-Term Care Homes and the Risk of COVID-19 Outbreaks and Resident Deaths,* 192 CAN. MED. ASSOC. J. E946-E955 (2020).

[100] Pue, *supra* note 93, at 421.

compared to non-profit and government-run LTC facilities; for-profit facilities had an infection rate of 85.1 per thousand among for-profit homes, while non-profit facilities had 64.1 per thousand, and government-run had a 23.4 per thousand infection rate.[101] The majority of Covid-19 *deaths* in Ontario LTC facilities occurred in for-profit LTC facilities as well.[102] This was mirrored by country-wide statistics, where government-run LTC facilities had better outbreak management than for-profit and non-profit LTC facilities.[103] It is interesting that while no category of LTC facility was successful at preventing outbreaks, government-run facilities were the most effective at minimizing deaths once an outbreak occurred.[104] Thus it can be concluded that in terms of Covid-19 management, for-profit LTC facilities performed noticeably worse than both non-profit and government-run LTC facilities.

Evidently, it seems that regardless of being in a pandemic or not, for-profit LTC facilities are proving to be problematic. There are two substantiated arguments as to why for-profit facilities provide such a low quality of care. The first argument is that the profit-seeking character of the facilities encourages providers to extract as much profit from them as possible.[105] Seeking the greatest possible profit often comes at the expense of the quality of the facility and the services provided. In context, for-profit LTC facilities often design their managerial processes to provide just enough labor in order to make the most profit, rather than providing the best care.[106] One of the ways for-profit LTC facilities do this is by providing fewer hours of care to each resident.[107] They do this even though daily hours of care are strongly

[101] Stall *supra* note 99 at E948.
[102] Tremain, *supra* note 4, at 19.
[103] Pue, *supra* note 93, at 434.
[104] Pue, *supra* note 93, at 434.
[105] Pue, *supra* note 93, at 425.
[106] Armstrong et al., *supra* note 79, at 6.
[107] Pue, *supra* note 93, at 425.

associated with quality of care and the presence of just one additional employee providing care has been proven to increase quality of care in LTC facilities.[108] Another way that for-profit LTC facilities stretch their profit is by paying their employees the lowest possible wages.[109] This forces employees to work multiple jobs in different LTC facilities and makes it impossible for them to stay home when sick with Covid-19.[110] Both of these factors not only further the spread of Covid-19 in LTC facilities but also make it more difficult to give a high quality of care in the few hours that each resident actually gets.

Solving this first prong of the for-profit issue here is somewhat obvious: if Canada is to permit for-profit LTC facilities, it must ensure that LTC employees are paid livable wages and are able to provide proper care to residents, including providing sufficient hours of care per day to create a high quality of life for residents. One way that this goal can be accomplished is if the rest of Canada adopts something similar to British Columbia's new policy. British Colombia's new policy first makes all LTC employees public employees, which increases their salaries to union rates, and requires LTC facilities to offer full-time work in a single facility.[111] If LTC employees had higher job security, they would be able to provide better care to residents and eventually lower residents' mortality and hospital admission rates.

The second substantiated argument as to why for-profit facilities provide such a low quality of care deals with cross-subsidization. In short, government-run and non-profit LTC facilities have access to cross-subsidization such as tax revenue and philanthropic donations, allowing them to effectively run at a net loss, which is something for-profit facilities cannot

[108] Veronique M. Boscart et al., *The Associations Between Staffing Hours and Quality of Care Indicators in Long-Term Care*, 18 BMC HEALTH SERVS RSCH. 750 (2018).
[109] Armstrong et al., *supra* note 79, at 6.
[110] Armstrong et al., *supra* note 79, at 6.
[111] Armstrong et al., *supra* note 79, at 9.

do.[112] More research is needed to understand how cross-subsidization actually affects each type of LTC facility, but the result potentially deals more with the distinction between non-profit and government-run rather than for-profit and non-profit LTC facilities, so I will not discuss it in further detail here.[113]

Furthering the problem of for-profit LTC facilities and care is another shameful reality: the for-profit LTC facilities are not providing the care for which the residents pay. In British Columbia, for-profit LTC facilities failed to deliver 207,000 hours of direct care to residents that they were funded for.[114] This is not to say that non-profit and government-run LTC facilities were providing adequate care hours either. Over two-thirds of publicly funded LTC facilities in British Columbia failed to meet the minimum provincial guideline of 3.36 hours of direct resident care per day.[115] This provincial standard, and the Canadian average standard of 3.30 hours, is dramatically lower than the minimum 4.1 hours of care recommended for high quality of life and care.[116] In environments like Canadian LTC facilities where residents receive an amount of care so far below their standards, and even further below a high quality-of-care standard, basic care duties are prioritized while emotional and social care duties are deemed non-essential and go ignored. LTC residents are owed at a minimum the care that they pay for and in a perfect world, a high quality of life regardless of how much they pay.

To resolve this issue of care hours, LTC facilities, either at an independent level or a provincial level, ought to set minimum hours of care for a high quality of life for their residents

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[112] Pue, *supra* note 93, at 435.
[113] Pue, *supra* note 93, at 435.
[114] OFF. OF THE SENIORS ADVOC., A BILLION REASONS TO CARE: A FUNDING REVIEW OF CONTRACTED LONG-TERM CARE IN B.C. 33 (2020).
[115] Nicole Molinari, *Seniors' Long-Term Care in Canada: A Continuum of Soft to Brutal Privatisation*, 55 ANTIPODE, 1089, 1092, (2021).
[116] Molinari, *supra* note 115, at 1092; Estabrooks, *supra* note 1, at 664.

and actually fulfill these hours. This likely would again involve hiring more staff and paying them livable wages so that they can provide the best care for residents.

The presence of under-provided hours is not the only issue that plagues Canadian LTC facilities– over-provided hours present an issue as well. By over-provided hours, I mean hours of care provided through unpaid labor. Employers across funding types of LTC facilities use emotional manipulation to procure unpaid work hours.[117] This is easily done by employers in a field where employees enter because they actually care about the work, and stay because of the bonds they make with residents. This issue is compounded by the preponderance of LTC employees being women and immigrants, two categories of people historically exploited for labor.[118] The solution for this is simple– pay people for the hours they work at the jobs they are hired to work for. Unwaged labor leads to unethical circumstances and the burnout of employees who care about the work so much that they do the work for free.

Another issue with LTC funding is the lack of a national organization and the lack of a whole-system approach. LTC is a national effort and involves connecting with all other aspects of continuing care including community programs, home care, assisted living, medical care, rehabilitative care, and senior housing programs.[119] Many such continuing care programs and institutions are already federally subsidized. A more unified whole-system approach would also create integration across the community, continuing care, and acute care sectors, increasing communication across each sector and reducing the transmission of communicable diseases such as Covid-19.[120] National organization and increased funding, especially funding from a national

[117] Molinari, *supra* note 115, at 1091.
[118] Molinari, *supra* note 115, at 1092; Naomi Lightman, *Caring During the COVID-19 Crisis: Intersectional Exclusion of Immigrant Women Health Care Aides in Canadian Long-Term Care*, 30 HEALTH AND SOC. CARE, e1343 (July 2022).
[119] Estabrooks et al., *supra* note 1, at 663.
[120] Estabrooks et al., *supra* note 1, at 665.

level, would help provinces stabilize their ability to finance LTC health care costs, an increasingly difficult task in the current environment of accelerated population aging.[121]

Many issues with for-profit LTC facilities exist, but it does not mean other LTC facilities are flawless. Policy changes regarding care hours and integration across health care systems are needed across all profit-structure types.

Issue Four: Employee Regulation

Another issue with LTC facilities is the lack of regulation around the majority of LTC employees. The dominant staffing model for LTC caregiving is to employ a combination of registered nurses, licensed practical nurses, care aides, personal support workers, orderlies, and nurse assistants.[122] Registered and licensenced practical nurses are the only regulated categories. Care aides, personal support workers, orderlies, and nurse assistants are unregulated, and provide upwards of 90% of direct resident care.[123] For ease of reference, I will refer to these four unregulated categories as personal care workers. Since they are unregulated, personal care workers receive variable, if any, formal education, which endangers both the employees and the residents, especially since they are often short-staffed. Most personal care workers are hired only part-time so that management can avoid paying them benefits. And further, personal care workers rarely, if ever, get to engage in decision-making about resident care.[124]

The lack of regulation inevitably harms both the unregulated personal care workers and the LTC residents receiving care. It harms personal care workers by putting them at high risk for

[121] Béland and Marier, *supra* note 15, at 359.
[122] Estabrooks et al., *supra* note 1, at 660.
[123] Estabrooks et al. , *supra* note 1, at 661.
[124] Estabrooks et al., *supra* note 1, at 661-62.

job dissatisfaction, burnout, and other negative mental and physical health consequences.[125] LTC personal care workers reported high rates of staff turnover, staff burnout, compassion fatigue, and great moral distress during the Covid-19 pandemic.[126] The lack of regulation likewise harms LTC facility residents because it inevitably means that they receive inconsistent and often inadequate care.

The issue of unregulated staff is not something that the Covid-19 pandemic created, but it is something the Covid-19 pandemic worsened. Personal care workers in Ontario ended up accounting for the brunt of Covid-19 illnesses and death among LTC facility staff in Ontario.[127] However, the pandemic also shifted media perception of personal care workers, and exposed the precariousness and hazardousness of their work.[128]

Interviews with Albertan healthcare workers elucidated the reality of personal care work during Covid-19.[129] The four main themes that arose from interviews were: the steep financial costs to healthcare workers, the increased physical and mental demands put on healthcare aides, institutional mismanagement, and a desperate need for healthcare aides to voice their opinions in LTC government decision-making.[130] The Albertan study concluded with recommendations including pay raises, paid sick days, legislated staff ratios, unionization, and health benefits.[131] The interviews with Albertan healthcare workers exemplified the lack of regulation, and suggested how regulations would benefit the industry.

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[125] Estabrooks et al., *supra* note 1, at 661.
[126] Britney J. Glowinski et al., *The Canadian Long-Term Care Sector Collapse from COVID-19: Innovations to Support People in the Workforce,* 25 HEALTHCARE Q. 26, 29 (2022).
[127] Husayn Marani et al., *The Impact of COVID19 on the Organization of Personal Support Work in Ontario Canada*, J. OF LONG-TERM CARE 383, 284 (2021).
[128] *Id.* at 288.
[129] NAOMI LIGHTMAN ET AL., CALGARY IMMIGRANT WOMEN'S ASSOC. AND PARKLAND INST., MORE THAN "JUST A HEALTH-CARE AIDE" IMMIGRANT WOMEN SPEAK ABOUT THE COVID-19 CRISI IN LONG-TERM CARE 2 (2021).
[130] *Id.* at 9.
[131] *Id.* at 33-38.

Let us briefly contrast the Canadian situation with Denmark to illustrate the importance of employee regulation. Denmark was quite successful in its Covid-19 response in its LTC facilities, having low LTC Covid-19 deaths compared to other countries who are a part of the Organisation for Economic Co-operation and Development (OECD).[132] In Denmark, 81% of care workers have formal training in care provision.[133] Denmark also has many quality controls in its LTC facilities to maintain their governmental regulations.[134] The Danish LTC system is a prime example of how regulation works effectively in LTC facilities, and is something Canadian policymakers should consider when drafting their own policy recommendations.

Another category of unregulated Canadian LTC care workers affects residents and should not go unchecked– indirect care workers. Indirect care workers include housekeeping, laundry, dietary, security, and service staff. These professions are unregulated even though they contribute greatly to infection control of facilities and the quality-of-care residents receive.[135] Not only are they often fragmented from the rest of the staff, or even outsourced completely, they are generally not trained in health services and do not know about proper infection control measures for LTC facilities.[136] Certainly, solving this issue would involve better communication with the entire staff of LTC facilities, especially concerning infection control measures. A potential solution to this issue is also linked to improvements needed in physical LTC facilities. When rebuilding or renovating facilities, designers should consider the benefits of having

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[132] Edgardo R. Sepulveda et al., *A Comparison of COVID-19 Mortality Rates Among Long-Term Care Residents in 12 OECD Countries,* J. AM. MED. DIRS. ASSOC., 1572 (2020).
[133] Mary Daly et al., *COVID-19 and Policies for Care Homes in the First Wave of the Pandemic in European Welfare States: Too Little, Too Late?*, J. OF EUR. SOC. POL'Y, 48, 55 (2022).
[134] *Id.*
[135] Estabrooks et al., *supra* note 1, at 662.
[136] Armstrong et al., *supra* note 79, at 6.

housekeeping, laundry, and kitchen services on-site, and how that could contribute to infection control.

The requisite policy change here is large, but simple. Regulations concerning staff education, quality of care, and quality of life are necessary for acceptable and consistent LTC facilities. More specifically, care aides, personal support workers, orderlies, and nurse assistants, which again provide 90% of direct resident care,[137] should be treated as semi-professionals instead of non-skilled workers. Semi-professionalism status would allow for the clarification of job training requirements, responsibilities, and wages.[138] This would increase consistency across LTC facilities, as well as benefit employees themselves. Semi-professionalism would likely be marked by two main factors. First, a minimum standard of education should exist.[139] This education should be accessible, and should consider that most care aides are immigrants, many of whom work more than one job.[140] Second, in gaining semi-professional status, self-imposed or government regulations concerning ethical standards and general standards of practice should be written and enforced.[141]

Semi-professional status would also naturally lead to further regulations to give personal care workers full-time positions with proper benefits and salaries.[142] In their current non-skilled job designation, personal support workers are the lowest-paid health workers, often making only

[137] Estabrooks et al., *supra* note 1, at 661.
[138] Marani et al., *supra* note 127.
[139] Marani et al., *supra* note 127.
[140] Estabrooks et al., *supra* note 1, at 661.
[141] Marani et al., *supra* note 127.
[142] *See* Marani et al., *supra* note 127.

minimum wage.[143] Increasing the salary and benefits of care aides would also decrease the spread of infection caused by care aides working in multiple LTC facilities at the same time.[144]

The lack of regulation of Canadian LTC healthcare workers impacts the care residents receive, as well as employee wellbeing.[145] Personal care workers, who were the LTC employees hit hardest by the Covid-19 pandemic,[146] should receive a change in professional status to better provide for residents and be better protected by the law.

Conclusion

We have explored some of the major shortfalls of Canadian LTC facilities in the context of Covid-19. In terms of pervasive ageism, policy considerations have been suggested, including the careful analysis of future public health messages, increasing specialized geriatric training for medical professionals, and forbidding the use of age alone as a basis for medical decisions or resource allocation. In terms of physical facilities, policy considerations suggested in this note include renovating and modernizing facilities, and using a dementia-friendly design to create accessible facilities that take into account virus transmission and quality of life. For dealing with the issue of for-profit LTC structure, proposed policy considerations include requiring LTC employees to be paid livable wages so that they can provide care safely, and enforcing minimum hours of daily care for all residents to receive a high quality of life. Finally, in dealing with unregulated LTC employees, recommended policy considerations have been introduced,

[143] Marani et al., *supra* note 127.
[144] *Id.*
[145] *See* Lightman et al., *supra* note 129.
[146] Lightman et al., *supra* note 129.

including the improvement of on-site facilities such as laundry and kitchen services and the semi-professionalization of care aides and personal support workers.

The shortcomings elucidated in this paper only scratch the surface of decades of scholarly research that has been done on Canadian LTC facilities. However, it is my hope that the publicity around the deplorable conditions that Canadian LTC residents faced during the pandemic will be used to jump-start much-needed changes to improve the LTC system in Canada.

A LITTLE QUIET NEVER HURT NOBODY: THE USE AND EFFECTS OF SOLITARY CONFINEMENT ON CHILDREN AND LGBTQ PERSONS IN IRISH PRISONS

Sydney Krause[1]*

ABSTRACT

This Note analyzes solitary confinement in the Irish context, focusing on the devastating impact of penal isolation on two especially vulnerable groups – children and the LGBTQIA+ community. Despite numerous laws in place to protect these groups and constrain, if not outright ban, solitary confinement in Ireland, the practice is alive and well under the restricted regime system. This Note reviews the guaranteed rights of LBGTQIA+ persons, children, and prisoners and discusses how the restricted regime system circumvents international and domestic policies against solitary confinement.

This Note examines solitary confinement from a historical perspective, considering the political, sociological, and legal development of the Irish penal system. It also explores the debilitative effects solitary confinement has on prisoner health, reintegration, and in-prison behavior. Finally, this Note will discuss international standards on solitary confinement and provide recommendations to bring current prison policy more in line with Irish law and international norms.

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I. INTRODUCTION

Solitary confinement has been a common practice across the world since at least the late eighteenth century to punish the prison population and encourage penance.[2] Although known by many names – isolation, special housing, disciplinary segregation, supermax, etc. – the practice is consistent across jurisdictions.[3] Solitary confinement consists of strict isolation to a cell for the overwhelming majority of the day.[4] Some prisoners are confined for twenty-three hours a day.[5]

Regardless of its name, the isolation diminishes prisoners' social capacity and likely contributes to recidivism.[6] More importantly, isolation often wreaks irreversible damage on the physical and mental well-being of prisoners.[7] Based on its debilitating effects, the practice has been consistently rebuked as a violation of human rights and has even been compared to torture.[8] Research on the effects of solitary confinement has primarily focused on people with mental health concerns, however the effects are equally troubling for LGBTQIA+ individuals and

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[2] *See* Mariposa McCall, MD, *Health & Solidarity Confinement: History & Background*, PSYCHIATRIC TIMES (Mar. 9, 2022), https://www.psychiatrictimes.com/view/health-and-solitary-confinement-history-and-background.

[3] ALISON SHAMES, ET AL., VERA INST. OF JUST.: CTR ON SENT'G & CORR., SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 2 (2015) https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf.

[4] *Id.*

[5] *Id.*

[6] Atul Gawande, *Hellhole – The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, THE NEW YORKER (Mar. 30, 2009), https://www.newyorker.com/magazine/2009/03/30/hellhole

[7] AGNIESZKA MARTYNOWICZ & LINDA MOORE, BEHIND THE DOOR: SOLITARY CONFINEMENT IN THE IRISH PENAL SYSTEM 6 (IRISH PENAL REFORM TR., 2018) at 17 https://www.iprt.ie/site/assets/files/6439/solitary_confinement_web.pdf; James Dean, *Short stays in solitary can increase recidivism, unemployment*, CORNELL CHRONICLE (16 Jun. 2020) (citing Christopher Wildeman and Lars Højsgaard Andersen, *Long-term consequences of being placed in disciplinary segregation*, 58 CRIMINOLOGY 3 (Mar. 12, 2020) https://doi.org/10.1111/1745-9125.12241

[8] *See* Press Release, United Nations Hum. Rts. Off. of the High Comm'r, UN Special Rapporteur on Torture Calls for the Prohibition of Solitary Confinement, U.N. Press Release (Oct. 18, 2011).

children.[9] These groups are generally more likely to experience trauma in their lifetime than others and, as such, are far more likely to be retraumatized and permanently impacted by social isolation.[10]

In Ireland, solitary confinement is primarily used to control and discipline disruptive inmates or protect those under threat within prison walls under the "restricted regime" system.[11] While the government has taken steps to eliminate solitary confinement, the practice is still widely used, especially to quell prison overcrowding and violence.[12] Ireland currently maintains a prison population of roughly 4,500 across twelve penal institutions.[13] In January of 2022, nearly twenty-five percent of those inmates were subjected to some form of solitary confinement.[14]

II. THE LAW OF THE LAND

A BRIEF HISTORY OF THE IRISH PENAL SYSTEM

[9] *See* Mariposa McCall, MD, *Health & Solitary Confinement: Issues and Impact*, PSYCHIATRIC TIMES (Mar. 16, 2022), https://www.psychiatrictimes.com/view/health-and-solitary-confinement-issues-and-impact; *see* MARTYNOWICZ & MOORE, *supra* note 7.

[10] *See* MARTYNOWICZ & MOORE, *supra* note 7 at 18; Jake Lowry, *Study Finds LGBQ People Report Higher Rates of Adverse Childhood Experiences Than Straight People, Worse Mental Health as Adults*, Vanderbilt Med. Univ. Rep. (Feb. 24, 2022, 9:16 AM), https://news.vumc.org/2022/02/24/study-finds-lgbq-people-report-higher-rates-of-adverse-childhood-experiences-than-straight-people-worse-mental-health-as-adults/; *see* Catriona O'Toole, *Trauma-Informed Approaches in Education*, Maynooth Univ. Dept. of Educ. (Dec. 13, 2022, 2:45 PM) https://www.maynoothuniversity.ie/education/news/trauma-informed-approaches-education.

[11] *See* MARTYNOWICZ & MOORE, *supra* note 7.

[12] *See* Niall McCracken, *Dozens of Irish Prisoners Held in Solitary Confinement*, IRISH TIMES (Oct. 24, 2016) https://www.irishtimes.com/news/crime-and-law/dozens-of-irish-prisoners-held-in-solitary-confinement-1.2840394 ; *Protection Prisoners on 23 hour lock up regime*, IRISH PENAL REFORM TR. [Press Release] (10 Oct. 2010), https://www.iprt.ie/latest-news/protection-prisoners-on-23-hour-lock-up-regime/ .

[13] WORLD PRISON BRIEF, INSTITUTE FOR CRIME & JUSTICE POLICY RESEARCH, REPUBLIC OF IRELAND https://www.prisonstudies.org/country/ireland-republic; *Prison Facilities in Ireland – Facts and Figures*, IRISH PENAL REFORM TR. (2022) https://www.iprt.ie/prison-facts-2/

[14] *See Census of Restricted Regime Prisoners January 2022*, IRISH PRISONS, p. 1 https://www.irishprisons.ie/wp-content/uploads/documents_pdf/January-2022-Restriction.pdf; *see also Prison Census Reports January 2022*, IRISH PENAL REFORM TR. (Mar. 2, 2022), https://www.iprt.ie/latest-news/prison-census-reports-january-2022/.

The Republic of Ireland became a free state under the Anglo-Irish Treaty of 1921.[15] It was a hard-fought independence rooted in religious and political conflict with England and battled out in the streets.[16] However, despite Ireland's keen desire to divorce itself from all things Anglican, the provisional government was slow to make any changes to the sociopolitical systems it inherited.[17] The state integrated small welfarist reforms but the only things that really changed were the "badges on the warders' caps."[18] The 1947 Prison Rules was one of the most groundbreaking prison reforms of the mid-twentieth century, which provided a basis for day-to-day prison regulation and inmate rights.[19] However, the Irish Civil War quickly brought any other planned reforms to a screeching halt. Although many political prisoners were released upon the creation of the Irish Free State, many more were detained in attempts to curb IRA power and violence.[20] Further, with Irish independence on the line, prison safety was put on the backburner and inadequate living conditions and overcrowding quickly became the hallmark of the Irish prison system into the twenty-first century.[21]

By the 1960s, a desire for progressive reform returned to the halls of the *Oireachtas*, Irish Parliament. At that time, the Criminal Justice Act of 1960 provided that youthful offenders were to be detained in remand centers rather than adult prisons and outlined regulations for temporary

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[15] David Torrence, *The Anglo-Irish Treaty, 1921*, UK PARLIAMENT: HOUSE OF COMMONS LIBR. (Dec. 5, 2021) https://commonslibrary.parliament.uk/research-briefings/cbp-9260/

[16] MARY ROGAN, PRISON POL'Y IN IRELAND: POLITICS, PENAL-WELFARISM AND POL. IMPRISONMENT (2011) https://doi-org.libezproxy2.syr.edu/10.4324/9780203828885.

[17] Keith Adams and Louise Brangan, *How I(reland) Learned to Stop Worrying and Love the Prison,* JCFC – PENAL REFORM (Jan. 21, 2022) https://www.jcfj.ie/article/how-ireland-learned-to-stop-worrying-and-love-the-prison/; *see* ROGAN, *supra* note 16, at 21-22

[18] ROGAN, *supra* note 16, at 22 (citing Brendan Behan, THE QUARE FELLOW: A COMEDY DRAMA 14 (1956)).

[19] Adams and Brangan, *supra* note 16; *see* Rules for the Government of Prisons, (1947 S.I No. 230/1947) (Ir.) https://www.irishstatutebook.ie/eli/1947/sro/320/made/en/print.

[20] Adams and Brangan, *supra* note 17.

[21] ROGAN, *supra* note 16, at 22.

release.[22] A special parliamentary committee also recommended that welfare officers be installed in the prison system and placed greater emphasis on prisoner access to vocational training.[23] Further, the Irish welfare state, which advocated for better healthcare and social policy, began to take hold and citizens grew less wary of government intervention.[24] However, the Irish public knew very little about the lives and treatment of prisoners, and the government consistently issued out of date reports on prison conditions.[25] Overcrowding remained a critical issue and, by the 1990s, plans to expand the prison system became popular.[26]

The 1990s also saw an increasing awareness of suicide and mental health crisis in prisons and, conversely, an increasingly crime-wary public.[27] As a result, the drive to increase prisons cells in Ireland skyrocketed despite a definite lack in concrete legislation to do so.[28] The Irish Prison Service (IPS) was established to more efficiently carry out prison policy developed by the Department of Justice, although there was still little public knowledge of what occurred within prison walls and poor reporting of overcrowding and casualties.[29] This theme was carried into the twenty-first century, which saw the use of "doubling up" as policy rather than a consequence of overcrowding, a practice that is still used today.[30] Irish prisons traditionally allotted one cell

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[22] *See* ROGAN, *supra* note 16, at 91-93.

[23] ROGAN, *supra* note 16, at 101, 104.

[24] ROGAN, *supra* note 16, at 123.

[25] Cormac Behan, *Putting Penal Reform on the Map: Prisoners' Rights Movements and Penal History*, 21 CHAMP PÉNAL/PENAL FIELD (Dec. 2020) https://doi.org/10.4000/champpenal.12086 (citing Mary Rogan, *Rehabilitation, Research, and Reform: Prison Policy in Ireland*, 6 IRISH PROBATION J. 6, 23 (2012) https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1030&context=aaschlawart).

[26] *See IPRT Briefing on Overcrowding in Irish Prisons*, IRISH PENAL REFORM TR. (Oct. 2011) https://www.iprt.ie/site/assets/files/6260/iprt_briefing_on_overcrowding_oct_2011.pdf.

[27] ROGAN, *supra* note 16, at 179.

[28] ROGAN, *supra* note 16, at 179, 193.

[29] *See* ROGAN, *supra* note 16, at 185-86; *see Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 2015 O.J. (CPT/Inf (2020) 37) 19, 25 [hereinafter, CPT Report]; *see* Adams and Brangan, *supra* note 16.

[30] Cormac O'Keefe, *Two prison units opened and 100 cells doubled up to tackle overcrowding*, THE IRISH EXAMINER (May 02, 2019, 7:07 PM) https://www.irishexaminer.com/news/arid-30921697.html; *Doubling up in*

per inmate, with little use of roommates.[31] In fact, the practice was illegal through the early 1980s.[32] However, it became more popular as prison populations rose.[33] Human rights activists took issue with the increasing use of doubling up, since essentially doubling prison capacity severely diminished allocation of education, health, and vocational services.[34]

By the early 2000s, prison policy reflected a desire to prepare inmates for reintegration following release with a focus on job and vocational training despite strained resources.[35] Overcrowding was still a critical issue, just as it had been for several decades. Despite a drive to return to single cell accommodation, approximately fifty-four percent of inmates shared a cell in 2014, and thirty-seven percent had to use the toilet in the presence of others.[36] However, greater prison reform, or at least greater clarity of penal rules and regulations, arose from the 2007 Prisons Act ("Act").[37] The Act was a landmark bill that outlined prisoner rights and entitlements, day-to-day prison operations, and disciplinary procedure.[38] Section 35 permits the creation of new prison rules.[39] The Act also established the Office of the Inspector of Prisons, whose main duty is to ensure the prison system adheres to Irish and international standards for prisoner health

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cells is an ineffective and short-term response to overcrowding, IRISH PENAL REFORM TR. TR. (May 3, 2019) https://www.iprt.ie/latest-news/doubling-up-in-cells-is-an-ineffective-and-short-term-response-to-overcrowding/; ROGAN, *supra* note 16, at 193.

[31] *See* ROGAN, *supra* note 16, at 202.

[32] *See* ROGAN, *supra* note 16, at 202.

[33] *See* ROGAN, *supra* note 16, at 202-04.

[34] Sinead O'Carroll, *Number of Prisoners Sharing Cells in Irish Jails is 'worrying',* THE J. (Dec. 31, 2013, 7:00 AM), https://www.thejournal.ie/prison-cells-doubling-up-1233518-Dec2013/.

[35] ROGAN, *supra* note 16 at 196, 198.

[36] *See* NICOLA CARR, ET. AL., OUT ON THE INSIDE: THE RIGHTS, EXPERIENCES, AND NEEDS OF LGBT PEOPLE IN PRISON, IRISH PENAL REFORM TR. 7 (2016) https://www.iprt.ie/site/assets/files/6369/iprt_out_on_the_inside_2016_embargo_to_1030_feb_02_2016.pdf.

[37] Prisons Act, 2007 (Act. No. 10/2007) (Ir.). (Revised Feb. 2016) https://www.irishstatutebook.ie/eli/2007/act/10/enacted/en/html. The Prisons Act was updated and revised on 11 Feb. 2016. The 2016 version is the document referenced by this note, even when refering or citing to the 2007 Prisons Act.

[38] *Id.*

[39] *Id.* § 35.

and welfare, facility conditions, and security and discipline.[40] The Inspector writes reports on human rights concerns including healthcare and prisoner complaints.[41] However, the Prison Service's investigations and reports of prison death and inmate complaints have consistently been critiqued.[42]

The Act also allowed for the expansion of current and construction of new prisons, however, this section of the Act has not been used yet. At present, there are twelve penal institutions in Ireland – ten traditional "closed" prisons and two "open" centers, which are low-security detentions centers with a "pattern of administration…based on trust, tolerance, truth and totality." [43] Open centers are generally focused on reintegration and provide inmates a greater sense of freedom, such as giving them keys to their rooms.[44] There are currently no open prisons for female prisoners despite recommendation for their creation as early as 1985.[45] Further, the open prison population only accounts for approximately six percent of the total incarcerated prison population.[46] The limited use of open prisons creates disparity among prisoners because it focuses reintegration services on a select few prisoners rather than offering these services, which

[40] *Id.* § 32(2).

[41] IRISH COUNCIL FOR CIV. LIBERTIES AND IRISH PENAL REFORM TR., KNOW YOUR RIGHTS: YOUR RIGHTS AS A PRISONER (2nd ed. 2020) https://www.iprt.ie/site/assets/files/6868/know_your_rights_-_your_rights_as_a_prisoner_plain_english-2.pdf at 2.

[42] Claire Hamilton, *Crime, Justice and Criminology in the Republic of Ireland*, 20 EUR. J. OF CRIMINOLOGY 1597, 1597-1620 (2023); *see also* Agnieszka Martynowicz, *Oversight of Prison Conditions and Investigations of Deaths in Custody: International Human Rights Standards and the Practice in Ireland,* 91 PRISON SERV. J. 81, 81–102 (2011) (cited by AGNIESZKA MARTYNOWICZ & LINDA MOORE, BEHIND THE DOOR: SOLITARY CONFINEMENT IN THE IRISH PENAL SYSTEM (2018)).

[43] *Open Prisons*, IRISH PENAL REFORM TR. (Apr. 5, 2017), https://www.iprt.ie/reintegration-of-offenders/open-prisons (citing Shubra Ghosh, OPEN PRISONS AND THE INMATES: A SOCIO-PSYCHOLOGICAL STUDY, 9, (1992))

[44] *Id.*

[45] *Id.*

[46] *Id.*

are proven to reduce recidivism, to the entire population.[47] Access to educational, vocational, and even health services is also diminished by the unprecedented levels of overcrowding afflicting Irish prisons.[48]

The number of incarcerated individuals has exceeded the number of beds available, resulting in a 103 percent total capacity.[49] Certain prisons experience more dire overcrowding than others. Limerick prison, for example, was at 164 percent capacity as of February 2023.[50] While prison overcrowding has been an issue for decades in Ireland, incarceration rates have traditionally been low, compared to other countries.[51] In 1970, 750 people were imprisoned; by 2000, the number increased to 2,948.[52] However, the current number (4,500)[53] reflects that the prison population has increased by more than one hundred fifty percent in the last two decades. This strain on the system makes it not only more difficult for prisoners to be properly prepared for post-release life, but also increases the likelihood that their rights will be violated.[54]

FUNDAMENTAL RIGHTS

[47] *See id.; see Benefits of Prison Education*, NW. PRISON EDUC. PROGRAM (2023) https://sites.northwestern.edu/npep/benefits-of-prison-education/; *see also Reintegration of Offenders*, IRISH PENAL REFORM TR. https://www.iprt.ie/reintegration-of-offenders/page5 (last visited Nov. 1, 2023).

[48] *See IPRT Voices Grave Concern about Prison Overcrowding as Bed Capacity Reaches 100% Across Prison Estate,* IRISH PENAL REFORM TR. (Feb. 3, 2023), https://www.iprt.ie/latest-news/iprt-voices-grave-concern-about-prison-overcrowding-as-bed-capacity-reaches-100-across-prison-estate/.

[49] *Prisoner Population on Thursday 16th March 2023*, IRISH PRISON SERV. https://www.irishprisons.ie/wp-content/uploads/documents_pdf/16-March-2023.pdf (last visited Nov. 1, 2023).

[50] *Prison Population Exceeds Number of Available beds*, L. SOC'Y GAZETTE IR. (Feb. 3, 2023), https://www.lawsociety.ie/gazette/top-stories/2023/february/prison-population-exceeds-number-of-available-beds.

[51] *See* Behan, *supra* note 25; Ian O'Donnell, et al., *Recidivism in the Republic of Ireland*, CRIMINOLOGY & CRIM. JUST. 123, 126 (2008).

[52] L. SOC'Y GAZETTE IR., *supra* note 50.

[53] *See* WORLD PRISON BRIEF, *supra* note 13.

[54] *See* Jessica Bullock, *Growing Concern for Prison Overcrowding Among Human Rights Bodies*, PENAL REFORM INT'L (Jun. 7, 2017), https://www.penalreform.org/blog/growing-concern-for-prison-overcrowding-among-human-rights/.

The Irish Constitution, *Bunreacht na hÉireann*, which holds "all citizens shall, as human persons, be held equal before the law" was ratified in 1937, and established the Irish government, court system, and fundamental rights of Irish citizens.[55] However, the Constitution stresses that equality before the law does not necessarily guarantee equal treatment across those with physical, moral, or social divides.[56] The Constitution is part of a broader "human rights framework," which includes all human rights commitments made by Ireland, such as United Nations treaties, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union.[57]

Article 15.4 is considered one of the most important components of the Constitution because it prohibits the *Oireachtas* from enacting laws considered repugnant to, or in conflict with, the Constitution.[58] Articles 40 through 44 detail fundamental rights, including equality under the law, freedom of speech, religion and expression, and freedom of association.[59] The right to bodily integrity is an unenumerated right under Article 40.3.1 that emphasizes personal autonomy, self-ownership, and self-determination. This right was recognized in *Ryan v. Attorney General* (1965) and carries with it the right to not be subjected to torture, inhumane, or degrading treatment.[60]

LGBTQIA+ Persons[61]

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[55] BUNREACHT NA HEIREANN [CONSTITUTION] Jul. 1, 1937 (Ir.); *The Irish Constitution*, CITIZENS INFO. BD. (Ir.) (Apr. 4, 2023) https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitution_introduction.htm [hereinafter, Irish Constitution].

[56] Irish Constitution, *supra* note 55; *Fundamental Rights Under the Irish Constitution,* CITIZENS INFO. BD. (Ir.) https://www.citizensinformation.ie/en/government-in-ireland/irish-constitution-1/constitution-fundamental-rights/ (last updated May 6, 2022)

[57] Irish Constitution, *supra* note 55.

[58] CITIZENS INFO. BD., *supra* note 55.

[59] CITIZENS INFO. BD, *supra* note 55

[60] *Id.; Ryan v. Att'y Gen.* [1965] IR 294 (Ir.).

[61] Hereinafter referred to as LGBTQ.

The original 1937 Constitution was heavily rooted in Catholic social and moral philosophies, the dominant beliefs held by Irish citizens at the time.[62] Common practices such as access to contraception or divorce were barred until the 1980s and 1990s.[63] Abortion was constitutionally banned until 1983 and remained heavily restricted until Irish voters chose to repeal the Eighth Amendment in 2018.[64] Likewise, homophobic legislation dates to at least 1861, with the Offences Against the Persons Act, persisting well into the early 1990s.[65] The 1993 passage of Criminal Law (Sexual Offences) decriminalized homosexuality following a successful suit brought by Senator David Norris before the European Court of Human Rights in 1988.[66] Although homosexuality itself was not a crime, Irish law "allow[ed] for the prosecution of consenting adults engaging in homosexual acts in private," a violation of Article 8 of the European Convention on Human Rights.[67] Ireland was one of the last countries in Western Europe to decriminalize homosexuality.[68] However, progress in furthering LGBTQ rights in Ireland gained momentum soon after.

Over the past thirty years, Ireland has seen several positive steps in LGBTQ legislation, including the Employment Equality Act (1998), the Equal Status Act (2000), and the Irish

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[62] *See* Theresa Reidy, *Same-Sex Marriage and the Liberal Transformation of Ireland*, GEORGETOWN J. OF INT'L AFFAIRS (Jan. 15, 2020), https://gjia.georgetown.edu/2020/01/15/same-sex-marriage-and-the-liberal-transformation-of-ireland/.

[63] *Id.*

[64] Reidy, *supra* note 62; Henry McDonald et al., *Ireland Votes By Landslide to Legalise Abortion*, THE GUARDIAN (May 26, 2018), https://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion.

[65] Haley Halpin, *Here's a Short History of the Battle for LGBT Rights in Ireland*, THE J. (Jun. 24, 2018), https://www.thejournal.ie/history-lgbt-rights-ireland-4078424-Jun2018/.

[66] *Norris v. Ireland*, App No. 10581/83, ¶ 46, Eur. Ct. H.R., (Oct. 26, 1988), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57547%22]}; Amnesty Int'l, *Republic of Ireland: Legislation decriminalising homosexuality*, AI Index EUR 29/005/1993 (Jun. 22, 1992).

[67] Amnesty Int'l, *supra* note 66.

[68] Reidy, *supra* note 62.

Human Rights and Equality Commission Act (2014).[69] 2015 was a landmark year for Ireland, when it became the first country to adopt same-sex marriage by popular vote.[70] The referendum passed with sixty-two percent of voters in favor of the amendment.[71] That same year, the Gender Recognition Act was passed, a major leap forward for transgender and gender nonconforming individuals.[72] The Act permits citizens to carry identification certificates stating their gender and authorizes legal gender change without requiring medical intervention or assessment by the state.[73] Citizens over the age of sixteen are permitted to apply for a gender recognition certificate and then a revised birth certificate.[74] However, a major drawback of the Gender Recognition Act is that "non-binary" is not an option for self-identification.[75]

The actual experiences of LGBTQ people do not always reflect these progressive policies and values. Ireland has been cataloged as having one of the largest gaps between public perceptions and lived perceptions regarding LGBTQ bias and discrimination.[76] In 2012, nearly half of Irish respondents reported harassment and discrimination based on sexual or gender

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[69] Employment Equality Act 1998 (Act No. 21/1998) (Ir.), https://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/html (prohibiting discrimination and ban sexual harassment and discrimination); Equal Status Act 2000 (Act No. 8/2000 (Ir.), https://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html (prohibiting discrimination in service industries and education); Irish Human Rights and Equality Commission Act 2014 (Act No. 25/2014) (Ir.), https://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html (creates the Coimisiún na hÉireann um Chearta an Duine agus Comhionannas (Irish Human Rights and Equality Commission) and amends the Employment Equality Act and Equal Status Act as they relate to public bodies' obligation to combat discrimination and promote equal opportunity and treatment of both staff and those provided services).

[70] Douglas Dalby & Dan Bilefsky*, Ireland Votes in Referendum on Same-Sex Marriage*, N.Y. TIMES (May 22, 2015), https://www.nytimes.com/2015/05/23/world/europe/ireland-gay-marriage-referendum.html; Halpin, *supra* note 65.

[71] Dalby, *supra* note 70; Haplin, *supra* note 65.

[72] Gender Recognition Act 2015 (Act No. 25/2015) (Ir.) https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html.

[73] *Legal recognition of your preferred gender*, CITIZEN INFO. BD., (Ir.) (Dec. 7, 2022) https://www.citizensinformation.ie/en/birth_family_relationships/changing_to_your_preferred_gender.html.

[74] *Id.*

[75] *See* Gender Recognition Act 2015, *supra* note 72.

[76] CARR, *supra* note 36, at 6.

identity. Further, although only twenty percent of Irish respondents acknowledged widespread discrimination against transgender people, eighty-three percent of transgender respondents reported experiencing discrimination.[77]

Social values in Ireland have shifted greatly since the Constitution was written, along with the median age and education level of its population.[78] Irish politics have traditionally leaned center-right and lacked the harsh left-right divide typical of West European politics.[79] However, Irish voters have increasingly self-identified as left-leaning during the past several decades.[80] Economic growth, greater integration with the European Union, and a decrease of dependency on the Catholic Church are cited as major factors in Ireland's progressive lean.[81] Regardless of the driving causes behind it, the polity has experienced rapid liberalization and the state cannot always keep up, leading to slow legislative change.[82]

Children

Article 42A was added to the Constitution in 2015 and ascribes to minors certain "natural and imprescriptible rights and the State's duty to uphold these rights."[83] Prior to this amendment, children had limited fundamental rights compared to Irish adults.[84] Ireland signed the United Nations Convention on the Rights of the Child (CRC) in 1992 and, as such, is obligated to

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[77] CARR*, supra note* 36, at 6.

[78] Reidy, *supra* note 60.

[79] Stefan Müller & Aidan Regan*, Are Irish Voters Moving to the Left?*, 36 IRISH POLT. STUDIES 535, 535 (2021).

[80] *Id.* at 549; *see* Michael Dimock and Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR., (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.

[81] Reidy, *supra* note 62.

[82] *See* Reidy, *supra* note 62.

[83] CITIZENS INFO. BD., *supra* note 55.

[84] CITIZENS INFO. BD., *Children and the Law in Ireland*, (47/1-2, 2020) (Ir.) https://www.citizensinformationboard.ie/downloads/relate/relate_2020_02.pdf; *see* Child Care Act 1991 (Act. No. 17/1999) (Ir.), https://www.irishstatutebook.ie/eli/1991/act/17/enacted/en/html; *see* Children Act 2001 (Act. No. 24/2001) (Ir.), https://www.irishstatutebook.ie/eli/2001/act/24/enacted/en/html.

protect certain rights including health, education, family life, protection from abuse, recreation, and adequate living conditions.[85] The CRC is based on four basic principles: non-discrimination; the best interests of the child as a primary consideration; the right to life, survival and development; and respect for the views of the child.[86] These tenets are generally reflected in Irish law.[87]

Under the Child Care Act of 1991 and the Children Act of 2001, a minor is anyone under the age of eighteen.[88] The Irish criminal justice system generally treats children differently than adult offenders. Standards for handling juvenile offenders are largely detailed in the Children Act of 2001.[89] Although the typical age of criminal responsibility is twelve, special exception is made for children over ten who are charged with murder, manslaughter, aggravated sexual assault, or rape.[90] Under Section 142 of the Children Act, the court may detain a child following a criminal conviction.[91] Children ages ten to sixteen are detained at Oberstown Children Detention Campus in County Dublin.[92] However, detention is considered a last resort and only used when the court demonstrates that there is no other option.[93] The Children Act provides a wide range of alternative "community sanctions" that allow the child offender to "remain in the

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[85] *What are Children's Rights?*, CHILDREN'S RTS. ALLIANCE, https://www.childrensrights.ie/childrens-rights-ireland/childrens-rights-ireland (last visited Feb. 18, 2022) (Ir.); *see* Convention on the Rights of the Child Nov. 20, 989, 1577 U.N.T.S. 3.

[86] *See* CHILDREN'S RTS. ALLIANCE*, supra* note 85; CITIZENS INFO. BD., *supra* note 55.

[87] *See* CITIZENS INFO. BD, *supra* note 84.

[88] *Children and Rights in Ireland*, CITIZEN INFO. BD., (Ir.) https://www.citizensinformation.ie/en/birth_family_relationships/children_s_rights_and_policy/children_and_rights_in_ireland.html (last updated May 10, 2023); *see* Children Act, 2001, *supra* note 84.

[89] Children Act, 2001*, supra* note 84.

[90] *Id.* Part 5 §52; CITIZENS INFO. BD, *supra* note 84.

[91] Children Act 2001, *supra* note 84 at Part 9 §142.

[92] CITIZENS INFO. BD, *supra* note 84; *see also Detention of Children*, CITIZEN INFO. BD., (Ir.), https://www.citizensinformation.ie/en/justice/children_and_young_offenders/detention_of_children_and_young_people.html (last updated Aug. 18, 2020).

[93] *See* CITIZENS INFO. BD, *supra* note 84.

community and stay at school," including community service, care and supervision orders, curfew orders, and various forms of probation.[94]

The general tenor of Irish jurisprudence seems to be that children should not be detained when physically possible, even in the case of more serious or repeat offending.[95] This is illustrated by the 2017 closing of St. Patrick's Institution,[96] which was prompted by a Ministerial Order announced by the Minister for Children and Youth Affairs, ending the sentencing of children to adult prisons.[97] However, like many penal reforms over the years, government action to close St. Patrick's was slow-going.

In 1985, the Report of the Committee of Inquiry into the Penal System ("the Whitaker Committee Report") was one of the most expansive reports on the Irish Penal system to date. In the wake of rising crime rates, Dr. T.K Whitaker concluded that prison offered only temporary public protection with "virtually no rehabilitative or educational value."[98] The report highlighted the value of non-custodial sentences and the need for greater medical and psychiatric support of

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[94] *Community sanctions for young offenders*, CITIZEN INFO. BD., (Ir.), https://www.citizensinformation.ie/en/justice/children_and_young_offenders/community_sanctions.html (last updated Feb. 26, 2021).

[95] *Children and the Criminal Justice System*, CITIZEN INFO. BD., (Ir.), https://www.citizensinformation.ie/en/justice/children-and-young-offenders/children-and-the-criminal-justice-system-in-ireland/ (last updated Aug. 18, 2020).; *see* Christina Finn, *Child offenders will no longer be detained in adult prisons*, THE J. (IR.) https://www.thejournal.ie/child-offenders-adult-prisons-3310914-Mar2017/ (last updated May 28, 2017, 8:00 PM).

[96] *See* Mark Hilliard, *Grim chapter in criminal justice ends as St Patrick's closes*, THE IRISH TIMES (Apr. 7, 2017, 01:00 AM) (Ir.), https://www.irishtimes.com/news/crime-and-law/grim-chapter-in-criminal-justice-ends-as-st-patrick-s-closes-1.3039455. (St. Patrick's Institution was a controversial male juvenile detention center built in the Victorian era and highly criticized for its antiquated structure, inadequate education services, and history of violence.)

[97] Hilliard, *supra* note 96; Finn, *supra* note 95.

[98] Peter McVerry, *The 1985 Whitaker Report*, JESUIT CTR. FOR FAITH & JUST. (Oct. 12, 2021) (Ir.), https://www.jcfj.ie/2021/10/12/the-1985-whitaker-report/; THE KATHERIN HOWARD FOUND & IRISH PENAL REFORM TR., THE WHITAKER COMMITTEE REPORT 20 YEARS ON: LESSONS LEARNED OR LESSONS FORGOTTEN 7 (2007) https://www.prisonpolicy.org/scans/irishpenalreformtrust/whitakerreport2007.pdf; *see also The Whitaker Committee Report 20 Years On: Lessons Learned or Lessons Forgotten?*, IRISH PRISON REFORM TR. (July 25, 2007), https://www.iprt.ie/iprt-publications/the-whitaker-committee-report-20-years-on-lessons-learned-or-lessons-forgotten/.

offenders.[99] However, the report was poorly received by both the public and the government, who sought more convictions and longer prison terms.[100] While some of the report's recommendations were implemented, such as the closing of St. Patrick's and the creation of the Office of Inspector of Prisons, prison policy has generally moved the other way.[101] The report was not widely circulated and became unavailable in its entirety not long after it was published.[102] The progressive sentiments expressed in the Whitaker Committee Report are still voiced in Ireland today but seem to lack drive. Dr. Whitaker noted in 2007 that very little had changed apart from increasing dismal prison conditions, and called for reform of the "whole social system."[103]

Prisoners

The main source of prisoners' rights is found in the 2007 Prison Rules ("Rules").[104] The Rules, developed per Section 35 of the Prisons Act, delve deeper into prison regulations and, more importantly, prisoners' rights including suitable accommodation, hygiene and sanitation, community interaction, and out-of-cell time.[105] Adult prisoners are allowed at least one visit and one telephone call per week if over the age of eighteen and have the right to vote (per the Electoral Amendment Act of 2006).[106] Juvenile prisoners, those under eighteen, are entitled to at

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[99] *See* THE KATHERIN HOWARD FOUND & IRISH PENAL REFORM TR., *supra* note 98, at 2.; *see* McVerry, *supra* note 98.

[100] McVerry, *supra* note 98.

[101] McVerry, *supra* note 98.

[102] McVerry, *supra* note 98.

[103] THE KATHERINE HOWARD FOUND. & IRISH PENAL REFORM TR., *supra* note 98, at 7.

[104] Prison Rules, 2007 S.I. No. 252/2007 (Ir.) at Part 3 Treatment of Prisoners §18-26 https://www.irishstatutebook.ie/eli/2007/si/252/made/en/print; *Prisoners' Rights*, CITIZEN INFO. BD., (Ir.), https://www.citizensinformation.ie/en/justice/prison_system/prisoners_rights.html (last updated Jan. 26, 2023).

[105] Prison Rules, *supra* note 104.

[106] *Prison Conditions*, CITIZEN INFO. BD., (Ir.), https://www.citizensinformation.ie/en/justice/prison_system/prison_conditions.html (last updated Mar. 2, 2022); CITIZEN INFO. BD., *supra* note 99; *see* Electoral (Amendment) Act 2006, 33/2006 (Ir.) https://www.irishstatutebook.ie/eli/2006/act/33/enacted/en/html.

least two visits and two telephone calls per week.[107] Inmates are also entitled to educational services, as well as recreational services including indoor and outdoor exercise facilities for at least one hour a day.[108] Further, prisoners are assured the same standard of healthcare as the outside community, including for mental health, per Rule 33.[109]

Ireland has adopted several international and European Union (EU) rights standards, including the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[110] Irish law must be strictly compatible with the ECHR, both in the creation of new laws and the interpretation of current ones.[111] Ireland formally adopted the ECHR through the 2003 European Convention on Human Rights Act, which prohibits the use of torture and discrimination, and vests power in the courts to determine whether a law violates the ECHR.[112] State agents, including prison officials, are obligated to adhere to the ECHR and decisions made by the European Court of Human Rights.[113] However, unlike laws considered repugnant to the Constitution, a declaration of incompatibility does not "affect the validity, continuing operation or enforcement of the statutory provision or rule of law."[114]

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[107] CITIZEN INFO. BD., *supra* note 104.

[108] CITIZEN INFO. BD., *supra* note 104.

[109] IRISH COUNCIL FOR CIV. LIBERTIES & IRISH PENAL REFORM TR., *supra* note 41, at 29, 32.

[110] CITIZEN INFO. BD., *supra* note 104; *see* European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Mar. 1, 2002, E.T.S. No. 126, https://rm.coe.int/16806dbaa3. Ireland has also adopted the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). CITIZEN INFO. BD., *supra* note 101.

[111] *Charter of Fundamental Rights*, CITIZENS INFO. BD., (Ir.), https://www.citizensinformation.ie/en/government-in-ireland/european-government/eu-law/charter-of-fundamental-rights/ (last updated Aug. 28, 2023).

[112] *See* European Convention on Human Rights Act 2003, (Act No. 20/2003) (Ir.), https://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html.

[113] IRISH COUNCIL FOR CIV. LIBERTIES & IRISH PENAL REFORM TR., *supra* note 41.

[114] European Convention on Human Rights Act §5(2)(a), *supra* note 110.

All European Union member states, including Ireland,[115] must also adhere to the Charter of Fundamental Rights of the European Union.[116] While the Charter is only implicated when Ireland directly implements EU law, Ireland is still bound to respect the freedoms it affords.[117] The Charter also serves as a foundation for protected rights not specifically enumerated in the Irish Constitution.[118] While the ECHR, associated Act, and the Charter provide a foundation for human rights in Europe and are considered highly persuasive within member states, the strongest authority for prisoners' rights in Ireland lies in the Constitution and 2007 Prison Rules. As such, any reform of the solitary confinement system must be rooted in that legislation.

Section 13 of the Prisons Acts regulates prison sanctions for misbehavior.[119] Punishments vary greatly, ranging from reprimand to forfeiture of prison funds or confinement in a cell for a "period not to exceed 3 days."[120] The Act does not address use of solitary confinement as punishment or protective practice beyond this limitation. However, it expressly prohibits a "sanction[s] of indeterminate duration."[121] The Act, reminiscent of the Charter of Human Rights and the European Convention for the Prevention of Torture, also prohibits confinement in special observation cells or sanctions constituting "cruel, inhumane or degrading treatment."[122]

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[115] The Republic of Ireland has been a member of the European Union since 1973. *See Ireland – Overview*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/country-profiles/ireland_en (last visited Jan. 16, 2023).

[116] Charter of Fundamental Rights of the European Union, 2000/C 364/01, OFFICIAL J. OF THE EUROPEAN COMMUNITIES (Jun.12, 2000), https://www.europarl.europa.eu/charter/pdf/text_en.pdf; CITIZENS INFO. BD., *supra* note 110.

[117] CITIZENS INFO. BD., *supra* note 110. Implementation of EU law in Ireland includes, but is not limited to, actions such as executing a European Arrest Warrant or direct legislation to incorporate an EU directive. *See* EU Charter on Fundamental Rights, *supra* note 116.

[118] *See* CITIZENS INFO. BD., *supra* note 110.

[119] Prisons Act, *supra* note 37, §13.

[120] Prisons Act, *supra* note 37, §13.

[121] Prisons Act, *supra* note 37, §13(7)(j).

[122] Prisons Act, *supra* note 37, §13(7)(h), (k).

The Prison Service published a policy document titled "Elimination of solitary confinement" in 2017 designed to address overuse of solitary confinement.[123] The policy purports to incorporate more rigorous standards on international prisoners' treatment into prison policy. Under the policy, Statutory Instrument 276/2017,[124] which amended Rule 27 of the Prison Rules, created a statutory provision for prisoners to have a minimum of two hours a day outside of their cells.[125] Further, in 2016, the Oireachtas initiated a bill to amend the 2007 Prisons Act outlining "provisions in regard to the use of solitary confinement in Irish prisons."[126] The bill specifically limits the use of solitary confinement "for any reason" to no more than "15 consecutive days," and thirty days within a year.[127] The bill also dictates that "the decision to hold a prisoner in solitary confinement shall be reviewed every three days."[128] It also prohibits the use of solitary confinement for those with diagnosed mental health disorders.[129] However, it does not appear to address those with undocumented or undiagnosed illness or the likelihood that isolation could exacerbate and even create mental illness.

III. SOLITARY CONFINEMENT IN IRISH PRISONS

Solitary confinement exists in "some shape or form, in every prison system"[130] [worldwide].The Irish government defines solitary confinement as a "restriction of a prisoner's

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123 *See* IRISH PRISON SERV., ELIMINATION OF SOLITARY CONFINEMENT 1 (2017) https://www.irishprisons.ie/wp-content/uploads/documents_pdf/Elimination-of-solitary-confinement-Policy.pdf.

124 Prison (Amendment) Rules 2017, (SI 276/2017) (Ir.), https://www.irishstatutebook.ie/eli/2017/si/276/made/en/print.

125 *Prison Service: Dáil Éireann Debate, Thursday - 8 September 2022*, HOUSES OF THE OIREACHTAS (Sept. 8, 2022) https://www.oireachtas.ie/en/debates/question/2022-09-08/1392/.

126 Prisons (Solitary Confinement) (Amendment) Bill 2016, (Act No. 95/2016) (Ir.) https://data.oireachtas.ie/ie/oireachtas/bill/2016/95/eng/initiated/b9516d.pdf.

127 *Id.* §(2A).

128 *Id.*

129 *Id.*

130 MARTYNOWICZ & MOORE, *supra* note 7, at 7. (citing Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Couns. Of Eur., *21st General Report of the CPT* (2011) https://rm.coe.int/1680696a88)

opportunities for meaningful human interaction and communal association for 22 to 24 hours a day, whether by means of restricting the prisoner to a cell or by any other means."[131] The United Nations considers fifteen or more days of such isolation "prolonged solitary confinement," which is the approximate threshold for psychological, and possibly physical, damage.[132] Many authorities consider it torture.[133] In 2016, of the fifty-one prisoners placed in some form of solitary confinement across Ireland, half had spent more than 100 days in isolation, and nine were held for over a year.[134]

Solitary confinement dates back to at least the 1790s when social reformers advocated for alternatives to corporal punishment and sought a more humane way to control and correct prisoners.[135] The first official use of solitary confinement in the United States was in 1829 at the Eastern State Penitentiary in Pennsylvania, where inmates were confined to spartan rooms for twenty-three hours a day with minimal social interaction.[136] The practice, designed to mitigate overcrowding concerns and encourage "virtuous thoughts," was soon employed by religious and medical institutions as well as prisons.[137] Solitary confinement quickly became a regular practice around the world but fell out of social favor by 1890 when its severe negative effects, including

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131 Prisons Bill 2016, *supra* note 124, §1.

132 *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS, (Oct. 18, 2011), https://news.un.org/en/story/2011/10/392012; Press Release, Off. of the High Comm'r for Hum. Rts., United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert, UN Press Release (Feb. 28, 2020), https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture; Dominic Martella, *Shorter Periods of Solitary Confinement in Irish Prisons due to Evidence of Harm on Prisoners' Well-being*, UNIV. COLL. DUBLIN (Mar. 7, 2016) https://www.ucd.ie/newsandopinion/news/oldlatestmirrors/evidenceshorterperiodsofsolitaryconfinementinirishprisons/

133 Off. of the High Comm'r for Hum. Rts., *supra* note 132.

134 McCracken, *supra* note 12.

135 *See* McCall, *supra* note 2.

136 Ashley T. Rubin and Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW AND SOC. INQUIRY 1604, 1615 (2008).

137 MARTYNOWICZ & MOORE, *supra* note 7, at 14 (citing P. CUEDES, BUILT FORMS AND BUILDING TYPES 151 (MACMILLAN ENCYCLOPEDIA OF ARCHITECTURE, 1979)).

hallucinations and self-harm, became apparent.[138] However, as crime rates increased, and prison overcrowding became a central concern for prison regulation, penal institutions began re-incorporating solitary confinement.[139]

The term "solitary confinement" is exceptionally broad, and its forms and use have changed over the last two centuries. The definition adopted by the Irish government is the textbook understanding of solitary confinement: isolation for twenty-two or more hours a day, with extremely limited access to other prisoners, activities, and services and virtually no connection to the outside world.[140] While solitary is traditionally spent alone, as the name implies, small group isolation is also employed and likely produces similar negative effects.[141] Isolation is used for a variety of reasons, including protective custody, discipline and order, pre-trial detention, medical observation, and as part of a life sentence.[142]

As solitary confinement became more popular in the nineteenth century, two main forms arose: the silent (Auburn) system and the separate (Pennsylvania) system.[143] The silent system was designed to suppress prisoner communication and came out of a more Puritan ethic.[144] Prisoners slept in solitary cells but worked and ate during the day in silent groups.[145] By contrast, the separate system did not enforce strict silence but strict isolation except for limited exercise and worship.[146] These systems were not limited to the United States and were common practice

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[138] McCall, *supra* note 2.
[139] McCall, *supra* note 2.
[140] *See generally* Prisons Bill 2016, *supra* note 126. (defining solitary confinement).
[141] MARTYNOWICZ & MOORE, *supra* note 7, at 15.
[142] *See* MARTYNOWICZ & MOORE, *supra* note 7; *Solitary Confinement*, PENAL REFORM INT'L https://www.penalreform.org/issues/prison-conditions/key-facts/solitary-confinement/ (last accessed Nov. 18, 2022).
[143] Katie Thorsteinson, *19th Century Prison Reform Collection*, CORNELL UNIV. LIBR., https://digital.library.cornell.edu/collections/prison-reform (last visited May 12, 2024).
[144] *Id.*
[145] *Id.*
[146] *See Id.* .

in the nineteenth century British Isles, often instituting a mandatory isolation period for those recently convicted, typically up to eighteen months at a time.[147] A shift in Irish penal policy later reduced this period to less than a year.[148]

Nineteenth-century Irish penal reformers were cognizant of the harms of solitary confinement and sought to mitigate them while capitalizing on the "dread" prisoners felt when subjected to solitary cells, leading to the Irish System.[149] This system predated the Irish Free State and consisted of a three-stage system designed to prepare prisoners for release and keep them in line while incarcerated.[150] The stages – a "strictly penal stage of separate imprisonment, the reformatory stage of progressive classification, and the probationary stage of natural training" – emphasized discipline and compliance, as well as training for post-release life.[151] Over time, the system gained national attention and was lauded as a success "believed to be as applicable to one country as to another."[152] The Irish System of tiered punishment and reintegration fell to the wayside by the 1940s.[153] However, the "philosophy behind the separate system" is still used in Ireland today, codified by statute under the name "restricted regime."[154]

RESTRICTED REGIME

[147] Gerry McNally, *James P. Organ, the 'Irish System' and the Origins of Parole*, 16 IRISH PROB. J. 42, 43–46 (2019).

[148] *Id.* at 46.

[149] Catherine Cox, *Separate Confinement and Insanity at Mountjoy Convict Prison, Dublin 1850-55*, CTR FOR THE HIST. OF MED.: BLOG https://histprisonhealth.com/arts-projects/disorder-contained-a-theatrical-examination-of-madness-prison-and-solitary-confinement/disorder-contained-background-reading/separate-confinement-and-insanity-at-mountjoy-convict-prison-dublin-1850-55/ (last visited Dec. 7, 2022).

[150] *See* McNally, *supra* note 147, at 46–47.

[151] McNally, *supra* note 147, at 46–47.

[152] McNally, supra note 147, at 46–47.

[153] *See* McNally, *supra* note 147, at 57.

[154] *See* MARTYNOWICZ & MOORE *supra* note 7, at 14 (citing *Separate and Silent Systems in* H. JOHNSTON, DICTIONARY OF PRISONS AND PUNISHMENT 271 (YVONNE JEWKES & JAMIE BENNETT eds., 1st ed. 2008)); Prisons Rules, *supra* note 104, §§62-63.

Prisoners that are removed from the general population for non-health related reasons, such as discipline or protective custody, are placed on "restricted regime," per Rules 62 and 63 of the 2007 Prison Rules, respectively.[155] Isolation of children is generally referred to as "single separation."[156] Inmates on restricted regime are segregated from the larger prison community, either alone or in small groups, with limited access to social activities, exercise equipment, or vocational and educational services for **nineteen or more hours a day**.[157] This limited access to educational and other enrichment activities is in direct opposition to Ireland's goal of preparing inmates for post-release life.[158] Restricted regime is distinguished from textbook solitary confinement, which consists of "**22 hours a day or more**, with consequent restrictions in regimes."[159] [emphasis added]. This difference is in name only. Restricted regime is *de facto* solitary confinement, regardless of terminology, because it constrains a prisoner's freedom of movement and access to social activity for extended periods of time, creating a "continuum of exclusion."[160] The identifying factor of solitary confinement is not terminology, but the severe restriction of social interaction.[161]

Ireland is not alone in its use of masking terminology. Use of ambiguous labels such as "restricted regime" is common across prison systems, since administrators wish to avoid the negative connotations associated with solitary confinement.[162] Perhaps one of the most well-

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[155] Prison Rules, *supra* note 104; MARTYNOWICZ & MOORE, *supra* note 7, at 7.

[156] IRISH PENAL REFORM TR., *supra* note 14.

[157] MARTYNOWICZ & MOORE, *supra* note 7, at 6.

[158] *See* ROGAN, *supra* note 16.

[159] MARTYNOWICZ & MOORE, *supra* note 7, at 6.

[160] MARTYNOWICZ & MOORE, *supra* note 7, at 15 (citing SHARON SHALEV & KIMMETT EDGAR, DEEP CUSTODY: SEGREGATION UNITS AND CLOSE SUPERVISION CTR.S IN ENG. AND WALES 5 (PRISON REFORM TR., 2015)).

[161] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 14–15 (citing *Position Statement: Solitary Confinement (Isolation),* NAT'L COMM'N ON CORR. HEALTH CARE (2016) https://www.ncchc.org/position-statements/solitary-confinement-isolation-2016/.

[162] MARTYNOWICZ & MOORE, *supra* note 7, at 14 (citing Valerie Kiebala, et al., *Solitary Confinement in the United States: The Facts*, SOLITARY WATCH https://solitarywatch.org/facts/faq/ (last updated in June 2023)).

known examples of this is American "supermax" prisons, of which Alcatraz is an early example.[163] Like solitary confinement, supermax appears to be largely an American invention, but has cropped up around the world, including Denmark, Turkey, and Ireland.[164] However, these maximum-security prisons, which isolate prisoners for up to twenty-three hours a day, are typically reserved for the "worst of the worst" – terrorists, traitors, and extremely violent offenders, as opposed to those threatened by prison violence.[165]

During the last ten years, Ireland has seen a downturn in the number of prisoners subjected to twenty-two plus hour isolation, but the overall number of those on "restricted regime" continues to rise.[166] In 2014, approximately 5.7 percent of the prison population was on restricted regime, but by 2016, nearly ten percent was isolated.[167] In October 2017, 428 prisoners were on restricted regime, 385 of which were isolated for means of protection.[168] In January 2022, 982 prisoners across Ireland were on restricted regime, a thirty percent jump from October 2022 alone.[169] This means that in January 2022, one in four (twenty-five percent) incarcerated persons in Ireland were on restricted regime.[170] Of the prisoners on restricted regime, 492 (thirteen percent of the total prison population and approximately fifty percent of those on

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[163] *5 Things to Know About the 'Escape Proof' Supermax Prison*, CORR.1 (March 1, 2019, 2:12 PM), https://www.corrections1.com/escapes/articles/5-things-to-know-about-the-escape-proof-supermax-prison-Nw3H6vQbd0EN0mSd/.

[164] Rubin and Reiter, *supra* note 136, at 1625 (citing JEFFREY I. ROSS, THE GLOBALIZATION OF SUPREMAX PRISONS (RUTGERS UNIV. PRESS 2013); Dennis O'Hearn, *Diaspora of Practice: Northern Irish Imprisonment and the Transnational Rise of Cellular Isolation*, Breac: A DIGIT. J. OF IRISH STUD. (Apr. 12, 2013),https://breac.nd.edu/articles/diaspora-of-practice-northern-irish-imprisonment-and-the-transnational-rise-of-cellular-isolation/; KERAMET REITER, PUNITIVE CONTRASTS: UNITED STATES VS. DENMARK—A SOCIO-LEGAL COMPARISON OF TWO PRISON SYSTEMS IN CRIM. JUST. AND LAW ENFORCEMENT ANNUAL: GLOBAL PERSPECTIVES 139-76 (Larry Sullivan ed., 2014)).

[165] *See* CORR.1, *supra* note 163.

[166] MARTYNOWICZ & MOORE, *supra* note 7, at 36.

[167] IRISH PENAL REFORM TR., *supra* note 14, at 1.

[168] MARTYNOWICZ & MOORE, *supra* note 7, at 6.

[169] IRISH PRISONS, *supra* note 14; *see also* IRISH PRISON REFORM TR., *supra* note 14.

[170] *See* IRISH PENAL REFORM TR., *supra* note 14.

restricted regime) were restricted on grounds of protection.[171] Four hundred sixty of those on protective restriction were there of their own request, while thirty-two inmates were subjected involuntarily.[172]

Rule 62 – Disciplinary Isolation

Prisoners who pose a threat to other members of the population or otherwise have a "negative effect on the general population" may be placed under Prison Rule 62 isolation.[173] This may be for disciplinary purposes, to create a more orderly prison environment, or to separate dangerous individuals from the general population, although all fit under the general umbrella of "disciplinary isolation."[174] The official Prison Rules comments note that Rule 62 practice is employed to "remov[e]…prisoner[s] from structured activity or association on grounds of order." Disciplinary isolation strips prisoners of access to structured prison activities, free exercise time, communal recreation, and association with other prisoners.[175]

Isolation for true disciplinary purposes tends to be the most legally regulated "in terms of time and proportionality."[176] Under the Prison Act, prisoners who have committed a breach of prisoner discipline shall not be confined to their cell for more than three days.[177] While this rule appears to conflict with the 2016 Amendment Bill permitting confinement of up to fifteen consecutive days, the bill requires prison officials to review decisions on solitary confinement

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[171] *Id.* at 1.

[172] *Id.*

[173] McCracken, *supra* note 12; Prison Rules, *supra* note 104, § 63

[174] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 7; *Briefing on Solitary Confinement, Isolation, Protection and Special Regimes*, IRISH PENAL REFORM TR. at 1 https://www.iprt.ie/site/assets/files/6471/iprt_briefing_on_solitary_confinement.pdf (last visited Dec. 14, 2022).

[175] Prison Rules, *supra* note 104.

[176] MARTYNOWICZ & MOORE , *supra* note 7, at 15.

[177] *See* Prisons Act, *supra* note 37, §13(c).

every three days.[178] This allows officials to effectively create new orders each time and circumvent potential conflict with regulations under the Prison Act. However, while prisoners may contest the decision to place them under Rule 62 isolation, they rarely prevail, suggesting that due process and complaint mechanisms under the Prison Act and Prison Rules are largely ineffective.[179]

Conversely, there appears to be little restriction on isolation for "dangerous" prisoners or those separated to restore order.[180] In such cases, prison officials have more discretion for how long a prisoner may be isolated.[181] A 2015 report cited several instances at Dóchas Centre prison where prisoners subject to Rule 62 for order violations were isolated for four to twenty days without a clearly stated legal basis or notice of the reasons for such a placement.[182] This not only violated Prison Act Section 13, which only permits punitive confinement in a cell for a "period not exceeding 3 days," but also Rule 62(5), which requires prisoners be given notice of their isolation before or upon confinement.[183]

Prison officials may also employ "loss of privileges" as a disciplinary measure under Section 13 of the Prisons Act.[184] This measure is not subject to Rule 62 regulations, meaning there is no clear limit to the number of consecutive, or yearly, days a prisoner may be denied social interaction and activities.[185] However, loss of privileges may amount to de facto solitary

[178] *See* Prisons Bill 2016, *supra* note 126.
[179] Prisons Bill 2016, *supra* note 126; *see* Prisons Act, *supra* note 37; *see* Prison Rules, *supra* note 104.
[180] Prisons Bill 2016, *supra* note 126; *see* Prisons Act, *supra* note 37; *see* Prison Rules, *supra* note 104.
[181] Prisons Bill 2016, *supra* note 126. *see* Prisons Act, *supra* note 37; *see* Prison Rules, *supra* note 104.
[182] *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, *infra* note 262 at 61.
[183] Prisons Act, *supra* note 37, §13; Prison Rules, supra note 104.
[184] Prisons Act, *supra* note 37, §13 .
[185] *See* Prison Rules, *supra* note 104, § 62; Prison Act, *supra* note 37, §13.

confinement without the necessary oversight because prisoners are stripped of access to services for days on end.[186]

Rule 63 – Protective Segregation

Prisoners may be placed in protective custody under Prison Rule 63 if there is reason to believe "significant harm" will come to them if they are held in general population.[187] Prisoners may be placed "on protection" by order of the prison governor or request from the prisoner.[188] The majority seek protection at the committal stage of incarceration.[189] Protective segregation accounts for the largest group of isolated prisoners in the Irish Penal System.[190]

Most individuals on this form of restricted regime are considered under threat of gang violence and retaliation for outstanding drug debts or giving evidence against other prisoners.[191] For example, a 2018 report by the Mountjoy Visiting Committee found that one in four Mountjoy inmates were isolated under Rule 63 for threats of gang violence.[192] The Inspector of Prisons also noted in a 2008 report that approximately twenty-five percent of juvenile inmates were "on protection" at any given time.[193]

Prisoners on protection are statutorily authorized to participate in prison activities with other prisoners subject to Rule 63, provided the prison governor "considers that such participation in authorised structured activity is reasonably likely to be beneficial to the welfare

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[186] *See CPT Report*, *supra* note 29, at 26.; *see* PETER SCHARFF SMITH, SOLITARY CONFINEMENT - EFFECTS AND PRACTICES FROM THE NINETEENTH CENTURY UNTIL TODAY 1, 30 (2019).

[187] Prison Rules, supra note 104.

[188] IRISH PRISON REFORM TR., *supra* note 14, at 1.

[189] *Id.*

[190] IRISH PRISON REFORM TR., *supra* note 14.

[191] IRISH PRISON REFORM TR., *supra* note 12.

[192] Sharon Besra, Sarah Branagan, and Ella Chapman, et al, *The Irish Prison System: A Legal Research Report by Trinity FLAC*, Free Legal Advice Centre at 35

[193] IRISH PENAL REFORM TR., *supra* note 12.

of the prisoner concerned."[194] In reality, conditions in protective segregation are "often identical to conditions for prisoners placed in segregation for disciplinary reasons, thus breaching fundamental human rights principles of non-discrimination."[195] Rule 63 also requires the Prison Service to define specific review dates for the necessity and duration of isolation,[196] however, it can be difficult for a prisoner to come off of protection even when they explicitly request it.[197]

IMPACT ON HEALTH & WELLBEING

While the effects of solitary confinement vary between individuals, it is well-established that the "central harmful feature…is that it reduces meaningful social contact to a level…insufficient to sustain health and well-being."[198] Humans are social creatures; we require human contact to effectively function. Without such contact, we begin to break down both mentally and physically.

The effects of solitary confinement are "analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder."[199] Within days, inmates may exhibit sleep disturbance, lethargy, rage, anxiety, panic attacks, and depression.[200] The effects can quickly become more severe, leading to memory loss, hallucinations, paranoia, cognitive dysfunction, self-harm, and suicidal ideation.[201] Physical symptoms include hypertension, chronic headaches, dizziness, heart palpitations, and high cortisol levels (a

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[194] Prison Rules, *supra* note 104, §63(2).

[195] CARR, *supra* note 36, at 28.

[196] *See CPT Report* , *supra* note 29, at 30-31.

[197] MARTYNOWICZ & MOORE, *supra* note 7, at 15.

[198] MARTYNOWICZ & MOORE, *supra* note 7, at 17 (citing *The Istanbul Statement on the Use of and Effects of Solitary Confinement*, SOLITARY CONFINEMENT https://www.solitaryconfinement.org/istanbul (adopted on Dec. 9, 2007 at the International Psychological Trauma Symposium, Istanbul).

[199] MARTYNOWICZ & MOORE, *supra* note 7, at 16 (citing C. Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 1 (2003)).

[200] MARTYNOWICZ & MOORE, *supra* note 7, at 17.

[201] MARTYNOWICZ & MOORE, *supra* note 7, at 16.

hormone released when the body is under stress).[202] These symptoms may be attributed to the stress of social isolation, but may also arise from the *physical* barriers that solitary confinement poses to accessing nutritious foods and fresh air.[203]

Social isolation, like solitary confinement, has been characterized as a "form of pain" that is linked to higher mortality rates.[204] In fact, such isolation renders a person twenty-six percent more likely to suffer a premature death.[205] Chronic stress may also permanently damage the hippocampus, the part of the brain that controls learning, memory, and emotional processing.[206] Ultimately, denial of meaningful human contact can cause isolation syndrome, which is characterized by many of the previously discussed symptoms and, in the long run, can lead to psychosis and a complete breakdown of a person's personality. A lack of human contact, coupled with stagnant stimuli and little activity, also often all but destroys coping skills, making it difficult for prisoners to adapt to changes in the prison environment.[207] Presumably, this also increases difficulty with coping with post-release life.

Further, while social isolation always carries mental and physical risks, forced isolation is far more likely to cause long-term harm.[208] When prisoners actively participate in the decision to place them in solitary confinement, such as through the voluntary protection process, they are less likely to experience the negative impact of isolation because they retain a sense of autonomy.[209] Likewise, when a prisoner requests to leave protective custody and is denied, they

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[202] *See* McCall, *supra* note 2.
[203] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 18.
[204] Joe Garrihy, et al., '*Cocooning' in Prison During COVID-19: Findings from Recent Research in Ireland*, EUR. J. OF CRIMINOLOGY (2022).
[205] McCall, *supra* note 2.
[206] *Id.*
[207] Garrihy, *supra* note 204.
[208] Garrihy, *supra* note 204.
[209] *See* Garrihy, *supra* note 204.

lose their sense of autonomy. They begin to feel limited, punished without cause, and become more aware of "painful bodily manifestations of the power the institution holds over the individual."[210]

Solitary confinement can be especially traumatizing for those who have already suffered a trauma.[211] One study found that eighty-three percent of LGBTQ people have experienced trauma throughout their lives.[212] LGBTQ prisoners are generally more likely to experience harassment from both prisoners and guards, especially in male prisons, already placing them in a highly stressful and virtually inescapable situation.[213] The Inspector of Prisons has reported that certain demographics are more at risk for prison violence due to factors "such as age, sexual orientation, ethnicity, racial origin, etc.," ostensibly making them more likely to request protective segregation since prisons generally lack other protective measures.[214]

Transgender prisoners are especially at risk for both solitary confinement and self-harm as a result of the isolation.[215] Some jurisdictions incarcerate transgender women in male prisons and then place them in protective segregation.[216] A 2016 report by the Irish Penal Reform Trust found that this practice is a safety "fallback," as there are few procedures in place for the care and treatment of transgender prisoners.[217] Guidelines for LGBTQ inmates are severely lacking, including adequate search guidelines, as Prison Service policy does not permit male guards to

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[210] *See Id.*

[211] MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[212] Lowry, *supra* note 10. (Statistics based on studies of LGBTQ people in the U.S.).

[213] CARR, *supra* note 36, at 23.

[214] *See* CARR, *supra* note 36, at 8.

[215] MARTYNOWICZ & MOORE, *supra* note 7, at 21.

[216] MARTYNOWICZ & MOORE, *supra* note 7 (citing *Worse than second-class: solitary confinement of women in the United States*, ACLU (2014)), at 19.

[217] MARTYNOWICZ & MOORE, *supra* note 7, at 21.

search female prisoners, and vice versa.[218] Further, while access to adequate medical care is an issue for all prisoners on restricted regime, it may pose a greater concern for transgender inmates requiring gender-affirming care. Prisoners are entitled to reasonable equal access to medical care similar to what they would receive outside of prison.[219] However, many transgender prisoners experience delays and withholding of care as a form of disciplinary sanction when they are in general population.[220] It is likely that the same practices are employed to those on restricted regime, where access to services is already diminished.

Solitary confinement is also more likely to negatively affect children. Approximately eighty percent of Irish children have reported "at least one adverse event by age nine," making them more likely to be markedly impacted by solitary confinement.[221] While children present the same isolation syndrome symptoms as adults, they may be more likely to experience psychiatric episodes where they lose touch with reality or feel "doomed" or "abandoned."[222] Children are also more likely to resort to self-harm quicker, including cutting themselves with staples.[223] Isolation has been found to have a unique impact on children due to their "psychological, neurological and social immaturity."[224] The mental immaturity of children may also make them more likely to be subjected to single separation (solitary confinement).

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[218] Ali Bracken, *Prison Officers Demand Guidelines on Transgender Inmates*, IRISH INDEP., (Oct. 17, 2020, 9:30 PM), https://www.independent.ie/irish-news/prison-officers-demand-guidelines-on-transgender-inmates/39637102.html.

[219] *See* IRISH COUNCIL FOR CIV. LIBERTIES & IRISH PENAL REFORM TR., *supra* note 41, at 49.

[220] CARR, *supra* note 36, at 20.

[221] O'Toole, *supra* note 10. ; *see* MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[222] MARTYNOWICZ & MOORE, *supra* note 7, at 19.

[223] MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[224] MARTYNOWICZ & MOORE, *supra* note 7 (citing Haney 2014), at 19.

A 2006 study found that children were often placed in "youth segregation units" as punishment for normal adolescent behavior such as refusing to comply with instructions.[225] Despite recommendations to terminate this practice, it was still active as late as 2016.[226] Similarly, a 2015 Health Information and Quality Authority (HIQA) reported frequent and extensive use of solitary confinement at Oberstown juvenile center, including 1,420 instances of single separation between October 2014 and May 2015.[227] Further, of ninety-six children detained in 2014, only twenty-seven percent (approximately twenty-five children) were issued a detention order.[228] The Irish Penal Reform Trust found this to be a violation of the Children Act 2001, which permits detention of minors only as a last resort.[229] The key difference between adults and juveniles in the timeframe and severity of isolation symptoms appears to be the fact that children in solitary confinement lose out on "core activities" necessary to proper development such as play and education.[230] Unfortunately, this may permanently damage an individual later in life, again increasing the possibility of recidivism or social disconnect.

There is limited research on the effect solitary confinement has on recidivism in Irish prisons. However, recent research out of Cornell University on Danish prisons suggests that even short stays in solitary confinement can increase likelihood of reoffending within three years of release by about fifteen percent.[231] Research conducted in England and Wales also found that

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[225] MARTYNOWICZ & MOORE, *supra* note 7 (citing Carlile Inquiry 2006), at 19.

[226] MARTYNOWICZ & MOORE, *supra* note 7 (citing Howard League for Penal Reform (2016b)), at 19.

[227] *Abolishing Solitary Confinement in Ireland,* IRISH PENAL REFORM TR. 1 Reform https://www.iprt.ie/site/assets/files/6473/iprt_research_tender_solitary_confinement_nov_2016.pdf (last visited May 12, 2024).

[228] *HIQA inspection report of Oberstown children detention school campus*, IRISH PENAL REFORM TR. (Feb. 25,. 2015) https://www.iprt.ie/latest-news/hiqa-inspection-report-of-oberstown-children-detention-school-campus/

[229] *Id.*; *see* Children Act 2001, *supra* note 84, Part 9 § 143.

[230] MARTYNOWICZ & MOORE, *supra* note 7, at 19.

[231] Dean, *supra* note 7 (citing Christopher Wildeman and Lars Højsgaard Andersen, *Long-term consequences of being placed in disciplinary segregation*), at 3

inmates exposed to social activity for ten or more hours a day self-reported that their time in prison would make them less likely to offend in the future.[232] Over sixty-two percent of prisoners in Ireland reoffend within three years of release and around forty-four reoffend within one year of release.[233]

The data is more concrete on solitary confinement's detrimental effects on a prisoner's ability to adapt to post-release life. Prisoners in solitary confinement have limited access to friends and family, weakening ties that not only serve as protective factors against suicide and self-harm, but support systems outside of prison. [234] Isolated prisoners are often "starved…for companionship, [and] the experience typically leaves them unfit for social interaction" so they are released with severely diminished social skills.[235] Some releasees may experience irrational anger and revenge fantasies.[236] Others may "lash out against those who…treated them in ways they regard as inhuman," which both limits their ability to adjust to society and may result in re-incarceration.[237]

The Irish court system also recognizes the debilitating effects of solitary confinement, and has repeatedly stressed the Prison Service's obligation to provide safe and adequate living conditions to all prisoners.[238] *Kinsella v. Governor of Mountjoy* (2012) held that although prison administrators have a duty to protect inmates from targeted prison violence, they must also

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[232] MARTYNOWICZ & MOORE, *supra* note 7 at 18 (citing Her Majesty's Inspectorate of Prisons, *Time out of cell: A short thematic review, December 2007* (2008) http://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/07/Time-out-thematic.pdf).

[233] Prison recidivism 2016 and 2019 cohorts, IRISH PENAL REFORM TR. (Jun. 21, 2022), https://www.iprt.ie/latest-news/prison-recidivism-2016-and-2019-cohorts/

[234] *See* McCall *supra* note 2.

[235] Gawande, *supra* note 6.

[236] *Id.*; MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[237] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[238] *See, e.g.*, *Kinsella v. Governor of Mountjoy*, [2011] IEHC 235 (High Ct.) (Ir.); *see also*, *Mulligan v. Governor of Portlaoise Prison*, [2010] IEHC 269 (High Ct.) (Ir.).

provide reasonable conditions within protective segregation.[239] This case has subsequently been cited in solitary confinement challenges since "one does not need to be a psychologist to envisage the mental anguish which would be entailed by more or less permanent lockup."[240]

Similarly, in *McDonnell v. Governor of Wheatfield Prison* (2015), the High Court held that a twenty-year-old prisoner's constitutional rights were breached when he was held in isolation for twenty-two hours a day for a period of eleven months with limited to no recreational or educational activities.[241] The Court, acknowledging that his mental state had deteriorated, ordered that he be allotted more social activity.[242] However, the Court of Appeals overturned the ruling on the grounds that the measures were "necessary to the prisoner's physical safety".[243] The Court of Appeals decision is disparate to Irish case law, specifically *Devoy v. Governor of Portlaoise Prison* (2009), which recognizes the health risks attributed to solitary confinement.[244] *Devoy* also requires prison rules, including any deference given to the Governor to manage a prison under Rule 63, to adhere to the Constitution.[245]

Solitary confinement is akin to torture and leaves debilitating effects on those subjected to it.[246] Further, the social cost generally outweighs any advantages derived from isolating prisoners. There is little benefit to solitary confinement if it only creates maladjusted individuals likely to reoffend or be social outcasts, rather than rehabilitate offenders and train them to be

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[239] *Kinsella v Governor of Mountjoy*, *supra* note 238.

[240] *McDonnell v. Governor of Wheatfield Prison*, [2015] IEHC 112 (High Ct.)(Ir.) (citing *Kinsella v. Governor of Mountjoy*, [2011] IEHC 235 (High Ct.) (Ir.)).

[241] *McDonnell v. Governor of Wheatfield Prison*, *supra* note 240.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] Legal Submissions on Behalf of the Irish Human Rights and Equality Commission, at 4, *McDonnell v. Governor of Wheatfield Prison*, [2015] IEHC 112 (High Ct. 2015)(Ir.) (citing *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288).

[246] *See* Legal Submissions on Behalf of the Irish Human Rights and Equality Commission, *supra* note 245, at 2.

functional members of society. Given Ireland's long-standing goal of providing job and educational training in prisons,[247] the distinct lack of access to these services by a significant portion of the prison population is counterintuitive. It is also rather hypocritical, considering that Ireland has consistently recognized the damaging effects of solitary confinement, from administrative policies such as the 2017 Prison Service elimination of solitary confinement program to landmark court decisions such as *Kinsella* and *Devoy*.

IV. RECOMMENDATIONS

The ultimate goal is, of course, the eradication of solitary confinement. Considering its global use and long-standing history, it is not yet practical to expect a total ban on the practice. However, certain limits must be put in place to ensure Ireland adheres to international standards and its current law. Solitary confinement must be "strictly regulated and completely prohibited in certain cases."[248] Ireland must take full advantage of its ability to update the Prison Rules under Section 35 of the Prison Act, as it did for Statutory Instrument 276/2017, and create more rigorous standards for solitary confinement.[249]

International standards such as the Mandela Rules provide a framework for compassionate treatment of prisoners.[250] Based on Nelson Mandela's own experience with solitary confinement, consisting of "no end and no beginning," the Rules permit use of solitary confinement only as a last resort.[251] Rule 45.2, states that "the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be

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247 *See* ROGAN, *supra* note 16, at 196, 198.

248 MARTYNOWICZ & MOORE, *supra* note 7, at 47.

249 Prison (Amendment) Rules, *supra* note 124.

250 Andrew Gilmour, *The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty*, UN Chronicle, https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty (last visited Mar. 15, 2023).

251 *Id.*

exacerbated by such measures."[252] This regulation should also be taken to mean solitary confinement should not be used against those who are likely to suffer mental or physical disabilities, including LGBTQ individuals and children.

PROHIBITION OF SOLITARY CONFINEMENT OF CHILDREN

In 2011, the United Nations Special Rapporteur on Torture, Juan E. Méndez, proposed a global ban on prolonged solitary confinement as well as punitive and juvenile isolation, calling the practice "a harsh measure which is contrary to rehabilitation."[253] The Council of Europe has also published rules permitting the isolation of children only in "very exceptional cases for security or safety reasons."[254] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty also absolutely prohibits the use of solitary confinement for children.[255] Given the debilitating and likely irreversible effects on solitary confinement on children, and the broad international effort to ban its use, Ireland should prohibit penal isolation of minors.

Ireland should adopt new prison rules specially banning solitary confinement of children per section 35 of the 2007 Prisons Act[256] and should seek to develop alternative ways to ensure prisoner safety. As a means of both adhering to Irish law and protecting children, the Prison Service must also only detain juveniles when absolutely necessary, and then only in designated institutions such as Oberstown.[257] The Children Act outlines alternative "community sanctions"

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[252] G.A. Res. 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),* (Dec. 17, 2015).
[253] U.N. Hum. Rts, *supra* note 8.
[254] IRISH PENAL REFORM TR., *supra* note 14, at 1.
[255] *See* G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990).
[256] Prisons Act §35, *supra* note 37.
[257] *See* CITIZEN INFO. BD., *supra* note 84.

such as community service and probation that not only promote better community integration but do not contribute to the prison population.[258]

RESTRICTION OF SOLITARY CONFINEMENT OF ADULTS

Disciplinary Isolation

Prisoner isolation should never be permitted as a means of punishment. Solitary confinement has been equated to torture by numerous international authorities, including the European Convention for the Prevention of Torture, which Ireland adopted in 2003. [259] Although the Prisons Act does not expressly address solitary confinement, it does prohibit cruel or degrading punishment.[260] The right to bodily integrity, and to be free from torture or inhumane treatment, is also a fundamental right recognized under *Ryan v. Attorney General* (1965).[261] Therefore the use of punitive solitary confinement is a direct violation of Irish law and international standards. Further, conditions "akin to solitary confinement," including disciplinary actions such as loss of privileges, can have "an extremely damaging effect on the mental, somatic and social health of the prisoner."[262] As such, these practices should be monitored and regulated in the same manner as solitary confinement to prevent harm to prisoner health.

Protective Segregation

Although it does not appear that protective segregation violates current Irish law, the effects of "enforced isolation can emerge even if imposed with benevolent intentions."[263] This is

[258] *See* CITIZEN INFO. BD., *supra* note 92; Children Act 2001, *supra* note 84.
[259] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (2002), *supra* note 110; European Convention on Human Rights Act 2003, *supra* note 112.
[260] *See* Off. of the High Comm'r for Hum. Rts., *supra* note 132; Prisons Act, *supra* note 37, §13(7) .
[261] Ryan v. Att'y Gen*., supra* note 60.
[262] *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 2015 O.J. (CPT/Inf (2015)
[263] Garrihy, *supra* note 204.

especially true of populations that run the risk of being retraumatized by social isolation, such as LGBTQ individuals.[264] As such, the Prison Service must take special care to ensure that protective segregation is used only when necessary to protect a prisoner from harm.

The Yogyakarta Principles also offer seminal guidance for treatment related to LGBTQ persons that the Prison Service should consider. Principle 9 states that protective measures must "involve no greater restriction of their rights than is experienced by the general prison population."[265] This includes access to gender-affirming care when possible, as well as other LGBTQ-specific support services.[266] Further, while "single-cell accommodation should be the norm for all prisoners across the prison estate," this policy is especially important for LGBTQ individuals.[267] LGBTQ prisoners are particularly vulnerable to the violence associated with overcrowding and doubling up. However, the use of protective segregation as a "fallback" for these concerns is intolerable.[268] A more sustainable and humane alternative is the restoration of single-cell accommodation.

Involuntary isolation should also be only used in emergency circumstances. Given the effect loss of autonomy and choice have on mental health, involuntary protective custody may have prolonged side effects.[269] In the interest of transparency and harm reduction, the Prison Service should issue publicly accessible reports clearly explaining why a prisoner's request to return to general population has been denied. It is also important to note that, while isolation should not be

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[264] MARTYNOWICZ & MOORE, *supra* note 7, at 18.

[265] *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, INT'L COMM'N OF JURISTS, (Nov. 10, 2017), https://yogyakartaprinciples.org.

[266] *Id.*

[267] CARR, *supra* note 36, at 36.

[268] CARR, *supra* note 36, at 29.

[269] Garrihy., *supra* note 204.

tolerated as a means of punishment, those in protective custody should not *feel* punished for requiring such protection. Accordingly, additional measures should be taken for prisoners on protection for an extended period of time to ensure access to education and activities.[270] Likewise, prisoners subjected to involuntary protective segregation must be apprised of the reasons for their isolation and given special attention to mitigate the compounding effects of forced isolation.[271]

Access to Social, Educational, and Legal Services

Restricted prisoners should be allotted a minimum of eight hours out of their cell and must only be restricted from vocational, educational, and other enrichment activities when absolutely necessary.[272] Prisoners must also be allowed meaningful contact with other people and access to enrichment services. Not only will this mitigate the effects of isolation, but it will better prepare them for post-release life.[273] Further, prisoners on restricted regime should be allotted greater contact with family and loved ones to offset the effects of reduced freedom of movement.[274]

The Prison Service would also benefit from training on the effects of solitary confinement to better intervene in crisis situations and prevent isolation syndrome. The current guidelines on restricting the number of consecutive and total days in isolation[275] are an admirable first step but, as the effects of isolation can set in quickly, the ability to identify the warning signs are critical to prisoner health and safety. Similarly, inmates who have requested protective segregation should be briefed on the potential effects of isolation. Considering the connection between

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[270] CARR, *supra* note 36, at 31.
[271] *See* Garrihy, *supra* note 204.
[272] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 47– 48.
[273] ROGAN, *supra* note 16, at 196, 198.
[274] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 48.
[275] *See* Prisons Bill 2016, *supra* note 126.

poverty, poor education, and incarceration, the language of such briefing must be accessibly written.[276]

Access to justice is a concern for all inmates but particularly those in solitary confinement. Therefore, the Prison Service must ensure that prisoners are properly apprised of their rights, especially their right to counsel, and inform prisoners of the complaint mechanisms available through the Prison Service.[277] The Inspector of Prisons must continue to pay special attention to the status and number of prisoners in isolation and provide consistent and detailed reports for public consumption.[278]

SOCIAL PROGRAMMING AND ALTERNATIVES TO CUSTODY

Ireland's overuse of solitary confinement largely appears to stem from a need to control the prison environment and reduce violence, which are exacerbated by prison overcrowding. Therefore, Ireland should invest in preemptive strategies to reduce the prison population. This will not only mitigate control and safety concerns, but will also reduce the strain on educational, health, and vocational services and allow more inmates to access them during their incarceration. One strategy is preventative social programming and alternative sentencing.

Irish criminal law appears to target activity often linked to poverty, including vagrancy and begging.[279] By international standards, Ireland has always had relatively low crime and incarceration rates.[280] The most common crimes in 2022 were theft, public order offenses such as

[276] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 48.
[277] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 49.
[278] *See* MARTYNOWICZ & MOORE, *supra* note 7, at 49.
[279] IRISH PENAL REFORM TR., *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor*, 11, https://www.iprt.ie/site/assets/files/6264/position_paper_final.pdf (last visited May 12, 2024); *see* Criminal Justice (Public Order) Act 2011 No. 5/2011 (Ir.).
[280] Behan, *supra* note 25; O'Donnell, *supra* note 51.

drunkenness, and drug offenses.[281] However, courts consistently issue custodial sentences to individuals for not paying fees and fines on time, improper dog licensing, and other minor crimes often associated with lower economic status.[282] In 2021, those sentenced to six months to a year for minor offenses represented nearly half of all custodial sentences.[283] Investment in education and community organization are proven to reduce the risk of offending, which will in turn reduce overcrowding rates.[284]

Ireland has also seen a steady climb in the number of people in pre-trial detention for minor offenses, with a fifty-six percent jump between 2016 and 2020.[285] Since Ireland does not have designated pre-trial custody centers, its twelve institutions generally see a mix of long-term committals and remand detainees.[286] Short custodial sentences, especially for minor offenses and pre-trial detention, likely takes up unnecessary room in state prisons. In lieu of this, Ireland should rely more on alternatives such as community services orders (CSO).[287] The Criminal Justice (Community Service) (Amendment) Act 2011 introduced a requirement for courts to consider CSOs for offenses that typically carry sentences of twelve or fewer months in prison.[288]

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[281] *See Provisional Crime Statistics 2022 (to end June 2022)*, National Police and Guard Service (Aug. 2022) https://www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2022/august/an-garda-siochana-provisional-crime-statistics-2022-to-end-june-2022-.html.

[282] *Rules for Specific Debts*, CITIZENS INFO., (Oct. 16, 2020); IRISH PENAL REFORM TR., *supra* note 279, at 9, 14.

[283] *Breakdown of Sentenced Committals Year 2007 to Year 2021* [Report], Irish Prison Service (2023) https://www.irishprisons.ie/wp-content/uploads/documents_pdf/05-SENTENCED-COMMITTALS-by-Offence-GroupSentence-Length-2007-to-2021.pdf (last visited May 12, 2024). .

[284] *See* IRISH PENAL REFORM TR., *supra* note 279 at 22.

[285] Conor Gallagher, *Growing Number of People in Pre-trial Custody for Minor Offences*, THE IRISH TIMES (Nov. 25, 2020), https://www.irishtimes.com/news/crime-and-law/growing-number-of-people-in-pre-trial-custody-for-minor-offences-1.4418052.

[286] *See Prison System in Ireland*, CITIZEN INFO. BD., (Nov. 12, 2020), https://www.citizensinformation.ie/en/justice/prison_system/prisons_and_places_of_detention.html; Remand detainees are offenders charged with an offense and detained without bail; *See Detention After Arrest*, CITIZEN INFO. BD., (last updated Aug. 18, 2020), https://www.citizensinformation.ie/en/justice/arrests/detention-after-arrest/.

[287] *See* IRISH PENAL REFORM TR.., *Alternatives to Custody,* (last visited Mar. 15, 2023).

[288] Criminal Justice (Community Service) (Amendment) Act 2011 (Act No. 24/2011) (Ir.).

However, Irish Prison Service reports published after enactment show that the legislation has largely failed to reduce imprisonment for minor offenses.[289]

In July 2022, the United Nations Human Rights Committee, under the International Covenant on Civil and Political Rights (ICCPR), recommended Ireland separate detainees and convicted prisoners.[290] Since overcrowding contributes to the level of violence in prisons and, consequently, the number of prisoners subjected to Rule 62 and 63 segregation, separate institutions or greater use of bail for those awaiting trial may reduce prison populations.[291]

Custody alternatives may lead to strides not only in decreasing prison overcrowding but also recidivism rates. Policies such as CSOs, early release, and suspended sentencing have a positive impact on recidivism rates and may inspire greater sense of community in offenders.[292] Custody alternatives will also likely have a marked impact on juvenile offenders and be more cost-effective options than custodial sentencing.[293] Considering the connection between prison overcrowding and use of solitary confinement, pursuing ways to reduce the incarcerated population in Ireland will also reduce the number of people on restricted regime, thus minimizing its dangerous effects.

V. CONCLUDING REMARKS

Reports on solitary confinement in Ireland are few and far between, and the Prison Service reports on the number of prisoners subjected to the practice are generally inaccurate or

[289] *See* IRISH PENAL REFORM TR., *supra* note 287.
[290] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Ireland 2022 Human Rights Report (2022).
[291] *See Bail and Surety*, CITIZEN INFO. BD., (May 5, 2022), https://www.citizensinformation.ie/en/justice/arrests/bail-and-surety/.
[292] *See* Ian O'Donnell, *An Evidence Review of Recidivism and Policy Responses*, Dept. of Just. and Equal., 11 (May 2020).
[293] O'Donnell , *supra* note 292, at 53-55.

inconsistent.[294] Most publicly accessible reports and analysis are published by the Irish Penal Reform Trust.[295] While this work is important and highly appreciated, there are many gaps in the data and, thus, it is difficult to pinpoint the root causes of the flaws in the Irish penal system.

It is too reductive to say that traditional Catholic and government-wary values, coupled with a history of comparatively low crime and incarceration rates, created a system keen on correction without the resources necessary to do so.[296] However, experts have noted a distinct lack of administrative action to improve prison conditions and resources, despite public motivation.[297] The near epidemic-levels of prison overcrowding that have permeated the Irish prison system for decades also increases the likelihood of prison violence, creating both a need to protect and restrain inmates, with little space to do so.

Solitary confinement has been admonished as a human rights violation tiptoeing the line of torture for over a century, yet it remains a feature in virtually every penal system around the world.[298] Ireland's restricted regime and single separation of children is no less a human rights violation than any other solitary system. An endemic of overcrowding in prisons is not sufficient to justify wide-scale use of solitary confinement, especially against vulnerable groups. Solitary confinement threatens the mental health of vulnerable prison populations and contributes to recidivism.[299]

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[294] *See CPT Report*, *supra* note 29, at 7, 24-27.

[295] *See* MARTYNOWICZ & MOORE, *supra* note 7; s*ee* CARR, *supra* note 36.

[296] *See* Behan, *supra* note 25; O'Donnell, *supra* note 51.

[297] *See e.g.,* MARTYNOWICZ & MOORE*, supra* note 7*; see e.g., Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, supra* note 262; *see e.g.,* ROGAN, *supra* note 16.

[298] MARTYNOWICZ & MOORE, *supra* note 7, at 6; McCall, *supra* note 2.

[299] *See* McCall, *supra* note 2.

After meeting prisoners isolated in cramped, single cells with no meaningful human interaction for years, American novelist Charles Dickens remarked:

> Very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers…which no man has a right to inflict upon his fellow creature. …I denounce it, as a secret punishment which slumbering humanity is not roused up to stay.
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> *Charles Dickens, in response to his visit to Eastern State Penitentiary, published October 1842*

CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION (1942).

Punitive isolation borders on torture and protective isolation cannot be tolerated as a long-term treatment for prison violence and limited space in prisons.[300] Both have been components of the Irish penal system since its inception and, therefore, there has been ample time to arrive at a better solution. Prisoners are entitled to human dignity and reasonable living conditions under Irish Law and international normative law. Society cannot ignore the maltreatment of prisoners – to do so would not only be cruel, but hypocritical. We cannot expect progress on the outside when those on the inside, a microcosm of human society, are subjected to such abuse.

[300] *See* Off. of the High Comm'r for Hum. Rts., *supra* note 132.

ETHIOPIA AND CONTROL OF THE INTERNET: A PATHWAY TO HUMAN RIGHTS VIOLATIONS

Kaylee Searcy[1]

ABSTRACT

This note focuses on Ethiopia and the recent two-year conflict in the region of Tigray. This note will focus on the internet and telecommunications blackouts being utilized as a weapon of war and the availability of legal repercussions. This note will address whether the use of internet and telecommunication blackouts constitute a violation of the law and further if it violates the Ethiopian citizen's human rights.

Although the freedom of the press and freedom of expression is explicitly stated in the Constitution of the Federal Democratic Republic of Ethiopia and protected by international law, there remain issues with government authority overreaching in the name of national security. This note will focus on the means by which the Ethiopian federal government controls the internet access and information its people receive, specifically in a time of armed conflict. This note will address how that control is a violation of domestic and international law. This note will recommend changes to be implemented for the future protection of citizens' right to information as well as provide recommendations for ensuring the appropriate parties are accountable for the crimes committed during the Tigray conflict.

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I. INTRODUCTION

Technology is advancing at an undeniably rapid pace. The internet and telecommunications are the fastest way to retrieve news, stay informed on current events, and communicate around the world. Yet, there is little domestic and international legislation specifically protecting a person's right to access it. A vital political, social, and economic tool, cyber networks are a great resource. Unfortunately, in the hands of the government, the internet can be a method of information control and censorship of its citizens.[2] In times of conflict within a nation, the internet and telephones play important roles in the spread of information. Journalists strive to gather news updates on the crisis, protests, and government responses. They help communicate the need for humanitarian aid. Citizens provide current event updates to journalists and also their neighbors and families afar. During times of crisis, details must be documented at that moment to protect truth and accuracy and ensure accountability. Should a government have the authority to blackout its' people's internet and telecommunications?

Where is the line at which a government entity can control whether a citizen has access to telecommunication? At what point does access to information become a protected right and by limiting access, the government commits a human rights violation? Finally, who, if anyone, should be held accountable? This note will answer these questions as they relate to the Tigray conflict in Ethiopia based on existing law in Ethiopia and laws at the international level. The domestic law of Ethiopia provides its people with the right to information without censorship[3] and international agreements support the enforcement of this. Yet, citizens were denied

[2] *See* Tom Gjelten, *Seeing The Internet As An 'Information Weapon',* NPR (Sept. 23, 2010, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=130052701.
[3] Constitution of the Federal Democratic Republic of Ethiopia Aug. 21, 1995, art. 29.

information, communication, and humanitarian aid as a result of repeated, unlawful communication blackouts.[4] Families were unable to contact loved ones and remained in the dark about their conditions and whereabouts; a problem which should never be inflicted on any group of people, especially during a time of war.

Part II of this note will provide a summary of the conflict in Ethiopia including the most recent conflict in the Tigray region. Part III of this Note will discuss human rights violations that occurred in the Tigray region during the most recent conflict including the blocking of humanitarian aid and attacks on civilians. Part IV will provide the focus of this note and address the communications blackouts during the Tigray conflict, including information regarding the technology, specific events surrounding the blackouts in Ethiopia, and material related to the responsible party. Part V of this note will provide a summary of the consequences of the blackouts in Ethiopia and the effects the shutdowns had on journalists, humanitarian aid, and the economy. Part VI of this note will provide accounts of modern blackouts used as weapons and forms of control around the world, detailing the circumstances surrounding blackouts in Russia, Iran, and Myanmar. Part VII will provide the law, both the Ethiopian local laws and international laws, related to human rights violations as a result of the internet blackouts including freedom of expression and freedom of the press. Part VIII will provide a summary of the peace agreement signed to end the Tigray conflict. Part IX will discuss information as a right and the manner in which the internet facilitates and protects that right. Part X will provide a conclusion and recommendation including amendments to the peace agreement and potential claims to be filed in the Ethiopian court system.

[4] *Telecommunications and Internet Blackout in Ethiopia's Tigray Region*, OMNA TIGRAY, 3 (Feb. 2022), https://omnatigray.org/telecommunications-and-internet-blackout-in-ethiopia-tigray-region/.

II. CONFLICT IN ETHIOPIA

In early November 2020, the Tigray People's Liberation Front (TPLF), a regionally government-opposed political group, believed that federal government forces were planning to attack.[5] The TPLF acted offensively and moved toward the capital city, Addis Ababa.[6] The TPLF attacked numerous military bases[7] and within hours, the Ethiopian National Defense Forces (ENDF) responded to the acts of aggression by order of the Prime Minister, Abiy Ahmed.[8] A two-year war in northern Ethiopia ensued.

The country has a history of conflict, as the 1970s and 1980s were tumultuous times in Ethiopia.[9] Haile Mariam Mengistu, a military dictator, had been head of the state since 1974.[10] Mengistu oversaw the drafting of the Ethiopian Constitution in 1986, the 1987 election of himself as president, and left a legacy of genocide and violence against his people.[11] Known as the "Red Terror" campaign, the government, under control of Mengistu, sought to silence any member of an opposing party.[12] Mengistu vowed to eliminate "counter-revolutionaries" and

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[5] Declan Walsh & Abdi Latif Dahir, *Why Is Ethiopia at War With Itself?*, N.Y. TIMES (Mar. 16, 2022), https://www.nytimes.com/article/ethiopia-tigray-conflict-explained.html.
[6] *Id*.
[7] *Inside a Military Base in Ethiopia's Tigray: Soldiers Decry Betrayal by Former Comrades*, REUTERS (Dec. 17, 2020, 6:29 AM), https://www.reuters.com/article/us-ethiopia-conflict-attack/inside-a-military-base-in-ethiopias-tigray-soldiers-decry-betrayal-by-former-comrades-idUSKBN28R1IE.
[8] *Q&A: Conflict in Ethiopia and International Law*, HUM. RTS. WATCH (Nov. 25, 2020, 12:25 P.M.), https://www.hrw.org/news/2020/11/25/qa-conflict-ethiopia-and-international-law#:~:text=On%20November%204%2C%202020%2C%20Ethiopian%20Prime%20Minister%20Abiy,and%20at%20other%20camps%20in%20the%20Tigray%20region.
[9] *Ethiopia's Tigray War: The Short, Medium, and Long Story*, BBC NEWS, https://www.bbc.com/news/world-africa-54964378.
[10] *Mengistu Haile Marian*, BRITANNICA, https://www.britannica.com/biography/Mengistu-Haile-Mariam(last updated Jan. 1, 2024).
[11] *Id.*
[12] African Union, *AUHRM Project Focus Area: Ethiopian Red Terror*, AFR. UNION HUM. RTS. MEM'L,https://au.int/auhrm-project-focus-area-ethiopian-red-terror (last visited Sept. 28, 2023.

targeted civilians.[13] He committed countless humanitarian crimes and forced relocations in the years that followed.[14] *Human Rights Watch* reports that over half a million people were killed,[15] while other estimates show that more than 700,000 people were killed during the fighting between Mengistu's party and its opposing groups.[16]

In 1991, the TPLF and the Ethiopian People's Revolutionary Democratic Front (EPRDF) merged to overthrow Mengistu.[17] His seventeen-year reign of brutality came to an end when he was forced to flee the country after the Tigrayan rebel organization defeated the Ethiopian army.[18] The same year, the EPRDF and other political parties evolved into the Transitional Government of Ethiopia (TGE) and worked to establish a democracy.[19] In 1992, the Special Prosecutor's Office was created to investigate the immense crimes committed during Mengistu's time in office.[20] Thousands of government officials and suspects were tried for various crimes throughout the 1990s, but the court system in Ethiopia was ill-equipped to handle such an influx of cases.[21] Years of delays occurred before trials, and concerns about due process and impartial judicial adjudication remain prominent.[22]

Amid a seemingly reconstructive decade, the election for an assembly was held in 1994 and in December 1994 the assembly adopted the Constitution for the Federal Democratic Republic of

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[13] *Ethiopian Dictator Mengistu Haile Marian*, HUM. RTS. WATCH (Nov. 24, 1999, 10:16 AM), https://www.hrw.org/news/1999/11/24/ethiopian-dictator-mengistu-haile-mariam.
[14] *Id.*
[15] *Id.*
[16] African Union, *supra* note 12.
[17] *Constitutional History of Ethiopia*, ConstitutionNet, https://constitutionnet.org/country/ethiopia#:~:text=Due%20to%20the%20Derg%27s%20oppressive%20regime%2C%20rebel%20groups,Front%20%28EPRDF%29%20merged%20to%20overthrow%20Mengistu%20in%201991.
[18] *Overv*iew *About Ethiopia*, EMBASSY OF ETHIOPIA, https://ethiopianembassy.org/overview-about-ethiopia/# (last visited Jan. 15, 2024)
[19] *Id*.
[20] *Ethiopian Dictator*, *supra* note 13.
[21] *Ethiopian Dictator*, *supra* note 13.
[22] *Ethiopian Dictator*, *supra* note 13.

Ethiopia.[23] Ethiopia is comprised of nine National Regional States including Tigray, Afar, Amhara, Oromia, Somali, Benishangul-Gumuz, Southern Nations, Nationalities and Peoples Regions, Gambella and Harari, and two administrative councils, Addis Abada and Dire Dawa.[24] For decades, the regions have been subject to conflict, control, and death as it was in the years Mengistu reigned.[25] From 1998 to 2000 Ethiopia was at war with a bordering country, Eritrea, fighting for control over a border town.[26] The town was eventually awarded to Eritrea, with the condition of further negotiations with Ethiopia. [27] Tensions remained in the years that followed as Eritrea refused to comply with the conditions and new leadership sought to find a peaceful resolution.[28]

Prime Minister Abiy Ahmed became the leader of the EPRDF in 2018.[29] Within a year, he declared a new future for Ethiopia with a united approach and denounced his political party for a new one, The Prosperity Party.[30] The Prosperity Party aimed to transform the economy of Ethiopia and its fundamental way of functioning.[31] The idea was to lessen the government's "active role in the economy" and develop a market of capitalism.[32] The controversy peaked when

[23] Embassy of Ethiopia, *supra* note 18.
[24] Embassy of Ethiopia, *supra* note 18.
[25] *The E*thiopian Civil War in Tigray, ORIGINS Current Events in Historical Perspective (Oct. 2021), https://origins.osu.edu/article/ethiopian-civil-war-tigray?language_content_entity=en.
[26] Tesfalem Araia, *Remembering Eritrea-Ethiopia border war: Africa's unfinished conflict*, BBC NEWS (May 6, 2018), https://www.bbc.com/news/world-africa-44004212.
[27] *Id.*
[28] *Id.*
[29] Scott Neuman, *9 Things To Know About The Unfolding Crisis In Ethiopia's Tigray Region*, NPR (Mar. 5, 2021, 12:12 PM), https://www.npr.org/2021/03/05/973624991/9-things-to-know-about-the-unfolding-crisis-in-ethiopias-tigray-region.
[30] Tom Gardner, *Will Abiy Ahmed's Bet On Ethiopia's Political Future Pay Off*?, FOREIGN POL'Y (Jan. 21, 2020, 8:56 AM), https://foreignpolicy.com/2020/01/21/will-abiy-ahmed-eprdf-bet-ethiopia-political-future-pay-off/.
[31] Goitom Gebreluel, *Ethiopia's Prime Minister Wants to Change the Ruling Coalition. Who's Getting left out?*, WASH. POST (Dec. 23, 2019, 7:00 AM), https://www.washingtonpost.com/politics/2019/12/23/ethiopias-president-wants-change-ruling-coalition-whos-getting-left-out/.
[32] *Id.*

Ahmed announced the idea of unity by invoking an "alternative history that deemphasized ethnic oppression" and focused on national unity.[33]

Arguing they were taking a stand to defend federalism and the constitution,[34] the TPLF did not agree with Ahmed's changes and instead made their home in the northern region of Tigray where they had small but powerful community support.[35] In 2020, the Prime Minister announced the country's election would be delayed due to the COVID-19 pandemic.[36] The TPLF argued this was an unconstitutional overreach of Ahmed's authority and held their own elections.[37] Ahmed "declared the Tigray elections invalid" and a battle of words, Constitutional authority, and the legitimate government began.[38]

III. HUMAN RIGHTS VIOLATIONS

At the start of the conflict and the TPLF's seizing of the capital city, the Prime Minister termed it "treason" and went on the offensive.[39] The ENDF quickly gained control of several Tigrayan cities bringing the physical fight to a region inhabited by over one million people.[40] People were forced to flee as the ENDF shelled towns and villages and the civil war began.[41] International awareness of the incident rose when tens of thousands of people fled[42] to neighboring Sudan.[43] Both parties to the conflict engaged in the displacement of civilians, and

[33] *Id.*
[34] *Id.*
[35] Neuman, *supra* note 29.
[36] Neuman, *supra* note 29.
[37] Neuman, *supra* note 29.
[38] Neuman, *supra* note 29.
[39] Neuman, *supra* note 29.
[40] Neuman, *supra* note 29.
[41] Agnès Callamard & Kenneth Roth, *Ethiopia's Invisible Ethnic Cleansing: The World Can't Afford to Ignore Tigray*, FOREIGN AFFS. (Jun. 2, 2022), https://www.foreignaffairs.com/articles/ethiopia/2022-06-02/ethiopias-invisible-ethnic-cleansing?utm_medium=social.
[42] *Id*.
[43] OMNA TIGRAY, *supra* note 4.

reports indicate Tigray forces engaged in the execution of civilians.[44] As forces tried to take control of towns and expand their presence, farmers and other locals would retaliate and defend themselves resulting in violent reactions and mass killings.[45] Mixed reports of violence included accusations against the TPLF of ethnic cleansing of other regions and claims that the ENDF was tactically aiming at the population of Tigrayan people.[46]

In violation of international law, humanitarian aid was blocked as healthcare facilities were "looted, vandalized, and destroyed in a deliberate and widespread attack on healthcare."[47] Medical facilities were damaged leaving paperwork in chaos and equipment and medicine ransacked and demolished.[48] Of the 106 medical facilities in Tigray, Médecins Sans Frontières (translated to Doctors Without Borders) reported that 87% were no longer fully functioning as of March 2021.[49] Doctors, who did not wish to be identified, cited lack of supplies as the primary cause of death in northern Ethiopia hospitals.[50] Government blockades prohibited the importing of supplies and left facilities unable to properly treat patients.[51] The government asserted that the TPLF was responsible for fighting forces invading health centers and making them inoperable.[52] Ethiopian government forces allegedly used a hospital building as their base and for treating

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[44] *Ethiopia: Tigray Forces Summarily Execute Civilians*, HUM. RTS. WATCH (Dec. 9, 2021, 10:00 PM), https://www.hrw.org/news/2021/12/10/ethiopia-tigray-forces-summarily-execute-civilians.
[45] *Id.*
[46] *"We Will Erase You from This Land": Crimes Against Humanity and Ethnic Cleansing in Ethiopia's Western Tigray Zone*, HUM. RTS. WATCH (Apr. 6, 2022), https://www.hrw.org/report/2022/04/06/we-will-erase-you-land/crimes-against-humanity-and-ethnic-cleansing-ethiopias.
[47] Press Release, *People Left With Few Healthcare Options In Tigray as Facilities Looted, Destroyed* (March 15, 2021), Medecins San Frontieres [hereinafter, Press Release].
[48] *Id.*
[49] *Id.*
[50] Katharine Houreld & Giulia Paravicino, *Doctors say lives are lost tin hospitals in Ethiopia's Tigray due to dwindling supplies, blame blockade*, REUTERS (Jan. 5, 2022, 6:29 AM), https://www.reuters.com/business/healthcare-pharmaceuticals/doctors-say-lives-are-lost-hospitals-ethiopias-tigray-due-dwindling-supplies-2022-01-05/.
[51] *Id.*
[52] *Id.*

soldiers, preventing ordinary citizens and civilians from seeking care at that location.[53] Referred to a healthcare center in town, people were left without hope when the center did not have the capability to supply the proper equipment as the hospital.[54] Common Article 3 of the Geneva Conventions of 1949 governs non-international conflict such as civil wars.[55] Article 3 prohibits a number of actions including taking hostages and torture.[56] It also provides that "the wounded and sick shall be collected and cared for."[57] There were violations of Article 3 when hospitals were taken over and citizens were unable to access necessary care.

There was reason to believe the government committed human rights abuses, crimes against humanity, and possible war crimes. International Criminal Court prosecutor Fatou Bensouda led the investigation .[58] In September 2022, the United Nations released a report detailing the International Commission of Human Rights investigative findings.[59] Violations were ongoing and dated back to the beginning of the conflict in November 2020.[60] The report specifically included, "reasonable grounds" to believe that starvation was used as a weapon against civilians and that crimes of sexual violence had been committed by both the TLPF and federal forces.[61] The report noted that millions of people had been unable to access basic services, including

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[53] Press Release, *supra* note 47.
[54] Press Release, *supra* note 47.
[55] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516.
[56] *Id*.
[57] *Id*.
[58] U.N. Human Rights Council, *International Commission of Human Rights Experts on Ethiopia Finds Reasonable Grounds to Believe that the Federal Government Has Committed Crimes against Humanity in Tigray Region and that Tigrayan Forces Have Committed Serious Human Rights Abuses, Some Amounting to War Crimes* (Sept. 22, 2022), https://www.ohchr.org/en/news/2022/09/international-commission-human-rights-experts-ethiopia-finds-reasonable-grounds#:~:text=The%20report%20found%20reasonable%20grounds%20to%20believe%20that%20Tigrayan%20forces,property%20in%20Kobo%20and%20Chenna.
[59] *Id.*
[60] *Id.*
[61] *Id.*

medical aid, and recommended that the federal government "immediately cease hostilities" and investigate the accusations to bring the proper parties to justice.[62]

IV. COMMUNICATION BLACKOUTS

a. The Technology

The Ethiopian Telecommunications Corporation, or Ethio Telecom, is the state-owned primary internet and telephone provider in the country.[63] The government has total control over the organization and the ability to impose telephone and internet blackouts without clarity or reason.[64] As a landlocked country, Ethiopia is unable to connect through submarine cable landing stations.[65] Instead, the telecommunications connect by satellite and fiber-optic cables that pass through Sudan and Djibouti. [66] With a monopoly on the supply of communications through Ethio Telecom, the government often argues the need to maintain public order and uses political events and national security interests as a defense to explain a blackout in communication.[67]

In 2018, acting on his strategy to reform the economy, Prime Minister Ahmed announced the government would sell minority shares in Ethio Telecom to both domestic and international

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[62] *Id.*
[63] *Freedom on the Net 2020: Ethiopia*, FREEDOM HOUSE, https://freedomhouse.org/country/ethiopia/freedom-net/2020#:~:text=As%20of%20January%202020%2C%20Datareportal,rate%20during%20the%20same%20period (last visited Sept. 29, 2023).
[64] *Id*.
[65] *Id.*
[66] Sintia Radu, *How Ethiopia Controls the Internet*, U.S. NEWS (June 21, 2019, 11:14 AM), https://www.usnews.com/news/best-countries/articles/2019-06-21/ethiopia-restores-the-internet-but-digital-censorship-worries-remain.
[67] Freedom House, *supra* note 63.

investors.[68] Sales were all but halted when the country entered into a civil war in 2020 and the ability to induce investors declined rapidly.[69]

On November 4, 2020, the TPLF violently attacked military bases and moved toward the capital,[70] the first stage of the two-year conflict. Around 1:00 am, NetBlocks, a global internet monitor, reported that the internet had been cut off in the northern regions of Ethiopia.[71] Within minutes, Prime Minister Ahmed tweeted about the military action being taken in Tigray.[72] NetBlocks cited previous instances of government-imposed communications blackouts as evidence that the government was responsible for this one as well.[73] Previously, the Ethiopian government had shut down the internet more than eight times during Prime Minister Ahmed's second year in office.[74] On certain occasions, the government publicly justified the shutdowns, but during other situations, failed to acknowledge a reason.[75] The length of the blackout revealed a strategy by the government with various potential motives.[76] Absent the Prime Minister citing "security reasons" to parliament once, the government offered no further explanation.[77] The

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[68] Saleha Riaz, *Ethiopia opens up Ethio Telecom to investors*, MOBILE WORLD LIVE (June 6, 2018), mobileworldlive.com/featured-content/top-three/ethiopia-opens-up-ethio-telecom-to-investors/.
[69] *Ethiopia restarts sale of Ethio Telecom stake, new telecoms licence,* REUTERS (Nov. 16, 2022, 5:56 AM), https://www.reuters.com/markets/deals/ethiopia-revives-sale-ethio-telecom-stake-new-telecoms-licence-2022-11-16..
[70] *Inside a Military Base in Ethiopia's Tigray: Soldiers Decry Betrayal by Former Comrades*, REUTERS (Dec. 17, 2020, 6:29 AM), https://www.reuters.com/article/us-ethiopia-conflict-attack/inside-a-military-base-in-ethiopias-tigray-soldiers-decry-betrayal-by-former-comrades-idUSKBN28R1IE.
[71] *Internet Disrupted in Ethiopia as Conflict Breaks out in Tigray Region*, NETBLOCKS (Nov. 4, 2020), https://netblocks.org/reports/internet-disrupted-in-ethiopia-as-conflict-breaks-out-in-tigray-region-eBOQYV8Z.
[72] *Id.*
[73] *Id.*
[74] Olesia Andersen, *Internet Shutdowns in Ethiopia: The Weapon of Choice*, PRIF BLOG (Mar. 11, 2022), https://blog.prif.org/2022/03/11/internet-shutdowns-in-ethiopia-the-weapon-of-choice/.
[75] *Id.*
[76] *Id.*
[77] *Ethiopia: Communications Shutdown Takes Heavy Toll*, HUM. RTS. WATCH (Mar. 9, 2020, 12:00 AM), https://www.hrw.org/news/2020/03/09/ethiopia-communications-shutdown-takes-heavy-toll.

blackouts had become "routine during social and political unrest,"[78] so that when the military responded to the TPLF in November 2020, NetBlocks found the connection to be clear- that the central government was responsible for the shutdown, and this was not the first or last time it would happen.[79]

Specifically, in February 2021, the Tekeze Hydroelectric Dam and power station, which provided electricity to parts of northern Ethiopia, was bombed by the Ethiopian Air Force.[80] The damage from this attack would take months to restore power to local communities.[81] By limiting citizens' ability to access power, the government ensured limitations to the internet and telecommunications. Telecommunication blackouts such as this one prevent communications by a shutdown of the internet and both mobile and landline communications.[82] The blackouts continued to occur throughout the Tigray region, most often in rural areas with already limited internet access.[83] On a personal and individual scale, families were unable to contact each other to confirm their safety and location, thus creating unnecessary hardship and concern.[84] On a larger scale, the blackouts made it increasingly difficult for citizens to inform surrounding communities and the world about what was happening.[85] Citizens needed to communicate the human rights violations, the military action, and the information control that were being perpetrated.[86] However, the military response ordered by the Prime Minister allegedly involved

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[78] *Id.*
[79] NETBLOCKS, *supra*, note 71.
[80] *Ethiopian Air Force Destroys Tekeze Hydroelectric Dam in Tigray,* GAROWE ONLINE (Feb. 12, 2021, 6:18 AM), https://www.garoweonline.com/en/world/africa/ethiopian-air-force-destroys-tekeze-hydroelectric-dam-in-tigray.
[81] *Id.*
[82] *See* James Jeffrey, *Ethiopia's Tigray Conflict and the Battle to Control Information*, ALJAZERRA (Feb. 16, 2021), https://www.aljazeera.com/news/2021/2/16/ethiopias-tigray-conflict-and-the-battle-to-control-information.
[83] OMNA TIGRAY, *supra* note 4.
[84] OMNA TIGRAY, *supra* note 4.
[85] Hum. Rts. Watch, *supra* note 76.
[86] *See* generally, Fidelis Mbah, *Outrage Over Ethiopia's Continuing Internet Blackout*, ALJAZERRA (June 25, 2019), https://www.aljazeera.com/economy/2019/6/25/outrage-over-ethiopias-continuing-internet-blackout.

abuse of civilians and the blackouts made it difficult to document and "discern the true cost of the war on the ground."[87] Connection to any network in Tigray was "sporadic and intermittent at best and nonexistent at worst."[88] The two-year shutdown in Tigray is one of the longest network blackouts to occur worldwide.[89]

b. Responsibility and Accuracy

However, while the TPLF accused the government of not actively working to restore services, federal officials in turn accused the rebels of intentionally damaging networks.[90] Federal forces asserted that the TPLF was attempting to limit Tigrayan people to only viewing propaganda in support of their movement.[91] Yet, the federal government continued to arrest journalists and prevent access to various forms of media.[92] The scarcity of direct reporting from Tigray and censorship concerns made it difficult to decipher accurate information from misinformation.[93]

Demonstrating that this is a problem that stretches far outside of Ethiopia, a global internet tracker reported an average of fifteen yearly shutdowns in Africa.[94] Sudan is believed to have utilized an internet blackout in an attempt to prevent pro-democracy protests which resulted in

[87] *Conflict in Ethiopia*, GLOB. CONFLICT TRACKER (Dec. 13, 2023), https://www.cfr.org/global-conflict-tracker/conflict/conflict-ethiopia.
[88] OMNA TIGRAY, *supra* note 4.
[89] OMNA TIGRAY, *supra* note 4.
[90] Salem Solomon, *Journalists Struggle Through Information Blackout in Ethiopia*, VOA NEWS https://www.voanews.com/a/press-freedom_journalists-struggle-through-information-blackout-ethiopia/6199045.html (last updated Dec. 4, 2020, 11:40 AM).
[91] *Id.*
[92] *Three Workers for Foreign Media Arrested in Ethiopia's Tigray Region*, REUTERS (Mar. 2, 2021, 6:38 AM), https://www.reuters.com/article/us-ethiopia-conflict-journalists/three-workers-for-foreign-media-arrested-in-ethiopias-tigray-region-idUSKCN2AU163.
[93] *Id.*
[94] Oluwatosin Ogunjuyigbe, *Ethiopia Has Lots $410 Million to a War-Induced Internet Shutdown*, VENTURES AFR. (Jan. 16, 2023), https://venturesafrica.com/ethiopia-has-lost-410-million-to-a-war-induced-internet-shutdown/.

military action by the government,[95] and the killing of over one hundred protestors.[96] On a continent with many developing regions, a lack of accurate record keeping, and repeated communication blackouts, records of the shutdowns are at times conflicting. *Ventures Africa* reported that Ethiopia had been without internet twenty-two times since 2016,[97] confirming government authority issues even before the current prime minister took over. As of February 2021, just months into the conflict, the European Union stated that about eighty percent of the Tigray population is "unreachable…it's a complete blackout."[98] *Ventures Africa* further cited the country's longest shutdown, in 2022, as 365 days- the longest in the world.[99]

V. CONSEQUENCES

Prior to the beginning of the Tigray conflict, Ethiopia had an expansive history of internet blackouts.[100] Prime Minister Ahmed told a journalist the "[i]nternet is not water, internet is not air," in an effort to substantiate the shutdowns.[101] He further maintained that should it be necessary "to save lives and prevent property damages, the internet would be closed permanently, let alone for a week."[102] Allowing the government this much control over citizens' access to information presents opportunities for distributing information in an unreasonable way that controls the narrative. By limiting internet access, governments substantially limit the most

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[95] Id.

[96] Steven Feldstein, *To End Mass Protests, Sudan Has Cut off Internet Access Nationwide. Here's Why.*, WASH. POST, (Jun. 13, 2019, 7:45 AM), https://www.washingtonpost.com/politics/2019/06/13/end-mass-protests-sudan-has-cut-off-internet-access-nationwide-heres-why/.

[97] Ogunjuyigbe, *supra* note 94.

[98] *EU Urges Ethiopia to Lift Tigray 'Blackout*,' EUOBSERVER (Feb. 23, 2021, 7:25 AM), https://euobserver.com/tickers/151023.

[99] Ogunjuyigbe, *supra* note 94.

[100] Ogunjuyigbe, *supra* note 94.

[101] *'Internet Is Not Water, Air:' Ethiopia PM Defends Blackouts*, BUS. FOCUS (Aug. 2, 2019), https://businessfocus.co.ug/internet-is-not-water-air-ethiopia-pm-defends-blackouts/.

[102] *Ethiopia Will Cut Internet as and When, 'It's Neither Water nor Air' – PM Abiy*, AFR. NEWS , https://www.africanews.com/2019/08/02/ethiopia-will-cut-internet-as-and-when-it-s-neither-water-nor-air-pm-abiy/ (last updated Feb. 8, 2019).

popular forms of modern communication, including social media, news, and applications used for communication or texting.[103] This preferred tactic of using the internet as a weapon allows governments to control citizens' ease of communication and its effectiveness when organizing protests or anticipating conflict.[104]

An estimated six million people were affected by internet outages.[105] Prime Minister Ahmed argued that at times, the communication shutdown was necessary to help "curb violence."[106] On February 3, 2020, the Prime Minister told the country's parliament that there had been an intentional telecommunications blackout in a certain region; a region which had reports of growing violence and rebel groups.[107] Additionally, in 2019 the Information Network Security Agency confirmed to a UN representative that the government had repeatedly shut down the internet and could not "articulate for me a legal basis for such actions."[108] The Prime Minister has publicly urged that the blackouts were used in times of crisis and unrest for the people's own protection, but in reality, activists were unable to document and share the events as they were occurring.[109] By using the internet and communication for censorship and control, the government was able to limit what information was dispersed to the rest of the world. Because

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[103] Steven Feldstein, *Government Internet Shutdowns Are Changing. How Should Citizens and Democracies Respond?,* CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 31, 2022), https://carnegieendowment.org/2022/03/31/government-internet-shutdowns-are-changing.-how-should-citizens-and-democracies-respond-pub-86687.

[104] *Id*.

[105] Zecharias Zelalem, *FEATURE-Six Million Silenced: A Two-Year Internet Outage in Ethiopia*, REUTERS, https://www.reuters.com/article/ethiopia-internet-shutdown-idAFL8N2ZM09X (last updated Sept. 28, 2022 8:05 PM).

[106] *Id*.

[107] Ermias Taprsfaye, *Amid Blackout, Western Oromia Plunges Deeper into Chaos and Confusion*, ETH. INSIGHT (Feb. 14, 2020), https://www.ethiopia-insight.com/2020/02/14/amid-blackout-western-oromia-plunges-deeper-into-chaos-and-confusion/.

[108] Press Release, Special Procedures, U.N. Special Rapporteur on the Right to Freedom of Op. And Expression David Kaye Visit to Ethiopia., 2-9 Dec. 2019 End of Mission Statement, U.N. Press Release (Dec. 9, 2019).

[109] Zelalem, *supra* note 105

people were unable to confirm the safety and stability of areas, it became extremely difficult for humanitarian aid to enter Tigray.[110]

The U.N. reported that federal forces entered humanitarian aid offices and confiscated internet and communication equipment.[111] This was likely a tactic intended to limit their ability to successfully assist or transport emergency equipment to the necessary location.[112] Humanitarian aid was delayed because workers were unable to communicate by telephone and plan where to locate shelters or citizens in need with the knowledge of the area.[113] In-person meetings and hardcopy reports had to be transferred by hand, which slowed the assistance people were able to provide.[114] The International Committee of the Red Cross (ICRC) helped facilitate over 185,000 phone calls and voice messages "to affected families throughout the country to exchange news about themselves."[115] They, along with other humanitarian aid workers, relied on satellite phones to bypass the communication blackouts.[116]

Journalists within Ethiopia's northern border were unable to report stories to the surrounding countries.[117] Investigations into potential war crimes were delayed because the transfer of

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[110] Zelalem, *supra* note 105.

[111] U.N. Off. for the Coordination of Humanitarian Affs., *Ethiopia-Tigray Region Humanitarian Update - Flash Update*, RELIEFWEB (July 1, 2021), https://reliefweb.int/report/ethiopia/ethiopia-tigray-region-humanitarian-update-flash-update-1-july-2021.

[112] Zelalem, *supra* note 105.

[113] Zelalem, *supra* note 105.

[114] Zelalem, *supra* note 105. The ICRC convoy was completely unable to access the Tigray region to deliver medical supplies, food, and clean water by car from September 2021 until April 2022. Zelalem, *supra* note 103. However, the ICRC was able to successfully facilitate flights into the region to deliver emergency life-saving medicine and medical resources. Zelalem, *supra* note 105.

[115] *Red Cross Reunites Families With 185,000 Calls and Messages in Ethiopia*, INT'L COMM. OF THE RED CROSS (Oct. 25, 2022), https://www.icrc.org/en/document/red-cross-reunites-families-185000-calls-and-messages-ethiopia#:~:text=In%20nine%20months%20from%20January,Northern%20Ethiopia%20where%20fighting%20continues.

[116] Zelalem, *supra* note 105.

[117] CPJ Africa & Asia Program Staff, *Journalists Struggle to Work Amid Extended Internet Shutdowns in Myanmar, Ethiopia, Kashmir*, COMM. TO PROTECT JOURNALISTS (May 3, 2021, 7:09 AM), https://cpj.org/2021/05/journalists-shutdowns-myanmar-ethiopia-kashmir/.

information was so scarce.[118] Journalists provide a level of accountability. With the communication blackout, reporters faced challenges in confirming stories.[119] They could not share photographs over the internet that would typically be used to corroborate stories when conflicting information was rampant.[120] The growing human rights narrative for internet blackouts is that if the government had nothing to hide, there would be no need for it.[121] Documentation encourages the avoidance of human rights violations. By exercising censorship and control over the internet, the government is violating the freedoms of the press and of expression.

An additional consequence of the internet shutdowns was that banking services were inaccessible, meaning that citizens were unable to access their personal bank accounts to buy food and basic necessities.[122] The devastating effects of the shutdowns have reached upwards of a $410 million dollar loss in the economy.[123] The total amount lost is difficult to confirm, but to further oppose the government's "form of social control," cyber companies are making efforts to track the economic consequences.[124]

VI. MODERN BLACKOUTS

Ethiopia is not unique. Internet shutdowns are a modern-day tool used by governments, often to cover up human rights atrocities and limit the free speech and expression of the people.[125]

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[118] *See* OMNA TIGRAY, *supra* note 4.
[119] CPJ Africa & Asia Program Staff, *supra* note 117.
[120] CPJ Africa & Asia Program Staff, supra note 117.
[121] *See* OMNA TIGRAY, *supra* note 4.
[122] *Electricity, Telecoms Return to Parts of Tigray Following Cease-Fire with Ethiopia*, ASSOCIATED PRESS (Dec. 7, 2022, 9:46 AM), https://apnews.com/article/technology-africa-business-kenya-ethiopia-fccde80683cd3fee0fe3ed8fd21e2740.
[123] Ogunjuyigbe, *supra* note 94.
[124] Samuel Woodhams & Simon Migliano, *Government Internet Shutdown Cost $5.6 Billion in 2021*, TOP 10 VPN (Jan. 4, 2022), https://www.top10vpn.com/research/cost-of-internet-shutdowns/2021/.
[125] *Activists: Internet Shutdowns Violate Human Rights,* U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Aug. 19, 2022), https://www.ohchr.org/en/stories/2022/08/activists-internet-shutdowns-violate-human-

There lies the problem with the government being the sole regulator of the telecommunication flow of information. A "digital authoritarianism" practice is rising as governments strategically utilize the internet, or lack thereof, to the benefit of their control-driven agendas.[126] Reporting seventy percent of the 155 telecommunication disruptions in 2020, India "leads the world in internet shutdowns."[127] The shutdowns occur during times of unrest in India, for example during times of political unrest including protests, wars, and elections.[128]

Several times the government of India attempted to justify shutdowns by stating it was to prevent students from cheating during exams by utilizing the internet.[129] Internet shutdowns prohibited people from attempting to speak out or encouraging fellow citizens to become politically involved. In 2021, a digital rights organization recorded more than 180 network shutdowns spanning thirty-four countries.[130] Iran and Russia are also perpetrators of government-sanctioned internet blackouts to filter information that citizens may read or hear about.[131] What began in countries like Iran and Russia as sporadic pieces of censorship grew into deliberately coordinated blackouts.[132] In Iran, the government shut down the internet when public dissent

rights#:~:text=Government%2Dimposed%20internet%20shutdowns%20cause,UN%20Human%20Rights%20Office%20warns.

[126] Julia Bergin et al., *Flicking the Kill Switch: Governments Embrace Internet Shutdowns as a Form of* Control, THE GUARDIAN (Aug. 28, 2022), https://www.theguardian.com/technology/2022/aug/29/flicking-the-kill-switch-governments-embrace-internet-shutdowns-as-a-form-of-control.

[127] CJP Africa & Asia Program Staff, *supra* note 117.

[128] Marianne Díaz Hernández et al., *Internet Shutdowns in 2021 Report: India is the World's Largest Offender*, ACCESS NOW (Apr. 28, 2022), https://www.accessnow.org/wp-content/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf.

[129] *Id.*

[130] *Ethiopia: Internet Shutdowns in Tigray Persist as Ethiopia Hosts UN Internet Meeting*, INT'L PRESS INST. (Dec. 2, 2022), https://ipi.media/ethiopia-internet-shutdowns-in-tigray-persist-as-ethiopia-hosts-un-internet-meeting/.

[131] Adam Satariano & Valerie Hopkins, *Russia, Blocked From the Global Internet, Plunges Into Digital Isolation*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/technology/russia-ukraine-internet-isolation.html.

[132] *See Id.*

began against the government in February 2022.[133] It appeared to be motivated by a desire to quash citizens' attempts to protest, but the result was further disorder and misinformation.[134]

Blocking off an entire region to the outside world creates a "cloak of darkness."[135] In the country of Myanmar, after overthrowing the elected government, the army ordered the shutdown of the internet and continued to intermittently block phone communications.[136] People protested and violent consequences followed.[137] Victims of attacks by juntas in the Myanmar conflict say they would have been prepared and able to protect themselves had they had access to telephone communications and received a warning.[138] The junta leaders acted strategically and ordered companies to block internet and telephone communications to areas where resistance was rising, and people were uniting.[139] It made unifying citizens and mobilizing protests arduous.[140] *Access Now* maintains that any government willing to shut down their country's internet is doing so to hide what is happening.[141] During the initial thirty-hour shutdown, the U.N. Human Rights Office tweeted on their account that services must be restored "to ensure freedom of expression and access to information."[142]

VII. THE LAW

a) Ethiopian Law

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[133] *Id.*
[134] *Id.*
[135] Bergin et al., *supra* note 123.
[136] Andrew Nachemson, *In Myanmanr's Rebel Strongholds, Internet Blackouts Can Mean Life or Death,* CONTEXT (Sept. 29, 2022), https://www.context.news/digital-rights/in-myanmars-rebel-strongholds-internet-can-mean-life-or-death.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Andrea Januta & Minami Funakoshi, *Myanmar's Internet Suppression,* REUTERS (Apr. 7, 2021), https://www.reuters.com/graphics/MYANMAR-POLITICS/INTERNET-RESTRICTION/rlgpdbreepo/.
[141] *Id.*
[142] *Id.*

Article 29 of the ratified Constitution of the Federal Democratic Republic of Ethiopia guarantees citizens the rights to freedom of expression and freedom of the press.[143] Specifically, paragraph two of Article 29 states that all have the right to freedom of expression "to seek, receive and impart information and ideas of all kinds" without interference, orally, written, in print, and other forms.[144] Additionally, the freedom of press subpoint number three states "Freedom of the press and other mass media and freedom of artistic creativity is guaranteed."[145] Freedom of the press includes access to information "of public interest" without censorship.[146] The internet is the press in the modern era of technology. Article 29 also includes a provision stating that the free flow of information and opinions is "essential" and will be legally protected.[147] In an outright violation of Article 29, the Prime Minister insisted that by limiting communications, controlling internet access, and restricting the press, he prevented the spread of misinformation,[148] a justification not supported by the Constitution.

Ethiopia cannot continue to ignore its own established laws. By blocking the internet and spread of information, the state is infringing upon its citizens' right to access and share information relevant to public interest.[149] In a time of conflict and civil war, information is vital and without question, of the public's interests.

b) African and International Law

[143] THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Aug. 21, 1995, pt. 2, art. 29.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] FREEDOM HOUSE, *supra* note 63.
[149] Constitution, *supra* note 3.

The African Charter created the African Commission on Human and People's Rights (ACHPR) to protect human rights in Africa.[150] Ethiopia has been a party to the African Charter since its ratification in 1998.[151] In November 2016, the ACHPR finalized the Resolution on the Right to Freedom of Information and Expression on the Internet in Africa.[152] The Commission called on the countries to ensure legislative action was taken to protect citizens' right to freedom of information by access to the internet.[153] On May 12, 2021, the ACHPR launched an investigation into the events in Ethiopia.[154] The announcement referenced Article 45 of the African Charter and the requirements to "promote and protect human and peoples' rights" and included an extensive list of crimes and allegations committed against the people of Tigray.[155] However, no mention of telecommunication blackouts was made. The announcement of the investigation was not well-received.[156] Ethiopia issued a response stating that the ACHPR unilateral announcement of the inquiry of events in Tigray was outside the scope of their authority absent joint efforts by the Ethiopian government.[157] Ethiopia's Ministry of Foreign Affairs press release alleged the country officials were acting in good faith and willing to

[150] African Union [AU], African Comm'n on Hum. Rts. and People's Rts. [ACHPR], (2023), https://achpr.au.int/en/about.
[151] Concluding Observations and Recommendations - Ethiopia: 1st to 4th Periodic Reports, 1998-2007 (May 26, 2010), https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-ethiopia-1st-4th-periodic-repo.
[152] ACHPR/Res.362(LIX), *Resolution on the Right to Freedom of Information and Expression on the Internet in Africa* (Nov. 4, 2016).
[153] *Id.*
[154] ACHPR/Res. 482 (EXT.OS/XXXII), *Resolution on the Fact-Finding Mission to the Tigray Region of the Federal Democratic Republic of Ethiopia* (May 24, 2021).
[155] *Id.*
[156] Press Release, Ministry of Foreign Affairs, Embassy of Eth., *Press Statement on the African Commission on Human and Peoples' Rights Measures to Investigate Alleged Violations of Human Rights and Humanitarian Law in the Tigray Region of Ethiopia* (June 17, 2021) [hereinafter Embassy].
[157] *Id.*

conduct a joint investigation until the announcement was released.[158] The press release cited concerns about the ACHPR not following the proper investigative procedure.[159]

The United Nations has become increasingly involved in the debate surrounding internet access as a human right. Regulations have been expanded and interpreted, arguably to include evolving technologies and the internet.[160] The International Covenant on Civil and Political Rights (ICCPR) provides the freedom of expression, assembly, and access to information.[161] "The right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[162] The International Governance Forum (IGF) stated in 2014 that internet access free from protest and censorship was a freedom of expression and information as described in the ICCPR.[163] It is not difficult to see that the language is broad to allow interpretation as well as the development and application of new technology.[164] In fact, upon a study of the history and drafting of the language, the intention was to allow the inclusion of new technology.[165] The word "internet" is not explicitly stated, but Article 19 protects access to media and information and provides the foundation upon which gaps may be filled regarding internet law at an international level.[166]

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[158] *Id*.
[159] *Id*.
[160] Molly Land, *Toward an International Law of the Internet*, 54 Harv. Int'l L.J. 393, 416 (2013).
[161] *#KeepItOn In Tigray: Ethiopia Must Lift the Blackout from Conflict Zone* (July 29, 2021) https://www.accessnow.org/cms/assets/uploads/2021/07/Tigray_Ethiopia_KeepItOn_Statement.pdf.
[162] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights [ICCPR] at 11 (Dec. 16, 1966). [hereinafter ICCPR]
[163] U.N. Internet Governance F., *The Charter of Human Rights and Principles for the Internet,* (Aug. 2014). [hereinafter Governance]
[164] Ryan Shandler & Daphna Canetti, *A Reality of Vulnerability and Dependence: Internet Access as a Human Right*, 52 Isr. L. Rev. 77 (2019).
[165] Land, *supra* note 160.
[166] ICCPR, *supra* note 162.

In reference to the freedom of expression, opinion, and media, the United Nations added the following language to Article 19 of the Universal Declaration of Human Rights (UDHR): "The promotion, protection, and enjoyment of human rights on the Internet."[167] The release was aimed at countries implementing internet blockades.[168] The problem is the UDHR is not a legally binding agreement, but a standard of principles recommended to guide countries.[169]

The IGF is a body within the United Nations that "facilitates the discussion of public policy issues pertaining to the internet."[170] In the past, the IGF has reported blackouts in Russia, Sudan, and Ethiopia. The fight for a right to the internet and telecommunications is driven by the fact that often these blackouts occur when the government is executing an operation or committing an alleged human rights violation.[171] Coincidentally, despite voices in opposition, the annual IGF meeting in 2022 was planned and carried out in the capital city of Ethiopia.[172] Under the human rights summary of the IGF 2022 report, the organization noted, "Governments should avoid recourse to internet shutdowns because of their negative impact on human rights…technology companies should support citizens in their advocacy efforts concerning shutdowns."[173] Lacking specificity, there was no mention of Tigray in the report. Ethiopian officials boasted about the digital future and commitment to the development of the internet[174] and access while the region of Tigray remained systematically disconnected.

VIII. RESOLUTION: STEP ONE

[167] Catherine Howell & Darrell M. West, *The Internet as a Human Right,* TECH TANK (Nov. 7, 2016), https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/.
[168] *Id.*
[169] G.A. Res. A/RES/53/144, *Declaration on Human Rights Defenders,* (Mar. 8, 1999).
[170] Governance, *supra* note 163.
[171] *Activists*: *Internet Shutdowns Violate Human Rights*, *supra* note 125.
[172] Governance, *supra* note 163.
[173] *Summary Records of the 17th Meeting*, [2022] Internet Governance F.
[174] *Id.*

On November 2, 2022, after ten days of peace talks and mediation, the parties came to a final agreement.[175] The TPLF and the Ethiopian government signed the Agreement for Lasting Peace through a Permanent Cessation of Hostilities.[176] Despite a clause in Article 1.7 instructing the parties to "provide a framework to ensure accountability for matters arising out of the conflict,"[177] there are future concerns if parties are not held accountable.[178] Article 10.3 elaborates by providing that the government of Ethiopia will establish a plan for a "national transitional justice policy aimed at accountability."[179] Article 10.3 states that the policy will be developed with various inputs and go through a formal process, concluding in Article 10.4 with a note that the parties agree to abide by the Constitution of Ethiopia.[180] The federal government has routinely denied its people access to information in violation of both local and international law. The agreement is not specific enough or detailed enough to ensure accountability at a federal government level.

While the signed agreement required a restoration of basic services to Tigray, a month after the cease-fire, regions of Tigray remained in the dark without internet and phones.[181] Forging a small path for change, in the weeks following the signing of the peace agreement, Ethiopia again

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[175] Declan Walsh et al., *Ethiopia and Tigray Forces Agree to Truce in Calamitous Civil War*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/world/africa/ethiopia-tigray-civil-war.html.

[176] U.N.News, Global Perspective Human Stories, *Ethiopia: Peace Agreement Between Government and Tigray 'a Critical First Step'*(Nov. 2, 2022), https://news.un.org/en/story/2022/11/1130137.

[177] Agreement for Lasting Peace Through a Permanent Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People's Liberation Front (TPLF), Eth.-TPLF. Nov. 2, 2022, African Union. [hereinafter Agreement for Lasting Peace]

[178] Owiso Owiso, *The Ethiopia-Tigray Permanent Cessation of Hostilities Agreement and the Question of Accountability for International Crimes*, JUST SEC. (Nov. 28, 2022), https://www.justsecurity.org/84225/the-ethiopia-tigray-permanent-cessation-of-hostilities-agreement-and-the-question-of-accountability-for-international-crimes/.

[179] Agreement for Lasting Peace, *supra* note 177.

[180] Agreement for Lasting Peace, *supra* note 177.

[181] ASSOCIATED PRESS, *supra* note 122.

initiated a process of selling forty percent of its stake in Ethio Telecom.[182] In February 2023, the government increased it to forty-five percent.[183] It is too soon to know the effect of the potential sales.

IX. INFORMATION ACCESS AS A RIGHT

Ethiopia's internet outages from 2020-2022 were not isolated incidents. The country has one of the most obstructive reputations in the world for information access.[184] Practically speaking, of the 120.3 million people in Ethiopia in 2020, only 21.1 million people were regularly using the internet, a mere 18.5 percent of the population.[185] Statistically one of the most disconnected nations across the globe, Ethiopia's internet usage increased by 2.6 percent from 2020. [186] By contrast, in 2015, internet access was reported at only 15.4 percent of the country.[187] It is necessary to consider population growth as a contributing factor and note the differences in urban internet access and rural access.[188]

Establishing international laws to regulate internet access as a human right would open an entirely new field of regulating cyber policy and national security.[189] Alternatively, many view the internet as a means to utilize rights granted and not an inherent right itself. According to one

[182] *Ethiopia Restarts Sale of Ethio Telecom Stake, New Telecoms Licence,* REUTERS (Nov. 16, 2022, 5:56 AM), https://www.reuters.com/markets/deals/ethiopia-revives-sale-ethio-telecom-stake-new-telecoms-licence-2022-11-16/.
[183] Alan Burkitt-Gray, *Ethiopia Aims to Raise $675m in Ethio Telcom Share Sale*, CAPACITY MEDIA (Feb. 13, 2023, 11:46 AM), https://www.capacitymedia.com/article/2b9xzdsntty8jfmpp06ww/news/ethiopia-aims-to-raise-675m-in-ethio-telecom-share-sale.
[184] Sintia Radu, *How Ethiopia Controls the Internet*, US NEWS (Jun. 21, 2019, 11:14 AM), https://www.usnews.com/news/best-countries/articles/2019-06-21/ethiopia-restores-the-internet-but-digital-censorship-worries-remain.
[185] FREEDOM HOUSE, *supra* note 63.
[186] FREEDOM HOUSE, *supra* note 63.
[187] FREEDOM HOUSE, *supra* note 63.
[188] FREEDOM HOUSE, *supra* note 63.
[189] Shandler & Canetti, *supra* note 164.

New York Times writer "technology is an enabler of rights."[190] The bottom line of the disagreement in this area is how to define a human right. We hold governments accountable by concluding that inhibiting access to the internet creates a barrier to a person's freedom of expression, a hindrance to access to information, and therefore, a violation of the law.

The legal route should be considered in accountability for internet and communication blackouts. In countries such as Sudan and Zimbabwe, attorneys representing organizations aiming to defend "constitutional and consumer rights" have filed lawsuits against the telecommunication company responsible for the shutdown and against the state itself.[191] In 2019 in Sudan, an attorney filed suit against a communications company for shutting down the internet at the instruction of the country's security forces.[192] The judge in the matter ordered the three internet providers in the region to restore services.[193] The same year, in Zimbabwe, an attorney filed a suit against the state on behalf of a human rights organization.[194] The court, in that case, held that the particular government office responsible for the shutdown did not have the authority to act by blacking out the internet pursuant to a local communications act.[195] Contenders note the risks of challenging a government-ordered internet shutdown- specifically, the personal safety of anyone involved in the judicial process and the costs in time and money.[196]

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[190] Vinton G. Cerf, *Internet Access Is Not A Human Right*, N.Y. TIMES (Jan. 4, 2012), https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html.
[191] Peter Micek & Madeline Libbey, *Judges Raise the Gavel to #KeepItOn Around the World*, ACCESS NOW (Sept. 23, 2019), https://www.accessnow.org/judges-raise-the-gavel-to-keepiton-around-the-world/.
[192] *Sudan Court Orders Restoral of Internet, but no Sign of Services Returning*, REUTERS (Nov. 9, 2021 11:40 AM), https://www.reuters.com/world/africa/court-orders-restoration-sudan-internet-access-2021-11-09/.
[193] *Id.*
[194] *High Court Sets Aside Internet Shut Down Directives*, MISA ZIMBABWE (Jan. 21, 2019), https://zimbabwe.misa.org/2019/01/21/high-court-sets-aside-internet-shut-down-directives/.
[195] *Id.*
[196] Micek & Libbey, *supra* note 191.

Although there are potential risks involved, Ethiopia advocates must follow this legal pathway to justice. Attorneys and potential plaintiffs need to secure protection and unquestionable standing in the court. Challengers may need to be prepared for discrediting tactics and have the funds to continue litigating.[197] For this reason, it may be more effective to utilize human rights organizations rather than an individual plaintiff within the country to file the suits. There is power in numbers. AccessNow argues that "more lawsuits, by more lawyers, in more countries," a quote from a Cameroonian lawyer, is the answer.[198]

Human rights organizations should file lawsuits within the Ethiopia court system claiming violations of their freedom of expression and freedom of the press without censorship under Article 29 of the Federal Democratic Republic of Ethiopia Constitution. Legal and public reprimand and enforcement of existing legislation is the necessary response in Ethiopia. Plaintiffs today will create precedents and serve as a symbolic movement in the judicial system to protect victims of wartime blackouts in the future.

X. CONCLUSION

The most recent conflict in Tigray demonstrates the need for accountability in Ethiopia. The vague language of the peace agreement to initiate a judicial process needs to be amended. Upon the establishment of a clear and detailed judicial process to hold the accountable parties responsible for the crimes committed, all parties should sign and implement the amended plan.

Political authorities were in violation of local and international law by restricting access to information, freedom of expression, and freedom of press. The method by which they did this is the relevant issue here: the internet. Ethiopia has demonstrated its unwillingness to cooperate

[197] Micek & Libbey, *supra* note 191.
[198] Micek & Libbey, *supra* note 191.

with the ACPHR inquiry, so additional steps must be taken. An investigation is needed to determine the facts and circumstances in which telecommunications were blocked in Tigray and the inherent human rights violations as a result of the blockades. Human rights organizations should use the data and facts collected to challenge the federal government's control of the internet. The law needs to explicitly define human rights and the authority and mechanisms to protect those rights. Additional specific legislation needs to be enacted to maintain individual freedoms as technology continues to develop.

Access to the internet and telecommunications is a necessary means to preserve human rights. The world will watch how this is approached and handled in the court system and by the people. Countries will note how they may approach the issue or toe the line. The next legal step matters.

Imperialistic Tendencies – How the United States Still Practices Imperialism Through the *Insular Cases*

By: Nathanael Linton[1]

Abstract

From its inception, the founding fathers arguably envisioned The United States of America as an extensive empire of liberty. Contrary to the popular thought, the U.S.'s imperialistic tendencies began long before the 1890's. This vision of an "empire" has been the guiding force for this country's "imperial ambition" and has had major impacts on its constitutional history, politics, theory, and law.

This paper argues how the United States still has imperialistic tendencies to date. However, within establishing such imperialistic tendencies, this paper's premise is that the Insular Cases should no longer be accepted as good law. These series of cases should be overturned, and the federal government must abolish its doctrine of unincorporated/incorporated territories. In overturning the Insular Cases, the federal government must now decide what to do with the territories. This paper does not argue that government does not have the power to acquire territories, but rather if the United States acquires a territory, it should be admitted as a state or ultimately let go, and not separated into distinct categories of incorporated/unincorporated.

This paper will provide specific case studies which show how the Insular framework is the basis of modern-day Supreme Court cases which show how ill-principles still grips modern law as "good precedent." Accomplishing this in distinct parts, it will paint a picture for how the nation still sees itself as an "extensive empire of liberty," but limits the rights of inhabitants deemed to be the "other" in the United States. Part I(a) will focus on defining the nature of imperialism today. Part 1(b) will focus on the historical framework of how the United States is able to acquire territories. Part II will focus on the Insular Cases. These are a series of cases from 1901 – 1905 that will prove how the United States made imperialism legal. Part III will focus on the subsequent effects on new caselaw that still embrace the detrimental holdings of the Insular Cases. Part IV will be a subjective analysis adding a proposed solution to figure out moving forward what should be done if the United States acquires new territories.

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Introduction

From its inception, the founding fathers arguably envisioned the United States of America as an extensive empire of liberty.[2] Contrary to popular thought, the U.S.'s imperialistic tendencies began long before the 1890's. This vision of an "empire" has been the guiding force for this country's "imperial ambition" and has had major impacts on its constitutional history, politics, theory, and law.[3]

Although certain concepts should be considered void of logical reasoning in the modern day, one should consider how it came to be by looking at its usage in time, place, and context in history. To understand how American society once deemed imperialism as necessary and proper, is to understand how the law was used to provide legal justification for its territorial acquisition. From gaining numerous territories to creating various legal fictions, the United States was able to create and justify fundamental distinctions between indigenous and United States-born individuals. Although society present-day would condemn such historical beliefs of prejudice and racial inferiority, certain legal fictions created during the 19th and 20th centuries persist today as good and binding law. Therefore, this "imperial ambition" still has rippling effects in modern society.[4]

This paper is about those rippling effects and argues how the United States still has imperialistic tendencies to date. However, within establishing such imperialistic tendencies, this paper's premise is that the *Insular Cases* should no longer be accepted as good law. These series of cases should be overturned, and the federal government must abolish its doctrine of unincorporated/incorporated territories. In overturning the *Insular Cases*, the federal government

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[2] GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 2 (Yale Univ. Press 2004).

[3] JAMES G. WILSON, THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY 2 (Ashgate Publishing Ltd. ed., 2002).

[4] *Id.*

must now decide what to do with the territories. This paper does not argue that the government does not have the power to acquire territories, but rather if the United States acquires a territory, it should be admitted as a state or ultimately let go, and not separated into distinct categories of incorporated/unincorporated.

This paper will provide specific case studies which show how the *Insular* framework is the basis of modern day Supreme Court cases which show how ill-principles still grip modern law as "good precedent." Accomplishing this in distinct parts, it will paint a picture for how the nation still sees itself as an "extensive empire of liberty,"[5] but limits the rights of inhabitants deemed to be the "other" in the United States. Part I(a) will focus on defining the nature of imperialism today. Part 1(b) will focus on the historical framework of how the United States is able to acquire territories. Part II will focus on the *Insular Cases*. These are a series of cases from 1901 – 1905 that will prove how the United States made imperialism legal. Part III will focus on the subsequent effects on new case law that still embrace the detrimental holdings of the *Insular Cases*. Part IV will be a subjective analysis adding a proposed solution to figure out moving forward what should be done if the United States acquires new territories.

I. Defining Imperialism

I(a): Legal Framework of U.S. Imperial Action

In order to argue that the United States is still an imperialist nation in the 21st century, there must be a suitable definition of imperialism that fits current U.S. policies. Imperialism can be defined as "a policy, practice, or advocacy of extending the power and dominion of a nation especially by direct territorial acquisition or by gaining indirect control over the political or

[5] LAWSON & SEIDMAN, *supra* note 2.

economic life of other areas."[6] One can argue that the original vision of some of the founding fathers was for the United States to become an "empire." According to a letter written to James Madison by Thomas Jefferson, "no constitution was ever before so well calculated as ours for extensive empire."[7] Of course, the founding fathers envisioned an "empire" different from that of the various European powers. Nevertheless, it is evident that somewhere in annals of history, there was a belief for the United States to expand its borders.

This debate of expansion is not new. Since 1787, discussion arose and began concerning limitations on how far the United States could expand. Nathaniel Gorham, who served as the chairman of the Committee of the Whole and served on the Committee of Detail argued the reality that the Western territory (all of the United States at the time and future admitted states) would remain one country 150 years after.[8] Opposing Gorham's perspective, James Madison argued the possibility of the future increase of population was a possibility and further expressed this concept in *The Federalist*.[9] However, although the concept of expansion is not new, it is important to label how such expansion was done, begging the question of what was the face of expansion in the early 20th century concerning extraterritorial areas. The answer, arguably, is imperialism. Therefore, the history of American imperialism can be tied to the concept of the American "empire."[10]

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[6] *Imperialism*, MERRIAM-WEBSTER'S DICTIONARY, *https://www.merriam-webster.com/dictionary/imperialism* (last visited May 16, 2024).

[7] LAWSON & SEIDMAN, *supra* note 2, at 1.

[8] LAWSON & SEIDMAN, *supra* note 2, at 2.

[9] LAWSON & SEIDMAN, *supra* note 2, at 2..

[10] *Imperialism*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/imperialism (last visited May 16, 2024). "Historically, the term imperialism is connected to the notion of Empire, the political form of organization that arose in ancient times. More precisely, the term Imperialism found its meaning when European States expanded their power through the colonial conquest that lasted from the XVIIth to the XVIIIth Century."

I(b): Historical Framework for Territorial Acquisition – How Did We Get Here?

The reality of how the United States became an imperialist nation was through the legal justifications for the takings of extraterritorial areas as American territories. To legally justify imperialism, there must be some relevance between the United States Constitution and territorial acquisition.[11] Legal historians have tried to present various arguments for territorial acquisition through the Constitution.[12] First, the Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[13] It is followed by "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[14] This provision alone does not answer the question of how the United States legally justified imperialism. In 1828, Chief Justice Marshall held that "The Constitution confers absolutely on the government of the Union, the powers of making war [and making] treaties; consequently, that government possesses the power of acquiring territory either by conquest or treaty."[15] Therefore by 1828, two ways of legally gaining territories were either through making treaties with other sovereign nations, or by conquest.

Another premise on which the Constitution allows the taking of extraterritorial areas as American territories is the Treaty Clause; the President shall have the power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur.[16] The argument here is how the treaty clause is interpreted. The primary perspective of

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[11] LAWSON & SEIDMAN, *supra* note 2. (presents various constitutional arguments for extraterritorial acquisitions).
[12] LAWSON & SEIDMAN, *supra* note 2.
[13] U.S. CONST. art. IV, § 3, cl. 2.
[14] *Id.*
[15] *Am. Ins. Co. v. 356 Bales of Cotton,* 26 U.S. 511, 542 (1828).
[16] U.S. CONST. art. II, § 2, cl. 2.

the Treaty Clause is that the President and Senate could regulate, by treaty, matters that Congress could not constitutionally regulate by statute.[17] However, Jefferson argued that the treaty power of the President can be seen as an "implementational power;" specifically, the President is permitted to carry into effect national powers internationally, but the federal government does not have jurisdiction beyond its enumerated powers.[18]

There are various treaties relevant to the discussion of American imperialism in the modern day. First, there is the 1898 Treaty of Peace Between the United States and Spain. This treaty marked the ending of the Spanish American War. However, it also marked the expansion of the United States into the Pacific. According to Article II of the Treaty of Peace, "Spain cedes to the United States the island of [Puerto] Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marinas or Ladrones."[19]

Second, there is the Deeds of Cession of 1900, in which the United States gained the American Samoa territory. According to the deed, the territory was conveyed to the United States for the "promotion of peace and welfare, and for the preservation of the islands."[20] Therefore, the United States was given "full powers and authority to enact proper legislation for and to control [the] islands . . ."[21] Third, there is the 1916 Convention between Denmark and the United States. Here, the United States gained "all territory, dominion, and sovereignty,

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[17] LAWSON & SEIDMAN, *supra* note 2, at 5 (citing *Missouri v. Holland,* 253 U.S. 416, 416 (1920)).
[18] LAWSON & SEIDMAN, *supra* note 2.

[19] Treaty of Peace, Spain-U.S., Dec. 10, 1898, DEP'T. OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES: VOL. 11, 615 (Charles I. Bevans, ed.) [hereinafter Treaty of Paris].

[20] Instrument of Cession of Tutuila, Tutuila-U.S., Apr. 17, 1900, https://asbar.org/wp-content/uploads/attachments/cession1.pdf

[21] *Id.*

possessed, asserted, or claimed by Denmark in the West Indies."[22] All of these treaties serve as the foundation to how the United States set their foundation in the Pacific and the early 20th century as an imperialistic nation.

However, the constitutional issue is what happens to new territories once they are acquired by the United States. More specifically, the issue is whether the United States has a constitutional right to acquire those territories and never make them states. This issue was later "answered" by the *Insular Cases*, but it has led to the progression of imperialistic tendencies to date.

II. *Insular Cases*

II(a): Legal Fiction of Territorial Statuses

The *Insular Cases* serve as the primary foundation in which the United States solidified its imperialistic powers and expanded its borders overseas. However, this was at the perpetual cost of creating a form of second-class citizenship in its various territories. The *Insular Cases* are a series of cases decided between 1901 to 1905 in which the Supreme Court justified the occupation and acquisition of the territories of Hawaii, Puerto Rico, and the Philippines.[23] Although there are various cases, the seminal case is *Downes v. Bidwell*.[24] This case highlights one of the most controversial territories gained by the United States at the start of the 20th century: Puerto Rico. Although the facts of the case involved duties payment under the Forsaker Act, the crux of the case dealt with Puerto Rico's status as a territory.[25] The concurrence, written

[22] Convention Between the United States and Denmark for the Cession of the Danish West Indies, Den.-U.S., art. I, ¶ 1, Aug. 4—Dec. 22, 1916, T.S. No. 629.
[23] Hon. Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, FED. LAW., Mar.-Apr. 2011, at 22-25.
[24] Downes v. Bidwell, 182 U.S. 244 (1901) (White, J., concurring).
[25] *Id.*

by Justice White, identified the key issue: "Had Puerto Rico, at the time of the passage of the act in question been incorporated into and become an integral part of the United States?"[26]

The answering of this question by Justice White has led to territorial doctrines which stand to this day as good law. In answering the issue, Justice White had articulated two perspectives on how Puerto Rico's territorial statutes should be determined. First, cession by Spain to the United States in the 1898 Treaty of Peace were accompanied by such conditions that prevented the island from becoming an integral part of the United States, at least temporarily, until Congress determined. On the other hand, by cession, irrespective of any conditions found in the treaty, Puerto Rico became part of the United States and was automatically incorporated as a state.[27]

The argument chosen by Justice White was the former; Congress must determine whether a territory is an integral part of the United States. The justifications for Justice White's legal reasoning are that it is "entirely political," and that the judiciary should not be invoked to usurp political discretion.[28] Therefore, the holding of this case decided that Puerto Rico was an unincorporated territory and not on its way to statehood.

This doctrine, created by Justice White, became the foundation for territorial incorporation. It established two types of territories under United States sovereignty: Incorporated Territories and Unincorporated Territories. Incorporated Territories are any United States insular areas in which Congress has applied the full *corpus* of the United States Constitution as it applies to the "several states." Incorporation is therefore interpreted as a

[26] *Id.* at 299.
[27] *Downes*, 182 U.S. at 244.
[28] *Downes*, 182 U.S. at 312.

perpetual state and once a territory has gained this status, it is irrevocable.[29] An unincorporated territory is a United States insular area in which Congress has determined that only selected parts of the Constitution apply. Currently, there are various unincorporated territories including, but not limited to: Puerto Rico, United States Virgin Islands, American Samoa, Northern Mariana Islands, and Guam. [30]

II(b): Contemporary Scholarship: What to do with the *Insular Cases*

Contemporary scholarship currently varies on how the *Insular Cases* should be viewed modern day and argue its legal effects. The first argument is that the *Insular Cases* should be "repurposed."[31] A deeper review of the repurposing argument shows that its foundation is based on acceptance of the theories which led to the creation of *Insular Cases*. The doctrine of territorial incorporation[32], created by Justice White, was based on Lowell's "Third View."[33] This argument was one of many of the time trying to answer the question of new territories gained by the United States at the start of the twentieth century. Lowell's argument, adopted later in the *Insular Cases*, was that some territories may be annexed by the United States to be part of it, and all general restrictions of the Constitution apply to it.[34] Other territories, according to Lowell, would not be annexed but acquired as "not to form part of the United States."[35] Therefore, rights of citizens would not wholly extend to those territories annexed but not acquired to be part of the

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[29] *Definitions of Insular Area Political Organizations*, U.S. DEPT. OF THE INTERIOR, https://www.doi.gov/oia/islands/politicatypes (last visited Jan. 11, 2024).
[30] *Id.*
[31] Christina D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J., 2449, 2449 (2022) (citing repurposing theories).
[32] Downes, 182 U.S. at 244.
[33] *Developments in the Law: The U.S. Territories* 130 HARV. L. REV. 1616, 1619-20 (2017); *See* Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View,* 13 HARV. L. REV 155, 171 (1899).
[34] *Developments in the Law: The U.S. Territories, supra* note 33, at 1619; *see* Lowell, *supra* note 33, at 176.
[35] *Developments in the Law: The U.S. Territories, supra* note 33, at 1619; *see* Lowell, *supra* note 33, at 176.

United States.[36] Therefore, the revisionary argument is an attempt to transfer the doctrine of incorporation in the *Insular Cases* into an opportunity to "repurpose the framework in order to protect indigenous cultures from the imposition of federal scrutiny and oversight."[37]

The repurposing argument of the *Insular Cases* has gained support overtime. Proponents of the *Insular Cases* see the doctrine as "defensible, and even necessary."[38] It is important to note that to argue that the *Insular Cases* should be repurposed by judicial courts is to complicate the legacy of these historic cases – it is not clear and cut, good or bad. Revisionists do not try to defend the offense and ill origins of the *Insular Cases*, but focus on trying to change the legacy for what these cases should represent.[39] Proponents offer the perspective that these historic cases should show current unincorporated territories are allowed to be full-fledged parts of the United States, and still maintain their cultural sovereignty.[40] According to proponent Russell Rennie,

> A regime allowing territorial peoples different sets of rights and obligations, at the cost of perfect constitutional compliance, allows equal participation (in a meaningful sense) in the republic by territories that did not always voluntarily join (the "equality argument"). Moreover, it protects their ways of life and honors bargained-for deviations from the Constitution for those territories that did affirmatively join (the "historical argument").[41]

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[36] See Lowell, supra 33.

[37] *Developments in the Law: The U.S. Territories, supra* note 33, at 1619.

[38] Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683, 1707 (2017).

[39] *Id.* at 1685

[40] Ponsa-Kraus, *supra* note 31 (citing Stanley K. Laughlin Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea - and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005)).

[41] Rennie, *supra* note 38.

The complex history of the revision or "repurposing" argument became reanimated in *Tuana v. United States*.[42] In this case, the main issue before the D.C. Circuit was whether the Citizenship Clause of the Fourteenth Amendment extended to the unincorporated territory, American Samoa.[43] The Court found that the Citizenship Clause did not extend to American Samoa and that natives unique to this territory already had their status defined by statutes.[44] This case is a highlight in the revision-repurpose argument because in the underlying arguments in the case, the government of American Samoa opposed the arguments made by the petitioners, their fellow natives.[45] The belief that enforcement of certain constitutional provisions could lead to disastrous cultural impacts of certain unincorporated territories has breathed life into the revision-repurpose argument. According to contemporary scholarship, "Where the doctrine [of the *Insular Cases*] once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution."[46]

Although the premise of the repurposing argument is to preserve the survival of indigenous cultures of all U.S. unincorporated territories to date,[47] it can be said that the goals of repurposing the *Insular Cases* are manifold: cultural accommodation, but more importantly the continuation of U.S. sovereignty over such territories.[48]

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[42] Tuana v. United States, 788 F.3d 300 (D.C. Cir. 2015).

[43] *Id.*; U.S. CONST. amend. XIV, § 1.

[44] *See Tuana*, 788 F.3d at 302; *See also* 8 U.S.C. § 1408 (persons born in American Samoa are designated under the Immigration and Nationality Act (INA) of 1952 as "non-citizen nationals" of the United States).

[45] *See Tuana*, 788 F.3d at 302. ("[Government of American Samoa fearing] that the extension of United States citizenship to the territory could potentially undermine . . . aspects of the Samoan way of life.")

[46] Ponsa-Kraus, *supra* note 31 (quoting *Developments in the Law: The U.S. Territories* 130 HARV. L. REV. 1616, 1686 (2017)).

[47] *See* Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J., 2449, 2457 n.21 (2022); *see also Developments in the Law: The U.S. Territories, supra* note 33, at 1619.

[48] Ponsa-Kraus, *supra* note 31.

The second argument is by opponents of the *Insular Cases* and seeks to overturn the *Insular Cases*, specifically the doctrine of incorporation.[49] Opponents state that the doctrine of territorial incorporation was just a mere constitutional cover for proponents of expansion grounded in race and social Darwinism.[50] According to Christina Duffy Ponsa-Kraus, "the idea of unincorporated territory gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire."[51] Ponsa-Kraus argues against the repurposing project of the *Insular Cases*, stating that no amount of repurposing can change the legacy of such cases; it only gives rise to a perpetual crisis of political legitimacy in the unincorporated territories.[52]

One of recent opponents of the repurposing project, Ponsa-Kraus argues that the rationale behind repurposing, cultural preservation does not justify keeping the *Insular Cases* as good law (*for purposes of this paper, Ponsa-Kraus' argument will symbolically represent the "opponents" of the repurposing project*). Taking a powerful stance, she connects the idea of repurposing the *Insular Cases* to accommodate culture to an attempt to repurpose *Plessy v. Ferguson* (no longer good law) to accommodate "benign racial classifications."[53] Ponsa-Kraus, like contemporary opponents, ultimately argues that the *Insular Cases* be overruled and that the doctrine of territorial incorporation be erased from constitutional law.[54] The opponent's argument for how the *Insular Cases* should not be repurposed is broken into various parts. First, Part I focuses on the standard account of the *Insular Cases* and argues that the traditional interpretation that has

[49] Ponsa-Kraus, *supra* note 31.
[50] Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. 284, 289 (2020).
[51] Ponsa-Kraus, *supra* note 31, at 2451.
[52] Ponsa-Kraus, *supra* note 31, at 2451.
[53] Ponsa-Kraus, *supra* note 31, at 2459-60.
[54] Ponsa-Kraus, *supra* note 31, at 2459-60.

been given by the judiciary is incorrect.[55] Part II involves a test that has arisen out of various cases relying on the precedent set in the *Insular Cases* and how it has made its way into domestic yet unincorporated territory jurisprudence.[56] Part III focuses on how the Supreme Court has embraced this repurposing project and provides a close analysis of how this school of thought fails on a practical level.[57] The last part sets the stage for how the Supreme Court should overturn the *Insular Cases*, but that time will show how the Court denied the opportunity to do so.[58]

The standard account, which has been the main interpretation of the *Insular Cases*, comes from an ambiguous history. The reason is that throughout the nineteenth century, the territories were governed by Congress through statutory provisions.[59] These organic acts either allowed territories to pass laws consistent with applicable portions of the Constitution, or explicitly extended the Constitution to a given territory.[60] However, the issue that remained was whether such provisions applied *ex proprio vigore* ("of its own force") or just as a relevant constitutional guarantee to the respective territory.[61] With the issue being resolved in *Downes v. Bidwell*, the Court, through Justice White's concurrence, answered the question by creating the legal fiction of the doctrine of territorial incorporation.[62] Under this doctrine, the standard account that courts

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55 Ponsa-Kraus, *supra* note 31, at 2459-60.

56 Ponsa-Kraus, *supra* note 31, at 2460-61.

57 Ponsa-Kraus, *supra* note 31, at 2461.

58 Ponsa-Kraus, *supra* note 31, at 2462-64.

59 Ponsa-Kraus, *supra* note 31, at 2462-64.

60 Ponsa-Kraus, *supra* note 31, at 2464-65.

61 Ponsa-Kraus, *supra* note 31, at 2464-65. (Ponsa-Kraus details how this debate was hindered by the concept of slavery in the territories and goes into a detailed account of the various theories related to such. The issue of extending Constitution to territories is taken up again after the Spanish-American War.) *See Downes*, 182 U.S. at 244.

62 *See Downes*, 182 U.S. at 245–46 (White, J., concurring); *see also* Ponsa-Kraus, *supra* note 31, at 2467.

and scholars alike began to believe that *only* fundamental constitutional limits apply to the unincorporated territories.[63]

However, a closer inspection of *Downe* expresses a different idea: Justice White's concurrence did not restrict fundamental rights but expanded them.[64] According to White: [E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed" anywhere.[65] Opponents argue that the standard account which created an extra-constitutional zone in the unincorporated territories substantially "oversimplifies and overstates what [*Downes v. Bidwell*] held."[66] However, this legacy of the *Insular Cases* has lived on in Supreme Court's precedence after *Downes*, and led to what opponents call a "permanent colonial system."[67]

Ponsa-Kraus' part II of her argument focuses on the "impracticable and anomalous test."[68] This test, originating in Justice Harlan's concurrence in *Reid* found that the *Insular Cases* still had "vitality."[69] According to Harlan:

> In other words, it seems to me that the basic teaching of . . . the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.[70]

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[63] *See* Ponsa-Kraus, *supra* note 31, at 2466.

[64] Ponsa-Kraus, *supra* note 31, at 2468.

[65] *See Downes*, 182 U.S. at 291.

[66] *See* Ponsa-Kraus, *supra* note 31, at 2469.

[67] Ponsa-Kraus, *supra* note 31, at 2473-74.

[68] Ponsa-Kraus, *supra* note 31, at 2477 n.117.

[69] *See* Reid v. Covert, 354 U.S. 1, 67 (1957) (Harlan, J. Concurring).

[70] *Reid*, 354 U.S. at 74 (Harlan, J. Concurring).

This test kept the *Insular Cases* alive and changed the question into whether the application of a constitutional provision would either be logistically impossible or lead to absurd results.[71] This test has been adopted by proponents of repurposing the *Insular Cases* because to overrule and extend all constitutional provisions would lead to absurd results such as destroying the cultural sovereignty of the unincorporated territories.

However, accepting the goal of cultural preservation as a form of repurposing the *Insular Cases* is not meritorious. Ponsa-Kraus argues that these cases, by any account (that standard account accepted by a majority, or the proposed account argued in Ponsa-Kraus' argument), still create a colonial-type system which is governed by Congress' plenary power and also denied basic liberties such as voting representation in the federal government.[72] Also, avenues exist to still protect or preserve current territories' cultural practices without harboring the *Insular Cases*.[73] Ponsa-Kraus argues that the cases in which the Supreme Court tries to embrace the repurposing project, they rather illustrate the "ambiguous, confusing, and unnecessary approach" relying on the *Insular Cases* bring.[74]

Finally, Ponsa-Kraus rests her argument on the opportunity that the Supreme Court was presented with in *Fitisemanu v. United States.*[75] *Fitisemanu* begs to question Justice Harlan's enduring statement: Do the *Insular Cases* still have vitality? The reason why is because at the heart of this case is the issue of territorial incorporation. Overall, opponents such as Ponsa-Kraus

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71 *See* Ponsa-Kraus, *supra* note 31, at 2477–78.

72 *See* Ponsa-Kraus, *supra* note 31, at 2477–78.

73 *See* Ponsa-Kraus, *supra* note 31, at 2477–79.

74 *See* Ponsa-Kraus, *supra* note 31, at 2485, Parts III-IV;

75 Petition for a Writ of Certiorari, Fitisemanu v. United States, 143 S. Ct. 362 (2022) (No. 21-1394); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

find that there is a need to "repurpose" the *Insular Cases* because the legacy of what it meant during the nineteenth century is inseparable from any modern-day goal of preserving culture.[76]

III. Current Implications of the *Insular Cases*

III(a) United States v. Vaello-Madero

Due to the *Insular Cases* still being good law and binding, it has had various negative impacts on people living in such territories. Such impacts are echoed through current Supreme Court opinions. An example of this is seen in *United States v. Vaello-Madero*. In this case, the issue before the Court was whether the Equal Protection Clause of the Fifth Amendment Due Process Clause requires Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of states.[77]

The majority opinion, written by Justice Kavanaugh, held that Congress does not have to extend Supplemental Security Income Program (SSI) benefits available to residents of Puerto Rico to the same extent as residents of the States.[78] According to Kavanaugh, "The Constitution affords Congress substantial discretion over how to structure federal tax and benefit programs for residents of the Territories."[79] The Court's reasoning included precedent in which the Court applied the deferential rational-basis test.[80] The rational-basis review is a test to see whether a law or regulation is constitutional. This form of review is deferential because a court must determine that the specific law or statutory provision is rationally related to a legitimate state interest. Here, the Court looked to whether the restrictions of residents of Puerto Rico not

[76] Ponsa-Kraus, *supra* note 31.
[77] United States v. Vaello-Madero, 142 S. Ct. 1539, 1541 (2022).
[78] *Id.* at 1540.
[79] *Id.* at 1544.
[80] *Id.* at 1543.

receiving benefits under the SSI have a legitimate state interest and if there is some rational connection between the statue's restrictions and their goals.[81] The Court reasoned that because not every federal tax extends to residents of Puerto Rico, neither should every federal benefit extend, and therefore Congress has the power to pass policies such as SSI.[82] Also, the majority expressed that there are other alternatives open to residents of Puerto Rico that allow Congress to withhold SSI benefits.[83]

Although the Court held that certain federal benefits can be held from territories at Congress' discretion because this has been a ". . . longstanding congressional practice reflect[ing] both national and local considerations,"[84] the Court also highlights the treatment that residents of the territories receive. The facts which the majority opinion focuses on are how the respondent, Mr. Vaello Madero, was a resident of New York receiving SSI benefits.[85] In 2013, he moved from New York to Puerto Rico, but was still receiving SSI payments.[86] However, upon the federal government learning that Mr. Vaello Madero no longer lived in New York, they sued him for restitution.[87] Here, just because Mr. Vaello Madero moved back to Puerto Rico, he became ineligible to receive the benefits he received while he resided in New York.

However, the dissent authored by Justice Sotomayor, expresses how the majority left out important, relevant considerations when deciding the case on the merits. First, the purpose of the SSI is to provide a "minimum income to certain vulnerable citizens who lack the means to

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81 *Vaello-Madero*, 142 S. Ct. at 1543.
82 *Vaello-Madero*, 142 S. Ct. at 1543.
83 *Vaello-Madero*, 142 S. Ct. at 1543.
84 *Vaello-Madero*, 142 S. Ct. at 1541-42.
85 *Vaello-Madero*, 142 S. Ct. at 1542.
86 *Vaello-Madero*, 142 S. Ct. at 1542.
87 *Vaello-Madero*, 142 S. Ct. at 1542.

support themselves."[88] In creating the SSI program, Sotomayor expressed how there was a major shift in the federal government's relationship with the states and territories in assisting low-income individuals.[89] Prior to the SSI, there were various programs funded and administered by states, and were only supplemented by matching federal funds.[90] The SSI program created uniformity across all the states and provided monthly cash benefits directly to low-income individuals over the age of sixty-five, blind or disabled. Justice Sotomayor then argues that although Congress stated that the SSI benefits are available to resident[s] of the United States, and has defined the United States as "including the fifty states and District of Columbia,"[91] Puerto Rico should not be left out.

First, she argues that Puerto Rico has been part of the United States for over a century and that people born there are U.S. citizens.[92] Next, Congress has made clear in other contexts that Puerto Rico is part of the United States. However, in terms of the SSI program, Puerto Rico is not part of the United States, and only left in place the AABD program. Additionally, the decision not to include Puerto Rico has a significant impact on the U.S. citizens residing there.[93] Pertaining to Mr. Vaello Madero, who is a U.S. citizen, Sotomayor found that his equal

88 *Vaello-Madero*, 142 S. Ct. at 1557.

89 *Vaello-Madero*, 142 S. Ct. at 1557.

90 *Vaello-Madero*, 142 S. Ct. at 1557. *See also* WILLIAM MORTON, CONG. RSCH. SERV., 7-9453, CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO (2016). An example of such a program is the Aid to the Aged, Blind, and Disabled (AABD).

91 *Vaello-Madero*, 142 S. Ct. at 1558.

92 *Vaello-Madero*, 142 S. Ct. at 1558.

93 *Vaello-Madero*, 142 S. Ct. at 1558. *See also* Brief of the Hon. Jennifer A. Gonzalez Colon, Resident Commissioner for Puerto Rico, as *Amicus Curiae* in Support of Respondent, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022) (No. 20-303) (focuses on how 34,244 residents were enrolled in the AABD program; by contrast, over 300,000 Puerto Rico residents would qualify for SSI benefits).

protection claim has merit because there was no rational reason that U.S. citizens who qualify for the SSI program cannot receive the benefits because they reside in Puerto Rico.[94]

The powerful dissent by Justice Sotomayor implicitly highlights the legacy of the *Insular Cases* and its impact on U.S. territories. In the majority's analysis of the case, Justice Kavanaugh focused on the "longstanding congressional practice" where Congress has legislated differently with respect to territories. However, the upshot is that United States citizens are affected by this decision. Mr. Vaello-Madero lived in New York where he received SSI benefits, but his benefits were stopped once he moved back to Puerto Rico. This begs the question: What benefits do citizens surrender if they desire to live in a current U.S. territory? It also begs the question: How is the holding of this case (SSI benefits are not given to residents of Puerto Rico) rationally related to the legitimate governmental interest that Congress has deference to allow or deny certain benefits to U.S. territories? The equal protection clause of the constitution ensures that the government will treat "similarly situated individuals in a similar manner."[95] However, the federal government does have the ability to classify persons or draw lines when creating and applying laws as long as such classifications are not based on impermissible criteria or arbitrarily burden a particular group of individuals.[96] Where a law treats two different groups of people, which are not members of a suspect or quasi-suspect classification, and such a law is not a fundamental right, the law will survive an equal protection claim if it is rationally related to a legitimate government interest.[97] Although rational-basis review is the most deferential form of review that the Court uses, as Justice Sotomayor points out, it is not "toothless."[98]

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94 *Vaello-Madero*, 142 S. Ct. at 1558.
95 *Vaello-Madero*, 142 S. Ct. at 1559.
96 *Vaello-Madero*, 142 S. Ct. at 1559.
97 *Vaello-Madero*, 142 S. Ct. at 1559.
98 *Vaello-Madero*, 142 S. Ct. at 1560 (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976))..

In agreement with Justice Sotomayor's dissent, the Court should have found that the relationship between the SSI program, the people who currently receive such benefits, and its overall goal is "so attenuated [that] it's distinction is arbitrary or irrational.[99] The decision to keep the SSI benefits only to "residents of the United States" interpreted to be only the fifty states and District of Columbia is a distinction that is purely arbitrary and irrational. The creation and sole reason of the SSI program is to assist low-income individuals; it established a direct relationship between the recipient and the federal government.[100] However, according to the majority, such a relationship is dependent on the place of residence. If a United States citizen decides to move from a state to a territory, the individual will be barred from receiving benefits of this program. This is the reality that Mr. Vaello-Madero faced, when he moved to a territory.

This distinction is fundamentally what is wrong with the *Insular Cases*. Although *Vaello-Madero* proposed various underlying issues, the prominent issue is the *Insular Cases'* doctrine of incorporated/unincorporated territories and its impact on modern-day caselaw. In certain respects, United States citizens can and are treated differently if they choose to live in Puerto Rico. However, *Vaello-Madero* is not the only case that serves as an example of how the *Insular Cases* have guided courts to establish detrimental precedent.

III(b) Fitisemanu v. United States

Along with *Vaello-Madero*, *Fitisemanu v. United States* also serves as an important modern case which shows the legacy of the *Insular Cases*.[101] Distinguishable from *Vaello-Madero*, this case concerns the U.S. unincorporated territory of American Samoa. Here, the issue

[99] *Vaello-Madero*, 142 S. Ct. at 1560 (quoting *Nordlinger v. Hahn*, 505 U.S. 1,11 (1992)).
[100] *Vaello-Madero*, 142 S. Ct. at 1560.
[101] Fitisemanu v. United States, 1 F.4th 862, 862 (10th Cir. 2021).

before the Tenth Circuit Court of Appeals was whether people of American Samoa are considered American citizens, and specifically whether the citizenship clause was applicable to this territory.[102]

The facts of this case are simple in nature. The plaintiffs, three American Samoans who are currently residents of Utah, are considered non-citizen nationals of the United States.[103] Of all the unincorporated territories, Congress has conferred American citizenship to all residents of inhabited unincorporated territories including, but not limited to: Puerto Rico, Guam, and the U.S. Virgin Islands.[104] American Samoans are statutorily designated by the Immigration and Nationality Act as "non-citizen nationals" of the United States.[105] Therefore, American Samoans are denied the right to vote, to run for elective federal or state office outside of American Samoa, and to serve on federal and state juries.[106] The plaintiffs argued that they and other American Samoans should have American citizenship on the basis of their birth in The American Samoa.[107] The United States government argued that the Citizenship Clause does not extend broadly to encompass unincorporated territories. Also, in this case are intervenor-defendants ("Intervenors"), who are the elected officials representing the government of American Samoa; the intervenors sided with the United States government arguing that the status of American Samoa is constitutional, and that to make American citizenship a birthright would be against the will of the American Samoans and would "risk upending certain core traditional practices."[108]

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[102] *Fitisemanu*, 1 F.4th at 864.
[103] *Fitisemanu*, 1 F.4th at 864.
[104] *Fitisemanu*, 1 F.4th at 864.
[105] Tuana v. United States, 788 F.3d 300, 301–02 (D.C. Cir. 2015).
[106] *Fitisemanu*, 1 F.4th at 865.
[107] *Id.*
[108] *Id.*

For the Court to reach its holding, it first reviewed two preliminary topics in depth, and then had to determine which precedent would guide their analysis which led the Court to ultimately conclude that the Citizenship Clause does not apply to American Samoa.[109] The first preliminary topic reviewed was the relevant history and characteristics of American Samoa. The Court briefly covered the geographical location of the American Samoa islands, but then focused on the cession from tribal leaders to the American government giving the U.S sovereignty over the territory in 1900.[110] The Court focused on how, since its cession, American Samoa has owed "permanent" allegiance to the United States, but has never been American citizens.[111] However, American Samoa's relationship with the United States can be seen through the high enlistment rates of its people in the American military, and how the governing constitution of the American Samoas reflects principles found in the U.S Constitution, such as freedom of speech and of religion, due process of law, and other basic civil rights.[112]

The other historical aspects focused on by the Tenth Circuit are the "cultural imprints" the people of American Samoa maintain through the "Fa'a Samoa."[113] American Samoa's social structure is organized through large, extended families called "agia."[114] Land ownership is unique in the American Samoan islands in that it is predominantly communal.[115] Over ninety percent of the land belongs to the 'agia rather than to one person.[116] Each of these large families are led by the "matai" which are hereditary chieftain titles; their responsibilities include

[109] *Fitisemanu*, 1 F.4th at 865.
[110] *Id.*
[111] *Id.* at 866.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Fitisemanu*, 1 F.4th at 866.
[116] *Id.*

regulating village life for the 'agia.'[117] Additionally, there are certain racial restrictions on land ownership requiring landowners to be at least fifty percent American Samoan.[118] The Tenth Circuit focused on the cultural history of the American Samoan people because the Intervenors argued that this cultural heritage would be threatened by recognizing birthright citizenship in American Samoa and conforming with the Citizenship Clause.[119]

The second preliminary review taken by the Court is the history of American citizenship as it has been applied to American territories. The Tenth Circuit. explored the history of citizenship and found that the emerging maxim in the eighteenth century was that "the tie between the individual and the community was contractual and volitional, not natural and perpetual."[120] The Court asserts that the model of citizenship that the founding fathers believed in was one of consent which is imbued in the founding documents.[121] However, the scope of citizenship was not clearly defined in the Constitution, and the Court reviewed precedent, which vacillated between competing perspectives, until the Citizenship Clause was put into effect.[122] However, as applied to the territories, the Constitution did not extend citizenship to the territories. The Tenth Circuit found that the history of citizenship being applied to the territories was through ad hoc legal procedure; treaties, acts of Congress, administrative ruling, and judicial decisions are how the territories received citizenship status; it was not an automatic right guaranteed by Congress.[123] The Court reasoned that the most recent territorial acquisitions at the

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[117] *Id.*

[118] *Id.* at 866.

[119] *Fitisemanu*, 1 F.4th at 867.

[120] *Fitisemanu*, 1 F.4th at 867 (quoting JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 10 (1978)).

[121] *Id.*

[122] *Id; See also Slaughter-House Cases* 83 U.S. 36, 72-73 (1872).

[123] *See* Charles Gordon et al.*, Immigration Law and Procedure* Section 92.04[1][a]; *See Am. Ins. Co. v. 356 Bales of Cotton,* 26 US (1 Pet.) 511, 542 (1828).

time of ratification of the Fourteenth Amendment showed that citizenship was not automatically extended with sovereignty.[124] The majority eventually rests its determination on this rule: every extension of citizenship to residents of overseas territories comes by an act of Congress.[125]

The two competing lines of precedent which the Tenth Circuit navigated to reach its holding were the *Insular Cases* and *United States v. Wong Kim Ark.*[126] Relying principally on the *Insular Cases,* the Tenth Circuit found that former Justice White tackled the very issue that was presented to them, "citizenship as the type of constitutional right [it is] should not be extended automatically to unincorporated territories."[127] However, the Court here tried to separate the underpinnings of the *Insular Cases* from the doctrine of incorporation which became the "settled law of the court."[128] The Court not only stated that the purpose of the *Insular Cases was* disreputable, but also that the primary reasoning was reprehensible.[129] However, the Tenth Circuit referenced various Supreme Court decisions that continue to invoke *Insular* framework when it has grappled with questions of constitutional applicability to unincorporated territories.[130] The Tenth Circuit also reasoned that although the underpinnings of the *Insular Cases* are condemnable, they could be repurposed to preserve the "dignity and autonomy of the peoples of America's overseas territories.[131]

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[124] *Fitisemanu,* 1 F.4th at 868; *See* Treaty of Peace, Friendship, Limits and Settlement (Treaty of Guadalupe Hidalgo) Art VIII, Feb. 2, 1848*,* 9 Stat. 922; *See also* Cession of Alaska, U.S.-Russ., Art III, Mar. 30, 1867, 15 Stat. 539.

[125] *Fitisemanu,* 1 F.4th at 869.

[126] *Downes*, 182 U.S. at 244; *See also* U.S. v. Wong Kim Ark*,* 169 U.S. 649, 649 (1898).

[127] *Downes,* 182 U.S. at 306.

[128] *Fitisemanu,* 1 F.4th at 869.

[129] *Id.* at 870.

[130] *Id.* at 870. *See* Reid v. Covert*,* 354 U.S. 1, 1 (1957); Boumediene v. Bush, 553 U.S. 733, 733 (2008); U. S. v. Verdugo-Urquidez, 494 U.S. 259, 259 (1990).

[131] *Fitisemanu,* 1 F.4th at 870.

The Court next focused on *United States v. Wong Kim Ark*. This case, being decided three years before the first set of *Insular Cases*, concerned Mr. Wong who was born in California, and his parents who were Chinese immigrants and non-citizens.[132] When Mr. Wong returned to San Francisco after visiting his parents, he was denied entry to the United States because he was not deemed a citizen on account of his parents' Chinese citizenship.[133] The Supreme Court declared that this denial of entry was unconstitutional because the citizenship clause of the Fourteenth Amendment was to be interpreted in light of the common law under the doctrine of *jus soli* ("the right of soil").[134] The Tenth Circuit found that the lower court, where the plaintiffs brought their claim, relied on this precedent to hold that American Samoa is within the dominion of the United States.[135] The lower court interpreted, in light of the common law, that American Samoa was a territory under the full sovereignty of the United States, so it is "in the United States" for purposes of the Fourteenth Amendment qualifying citizenship for the plaintiffs.[136]

Although the district court found that plaintiffs were considered citizens under this precedent, the Tenth Circuit disagreed with the interpretation of the lower court. The tenth circuit held the *Insular Cases* were the more applicable framework for the following reasons. First, "the *Insular Cases* contemplate the issue of constitutional extension to unincorporated territories, whereas *Wong Kim* does not."[137] Secondly, "the district court overread the weight accorded to English common law by *Wong Kim*."[138] Thirdly, the Tenth Circuit reasoned that the "*Insular*

[132] *Id.* at 871.
[133] *Id.* at 871.
[134] *Fitisemanu,* 1 F.4th at 871; *See also Wong,* 169 U.S. at 654.
[135] *Fitisemanu,* 1 F.4th at 871.
[136] *Id.*
[137] *Id.* at 873.
[138] *Id.* at 874.

framework better upholds the goals of cultural autonomy and self-direction" which ensure that the "the American Samoan people [are not forced] to become American citizens against their wishes."[139] Finally, the Court rests its decision on concluding that birthright citizenship is not a fundamental right as that term is defined by the *Insular Cases*; the Court held that "birthright citizenship, like the right to trial by jury, is an important element of the American legal system, but it is not a perquisite to a free government. . . [it] is not a fundamental right that would preclude application of the "impracticable and anomalous" standard.[140]

Like *Vaello-Madero*, but also distinguishable*,* the outcome of *Fitisemanu v. United States* is clearly due to the legacy of the *Insular Cases.* Various perspectives are reverberated throughout the majority opinion's answer to whether the citizenship clause extends to the territory of American Samoa. A deeper look into the case reveals that, although the Tenth Circuit condemns the *Insular Cases,* it finds purpose in its framework through the aforementioned "repurposing argument."[141] Additionally, Ponsa-Kraus' challenge to the Supreme Court to right their wrongs fell on deaf ears when the Court denied Fitisemanu's petition for writ of certiorari.[142] This refusal to decide the case on the merits shows how the *Insular Cases* have been re-embraced as a basis of cultural preservation. In reality, as long as this remains good law, it is reinforcing a precedent which will perpetually label residents and inhabitants of unincorporated territories as inferior.

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[139] *Id.*

[140] *Id.* at 878-79.

[141] Ponsa-Kraus, *supra* note 31.

[142] Fitisemanu v. United States, 143 S. Ct. 362, 362 (2022).

IV. Problems & Solutions

The *Insular Cases* and imperialism go hand in hand. By the Supreme Court holding that territories are either incorporated or unincorporated territories, they still belong to the United States. For example, Puerto Rico is deemed a "commonwealth" having an Article III District Court.[143] Therefore, because its court has jurisdiction under Art. III of the Constitution, claims from Puerto Rico are heard in the United States Court of Appeals for the First Circuit.[144] Puerto Rico has its constitution approved by Congress.[145] Within its constitution, Puerto Rico maintains a governor, bicameral legislature, and court of last resort.[146] Also, it is completely integrated into the American banking system.[147] However, as an unincorporated territory, Puerto Rican U.S. citizens cannot vote for the President or Vice President, or elect voting representatives.[148] This is "balanced" by citizens who are allowed to vote in the presidential primaries and elect delegates by major political parties.[149]

The major problem is that Puerto Rico has all the attributes of a state in the Union but does not have the status of a state; this goes for all other unincorporated territories under the sovereignty of the United States. This is due to the faulty doctrine of the *Insular Cases*.

If the federal government is to move away from its imperialistic tendencies, it should first start with its foundations grounded in the *Insular Cases* and overturn them based on the negative precedent they have set. First, focusing on Chief Justice Fuller's dissent in *Downes v. Bidwell,* where Fuller disagrees with the concept that Congress has the power to deprive inhabitants of

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[143] Gelpi, *supra* note 23, at 23.
[144] Gelpi, *supra* note 23, at 24.
[145] Gelpi, *supra* note 23, at 24.
[146] Gelpi, *supra* note 23, at 23-24.
[147] Gelpi, *supra* note 23, at 24.
[148] Gelpi, supra note 23, at 24.
[149] *See* Tom Murse, *Why Puerto Rico Matters in the US Presidential Election,* THOUGHTCO., (May 5, 2021), https://www.thoughtco.com/puerto-rico-matters-in-presidential-election-3322127.

territories certain rights which they should be entitled to. In the cession to the United States, Spain states: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United states shall be determined by Congress."[150] Fuller argues that this statement does not assume that territorial inhabitants' rights could be deprived because the "grant by Spain could not enlarge the powers of Congress."[151] Justice Fuller goes on to argue that if a treaty's aim was to "take away what the Constitution secured, or to enlarge the federal jurisdiction," it would be considered void.[152]

In his dissent, responding to Justice White's concurrence, Justice Harlan also disagrees with the authority given to Congress. Although Harlan concedes that Congress has the responsibility to deal with new territories acquired by the United States, he strongly disagrees that Congress possesses powers outside of the Constitution. In his disagreement, Harlan warns, that the idea that the United States "may acquire territories by conquest or treaty and hold them as mere colonies, and that the people inhabiting them to enjoy the rights as only Congress chooses, is wholly inconsistent with the spirit and genius, as well as the with the words of the Constitution."[153] Although Justice Harlan does not use the specific term "state," it is very clear that he disagrees with the doctrine of incorporation, stating it has some "occult meaning which [his] mind cannot apprehend."[154] Therefore, based on the very dissenters in *Downes*, even if Puerto Rico was not to be deemed a "state," it should be granted full privileges and immunities

[150] *Downes,* 182 U.S. at 281.
[151] *Id.* at 369.
[152] *Id.* at 370.
[153] *Id.* at 381.
[154] *Downes*, 182 U.S. at 369.

guaranteed by the Constitution because it is "a part of and subject to the jurisdiction of the United States in respect of all its territory and people."[155]

The question remains, that if the United States overturns the *Insular Cases*, what should be done with the current territories? A simple answer is that either the United States transitions the territories to states, or it relinquishes them and the current inhabited territories become sovereign countries. Although this is feasible, having the territories become independent nations may be a hindrance rather than a blessing. Although not the focus of this paper, the United States has created an economic stronghold in its territories, and to remove its presence would arguably have a disastrous effect on the economy in the various territories. This paper does not argue that the territories should not be independent, but if they were, they may face economic hardships.

This paper's proposed solution is not to create a brand-new solution because past practices reveal how territories could successfully be admitted as states. From 1787-1858, the practice that Congress adopted for admitting states was the Northwest Ordinance.[156] This act encompassed the current states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota.[157] The Northwest Ordinance "formally prohibited slavery, encouraged education, and codified numerous rights including the freedom of religion, habeas corpus, trial by jury, and a republican form of government."[158] The requirements within the ordinance itself created a guideline for how territories would become states. First, the territory was overseen by a "congressionally appointed governor," and three judges until it reached a population of five

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[155] *Id.*

[156] *See* Government of the North-West Territory provided for, ch. VIII, 1 Stat. 50 (LEXIS).

[157] Joshua Stephen Ebiner, Note, *Democracy's Forgotten Possessions: U.S. Territories' Right to Statehood Through Constitutional Liquidation*, 98 NOTRE DAME L. REV. 885, 906 (2022).

[158] *Id.* at 907.

thousand male inhabitants (i.e., women, children, and slaves were not counted).[159] Secondly, once the population quota was reached, a general assembly was formed.[160] After the population reached sixty thousand, Congress would admit the territory as a state.[161]

The Northwest Ordinance can be modified to fit the current landscape of the United States' overseas territories. A possible name for such a modification could be the Modern Governance Ordinance for Territories ("MGOT"). First, the second prong requirement of sixty thousand can be considered ineffective due to the current unincorporated territories being islands and having smaller populations. Also, the essence of the Northwest Ordinance promoted the idea that western territories would eventually become states, and not just dwell in the perpetual state of being a territory. Puerto Rico, American Samoa, the U.S. Virgin Islands, and the Northern Marina Islands are currently territories that are someway disadvantaged by staying a territory and not a state. This proposed solution could allow the chance of these territories becoming states because they are inclined to statehood being part of the United States longer than some admitted states have. It would also get rid of the concept of incorporated/unincorporated territories and have an essential time limit for when a territory would have to be admitted, or properly transitioned into being an independent, sovereign nation. The current legal landscape of how territories are viewed/treated needs to change. Just as the Supreme Court has overturned cases such as, *Plessy v. Ferguson* and *Korematsu v. United States,* one hopes that the Court will see the true injustice that the *Insular Cases* have perpetuated and right their reprehensible wrongs.

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[159] *Id.* at 906.
[160] *Id.*
[161] *Id.* at 906-7.

Conclusion

Grounded in imperialistic fantasies, and racial and prejudicial undertones, the *Insular Cases* represent a legacy which current society does not endorse. However, courts have created legal justifications which have switched or "repurposed" these cases to preserve cultures in the territories which the United States oversees. In reality, inhabitants of these territories are limited in what it means to be an American citizen, and some inhabitants are not even recognized as citizens. The *Insular Cases* represent a dismal stain in the progression of our society today. The maxim "old habits die hard" rings true as the United States still has imperialistic tendencies to date. In order for this to change, the Supreme Court must overturn its precedent and change the legal landscape of territorial acquisition.

NATIVE AMERICAN FAMILIAL SEPARATION IN AMERICA AND CANADA: EVERLASTING PAIN WITH PARTIAL REDRESS

Tracy Acquan[1]

Abstract

This Note focuses on the hardships that many indigenous people have faced due to family separation. Although miles apart, the United States and Canada implemented laws from the 1800s to the 1900s that placed young indigenous children in boarding schools and away from their families. The goal was to strip them of their culture and assimilate them into American and Canadian society. This note discusses the impact of family separation on indigenous people. It discusses, the maltreatment at the boarding schools, the resulting loss of culture, the emotional and financial losses, and the worst of all death. Today, many indigenous children are overrepresented in the child welfare system.

This Note further addresses the methods in which the United States and Canada have used to address the issue of the overrepresentation of indigenous children in the child-welfare system. The United States enacted the Indian Child Welfare Act as known as the ICWA. The ICWA raises the standard of when child protective services can remove indigenous children from their families. Canada enacted Bill C-92 to affirm the rights and jurisdiction of indigenous people in relation to child and family services. This Note first recognizes both countries efforts in providing redress but suggests that the government address the lack of uniformity in the implementation of the respective legislations. To shape proper redress the Governments must take an active role in ensuring that in cases regarding indigenous family relations, tribal law takes precedent.

[1] J.D. Candidate (2024) at Syracuse University College of Law. Editor-in-Chief of the Journal of Global Rights and Organizations Vol. 14. This article was written prior to the Supreme Court of the United States decision in Haaland v. Brackeen, rejecting all challenges to the ICWA. This article was written prior to the Supreme Court of Canada's decision in Attorney General (Quebec) v. Attorney General (Canada) respecting First Nations, Inuit and Métis children, youth and families. I would like to thank all those who have encouraged me throughout my law school journey, especially my biggest inspiration "Nana".

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I. Introduction

In 2018, the repercussions of President Trump's "zero tolerance policy" gained "public outcry" when many children of immigrants were separated from their parents when attempting to enter the United States.[2] Many onlookers could not believe that the United States would be at the center of such cruel practices involving children. More than 2000 immigrant children were detained in immigration facilities, many miles away from their parents.[3] Although the Trump Administration tried to rectify the issue by keeping migrant families detained together, the psychological and physical harm from those who were previously separated remains.[4]

In April 2018, the events of systematic separation by the Trump Administration may have seemed like a shock to people, but history tells a tale of a series of systematic separations involving indigenous people in North America. Throughout history, indigenous people have been mistreated and expected to be subservient to other cultures and nations. One of the harrowing issues that people of color, including indigenous people, continue to experience is family separation.[5]

During the 1870s, Native American children were systematically removed from their homes under the guise of self-improvement.[6] These school aged children were sent to boarding schools with the purpose of assimilating them into American culture.[7] Since one's culture is

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[2] The Trump Zero Tolerance Policy: A Cruel Approach with Humane and Viable Alternatives, Refugees Int'l (July 31, 2018), https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy

[3] Family Separation by the Numbers, ACLU (Oct. 2, 2018), https://www.aclu.org/issues/family-separation

[4] The Trump Zero Tolerance Policy, *supra* note 2.

[5] Rachel Nolan, *As American As Child Separation*, Borderlands (Feb. 19, 2021), https://www.publicbooks.org/as-american-as-child-separation/

[6] Nolan, *supra* note 5.

[7] Nolan, *supra* note 5.

often hard to unlearn, the teachers in these boarding schools resorted to using torture tactics to make the children comply.[8] The anthem of the government was to "kill the Indian, save the man."[9] These governmental actions towards indigenous people were not exclusive to the United States[10].

From the 1880s to the 1990s about 150,000 First Nation, Inuit, and Metis children were unwillingly moved to "residential schools" without their parents' consent.[11] During the 1960s, to escape financial responsibility, many Canadian provinces decided to put about 20,000 indigenous children up for adoption.[12] These children were placed with non-indigenous families and were forever stripped of their cultures.[13] In the words of Canada's first Prime Minister, Captain Richard Henry Pratt, the goal was to "sever the children from the tribe" and then "civilize" them. [14] The goal here, just like in the United States, was also to "Kill the Indian, Save the Man."[15]

The United States and Canada have tried to compensate indigenous people for the tortures they faced when they were separated from their families. In 1978, the United States

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[8] Matthew Brown, *Native Americans recall torture, hatred at boarding schools*, NEWS (Oct. 18, 2022) https://www.nbcnews.com/news/us-news/native-americans-recall-torture-hatred-boarding-schools-rcna52470

[9] *"Cultural Genocide" and Native American Children*, EJI (Sept. 1, 2014) https://eji.org/news/history-racial-injustice-cultural-genocide/#:~:text=(U.S.%20Army.),children%20to%20attend%20boarding%20schools.

[10] Id.

[11] Gillian Steward, *Separating Children from their Parents, the Canadian way*, Toronto Star (June 26, 2018). https://www.thestar.com/opinion/star-columnists/2018/06/26/separating-children-from-their-parents-the-canadian-way.html?rf

[12] Steward, *supra* note 11.

[13] Steward, *supra* note 11.

[14] Anderson Cooper, *Canada's unmarked graves: How residential schools carried out "cultural genocide" against indigenous children*, CBS (Feb. 6, 2022), https://www.cbsnews.com/news/canada-residential-schools-unmarked-graves-indigenous-children-60-minutes-2022-02-06/

[15] Cooper, supra note 14.

enacted the Indian Child Welfare Act ("ICWA"), which "governs the removal and out-of-home placement" of indigenous children due to the high removal rate.[16] Canada adopted Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families which was enacted to give indigenous communities the power to "create their own child and family policies and laws."[17] Currently, the constitutionality of these two legislations is up at each country's highest court.[18] The United States' Supreme Court will hear the case of *Brackeen v. Haaland,* in November 2022 whilst the Supreme Court of Canada will hear of *Attorney General of Québec, et al v. Attorney General of Canada, et al.* in December 2022.[19]

First, this Note will compare the historical treatment of indigenous people both in the United States and Canada. Second, it will explore the effects of the separation of the children. Third, this Note will argue that the residual effect of the past separation continues today in the child welfare system in both countries. Fourth, this Note will explore both countries response to tackle the issue of family separation and whether it has been effective to curtail the issue. Finally, this Note will provide suggestions on ways to support indigenous people who were subjected to such treatment, and how to prevent future generations from enduring this trauma.

[16] *Indian Child Welfare Act (ICWA)*, Child Welfare Info. Gateway https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/icwa/ (last visited Jan. 1, 2023).
[17] Olivia Stefanovich, *2023 will be a pivotal year for indigenous child welfare on both sides of the border*, CBC News (Jan. 2, 2023) https://www.cbc.ca/news/politics/indigenous-child-welfare-upcoming-decisions-canada-us-1.6694103
[18] Stefanovich, *supra* note 15.
[19] Stefanovich, *supra* note 15.

II. History of Separation in America

Richard Pratt, a founder of the Carlisle Indian Industrial School, just like the government, believed that indigenous people could not lead fruitful lives till their "traditions, habits, and beliefs were eradicated".[20] The Indian Civilization Act Fund of March 3, 1819, the Peace Policy of 1869, and the Christian Church created an Indian Boarding School mandate forcing thousands of Native American children into boarding schools with the purpose of robbing them of their culture.[21] Records do show that by 1900, an estimated 20,000 Native Americans children were sent to these boarding schools, over the years the number continuously increased.[22] During this period the federal government further took steps to annihilate the future indigenous generation by paying the Indian Health Service to forcibly sterilize more than 3,000 Native American women.[23]

In the boarding schools, many Native American children experienced "cultural genocide".[24] They were banned from speaking their languages, prevented from wearing their traditional clothing, prevented from expressing their cultural practices, and deviation from this would result in severe punishment .[25] In 37 States, there were 408 federal Indian boarding schools that

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[20] "Cultural Genocide" and Native American Children, *supra* note 9.
[21] US Indian Boarding School History, *The National Native American Boarding School Healing Coalition*, https://boardingschoolhealing.org/education/us-indian-boarding-school-history/#:~:text=Intro%20to%20Boarding%20School%20History&text=Between%201869%20and%20the%201960s,federal%20government%20and%20the%20churches (last visited Jan. 2, 2023).
[22] US Indian Boarding School History, *supra* note 19.
[23] Christie Renick, *The Nation's First Family Separation Policy*, The Imprint (Oct. 9, 2018) https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431
[24] US Indian Boarding School History, *supra* note 19.
[25] US Indian Boarding School History, *supra* note 19.

perpetuated these ideals.[26] A federal report by the U.S Department of Interior, led by U.S Secretary of the Interior Deb Haaland found that, students were forced to change their names and cut their hair because their natural traits were indicative of their culture.[27] Children were starved, tortured, punished, beaten, whipped, forced to do intense "manual labor" like "raising livestock, chopping wood, making bricks", and they were regularly confined to small spaces.[28] Students were also forced to practice Christianity.[29] The designated school hours were filled with working under deplorable conditions.[30] The report further states that the teachers at the schools use older Native American children as a means to harm the younger ones, which probably made them lose a sense of safety with their own people.[31] Children were treated like slaves and freely given to white families as "indentured servants", and some were sent to adoption agencies.[32] Many children were sexually abused and were forbidden from seeing their parents.[33] Any resistance or protest by parents who questioned the use of the board schools resulted in their imprisonment, and most times their children would never be returned home.[34]

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[26] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, Education Week (May 11, 2022) https://www.edweek.org/leadership/native-american-children-endured-brutal-treatment-in-u-s-boarding-schools-federal-report-shows/2022/05#:~:text=Tens%20of%20thousands%20of%20Native,U.S.%20Department%20of%20Interior%20found.

[27] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 26.

[28] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 26.

[29] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 26.

[30] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 26.

[31] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 26.

[32] "Cultural Genocide" and Native American Children, *supra* note 9.

[33] Nolan, *supra* note 5.

[34] "Cultural Genocide" and Native American Children, *supra* note 9.

When the boarding schools closed, the surviving students were left to fend for themselves, and sadly they were unable to properly contribute to the economy.[35] This led to generational poverty in many Native American Reservations.[36] The uninhabitable living conditions and torturous experiences Native American children faced led to adverse health effects.[37] Studies by the National Institute of Health show that survivors of this ordeal were "three times more likely to have cancer, twice as likely to have tuberculosis, and more than 80 percent more likely to have diabetes," in comparison to children who were not confined to these schools.[38] Many students died; some were buried around the schools, and the conditions at the schools led to the eradication of many American Indian Tribes, Alaskan Native Villages, and the Native Hawaiian community.[39]

III. History of Separation in Canada

The *Indian Act of 1876* is one of the many policies introduced by the Canadian government for the purpose of conforming the First Nations into a Euro-Canadian society.[40] The First Nations indigenous people were prevented from expressing their culture just like the indigenous people in the United States, and they were also restricted from participating in government.[41] Under the act, they were forbidden from holding "religious ceremonies" ,

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[35] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 24
[36] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 24.
[37] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 24.
[38] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 24.
[39] Native American Children Endured Brutal Treatment in U.S Boarding Schools Federal Report Shows, *supra* Note 24
[40] Indian Act, The Canadian Encyclopedia, https://www.thecanadianencyclopedia.ca/en/article/indian-act (last edited, Sept. 23, 2022).
[41] Indian Act, *supra* note 36.

"cultural gatherings", cultural festivals, and cultural dances like the "Sun Dance."[42] By 1894 subsequent amendments to the Indian Act required First Nations children to attend "residential schools."[43] This continued until the late 1900s, and with every amendment there were more restrictions.[44] Just as in the United States, these schools were designed by various Canadian churches with the goal of assimilating indigenous children into Euro-Canadian culture.[45]

From the 1600's to the late 1900's, over 150,000 indigenous Canadian children were taken against their will from their homes and sent to these residential schools. [46] The children went through extensive physical and mental abuse, "poor nutrition", "malnourishment", "overcrowding", and they were essentially "vulnerable to diseases".[47] The Indian Affairs chief medical officer Peter Bryce testified that about twenty-five percent of indigenous children died in these schools and some were buried around the school.[48] Although most of these deaths were due to tuberculosis, he expressed that it was not "natural" due to the circumstances they were in, especially since one school had sixty-nine percent of its students pass away.[49] Testimonial recollections from survivors depict unacceptable living conditions. Andrew Paul, a student of the Aklavik Roman Catholic Residential School in the Northwest Territories, testified that they "cried for something good to eat before [they] fell asleep."[50] He stated that the food given to

[42] Indian Act, *supra* note 36.
[43] Indian Act, *supra* note 36.
[44] Indian Act, *supra* note 36.
[45] Racial Segregation of Indigenous People in Canada, The Canadian Encyclopedia https://www.thecanadianencyclopedia.ca/en/article/racial-segregation-of-indigenous-peoples-in-canada (last edited May 12, 2020)
[46] Racial Segregation of Indigenous People in Canada, *supra* note 41.
[47] Racial Segregation of Indigenous People in Canada, *supra* note 41.
[48] Canada's residential schools were a Horror, Scientific American (Aug. 1, 2021) https://www.scientificamerican.com/article/canadas-residential-schools-were-a-horror/
[49] Canada's residential schools were a Horror, *supra* note 44.
[50] Canada's residential schools were a Horror, *supra* note 44.

students was "rancid, full of maggots, and [stunk]."[51] To add insult to injury, instead of providing better nutrition, the schools used the failing health of students to conduct a series of "nutrition experiments" on about 1,000 children in these residential schools.[52] These experiments included testing "nutrition supplements" on children with alleged "vitamin C deficiencies."[53] The experiments in no way improved the health of the indigenous children because they were mostly deprived of proper nutrition.[54] The nutrition experiments seem like a way to find an alternative explanation to why the children were dying faster than their non-indigenous peers.

When the health of the indigenous children deteriorated and ended in death, their families were not always informed.[55] Till today, many families are unaware of what happened to their children who were sent to these institutions, since many of them were not returned home.[56] In turn, there was never any reasonable accountability.[57] The Canadian Government put up to 20,000 indigenous children from Alberta, Saskatchewan, and Manitoba for adoption with non-indigenous families.[58] These children were put up for adoption and sent to non-indigenous homes because the government did not want to take economic responsibility for the increasing indigenous population.[59]

[51] Canada's residential schools were a Horror, *supra* note 44.
[52] Canada's residential schools were a Horror, *supra* note 44.
[53] Canada's residential schools were a Horror, *supra* note 44.
[54] Canada's residential schools were a Horror, *supra* note 44.
[55] Canada's residential schools were a Horror, *supra* note 44.
[56] Canada's residential schools were a Horror, *supra* note 44.
[57] Canada's residential schools were a Horror, *supra* note 44.
[58] Steward, *supra* note 11.
[59] Steward, *supra* note 11.

In 2021, Canada found the remains of more than 1,300 First Nations students who were buried at Canada's residential schools.[60] The treatment of indigenous children at these residential schools did not only result in an eradication of their culture, but also often resulted in death.[61] John Jones, a student at the Alberni Residential School in 1962, explained that a supervisor at his residential school would use a "strap that was made out of a fire hose" to strike him and many of his friends when they would speak their native languages.[62] Currently, just like many other indigenous children who have lost their culture, John Jones is unable to remember or speak his native language.[63] Just as in the boarding schools in America, indigenous children in Canada also faced "sexual abuse" from their superiors.[64] One of John Jones' supervisors, Arthur Plint, was named a "sexual terrorist" by a judge, because he would sexually abuse children, including John Jones.[65] Plint would use "a chocolate bar" as some form of compensation for the abuse.[66] John Jones testified that he "threw the chocolate bar in the garbage" when he realized its purpose, and he took baths "three to four times a day to feel clean."[67]

Such torturous experiences suffered by indigenous children in Canada affected their "mental, emotional, and spiritual wellness."[68] A revision of records concludes that many indigenous students who went through the physical, mental, and sexual abuse ended up having

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[60] Sam Kesler, *Indian Boarding Schools' Traumatic Legacy, And The Fight To Get Native Ancestors Back*, CODE SWITCH (Aug. 28, 2021, 06:00 AM), https://www.npr.org/sections/codeswitch/2021/08/28/1031398120/native-boarding-schools-repatriation-remains-carlisle.

[61] Mosby & Millions, *supra* note 48.

[62] Jonathan Chang et al., *Stories from Canada's Indigenous Residential School Survivors*, WBUR (July 28, 2021), https://www.wbur.org/onpoint/2021/07/28/stories-from-survivors-of-canadas-indigenous-residential-schools.

[63] Chang et al., *supra* note 61. or *Id.* .

[64] Chang et al., *supra* note 61. or *Id.*

[65] Chang et al., *supra* note 61. or *Id.*

[66] Chang et al., *supra* note 61. or *Id.*

[67] Chang et al., *supra* note 61. or *Id.*

[68] Piotr Wilk et al., *Residential Schools and the Effects on Indigenous Health and Well-being in Canada—A Scoping Review*, PUB. HEALTH REV. (Mar. 2, 2017), https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0055-6.

more diseases like obesity, cancer, high blood pressure, and increased "health problems, substance abuse, mortality/suicide rates, criminal activity, and disintegration of families and communities." [69] The effects of the treatment of these indigenous students did not only impact the students at the residential schools, but also the worrying families they left behind.[70] The effects of these experiences will be felt through generations to come.[71] Such traumatic experiences linger since members of the families were lost.

IV. America's solution to the problem

Although the boarding schools were eventually closed, the effects of dividing up families has had a lasting negative impact on the child welfare system. After being assigned a case concerning a kinship dispute, Bertram Hirsch, an attorney working for the Association on American Indian Affairs ("AAIA"), was initially baffled at the rate at which indigenous children were sent to live with non-indigenous families. [72] In 1969, research led by Hirsch and the AAIA uncovered data showing that "25 and 35 percent of all American Indian children were placed in adoptive homes, foster homes or institutions."[73] The relationship between these children and their families would be severed forever.[74] Together with congressional staffers, Hirsch wrote a bill to resolve this issue of family separation.[75] On October 24, 1978, this bill was passed by Congress to curtail a history of family separation. The Act has become popularly known as the Indian Child Welfare Act ("ICWA").[76]

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[69] Piotr Wilk et al., *supra* note 68.
[70] Piotr Wilk et al., *supra* note 68.
[71] Piotr Wilk et al., *supra* note 68.
[72] Renick, *supra* note 23.
[73] Renick, *supra* note 23.
[74] Renick, *supra* note 23.
[75] Renick, *supra* note 23.
[76] Renick, *supra* note 23.

For many Native Americans, the passage of this act was an acknowledgment of the torture they faced and a starting point in the journey to restore their dignities.[77] Under the ICWA,

> "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that "active efforts" have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful."[78]

Any party seeking to request foster care placements must ensure that the petition is "supported by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[79] If an agency seeks to terminate the rights of the indigenous parent, it needs "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[80]
The burden of proof for termination of parental rights is equivalent to that required for a criminal proceeding. The ICWA seems to give deference to the Native American parent and requires that the petitioning party show, with definitive evidence, that the adjustment of termination of rights is necessary.

The Bureau of Indian Affairs has issued a set of guidelines in 2016 to assist state courts in their application of the ICWA.[81] In *People v. V.K.L*, the Supreme Court of Colorado held that an agency's application of "active efforts" calls for a "heightened standard requiring a greater

[77] Renick, *supra* note 23.
[78] 25 U.S.C. § 1912(d).
[79] *Id.* §1912(e).
[80] *Id.* §1912(f).
[81] People v. V.K.L., 512 P.3d 132, 140 (2022).

degree of engagement" than the usual "reasonable efforts standard."[82] In this case, the Court decided that the Department of Human Services ("DHS") met its burden of "active efforts" by taking continuous steps to "reunite the family." [83] The Mother and the Father's relationship with DHS commenced during a welfare check after one of their children was left unattended when the Father rushed the other child to the hospital for a medical emergency.[84] The children were placed in emergency foster care.[85] They were later returned to their Mother under the condition that she underwent a substance abuse evaluation and, in turn, followed treatment recommendations.[86] DHS provided the Mother with support services from places such as the Community Alcohol, Drug, Rehabilitation & Education Center, cocaine anonymous services, supervision, therapy, inpatient and outpatient programs but most proved unsuccessful.[87] Juvenile Court ordered the Father to have no contact with the children after he assaulted the Mother.[88] DHS proceeded to terminate the rights of the Mother after she had several relapses, failed treatment plans, failed to follow rules to exclude the father from the home, and refused to connect with children and work with the social services workers.[89]

After hearing the testimonies of people who worked with the family, the expert witness, who was the program manager for the Coville Tribe's child welfare program, confirmed that a continued relationship would cause "emotional and physical damage to the child."[90] Unfortunately, although the expert witness was responsible for placing the children with an

[82] *Id*. at 135.
[83] *Id*.
[84] *Id*. at 136.
[85] *Id*.
[86] V.K.L., 512 P.3d at 137.
[87] *Id.*
[88] V.K.L., 512 P.3d at 137.
[89] *Id.* at 138.
[90] *Id.* .

Indian family, she was unable to place them with an Indian family.[91] Although the parents in this case lost custody due to their inability to engage in these services, the Supreme Court of Colorado affirmed that the provision within the ICWA should be "construed liberally in favor of the Indians."[92] The Bureau of Indian Affairs developed illustrations that show "active efforts" include "reunification" as an agency goal, inclusion of the tribe "to participate in providing support and services to the family," making a "diligent search for the Indian child's extended family members," "taking steps to keep siblings together," "identifying community resources including housing, financial, transportation, and mental health, substance abuse, and peer support services," and more.[93]

i. Disparate application of the ICWA

There seems to be inconsistencies in the application of the ICWA across states because each state determines to what extent they want to apply the ICWA. Generally, states have implemented the ICWA in their child welfare proceedings, but there is no uniformity across the states in their application[94] A landmark case, *Adoptive Couple v. Baby Girl,* sheds light on the different standards that each court has set in applying the ICWA because the Supreme Court held that a Father did not meet the standard of the ICWA because he failed to initiate proceedings to adopt the Baby Girl.[95] The Native American Father gave up his parental rights when the Mother was pregnant with the Baby Girl.[96] Subsequently the Birth Mother put the child up for adoption and chose a non- Indian family as adoptive parents. [97] After being served with the notice of the

[91] *Id.* at 138.
[92] *Id.* at 139.
[93] V.K.L., 512 P.3d at 141-42.
[94] Renick, *supra* note 23.
[95] Adoptive Couple v. Baby Girl, 570 U.S. 637, 639 (2013).
[96] *Id.* at 637.
[97] *Id*.

pending adoption, the father objected and requested custody.[98] The South Carolina Family Court applied ICWA standards and conferred custody to the Biological Father, and the State Supreme Court also affirmed.[99]

Using a dictionary, the Supreme Court reversed the State Supreme Court decision on the ground that section 1912(f) of the ICWA is inapplicable where the parent did not have previous custody. [100] The statute generally requires a heightened standard proved "beyond a reasonable doubt" to terminate Indian parent's rights. [101] Under the Supreme Court application, "continued custody" means that the parent has present or had past custody. [102] The Supreme Court further explains that section 1912(d) requires a showing that "active efforts have been made to provide remedial services…designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.'"[103] The court defines "break up" as a "discontinuance of a relationship," which cannot happen unless there was a relationship to begin with.[104] Lastly, in supporting its decision the Supreme court considered the fact the Adoptive couple were the only people to initiate proceedings for custody.[105]

One could argue that the Supreme Court does not give the heightened deference required by the ICWA to the Biological Father. Theoretically, even if the Biological Father sought to adopt the child, he would need to exercise those rights through the court system, just as he did to object to custody. Seeking to adopt the child instead of seeking custody could not establish the prior

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[98] *Id.*
[99] *Id.*
[100] Adoptive Couple, 570 U.S. at 638.
[101] 25 U.S.C. § 1912(f).
[102] Adoptive Couple, 570 U.S. at 638.
[103] Adoptive Couple, 570 U.S. at 638.
[104] *Id.* at 639.
[105] *Id.*

relationship with the child the Court sought. The Biological Father sought custody immediately after receiving notice of the adoption, which proves he sought to build a relationship with the child. In addition to this, it may not be common knowledge for any parent to think it necessary to adopt their own biological child. It would be fair to assume that the biological relationship with the child would be sufficient. Furthermore, if the court believes in its own stated purpose of the ICWA, which is to address the "consequences of abuse of child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes," then the proper decision would be to keep the Baby Girl with her biological, Cherokee Father, especially since there were no indications that the father would harm the child.[106]

ii. Challenges with ICWA

Although the ICWA was passed to solve the issue of family separation in the child welfare system, many organizations and people have sought to invalidate the ICWA.[107] There are lawsuits by non-Native parents, adoption attorneys, and agencies who seek to question the constitutionality of the ICWA.[108] Many supporters of the ICWA complain about the lack of substantive data records in cases where the ICWA has been implemented. [109]

Brackeen v. Haaland, a new case brought my non-Native parents and different states seeks to invalidate the ICWA.[110] This case consists of several plaintiffs, Chad and Jennifer Brackeen, Nick and Heather Libretti, Altagracia Socorro Hernandez, and Jason and

[106] *Id.* at 637.
[107] Renick, *supra* note 23.
[108] Renick, *supra* note 23.
[109] Renick, *supra* note 23.
[110] Theodora Simon, *Native Families' Right to Stay Together is at Stake at the Supreme Court*, ACLU https://www.aclu.org/news/racial-justice/native-families-right-to-stay-together-is-at-stake-at-the-supreme-court.

Danielle Clifford, each of whom are non-native parents from Texas, Louisiana and Indiana, respectively.[111]

The Brackeen family of Texas fostered a 10 month old child, and tried to adopt the child twice.[112] The child's biological parents were from the Navajo and Cherokee Nation.[113] The Cherokee and Navajo Nation tried to place the children with a tribal family but had challenges.[114] The Brackeen family tried to adopt the child's siblings but the Navajo Nation objected to their complaint.[115] The Liberetti family of Nevada tried to adopt a child with a father from the Yselta del sur Pueblo Tribe.[116] The Pueblo Tribe did not object to the adoption.[117] Although the Libretti family was successful in adopting their child, they are bringing this claim because they are fearful of the power given to Indian tribes concerning Native American children.[118] The Clifford family of Minnesota attempted to adopt the grandchild of a member of the White Earth Band of Ojibwe Tribe.[119] The court denied their petition for placement even though the child could not be placed with the grandmother. .[120]

The Defendants in this case include the United States Department of Interior, the Department of Health and Human Services, the Bureau of Indian Affairs, Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians, and all their respective Secretaries.[121] The Plaintiffs claim that the ICWA and Final rule should be held

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111 Brackeen v. Haaland, 994 F.3d 249, 288 (5th Cir. 2021).
112 *Id.*
113 *Id.*
114 *Id.*
115 Haaland, 994 F.3d at 289.
116 *Haaland,* 994 F.3d at 289.
117 *Id.*
118 *See Id.*
119 *Id.*
120 *Id.*
121 *Id.*

unconstitutional because they violate equal protection, substantive due process, and the anti-commandeering doctrine.[122]

The Court of Appeals, en banc, decided in favor of the Defendants on the grounds that Congress' "plenary power" to make decisions for Indian tribes results in the duty to "protect" them from harm by the states.[123] The Court further asserted that the ICWA does not violate the Equal Protection Clause because the privileges of the ICWA are not "race based" they are relevant through the tribe's status as "political entities."[124] The Court further reasoned that the classification and application of the ICWA applied to "federally recognized tribes," not all tribes.[125]

The attack on the ICWA, as the country awaits a decision from the Supreme Court, could have grave consequences on the family dynamics of Native American people. In a bid to effect change the American Civil Liberties Union of many states filed an amicus brief detailing the necessity of the ICWA to Native American families and subsequently asking the court "to uphold the constitutionality of the ICWA".[126] Like the Court of Appeals in *Braakeen,* they argue that the ICWA is constitutional because it is not "raced-based" but rather enforced through "political eligibility."[127] Thus, there is an eligibility requirement that does not consider whether tribes are not "federally recognized" or part of the "political entity"[128] They also argue that even if it is a race based statute, it will survive strict scrutiny because the statute is narrowly tailored to

[122] Haaland, 994 F.3d at 290.
[123] *Id.* at 303-04.
[124] *Id*. at 337 (quoting COHEN'S, supra § 4.01 [1][a]; see generally Krakoff, supra, at 1060-78).
[125] Haaland, 994 F.3d at 340.
[126] Simon, *supra* note 108.
[127] Brief for American Civil Liberties Union et. al. as Amici Curiae in support of Federal and Tribal Defendants, 1-3
[128] *Id.*

serve a compelling state interest of protecting " the best interests of Indian children and the stability and security of Indian tribes."[129]

iii. Conclusion and Proposed Solutions

Holding the ICWA unconstitutional would reverse all necessary progress made to keep Native American families together. Even after the ICWA was enacted, an investigation in 2015 proved that Native American children were overrepresented in the foster care system.[130] Instead of holding the ICWA unconstitutional, the statute should be upheld and congress needs to implement more stringent standards to further refine the statute, and to fix the issues that prevent the success of the ICWA. Generally, the studies show a disparate implementation of the ICWA across the board, with "experts witnesses only used in 71% of cases", "active efforts documented in only 66% of cases examined", and only "15% of the records showing the court or child protection agency determining the child was American Indian".[131] Previous suggestions in support of the ICWA include requests for more funding to support parents, training programs to educate agencies, and uniform "compliance measures" in applying the ICWA.[132]

I suggest that any provisions created by states to reduce the effects or purpose of the ICWA should be challenged and held to be preempted by the ICWA. Since the ICWA was enacted to curtail disparate treatment of Native Americans in the child welfare system, [133] any state action with an opposing purpose should not be tolerated. Following the standards set in the ICWA should be required. States should not be permitted to decide whether to use an expert

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[129] *Id.* at 3

[130] Renick, *supra* note 21.

[131] Casey Family Programs, A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act, 1, 9 (March 2015), https://www.casey.org/media/measuring-compliance-icwa.pdf.

[132] *Id.* at 13.

[133] *Id.* at 4.

person, when they fall under the category under the statute which requires it. Instead of limiting the ICWA to tribes that are federally recognized,[134] the ICWA should apply to all Native American people who have suffered injustices due to the United States' past policies. When the polices were enacted, their effects were not only felt throughout federally recognized tribes. All Native American tribes felt the impacts of the death, loss of culture, exposure to uncontrolled diseases, assimilation, poverty, and more.[135] If there were no classifications of who should experience the pain, then there should be no classifications on who should experience the reparations.

V. **Canada's Solution to the Problem**

i. Reparations

To help curtail the effects of separating indigenous people, in January of 2022 Canada pledged a 30 billion dollar investment into the child welfare system.[136] Since the First Nations brought suit to recover for a life-long disparate treatment, the Canadian government pledged 40 billion Canadian dollars, with half going toward compensating the families of children who were unwillingly sent to residential schools.[137] The rest of the money will be invested in the child welfare system for indigenous children who are at risk of being removed from their native

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[134] UCLA et. al., *supra* note 125.

[135] *See* Peterson, Rebecca. *The Impact of Historical Boarding Schools on Native American Families and Parenting Roles.* https://minds.wisconsin.edu/bitstream/handle/1793/66821/Peterson.pdf?sequence=8&isAllowed=y.

[136] Interview by Steve Inskeep with Andre Bear, *Why did Canada separate Indigenous families from their children?* Morning Edition, NPR, (Jan. 25, 2022) https://www.npr.org/2022/01/25/1075488955/why-did-canada-separate-indigenous-families-from-their-children.

[137] News Release, *Agreements in Principle reached on compensation and long-term reform of First Nations child and family services and Jordan's Principle*. Indigenous Services Canada. (Jan.4 2022) https://www.canada.ca/en/indigenous-services-canada/news/2022/01/agreements-in-principle-reached-on-compensation-and-long-term-reform-of-first-nations-child-and-family-services-and-jordans-principle.html.

families.[138] In addition to this, it would also support indigenous children who will age out of foster care.[139]

To many this decision is a step in the right direction since the Canadian government was initially reluctant to compensate the victims of the family separation.[140] In 2016, The Canadian Human Rights Tribunal ruled that the Canadian government was in violation of the human rights act due to its "discriminatory" practices.[141] The adjudicative body found that at times the agencies would bring the children into their care because it was more cost effective.[142] The federal government was reluctant to make changes.[143] Further, they repeatedly appealed in hopes of having the case dismissed on procedural grounds.[144] This new development would serve as a beacon of hope for many indigenous people who have lost so much due to family separation.

ii. Legislation

Although the Canadian government was initially reluctant to settle with the First Nation, they previously took steps to investigate their treatment by forming the Truth and Reconciliation Commission and the National Inquiry into Missing Women and Girls.[145] The reports from these investigations were instrumental in giving the Prime Minister recommendations on how to

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[138] *Id.*

[139] *Id.*

[140] Case Summary, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), (2016) prepared by Mandell Pinder on January 27, 2016, https://www.mandellpinder.com/first-nations-child-and-family-caring-society-of-canada-et-al-v-attorney-general-of-canada-for-the-minister-of-indian-and-northern-affairs-canada-2016-chrt-2-case-summary.

[141] *Id.*

[142] *Id.*

[143] *See Why did Canada separate Indigenous families from their children*?, *supra* note 136.

[144] *See* Mandell Pinder LLP, *supra* note 140.

[145] *See* Rose Skylstad, *Reckoning and Reparation: Canada Navigates Past Mistreatment of Indigenous Population*, Canada Institute (Nov. 18, 2021) https://www.wilsoncenter.org/article/reckoning-and-reparation-canada-navigates-past-mistreatment-indigenous-populations.

provide benefits to the First Nations, the Metis Nation, and Inuit groups.[146] On December 3, 2020, the House of Commons of Canada introduced Bill C-15, which is "an act respecting the United Nations Declaration of the Rights of Indigenous Peoples."[147] Bill C-15 requires that, "[The]Declaration must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence and discrimination, including systemic discrimination, against indigenous peoples and indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons."[148] The Bill also includes promises by the Government to include indigenous people in policy implementations that concern "legislative, policy and administrative measures — at the national and international level."[149] In addition, there will be a definitive "action plan" to effectuate these policies.[150]

Alongside Bill C-15, the Canadian government passed Bill-C-92 in June 2019, which came into effect in January 2020.[151] Bill C-92 went beyond a declaration of indigenous rights and addressed the negative treatment and "overrepresentation" of indigenous people in the child welfare system. [152] Since children of indigenous families have historically suffered separation, Bill C-92 establishes tribal power over indigenous children.[153] In *Attorney General of Quebec, et al. v. Attorney General of* Canada, *et al*, the Quebec Court of Appeal questioned the

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146 *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 (Sept. 9, 2022).

147 An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, 2020-2021, HC Bill C-15.

148 *Id.*

149 *Id*.

150 *Id.* at 6.

151 *Bill C-92*, METIS NAT'L COUNCIL, https://www.metisnation.ca/what-we-do/cfs/c-92#:~:text=Bill%20C%2D92%20was%20officially,their%20identity%20and%20family%20connections.

152 *Id.*

153 *See Id.*

constitutionality of Bill C-92, specifically "whether it ultra vires –beyond the authority– of the Parliament of Canada."[154]

The Quebec Court of Appeal decided that Bill C-92 was constitutional, except for ss. 21 and ss. 22(3), which were not constitutional because they gave indigenous people too much power, giving the legislation the "force of law as federal law."[155] According to section 22(3), if there was any "conflict or inconsistency" between federal law and indigenous law, indigenous law would be applicable.[156] The Quebec Court of Appeal reasoned that these sections are unconstitutional, because the Constitution Act section 91(24) did not allow "Parliament to give absolute priority to an Aboriginal right."[157] Canada decided to appeal the section of the decision that held section 21(1) and section 22 (3) to be unconstitutional.[158] Canada supports the constitutionality of the act, recognizing the need to protect indigenous rights. [159] Indigenous groups and provinces besides Quebec have an interest in the ultimate decision of the Supreme Court of Canada in Attorney *General of Québec, et al. v. Attorney General of Canada*.[160] As various groups await the decision of the Court, the Government of Canada plans to continue supporting indigenous communities regardless of the outcome.[161]

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[154] Aidan Macnab, *Two upcoming SCC cases could have significant implications for Indigenous law*, CANADIAN LAWYER (Sept 13, 2022).

[155] Attorney General of Québec, et al. v. Attorney General of Canada, et al. https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=40061

[156] Bill C-92, *supra* note 149.

[157] 2022 CanLii 185 at para. 56.

[158] Indigenous Services Canada, *The Government of Canada appeals the Quebec Court of Appeal's opinion on the Act respecting First Nations, Inuit and Metis children, youth, and families, GOVERNMENT OF CANADA* (Mar.14 2022), https://www.canada.ca/en/indigenous-services-canada/news/2022/03/the-government-of-canada-appeals-the-quebec-court-of-appeals-opinion-on-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families.html.

[159] Indigenous Services Canada, *supra* note 158.

[160] Bill C-92, *supra* note 147.

[161] Indigenous Services Canada, *supra* note 158.

In Canada, each province has its own laws regarding indigenous child welfare.[162] Canada does not have a detailed federal regulation like the ICWA in the United States to implement its child welfare services across the board.[163] Each province has its own law; for example Bill-38, or the Indigenous Self-Government in Child and Family Services Amendment Act, was passed in British Columbia.[164] Like similar bills of its kind, it seeks to confer child welfare authority on indigenous people. [165] The individual acts enacted by each of the provinces are specific to each of its territories.[166] This would essentially cause a lack of uniformity, just as the United States is facing with the different implementations of the ICWA act across the different states.

iii. Conclusion and Proposed Solutions

Although the Canadian government enacted Bill C-92 and Bill C-15[167] with the purpose of respecting and extending the rights of indigenous people, the Canadian government needs to do more on a national level. The settlement of more than 30 billion dollars[168] is a step in the right direction, but it is not sufficient on its own to continuously make sure that indigenous children are not separated from their families. This money can repair broken systems, but it will not change what children went through in residential schools. Bill-92 was monumental, and not just because it focused on the declaration of the rights of indigenous people, it also focused on child

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[162] *See* Cristell Bacilio, *The Indian Child Welfare Act in Context: Legislating Native Child Welfare Around the World, 145, INT'L RELS. REV. (Jan. 3 2023),* https://www.irreview.org/articles/the-indian-child-welfare-act-in-context-legislating-native-child-welfare-around-the-world#:~:text=The%20United%20State's%20neighbor%2C%20Canada,in%20its%20provinces%20and%20territories.

[163] *Id.*.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Bill C-15, supra note 147.

[168] *See Why did Canada separate Indigenous families from their children*?, *supra* note 136.

welfare and was intended to curtail the "overrepresentation of indigenous children in the child welfare system."[169]

The monetary settlement should come with national laws in Canada that set specific standards on how indigenous children should be treated when they go through the welfare system. There should be standards in place that may specify on what grounds the children can be removed. There should also be a hierarchy provided of the best places children can be placed if removal is necessary. Having different laws among the provinces does not ensure uniformity. The result will be some territories protecting indigenous children with a heightened standard, and others possibly with a lower standard. This would not further the goals of Bill C-15 and of Bill C-92. As section 21 and 22(3) of Bill C-92 go up to the Supreme Court of Canada, the Court should hold that those sections are valid. Due to the historical treatment of indigenous people, in the taking of their land and the separation of their children, they should be entitled to have their voices heard concerning their children. Deference should be given to the tribe's law-making body on determining what law best serves their children. The tribes are more knowledgeable about their culture and what tribal groups may best serve as placements for children to learn and maintain their cultures. Declarations of protection and reconciliation are not sufficient to solve this issue of family separation. Legislation and strict implementation are the most viable options.

[169] Bill C-92, *supra* note 151.