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Genocide: Defining and Understanding Protected Groups

Tesa Hargis

Abstract

Although the recognition and defining of genocide was a revolutionary and innovative addition to international law, many of the components of the crime, such as protected groups, remain ambiguous. The Genocide Convention provides a short definition for protected groups as well as a list of which groups are protected, but lawyers and scholars remain unconvinced. Many of the key cases in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have added clarity to the meaning of protected groups and all that they entail. While some cases have been able to further develop the definition of protected groups, other decisions made in International Criminal Tribunals have emphasized its obscurity. Several of the crucial court cases have wrestled with the question of whether mens rea or actus reus is more important in identifying a genocide. After analyzing many case files and reading several scholarly articles on protected groups, I argue that actus reus has been the most important determinant in genocide; therefore, political groups should be included in the list of protected groups.

1 Introduction

Genocide is often called the crime of all crimes. The devastation that occurs when a group is targeted and decimated causes political and social upheaval within a nation and around the world. Since World War II, the international community has been actively informing the world about the horrors and consequences of genocide through the creation of international criminal

laws and the prosecution of perpetrators of the crime. The component of genocide that makes it distinct from other crimes against humanity is that the crime requires that a group with shared ideals, characteristics, history, religion, geographic location, etcetera is targeted. The first official document that explained genocide and all that the crime entails was the Genocide Convention. The Genocide Convention was revolutionary and paved the way for the ICTY Statue, the ICTR Statute, and the Rome Statue. Within the Genocide Convention and each of these statutes exists an identical definition for protected groups. The definition is short and the *travaux préparatoires* are not exceedingly descriptive or detailed. As a result of the ambiguity that existed within the Genocide Convention, particularly the descriptions of the protected groups, there have been various issues in judiciary proceedings for international criminal court cases. The definition of protected groups has not been amended for a very long time, so the only way to reveal a clearer meaning of protected groups is through trials. Many of the cases in the ICTY and the ICTR, as well as other international criminal tribunals, have uncovered and explained in more detail the articles of the Genocide Convention. Innovative cases like *Akayesu* and *Krstić* added dimension and understanding to the legal jargon of the international criminal laws. Even though tribunals and statutes have shed light on the ambiguity that exists in the explanation of genocide and protected groups, scholars are still unconvinced. Intellectuals, lawyers, and professors continue to question the wording of the Genocide Convention and all that the legislation encompasses. While international criminal tribunals and laws have helped to clarify genocide law, there are still moving pieces and unanswered questions that exist within the legal meaning of protected groups.

The horrendous crimes committed during World War II illustrated the existence and pervasive evilness of genocide. Subsequently, the initial definition of genocide and description of

the groups protected under the offence, was written into international criminal law. The Charter of the International Military Tribunal, or more commonly known as the Nuremberg Charter, was the first international criminal law document to contain a moderately formed explanation for the crime of genocide. The Nuremberg Trials were utilized in order to provide retribution and peace to the people affected by the Holocaust, and to deter people from ever committing crimes similar to those again. In the words of the United States Chief of Counsel for the Nuremburg Trials Robert H. Jackson, "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[1] Subsequently, the international community realized it was time to define some of these grave breaches. The Nuremberg Charter defined crimes against peace, war crimes, and crimes against humanity, but it failed to give a specific definition for the newly coined crime of genocide. Instead, there is a vague explanation of genocide imbedded in the definition for crimes against humanity. The Charter states that "crimes against humanity… and other inhumane acts perpetrated against a civilian population … [including] persecutions on political, racial or religious grounds in execution of or in connection with any crime [are] within the jurisdiction of the Tribunal."[2] This definition explicated that peoples persecuted "on political, racial or religious grounds" were protected under law and jurisdiction of the charter. Thus, the Nuremberg Charter was a groundbreaking accord which paved the way for the Genocide Convention, which provided the first fully-formed definition of genocide and protected groups.

[1] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[2] UN, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (1945).

 # Genocide: Defining and Understanding Protected Groups

Erection of genocide into criminal law

The crime of genocide was not thoroughly defined until the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG) was adopted on December 9, 1948. The Genocide Convention was a direct response to some of the crimes that were committed during World War II which fell under neither the categories of humanitarian crimes nor crimes against humanity as explicated in the Nuremburg Charter. Because the Nuremberg Charter did not include a concise and clear definition of genocide, the United Nations decided that it was of grave importance that they convene in order to discuss and define the crime of genocide. The subsequent resolution indicated and explicated the specificities of genocide including what qualifies a crime what constitutes a genocide, who may be held liable for a genocide, how the crime should be investigated and prosecuted, and introduced a list of protected groups. This list of 'protected groups' which indicated what traits and mores of a group of people makes them most susceptible to genocidal crimes. Under the Genocide Convention, "genocide means any of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[3] The addition of a definition for protected groups would allow for the prosecution of individuals who committed genocidal crimes. In fact, the enumerated crimes would have to be perpetrated against a protected group to even constitute the particular crime of genocide; otherwise, it is simply a crime against humanity. The problem remains that there is a

[3] *UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNITED NATIONS, TREATY SERIES (1948).

considerable amount of ambiguity surrounding the definition of protected groups under genocide.

ICTY and ICTR case findings

There are numerous issues surrounding the definition of protected groups, and these issues have been addressed within the Genocide Convention, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. Many ambiguities lay in the Genocide Convention's definition of protected groups, or rather its lack thereof. Although the convention includes a list that states which groups are protected, it does not, however, expound on the characteristics that are necessary to be placed in these groups, and there is no more clarity supplemented by the *travaux préparatoires* or the commentary on the Convention.[4] Since the convention was codified, there have been complications surrounding the meaning of protected groups under the Geneva Convention based on individual interpretations of the characterization of each group. There are some who claim that the protected groups seem to overlap synonymously; critics would argue that national groups include ethnic groups and that racial and ethnical groups have identical connotations.[5] The lack of clarity surrounding protected groups was reevaluated with the ICTY and the ICTR; many issues were brought to light, including the definition of each group, the use of subjective and objective criteria, the importance of stability and permanence, and other abstruse factors.

There were several cases in the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda that clarified and expanded on

[4] STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNAL LAW: BEYOND THE NUREMBERG LEGACY (Oxford ed., Oxford University Press, 3d ed.).
[5] STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNAL LAW: BEYOND THE NUREMBERG LEGACY (Oxford ed., Oxford University Press, 3d ed.).

Article II of the Genocide Convention. One of the most influential cases was the trial of *Prosecutor v. Radislav Krstić*, where Krstić became the first person convicted of genocide in the ICTY. The *Krstić* case further specified the lengths at which one must try to destroy a group, and supplementary information on how subjective perception may play into the identifying of a group. The Krstić judgment was the first to illustrate that genocide is not simply an attempt to destroy a group in its entirety. It was decided in the Trial Chamber that Krstić was not attempting to extinguish all Bosnian Muslims, but instead he was trying to eliminate the entire Bosnian Muslim population in Srebrenica.[6] Article IV of the ICTY Statute mimes the CPPCG in that it states that genocide occurs with "intent to destroy [a group], in whole or in part." The criminal court specified that the part of the group which is targeted must be substantial enough to impact the group as a whole.[7] The trial chamber found Krstić guilty of genocide; they were able to prove his intent to murder a part of the Bosnian Muslim population. The second breakthrough of the *Krstić* case was the recognition of stigmatization of a group as a criterion for identifying relevant groups.[8] The trial chamber felt that the Genocide Convention only protected the groups which are identified based on "the socio-historic context [they] inhabit," but, after research and investigation, their findings led them to believe that genocide could be committed based on "perceived national, ethnical, racial or religious characteristics."[9] As a result of this conclusion, the ICTY commenced recognition of protected groups based on objective classification and subjective perception. For this reason, the ICTY was able to identify the Bosnian Muslims who

[6] Prosecutor v. Radislav Krstic (Trial Judgment), IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2001).
[7] Prosecutor v. Radislav Krstic (Appeal Judgement), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY) (us Apr. 19, 2004).
[8] Prosecutor v. Radislav Krstic (Trial Judgment), IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2001).
[9] Prosecutor v. Radislav Krstic (Trial Judgment), IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2001).

were massacred at Srebrenica as a national group.[10] Other trials, such as *Prosecutor v. Rutaganda,* reinforced the use of subjectivity in determining a protected group. The Trial Chamber noted that "for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept."[11] The perpetrator perceives the victim of being a member of a certain group which they intend on destroying, and in some cases the targeted victim or group may even perceive themselves as a member of said group.[12] These judicial findings were able to convey the vagueness and simplicity of the original Genocide Convention and institute new *travaux préparatoires* for future cases. The *Krstić* and *Rutaganda* trials illustrated how unclear the bounds of the Genocide Convention could be on a criminal trial, but the findings of the *Jelisić* case introduced a new and revolutionary approach to defining one's group identity.

The ICTY case *Prosecution v. Jelisić* further demonstrated the lack of clarity that exists in defining and identifying protected groups. In the prosecution of Jelisić, there were findings that insinuated that groups could be targeted based on attributes they possess but also on the attributes they lack. In the words of the ICTY Trial Chamber, a group can be stigmatized in a "positive approach" based on characteristics specific to their nationality, ethnicity, race, or religion. On the contrary, the Trial Chamber also concluded that a "negative approach" may be utilized when targeting a group. The "negative approach" occurs when the targeted group does not display certain characteristics that the perpetrating group does display; this means that the individuals who do not fit into the group of the perpetuators make up their distinct group by

[10] Prosecutor v. Radislav Krstic (Trial Judgment), IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2001).
[11] The prosecutor v. Georges Anderson Nderubumwe Rutaganda (judgement and sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR) (us Dec. 6, 1999).
[12] The prosecutor v. Georges Anderson Nderubumwe Rutaganda (judgement and sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR) (us Dec. 6, 1999).

exclusion.[13] While *Prosecutor v. Jelisić* aided in developing the explanation of protected groups in the crime of genocide, the case *Prosecutor v. Stakić* added obscure information and terminology by differentiating genocide and extermination based on protected groups.

While some ICTY cases clarified a number of aspects of genocide and the groups protected from genocide, the case *Prosecutor v. Stakić* accentuated the ambiguity of genocide and its protected groups. The case juxtaposed the crime of genocide with the crime of extermination, pointing out the similarities and differences. The Trial Chamber took several paragraphs to explain how extermination differs from genocide, but the end result is somewhat contradictory to previous findings. In order for the crime to amount to extermination, the acts "must be collective in nature," and they "must form part of a widespread or systematic attack."[14] Both of these requirements mirror important conditions for the crime of genocide. The judgment later discerns the two crimes by noting that extermination diverges from genocide in that the offender does not need to be targeting a group and that the victims do not have to share nationality, ethnicity, race, or religion. The judgment goes on to explain that the crime of extermination may be committed against victims who are characterized by political affiliation, physical features, or geographic location.[15] Although this conclusion is concurrent with the *travaux préparatoires* of the protected groups in the Genocide Convention, it fails to recognize the innovative conclusions that were made in the *Krstić and Jelisić cases.* According to the findings of the *Krstić case,* there is a possibility of "perceived" identity affecting who is killed in a genocide. Therefore, there is ambiguity surrounding what would happen if a group of people

[13] Prosecutor v. Goran Jelisić, (Trial Judgment), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us Dec. 14, 1999).
[14] Prosecutor v. Milomir Stakić (Trial Judgment), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us Jul. 31, 2003).
[15] Prosecutor v. Milomir Stakić (Trial Judgment), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us Jul. 31, 2003).

who did not fit into a protected group were targeted based on perceived characteristics such as political affiliations or geographic location. According to *Jelisić,* a group could be targeted because of its exclusion from the perpetrating group. It is unclear how a trial chamber would approach a crime where a group was singled out through a negative approach. Because of these contradictions, it is hard to know how to categorize a crime based simply on these differing definitions and requirements. These ambiguities are not specific to the ICTY cases; they exist in all forms of law, especially ad hoc law. For these reasons, it is very important that the precedent formed by the ruling on the *Brjdanin* case was established.

The *Prosecutor v. Brjdanin* introduced one of the most important precedents in genocide law. The Trial Chamber decided that decisions made in regard to genocide must be made on a "case by case basis" due to the complexity and uniqueness of each event and its subsequent circumstances.[16] It was determined that the fundamental acts of genocide should not be considered in isolation, but in context. This idea allows judges to evaluate a case based on cumulative effect of the enumerated acts.[17] Without the Brjdanin decision, an international criminal tribunal could make decisions subject to the ambiguity of the legal definition of protected groups. The evaluation of each situation as a whole eliminates the unwavering constraints that exist in international criminal law. While the ability of a court to make decisions on a case by case basis is vital to the comprehensive understanding of genocide, it is equally or more important to understand which characteristics each protected group encompasses.

The *Prosecutor v. Jean-Paul Akayesu* established multiple important clarifications concerning groups protected within the definition of genocide. In the *Akayesu* case, the tribunal

[16] Prosecutor v. Radoslav Brjdanin (Trial Judgment), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2004).
[17] Prosecutor v. Radoslav Brjdanin (Trial Judgment), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (us 2004).

was able to clearly define each protected group and even go a step further in adding another factor in determining whether a group is safeguarded. The Trial Chamber categorized a national group as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[18] They defined an ethnic group as "a group whose members share a common language or culture."[19] In addition, they qualified what constitutes as a racial group "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[20] And finally, the *Akayesu* judgment defined a religious group as "one whose members share the same religion, denomination or mode of worship."[21] These concise definitions added clarity to the otherwise unclear listing of groups in article II of the Genocide Conventions. The *Akayesu* Trial also added an introspective vis-à-vis the condition of a group. The case ruled out mobile groups that one joins voluntarily, such as political or economic groups, from being included as a part of the protected groups in genocide.[22] The ICTR was the first to hold that a crime can only be perceived as genocide if the acts are targeted at "stable" and "permanent" groups upon which membership is determined at birth.[23] Although many of the court cases addressed the vague nature of genocide within international criminal law, there are still many critics of these writings and explanations.

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[18] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).
[19] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).
[20] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).
[21] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).
[22] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).
[23] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (us 1998).

Opinions of scholars on protected groups

The way in which the use of the term "protected groups" has evolved as a result of numerous investigations and trials has often been deemed obscure and paradoxical. In an attempt to uncover the true meaning of protected groups and what the term should and should not encompass, many scholars have conducted research and published papers to explain various positions. David L. Nersessian's "The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention" attempts to convey where the definition of protected groups could be more precise and in what way perpetrators of genocide should be tried. Nersessian begins by presenting how protected groups seem to overlap and how the true definition of each group is not completely understood. He explains that the difference between racial and ethnic groups can be somewhat difficult to "grasp." One's ethnic group is based on their "cultural values" and outlook on life, but one's racial group is purely based on genetics and geographical position.[24] An indistinctness that existed in a "religious group" is the inclusion, or exclusion, of nonreligious groups.[25] Nersessian concludes that nonreligious groups, such as atheists, agnostics, and other nontheistic persons, suffice as "religious groups" because of their shared internal convictions ("i.e. that there is no God") and common way of worship ("i.e. choosing not to worship at all").[26] When it comes to national groups, judiciaries and scholars alike seem not to know whether being a part of a nation is dependent on legal elements or if it is dependent on other factors. After looking at the Geneva Convention more meticulously, Nersessian concludes that a "national group" refers to people who "share linguistic, ethnic,

[24] David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INTERNATIONAL LAW JOURNAL (2003).
[25] David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INTERNATIONAL LAW JOURNAL (2003).
[26] David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INTERNATIONAL LAW JOURNAL (2003).

religious and cultural similarities (or some of these), rather than any legal criteria concerning citizenship or nationality."[27] The overlapping and obscurity of protected groups as well as the use of subjective-objective criteria test has led to the confusion in international criminal trials on genocide.

In his article, "Was Srebrenica a Genocide," Ryan H. Ash makes an effort to explain the ICTY, ICTR ICC, and other international tribunals' use of subjectivity has resulted in the current ambiguity of protected groups. Ash agrees with other scholars in that the four protected groups intersect and describe each other concurrently. This leads to people not fitting distinctly into a particular protected group. For that reason, the use of subjectivity in explaining the state of a certain group has been put into use during judicial proceedings.[28] While Ash recognizes that subjectivity can be necessary because of the unpredictability of mens rea, he is inclined to believe that the "identifying [of] a true group trait" may become overlooked.[29] He used the case of Srebrenica to convey how the objective facts are crucial to a judicial proceeding while also reducing "judicial strain."[30] He explains that the identification of the Bosnian Muslims as a protected group was agreed upon in part because of the perpetrators intent based on subjective perception, but also the objective facts. The Yugoslav Constitution provided the objective criteria necessary in proving that the Bosnian Muslims were a national group because the document recognized the Bosnian Muslims as a 'nation.' According to Ash, their constitutional recognition was the most important component of their claim.[31] This case had concrete proof that the Bosnian Muslims constituted as a protected group, and the subjective criteria was able to

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[27] David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INTERNATIONAL LAW JOURNAL (2003).
[28] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[29] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[30] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[31] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).

strengthen and emphasize the finding. Thus, the use of subjectivity as well as objectivity in criminal tribunals is important and provides the potential to emphasis one's case, but simply arguing the existence of genocide with subjective evidence might actually weaken the structure and definition of protected groups.

As a result of the increased emphasis on subjectivity in proving whether a group is protected, it seems "the judicial weight of objective criteria" has started to decrease and become less significant.[32] The claim that subjectivity outweighs objective fact has been made in the ICTR. In the case *Prosecutor v Rutaganda,* the ICTR held that "membership [in a group] is … a subjective rather than objective concept."[33] The biggest concern when it comes to the "objective-subjective criteria test" is that it is not being employed consequently by international criminal tribunals and judicial systems and that subjective evidence is becoming the sole element in ascertaining whether or not a protected group exists.[34] To Ash, the enumerated protected groups are too limited; because of the constriction, the international criminal courts have been driven into adopting the objective-subjective criteria test.[35] If the definition of protected groups within the Genocide Convention and the ICTY, ICTR, and Rome Statute were more explicit, the international judicial systems would not have to rely on subjective criteria to prove their case. Instead, they would be able to prove their validity simply through a concise definition within the treaties.

Some claim that the current classifications of protected groups under genocide should be expanded in order to include political groups. While the majority of international criminal law

[32] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[33] The prosecutor v. Georges Anderson Nderubumwe Rutaganda (judgement and sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR) (us Dec. 6, 1999).
[34] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).
[35] Ryan H. Ash, *Was Srebrenica a Genocide?*, 5 ELON LAW REVIEW (2013).

supports the exclusion of political groups from the list of protected groups, scholar Howard Shneider has argued that whether or not political groups should be included is becoming increasingly unclear based on the nature of the genocide as well as the claims of genocide in Latin America and South America. Most who oppose the inclusion of political groups maintain that they are not "stable or permanent" and that the voluntary nature of membership in the group would make any prosecution too imprecise.[36] These ideas have been reinforced by several cases in the ICTY and ICTR, including *Akayesu* and *Jelisić*, as well as their subsequent statutes. Recognizing this, Shneider accepts that current opinions surrounding that explanation of protected groups and the cases that enforce it, but he argues that there are conflicting judiciary findings on the matter which leads to ambiguity and a lack of agreement. Groups have been targeted based on political beliefs, and perpetrators have been convicted of genocide for targeting said political group. In the case of Argentina, it has been proven that the state targeted victims based on their perceived political beliefs, and it was officially declared by a court of law during 2006 trial of Miguel Etchecolatz that the acts committed were, in fact, that of genocide.[37] There either needs to be an amendment to the definition of protected groups under the Genocide Convention and other international statutes, or "one should not consider the crimes of the Dirty War to be genocide."[38] The problem lies in the contrasting opinions and judicial decisions regarding political groups and protected groups. Since the Genocide Convention is supposed to protect "groups" from crimes against humanity that are targeted at people based on their group

[36] Howard Shneider, *Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence*, 25 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (2010).
[37] Howard Shneider, *Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence*, 25 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (2010).
[38] Howard Shneider, *Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence*, 25 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (2010).

identity, the exclusion of political groups based on the mere fact that they are mobile and membership is voluntary is sometimes seen as paradoxical. Perpetrators of genocide do not target groups based on their "permanence," and several courts have agreed that numerous crimes of genocide have been motivated by a group's political identity. The questions surrounding the explanation of protected group seem to have become murkier as a result of the courts weighing the importance of the act versus the intent.

Supposition

Genocide is basically the commission of crimes against humanity against people based on group identity. Scholars argue that subjectivity is necessary, but sometimes too relied upon. They disagree on whether political groups should be included in the official list of protected groups. They emphasize the ambiguity that stems from overlapping protected groups. Within all of these arguments, there is an overarching question that exists: does the intent outweigh the act or vice versa? The mens rea and the actus reus are often used as evidence in a genocide trial, but judiciaries do not openly state which one is more important in defining genocide. It seems like the Genocide Convention enacted policy based on actus reus and circumstance, while the use of subjective-objective criterion illustrates the transition of the courts towards convictions based on mens rea. The deciding factor in international criminal proceedings seems to be the actus reus, but mens rea is an important part of proving genocide beyond a reasonable doubt. In the case of *Prosecutor v. Stakić* the trial chamber decided that extermination differs from genocide; genocide must be committed against a group with shared characteristics. Therefore, if someone intends on murdering a group of people because he believes that they are of a certain ethnicity, but the persecutor mistakenly murders a group of people who do not have a shared ethnicity, the result is extermination not genocide. Although the persecutor's intent was to kill group of people

based on the ethnicity he assumed that they shared, the act was not that of genocide. The differentiation between genocide and extermination illustrates how actus reus is truly the deciding factor in genocide. Based on the assumption that action outweighs intent in magnitude, would "political groups" be placed under the umbrella of protected groups?

When a group is persecuted based on their shared political affiliation, they are being targeted because of a common attribute just like any other protected group. This causes ambiguity because political groups have been purposefully excluded from international criminal law regarding genocide and protected groups. The most efficient way to prove genocide is to utilize objective proof and reinforce the case with subjective criteria. When one is committing genocide against a protected group, the intent is to destroy a group (in whole or in part) and the act is to commit crimes against that group. The "permanent and stable" factor of political groups is debatable. Ethnicities mix, religions evolve, cultures change and nations drift, so the mobility of political groups is not a definitive reason for them to be excluded in the list of protected groups. Additionally, political affiliation is often based on the "permeant and stable" factors of religion, race, culture, and ethnicity. The *Stakić* trial implied that when crimes are performed against a group that is sought out because of its features, then the act would be described as genocide rather than extermination. But the case also directly points out that the persecution of political groups amounts to an extermination rather than a genocide. Political groups are "collective in nature," and they are occasionally targeted as "part of a widespread or systematic attack." Political groups have communal characteristics and are often besieged because of their beliefs. But political groups remain left out of the enumerated protected groups. So if the definition of a protected group was altered slightly to allow for some lenience regarding the permanence and mobility of a group, the protection of political groups would fit right in. The

Genocide Convention would be more comprehensive if political groups were protected under it and other international criminal laws.

Conclusion

The legal ambiguity of genocide, despite the clarity of its violence, has led to constant confusion and ever-changing opinions about the meaning and structure of protected groups. The Nuremberg Charter brought to light a crime that had never been thoroughly defined, and, as a result, the United Nations General Assembly established the Genocide Convention. The Genocide Convention was used as a base for genocide law in numerous other international legislative documents such as the International Criminal Tribunal for the Former Yugoslavia Statute and the International Criminal Tribunal for Rwanda Statute. Although the writers of the Genocide Convention, as well as the ICTY and ICTR Statutes, intended to define geocide clearly and concisely, the lack of elucidation in the actual articles and the obscure nature of the *travaux préparatoires* have caused immeasurable confusion when it comes to the protected groups and the other facets of genocide. This has led international criminal tribunals to have to work through these ambiguities piece by piece. *Akayesu* added more detailed definitions to each of the four protected groups, and *Krstić* clarified that genocide can be the *attempted destruction of a group "in whole or in part." Brjdanin* asserted that genocide trials are inconsistent and need to be tried on a "case by case basis," and *Stakić* differentiated extermination from genocide. *Rutaganda* conveyed the importance of a subjective approach when identifying protected groups, and *Jelisić* introduced the "positive-negative approach" when characterizing a groups identity. All of these pioneering court cases allowed for the international system to gain a better understanding of genocide and the groups that are protected under international law. Despite the precedents established, scholars continue to debate and negotiate the confines of the language in the Geneva

Convention. Even though the subjective criterion has become an appropriate approach to discovering whether a crime equates to genocide, many argue that objective evidence is the cornerstone of a genocide trial. The overlapping of protected groups as well as the constant emphasis on the permanence of a group has caused numerous arguments about who fits into each protected group and what kind of shared attributes even qualifies a set of people as a protected group. The tribunals concerning genocide and scholarly writings and criticisms have amounted to a couple conclusions. Proving the actus reus of a genocide outweighs the mens rea in international criminal law, but the mens rea is still an important factor in proving the crime beyond a reasonable doubt. This assertion strengthens the argument for the inclusion of political groups in protected groups. Political groups should not be excluded from protected groups based on "stability and permanence," because the intent and action involved in targeting a political group equates more to genocide than extermination.

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Serving Time for Doing Drugs:

The Issue with Prisons in the United States

By Samuel Higgs

Executive Summary

America currently faces a problem where many individuals are being incarcerated for simple drug possession charges. Most of these people did not commit any violent crimes, they simply had an illicit substance on their person and are now serving time. Not only does this take away these individual's freedom, it wastes taxpayer dollars. Each year billions of dollars are spent to imprison these individuals, thus, creating a policy issue. The government should create new policy to better the lives of its citizens and reduce spending of tax dollars.

There are many proposed alternatives to this current status quo. As previously mentioned, the current status quo is to arrest and imprison most, if not all, drug offenders. This paper analyzes four proposed alternatives: (1) Increasing federal funding for rehabilitation: if the Government increased funding it could potentially help these individuals recover, thus deterring their return to prison. (2) Simultaneously increasing funding for rehabilitation while decriminalizing possession of all substances for personal use. (3) Increasing education to stop future generation from using substances. (4) Increasing funding to stop drugs at their source, both internationally, at our borders, and domestically, targeting local dealers and distributors.

After conducting a thorough cost-benefit analysis in my research, it appears that increasing funding for rehabilitation would be the most viable alternative. Sending a drug offender to a rehabilitation program has the potential to not only help them recover and live a life

free of drugs but if a person is successful in the program it will substantially decrease the taxpayer dollars spent on the prison system. It has the highest expected effectiveness as well as an excellent political viability with our current federal administration and congress.

Portugal is one example of a country that implemented a policy that both decriminalized drug use as well as increased rehabilitation. Before implementation they were facing a rather large drug epidemic. Today, they have the second lowest drug overdose rate in Europe. Their strategy was to offer rehabilitation instead of incarceration and it appears that they have achieved their goal of decreasing the number of drug users in their country. Perhaps the United States could also be successful at solving our drug imprisonment issues by implementing similar policies.

I. Introduction

This paper offers in-depth research and analysis on the issues that arise when individuals are incarcerated for drug possession and use. To resolve the issue, this paper evaluates the possible policy alternatives to the current state of the justice system, including their projected outcomes. Each alternative takes a different approach to resolve the issue with the prison system. Although every option has benefits, this paper explains why increased rehabilitation would be the most effective alternative.

Two of the primary functions of prisons are to punish those who have committed a crime and to protect law-abiding citizens from criminals.[1] While incarcerating violent criminals achieves both of these purposes, the ongoing drug epidemic in America involves many more people than just violent criminals. Since not all drug users are necessarily violent, as in the case of large-scale dealers and distributors, it begs the question of whether America is using the most

[1] Dianne Clemens, Prison: To Punish or to Reform? PBS (2003), http://www.pbs.org/pov/whatiwant/prison-to-punish-or-reform/ (last visited Dec 13, 2017).

effective solution to decrease personal drug use. Imprisoning all drug offenders is only a temporary solution that is not actually working to deter drug use in general. The aforementioned solution leaves us with a problem: *There are too many nonviolent drug offenders incarcerated in the U.S*. Imprisoning non-violent drug offenders, regardless of the drug or number of offenses, creates two major issues. First, users are commonly put into jail only to either continue using while in prison or relapse as soon as they're released.[2] Second, users are commonly arrested multiple times, which wastes tax dollars by imprisoning individuals repeatedly.[3] To end the cycle, policy makers must end drug use in America, not sweep it under a rug. As phrased by James Gilligan, a professor of law at the University of New York, "If any other institutions in America were as unsuccessful in achieving their ostensible purpose as our prisons are, we would shut them down tomorrow".[4] This demonstrates that if our prison systems are failing, they should be replaced or removed.

Reviewing the statistics, it is clear that incarceration rates are rising. n 1972 the rates of incarceration were 171 per 100,000 citizens. As of 2012 that rate has risen to 707 per 100,000 citizens.[5] Fifty-one percent of those incarcerated today are drug offenders.[6] This means that as of 2012, 354 per 100,000 citizens are incarcerated for drug offenses. based upon these aforementioned numbers, out of 308 million citizens, approximately 1 million are in our prison system from drug offenses alone. According to *The Price of Prisons,* imprisoning one individual

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[2] Ingrid A Binswanger et al., Return to drug use and overdose after release from prison: a qualitative study of risk and protective factors Addiction Science & Clinical Practice (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3414824/ (last visited Dec 13, 2017).

[3] Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, (2012).

[4] James Gilligan, The New York Times, https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works (last visited Dec 12, 2017).

[5] Jeremy Travis, Bruce Western & Steve Redburn, Read "The Growth of Incarceration in the United States: Exploring Causes and Consequences" at NAP.edu National Academies Press: OpenBook, https://www.nap.edu/read/18613/chapter/1 (last visited Dec 12, 2017).

[6] Kathleen Miles, Just How Much The War On Drugs Impacts Our Overcrowded Prisons, In One Chart The Huffington Post (2014), https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html (last visited Dec 12, 2017).

costs roughly $31,307 per year as of 2010, meaning American taxpayers spend $31 billion dollars a year on imprisoning drug offenders. Significantly, 27.6% of those drug related crimes are from marijuana, a drug in which is already legalized in many states. These statistics beg the question: are we arresting individuals who could otherwise potentially be rehabilitated into productive members of society?

Lindsay Lohan is all too familiar with being in possession of controlled substances. In 2007 she was arrested with possession of cocaine, receiving a 45-day rehabilitation treatment as a sentencing. Only after she reoffended with the same charges 3 months later did she receive a single day in jail as her sentence. After a mere 84 minutes in jail due to "overcrowding" she was released.[7] Lohan's wealth insulated her from jail time, but, those unable to afford ample legal representation end up serving month(s) or possibly longer (depending on how many strikes they have received) for very similar charges. If a judge deemed Lohan fit to be released back into society, why are others given such long terms, and why is there such a large disparity in sentencing?

The U.S. is in need of federal public policy reform. Drug abuse affects everyone, from the family members of the drug addict, to the taxpayers' dollars that were used to imprison offenders for possession of a schedule I drug. While it may be true that some states have a larger drug crises than others, this policy implementation needs to start at the federal level.

II. Status Quo and Proposed Policy Alternatives

As the American status quo stands, an individual found in possession of a certain controlled substance will face the consequences associated with that schedule of drug; provided they are found guilty in the court of law. Currently there are 5 schedules of drugs, with V being

[7] Alan Duke, Lindsay Lohan's troubled timeline CNN (2012), http://www.cnn.com/2012/03/28/showbiz/lohan-troubled-timeline/index.html (last visited Dec 12, 2017).

the least likely for addiction with the highest medicinal benefits. Schedule I is known for having high addictive tendencies and little-to-no medicinal uses.[8] Currently state-by-state punishment varies for certain schedules of controlled substances.

After an extensive policy analysis, we are provided with four possible policy alternatives to the status quo. These alternatives include a policy such as Portugal has implemented, involving the mass decriminalization of drugs. We are also presented with the option to increase rehabilitation efforts, thus decreasing the amount of drug users. Likewise, we must consider preventative measures to stop future drug users via educational programs. Finally, the last alternative option would be to implement policy to eliminate much of the distribution of drugs into and outside the U.S.

Policy Alternative I: Decriminalization & Rehabilitation

In 2001, Portugal took a new approach to their drug epidemic through a drastic decriminalizing of the usage of every kind of drug.[9] If a user is caught with a small amount, less than 10-day supply, they are seen by a council consisting of three professionals typically consisting of: a lawyer, a doctor and a social worker, and is then either given a minor fine or is sent to rehabilitation. Individuals do not get thrown in a prison, nor do they get this charge put on their permanent record. Therefore, allowing them to obtain a job once they become sober. Ever since introducing this new policy drug use has decreased, deaths due to overdose have decreased, and HIV deaths (commonly associated with heroin use) have decreased. Table 1 provides evidence that Portugal's new drug policy has contributed to reducing their drug usage among citizens, as they now have one of the lowest drug overdose rates in the European Nation.

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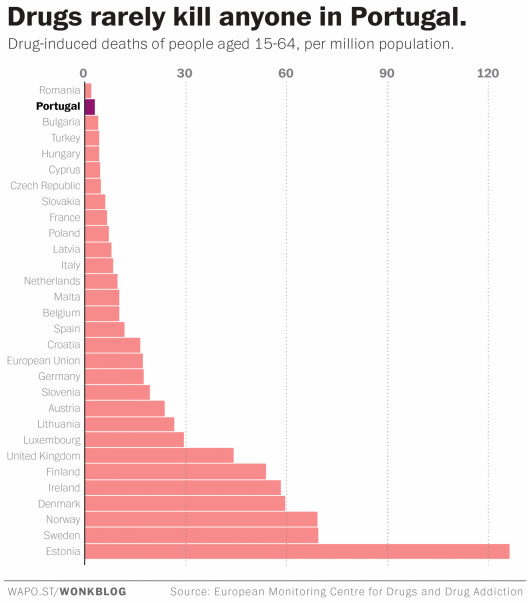
[8] Drug Scheduling, DEA / Drug Scheduling, https://www.dea.gov/druginfo/ds.shtml (last visited Dec 12, 2017).

[9] Christopher Ingraham, Why hardly anyone dies from a drug overdose in Portugal The Washington Post (2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/05/why-hardly-anyone-dies-from-a-drug-overdose-in-portugal/?utm_term=.e9a619e98c0a (last visited Dec 12, 2017).

Table 1: Drug overdose rates in Portugal compared to other countries within the European Nation.



Shown in the table, Portugal is only second to Romania with amazingly low 3 deaths per million from drug overdoses. Compared to a rate of 44.6 in the European Nation. Proving that the new drug policies have improved their country's drug crisis.

The *Decriminalization & Rehabilitation* proposed policy alternative would decriminalize the use of all drugs so long as the person has less than what is deemed a 10 day supply of the illegal substance. The country would be left with billions of tax dollars that could be redirected towards government funded and subsidized rehabilitation programs that focus on preventing users from relapsing. These programs would give users the tools necessary for living a life free from substances. The defendant would be court mandated to go to a doctor and/or psychiatrist and receive the recommendation of the doctor/psychiatrist. Following the doctor's visit the defendant would go before the judge and receive either a fine equal to the illegal substance or a mandatory rehabilitation sentence. If the defendant has gone through mandatory treatment previously and appears to have no desire to quit, the fine will be given in most cases. If a defendant fails appear to court or does not pay the fine, they may receive a jail/prison sentence.

Policy Alternative II: Rehabilitation

Similar to the prior policy alternative, rehabilitation would increase options to help those charged with possession of illicit substances start a life without substance use. Individuals would be offered rehabilitation provided they met the following criteria: (1) The individual is in a sound state of mind, and does not have any mental illnesses preventing them from recovery. (2) At time of arrest, the charge was solely for possession of a schedule I, II, III, IV, or V drug, and no violent offenses or felonies took place in addition to these charges. (3) If provided with rehabilitation the outlook of recovery appears to be likely. (4) The individual has not already been granted 4 months of state-funded rehabilitation within the same calendar year. (5) The individual is not affiliated with any violent groups such as gangs or cartels.

Policy Alternative III: Education for a better tomorrow

Alternatively**,** the U.S. could increase the budget for national drug education alongside programs that already exist. One such program that currently exists was formerly known as Drug Abuse Resistance Education (D.A.R.E.). In 2011 this program was reformed and renamed to "Keepin' It REAL" which, unlike its precursor D.A.R.E., goes beyond saying no to drugs and teaches skills such as being honest, responsible, and safe.[10] The theory behind this program, and similar drug education programs, is simple: if there is a federal budget set aside to prevent future generations from becoming drug addicts, this will decrease the number of drug users in the long run. In theory, decreasing the number of future drug offenders decreases the required tax expenditures for incarcerating non- violent drug offenders. All of this saves taxpayer money, and creates a better society. Importantly, the drug education programs do not refer to scare tactics or propaganda; these methods, commonly used in the D.A.R.E. program, have shown negative

[10] Rosie Cima, DARE: The Anti-Drug Program That Never Actually Worked Priceonomics(2016), https://priceonomics.com/dare-the-anti-drug-program-that-never-actually/ (last visited Dec 12, 2017).

impacts and no real positive outcomes. "Keepin' It REAL" focuses solely on factual education about the adverse effects of drugs, along with teaching life skills to underprivileged public school-aged children and teens.

Implementing this policy alternative would not require changing the current drug classification, leaving the current status quo for drug offenders unaltered. The goal is that introducing this educational policy will lead to less drug offenders, and therefore requiring less imprisonment. In other words, this policy alternative could decrease the need for the current status quo in the future.

Policy Alternative IV: Preventing it at the source

Finally, there is the challenging option to stop the spread of drugs before they begin to circulate. There are multiple steps policymakers could take to stop the distribution of drugs in the United States. Many, if not all of them, would require more government spending in the short run. Some of these policies already exist but they can be expanded upon. In order to stop drug distribution at the source lawmakers would need to implement a multi-part policy. For example, lawmakers must increase penalties for distributing drugs within the United States. At first glance, such a policy seems like it may have the opposite effect of what is trying to be achieved, resulting in more imprisonment. However, higher penalties would theoretically deter individuals from distributing, therefore decreasing the supply of drugs for users.[11] Second**,** increase border patrol funding to decrease the amount of drugs entering the United States. Third**,** increase undercover operations within the U.S. to catch dealers and distributors. Fourth**,** offer an increased number of plea deals to low-level drug users upon their agreement to become

[11] Giovanni Mastrobuoni & David A Rivers, *Criminal Discount Factors and Deterrence*, SSRN Electronic Journal (2017), http://publish.uwo.ca/~drivers2/research/Criminal_Discount_Factors_5_19_17.pdf.

confidential informants. All four of these policies would be implemented as a large-scale operation to stop drug distribution at the source, cutting off the supply of drugs within the U.S.

III. Evaluative Criteria

Whether or not they commit a violent crime, if someone is caught using an illegal substance they will most likely serve prison time, which costs the taxpayer and leads to prison overcrowding. The goal suggested in this paper is to keep nonviolent drug offenders out of prison. Doing so will save taxpayer money currently spent on imprisonment and will lead to a better society.

Each policy's effectiveness is measured by the quantity of drug users that can be prevented from using drugs; in turn preventing them from going or returning to prison. The scale will consist of: low, medium, and high effectiveness. High represents a very large and lasting impact in the percentage of drug users that are either prevented from or stopped from using illegal narcotics. While low displays a small likelihood of making any sort of impact, with medium falling in middle of the spectrum.

Another criterion to focus on is cost. How much will it cost in terms of dollars to implement the policy alternative being evaluated? Cost plays a big role because there's an immeasurable amount of policy alternatives that could be implemented but there's a finite amount of funding available. In order for a policy alternative to be considered it must demonstrate a very high cost-to-effectiveness ratio.

Lastly, the analysis will be focusing on how politically viable a certain policy alternative is. Political viability is defined as how much support a policy is expected to have from the intended target audiences. Similar to effectiveness political viability will be ranked as high, medium, and low with respect to its expected support. Since the policy alternatives would be

implemented at the federal level, the target audiences are currently President Trump and Congress.

IV. Outcome Matrix and Projected Outcomes

	Status Quo	Decriminalization & Rehabilitation	Rehabilitation	Education	Increased Law Enforcement
Cost	*$31/year*	*-$13/year*	*-$7.9/year*	*$1/year*	*$2/year*
Political Viability	*High*	*Low*	*Medium*	*Medium*	*High*
Effectiveness (short-run)	*Low*	*Low*	*High*	*Medium*	*Medium*
Effectiveness (long-run)	*Low*	*High*	*High*	*High*	*Medium*

Note: Evaluative Criterion is displayed on the left hand column, while the policy alternatives are displayed in the top row. Cost is displayed in billions of dollars; a negative cost denotes a savings. In this outcome matrix the cost displayed is the initial cost for the first year the policy alternative is implemented. It should also be noted that "Education" and "Stopping Drugs at the Source" are an addition to the already $31 billion of the status quo. Both "Decriminalization & Rehabilitation" and "Rehabilitation" take this into account in their costs; both have an expected savings. Political Viability is ranked by expected support of Congress and the President. Effectiveness is ranked from this analysis by the quantity of drug users can be prevented or stopped from using drugs; resulting in keeping them out of prisons.

Cost

In this section each policy's alternative outcome is reviewed in terms of the actual monetary cost that the federal government would incur.

Status Quo

As previously mentioned, imprisoning one inmate costs the justice system $31,307 per year. With approximately 1 million inmates incarcerated for nonviolent drug offenses, this translates into $31 billion spent by U.S. taxpayers per year. Without changing the status quo or offering other alternatives to help addicts recover, these numbers are expected to either remain the same or increase in future years.

Policy Alternative I: Rehabilitation and Decriminalization

First, to consider rehabilitation and decriminalization we must calculate the costs. Basic rehabilitation programs, which include counseling, 24-hour supervision, and meals, range in cost from approximately $2,000-$7,000 for a 30-day program.[12] For simplification purposes all estimates will be based off of an average cost of $4,500 for a 30-day program.[13] The cost to provide a 30-day rehabilitation program to the 1 million drug offenders currently incarcerated would be roughly $4.5 billion per year (provided each individual only goes to rehabilitation once in a given year). If every person reoffended directly after release from rehabilitation, then the cost would equal approximately $54 billion dollars per year.[14] However, the policy sets the maximum rehabilitation an individual can receive per year to 4 months, which sets the maximum cost at $18 billion.[15] The actual cost of this policy alternative is the cost minus the current status quo; leaving us with a savings of $13 billion in the first year (a negative cost of $13 billion).

[12] Lauren Brande, How Much Does Rehab Cost? Recovery.org (2016), https://www.recovery.org/topics/how-much-does-rehab-cost/ (last visited Dec 12, 2017).
[13] $4,500 is the average from the previously mentioned $2,000-$7,000.
[14] $4.5 billion multiplied by 12 months equates to $54 billion.
[15] $4.5 billion multiplied by 4 months equates to $18 billion.

Although this outcome for cost appears promising, decriminalizing the use of all substances would likely lead to many unexpected costs. The projected cost does not take into account these apparent risks. With that said, the uncertainty for cost is very high in the long run.

Policy Alternative II: Rehabilitation

Second, we can calculate the cost of maintaining the status quo while simultaneously implementing more rehabilitation programs as opposed to replacing the status quo. According to the National Institute on Drug Abuse, the percentage of patients who relapse after drug rehabilitation is 40% to 60%.[16] By these estimate this program will help approximately 400,000-600,000 inmates recover in the first year.[17] For the following example we will assume the lowest estimate of a 40% recovery, 400,000 in the first year. The cost to treat all 1 million inmates would cost an estimated $4.5 billion, alternatively the cost of keeping those 400,000 prisoners incarcerated for a year is $12.5 billion.[18] From these calculations if the rehabilitation is as successful as the NIDA claims there would be a $7.9 billion savings in the first year (a negative cost of $7.9 billion). Assuming the constancy of these numbers, the cost to maintain the status quo and offer rehabilitation to offenders once per year would be $23.1 billion.[19]

Policy Alternative III: Education

Third, costs of education are fairly easy to predict based upon number from previous programs with a similar intent. The necessary costs would include salaries to employees, training, offices and overhead, and materials for students. The previously failed program known as D.A.R.E. estimated their costs to be around $215 million annually. Other professional

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[16] National Institute on Drug Abuse, How effective is drug addiction treatment? NIDA, https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/how-effective-drug-addiction-treatment (last visited Dec 12, 2017).

[17] 40% of 1 million and 60% of 1 million respectively

[18] 400,000 multiplied by $31,307 equates to $12.522 billion

[19] $31 billion minus the new savings of $7.9 billion equates to $23.1 billion

estimates indicate such estimations to be incorrect and estimate their costs to be around $1 billion.[20] Such statistics imply that implementing a new national education program to elementary and middle school aged students would cost around $1 billion. Education costs pose less monetary risk than the rehabilitation/decriminalization alternative due to their uncertainty on cost and potential savings.

Policy Alternative IV: Increased Law Enforcement:

Finally, stopping drugs at the source is likely the costliest policy alternative, seeing as how it has multiple parts that work in unison. Increasing the penalties for distributing drugs will increase prison sentencing, costing more tax dollars as more individuals imprisoned. For example, Border Patrol agents receive an average starting salary of $50,000, so in order to hire 10,000 more Border Patrol agents, it would cost $500 million to fund their salaries alone, not including the price of their vehicles or any of their equipment.[21] These extra supplies would cost an estimated $500 million to $1 billion. Increasing undercover operations would require more police, which will require more tax dollars. This policy alternative would allocate $500 million to be spent on undercover operations. Unlike the three previous parts to this alternative, offering more plea deals to low level drug users would not pose a substantial cost and will not be included in calculation. Collectively, this program is expected to reach $2 billion, with the majority of funding going towards border patrol agents stopping drugs from entering the U.S.

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[20] Edward M Shepard, *The Economic Costs of D.A.R.E.*, 1–20 (2001)

[21] Jeffrey Joyner, The Average Starting Pay for Border Patrol in Texas Chron.com, http://work.chron.com/average-starting-pay-border-patrol-texas-25903.html (last visited Dec 12, 2017).

Political Viability

Since these policies are intended to be implemented at the federal level the political viability must be taken into account; this section examines the expected support from President Trump and Congress.

Status Quo

With Republicans holding the majority in the House and Senate there is high political viability for the status quo.

Policy Alternative I: Rehabilitation and Decriminalization

As previous existing situations have suggested, Republicans are not highly supportive of most decriminalization proposals, and they tend to stand on the enforcement side of the spectrum. Offering something as drastic as complete decriminalization would have very little political viability on the federal level.

Policy Alternative II: Rehabilitation

Rehabilitation would gather medium support from the Republican majority. However, opponents may criticize it as being ineffective and argue that individuals will just accept this route instead of prison, thus, return to using drugs afterwards. The support that it gathers would likely be from President Trump trying to fulfill his promises of fixing the opioid epidemic that certain parts of America are facing today.[22] Overall, it seems that rehabilitation could gather the support it needs to come to life.

Policy Alternative III: Education

Implementing an education policy in addition to the current status quo would likely have medium support based upon two factors: Republicans are generally in favor of policies to

[22] Harrison Jacobs, Where Donald Trump stands on the opioid epidemic Business Insider(2016), http://www.businessinsider.com/donald-trump-on-opioid-drug-addiction-treatment-epidemic-2016-10 (last visited Dec 12, 2017).

decrease drug use but the extra spending would likely be a deterrent for fiscally conservative Republicans. Some may argue that this could just be a D.A.R.E. 2.0 and become a massive failure and waste of taxpayer dollars.

Policy Alternative IV: Increased Law Enforcement

Stopping drugs at the source would likely have a high political viability from President Trump, the Senate, and the House. On the campaign trail Trump spoke of the opioid problem that the U.S. is currently facing and promised to fix the issue. His plan was to increase border security, stopping the influx of drugs from Mexico into the U.S.[23] Given this information it is plausible that Trump would provide strong support for a bill that increases border security.

Effectiveness

The effectiveness of the proposed policies is measured by the amount of drug users that stop drug usage, therefore reducing or eliminating the need for incarceration of these individuals.

Status Quo

The status quo is not very effective in preventing users from stopping their drug use, most will continue to use inside prison or they will relapse after being released.[24] Thus leading to a cycle of returning to prison again and again.

Policy Alternative I: Rehabilitation and Decriminalization

When it comes to decriminalization & rehabilitation, the initial impact may be the opposite of the desired outcome; by an initial rise in drug users. This was the case in Portugal after they decided to fully decriminalize all drugs.[25] Even though this outcome may make this policy alternative look poor upon proposal, it may just be a short-term issue; after 14 years

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[23] Harrison Jacobs, Where Donald Trump stands on the opioid epidemic Business Insider(2016), http://www.businessinsider.com/donald-trump-on-opioid-drug-addiction-treatment-epidemic-2016-10 (last visited Dec 12, 2017).

[24] James Gilligan, The New York Times, https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works (last visited Dec 12, 2017).

Portuguese studies show a lower rate of drug users than before decriminalization occurred. If it were to be implemented in the United States, the effectiveness for decriminalization and rehabilitation would likely be low in the early years of implementation, but become high after 10+ years.

Policy Alternative II: Rehabilitation

If the route of rehabilitation without decriminalization is taken, our population of interest is expected to see a decrease of at least 400,000 (or 40%) of drug addicts in the first year. Rehabilitation will be offered in lieu of imprisonment and for those 40% that remain clean. From these statistics, rehabilitation appears to be a highly effective method.

Policy Alternative III: Education

Studies have shown that drug education works when implemented properly. For example, compared to the control group, students who completed Keepin' It REAL were less likely to use substances and implemented more tactics to remain sober.[26] The policy would not have an immediate effect on the entire population because the majority of current drug users will have already completed public education. It will, however, have an effect on those still in elementary and middle school and continue to affect the future generation. So, a policy alternative in education would likely show medium political viability in the short run, and high effectiveness in the long run.

Policy Alternative IV: Increased Law Enforcement

Taking a stronger stance on the source of drugs will likely have a medium effect in both the short and long run. Whenever there is a demand, a supply will present itself; for example,

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[25] Zeeshan Aleem, 14 Years After Decriminalizing All Drugs, Here's What Portugal Looks Like, Mic (2016), https://mic.com/articles/110344/14-years-after-portugal-decriminalized-all-drugs-here-s-what-s-happening#.r7gx2QJ6K (last visited Dec 12, 2017).

[26] Amy Nordrum, The New D.A.R.E. Program-This One Works Scientific American (2014), https://www.scientificamerican.com/article/the-new-d-a-r-e-program-this-one-works/ (last visited Dec 12, 2017).

even if it was theoretically possible to stop all drugs from entering into the U.S., individuals will still be able to manufacture and grow them inside the country. It would be economically unfeasible to create enough undercover operations to stop all drugs from being manufactured and grown inside the country.

V. Policy Tradeoffs

In many scenarios, policy tradeoffs require foregoing one alternative's potential outcome to gain the outcome of another. In this section each policy's potential tradeoffs will be reviewed.

Status Quo

The status quo leads to imprisonment of most individuals who are arrested in possession of an illegal substance. Depending on which policy alternative is chosen, replacing the status quo could result in these offenders prematurely returning to the general public. While this may save money, it may face significant opposition. Some may argue against replacing the status quo due to the apparent risk individuals under the influence of an addictive, possibly mind altering, substance may pose.

Policy Alternative I: Rehabilitation and Decriminalization

The idea to decriminalize is modeled after a policy Portugal adopted. In 2001 the country decriminalized the possession of any substance so long as it was less than a 14-day supply. The number of drug related offenses shifted from 44% in 1999 to 21% in 2012, while drug treatment increased by 60%.[27] Instead of viewing drug use as a criminal issue, they shifted it to a public health issue. Treating users like human beings instead of criminals; users are required to go before a panel who decides if the individual will require drug treatment or issue them a citation. A major concern with a policy this drastic is the possibility of negative outcomes. Initially,

[27] Drake Baer, 6 incredible things that happened when Portugal decriminalized all drugsBusiness Insider (2016), http://www.businessinsider.com/what-happened-when-portugal-decriminalized-all-drugs-2016-3 (last visited Dec 12, 2017).

Portugal saw an increase in drug use after decriminalization; however, substance abuse is now lower than it was in years prior to this policy. Another tradeoff with this policy in the U.S. is the potential unexpected costs, decriminalization poses a large and apparent risk when considering the release of hundreds of thousands of inmates. These may be individuals who are not well prepared for life within the general population.

Policy Alternative II: Rehabilitation

Rehabilitation alone poses fewer unforeseen risks than decriminalization. With this policy those who meet the criteria will be offered rehabilitation instead of incarceration. Tax money will be spent to help those who qualify for recovery instead of incarcerating them. The objective for patients to not to return to drug use, but the tradeoff is that it has the potential to waste money rehabilitating individuals that have no desire to remain sober after their rehabilitation ends. The cost anticipates this outcome and allows users to spend up to 4 months in rehabilitation centers.

Policy Alternative III: Education

Increasing education intends to prevent future generations from ever becoming dependent on substances, in theory lowering future prison rates, saving taxpayer dollars. The tradeoff with this policy is that the results will not be immediate, leaving many unsure of the effectiveness of such a policy. Unlike decriminalization, this policy does not intend to change the current status quo, individuals who partake in drug use are still at equal risk of being imprisoned for their crimes.

Policy Alternative IV: Increased Law Enforcement

This is the only policy alternative being reviewed which takes aim at the supply of drugs, the other alternatives simply promote to stop drug use at the level of the user. The theory behind stopping drugs at the source is that by cutting off the supply you will cut off the use of the drug. Historically this has been met with mixed results. The best example of this was the prohibition of alcohol during the 1920s. Prohibition did not stop the manufacture of alcohol, it just led to an underground network of bootlegging and speakeasies.[28] With increased security at the borders, there may be a rise in drug manufacturing inside the United States, creating a new issue, requiring more policy alternatives in the future.

VI. Policy Recommendation

After thorough review of each policy alternative, it is apparent that Policy Alternative II: increasing rehabilitation would be the most beneficial alternative to the current status quo. This policy will likely have the most advantageous outcome, decreasing the number of drug users, and thus, decreasing the prison population. In terms of cost, rehabilitation is the second best alternative with an expected savings of $7.9 Billion.[29] Although Policy Alternative I: decriminalization & rehabilitation has a higher initial expected savings, it is unknown what monetary costs associated with decriminalization may come about; it is very probable that the costs would be much larger than the predictions made in this research. Provided with this information, it is clear that rehabilitation is a safer route in terms of cost effectiveness. Rehabilitation also offers a positive political viability with current President Trump and Congress. On the campaign trail Trump promised to help resolve the rampart opioid crisis faced

[28] The Editors of Encyclopædia Britannica, Bootlegging Encyclopædia Britannica, https://www.britannica.com/topic/bootlegging (last visited Dec 12, 2017).
[29] Savings denotes cost of implementing the alternative policy minus status quo.

by many state.[30] Increasing rehabilitation efforts could very well be the solution that he could use to bring his promises to fruition. Not only does this alternative look optimal in terms of cost and political viability, rehabilitation also offers a very high rate of effectiveness, 40% to be exact.

In conclusion, rehabilitation is the only policy proving to be highly effective in both the short, and long run, along with anticipating large projected savings and a positive political viability. Given this information increased rehabilitation is the ideal policy alternative to solve the excess of non-violent drug offenders incarcerated.

[30] Harrison Jacobs, Where Donald Trump stands on the opioid epidemic Business Insider(2016), http://www.businessinsider.com/donald-trump-on-opioid-drug-addiction-treatment-epidemic-2016-10 (last visited Dec 12, 2017).

The War on Liberties:

The United States Government's Failure to Adhere to the Basic Rights in the Bill of Rights and its Values During the War on Terror

By Scarlett Neely

In 2001, on a September day just like any other, a fateful event shook a strong nation to its core. It was the shot heard round the world for a second time, but this time, the weapon that started it all was not a gun belonging to a scared soldier, but, planes hijacked by ruthless men following even more ruthless orders. Many people feared that it was the end of America's reign as the world's superpower and leader of safety and democracy. The War on Terror had begun. The United States vowed to strike down any and all terror and to do whatever it took to prevent that terror from returning to its borders. This concept seemed noble in theory, however, instead of using fair, humanitarian tactics, America overstepped many human rights boundaries both at home and overseas. Liberties guaranteed to American citizens in the Bill of Rights were ignored, and those overseas experienced a loss of respect, decent treatment, and even life at the hands of American soldiers. When the war was declared over, one truth remained evident: The United States violated numerous human rights both at home and abroad under the guise of national security during the War on Terror.

On September 11, 2001, the first attack was made on American soil since Pearl Harbor. Citizens were left feeling terrified and defenseless, and looked to the government with high expectations of protection and retaliation. With incredible haste and almost no contemplation, the United States government provided, and many men and women were shipped out to numerous

Middle Eastern countries. The parameters of destruction (or lack thereof) were very plainly laid out in what came to be known as the Bush Doctrine: "We will make no distinction between the terrorists who committed these acts and those who harbor them".[1] This statement, as well as the harsh, fearful, and hyper-defensive attitude of the American government and people, set the mood for the entirety of what would become an immensely drawn-out war.

Over the course of the United States' infiltration and occupation of the Middle East, members of the American military were sent into small towns thought to be potential strongholds of radical groups, and would essentially destroy everything and everyone within these communities no matter age, gender, or circumstance; many innocent women and children were brutally killed for simply being in the wrong place at the wrong time. To make matters even worse, not only did many foreign citizens die, but countless American soldiers lost their lives as well, and often without even having a clear idea of what it was they were dying for. Our military leaders seemed merciless and coldly calculating as they sent our soldiers on missions from which they knew their men would not return. In hindsight, once President Bush declared his War on Terror, all moral guidelines for handling and respecting human life were seemingly forgotten or ignored. No sacrifice was too consequential when fighting for revenge on the destruction of the safety and peace that our country once had known.

Apart from the blatant disregard for human life in the United States' battle strategy, the War on Terror brought a new aspect to US military tactics that had never before been so openly cruel. Men within foreign cities that had been infiltrated who were not killed on sight were most often sent to imprisonment camps, even if they had no cause of suspicion, 'just in case' they were a radical affiliate. There, atrocities would be committed to these men by American soldiers,

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[1] Qtd.: Abe Greenwald, *A Decade After 9/11 What We Got Right in the War on Terror,* 132 COMMENTARY. 14-27 (2011).

including sexual assault and grotesque forms of punishment simply for the sake of amusement. One case of such brutality occurred at Abu Ghraib, where soldiers went so far as to take pictures of and with the prisoners after subjecting them to such humiliating and disgusting behaviors without proper reason.

Those captured by the military and deemed an immediate threat were sent to Guantanamo Bay. Here, U.S. Military and intelligence personnel were authorized by the United States government to utilize intensive and often violent interrogation techniques on prisoners to gain information that would aid in the war effort. These techniques were kept secret from the public until 2015, when the C.I.A. released a report. This report contained numerous findings of violent and dehumanizing behavior toward prisoners. Many Americans were alarmed and disgusted at how low the government was willing to stoop in order to further intimidation and thus national security. Reported techniques such as waterboarding and rectal feeding made citizens question the extent of cruelty their government was capable of and realize the magnitude of secrets that it was keeping from the people.

The War on Terror violated rights on the domestic level as well. In a desperate and hasty effort to prevent any further terrorist attacks from being made within the continental United States, the Patriot Act was implemented. This gave the National Security Agency the power to monitor and gather all cellular and internet data usage of American citizens. In theory, the NSA's newly approved practices would notify the government of any possible plots of terrorism toward the United States. The National Security agency could search Americans' phone records for 'keywords' that would indicate a person of terrorist intent. Unfortunately, as indicated in confidential NSA documents released in 2013 by Edward Snowden, the reality was that often NSA employees would monitor the activity of innocent citizens at the employees' own

amusement. Meanwhile, data from all citizens in the United States was stored in a 'super database' whose memory spans the course of several years.

When Snowden released the National Security Agency's private records, the public was blindsided by a shocking truth: the United States government had been violating the privacy rights of its own innocent citizens for a decade. The Patriot Act was quickly deemed the largest violation of the Fourth Amendment that the country had experienced. In fact, "the First, Fourth, Fifth, Sixth, and Eighth Amendments in the Bill of Rights have all been disregarded in the rush to make it easier to investigate people, put them in jail, and torture them if necessary".[2] The implications of this blatant violation of American rights are striking: does the United States government only respect the rights of its citizens when it is convenient to do so?

The Patriot Act is not the only instance of unconstitutional legislation endorsed by the United States in the name of national security. On July 17, 2007, an executive order was issued that authorized the president, then Bush, to seize the property of anyone who "threatens the stabilization efforts in Iraq." This order is incredibly problematic due to intentional vagueness of wording—in fact, when implementing this executive order, the executive branch was the sole deciding factor in what could be deemed threatening, and if the accusation were made, it led to immediate action that was unchallengeable (Giraldi 208). Furthermore, in making this executive order, President Bush publicly permitted further violations to the Bill of Rights. Causing another blow to amendment four of the constitution, this executive order allowed government officials to partake in illegal seizure of private property.

Unfortunately, the United States' violation of domestic rights doesn't end with the Bill of Rights—infringement came in the form of widespread discrimination and prejudice as well.

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[2] Philip Giraldi, *The Violent Radicalization and Homegrown Terrorism Prevention Act Infringes on Civil Liberties, in* CIVIL LIBERTIE 206-12 (Roman Espejo ed., 2009).

After 9/11, racial profiling became more acceptable and prevalent within many different societal levels. According to Chisun Lee, "It is important to realize that racial profiling has not gotten any less wrong—the government is just more willing to do the wrong thing".[3] Through the horrible, subtle promotion of inequality toward racial and ethnic minorities, the government completely abandoned all values of diversity and inclusion that the United States of America aimed to build throughout its history.

Since 9/11, a disproportionate number of American citizens of Middle Eastern backgrounds have been subject to random screenings or 'sweeps' that involve questioning and fingerprinting at immigration offices. As of 2009, more than 13,000 citizens had been deported from these 'random' investigations, and most without any just intention. Sometimes, innocent people are detained without any reason at all, and experience physical abuse or due process violations while in custody. Worst of all, no citizens that have been taken in for questioning or deportation were given terrorism-related charges.[4] These injustices and unfounded accusations are committed by the same government who vowed to protect the liberties of every citizen within its borders, for better or for worse.

Government influence of intolerance as a result of the War on Terror does not end with rights violations at an ethnic level—the implementation of unfair and groundless investigative measures increased nation-wide mistrust of minorities. Since 2001, over one thousand violent incidents have been recorded against persons of Middle Eastern descent; this violence includes assaults, arson, and sometimes murder. Almost all of these acts were committed by individuals,

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[3] Chisun Lee, *Ethnic and Religious Profiling Violates Civil Liberties, in* CIVIL LIBERTIE 228-37 (Roman Espejo ed., 2009).

[4] Chisun Lee, *Ethnic and Religious Profiling Violates Civil Liberties, in* CIVIL LIBERTIE 228-37 (Roman Espejo ed., 2009).

on their own accord, in situations that are strikingly similar to lynchings performed in the 1960s.[5] While the government cannot control personal prejudices, it does subtly imply what it deems permissible through its actions (or lack thereof). Historically, the government silently permitted the nationwide practice of segregation. During this time, the lack of government legislation and opinion influenced public practice of treating races as separate and unequal. Government actions impact the public's feelings and ideas; due to the many prejudiced measures taken against minorities, who were deemed susceptible to terrorism after 2001, societal fear and mistrust of these minorities soared exponentially.

Despite the vast proof from released documents that show blatant injustices committed by the United States government in the name of national security, many people continue to deny that the War on Terror unjustly infringed on any human rights. In fact, numerous individuals and experts alike regard the war fought overseas as defensible and necessary. Proponents of military action say that the war showed the rest of the world that America is a strong force that prioritizes safety and democracy, both domestically and abroad. Abe Greenwald, senior editor of *Commentary,* even claimed that "American policies and actions had kept the homeland safe from attack for a decade".[6] Unfortunately, this view of the Middle Eastern conflict fails to capture the bloody picture that the War on Terror created for people both foreign and domestic.

Throughout the war, the United States seemed preoccupied with its own victory rather than the possible repercussions that it could reap in the aftermath of the war. There are possible factors for how our country, who for so long championed human rights and equality, suddenly dropped these paramount values. Perhaps we had simply become comfortable in a state of war;

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[5] Chisun Lee, *Ethnic and Religious Profiling Violates Civil Liberties, in* CIVIL LIBERTIE 228-37 (Roman Espejo ed., 2009).

[6] Abe Greenwald, *A Decade After 9/11 What We Got Right in the War on Terror,* 132 COMMENTARY. 14-27 (2011).

the War on Terror lasted for over a decade, and the homeland was kept safe since the initial attack on the Twin Towers. Suddenly, our nation felt invincible, and our country fell under a veil of ignorance that cultivated blind trust and pride in our government. The public began to ignore daily attacks on freedoms and innocent lives both at home and at war. Possibly, the surge of patriotism that emerged post-9/11 led people to ignore the injustices on minorities. American citizens widely adopted an "us-against-them" mentality that allowed them to give their government the public support necessary to conduct otherwise terrifying behavior against human rights.

Many of the measures that the United States government took to prevent further terrorism were defended by the nation's citizens, and justified through personal sentiments about our country's duty in securing the safety of Americans. One example of such a measure is the Patriot Act--this legislation aimed to protect Americans from the plans and actions of terrorists partly through granting the government more liberty to carry out investigative or precautionary measures as they deemed necessary. Supporters of this act argue that the legislation that was exactly what America needed to protect its citizens in the future. Proponents also claim that accusations of the National Security Agency constantly monitoring all citizens' calls are false; instead, the agency monitors and only investigates a strict list of keywords. While the guidelines exist and are practiced, it is important to note that the NSA stores internet and cellular history from every American citizen regardless of if there has been any suspicious activity or not. This way, if there is a tabooed keyword used, the branch can sift through previous engagements and activity that the person in question had.

Importantly, the employees within the NSA are flawed humans. In many of Edward Snowden's statements, he mentions cases of NSA agents digging into innocent citizens' data for

the sake of amusement on a slow day. This is a clear violation of the Fourth Amendment's right to privacy and protection against unwarranted search and seizure, and there is nothing being done to stop these horrendous acts. Essentially, not only is the government infringing on our rights as citizens by conducting unauthorized seizures, but individuals within the government are also impeding on our constitutional rights by violating our right to privacy.

Another tragic result of the War on Terror is that some American citizens argue racial or ethnic profiling, and thus discrimination, is necessary within the border of the United States to maintain security. These people claim that certain ethnicities or races are statistically more likely to conduct violence; therefore, it is necessary to take extra precautions to ensure the safety of the entire nation. This issue escalated during the Obama administration when some citizens publicly complained that the current administration was too lax on screening immigrants and those of Middle Eastern origin to ensure they were not a threat. However, "while the Obama administration makes semantic distinctions between terrorists of various stripes, its anti-terror policies make no such distinction".[7] While the executive branch verbally preached tolerance, equality, and a fair chance for immigrants, in the policies regarding such minorities, the President's words fell flat due to fear of contradicting the public's tendency to distrust those of Middle Eastern descent.

Even today, there is growing controversy in the United States surrounding Middle Eastern immigrants. The Trump administration's stance on how the United States ought to treat immigrants from the Middle East is a clear example of the mental impact that the War on Terror had on Americans. During the 2016 presidential primaries, one of President Trump's rallying positions was his outspoken condemnation of the Middle East and those who are from the region.

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[7] Seth Mandel, *The Failed War on the 'War on Terror',* 136 COMMENTARY. 17-25 (2013).

These views had significant support from the public. Since becoming president, he has followed through with the treatment of the Middle East that he promised his supporters; so far, he has attempted numerous times to implement a travel and immigration ban on half of the countries in the Middle East in a political move that continues to stun the world. Unfortunately, the presence of an outspoken leader who promotes intolerance of the Middle East and its people has only made this issue worse for America. Almost two decades after the beginning of the War on Terror, public fear is ever-increasing and evolving and will continue to do so as long as the government continues to emphasize and imply the possibility of a threat from people of Middle Eastern descent or of the Muslim faith.

The United States created a paradox when it declared the War on Terror. To restore peace after terror and protect democracy, the country terrorized innocent civilians and impeded on foreign and domestic rights in order to make a global point. However, these violations have been made in vain; by incessantly opposing terrorism, the United States government set itself up to fail in its goal of completely abolishing radical extremism. By continuing to stigmatize Islam and mistreat Middle Eastern countries, the United States is only giving radical Islamists more fuel to procure a following in response to this abuse. For example, in 2013, Osama bin Laden was assassinated under the Obama administration in what was celebrated as a huge victory for America and what was thought to have finally ended the War on Terror. However, after the deterioration of al-Qaeda's power and influence, ISIS rose to the front of attention in response to what the group has deemed a western attack on Islam. Now, the group is committing and threatening countless acts of terror against western civilization, including the United States, in an attempt to legitimize themselves and their movement and to counteract the numerous negative statements and actions that the west has made against the Middle East.

As long as the current sentiments against the Middle East are abound in the words and actions of our leaders and in the thoughts of our citizens, the War on Terror can never end. If our country continues to violate democratic rights in the name of democracy, the entire idea of democracy will begin to diminish. It is already happening: innocent civilians are being brutally murdered daily, the constitutional rights of American citizens are being taken away without just cause, and immigrants and racial and ethnic minorities can no longer feel safe or respected in a country that was founded upon the ideas of tolerance and equal opportunity for all. When will the injustice end? It is time that the United States government realize that only through the promotion and practice of peace and tolerance can we ever hope to end the violations of human rights everywhere, and thus put a definite end to the War on Terror.

A Case for Abolishing Life Without Parole In The United States For Offenders of Small and Nonviolent Drug and Property Crimes

Up to today, there have been many prison inmates who have served Life Without Parole (LWOP) sentences for small and nonviolent crimes pertaining to drugs and property,[1] in which the offender possessed marijuana that amounted to less than $20.00 or stole items that did not exceed $200.00. Some offenders of such crimes continue to be punished with LWOP despite the Supreme Court's ruling *in Gregg v. Georgia* that the Eighth Amendment prohibits punishments that are more severe in nature compared to the crimes in question[2]. This paper finds that the costs of LWOP exceeds that of the small, nonviolent drug and property crimes mentioned above that it seeks to punish, that it is a severe form of punishment which unjustifiably penalizes those among society's most helpless and impoverished population, and that the sentence has minimal effects in deterring future offenders from committing similar crimes. Thus, this susts that LWOP as applied to small and nonviolent crimes may be more severe than the acts it seeks to punish, thus contrary to the reasoning articulated in Gregg that defines cruel and unusual punishment (described above), and in violation of the Eighth Amendment. As a result, the United States should abolish the punishment of LWOP for small drug and property crimes.

Arguments in Supreme Court cases (*Gregg v. Georgia, Enmund v. Florida)* can be used to interpret the meanings of the terms "cruel" and "unusual" per the Eighth Amendment and thus whether LWOP as applied to offenders of small, nonviolent drug and property offenses falls within parameters established by precedent. *Gregg v. Georgia* was a case in which the Court held Georgia's death sentence for a man who committed armed robbery and murder as

[1] A Living Death, (2013), https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses.
[2] Gregg v. Georgia, 428 U.S. 153 (1976)

constitutional, because the punishment included certain procedures to ensure that it was not mandated arbitrarily and in such a way as not to be cruel or unusual.[3] Hence, one interpretation of "cruel and unusual" is that the punishment is not mandated arbitrarily.[4]

Moreover, one reason that administering LWOP is disproportionately severe in punishing small drug and property crimes can be proved by the punishment's costs, since it far outweighs the cost of either crime. Firstly, according to the Texas Department of Criminal Justice, the average cost to house an inmate in Texas prisons is $47.50 per day, which could cost approximately $17,000.00 for a year.[5] Furthermore, "Since LWOP results in the death of the inmate during incarceration or at least for 2-3 years after conviction, a more adequate cost of housing for such inmates would be approximately $35,000.00. Nonetheless, the societal cost to imprison an offender($35,000.00) can be at least 100 times higher than that of certain drug and theft crimes that result in negligible harm. For instance, let us use the example of a small property crime offender, who once stole a sports jacket worth $160.00 from a department store and received LWOP as a consequence.[6] It is clear that the cost of the LWOP punishment (approx. $35,000.00 or at least thousands of dollars since the shoplifter may have received LWOP in a different state) far exceeds the cost of the crime(approx. $160.00) to the store (the societal member negatively impacted by the crime). The cost of LWOP (approx. $35,000.00) is also excessively high when compared to an alternate crime it seeks to punish, that dealing with the mere possession of $10.00 worth of marijuana. The CDC reports that while marijuana does possess a wide variety of long term effects, the total impact on the individual depends on many

[3] *Id.*
[4] *Id.*
[5] Marijuana and Public Health, (2017), https://www.cdc.gov/marijuana/health-effects.htm
[6] A Living Death, (2013).

factors, including the frequency of marijuana use.[7] Since impact depends on the use, it is not clear that consuming a mere gram of marijuana produces significant, if any, harmful side effects. Admittedly, it can be argued that the consumer of the ten dollars worth of marijuana could have been a frequent user of the drug. This would have made it more likely that the substance would have caused significant negative side effects, which might have increased the cost of the crime in proportion to that of its punishment(LWOP). However, this is only a conjecture and thus an argument for the unconstitutionality, of LWOP rather than its constitutionality. While the conjecture may have been true, the law that subjected the offender to LWOP made no distinction between a frequent and/or infrequent users of marijuana, which would have affected the cost of the crime. It instead while mandated the same punishment with the same severity for different amounts possessed, variations of which tend to produce different costs to society.

Additionally, one may not need to delve into statistics to justify the unconstitutionality of LWOP for the crimes discussed throughout this paper. Even if the recipient of a small amount of marijuana may be significantly harmed by consuming it, punishing this act with LWOP is cruel and unusual since the consumption of other equally or more harmful substances are legal despite their resulting in similar and negative effects on the brain. While the side effects of long term marijuana include the reduction of "attention or other learning functions",[8] moderate drinking leads to short–term brain impairment, and heavy drinking may have extensive and damaging effects on the brain.[9]

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[7] National Institute of Health, National Institute for Alcohol Abuse and Alcoholism National Institute for Alcohol Abuse and Alcoholism (2004), https://pubs.niaaa.nih.gov/publications/aa63/aa63.htm.

[8] *Id.*

[9] How does level of education relate to poverty?, , https://poverty.ucdavis.edu/faq/how-does-level-education-relate-poverty (last visited Dec 16, 2017).

The unconstitutionality of LWOP for small, nonviolent crimes can be justified based on the reasoning from of another Supreme Court case. In *Enmund v Florida*, the Court held that it is it unconstitutional for the death penalty to be mandated for someone who neither did not committed murder nor intended to do so. This case thus further defines what is meant by a punishment having a disproportionate severity in relation to its crime. In doing so, *Enmund* held that sentencing an offender to the death penalty without proof of murder would be cruel and unusual since it would be excessive and "out of proportion" in relation to the non murder crime.[10] To support this holding, the Court reasoned that "the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the robber, who, as such, does not take human life. Here, the focus must be on petitioner's culpability, not on those who committed the robbery and killings[11]." Although LWOP is not technically the same punishment as the death penalty, the main point in *Enmund* is that a crime that does not result in death does not deserve a punishment that results in death. Hence, this would also imply that a punishment that results in a person dying in prison or that confines a person to a certain vicinity(prison) for the rest of one's life should not be given for crimes themselves that do not interfere with either of the two. Therefore, assigning LWOP would be disproportionately severe to the crimes of engaging in either the possession of ten dollars of marijuana or robbing a single clothing item commercially worth less than a few hundred dollars, since none of these crimes can be clearly proven to cause a person's death in a certain place or cause the physical isolation of a person within four walls in the way that the subsequent punishment (LWOP) does.

Additionally, according to *Enmund*, LWOP can be seen as more severe than the death penalty because of what prison exposes an inmate to. In *Enmund*, the Court determined that a

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[10] Enmund V. Florida, 458 U.S. 782 (1982)
[11] *Id.*

certain punishment was excessive on the basis that it resulted in a different result (the intentional termination of life) which was not a consequence of the acts following from the crime in question. Based this reasoning, using LWOP to punish small drug or property crimes would also be unconstitutional since the punishment results in the offender spending more time in prison and increasing the chances that he/she will likely be a victim of prison rape and violence, as well as malnutrition and other factors that lead to physical and mental illnesses,[12] none of which are proven to have resulted specifically from either stealing a clothing item commercially worth $160.00 or selling one ounce of marijuana.

Another main point in *Enmund* was that (quoted earlier): "the focus must be on petitioner's culpability.[13] Moreover, LWOP for the offenders of the kinds of nonviolent crimes thus far discussed is unconstitutional because the punishment is not commensurate to the extent to which the criminals are at fault for their actions for reasons, since the crimes committed can be seen as byproducts of offenders' mental health statuses which is positively correlated with their inevitable socioeconomic circumstances. Firstly, as many as 60% of the prison population did not complete high school,[14] many of whom were born into families with the same level of low educational attainment. Although money is not a guarantor of mental health, poverty can be a determinant of mental health disorders,[15] and poverty rates are highest for those without a high

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[12] Robert Johnson & Sandra Mcgunigall-Smith, *Life Without Parole, Americas Other Death Penalty*, 88 THE PRISON JOURNAL 328–346 (2008).
[13] Enmund V. Florida, 458 U.S. 782 (1982)
[14] A Living Death, (2013), https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses.
[15] The Connection Between Mental Illness and Substance Abuse, DUAL DIAGNOSIS, http://www.dualdiagnosis.org/mental-health-and-addiction/the-connection/ (last visited Dec 16, 2017).

school diploma.[16] Additionally, patients of mental health disorders are responsible for nearly 44% of cocaine consumption and 38% of alcohol consumption.[17] The positive relationship between mental illness and committing crime is further clarified given that in 2005, more than half of all inmates in local jails and prisons possessed some kind of mental illness.[18] This indicates that despite LWOP being one of the most severe forms of criminal sentencing, it continues to be directed towards those who by their very existence are prone to commit crime and whose susceptibility of engaging in criminal conduct is intertwined with a socioeconomic status that is for the most part out of entirely individual control.

Finally, LWOP's failure to deter future offenders from committing petty crimes is an additional reason for why the punishment should be abolished for these offenses. In *Gregg v. Georgia*, the majority stated that the death penalty benefited society by deterring future offenders from committing murder related crimes since it was thought to prevent calculated and premeditated murders not committed in "the heat of passion" from occurring.[19] Whereas that reasoning may be accurate as applied to murder related crimes, the research shows that punishing offenders of small drug crimes yields little to no impact in reducing the rate at which they crimes occur in the future. From 1987-2005, arrests for drug possession increased from 500,000 to

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[16] "UC Davis Center for Poverty Research." How does level of education relate to poverty?, poverty.ucdavis.edu/faq/how-does-level-education-relate-poverty.

[17] Costs: Death Penalty Costs in Texas Outweigh Life Imprisonment, Costs: Death Penalty Costs In Texas Outweigh Life Imprisonment | Death Penalty Information Center, Https://Deathpenaltyinfo.Org/Costs-Death-Penalty-Costs-Texas-Outweigh-Life-Imprisonment

[18] Vijaya Murali & Femi Oyebode, Poverty, Social Inequality and Mental Health, 10 Advances In Psychiatric Treatment 216–224 (2004), http://apt.rcpsych.org/content/10/3/216/full-text.pdf html.

[19] Gregg v. Georgia, 428 U.S. 153 (1976)

1,500,000 despite LWOP being administered as a punishment for these crimes during this period.[20]

In conclusion, life without parole constitutes as cruel punishment contrary to the Eighth Amendment when applied to offenders of small, nonviolent drug and property crimes and hence should be abolished throughout the United States. The policy deprives offenders of a substantial quality and proportion of their lives; many of whom were involved in crimes in which it was not proven that they took this away from others. As a result, the policy is disproportionately severe in comparison to the crimes it seeks to punish while possessing minimal to no deterrent effects. Administering LWOP to offenders of drug and property related crimes resulting in negligible costs to society is also cruel and unusual since it punishes convicts who, despite having some or substantial control over their decisions, have no control over the circumstances they were born into (i.e poverty, households suffering from domestic violence) which predispose them to the very mental illnesses that significantly increase their likelihood of committing crime, thus reducing culpability.

[20] Drug and Crime Facts, BUREAU OF JUSTICE STATISTICS (BJS), https://www.bjs.gov/content/dcf/enforce.cfm

The Tenth Amendment in the 21st Century

By Brendan Meece

In the United States, the challenge of distributing power between state and federal governments is historically contentious. Many of today's most divisive issues revolve around how much authority states should be given to create their own laws. From marijuana to gambling, American society deliberates over when it is necessary for the government to step in and when it should let the states be. This essay will discuss the various interpretations of the 10th Amendment, specifically its literal and contextual interpretations. This essay will explore state's rights issues that are not mentioned in the Constitution, such as the legality of marijuana, betting, and the role of international law in the United Sates within the context of the 10th amendment.

The 10th Amendment encompasses the legal division of powers between the federal and state governments. The 10th Amendment states that the powers that the Constitution does not give to the federal government are given to the states. Taken literally, this definition states the Constitution is the only document determining which laws that the federal government has the right to create while everything else should be left to the states. For example, there are many departments of the federal government that exist today that were not explicitly outlined by the Constitution. The Department of Education was not initially outlined in the Constitution, yet it was nonetheless created in violation of the 10th Amendment.

Education is not explicitly mentioned in the Constitution and therefore should be left up to the states unless there is a Constitutional Amendment created justifying its existence. This framework supports the idea that this amendment is consistently violated. The framers wrote the Constitution as a document that limits the power of the federal government; the 10th amendment is a prime example of this. The Constitution comprehensively outlines the authority of the

federal government, but it nonetheless remains vague in its legal implementation, especially as time progresses and more legal challenges arise.

The importance of the 10th Amendment stems from its role as the primary doctrine concerning federalism in the United States. Federalism, which concerns the division of power between the federal government and state governments, is among the most basic principles to consider when creating laws. The Supreme Court has used federalism when federal statutes are unclear.[1] Federalism is the test by which laws that appear to be unconstitutional are questioned. The balance between state and federal rules has brought about tremendous conflict, and the issue of slavery and the civil war shows just how devastating this conflict can become. Although states had their own laws regarding slavery, the issue of slavery was seen to be such a divisive issue that it was outlawed by the 13th Amendment. This is a key aspect of the 10th Amendment, because while slavery had not been explicitly mentioned in the Constitution, Congress followed the 10th Amendment to explicitly outlaw slavery for all states. As time goes on, new legal problems arise; there are so many legal procedures that it is impossible for the Constitution to cover all these situations. Theoretically, this leads to the creation of more amendments. However, this more so literal interpretation of the 10th Amendment is not that pervasive.

Comprehensive interpretation of the law is crucial in determining future precedent for state's rights and the 10th amendment. The 10th amendment has been used to justify many vague legal issues. Since the use of the 10th amendment is inconsistent, partisanship is often a key factor in the implementation of the 10th Amendment. Previously, "support for states' rights was largely concentrated among those attempting to reject racial desegregation," but now several

[1] Bond v. United States, 572 U.S (3rd. Circuit 2014).

Democrats use the state's rights arguments as a basis for the legality of sanctuary cities.[2] Each case that involves issues not explicitly defined in the Constitution should be thoroughly reviewed to determine if the 10th Amendment is violated in that instance. The concept of federalism has little to no value in serving as an unbiased standard for legality or constitutionality if it is applied inconsistently and can be easily swayed by partisanship.

One of the most important recent Supreme Court cases involving the 10th Amendment is Bond v. United States (2013). This case voided the Chemical Weapons Convention Implementation Act of 1998, which outlaws the use of chemical weapons. In *Bond*, petitioner Anne Bond was charged with using a chemical weapon in violation of section 229a of the Chemical Weapons Act.[3] Bond pleaded guilty but later appealed, because she believed section 229(a) was in violation of the 10th Amendment. Eventually, the Supreme Court ruled that the Chemical Weapons Act was in fact unconstitutional. In his concurring opinion, Chief Justice John Roberts wrote that "because our constitutional structure leaves local criminal activity primarily to the states, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach".[4] Roberts states that there are few instances in which the federal government regulates criminal activity, and the Chemical Weapons Act does not fall under that category and is therefore unconstitutional. *Bond* aimed to determine whether the Chemical Weapons Convention Implementation Act can be applied by the federal government since there was no clear reach given to the law by Congress.

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[2] Tim Donner. "The Tenth Amendment and the Revival of Federalism", 12 Dec. 2016. https://www.washingtontimes.com/news/2016/dec/12/the-10th-amendment-and-revival-of-federalism/.
[3] *ID*. at 1.
[4] *ID*. at 1.

The decision reached in *Bond* leads to the different interpretations of the 10th Amendment. There is a spectrum of different interpretations of the 10th Amendment, with the conservative view being more literal and the liberal view being less absolute and more contextual. A literal viewer may conclude that the law is unconstitutional, because it does not come under the jurisdiction of Congress as states in the Constitution. Therefore, it should be left up to the states to implement this law. In such interpretations, it would be difficult to justify most federal statutes similar to the Chemical Weapons Convention Implementation Act, but those supporting a more contextual view of the 10th Amendment may believe this takes away too much power from the federal government. Those supporting a literal view may provide the counterargument that limited federal government is the point of the 10th Amendment.

General interpretation of the 10th Amendment has seen significant change within the last several decades. An older view of the 10th Amendment held that it only determines if the federal government has certain authority given to it by the Constitution.[5] In recent years, namely since 1986's *Garcia v. San Antonio Metropolitan Transit,* cases have focused on "judicially enforceable limits on the power of the federal government to regulate states".[6] *Transit* sets the precedent that cities can be regulated by federal labor laws, but cases after this have seemingly challenged this regulation without overturning the case itself. This shift provides justification for the different interpretations of the 10th Amendment. The conservative, literal view of the 10th Amendment is associated with this recent interpretation of state's rights as evidenced by the verdict of Bond. If the federal government creates a law which appears to limit the power of the states, those who share the conservative view may call the 10th Amendment into question. Those who would disagree with the verdict in Bond have an interpretation of the 10th Amendment that

[5] Gary Lawson and Robert Schapiro. "Common Interpretation: The Tenth Amendment," https://constitutioncenter.org/interactive-constitution/amendments/amendment-x (last visited Dec 6 2017).
[6] *ID*. at 5.

is closer to the old interpretation. This view revolves around the broader idea that the Amendment more so refers to the general powers of the Constitution and less so regarding whether these powers take away authority from the states.

Bond raises a question regarding the relationship between international law and its compatibility with the Constitution. The ability to make treaties comes from Article II, Section 2, Clause 2 of the Constitution: the Treaty Clause. This clause allows the President to create treaties given 2/3rds of Congress approve of said treaty.[7] This sometimes appears to be contradictory with the 10th Amendment, as these treaties have the potential to undermine the authority of the states. According to the Heritage Foundation, here has been increasing interest regarding federalist limits on Congress's power/authority on the tenth amendment. This notion begs the question as to whether these limits on the tenth amendment also apply to treaty power, a question which the Court has not yet explored.[8] The lack of clear legal answers shows that more in-depth interpretation of the 10th Amendment is required to better set future precedent about state's rights.

International law, such as the Chemical Weapons Act, can take away rights from the states, as evidenced by *Bond*. Yet, it still appears that the 10th Amendment is often ignored. In his concurring opinion on *Bond*, Scalia wrote that "according to some scholars, the Treaty Clause comes with no implied subject-matter limitations" and overrides the 10th Amendment.[9] Scalia does not agree with this framework, as he believes that it gives the government too much power when creating treaties. Since the Treaty Clause and the 10th Amendment can be quite contradictory, more precedent must be set and evaluated, although few cases are likely to challenge the relationship between the Treaty Clause and the 10th amendment.

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[7] *Treaty Clause*, The Heritage Guide to the Constitution.
[8] *ID*. at 7.
[9] *ID*. at 1.

In recent years, marijuana has become among the most prominent examples of states' rights against the power of the federal government. While a few states have recreational marijuana fully legalized, there are twenty-six states in total that have legalized marijuana either medically or recreationally.[10] Although it appears that laws are trending towards legalization for most states, it is likely that some states will oppose its legalization, which is a right given to the state by the 10th Amendment. The controversy lies in the fact that some legislation seeks to increase the power of the federal government to prosecute marijuana related offenses, a duty which should be relegated to the individual states. Marijuana or medicine does not have direct regulations mentioned in the Constitution, and it is therefore up to Congress to determine whether federal laws involving marijuana should overrule state laws.

As the John Roberts quote mentions earlier, the 10th Amendment leaves criminal activity to be regulated by the states unless Congress says otherwise. The fact that some states have legalized marijuana implies that Congress has not given the given the federal government the ability to regulate state actions regarding marijuana. The Rohrabacher amendment, proposed by Representative Dana Rohrabacher of California, has stopped the Department of Justice from "prosecuting medical marijuana businesses," while this year Attorney General Jeff Sessions "sent a letter to Congress demanding that the Rohrabacher amendment not be included in this year's budget".[11] This exceeds the powers given to the federal government by the 10th amendment, as the Constitution does not explicitly mention laws for the sale of medicine or marijuana. Individual states must decide how to handle the legalization of marijuana because it is their 10th Amendment right as a state.

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[10] Judson Phillips. "Medical marijuana amendment a state's rights issue", 25 Sept. 2017. https://www.washingtontimes.com/news/2017/sep/25/medical-marijuana-federalism-states-rights/.
[11] *ID*. at 10.

The ambiguity of the 10th Amendment and its lack of in-depth interpretation has contributed to it being a popular "defense mechanism" against many ideas which at first appear not to be explained by the Constitution in detail. Many believe that the 10th Amendment indicates more than what is written and relies more on contextual interpretation[12]. This amendment's broadness is the most significant challenge in its interpretation. If one were to go back and look at all laws that have been passed by the federal government within the last century, a significant number of them would merit some challenge by the 10th Amendment because of their lack of explicit mention in the Constitution. It is unlikely that most of these laws are going to be challenged because they have been entrenched in our legal system.

It is not a stretch that the 10th Amendment is one of the amendments which "has been the most ignored, misinterpreted, or abused".[13] Any new case which seriously challenges the division of powers between the federal and state governments can easily become a landmark case for the 10th Amendment, because it will open a new interpretation of the broad role of federalism. Most legal procedures are not contained in the Constitution because of the evolving nature of law. As cases such as *Bond* continue to be tried, the Supreme Court will be able to set precedents and narrow down what exactly the 10th Amendment means. However, the 10th Amendment is written in a way that may not allow it to be limited via precedent.

Even if an action may be harmful to the individual who performs said action, it is not necessarily up to the federal government to regulate such action. The 10th Amendment provides the legal backing for this, and the federal government is far too large to effectively regulate the commercial endeavors of all 50 states. One works in one state may not work in another, and vice

[12] Morgan Smith. "The New Tenthers", 8 Jun. 2010. https://www.texastribune.org/2010/06/08/just-what-rights-does-the-10th-amendment-protect.

[13] *ID* at 2.

versa. Several Supreme Court decisions have interpreted the 10th Amendment as having an "anti-commandeering clause," which "limit[s] the ability of the federal government to 'commander' state officials or a state legislative process".[14] This commandeering clause was used as justification for bringing the cases *Christie v. NCAA* and *New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA* to the Supreme Court to determine if the federal government from prevent states from enacting laws against gambling. The lack of specification in the Supreme Court concerning gambling could mean that it would be difficult to find legal justification for a ban on gambling and would thus likely require an amendment for it to be banned throughout the United States. However, this is unlikely to happen because of the prevalence of betting in several states already, such as Nevada. Betting is a commercial endeavor between two individuals and does not violate any principles laid out in the Constitution. Therefore, the 10th Amendment gives individual state's the authority to decide what the fate of betting should be. New Jersey legally has the right to legalize betting if the state legislature so decides. Just like marijuana, gambling cannot be regulated by the federal government unless there is explicit mention that a particular federal law can regulate how individual states deal with gambling. While law concerning regulation of marijuana can relate to the commercial aspect of marijuana, most marijuana law regulates the *possession* of marijuana. Gambling differs from marijuana in the sense that it is primarily transaction based and is primarily regulated on a transactional basis. Laws concerning gambling revolve around whether the act of gambling is permissible. Therefore, gambling law can set precedent for how future courts interpret the 10th Amendment in terms of transactions and whether or not the government can place limit on these transactions in individual states.

[14] Scott Bomboy. "New Jersey bets on 10th Amendment in Supreme Court Case", 28 Jun. 2017. https://constitutioncenter.org/blog/new-jersey-bets-on-10th-amendment-in-supreme-court-case.

The 10th Amendment remains a controversial and difficult section of the Constitution to interpret. States' rights will remain challenging to define because of the polar differences between proponents of the liberal and conservative viewpoints. The principle of federalism is widely based on the 10th Amendment, but the legal application of state's rights is often decided by partisanship. Interpretation of the 10th Amendment has shifted in recent years, leading to the decisions reached in *Bond v. United States* and opening debates as to the legality of marijuana and gambling. There are still questions concerning states' rights that have not been formally answered from legal perspective which must be interpreted to give greater precedent for use of the 10th Amendment. Greater interpretation of the 10th Amendment allows for a more clear and consistent application of the law, but ambiguity can lead to abuse of federal government power over the rights of states.

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2017.https://www.washingtontimes.com/news/2017/sep/25/medical-marijuana-federalism-states-rights/.

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^Has not been quoted yet

11. Smith, Morgan. “The New Tenthers.” *Texas Tribune*. 8 Jun. 2010. Accessed 17 Nov. 2017. https://www.texastribune.org/2010/06/08/just-what-rights-does-the-10th-amendment-protect/

12. “Treaty Clause.” *The Heritage Guide to the Constitution*. N.d. Accessed 29 Nov. 2017. http://www.heritage.org/constitution/#!/articles/2/essays/90/treaty-clause

The FCPA: To Reform or To Not Reform

By Akshar Patel

Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977 as a response to revelations of extensive bribery of foreign officials by U.S. companies. The Securities and Exchange Commission unearthed that more than 400 U.S. companies had paid several hundreds of millions of dollars in bribes to foreign government officials in order to secure business overseas.[1] The SEC also discovered that companies were making illegal campaign contributions in the United States. Companies falsified corporate documents in order to hide the payments.[2] Congress passed the FCPA to stop corporate bribery. Corporate bribery both damaged the perception of U.S. businesses overseas and hindered market efficiency. Not only does such corruption lead to inefficiency, it also causes the emergence of sub-standard products and an unfair environment for ethical businesses.[3] Corruption does this by channeling public resources away from their proper domains (healthcare, infrastructure, and education, etc.) towards personal gain. Bribing foreign officials in order to secure business means that short-term prosperity is granted to the highest bidder, instead of being granted on the basis of price and quality. Ethical business cannot compete if ethical conduct guarantees business failure in other countries.

The FCPA contains both anti-bribery and accounting provisions.[4] In 1988, Congress amended the FCPA to include two affirmative defenses: (1) the local law defense and (2) the reasonable and bona fide expenditure defense.[5] Subsequent negotiations at the Organization for Economic Cooperation and Development resulted in the Convention on Combating Bribery of

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[1] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, (2012). https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, at 3.
[2] *Id*. at 3.
[3] *Id.* at 3.
[4] Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L.J. 469 (2016), at 471.
[5] Anita Cava & Beverley Earle, *When is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. REV. 111 (2013), at 113-117.

Foreign Officials in International Business Transactions, commonly referred to as the Anti-Bribery Convention.[6] The Anti-Bribery Convention helped give the FCPA international scope as it required signatories to the treaty to pass laws declaring the bribing of foreign officials a crime.[7] Indeed, in 1998 the FCPA was amended to conform to the Anti-Bribery Convention. The amendments expanded the legal reach of the FCPA to include payments made to: secure "any improper advantage", reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States, cover public international organizations in the definition of "foreign official", add an alternative basis for jurisdiction based on nationality, and apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.[8]

The Anti-Bribery Convention came into effect on February 15, 1999. The Department of Justice and the SEC share enforcement authority for the FCPA's anti-bribery and accounting provisions. The DOJ has criminal enforcement authority over "issuers" and their officers, directors, employees, agents, and stockholders acting on the issuer's behalf. The DOJ has civil enforcement authority over domestic concerns: U.S. citizens, nationals, residents, U.S. businesses, and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States.The SEC has civil authority over "issuers" and their officers, directors, employees, agents, and stockholders acting on the issuer's behalf. Both the DOJ and the SEC have units dedicated specifically to the enforcement of the FCPA.[9]

The anti-bribery provision of the FCPA is designed to prohibit individuals and businesses from bribing foreign officials/governments in order to obtain or retain business. Corrupt intent is

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[6] *Id.* at 118.
[7] *Id.* at 118.
[8] Criminal Division, Supra note 1, at 4.
[9] *Id.* at 4-5.

an important factor in whether or not indictments occur.[10] The FCPA also has an accounting provision that imposes certain recordkeeping and internal control requirements on issuers, and prohibits individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failing to implement an issuer's system of internal controls.[11] Violating the FCPA can lead to consequences such as fines, disgorgement, and imprisonment. The FCPA is only concerned with payments intended to influence a foreign official to use his or her position "in order to assist … in obtaining or retaining business for or with, or directing business to, any person."[12] This is known as the business-purpose test.

Some organizations and authors have argued that the FCPA is an example of American moral imperialism[13], that the FCPA is emblematic of an overcriminalization problem in the U.S. [14], and that the FCPA creates difficult economic conditions for small and medium-sized enterprises (SMEs).[15] Others argue that the law has theoretical flaws, such as its (supposed) legislative moral ambiguity[16] or its ascription of intention to corporations.[17] The law can be improved with changes in administrative/bureaucratic policy.[18] However, the FCPA should in no way be weakened as it has made significant strides to fight corruption in the international marketplace.

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[10] *Id.* at 14.
[11] *Id.* at 38.
[12] *Id.* at 12.
[13] de la Torre, Supra note 4, at 470.
[14] Cava & Earle, Supra note 5, at 147.
[15] Stephen S. Laudone, *The Foreign Corrupt Practices Act: Unbridled Enforcement and Flawed Culpability Standards Deter Smes from Entering the Global Marketplace*, 106 J. CRIM. L. & CRIMINOLOGY 389 (2016), at 389.
[16] Upton Au, *Toward a Reconceived Legislative Intent behind the Foreign Corrupt Practices Act*, 79 B. L. REV. 925 (2014), at 932.
[17] Cava & Earle, Supra note 5, at 149.
[18] *Id.* at 144-145.

The first charge against the FCPA is that it imposes an American definition of corruption on global marketplaces, and is thus an act of moral imperialism. However, moral imperialism is a vague and problematic phrase. The use of the phrase "moral imperialism" in critiquing the FCPA implies some kind of commitment to moral relativism.[19] However, only some type of commitment to moral objectivism, the idea that moral truths are universal and are independent of cultures and groups, can sustain international law. A commitment to moral relativism has the consequence of undermining the rule of law, as it would not only lead to the philosophical negation of the FCPA, but it would have dangerous implications for all international norms and treaties. A dog-eat-dog attitude in international affairs makes the world a more dangerous place and undermines the interests of the United States. The United States has always maintained at least a nominal commitment to objective morality when engaging with sovereign states, and moral objectivism is embedded in the language of the Constitution. Without some commitment to objective morality, referring to concepts like justice and human rights becomes an incoherent practice. The interests of the United States are undermined when deferment is given to morally dubious cultural practices that basically amount to bribes.

Furthermore, the acceptance of the notion of corruption suggests a belief in moral objectivism. Corruption, specifically political corruption, implies that a duty has been violated.[20] In the case of the FCPA and other international bribery legislation, the duty is to that of a competitive marketplace and well as to to treaties such as the Anti-Bribery Convention. Those who accuse the U.S. of moral imperialism are wrong since moral relativism cannot provide basis for a belief in corruption or international law. Some would also argue that if the political culture

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[19] A. Dawson and E. Garrard, *In Defence of Moral Imperialism: Four Equal and Universal Prima Facie Principles*, 32 J. MED. ETHICS 200 (2006).
[20] Robert C. Brooks, *The Nature of Political Corruption*, 24 POL. SCI. Q. 1 (1909), at 4.

of a country requires certain payments from "all similarly situated businesses", then it is possible to argue that competition is not disrupted and that the payment is in fact a "routine governmental action."[21] However, if bribes to government officials for the purpose of securing business are routine governmental actions within a particular country, then that is a sign that the country simply has not reached a similar level of moral development. For example, there is no corrupt totalitarian government that is truly totalitarian in nature, because by nature, a truly totalitarian government has no obligation to its citizens.[22] Accusations of corruption suggest that a nation's citizenry holds its government to high moral standards. A perfectly complacent citizenry suggests that moral ideals do not have a strong presence within such a citizenry's culture. Even if one does not accept this as fact, corruption and bribery should always be mitigated at least for consequentialist reasons.[23]

Every year, about $1.5 trillion in bribes are paid every year across the world. This is approximately 2% of global GDP.[24] This is money that could instead be used for legitimate investment purposes. The costs of corruption are clearly enormous from a purely practical viewpoint as well as from a moral one. A specific example of a country in which the U.S. government imposes supposedly arbitrary standards is China. The ideas of guanxi and mianzi are imperative in Chinese culture. Guanxi generally refers to a mutual indebtedness that results from exchanging gifts and favors, and in general is a social undertaking that results from a sense of being part of a collectivity. Mianzi refers to the development of public self-image or a measure of one's social status that is developed from reciprocity in relationships. Guanxi and mianzi are

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[21] Cava & Earle, Supra note 5, at 117.
[22] Brooks, Supra note 20, at 7.
[23] Au, Supra note 16, at 950.
[24] World Bank, *Combating Corruption*, WORLD BANK (Sep. 16, 2017), http://www.worldbank.org/en/topic/governance/brief/anti-corruption.

especially important for business practices in the Chinese economy. One can see how this seemingly disadvantages U.S. business conducting business in China. Indeed, one-third of FCPA enforcement actions in 2012 involved violations in China.[25] Rather than mitigate FCPA enforcement actions in China, enforcement should be aggressively pursued. If Chinese companies wish to expand to American marketplaces or one of the many countries that has passed strict anti-bribery legislation, then that will eventually lead to the diminishing role of guanxi and mianzi. If not, then Chinese companies will simply be prevented from being as competitive as they could be in the global marketplace. For all of these reasons, charges against the U.S. of moral imperialism are unreasonable at best.

During 2011 Congressional hearings on proposed amendments to the FCPA, Shana-Tara Regon, Director of White Collar Crime Policy, National Association of Criminal Defense Lawyers, stated that "Because there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the DOJ and SEC says it means."[26] Regon goes on to assert that "The FCPA is emblematic of the serious problem of overcriminalization."[27] Representative Conyers disagreed with the notion that the the DOJ and SEC have been arbitrary with their enforcement priorities and that the FCPA is part of a larger overcriminalization problem. Conyers noted that in the past ten years, there have only been 140 FCPA prosecutions. The DOJ and FCPA are very clear with what their definition of "foreign official" is, as well as to whom is under the jurisdiction of the FCPA, and what kinds of acts the FCPA prohibits and under what circumstances. The FCPA is far from arbitrary.

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[25] Au, Supra note 16, 938-942.
[26] Cava & Earle, Supra note 5, at 146-147.
[27] *Id.* at 146-147.

Stephen Laudone, editor-in-chief of The Journal of Criminal Law and Criminology at Northwestern University School of Law argues that one of the problems with FCPA enforcement is that the DOJ and SEC prosecutes both violations committed by large corporations, the kind of violations that originally secured the passage of the law in 1977, and violations committed by SMEs. He further argues that FCPA compliance is so costly and risky for SMEs that it often deters them from entering the global marketplace.[28] However, as Laudone himself acknowledges, the DOJ Federal Sentencing Guidelines does discriminate based on the size of the company, among many other relevant factors, in deciding what kinds of consequences the prosecuted company should face. Laudone further argues that it is extremely difficult for SMEs to take advantage of the two mitigating factors that the DOJ considers when deciding to bring charges: the existence of an effective compliance and ethics program, and self-reporting/cooperation/acceptance of responsibility. Laudone argues that compliance and ethics programs are prohibitively expensive for SMEs, and that they may not even be aware of the existence of the FCPA, a necessary prerequisite for self-reporting.[29]

However, in 2012 the SEC and DOJ published a comprehensive 120-page *Resource Guide to the U.S. Foreign Corrupt Practices Act*. This resource guide is free, and is accessible by anyone who has access to the internet, and is thus accessible to any business that wishes to operate overseas. Any reasonable business executive would research international business laws before entering the global marketplace. To do otherwise would suggest laziness or neglect. Unsurprisingly, the author is only able to mention a handful of examples in which the DOJ has

[28] Laudone, Supra note 15, at 389.
[29] *Id.* at 390-391.

taken enforcement action against SMEs.[30] All companies have the resources necessary to comply with the FCPA.

Critics have also found alleged theoretical and minor practical flaws within the FCPA. There are some legitimate criticisms of the FCPA on this front, but the law does not need an overhaul to solve these problems. Upton Au, J.D. candidate at Brooklyn Law School, argues that the scope of the FCPA ought to be expanded to include all recipients of bribes, rather than just bribes directed toward foreign officials.[31] This mimics the United Kingdom Bribery Act, and would be a welcome enhancement to the law. Au also argues that the FCPA should have a compliance defense that is a part of the law itself and not entirely left to prosecutorial discretion. [32] Such a legislative amendment is unlikely in America's current political climate, as the sitting president is a huge critic of the FCPA.[33] However, pursuing such a legislative amendment would weaken the voices of those who argue that FCPA enforcement is particularly unfair to small businesses. As for theory, the FCPA states that bribery is wrong, but it never specifically states why bribery is wrong. A way to remove this moral ambiguity is by the DOJ and SEC providing a consequentialist rationale for FCPA enforcement priorities.[34] That is, bribery is wrong because of the practical consequences of a marketplace that is prone to such corrupt practices. Another criticism of the FCPA is that it assigns intentions to corporate entities; supposedly, corporate entities can not have intentions as corporations are allegedly not persons. This criticism has no

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[30] *Id.* at 392-393.
[31] Au, Supra note 16, at 950.
[32] *Id.* at 951.
[33] Jim Zarroli, *Trump Used To Disparage An Anti-Bribery Law; Will He Enforce It Now?*, NATIONAL PUBLIC RADIO (Nov. 8, 2017), https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now.
[34] Au, Supra note 16, at 950.

merit. The Supreme Court has long recognized corporations to be persons, because a corporation is essentially a group of people structured in a particular hierarchy to sell some good or service. There is no reason to not extend the same rights ascribed to individuals to groups of individuals.

In the final analysis, the FCPA in current form is an effective tool to fight corrupt business practices around the world. Although the law could be enhanced with minor modifications, it is currently adequate to achieve American interests at home and abroad. Given the contemporary American political climate of gridlock and stagnation, any changes to the FCPA should be done at the administrative level via the DOJ and SEC. Ultimately, both agencies should continue their rigorous enforcement practices to ensure a fair and competitive global marketplace

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The Role of International Law in Protecting Bulgaria's Roma Minority

By Galia Popov

International human rights law is an important tool for fighting racial and ethnic discrimination. It provides a clear international standard for human rights and can be used to put pressure on states to eliminate discriminatory or inhumane practices. Bulgaria is an excellent case study for the use of international law in conjunction with national law to protect minority groups, particularly the Roma. In recent years, international courts and advocacy groups have used human rights law as a basis to pressure the Bulgarian government to improve the situation of its Roma minority. One challenge with international law is that it is based on the cooperation of participant states and has no independent enforcement capability. Despite this limitation, international law is not only helpful, but essential to protecting minority rights.

Bulgaria is home to a relatively high number of Roma compared to most European countries. Most estimates place the number between five and ten percent of the general population.[1] The Roma in Bulgaria are a highly visible minority group due to their dark skin and distinct language and culture, which they have maintained by traditionally keeping themselves separate from the rest of the population. Most Roma live in segregated shantytowns on the outskirts of cities and are subject to harsh racial and ethnic discrimination. A majority of "ethnic Bulgarians" view the Roma with suspicion at best and outright hatred at worst. As a result, Roma face an unemployment rate of over 70% and lack access to healthcare and adequate housing.[2]

[1] European Commission, *The European Union and Roma Factsheet: Bulgaria* 1 (2014).
[2] European Union Agency for Fundamental Rights, *Poverty and Employment: the Situation of Roma in 11 EU Member States* 17 (2014); *European Center for Roma Rights, ERRC submission to the European Commission on the EU Roma Framework* (2016).

Because their Bulgarian language skills are poor, Romani children are often sent to special needs schools where they receive a subpar education, further damaging their chances at a better future.[3]

Over the last several decades, human rights violations against the Roma began to draw attention from international NGOs and legislative bodies, including the European Union (EU). In the late 1990s, efforts began in earnest to rectify discrimination against the Roma in Bulgaria. Despite strong anti-Roma sentiment, in the last several years Bulgaria has begun to cooperate with efforts to protect Roma rights. In October 2017, a Bulgarian court found the Deputy Prime Minister guilty of hate speech after he delivered an anti-Roma tirade to parliament.[4] Although this ruling is hardly a major step towards resolving cultural and systemic discrimination, it is noteworthy given that Bulgaria did not even have clear anti-discrimination legislation until 2003 and has a track record of ignoring hate crimes against the Roma.[5] In its efforts to comply with European and international legal standards, Bulgaria has begun to take human rights issues more seriously. In addition, Bulgaria is relatively unusual in that while it does not have a strong system of human rights law at a domestic level, international law still "forms an integral part of the national order."[6] Article 5.4 of the constitution declares that any ratified international treaty shall become part of state legislation and have precedence over domestic law.[7]

Understanding the international legal framework driving anti-discrimination efforts in Bulgaria requires understanding the structure of international law and evaluating the status of minorities within it. Bulgaria is a member of the United Nations, the EU and the Council of

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[3] Encho Gerganov, Silvia Varbanova & Hristo Kyuchukov, *School Adaptation of Roma Children,* Intercultural Education (2006).
[4] *Bulgarian Deputy PM Reprimanded Over Anti-Roma Speech*, REUTERS, October 25, 2017.
[5] European Roma Rights Centre, *Bulgaria Adopts Comprehensive Anti-Discrimination Law*, September 18, 2003.
[6] ANNA MEIJKNECHT, MINORITY PROTECTION, STANDARDS AND REALITY: IMPLEMENTATION OF COUNCIL OF EUROPE STANDARDS IN SLOVAKIA, ROMANIA AND BULGARIA § 40 (2004).
[7] Bulgaria CONST. art. 5.4.

Europe. Within these frameworks, Bulgaria has also signed and ratified all major human rights treaties. The most important of these include the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Framework Convention on the Rights of Persons Belonging to National Minorities (henceforth the Framework Convention). According to these documents, Bulgaria must ensure that its citizens have access to the civil, political, social and economic freedoms they are entitled to. However, this becomes slightly more complicated in regards to minorities. In order to clarify protections for minority groups, it becomes necessary to define not only who belongs in the minority, but also what rights apply to the group as a whole as opposed to its individual members.

Within international law, there is no clear consensus on the definition of a minority. According to some of the common criteria, a minority consists of a distinct non-dominant group with a specific homeland, numerical inferiority, and community cohesiveness. Unfortunately, one area that lacks clear resolution is the status of non-citizen minorities, who are not protected under definitions that refer to the minority as "citizens."[8] These definitions have been criticized for their exclusion of refugees and minorities that have been stripped of their citizenship, such as the Rohingya in Myanmar.[9] In addition, the assumption that a minority is tied to a specific homeland is inaccurate in the the Roma's case. However, in most ways, the Roma clearly fit the definition of a minority.

Another concern is how to distinguish the rights of a group as opposed to the rights of the individual. International human rights law is often focused on defense of individual rights, which

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[8] HELEN O'NIONS, MINORITY RIGHTS PROTECTION IN INTERNATIONAL LAW: THE ROMA OF EUROPE § 182 (2007).

[9] Syed S Mahmood et al., *The Rohingya People of Myanmar: Health, Human Rights, and Identity,* 389 THE LANCET, 1842 (2017).

runs the risk of excluding rights that apply to minority groups as a whole. This dynamic can be seen in one of the primary international human rights treaties affecting the Roma in Bulgaria, the International Covenant on Civil and Political Rights (ICCPR), which states that "all peoples have the right to self-determination...[and to] freely pursue their economic, social and cultural development."[10] At its most basic level, this statement lays the framework for defending minority rights within international law. Article 27 of the ICCPR defines minority rights even more clearly:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[11]

It is important to note that the phrase "belonging to such minorities" brings the focus back to individual rights. States often discourage the recognition of group rights out of concern about potential separatist movements. However, the collective right of peoples to self-determination is clearly established in Article 1 of the UN Covenant and indicates that group rights should be taken into consideration.[12] One problem with the individual rights approach is that it can create the semblance of equality ("equal treatment") without raising the minority group to a truly equal status. Group rights would allow for the creation of programs such as affirmative action which would correct the fundamental imbalance between the Roma and the general population. Bulgaria has not been motivated to create protections for group rights within

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[10] O'Nions, *Minority Rights Protection*, 192.
[11] O'Nions, *Minority Rights Protection,* 193.
[12] Id. at 223.

domestic law, but it cannot rely upon international law to fill in these gaps. In the future, defense of group rights will be an area that needs improvement.

The international convention that currently comes closest to protecting group rights is the Council of Europe's Framework Convention, which takes the rights established in the ICCPR and expands upon them in greater detail. Like the ICCPR, its primary focus is individual rights. However, the Framework Convention also includes protective measures for maintaining culture and protecting against assimilation, which is especially important to the Roma. In addition, it clearly prohibits education and housing discrimination. As such, the Framework Convention is one of the most important documents for establishing protection for the Roma.

One strength of the international legal system is that it provides a means of monitoring the implementation of changes. For example, the Council of Europe's Advisory Committee evaluates the adequacy of measures taken to achieve the goals set out in the Framework Convention.[13] Every five years, the committee releases a report detailing the progress made and the problems that still exist, along with recommendations for their resolution. Housing discrimination and school segregation are the two major issues that come up repeatedly in regards to Bulgaria, as well as lack of access to healthcare. Similarly, the UN Human Rights Committee monitors the implementation of the ICCPR and creates reports for each member country. Monitoring provides a secondary level of oversight above the national level, and ensures that national governments cannot ignore minority issues.

While monitoring plays a useful role in oversight, it does not serve to actually enforce human rights law. The Council has noted violations in every report thus far, but it has no mechanism for enacting punitive measures against Bulgaria directly. Even organizations such as the UN Human Rights Committee can do very little, so long as Bulgaria maintains that it is in the

[13] Meijknecht, *Minority Protection, Standards and Reality,* 14.

process of rectifying its violations. In general, enforcement remains the duty of the domestic government. This is necessary to respect Bulgaria's sovereignty but renders protecting minority rights more difficult. The discrimination that the Roma face in Bulgaria makes it problematic to rely on local government intervention. Many Bulgarian officials are not inclined to prioritize Roma rights, and the Roma themselves are cautious about interacting with the authorities.

Because the international legal system has only a limited jurisdiction over Bulgaria's domestic affairs, non-governmental organizations (NGOs) are currently the most effective means of protecting Roma rights on a short-term basis. Yet NGOs also rely on international law to provide support and legitimacy to their efforts. Many NGOs use advocacy to draw attention to international law and encourage governments to comply. Groups such as the European Roma Rights Centre not only lobby for increased protections, they also play a major role in bringing lawsuits to international courts. These lawsuits provide recourse for victims of discrimination while establishing important precedentat can be used in domestic enforcement. These methods are especially effective in Bulgaria due to its acceptance of international law and desire to conform to international standards.

Ultimately, discrimination against the Romani people is not an issue that will go away overnight. There are deep-seated cultural divisions that will likely create stumbling blocks in the process for decades to come. However, international law has created a push against discrimination that will help guide Bulgaria through the initial stages of reform. While international law has no jurisdiction to enforce Bulgaria's compliance with international human rights standards, the changes that have been enacted would never have happened without its support. So long as states have an interest in maintaining a positive image on the global stage, international law will remain an effective tool for pressuring states to consider human rights.

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Legally Blind (to U.S. Drone Strikes)

By Jessie Yin

It is a widely-held conception that the law is always attempting to catch up to the grim realities of our world. This posit holds true in our age of rapid technological modernization more than ever, yet there are some cases in which a party may wish and has the means to maintain this legal gray-area so that they may continue their actions unhindered. The United States' drone program in Pakistan and Yemen is a particular set of circumstances that exemplifies the clinical efficiency with which this can be accomplished. The United States has successfully orchestrated the factors of exceptional jurisdiction in foreign territories, the domestic interpretation of law that extends beyond all formerly accepted precedents on *jus ad bellum*, and limitations in the international community's ability to enact punitive measures.

The first question of legality regarding the United States military drone program in Pakistan and Yemen is which law code the conflict falls under. There are two types of law that governs international conflicts: international human rights law and international humanitarian law. International human rights law applies in situations outside of wartime and is comparable to the rule of law enforcement within countries. It does not allow for killing unless the individual poses an imminent threat to human life. U.N. GA. "Universal Declaration of Human Rights." 217 (III) A, 1948, art. 1. For example, in a hostage situation or in the case of a bomb threat, a police force would hypothetically have the authority to kill the target if deemed necessary. International humanitarian law, otherwise known as the laws of warfare as detailed by the Geneva Conventions, permits greater use of force and the targeting of lawful combatants. However, these considerations of international humanitarian law can only apply if the United States is considered a party in the armed conflict between the terrorist groups and the states that

they reside in. If the United States is not counted as an active party, then the actions that have happened between the United States and these terrorist groups do not meet the threshold to be considered an armed conflict, and international human rights law would apply. The United States can achieve this status while maintaining "friendly relations" with the countries that they are bombing, in part, due to the unusual jurisdiction claims in the areas most heavily targeted.

In Pakistan, most of the US drone strikes conglomerate in North and South Waziristan, which fall within the borders of the Federally Administered Tribal Areas (FATA). The FATA is a territory of seven tribal agencies spanning 27,244 km^2. The region was first articulated as a separated jurisdiction in 1901 under the Frontier Crimes Regulations (FCR) drafted by the British in order to establish it as a buffer state to the Russian-controlled Afghanistan. Ian Shaw, *The unbearable humanness of drone warfare in FATA*, (2012). The Pakistan Const. art. XII, § 3, cl. 2. states that "no Act of Parliament shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President directs so," placing all the power to institute law into the executive position. Additionally, "the President may, with respect to any matter, make regulations for the peace and good government" of any tribal area. The implications of these clauses are vast; they allow the United States to conduct full military operations against the Taliban without declaring war on the country. Until Pakistani-American relations deteriorated in 2011, the United States Central Intelligence Agency was engaging in a mass surveillance mission and operating a targeted killing program of Pakistani citizens based on an undisclosed list of behavioral criteria - all from within Pakistan and with the approval of the government. The permission of the President was the only consideration required before the people of the FATA were denied the right to fair distinctions between lawful targets and civilians.

The drone strikes conducted in Yemen are not quite as plentiful, yet ~~it~~ still number~~s~~ in the hundreds and lay within the mountain regions of the country, where the government's control to weaken. The lack of federal government regulation in the region has resulted in the development of a tribal system in Yemen. Weir, Shelagh. *A Tribal Order: Politics and Law in the Mountains of Yemen* (Austin: University of Texas Press, 2007). While it doesn't exactly parallel the situation of Pakistan, as it is not codified into the Yemeni Constitution, it does reflect some of the issues that arise from giving especial jurisdiction to territories within the borders of a state. The central government, again, does not involve itself in the day-to-day governance and judicial enforcement in the region yet imparts all legislative orders. These territories are also particularly vulnerable to the recruitment and control of the terrorist group, Al-Qaeda in the Arabian Peninsula (ADAP), due to the minimalistic political structure. However, the ambiguous legality works in the favor of the United States. It can more easily insert itself as a party to the conflict on the side of the government as the Yemeni government is more willing to consent to American military action in these territories that they already perceive as being somewhat out of their control. Thus, the United States gets tacit permission to justify their stance under the international humanitarian law.

Besides placing a stake into the armed conflict between government and terrorist groups, the United States would still need to establish *jus ad bellum* under the International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. *Jus ad bellum*, or justification of force, meaning that the origins of the conflict must justify the magnitude of war as a response. For example, organized crime would fall under law enforcement while a rebellion would be considered means for war. That makes the categorization of global terrorism tricky as

depending on how one views it, it could be seen as organized crime or a rebellion or both. The United States' justification for beginning the bombing of Pakistan and Yemen, essentially stem from the Al-Qaeda attacks on 9/11.

The Authorization for the Use of Military Force was passed in 2002 by the Bush Administration in the aftermath of 9/11. It states that the president has the permission "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Under the Bush Administration, the executive took this to mean going into war in Afghanistan and Iraq, as well as conducting a series of drone strikes in Pakistan. There have been contentions to the providence of such an expansion on the power of the executive branch, but none of them have been accepted in the American legal system as of yet. The insidious implications of this are that the executive can wage warfare without any consultation with Congress, and as long as the details of the operations are not advertised, the United States can continue unhindered. The suspension of the conversive process between the executive and the legislative allows for the United States drone program to flourish in a secret war.

Under the Obama administration, the use of drone strikes increased astronomically and moved into Yemen as well. The administration developed what is known as signature strikes, which target suspected militants based not off of identification of an individual but off of the behavior observed by the drones. The CIA has asserted that their process for identifying behavior is thorough and that strikes are not conducted without a great amount of certainty but have elected to not share the criteria for this process with the public. "Drone Wars: the Full Data." *The*

Bureau of Investigative Journalism, The Bureau of Investigative Journalism. The Obama drone program also quotes the AUMF as legal justification and have taken the definition even further. America's current actions in Yemen are against the AQAP, however the AQAP did not exist at the time of the 9/11 strike. This appears to be quite a stretch of the authorization to use force against those involved with the 9/11 attack. It also shows the true extent of the blank check that the United States has cashed on drone strikes, considering that this interpretation of the AUMF has shown little regard for time or geographic proximity. With no challenge holding against this interpretation, the Obama administration has set a precedent in domestic law regarding drone strikes that extends beyond Bush's drone war in Afghanistan and Pakistan or the terrorist attacks that originated the conflict.

Furthermore, under international humanitarian law, an individual can be targeted lawfully if they are a combatant. The definition of combatant here means a person who is actively engaged in a military operation. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Someone engaging in propaganda or recruitment are not valid targets, yet many of the targets are suspected members within the ranks of the terrorist groups even if their role is limited to propaganda or recruitment as was the case with Anwar Al-Aulaqi. He was killed by a US drone strike in Yemen in 2011, even though he had never been actively engaged in combat, and the CIA and the military only had intelligence on his rhetoric being used as recruitment and propaganda. Greg Miller. "Long-Sought Memo on Lethal Drone Strike Is Released." *The Washington Post*, WP Company, 23 June 2014. It is also illegal under international humanitarian law to harm civilians or kill a lawful target if it warrants too many civilian casualties, yet there have been many cases of US drone strikes where they clearly

incurred a substantial amount of civilian casualties. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. In 2011, a drone strike hit a group of community leaders in North Waziristan, none of which were able to be later confirmed as Taliban militants. Salman Masood and Pir Zubair Shah. "C.I.A. Drones Kill Civilians in Pakistan." *The New York Times*, The New York Times, 17 Mar. 2011. Even if the United States' claim that there were a few militants present was indeed correct, the sheer amount of civilian casualties (anywhere from 26 to 41 in reports) no longer justifies the attack. The nature of the United States' drone program, especially the signature strikes, blurs the line between civilian and combatant in such ways as even someone merely within the vicinity of someone suspected to be a militant would also become a militant in the eyes of the drone.

How then, considering the clear trespasses on the Geneva Conventions, has the United States been able to continue their actions without international reproach? When it comes to international law, the United Nations is the vehicle through which authority is intended to be asserted. However, it is an international body that only functions at the will and the approval of the member countries. Additionally, most of the committees in the United Nations have no judicial or punitive power with the crucial exceptions of the International Criminal Courts and the Security Council. U.N., *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. The International Criminal Courts can only try individuals with the permission of the Security Council. A problem presents itself when we begin to expect the Security Council to enforce international law on drone strikes. The Security Council has five permanent member countries. Each of these countries have veto power that can halt a resolution in its tracks, and in all the years since drones first became widely used in the military in 1985, the Security Council has

never made an official stance on the legality of certain actions made with drones in the context of war. The evasion of the issue is a direct result of veto-power countries engaging in or benefitting from drone strikes in such a fashion. Therefore, the United Nations cannot be expected to enforce international law or even to create a resolution specifically condemning targeted drone strikes as illegal.

Considering the limitations of the Security Council, the only way in which international law could be administered would be through information offered up by the United States voluntarily, which has failed to happen despite numerous calls internationally and domestically for more transparency in the American drone program. In the Special Rapporteur Report, U.N. GA *Protection of human rights and fundamental freedoms while countering terrorism*. A/64/211. 03 Aug 2009., they compel member states who possess drone programs to share more information about their activities. However, it is in the American government's best interests to leave the details of their actions vague. Without information, they cannot be condemned nor tried, and the US narrative on why they cannot allow this information to be made public is based around the concern of national security. In the case of Al-Aulaqi v. Obama, Nasser Al Aulaqi submitted this action against the President, the Secretary of Defense, and the Director of the CIA for the illegal targeting of his son who held American citizenship. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, United States District Court, District of Columbia. 2010. The defendants had made a claim for dismissal partially based on the states secrets privilege, which says that the government can chose to not engage with a court case on the basis that it would involve revealing too much information that would pose a threat to national security.

The newness of a war on global terrorism, often groups with no state or even an established territory, means that this disagreement over categorization is ongoing, and until it has

been settled, the United States can continue to manipulate definitions and apply to itself whichever code of law is more beneficial as long as they do not engage with the accusations. An intriguing way through which a challenge to the legality of the United States' actions could be posed is through domestic court cases. By forcing the United States to discuss the legal justifications for their military actions, it is pinning down the nebulous cloud of debate that surrounds the issue. Although the Al-Aulaqi case was ultimately dismissed, so no ruling emerged on the legality of kill lists, prior to the case hearing, the United States had never admitted to having kill lists for terrorist. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, United States District Court, District of Columbia. 2010. Through the back and forth of the case hearing, it was revealed that these alleged kill lists did exist, even if the government would not make statements on it. After Al-Aulaqi's death, due to the continuous pressure from domestic courts, the Obama administration published a 41-memo explaining the legal logic behind the strike against Al-Aulaqi and why it was not a violation of his rights as an American citizen. Greg Miller. "Long-Sought Memo on Lethal Drone Strike Is Released." *The Washington Post*, WP Company, 23 June 2014. It is the most that has ever been revealed about the military and the CIA's very secretive process in selecting drone strike targets. Currently in the case of Smith v. the United States, Al Smith is bringing to the D.C. courts the question of whether the AUMF breaches the War Resolutions Clause and whether or not the United States exceeds the limitations of the AUMF when fighting against ISIS. Garrett Epps. "Can the Courts Make Congress Declare War?" *The Atlantic*, Atlantic Media Company, 1 June 2016. While the results of this particular case are not revealed and it could yet be dismissed, another process of jurisprudence on the United States drone program will, intentionally or not, present us with new information and with more grounding on where exactly the legality of the drone program falls.

The unprosecuted freedom in United States drone usage in friendly countries, which by any analysis should be illegal, is a result of the careful maintenance of gray-zones in law and the manipulation of interpretation. The combination of exceptional territory, incomprehensive international enforcement, and domestic rhetoric has created a modern take on warfare that seems to extend beyond all formerly accepted precedents on *jus ad bellum*, the role of the civilian, and the role of the combatant. It is unclear whether any challenge against the United States' airstrikes will come to fruition, but any form of challenge in a strict legal setting would push the United States to acknowledge and explain certain reasonings, and any judgement would be patching the gaps between our rapid world and our slow laws.

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