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Letter from the Editor-in-Chief

Dear Reader,

Welcome to the eighth print edition—Vol. 5, No. 1—of the *Claremont Journal of Law and Public Policy* (CJLPP)! After reviewing many highly-qualified submissions, the editorial team is delighted to feature a number of especially stimulating papers in this issue. These cover a range of domestic and international topics in law and public policy, from U.S. sports law to Chinese health care policies. Additionally, we are glad to share with you two exclusive interview articles, where you will learn about Ambassador Cameron Munter's view on the new era of diplomacy and Prof. John Yoo's perspective on war in the modern era. For entries from our blog as well as submissions from across the U.S. and overseas, please be sure to visit our website at www.5clpp.com.

I am writing this Letter in early August, by which point our editorial board has finalized all selected submissions, having worked with the authors on a one-on-one basis. A huge thank-you here goes out to the gifted writers; our Chief Operating Officer (former senior editor) Greer Levin; senior editors Audrey Jang, Désirée Santos, Emily Zheng, Isaac Cui, and Jerry Yan; interview editor Matilda Msall; blog editors Kyla Eastling and John Nikolaou; publisher and webmaster Alice Zhang, as well as our new design editor Noah Levine.

It is particularly worth mentioning that CJLPP writers, business directors, and designers alike have also actively continued developing their own projects over a productive and creativity-filled summer. For me all summer, there has seldom been a day when I do not wake up to be greeted by at least a couple of CJLPP-related emails. For the first time, the CJLPP has regularly released new articles throughout the summer to provide our readers with insightful analyses on current and ongoing issues in the legal and policy realms. It has been fun collaborating remotely, yet consistently, with some of our wonderful returning staff writers—James McIntyre, Gabe Magee, Maïmouna Diarra, Helen Guo, Delaney Hewitt, Kaela Cote-Stemmermann, Nicole Hsu, and William Shi—and guest contributors on various articles over the past couple of months. Concurrently, our passionate business directors—Franco Liu, Kim Tran, and Ali Kapadia—working closely with Greer, who now oversees the business side of the Journal, have a series of exciting events and projects planned for the Claremont community for the 2017-18 academic year. Meanwhile, we are all eagerly looking forward to meeting our newest writers this autumn—many have already started brainstorming topics.

I sincerely congratulate the entire team on all the collective endeavors and, as always, cannot be prouder to see the fruits of everyone's hard work. More importantly, I am truly touched by the genuine enthusiasm that our members share in learning from each other as the Journal grows and evolves over the years.

Towards the end of this issue, you will find a very special Letter from our founder and Editor-in-Chief Emeritus, Byron Cohen (CMC '16), who continues to be a caring mentor and ever-so-inspiring friend to all of us. I highly recommend reading Byron's powerful reflections on what he calls "an origin story"—one that underscores the role that meaningful conversations on law and public policy play in allowing our democracy to grow and thrive. We hope that our Journal has contributed to initiating some of these important conversations.

It is always heartening to see students perusing copies of the Journal in physics lounges, inevitably joining the mighty league of law and policy nerds, and to overhear breakfast conversations about well-worn copies of the CJLPP awaiting their next readers inside Carnegie bathrooms… When our founding members launched the Journal in 2013, our website attracted 3,000+ views that year; in the first 7 months of 2017 alone, we have generated 13,000+ views from different parts of the world.

Of course, it is not only our readership that matters to us. The process of working with like-minded peers is at the very core of what we do. Today, the CJLPP is not only a 5C club, but also one that extends far beyond. I am thrilled to announce that together with our undergraduate law journal partners from 10 universities (including UPenn, Dartmouth, Williams, UToronto, and McGill) across the U.S. and Canada, we will be ready to launch the *Intercollegiate Law Journal* (ILJ) very soon. Stay tuned to our Facebook page for more information.

As always, I would like to end my Letter by thanking our faculty advisor, Prof. Amanda Hollis-Brusky, for her continued guidance. Our journal is certainly also indebted to the Salvatori Center for its support over the years, and of course, to all of our readers, partners, alumni, prospective members, and other supporters. If you enjoy reading our articles and would like to share your own writing, keep in mind that the CJLPP always welcomes submissions to our blog and future print editions. Please refer to the "Submissions" page on our website for details. In addition, for our Claremont readers, if you feel that you could be a valuable addition to our team, I invite you to visit our "Hiring" page for potential openings or email us at info.5clpp@gmail.com.

Happy Reading!

With Warmest Regards,
April Xiaoyi Xu
Editor-in-Chief

One Billion Lives and Counting: The Future of China's Health Care Policy

Kaela Cote-Stemmermann (SCR '18)
Staff Writer

China is currently in the middle of reforming its healthcare system, a decision that will affect over 1.3 billion people for years to come. Moving from historically state-sponsored care to market-oriented care and now to a combination of the two, China has struggled to find a structure that works for its diverse population. Public health problems carry important implications for political stability. Thus far, the Chinese Communist Party (CCP) has relied on performance-based legitimacy to secure its own political future. Only by constantly improving social welfare and economic growth does the CCP reinforce its own authority. However, China's slowing economic growth means that the government can no longer ignore institutional failures, such as its healthcare system, that are beginning to bring its legitimacy into question.[1] With no institutional mechanism in place to address private grievances, increasing unrest over issues of medical impoverishment represent a threat to the CPP's authority. Though China's health care system has come a long way, there remain many challenges to overcome in order for China to compete with international standards and mitigate increasing discontent among Chinese citizens. Health insurance inequity, over-prescription of drugs, as well as environmental and food safety problems pose potential threats to China's health care system and government stability. How the CCP resolves the issue of affordable health care and medical impoverishment could very well decide the fate of the CCP in China.

A Look at China's Evolving Healthcare System

Mao's State-Sponsored Health Care (1949-1978)

Before the 1949 Communist Revolution, China faced a health care crisis with fewer than 40,000 trained physicians serving a population of 540 million people.[2] The most affected area was the countryside, where physicians are lacking and health risks more pronounced. China's poor health care was seen as a consequence of its poor economic success. In pre-communist China, healthcare was not seen as a right but as one's personal responsibility. Therefore, Mao Zedong's attempt to create a state-sponsored health care system was a divergence from China's health care norm. In order to achieve the agricultural productivity promised in his 1958 campaign Great Leap Forward, Mao understood that accessible health care would be a necessary precursor. Thus, peasants received free health care in exchange for working in communes, and the profit from their labor supported China's health infrastructure.[3]

Health care was such a contentious issue that after the launch of the Cultural Revolution in 1966 that Mao became directly involved in the policymaking process. This allowed for streamlined decisions and coordinated state-sponsored health care. Consequently, the number of doctors and care centers increased exponentially and were accompanied by large advancements in basic indicators of China's overall population health. For example, from the late 1950's to the mid-1980's, average life expectancy rose from about 40 to 65 years.[4] These rapid accomplishments astounded even Mao and became a large source of legitimacy for the CCP; however, drawbacks of the system such as low quality, inefficiency, and financial strains raised questions of long-term sustainability. With Mao's death, ensuing economic reforms led to the demise of the commune system. The Party's state-sponsored health care system quickly came to an end.

Market-Oriented Health Care (1978-2008)

Under Deng Xiaoping, the government reduced its hand in all economic and social sectors, including healthcare. This turned the Chinese health care system on its head, shifting from a state-sponsored system into a market-oriented system. Economic development was prioritized, while the delivery of health care took a back seat. The breakdown of communes eliminated communal welfare funds, and effectively dismantled the rural health network, leaving millions uninsured. Deng's radical economic changes, known as the "opening up and reform" (*Gaige Kaifang*), stripped away Mao's communist policies that banned private enterprises and began to untie China's economy from its government. These reforms were largely a success, increasing overall productivity in manufacturing, business, and infrastructure. However, the reforms also caused health care organizations to start acting like for-profit institutions, leading to higher costs and resource waste. Even the World Bank, a fierce opponent of government intervention, predicted that China's health care system would become riddled with difficulties if left to the free market. Indeed, a 1988 survey found that, "more than 87 percent of the rural population had no health insurance of any kind".[5] This caused enormous resentment among the rural population who were now left with no protection against the cost of illness.

This for-profit mindset had serious consequences in terms of the quality of care that patients received. Physicians began to act like entrepreneurs in a capitalist world, seeking to make profits off of patients in various ways, such as drugs or expensive treatments. This shows that not only did the market based system fail to provide healthcare equality; it also incentivized moral hazards that could seriously affect the lives of patients. The results of these reforms climaxed in the 2002 SARS outbreak, which "exposed the inadequacies of the public health protection system, and showed how government neglect had left the health system unprepared".[6] The SARS outbreak resulted in 916 deaths, the majority of which were spread among the rural population, left uninsured by the new market based system.[7] A clear indication that China's experiment with market based health care was not working.

Mixed Health Care (2008-Present)

Faced with widespread public discontent after the SARS outbreak, the government started to reinstated its role in health care in an attempt to build a more equitable and efficient system. China committed to spending an additional "CN¥850 billion [$125 billion] in the ensuing 3 years"[8] with the goal of providing affordable universal health care by 2020. The political intention behind this

investment is clear, to mitigate brewing unrest and improve social stability by ensuring accessible health care. These recent reforms are commendable. For example, China's investment in healthcare has lowered patients out of pocket costs by 30 percent in 12 years.[9] However, many weaknesses still exist and will continue to cause challenges and inequity within the health care system. These include the over prescription of drugs, rural and urban insurance inequity, and environmental issues.

China's Most Pressing Health Care Challenges

Over-Prescription of Drugs

In the late 1970's, the Deng Xiaoping administration effectively removed all financial support from hospitals. This incentivized hospitals and their employees to make up the loss by exploiting the profit margin of drug sales. By implementing no separation between the prescription and distribution of drugs, and setting the service prices of drugs below their actual costs, and failing to their prescription and distribution, the government created a clear moral hazard-- resulting in the unnecessary prescription of drugs, introduction of expensive imported drugs, and even the facilitation of fake drugs.[10] These problems were particularly prominent in rural public health centers that relied on drug sales since they did not receive adequate resources from Beijing. Because profit margins are a main source of revenue for hospitals, accounting for over 50% of primary health facilities, health workers quickly took advantage of patient's lack of knowledge.[11] Hsiao tells us that in the 1990's, "74% of patients suffering from a common cold are prescribed antibiotics as are 79% of hospital patients – over twice the international average of 30%".[12] This type of practice has dangerous consequences and can lead to drug resistance in patients, as well as other unpleasant side effects.

Rural and Urban Insurance Inequity

It is important to not only consider average health outcomes, but also their distribution. Throughout the 2000's, inequality of health care and health insurance had become a major issue of debate and discontent. The way this issue gets resolved will be very important to China's future, both in terms of its political system and ongoing process of modernization. The Chinese government's 2008 plan for universal coverage failed to address the huge gap in access to healthcare between rural and urban populations. One reason for this inequality stems from the lack of government subsidies to rural areas following Deng's reforms in the late 1970's. During this time the healthcare services were funded solely through taxation, creating a substantial gap between urban and rural regions and unequal quality of care.

Rural citizens bear the majority of the health costs despite having the least ability to pay out-of-pocket fees. This discrepancy results in disproportionately high rates of child mortality and common adult illnesses in rural regions. Additionally, there is a large disparity in government spending across the country. For example, government spending in "Gansu, one of Chinas poorest provinces, amounted to just ¥46 [$6.80] per person… while spending in Shanghai and Tianjin, two of China's richest provinces amounted to ¥218 [$32.50] and ¥253 [$37.70] respectively".[13] Such discrepancies mean that major urban hospitals are able to expand and attract personnel, while draining resources from lower-level hospitals in the countryside.[14] This difference has worked to undermine the government's efforts at upgrading the rural healthcare network after 2008. However, with the legitimacy of the government resting on increasing economic growth, there has been little incentive to invest in health care.

Environmental Safety Problems

Another challenge is the government's failure to address significant risk factors such as environmental degradation and food safety. This lack of preventative care places greater pressure on China's health structure. Following China's rapid economic development came an increase in dangerous pollutants, subjecting Chinese citizens to significant health risks. The World Bank estimates that the costs of health care related to cancer and diarrhea associated with pollution was approximately $8 billion in 2003.[15] In 2012, "PM2.5 particulate pollutants…were linked to 670,000 premature deaths from strokes, lung cancer" and various other pollutant related illnesses.[16] The failure of the government to protect its citizens from basic health risks such as smog and water contamination will result in an increased demand for health care in coming decades, as well as increase public discontent.

Considerations for Improving China's Healthcare

This review of China's health care history shows that its leadership has made significant mistakes but has also acted with decisiveness in correcting those errors. China's willingness to experiment with different health care policies and infrastructures sheds light on possible ways that the Chinese government could increase the quality and equity of care within the health care system.

Aligning Incentive Structures

At the root of the previously mentioned challenges, lies a flawed and misaligned bureaucratic incentive structure that must be corrected. The government must clearly identify the public's needs, and then work to incentivize the government bureaucracy, healthcare facilities, and physicians to work towards this public interest. Misalignment between the public interest and bureaucratic interests can easily result in corruption and the waste of resources. Incentives must be put in place, not only for local governments to invest in healthcare over the economy, but also for physicians to refrain from over-prescription and more equally distribute funds. Additionally, there must be a clear and defined way for China's policy makers to monitor the behavior of policy implementers.

Mitigate Harmful Incentives

China must discourage corruption by raising the fees of drugs that are currently priced below cost, effectively diminishing the profit margin of drug producers.[17] Civic groups such as health based non-governmental organizations or religiously affiliated groups are well positioned to take up a role in the basic education of patients concerning these kinds of specific health care issues. This would reduce leeway for doctors to press unnecessary and expensive drugs onto patients. This goal could also be achieved by raising physician's income, which would reduce the incentive for corruption and attract intellectual capital to the health field.

Reducing Environmental Health Risks

Equally as important is the government's responsibility to limit countrywide health risks such as environmental degradation and food safety. The CCP needs to reevaluate and start placing citizen health and environmental challenges above economic gains. As the health costs increase so does social discontent, evidenced by increasing formal complaints, putting the country's political stability at stake. On a smaller scale, the government should consider taking measures to limit individual health risks such as smoking, unhealthy diets, and alcoholism.[18] This can be achieved though educational campaigns and widespread advertising.

Improving Rural Insurance System

One of the most pressing factors that must be addressed is the rural insurance system. While some health economists recommend providing equal health services to all people regardless of their ability to pay, this seems like an unrealistic approach in the case of China. The government would be better off focusing on building a system that ensures basic health services and drugs to everyone while reducing out-of-pocket costs. Improving the fiscal transfer system, which disperses funds from the central government to the provinces, may contribute towards this goal. Instead of general transfers, the government should implement more targeted transfers to poor provinces based on income, as well as mortality rates and doctor-patient ratios. This would allow local hospitals to get the resources they need while still being able to adjust for provincial differences. Additionally, migrant workers' insurance plans should be attached to their place of employment rather than their residency.[19]

Rewarding Quality of Care

More generally, China must create a reward system for health care providers that is based on the quality of care rather than quantity.[20] Thus far, China's health care goals have largely been focused on the amount of resources put into the health care system, when they should be focused on the actual outcomes. By focusing on how to transform inputs into effective services, China will maximize funding and prioritize the needs of patients. Ultimately, the Chinese people must hold their government and the bureaucracy accountable for improving the quality and accessibility of health care, reducing environmental hazards, and improving efficiency. Direct pressure from Chinese citizens will force the government to take a step back and reevaluate the health care system, ultimately giving it the priority it deserves. By adopting these reforms, China has the potential to deliver effective health care to one in every six people in the world.

In the past decade, China has made considerable strides towards affordable and equitable access to health care. Considering China's size and heterogeneous environment, these reforms represent an impressive accomplishment. Despite these strides, the Chinese health care system faces many challenges, which, if untended has the potential to create social instability. Such inadequacies have taken a large toll on the Chinese economy and spending habits of Chinese citizens. A study done by China's leading economists estimated that in 2005 alone, disease cost more than five billion working days, totaling ¥2.4 trillion ($296 billion) in lost economic activity.[21] By 2035, China's health care spending would account for 9.1% of its GDP.[22] Additionally, enormous health care costs are deterring Chinese people from spending, causing them to become a community of savers rather than consumers. As this will hinder the future growth of the economy, it is clear that the consequences of a faulty health care system go beyond a simple moral responsibility and hold potential negative outcomes for the entire nation.

China has the potential to become an exemplary model of healthcare reform, and how the CCP decides to deal with such a complex issue could determine the international reputation of China, as well as its political stability. However, if reforms are not implemented soon, the future of health care in China is grim. In the coming years, China will face an aging population that will cause an increase in the demand for accessible care. China's aged 65 and over population will rise from 140 million today to 230 million by 2030.[23] An expanding middle class will likely take advantage of its resources to demand better quality health care. Simultaneously, worsening environmental hazards will increase the amount of pollution related illnesses, stirring public discontent. While many of these events are inevitable, the policies that the Chinese Communist Party decides to take in the near future will affect how efficiently China's health care system will meet this rising need. •

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The Promise of Privacy Protections: Rights for Unauthorized Migrants

Isaac Cui (PO '20)
Senior Editor

I. Introduction

On February 10, Daniel Ramirez Medina was taken by the Immigration and Customs Enforcement (ICE) and placed in detention to await deportation proceedings. Having come to the United States at the age of seven, the 24-year-old registered under the Deferred Action for Childhood Arrivals (DACA) program.[1] DACA gives selected unauthorized migrants[2] who arrived in the United States as youths the legal authorization to work and study without fear of deportation.[3] Nevertheless, when ICE arrived at Ramirez Medina's apartment to arrest his father on immigration-related charges,[4] they also detained Ramirez Medina despite his DACA status. The justification, according to the Department of Homeland Security, was that Ramirez Medina was a gang member—something that, according to ICE, Ramirez Medina had admitted.[5] Ramirez Medina's attorneys, however, say that ICE became suspicious of him because of a tattoo that read "La Paz BCS," a reference to Ramirez Medina's birthplace of La Paz, the capital of Baja California Sur.[6] ICE also claimed that Ramirez Medina was affiliated with gangs because of statements that he allegedly made in custody.[7]

Regardless of whether Ramirez Medina was ever a member of a gang—which seems rather unsubstantiated, given that the only evidence that ICE offered was questionable claims about knowing members of gangs and a tattoo—Ramirez Medina was detained for six weeks,[8] which raises concerns about the strength of DACA protections under the Trump Administration.[9] People with certain criminal convictions are categorically ineligible for DACA, and the status is revocable,[10] which is why the accusation of gang membership is so dangerous. For example, President Obama in 2016 stated, regarding his administration's deportation policies, that "we prioritize criminals, we prioritize gang-bangers, we prioritize folks who have just come in."[11] The result is that "accusing an undocumented person of gang affiliation is the quickest way to get them arrested,"[12] and, according to one immigration lawyer, "the chances of getting out of being called a designated gang member[13] are next to nothing."[14] Despite the stakes at hand, it is easy to be accused of being in a gang. According to an ICE policy issued in 2006, someone can be placed in ICEGangs (ICE's database for gang members) for having "tattoos identifying a specific gang," for going to places that gangs are prevalent in, for displaying gang signs, and many other reasons.[15] And because defendants in a deportation proceedings cannot compel the government to disclose evidence against them, it is often extremely difficult to challenge the designation.[16]

For Ramirez Medina, the government pulled a bait-and-switch, offering him protection under DACA yet prosecuting him under flimsy justifications.[17] One of his attorneys commented that Ramirez Medina's detention was as such "one of the most serious examples of governmental misconduct that I have come across in my 40 years of practice."[18] Such conduct points to broader ambiguities regarding the rights afforded to non-citizens in the United States.

This essay seeks to address one of those ambiguities: the extent to which unauthorized migrants[19] are afforded privacy protections. I take it axiomatically that the Supreme Court does not have a coherent methodology for addressing the issue of constitutional personhood—the question of which entities the Constitution deems to have rights. However, Zoe Robinson,[20] professor at the DePaul College of Law, has persuasively shown that the Court has historically analyzed the extent of constitutional personhood through two lenses, which I deem the *functional* and *categorical* perspectives. In the functional perspective, the Court primarily looks to the "right at issue, rather than the claimant,"[21] determining the purpose of the right before its scope. From the categorical perspective, constitutional personhood is first a question of the claimant of the right, such that it is possible that "the status of the claimant renders them unable to claim constitutional personhood."[22] After answering this threshold question, the Court then analyzes the scope of that right.

This essay is split into four subsequent parts. In the first two, I analyze whether and to what degree unauthorized migrants should be given privacy rights under the functional and categorical perspectives. In doing so, I explore current Supreme Court case law and argue that it is unclear about the rights of migrants. Next, I apply these findings to gang databases to argue that they should not be used for deportations—if at all. Section V concludes.

II. Privacy Rights—the Functional Perspective

In the functional perspective, the Court examines the purpose of the right and from there determines whether it should be applied to a given claimant. This section explains the function of privacy rights; its findings are applied to gang databases in Section IV.

In the context of privacy, simply determining the purpose of the right itself is difficult. As one professor put it, privacy is "a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations."[23] As such, I limit my analysis of the function of privacy to two sources which are foundational to privacy law: Justice Brandeis' dissent in *Olmstead v. United States*,[24] and the Court's opinion in *Griswold v. Connecticut*.[25]

In *Olmstead*, the Court held that wiretapped telephone conversations gathered without a judicial warrant could constitutionally be used as evidence in a criminal trial under the Fourth Amendment.[26] In a lengthy dissent, Brandeis argued the practice violated the individual's right

to privacy since the Fourth Amendment, to Brandeis, guarantees protection for people "in their beliefs, their thoughts, their emotions and their sensations."[27] Brandeis understood privacy to be based on the sanctity of the individual, and, therefore, he held a cynical view of the government, warning that the "greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[28] While Brandeis' dissent in *Olmstead* did not form binding precedent, it has nevertheless been called a "foundation of American privacy law."[29] The right to privacy would be formally enshrined as a constitutional right in 1965 with *Griswold v. Connecticut*.

Griswold struck down a Connecticut law which banned the use of contraceptives for unconstitutionally infringing on the right to privacy. Writing for the majority, Justice Douglas established the right to privacy from the "penumbras" of the Bill of Rights, the "emanations from those guarantees that help give them life and substance."[30] Under this logic, the rights strictly enumerated in the Bill of Rights are buttressed by "peripheral rights" which affirm the main objects of their protection. In the example of free speech, the Court has also protected "the right to read [...] and the freedom of inquiry, freedom of thought, and freedom to teach,"[31] for, without them, "the specific rights would be less secure."[32] Drawing from the First Amendment's protection of association,[33] the Third Amendment's prohibition against housing soldiers,[34] the Fourth Amendment's protection of personal security,[35] the Fifth Amendment's Self-Incrimination Clause,[36] and the Ninth Amendment's protection of unenumerated rights,[37] Douglas weaved together a broader protection from unjustified governmental intrusion into an individual's personal life. That interpretation of privacy as an overarching right embodied by specific protections in the Bill of Rights was clearly influenced by Brandeis' writings on the issue, with Justice Goldberg's concurrence citing the *Olmstead* dissent.[38]

These texts have overarching motifs that illustrate the function of privacy. Privacy is an individual right, meant to allow persons to flourish in their own unique capacities. But privacy is also a political right, meant to inhibit the government from unjustifiably intruding into an individual's life and personal space.[39] Moreover, privacy is a *procedural* protection; it puts the onus on the government to follow a specific means for procuring information towards its ends.[40] According to Brandeis, even if it is legitimate to convict a criminal, the government cannot attempt to do so unlawfully, for the government "is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[41]

Privacy checks against governmental abuse and arbitrariness—something that is universally applicable because it constrains the actor (the government) rather than protecting the constituents. Viewed thusly, it is problematic to assume that unauthorized migrants would have no privacy protections. The need for procedural protections is amplified for communities with unauthorized migrants given the humanitarian toll[42] that deportation raids can have, in addition to the fear faced by the migrants themselves.[43]

Nevertheless, under the functional perspective, the application of a right to a given claimant is context-specific. Constitutional personhood, according to this paradigm, is not "a universal binary switch,"[44] but rather, is both right- and issue-dependent. As a result, the *extent* and *application* of privacy rights to unauthorized migrants is highly dependent on the practice that is being challenged. I will consider the case of gang databases in California in section IV to complete this analysis. In the subsequent section, I consider the categorical perspective on whether unauthorized migrants have privacy rights.

III. Privacy Rights—the Categorical Perspective

Under the categorical perspective, rights are first determined by their application to specific claimants, after which specific protections may be attributed. To approach this question, I consider the issue textually, showing that the precedent and text are unclear but suggest the possibility of privacy rights for unauthorized migrants.

When *Griswold* derived the right to privacy from five different amendments, it created uncertainty about the scope of privacy. The First Amendment's free speech clause[45] (where the right to association derives,[46] which is the actual right that *Griswold* cites[47]) does not clearly specify *whose* speech is protected. The Third Amendment applies to the "Owner" of a house.[48] The Fourth Amendment protects "the people."[49] The Fifth Amendment states that "No person"[50] shall be subject to certain abuses. And, the Ninth Amendment, as the Fourth, refers to "the people."[51] Problematically, the Supreme Court has held that the phrase "the people" is a "term of art,"[52] which implies that the right to privacy derives from overlapping penumbras which potentially *apply to different subjects*.

Unfortunately, these terms are not sufficiently clear. In *United States v. Verdugo-Urquidez*,[53] the Court held that the phrase "the people" referred to a "national community" or those "who have otherwise developed sufficient connection with this country to be considered part of that community."[54] However, when interpreting that phrase in the Second Amendment, Justice Scalia's majority opinion in *District of Columbia v. Heller*[55] specified that "the people" did not only refer to a national community, but also to a "political community."[56,57] In other parts of the opinion, Scalia wrote that this referred to "citizens," "Americans," and "law-abiding citizens," which led lower courts to uphold statutory bans on firearm possession by felons.[58] This obfuscation has created a circuit split over the issue of whether undocumented persons are protected by the Second Amendment: according to the Fourth, Fifth, and Eighth Circuits, they are not, whereas the Seventh Circuit has held that they could conceivably be protected under the Second Amendment if they have "substantial connections" to the United States.[59]

That being said, it is worth noting that Justice Scalia's clarifications of the term "the people" were dicta; the holding of the case was confined to the nature of the Second Amendment right, and the case never touched on the question of whether migrants (authorized or not) were to be afforded the right.[60] Moreover, as some scholars have pointed out, there is some sloppiness in the way that Justice Scalia's opinion addresses the issue. The Constitution specifically mentions citizenship when discussing it as a qualification for federal public office, whereas in re-

gards to the Second Amendment and other rights, it uses broader terminology. Aside from *Verdugo-Urquidez*, the Court's only other extended consideration of "the people" was in *Dred Scott v. Sandford,*[61] when the Court ruled that "the people" only referred to white citizens. Barring the morally reprehensible nature of relying on such a case for precedent, that case was explicitly overruled by the Fourteenth Amendment, which also uses "persons" and "citizens" in different clauses,[62] indicating that these words were thought of as distinct, at least by the Reconstruction Era.[63] Also, there would also be an ironic contradiction at the heart of the *Heller* ruling if it were to confine "the people" to citizens, given that it would make the right to bear arms—which Scalia declared was based on the right of self-defense—depend on "obligation and loyalty to—and recognition by—the state […] Conditioning the right on an intimate tie to the state suggests that the Amendment is not actually about self-defense, but about state-defense."[64]

A broader understanding of the Second Amendment's phrase, "the people," would also be more aligned with understandings of the Fourth Amendment. The case noted before, *Verdugo-Urquidez*, had to do with the application of the Fourth Amendment's prohibition of warrantless searches for a Mexican national's home in Mexico. Chief Justice Rehnquist's decision in *Verdugo-Urquidez* established the aforementioned "substantial connections" test for determining if someone was a member of "the people," which would imply that at least some unauthorized migrants would be protected. That decision, however, did not clarify the exact scope of how "substantial" one's connection must be.

The precedent reveals a muddied doctrine, as the Court has put forth mixed signals regarding the extent of the protections in the Bill of Rights. Key phrases such as "the people" have unclear boundaries—even if one were to assume, for example, Chief Justice Rehnquist's substantial connections test from *Verdugo-Urquidez.* (This is exacerbated by *Heller*'s inconsistent application of Rehnquist's substantial connections test.) Moreover, even if there was conceptual clarity about the nature of that phrase, the *Verdugo-Urquidez* decision to distinguish the communities referenced in "the people" (of the Second, Fourth, and Ninth Amendments) from "No person" (of the Fifth Amendment) makes the issue of privacy—which derives from all of those sources—difficult to conclusively resolve.

However, the phrase "no person" has been considered to be an "all-inclusive" and "sweeping" term by the Court in *Reid v. Covert*;[65,66] the broad nature of the term "person," as opposed to "the people," has also been noted by scholars.[67] If this term is indeed broader than "the people," and it is true—as I contend—that some unauthorized migrants meet the substantial connections test established in *Verdugo-Urquidez*, then it would be logical to assume that privacy, which derives from the penumbras of these various enumerated rights, would apply to some unauthorized migrants as well. In other words, if the protections offered by the Fifth and Third Amendments are broader in scope than those of the Fourth and the Ninth, and if the latter's protections do extend to some unauthorized migrants, then so too would the right to privacy as a whole.

IV. Against Gang Databases

This section analyzes the application of gang databases to immigration enforcement through the lens of privacy protections. More specifically, by interpreting the function of privacy as a shield against arbitrary governmental abuse, I argue that the accusation of gang membership, justified by entry in a database, is insufficient to override privacy concerns given multiple issues with their accuracy.

California's Gang Database Fails to Ensure the Validity of Its Entries

Gang databases are run on both the state and federal level. While it is unknown how many people are entered into ICE's system, databases in California and Texas alone contain over 250,000 people, the majority of whom are Latinx.[68] For the sake of conciseness, I limit my investigation to California's CalGang database.

The most common process for state law enforcement agencies to add someone into CalGang is that of field contacts—untargeted and informal investigatory stops performed without any court oversight.[69] The result is that allegations of gang membership can be extremely arbitrary[70] and that "investigatory stops are rarely based on objectively reasonable suspicion," according to a report published by the University of California, Irvine, (UCI) School of Law.[71]

The state auditor has also found problems with CalGang, most notably that 42 entries of CalGang were of persons younger than one year old at the time of entry—with 28 of those entries being entered for *admitting to being gang members*.[72] Those must be some precocious toddlers. Other inconsistencies[73] demonstrate that the system is overly deferential to law enforcement agents and lacks meaningful checks by independent agents. In fact, the audit even found that, in many scenarios, law enforcement agencies "could not substantiate CalGang entries they had made."[74]

Both CalGang and ICEGang[75] have policies that are meant to limit the usage of its information. More specifically, CalGang is only supposed to point to "source documentation," and cannot be used for purposes other than law enforcement. However, the audit found some law enforcement agencies' practices as well unpublished court opinions demonstrate that the information is used for non-law enforcement related activities, such as employment screenings. The auditor concludes, "[t]hese instances emphasize that inclusion in CalGang has the potential to seriously affect an individual's life; therefore, each entry must be accurate and inappropriate."[76]

Impacts on Immigration

Gang accusation, as noted before,[77] can have powerful ramifications on an unauthorized migrant's life by making it harder, if not impossible, to apply for DACA rights. For the DACA applicant, placement in a gang database creates a double bind as the application requires one to report gang affiliation. Both gang membership and lying on one's DACA application makes one a priority for deportation. If someone were included in a gang database, they would have no choice—they would either be forced to confirm

the gang database entry or they would be suspected of lying about gang affiliation.[78] And as in the case of Daniel Ramirez Medina,[79] it can also cause an unauthorized migrant to be continually detained for fear of them being dangerous to society.[80]

Unique issues arise with the intersection of gang databases and immigration. For one, the Court has held in *Immigration and Naturalization Service v. Lopez-Mendoza*[81] that deportation proceedings are civil actions instead of criminal actions because deportation is "not to punish an unlawful entry."[82] The effect is that many of the protections usually afforded to criminal defendants—such as the ability to cross-examine a witness, the right to prior discovery of evidence that will be presented at the hearing,[83] or the guarantee of legal representation[84]—are not provided to those undergoing immigration proceedings. This makes unauthorized migrants especially vulnerable to governmental abuse.

The Promise of Privacy

A substantial amount of precedent protects the federal government's discretion in immigration proceedings. As stated by the Court, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[85] However, even in recognizing the government's plenary power over immigration, the Court has emphatically stated that the government must be bound by the Constitution's guarantees.[86] The promise of privacy must protect against the abuse of governmental power found in the indiscriminate use of gang databases.

I argue specifically—following the conclusion of the UCI School of Law's report[87]—that neutral review hearings for gang membership status is vital to protect individuals. Because access to gang databases can be the justification for issuing civil warrants to engage in deportation proceedings,[88] law enforcement agencies should be barred from using gang membership databases as justifications for immigration proceedings until a neutral arbiter has confirmed the status through an adversarial process. Otherwise, those warrants become unjustifiably broad, based not in probable cause but overarching deference to law enforcement agents. Indeed, if it is law enforcement agents who generally determine whether one is placed in a gang database—and if a warrant is issued based off of such a database—then there seems to be little role for the judiciary. As one scholar has noted, these warrants "are neither very different from nor less offensive to liberty values than the general warrants that originally inspired the Fourth Amendment."[89]

It is true that such a rule would make it much more difficult for the law enforcement agents to designate individuals as gang members for the purpose of immigration proceedings, but this is only a problem if those agencies continue to use overly broad criteria for determining entries. Moreover, the risks related to false accusation are so dire—and so likely, given the problems with databases such as CalGang—that any meaningful constitutional protection would hold the government to a high standard regarding the usage of gang databases in immigration proceedings.

V. Conclusions

In this essay, I have argued that unauthorized migrants, in the eyes of the Constitution, must be understood as part of "the people"—even if it only includes those who have a substantial connection to the United States, per *Verdugo-Urquidez*.[90] As such, those migrants must be afforded the privacy protections necessary to limit arbitrary governmental abuse. Beyond the legal question, the issue of who is to be afforded rights in the eyes of the Constitution is fundamentally an ethical one. In *Verdugo-Urquidez* and in *Heller*, the Court understood "the people" of the United States to be a community. To be a part of a community is to understand that that community's actions matter, that those actions "belong uniquely to the community and will form a part of its narrative history and identity, helping to underwrite its standing in the community of communities."[91] For unauthorized migrants, many rights are not recognized, even as these migrants in all other respects are members of the community. People such as Daniel Ramirez Medina have found themselves arbitrarily detained or deported, without the full protections of constitutional personhood. A vital question that this political era confronts is whether or not this is acceptable. •

References

1 Daniel Ramirez Medina, "Daniel Ramirez Medina: I'm a 'dreamer,' but immigration agents detained me anyway," *The Washington Post*, March 13, 2017, accessed April 10, 2017, https://www.washingtonpost.com/posteverything/wp/2017/03/13/im-a-dreamer-immigration-agents-detained-me-anyway/.

2 Sometimes, people authorized under DACA are called "Dreamers," in reference to the Development, Relief, and Education for Alien Minors (DREAM) Act, a bill that would have created a pathway to citizenship for a similar class of people to those authorized under DACA. The DREAM Act was first introduced to Congress in 2001, and has been reintroduced multiple times, though it has never passed. See Nicole Chavez and Rosa Flores, "ICE releases Seattle 'Dreamer' Daniel Ramirez Medina, *CNN*, March 29, 2017, accessed April 10, 2017, http://www.cnn.com/2017/03/29/us/daniel-ramirez-dreamer-released/.

3 Hiroshi Motomura, "The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law," 55 *Washburn Law Journal* 1 (2015), 3-5.

4 Ramirez Medina, *supra* note 1.

5 Nina Shapiro, "Do feds have evidence that detained Dreamer is a gang member beyond tattoo?," *The Seattle Times*, February 15, 2017; updated February 16, 2017, accessed April 10, 2017, http://www.seattletimes.com/seattle-news/feds-says-detained-dreamer-is-gang-member-lawyer-denies-it/.

6 Id, and *supra* note 1.

7 Ali Winston, "Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members", *The Intercept*, February 17, 2017, accessed April 10, 2017, https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/.

8 Chavez and Flores, *supra* note 2.

9 DACA was originally established under the Obama administration, and the Trump administration has declared that it will support its protections. See Joe Sutton, Joe Sterling, Azadeh Ansari, and Rosa Flores, "Portland 'Dreamer' released on bond after being arrested by ICE agents," *CNN*, March 29, 2017, accessed April 10, 2017, http://www.cnn.com/2017/03/27/us/portland-dreamer-ice-arrest/.

10 Ramirez Medina, *supra* note 1, and Motomura, *supra* note 3.

11 Tina Vasquez, "Trump's 'Smart and Strategic' Immigration Approach: Everyone Is Deportable," *Rewire*, February 21, 2017, accessed April 10, 2017, https://rewire.news/article/2017/02/21/trumps-smart-strategic-immigration-approach-everyone-deportable/.

12 Id.

13 It should be noted that this is in reference to individuals who are placed in gang databases, whereas Ramirez Medina's attorneys state that ICE accused him of being in a gang after his arrest. Nevertheless, as I detail later, the criteria for being put in a gang database are as vague as the justifications that ICE used in Ramirez Medina's case.

14 Jennifer Medina, "Gang Database Criticized for Denying Due Process May Be Used for Deportations," *New York Times*, January 10, 2017, accessed April 10, 2017, https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html.

15 More precisely, that policy stated that anyone having two of the following ten criteria can be placed into the database:

"Subject has tattoos identifying a specific gang."
"Subject frequents an area notorious for gangs and/or associates with known gang members."
"Subject been seen displaying gang signs/symbols."
"Subject has been identified as a gang member through a reliable source."
"Subject has been identified as a gang member through an untested informant."
"Subject has been arrested in the company of other gang members on two or more occasions."
"Subject has been identified as a gang member by a jail or prison."
"Subject has been identified as a gang member through seized or otherwise obtained written or electronic correspondence."
"Subject has been seen wearing distinctive gang style clothing or has been found in possession of other gang indicia."
"Subject has been identified as a gang member through documented reasonable suspicion."
They can also be placed in the database if they were convicted for being in a gang or if they admit to gang ties during questioning by law enforcement. See: Ali Winston, "Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members," *The Intercept,* February 17, 2017, accessed April 10, 2017, https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/.

16 Id.

17 Vasquez, *supra* note 11.

18 Winston, *supra* note 15.

19 In using this terminology, I borrow from Hiroshi Motomura, *Immigration Outside the Law* (Oxford University Press 2014), 4. Throughout this essay, I avoid terms such as "alien" or "illegal aliens" due to their pejorative connotations. While it is true that those are the technical legal terms, they are needlessly politicized. For more discussion on this terminology, see Pratheepan Gulasekaram, "'The People' of the Second Amendment: Citizenship and The Right to Bear Arms," 85 *New York University Law Review* 1521 (November 2010): 1521-1580.

20 Zoe Robinson, "Constitutional Personhood," 84 *George Washington Law Review* 605 (May, 2016): 605-667.

21 Id at 655.

22 Id at 656.

23 Daniel J. Solove, "Conceptualizing Privacy," 90 *California Law Review* 1087 (July, 2002), 1088.

24 277 U.S. 438 (1928).

25 381 U.S. 479 (1965).

26 It is worth noting that there was also a Fifth Amendment claim brought, but this essay focuses on *Olmstead*'s implications on the Fourth Amendment. See Olmstead, supra note 24.

27 *Olmstead v. United States*, *supra* note 24, at 478.

28 Id at 479.

29 Neil M. Richards, "The Puzzle of Brandeis, Privacy, and Speech," 63 *Vanderbilt Law Review* 1295 (2010), 1295.

30 *Griswold v. Connecticut*, *supra* note 25, at 484.

31 *Griswold v. Connecticut*, *supra* note 25, at 482. Internal citations are omitted.

32 Id at 483.

33 This is derived not explicitly from the text, but rather, was found to be a peripheral right of the freedom of speech in *NAACP v. Alabama*, 357 U.S. 449 (1958).

34 U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner").

35 U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

36 U.S. Const. amend. V ("No person […] shall be compelled in any criminal case to be a witness against himself").

37 U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

38 *Griswold v. Connecticut*, *supra* note 25, at 494, Justice Goldberg's concurrence on privacy as a "fundamental personal right."

39 For example, Justice Douglas explicitly notes the special "sanctity of a man's home," mirroring the Fourth Amendment's protection. This designation of the home as sacred is a prominent part of the subsequent Court's Fourth Amendment and privacy jurisprudence. Id at 484.

40 Specifically, the Fourth Amendment requires "probable cause, supported by Oath of affirmation" to issue a warrant, which must describe "the place to be searched, and the persons or things to be seized."

41 *Olmstead v. United States, supra* note 24, at 485.

42 See, e.g., Raquel Aldana, "Of Katz and 'Aliens': Privacy Expectations and the Immigration Raids," 41 *UC Davis Law Review* 1081 (February, 2008), 1132. ("In Massachusetts, for example, Governor Deval Patrick called immigration raids' effect on families a 'humanitarian crisis,' when the state had to make childcare arrangements for at least thirty-five children, ranging from infants to age sixteen, whose parents were among at least 361 workers, mostly women, who were arrested during a raid […] Additionally, in Massachusetts, ICE denied social workers attempting to advocate on behalf of the children access to the detainees because it was a law enforcement issue.")

43 Ramirez Medina, *supra* note 1 (DACA allowed him to "live without the constant fear of being sent to a country we don't know, forced to leave behind the people we love.").

44 Robinson, *supra* note 20, at 654.

45 U.S. Const. amend. I ("Congress shall make no law […] abridging the freedom of speech").

46 *Supra* note 33.

47 *Griswold v. Connecticut*, *supra* note 25.

48 *Supra* note 34.

49 *Supra* note 35.

50 *Supra* note 36.

51 *Supra* note 37.

52 *United States v. Verdugo-Urquidez*, 494 U.S. 265 (1990).

53 Ibid

54 Id at 266.

55 554 U.S. 570 (2008).

56 Id at 576.

57 There is a meaningful distinction here; a "political community" connotes those with political rights, such as voting, whereas a "national community" might refer to a broader category. See Gulasekaram, *supra* note 19.

58 Gulasekaram, *supra* note 19.

59 D. McNair Nichols, Jr., "Guns and Alienage: Correcting a Dangerous Contradiction," 73 *Washington and Lee Law Review* 2089 (Fall, 2016).

60 Ibid

61 60 U.S. 393 (1857).

62 The Privileges or Immunities clause reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," whereas the subsequent clauses (the Due Process and Equal Protection clauses) read: "nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws" (emphasis mine).

63 Gulasekaram, *supra* note 19.

64 Id at 117.

65 354 U.S. 1 (1957), 8. It is worth noting that, again, this case did not deal explicitly with the rights of unauthorized migrants, so it is not dispositive in regards to its definition of these terms.

66 *Verdugo-Urquidez* also opined that the term "person" is "relatively universal." *Supra* at note 52.

67 See, e.g., Gulasekaram, *supra* note 19, at 119.

68 Tina Vasquez, "Here Are the State and Federal Databases That Could Hurt Immigrant Communities in Trump's Administration," *Rewire*, January 11, 2017, accessed April 9, 2017, https://rewire.news/article/2017/01/11/state-federal-databases-hurt-immigrant-communities-trump-administration/

69 Sean Garcia-Leys, Meigan Thompson, Christyn Richardson, "Mislabeled: Allegations of Gang Membership and Their Immigration Consequences," *University of California, Irvine, School of Law Immigrant Rights Clinic* (April 2016), http://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf, 5,7.

70 Id at 7 ("And during the more common untargeted consensual or investigatory field stops, gang allegations may be made on evidence as slight as wearing a baggy white t-shirt and standing in the courtyard of one's apartment if an officer believes that indicates gang clothing and presence in a gang area.").

71 Id at 8.

72 California State Auditor, "The CalGang Criminal Intelligence System," Report 2015-130 (August 2016), accessed April 11, 2017, https://www.documentcloud.org/documents/3010637-CalGang-Audit.html, 3.

73 Id at 2 ("For example, Sonoma included a person in CalGang for allegedly admitting during his booking into county jail that he was a gang member and for being 'arrested for an offense consistent with gang activity.' However, the supporting files revealed that this person stated during his booking interview that he was *not* a member of a gang and that he preferred to be housed in the general jail population. Further, his arrest was for resisting arrest, an offense that has no apparent connection to gang activity.").

74 Id at 2.

75 Winston, *supra* at note 7 (quoting an internal ICE policy: "'All information accessed through ICEGangs (ICE or third agency) is to be treated as law enforcement intelligence and not to be disclosed or used as evidence in any criminal, civil, or administrative proceeding, nor is it to be used independently as probable cause to support arrests, searches, seizures, or other law enforcement actions,'").

76 California State Auditor, *supra* note 72, at 2.

77 See section I.

78 Garcia-Leyes, et al., *supra* note 69, at 15.

79 Ramirez Medina, *supra* note 1.

80 Garcia-Leyes, et al., *supra* note 69, at 15.

81 468 U.S. 1032 (1984).

82 Ibid

83 Garcia-Leyes, et al., *supra* note 69, at 17.

84 Winston, *supra* note 7.

85 *Mathews v. Diaz*, 426 U.S. 67 (1976).

86 *Reid v. Covert*, *supra* note 65, at 5 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution").

87 Garcia-Leyes, et al., *supra* note 69; see also Winston, *supra* note 7.

88 Aldana, *supra* note 47.

89 Ibid

90 See section III.

91 Douglas A. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press 2010).

War in the Modern Era: An Interview with Professor John Yoo

James McIntyre (PO '19)
Staff Writer

John Yoo currently serves as the Emanuel S. Heller Professor of Law at the University of California, Berkeley and served in the Justice Department during the George W. Bush Administration. He specializes in constitutional law and has written many books on the topic, including his most recent work, *Embracing the Machines: Robots, Cyber, and New Rules for War*.

On April 13th, 2017, Professor Yoo delivered a talk at Claremont McKenna College on the President's constitutional war powers and sat down with the CJLPP for this interview, which has been condensed and lightly edited for clarity. The full version can be found online at https://5clpp.com/2017/05/23/war-in-the-modern-era-interview-with-professor-john-yoo/.

CJLPP: The first question I have for you is regarding Unitary Executive Theory. You've expressed support for it in a number of works. In your paper "War and Constitutional Text," you argue that Congress does not have the "sole authority to initiate hostilities." In another paper, you argue that the Supreme Court is not equipped to involve itself in military matters. So, I wanted to ask you, if the President has the power to initiate hostilities him or herself, and wide control over military matters, what is to stop the President from acting tyrannically under the guise of emergency power? A lot of people on these college campuses are concerned about this regarding Donald Trump. Is there anything to stop him from imposing martial law on Washington D.C. after a terrorist attack or something of that sort?

Yoo: Well, there's the Constitution and then there's practical politics and history. So, when you look at the practical politics and history, there's never been a President who has imposed tyrannical rule in the United States with far worse circumstances than we have now. Even Abraham Lincoln, during the Civil War, didn't impose a tyranny domestically even though that was probably the most dire threat the country has ever faced. And then second, if you want to look at the level of the constitutional text, you would need the cooperation of the President and the Congress together because it's the Congress that controls the size and shape of the military. And so, if the President were to try to do something like that, he would still need the cooperation of the legislature, and they have a natural reason to oppose any kind of tyranny on the part of the President. I think these kind of claims of tyranny are overbroad, just the way they were under President Obama. People who claimed that "President Obama is imposing a tyranny too," I thought that was all exaggerated. I think it is with Trump too. I don't think that necessarily means that Trump is using executive power in every case correctly, but I don't think Trump is imposing a dictatorship either. I think it's a little much.

CJLPP: In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson argued that the Court should more intensely scrutinize the executive branch when Congress opposes its actions. This is something that the Bush administration pushed back against. Do you give any credence to Jackson's concurrence, or do you think that was mistaken constitutionally?

Yoo: I think Jackson's concurrence makes a lot more sense when we're talking about domestic affairs. And the case itself you're referring to, *Youngstown*, was a case where the executive branch was trying to seize and run steel mills during wartime. Justice Jackson's concurrence was, in a way, almost more a description of politics than constitutional law. I think it's a matter of political reality that if the President acts against the express will of Congress that we're going to have a constitutional confrontation. But, I think Justice Jackson's opinion does not apply to the use of the power of the United States abroad, outside the United States. That's where the President has his broadest constitutional authority. So, I think that's how I would understand the *Youngstown* concurrence, because I can't believe that Justice Jackson himself or the Supreme Court would say that Congress can pass laws which dictate to the President how to wage war abroad. That's what some people think *Youngstown* means, but I don't that's ever been the case in our history.

CJLPP: In your upcoming book *Embracing the Machines*, you argue in favor of expanding new military technologies, such as drones and autonomous robots. In an interview at the Claremont Institute, you criticized Obama's drone program as undermining intelligence-gathering projects. So, I wanted to ask, how should the U.S. go about expanding the drone program without losing its ability to interrogate for information?

Yoo: I was critical of the Obama administration for overusing drones, not expanding drones, but choosing to use drones as the answer every time when they could locate a terrorist threat. It seems to me that the preference would be to try to capture terrorist leaders rather than to drop or guide a precision guided missile on them from a drone. I've always actually been puzzled by people who think this would be somehow be better for human rights too, that drones are a better solution. I think that they're not. I think they make a lot of sense when you can't capture safely a terrorist leader. But for example, even in the case of the Osama bin Laden raid, I don't understand why the United States didn't just capture Osama bin Laden rather than kill him. And the reason why is because that is our primary source of intelligence on pending new threats is what do the terrorist leaders know. That's a different question than how broadly can we use drones or cyberweapons legally. So, you can have a broad use of them, but when it comes to individual cases, you can choose what kind of approach or what kind of weapon you want to use. So, I think we are on the cusp of broad change in

the way technology affects war. And we're just starting to see it. Drones is just the first of a lot of changes coming down the road. Cyberwarfare, things we've been seeing in the press are another example. But we haven't really seen them really fully deployed in conflict between nations. And so, I argue that the United States shouldn't restrain itself in developing these weapons because I think they're actually better for humanity because they're more precise, they inflict less damage. I think we should only encourage weapons that cause less harm, not more.

CJLPP: Regarding Obama's airstrikes in Libya, some argued that the airstrikes constituted "hostilities," while the Obama administration argued that it did not. So, how would you define "hostilities" in light of new technologies, specifically drones? Do drone strikes count as hostilities? And what about Trump's action on April 13th, 2017 with the "Mother of all Bombs," referring specifically to the most powerful non-nuclear weapon that the United States possesses that was dropped in Afghanistan?

Yoo: You mean like the bunker busting bomb? So, I don't take seriously the Obama administration's claim that the Libyan air war wasn't a war or wasn't hostilities because it was conducted from the air and there were no ground troops. It just doesn't make any sense. And at the time I criticized the justification. That's because they wanted to take the position that the President wasn't really exercising much power, which I think is kind of silly. If the United States drops a bomb and kills the head of state in another country, that's certainly "hostilities." It doesn't matter whether it's done by air or ground. So, I don't think it's a very serious argument. So, I think the Libyan War was "hostilities." I think it was a war. I think our attacks on Syria are acts of war, and are hostilities too. That just goes to my point, the only way to reconcile that practice, I think, with the Constitution, is if you have the view that the President can wage hostilities without a declaration of war. If you have the view that a lot of, I think, liberal scholars have, that Congress has to approve all hostilities, then you have to think that the Libyan War was unconstitutional, that the Syrian intervention is unconstitutional, that a lot of the fighting in Iraq was unconstitutional. I don't have that view, but I think if you do, then how do you reconcile them? I think critics would have to say that it's unconstitutional, the President has to stop, which has never been the practice of our country.

CJLPP: How do you then define hostilities in light of new technologies? Would using these new technologies count as hostilities?

Yoo: I don't think the type of technology makes a difference as to whether it's war or not. It's the effect. So, if you kill someone—a member of the enemy's armed forces—with a drone, a bomb, ground troops, I think it's all a state of war. I don't think it should matter what tool you use. It's what effect it causes.

CJLPP: Turning to the topic of Guantanamo Bay, Mohamedou Slahi, a Guantanamo inmate, recently wrote a book, *Guantánamo Diary*, describing some of the conditions he was forced to endure. Referring to being forced to drink seawater, he writes: "It was so nasty I threw up… They stuffed the air between my clothes and me with ice cubes from my neck to my ankles…every once in a while one of the guards smashed me, most of the time in the face." The book also describes long periods of isolation, being chained the floors in agonizing positions, extreme temperature, lack of food and sleep, beatings, and mock executions. And many of Mr. Slahi's claims were corroborated by the U.S. Senate Armed Services Committee and the Justice Department in 2008.

CJLPP: So, while you were at the Justice Department, you said that physical torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." And so I wanted to ask—does the treatment described in Mr. Slahi's book constitute torture? And does the Constitution offer any protections to people like him?

Yoo: I'm not fluent with this case. I don't know whether what he says is true. I'm not aware that the Justice Department said that this was true, and I don't know of any Justice Department verification of any claims like that. So, I would say that if the Justice Department looked at that, I would imagine they would find that wasn't torture, and so I'm surprised to hear that some agency of the United States government said it was. I'm not aware of the Senate in 2008 said that this was torture either. So, I wouldn't say so.

CJLPP: As a constitutional scholar, do you believe the kind of treatment that Mr. Slahi described constitutes torture?

Yoo: Not in the way that it was defined at the time that the statute existed back then. But I don't know if these set of facts you're giving me are true or not. I actually do not believe that the Justice Department found that to be true.

[Note from the CJLPP: There appears to be a misunderstanding here. The interviewer intended to say that the Justice Department and Senate Armed Services Committee corroborated some of the information provided in Mr. Slahi's book, not that either entity found the interrogation to be "torture" in a legal sense. Refer to this footnote for relevant links.][1]

CJLPP: On another note, in a debate that you had with law professor Doug Cassel, he asked if crushing a child's testicles might be permissible under the law. In your opinion, does this constitute torture?

Yoo: All I said was that it's under the President's power. I would obviously say that was torture under the statute, but in wartime, the President is the final decision-maker.

CJLPP: So, to be absolutely clear, the President has the power to torture?

Yoo: The statute would prohibit it, but the President is the final decision-maker on all tactics in wartime, not Congress. So, I'm not saying that the President would or wouldn't—in fact, if you look at the rest of that debate, I'd say that no President would order anything like that ever, but the President has the final decision, not Con-

gress. To sum it up, this is exactly what I'm saying—the statute would prohibit it. I agree that would be torture. The President makes the final decision. That doesn't mean the statute's irrelevant, but the President is the Commander in Chief who makes the final decision. I don't think the President would ever do anything like that. I don't think any American President would.

CJLPP: In a paper at the Chemical Weapons Convention, you argued that the Chemical Weapons Convention is unconstitutional because it violates the Constitution's Appointments Clause, which gives the President the power to appoint federal officials with the "advice and consent" of the Senate. In your book *The Powers of War and Peace*, you argue that the President has the sole authority to interpret the Geneva Conventions and other treaties, because it is part of conducting foreign affairs. The Chemical Weapons Convention is a treaty, so why can't the federal government skirt around the Appointments Clause issue by just arguing that treaty enforcement is a foreign affairs issue, under the purview of the presidential discretion?

Yoo: Because we carry out a treaty domestically. That's up to Congress, so any Congress can decide how under a statute a treaty is implemented domestically, and you can't use a treaty to violate the Constitution. The Constitution is the highest law of the land. All treaties have to be consistent with the Constitution, not the other way around. So, we can't say a treaty allows us to violate some other provision of the Constitution. That's the point of the article—is that if the treaty is unconstitutional, the treaty doesn't get enforced, not the Constitution.

CJLPP: So, is it your view that a treaty, as it's implemented inside the United States, is not a foreign affairs issue, but rather a domestic issue?

Yoo: No–the carrying out of the treaty within the United States is up to Congress. That's the way our system works. But even so, it doesn't matter, because a treaty can't allow the government to do something that would violate the Constitution. You couldn't sign a treaty that says, "we sign a treaty that the Congress it the commander in chief." You can't sign a treaty that says, "part of the government's enforcement powers transfer from the President to an international body," which is what happened in the Chemical Weapons Convention. It all still has to be consistent with the Constitution. It doesn't matter whether it's foreign affairs or domestic affairs. They all have to be consistent with the Constitution.

CJLPP: In *Taming Globalization*, you argue that state implementation of international law and agreements is necessary to avoid various constitutional issues. So, if this becomes reality, how should we adjudicate a dispute between a state government and the courts or the President? If Presidents interpret treaties, how can the judiciary effectively deal with state violations of constitutional rights that the President might order in interpreting a treaty?

Yoo: So, I think it's very similar to the other question. A President can't interpret and enforce a treaty that would violate the Constitution. So, no matter if a state does it, Congress, or the President, a treaty can't be an authority to violate the Bill of Rights. They would all lose. And that actually is the core function of the judiciary—is to defend individual rights against actions of the federal or state governments. So, I don't think that's a very difficult issue, in fact.

CJLPP: You have said in the past that the judiciary doesn't really have a place making decisions that have to do with war. So, what would happen if a President interpreted a treaty during wartime in such a way that might violate state constitutions, or constitutional rights?

Yoo: Well, state constitutions are different. State constitutions don't prevail over the federal Constitution or federal law. So, if a President, or a President and Congress, take a valid wartime measure, it doesn't even matter if there's a treaty, if there's some decision they think is necessary to winning war, the state constitution can't stand in the way. If cases of wartime measure against individuals inside the United States, then courts traditionally have judicial review. What I think is a problem is when courts try to adjudicate cases involving the conduct of war outside the United States, in foreign territory, involving the military. There, I think the judiciary is particularly poorly suited to making decisions.

CJLPP: Thanks so much for your time and expertise. •

[1] Note from CJLPP: The following links contain information about Mr. Slahi's book and the government reports corroborating some of its details.
Information on the Justice Department's Inquiry: http://www.cnn.com/2015/01/21/americas/guantanamo-bay-prisoner-book/

Some of Slahi's claims are corroborated by reports published by the U.S. Senate Armed Services Committee and the Department of Justice in 2008.

Report by the Armed Services Committee: https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf

See pages xxii for information on sleep deprivation

See page 135 and its following pages for further information on Slahi's interrogation

California State Right-to-Try: Unconstitutional Legislation that Endangers Public Health

Helen Guo (PO '20)
Staff Writer

In recent years, "right-to-try" laws, which aim to grant terminally-ill patients access to experimental drugs or devices, have become a contentious policy issue and have gained speed throughout the U.S. In the latter months of 2014 alone, five states—Colorado, Louisiana, Michigan, Missouri, and Arizona—passed right-to-try legislation.[1] As of September 2016, California has joined the growing ranks of states that have approved right-to-try bills.[2] This article will examine the issues surrounding California's recently-passed right-to-try bill, California Assembly Bill 1668.[3] It must be noted that although each state's right-to-try legislation has its own complexities in terminology and implementation, most of these bills passed across the nation are similar to California's.[4] Moreover, the unconstitutional nature of right-to-try legislation is applicable to all states. Thus, the arguments in this article may be extrapolated to state right-to-try laws that are similar.

Since Governor Brown signed California Assembly Bill 1668 in September 2016, the Health and Safety Code in California has been revised to allow the terminally ill the right to try investigational medications and treatments.[5] On the surface, the state's newly-approved right-to-try bill seems to grant individuals access to treatment that may save their life. However, state right-to-try laws directly challenge the federal Food and Drug Administration's regulations concerning access to investigational treatments, which means they are preempted by federal law (per the Supremacy Clause of the Constitution). Beyond the power clash between state right-to-try legislation and federal laws, California's right-to-try law requires less scrutiny in granting access to experimental drugs than the latter, endangering public health.

This article argues that California's right-to-try law should not be implemented because it is unconstitutional and poses a threat to public health. The next section details how state right-to-try laws are preempted by federal law and are therefore unconstitutional. The subsequent section will analyze the flaws in California's right-to-try law that lead to public health issues.

State vs. Federal Jurisdiction

The FDA certifies specific drugs or treatments that have passed the full round of clinical trials, banning pharmaceutical companies from selling non-certified drugs or treatments.[6] State right-to-try laws thus conflict with federal law in granting access to experimental treatment, breaching the Supremacy Clause of the U.S. Constitution, which deems federal law the "supreme law of the land."[7] State laws are preempted by federal law, rendering right-to-try laws necessarily unconstitutional. Still, proponents of state right-to-try legislation argue that barring access to investigational drugs is considered the deprivation of life without due process of law for terminally-ill patients, violating the Fourteenth Amendment. However, in the 1979 case *United States v. Rutherford*, the Supreme Court did not find any legislative justification for terminally-ill cancer patients to have access to the drug Amygdalin, a now-detracted treatment that was pending before the FDA at the time.[8] The case affirmed, although only on statutory grounds, that "nothing in the legislative history suggests that Congress intended protection only for persons suffering from curable diseases... The FDA has never exempted drugs used by the terminally ill."[9] In other words, the terminally ill must abide by federal regulations.

Although *United States v. Rutherford* was only resolved on statutory grounds, the recent 2008 case, *Abigail Alliance v. von Eschenbach,* established that access to experimental treatments is not a constitutional right. In this case, the Abigail Alliance for Better Access to Developmental Drugs sued the FDA for the patient's right to due process under the Fourteenth Amendment. The U.S. District Court for the District of Columbia first ruled in favor of Abigail Alliance, then reheard the case en banc and reversed the panel in favor of the FDA. The U.S. Supreme Court declined to review the case further, again upholding the decision that the "right-to-try" experimental drugs are not guaranteed within the Constitution.[10]

In justification of state right-to-try laws, some scholars have noted that the laws serve to persuade federal lawmakers by creating constitutional conflict and drawing national attention to the issue.[11] So while state right-to-try laws are technically unconstitutional, they are a method of inciting changes within federal law. States may pass right-to-try laws to critique the time required to access treatment under the FDA regulations.[12] FDA regulations and programs provide patients with the access to experimental treatments within a necessary time frame. State right-to-try laws, which point out a need for changes in federal law, may incite lawmakers to quicken and de-regulate access to investigational drugs on the federal level.

To allow for more flexibility in terms of access to experimental treatment, the FDA has set the federal Expanded Access Program in place.[13] Although the provisions of the Expanded Access Program and California's right-to-try legislation achieve the same purpose, the former adopts stricter and more consistent standards of treatment access.[14] As a consequence of federal oversight and stricter standards, the argument of right-to-try legislation sympathizers still holds; the time required to approve individuals for treatment under the Expanded Access Program may justify state right-to-try laws.[15] However, the restrictions under the Expanded Access Program are set in place to ensure a higher level of inspection than that of state right-to-try laws in determining the health risks of experimental drug access for patients. Expanded Access attempts to establish treatment safety and effectiveness, so that patients are not trying investigational drugs with a blind eye to unreasonable risk. The differences between Expanded Access and state right-to-try laws will be discussed in the following section.

A Danger to Public Health

Under California Assembly Bill 1668, those who have an "immediately life-threatening disease or condition" are allowed access to treatment that has undergone at least the first stage

of clinical trials.[16] The patient would require a physician's recommendation, consistent with the protocol of an accredited institution's review board. Any physician recommending investigational treatments would be exempt from disciplinary action by medical boards.[17] To the uninformed eye, California's right-to-try law seems justified, necessary for the terminally ill, and safe.

Under scrutiny, however, the language of the bill reveals alarming flaws of California's right-to-try legislation. The bill states that a terminally-ill patient may be given access to an "investigational drug, biological product, or device that has successfully completed phase one of a clinical trial approved by the United States Food and Drug Administration."[18] Treatments open to the terminally ill will have undergone the lowest level of inspection, phase one of clinical trials, which, as defined by the FDA, "determine[s] what the drug's most frequent side effects are and, often, how the drug is metabolized and excreted."[19] Stage one does not require controlled trials and demands a sample size too small (20 to 80 patients) to determine safety or effectiveness; it is only in the second stage of clinical trials that drug effectiveness is tested in controlled trials.[20]

The Expanded Access Program, in contrast to California's right-to-try law, ensures scrutiny when giving the terminally ill access to experimental treatments. The FDA not only must determine that the treatment in question does not pose a greater risk than an *individual's* disease, but it must also find sufficient evidence of "safety and effectiveness" before it permits an expanded-access protocol involving *large numbers of patients* with serious disease.[21] To determine "safety and effectiveness" before permitting large numbers of people to access a treatment, Expanded Access would study larger samples of individuals in comparison to those of controlled trials.[22] Expanded Access is more likely to procure positive health outcomes than California's right-to-try law. The low level of scrutiny to which the medical treatments are subject to under California's right-to-try law pose serious health risks for the state's residents as it fails to ensure treatment safety and effectiveness.

Beyond issues involving inadequate scientific investigation and its effects on drug safety, the ethical dilemmas surrounding a singular physician recommendation for an investigational treatment may exacerbate public health issues. California's right-to-try law allows for access to treatment "based on [a] physician's recommendation to an eligible patient...if the recommendation or prescription is consistent with protocol approved by the physician's institutional review board or an accredited institutional review board."[23] While the physician's recommendation or prescription would have to be consistent with the protocol of an accredited institution review board, medical review boards vary from institution to institution. A physician's recommendation under one set of institutional protocols may not pass under another's, calling into question the reliability of various independent physicians motivated by profit and the reliability of varying institutional protocols in general. While the standards of treatment recommendation for California's right-to-try law vary, those of the Expanded Access Program are consistent and overseen by the FDA. Although the Expanded Access Program also requires that "the patient's physician determines that there is no comparable or satisfactory therapy available to diagnose, monitor, or treat the patient's disease or condition," the FDA is involved as a second party that establishes that the potential benefits of expanded access justify the potential harms.[24] Federal oversight provides more reliability than the standards provided by California's right-to-try law.

Review: Beyond the Superficial

From a cursory glance, legislation like California Assembly Bill 1668 seems to provide citizens with the inalienable right to attempt saving their own lives through investigational treatments not yet offered on the market. Underneath the surface, however, California's right-to-try law is apt to result in negative health outcomes and is unconstitutional. Legal precedent would dictate that terminally-ill patients do not have a constitutional right to access experimental treatment and state right-to-try laws cannot bypass federal law.

The interests of constitutionality and public health go hand-in-hand as the federal Expanded Access Program ensures a higher level of scrutiny than state legislation like California's newly-passed right-to-try law. As most of state right-to-try bills passed across the nation only require that investigational treatments undergo phase one of clinical trials, the legislation may prove more harmful than helpful to the health of the patients involved.[25] Before similar laws continue to be passed throughout the nation, legislators should look beyond the falsely-philanthropic surface of proposed right-to-try bills. However, for the time being, state right-to-try laws will likely continue to sweep across the nation until they are challenged in federal court or until legislators hold themselves to higher standards of accountability for the public health. •

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The Interplay Between Civil and Criminal Law in Relation to Sports Law in America

Aman Rastogi (Jindal Global Law School)
Guest Contributor

Imagine while watching the 2017 NBA finals game between the Golden State Warriors and Cleveland Cavaliers, Kevin Durant in the middle of the game punches Lebron James. This conduct is unsportsmanlike, but how will Kevin Durant be punished? An act that is performed while participating in a sport can be subject to either civil law or criminal law, and participation in a sport will not automatically exempt the athlete from facing potential criminal liability. It is traditionally justified that rough play is a major part of the game and that an athlete cannot perform with the fear of criminal sanctions ruling over their head. Therefore, some contend, there should be an exemption for violent acts taking place on the field from criminal liability. However, athletes are role models for future generations, and therefore they should be subject to the same moral standards—if not more stringent ones. Imposing criminal liability on an athlete sends a message that no one is above the law and that any kind of violent behavior will not be tolerated in a sport.

A large number of athletes play sports under a recognized sporting federation. Those federations have established rules regarding whether an act that took place during a game was beyond the limits of appropriate behavior (and therefore whether the athlete should have criminal or civil liability).[1] However, any league sanction that an athlete might face would at worst be a fine or a suspension. Only in rare cases will the act be subject to the possibility of criminal prosecution. Acts of violence are seemingly treated in a completely different manner because they are on the field, as if there was a protective shield for athletes in terms of sanctions.[2] Nevertheless, the large number of injuries combined with the increasing number of fee arrangements has led more and more athletes, when injured, to pursue civil remedies. Injuries could also be prosecuted under criminal law, if the incident meets certain requirements.

In tort law, a plaintiff may sue a defendant for an assault or battery while the same defendant might be charged by the government for criminal assault or battery. For each alleged criminal act, the state must prove that the act occurred (*actus reus*) which violated a federal or state statute and that the defendant had the intent to commit such act (*mens rea*).[3] In a criminal action, the state prosecutor must convince a jury beyond a reasonable doubt that the athlete committing the crime was guilty, while civil cases only require the preponderance of the evidence to be successful.

Violence in sports raises the issue of whether a violent act committed on the field should be handled by the sports league or the justice system. Currently, the only solution is punishment by the sports league itself, which is an insufficient deterrent. Therefore, this article argues that legal punishments should be established.

This article first examines the role of consent in sports. It then turns to various laws that interact with sports such as civil law, league laws, as well as criminal law, and their respective effects on deterring violence in sports. The article concludes by suggesting that a resolution to sports violence is available through the interplay of civil and criminal law.

Civil Law

In violent sports cases, the main claim is for assault, where a plaintiff brings a civil lawsuit against a defendant with the intention of recovering any monetary damages caused to them by the defendant's action. This is different from criminal law, where a prosecutor commences a lawsuit against the defendant with the intention of deterring future unlawful behavior by sanctions of community service, probation, or jail time, depending on the severity of the assault. Their is a higher chance of a defendant being found guilty in a civil lawsuit due to the lower standard of evidence needed to succeed in a case. Under civil law, the three claims a plaintiff may make in suing a defendant are intentional tort, negligence, and recklessness.

Negligence is established through different elements. First, the defendant must owe the claimant a duty of care which is just, fair, and reasonable. A duty of care establishes that an individual, while performing an act that may cause injury to others, must adhere to a standard of care that is reasonable. Second, the defendant must have breached that duty. Third, the breach must have caused the claimant loss. (This loss extends to pain, suffering, and loss of amenity resulting from a sporting injury.) Fourth, the breach must have caused the loss suffered. Fifth, the loss must not be too remote, in the sense that there must be some connection between the loss and the negligent action that took place (or that that loss was foreseeable). Lastly, the defendant must be unable to establish a successful defense to the claim. However, in sports, the duty of care that an athlete owes another athlete is complicated due to the issue of consent.

Athletes, when participating in a sport, consent to an inherent risk of negligently-caused injuries. Therefore, a higher threshold than that of the ordinary claim of negligence must be met. Both athletes are conscious of the type of injuries that can normally result from the sport, so, for an injury to be actionable, the injury and the conduct must be beyond the accepted bounds of play

because the ordinary injury would be consented to under the maxim *volenti non fit injuria*—the idea that no injury can be done to a consenting party.[4] Despite this, there are examples of suits that met this higher threshold.

In the case of *Nabozny v. Barnhill,*[5] the Appellate Court of Illinois gave a test for this higher than negligence threshold which considered several factors before concluding whether the violent conduct of an athlete was part of the game. These factors included whether the act took place while the game was going on, the type of play involved, the rules of the sport, the level of skill, and the nature of the competition.

The implicit consent doctrine has made the claim of negligence irrelevant in sports. The minimum standard of liability for sports injury cases is instead one of recklessness. A person acts recklessly when they consciously disregard a substantial and unjustifiable risk that harm will result from their conduct. In other words, reckless action occurs when the person takes a risk knowing that it can cause injury to another and still decides to do the action. The person's disregard must involve a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[6] The concept of recklessness therefore falls in between an intentional injury and a negligent injury.

Take for example an injury that took place during a game between the Cincinnati Bengals and the Denver Broncos in 1973. The injury occurred when Charles Clark hit Dale Hackbart on the back of his skull with his right forearm, fracturing Hackbart's neck. Hackbart filed a civil lawsuit against the Cincinnati Bengals and won the case, with the Tenth Circuit Court of Appeals holding that Clark "disregarded Hackbart's safety and breached the duty of care he owed Hackbart."[7] This decision demonstrates that an athlete may have a valid cause of action against another athlete if the injurer acted with recklessness on the playing field even if they did not intend to cause injury.

As compared to criminal lawsuits for excessive sports violence, which generally do not succeed, civil lawsuits have proven successful. For example, when Kermit Washington punched Rudy Tomjanovich, he was punished by a suspension for 60 days without pay and a fine of $10,000. Tomjanovich returned to the NBA the next season and also filed a civil lawsuit against the Los Angeles Lakers. Eventually, the jury awarded him more than $3 million in punitive and actual damages.

An injured athlete therefore may bring civil claims of intentional tort, recklessness, or negligence against another athlete, which might help to reduce the amount of excessive sport violence that may occur. However, in reality, these acts of excessive sports violence continue to occur due to the lack of proper deterrence.

Laws of the League

Sports leagues use fines and suspensions to deter excessive violence. A league is able to punish a player through contract law in the form of the player's contract, the league's constitution, and its bylaws as well as collective bargaining agreements. Further, the misconduct of the player decreases ticket and merchandise sales due to a loss of good reputation, causing loss to the league. This enables them to punish a player through property law. In theory, leagues are also effective because they are publically accountable: professional athletes garner media attention and any misconduct is scrutinized intensely by the public. Leagues are also uniquely positioned to determine whether an athlete's conduct was reasonably foreseen or if it was against the rules of the game. Lastly, they can penalize an athlete faster than a court could.

League commissioners have the power to deal with sports violence as they are supposed to promote the "best interests of the game." The commissioner derives his or her power from the league constitution and bylaws which provide them with the power to punish athletes for acts outside the scope of play. They also derive power from individual player contracts and the league's collective bargaining agreement. For example, a standard NBA player's contract contains a clause for good character. A typical NFL player's contract, similarly, contains an integrity clause which allows a team to terminate a player's contract in cases where the player's actions are detrimental to public confidence in the league or the integrity and good character of the player.[8] Under these contract clauses, the commissioner can impose punishments on players for any contravention. Punishments range from fines to suspension or even expulsion from the league. However, the commissioner's powers are limited by the league constitution as well as its collective bargaining agreement.[9]

There are a few cases in which the commissioner's authority has been challenged in court. In *Molinas v. NBA*,[10] the Southern District Court of New York upheld an indefinite suspension of Fort Wayne Pistons player Jack Molinas for gambling on his team. The court reasoned that the elimination of gambling was in the best interests of the game, and therefore the punishment was justified.

The problem with a league's punishment is that league sanctions are not considered to be harsh enough to act as deterrents and do not help to send the message that excessive violence will not be tolerated. Under the NBA rule book, a player who punches someone, whether it connects or not, will be given "a fine not exceeding $50,000[,] and/or suspension may be imposed upon such player(s) by the Commissioner at his sole discretion."[11] However, consider Lebron James of the Cleveland Cavaliers who earned almost $31 million in the 2016-2017[12] season alone without any endorsement contracts. This fine of $50,000 will be worth nothing to him. Furthermore, any suspensions without pay will barely affect an athlete either. Take the case of Carmelo Anthony who

was suspended by Commissioner Stem for fifteen games without pay for his role in a fight at Madison Square Garden. Anthony's lost salary amounted to $640,096.50; in that season, he earned $4.69 million. This would barely be a deterrent.[13] One potential method that could help prevent sports violence is to increase fines based on the athlete's salary, the severity of the violence, and the sport itself.

However, increasing suspensions or fines is an imperfect solution for preventing violence in sports. Leagues have a biased financial incentive when punishing athletes because their goal is to keep fan interest in order to protect their revenue stream (as well as that of the team owners). If the league punishes a player with fines and suspensions, it hurts the player, the team, and the league's reputation which can affect merchandise and ticket sales. As a result, smaller suspensions and fines are usually given to prevent the team and the league from losing any money; the money that is fined from players and coaches go to charities selected by the league.[14] A stricter mode of punishment is required for athletes who commit excessively violent acts.

Criminal Law

Athletes have sometimes been prosecuted for violent acts during sporting events. There are a few factors that limit the viability of criminal cases; one is the doctrine of implied consent which will be examined later. Another is the distinction between aggressive behavior in sports (such as a tackle) and excessive violence (such as a punch thrown during the game). The distinction between aggression and violence during is important to understand because some aggressive contact is necessary (and therefore legal) in sports. For example, tackling is an integral aspect of professional football.[15] There is, however, a distinction between contact which is necessary and contact that is not related to the game itself. Contact that is not related to the sport would be considered as violence and should be criminally prosecuted.

Such acts of violence can be criminally prosecuted as assault and battery, which relate to excessive physical contact between parties. The Model Penal Code defines criminal misconduct and divides criminal assault into simple and aggravated assault.[16] Battery can either be consolidated with assault or provided for separately depending on jurisdiction. In California, battery is defined as "any willful and unlawful use of force or violence upon the person of another."[17] Convicting an athlete for assault or battery is quite difficult because the prosecutor must prove that there was some intent or recklessness. Unlike with violence outside a sports stadium, where it is not normal for people to tackle and hit each other with sticks, these acts are consented to in sports such as football or hockey. This is recognized as the implied consent doctrine, where athletes voluntarily assume certain risks of injury while playing a sport. However, violence in sports may still go beyond what is acceptable under the implied consent doctrine and each case of sports violence must be assessed separately. An athlete's consent should not allow another athlete to injure him or her without facing criminal liability.

American case law on sports violence has been influenced by Canadian courts, which have applied the implied consent doctrine but limited it to foreseeable sports injuries. One example of when the implied consent doctrine was not applied was in the case of *State v. Floyd*,[18] where a basketball game broke out into a fight after play had stopped. Floyd was charged with assault but argued that the court should apply the doctrine of implied consent since the fight broke out during the game. The Iowa Court found that, because the game had stopped when the fight broke out, the victim could not have consented as the fight was not a foreseeable aspect of the sport.

The case of *People v. Freer*[19] highlights this distinction. There, the defendant received a punch when he was tackled during a game of football. The punch was covered under the implied consent doctrine as it took place while the game was going on. However, the defendant punched the other athlete back after the play was over. The defendant's punch was considered to be outside the scope of the implied consent doctrine.

In addition to this precedent, §2.11 of the Model Penal Code (a standardized codification of criminal laws adopted by many states) reads, regarding the implied consent doctrine:

> "(2) Consent to Bodily Injury: When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
> ... (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic competitive sport or other concerted activity not forbidden by law." [20]

The Model Penal Code, just like court precedents, specifically allows for a defense of sports-related contact that was reasonably foreseeable. Therefore, the implied consent doctrine allows for meaningful checks on the application of criminal charges such that the threat of criminal charges won't hurt the quality of the game.

The doctrine of self-defense is another hurdle for prosecuting sports violence. Conduct which falls within the implied consent of the sport is not considered as the initial aggression for the purpose of self-defense and a violent response to this conduct would be the initial aggression.[21] For example, a tackle, albeit rough, is part of the game and will not be considered violent. A punch in response to this tackle will be considered violent and the initial aggression. In the Canadian cases of *Regina v. Maki*[22] and *Regina v. Green*,[23] two players of opposing teams, Maki and Green, got into a fight. Green hit Maki with a stick on his head, and Maki hit Green back which resulted in Green fracturing his skull. Maki was acquitted on the doctrine of self-defense. Nevertheless, the court

did note that acts in sports leagues do not make players immune from criminal liability.

Another problem with prosecuting athletes is the high burden of proof required to show the *mens rea* of the accused. Moreover, some worry that athletes will not compete at full potential due to the fear of criminal sanctions; athletes shouldn't fear prosecution as long as their behavior is within the rules of the sport, however. Further, just as in normal society, any person who breaks the law is be subject to prosecution. In sports, too, any athlete who breaks the rules of the game should be subject to prosecution as well—especially since sports are such an important part of American culture.

An additional problem is that penalties imposed on offending athletes are ineffective. For example, in the *Ciccarelli case,*[24] a hockey player named Dino Ciccarelli from the Minnesota North Stars hit Luke Richardson of the Toronto Maple Leafs with a stick while the game was going on. While he was promptly ejected from the game and given a suspension of ten games, he was also criminally prosecuted. His punishment, however, was only a $1000 fine and one day in jail for assault, which can hardly be considered as a daunting punishment.

Similarly, in the *McSorley* case,[25] Marty McSorley of the Boston Bruins hit Donald Brashear of the Vancouver Canucks on his head with a hockey stick, giving Brashear a Grade 3 concussion. McSorley was suspended for 23 games, losing about $100,000 in pay. The judge however gave him a conditional discharge of 18 months instead of sentencing him to jail for 18 months as is the Canadian law for assault, thereby showing how the judgment was soft on the athlete. In the case of *Bertuzzi*, Bertuzzi punched Moore on the side of the face, causing serious damage, including a concussion and two damaged vertebrae. Bertuzzi was subject to suspension from the NHL, a criminal charge for assault,[26] and also a civil lawsuit which ultimately resulted in a settlement between Moore, Bertuzzi and the Vancouver Canucks, the team that Bertuzzi played for.[27]

All three of these cases mentioned above showcased an interplay of civil and criminal law in them. However, criminal prosecution was not a sufficient deterrent because the players who were criminally prosecuted returned to the hockey rink right after serving their sentence. This cannot be termed as a sufficient deterrent for violent behavior. Proper criminal sentences need to be given to the athletes to prevent them from doing these actions again.

Interplay

In sports, violence is frequently addressed by equity-based penalties rather than deterrent-based penalties. Think of common sports: a foul results in free throws in basketball, free kicks in soccer, or loss of yardage in football. This might be a factor in why violence in sports has increased. Some extremely violent crimes might result in a suspension of the player, which would be a deterrent, but no action would be taken off the field by a court.

Civil law is equity-based; its main motive is to restore fairness, while criminal law is deterrent-based, with the goal of preventing deviance. A system that allows for deterrence is not seen as rehabilitative and a system that is rehabilitative is not seen as deterrent. Neither rehabilitation nor deterrence can themselves be a complete system. A system should therefore consist of a mixture between equity- and deterrent-based penalties. This is based on the fact that athletes, when committing violent crimes that go against the spirit of the game, should be punished not as athletes but as regular people who have committed violent crimes. Therefore, the athlete should not just face sanctions from the league in which he or she plays but also civil and criminal sanctions as a regular person. In the sports context, criminal law and civil law should be used together to achieve a practical deterrent while allowing for rehabilitation.

A form of interplay between civil and criminal law in courtrooms is due to the introduction of the recklessness standard of civil liability in sports injuries. As explained before, the negligence standard of care could not be used in relation to sports due to players consenting to foreseeable injuries. Therefore, the recklessness standard was introduced. Now both civil and criminal courts need intent to be proven in the case of violence in sports, albeit the criminal court will require a higher level of proof.

Civil and criminal law should not interfere with the rules of the game. Sports leagues should develop rules for an acceptable standard of play within the game without any outside interference, and any conduct that takes place within the rules of play should not give rise to legal liability due to the implied doctrine of consent. However, courts must emphasize that any act that departs from the rule of the game—which cannot have any implied consent—must be punished with both civil and criminal sanctions to deter future violent behavior.

A perfect example of the interplay between civil and criminal law was the Indiana Pacers and Detroit Pistons brawl on November 19, 2004, which resulted in the NBA suspending nine players. This led to a total of $11 million lost in salary due to the suspensions[28] as well as assault charges against the players. Five fans also faced criminal charges and were banned for life from attending Pistons home games. The brawl took place not only on the court between the players after play had stopped but also broke the invisible barrier between spectators and athletes when the players and spectators started fighting. The players and fans all faced criminal sanctions and civil sanctions, with the players suspended and the fans banned from games. Once again, criminal law alone was not an effective deterrent—the players were only sentenced to probation and community service. What did however prove to be an effective deterrent was the mix of civil and criminal law.

The brawl, and the NBA's corresponding rule changes, led the league to increase its security during games and to change its alcohol policy, so that no drinks could be sold after the third quarter. The words of Stephen Jackson (a player for the Indiana Pacers) summed up the punishment best: "I actually think [Stern, the President of the NBA] took it light on us, because he could have easily kicked us out the league. This is my opinion. Taking $3 million was harsh, but I'd rather give that $3 million up and still have my job than keep the $3 million and be kicked out the league."[29] The interplay between civil law, in the form of league sanctions and updated league rules, and criminal law, in the form of probations and community service, proved successful as it prevented an incident on such a massive scale from happening again.

Conclusion

Violence can only be curbed by a mix of league sanctions, civil claims, and criminal punishment. Leagues cannot regulate violent conduct by themselves because their sanctions are not a sufficient deterrent. Athletes know that an act they might do on the field will not be subject to criminal sanctions, and therefore no punishment short of being banned from playing the sport will deter them. League commissioners state that any act of violence will be punishable, however, the leagues are biased and trying to protect their revenue stream, which constrains the severity of their punishments. In the cases of McSorley and Bertuzzi, both players were given conditional discharges and continued to play in the NHL, which sends a message to the athletes that they are above the law.

An act was proposed in Congress called the Sports Violence Act of 1980, which provided for the standardization of criminal violence in sports and would have placed criminal sanctions on athletes that used "excessive violence during professional sports events." An act such as the Sports Violence Act of 1980 would be perfect for reducing sports violence. Further, by enacting such an act, criminal courts would be more consistent in not only charging athletes for various violent actions that took place in sports but also in giving reasonable punishments that could act as deterrents. The bill however failed due to its vague and inconsistent penalties.[30]

To prevent any excessive violence that cannot be consented to from taking place in sports, both criminal law and civil law must apply. The current lack of interplay between civil and criminal law has resulted in an increase in sports violence, as there is no deterrent against athletes committing violence. Athletes need to be reminded that they are not above the law. Therefore, a new Sports Violence Act needs to be introduced by Congress, which has complete penalty clauses to charge athletes for violent crimes committed on the sports field.

In the scenario of the 2017 NBA Finals when Kevin Durant punches Lebron James, he should be ejected from the game immediately, suspended, and fined. He should also be adequately punished by paying Lebron James money for the assault through a civil claim and punished under criminal law by doing community service or facing probation or jail. That single punch would end up costing the Golden State Warriors the championship as their Most Valuable Player would have been suspended. •

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On the New Era of Diplomacy and Being in the Foreign Service: Interview with Cameron Phelps Munter

Maïmouna Diarra (PO '19) and
Gabe Magee (PO '20)
Staff Writers

Mr. Cameron Phelps Munter was the former U.S. ambassador to Serbia (2007-2009) and Pakistan (2010-2012), serving as a U.S. Foreign Service Officer in some of the most conflict-ridden regions of the world for almost thirty years. Prior to joining the Foreign Service, Mr. Munter taught European history at the University of California Los Angeles, and also taught at Columbia University School of Law.

After his retirement from the Foreign Service, Mr. Munter was a professor of international relations at Pomona College from 2013 to 2015, and served as a consultant to the equity funds KKR and Mid Europa Partners. In addition, he also advised the Gates Foundation project on polio eradication. Currently the CEO of the EastWest Institute (EWI) in New York, Mr. Munter heads research in conflict resolution working to reduce international conflict and addressing seemingly intractable problems that threaten world security and stability.

This interview has been condensed and lightly edited for this print edition. The full version can be found online at https://5clpp.com/2017/07/25/on-the-new-era-of-diplomacy-and-being-in-the-foreign-service-interview-with-cameron-phelps-munter/.

CJLPP: Do you see any problems in diplomacy between the United States and other countries that may not be as prevalent or as talked about or publicized as much as others?

Munter: One of the things that's key to understand diplomacy is that there are always parts of diplomacy that are not visible. That is no more or no less now than at any other time. We sometimes use the language of what's above the water line and what's below the water line. What you see and what don't you see. An example of above the water line would be kind of a public diplomacy, a statement by the president about relations with Russia. Or a statement or a policy negotiation about trade with Mexico or something like this. These are public, these are kind of diplomacy relations out in front, and people talk about it. There are things that you don't see, and there are a couple of reasons for that. Sometimes they're secret, there are questions of famous efforts by people like Henry Kissinger going quietly to China to open negotiations. This quiet, sometimes done through proxies, back-channel diplomacy, is important because there are times where you want to keep things secret. You don't want to blow up the possibility of talking. But there's another kind of diplomacy that's not seen which is where there are millions of different ties between countries, and you don't see a lot of them simply because they're not of interest to many people.

Just because you see the crisis, doesn't mean that's the only thing there is. There's lots of stuff going on in the world you don't know about. That doesn't necessarily have to be bad or a crisis. It's that there are relations that are just carrying on every day, whether its business relations or security relations, etc. So the answer to your question is: are there problems in diplomacy that may not be visible? Yes, because we may be talking quietly to the Russians even while there's tension between the countries. We may be doing quiet things. Or, there may be a lot of things going on – like the U.S. relations with Chile, which you might not hear about very often, right? Because it's not a problem. So the point I would make to this question is be careful about seeing the world as so fraught with danger. You'll hear about the dangerous stuff. But there's a lot going on that is going on and the reason people don't pay attention is because it's not too bad. This should make you a little more optimistic about the state of the world, right? Because so much is going on that is simply not grabbing the headlines. And when people over-sensationalize, they sometimes make mistakes.

CJLPP: Is there a demand or need for an evolution or change in the type of diplomacy that we have been engaging in for the past however many years?

Munter: You've jumped onto the topic that I'm going to be addressing tonight, which I call the new diplomacy. Traditional diplomacy is the diplomacy of people who represent countries. That is someone from Washington talking to someone from Beijing. So it's intergovernmental. You may know the phrase from history – it's a westphalian system. This system, which was basically built after a series of wars in Europe in the seventeenth century, was meant to say diplomacy is the art of countries talking to each other. And what's inside the country is no one else's business. What has happened in the twentieth century is that, and is especially accelerating in the twentieth century is it's harder and harder to fit diplomacy, if you will, to shoehorn diplomacy, into that narrow set of relationships. What about business relationships? What about people to people relationships? What about the ties between different universities? What about problems such as global warming that go over borders? Problems such as proliferation and illegal economies that cross borders? What if you're dealing with a problem that a diplomat from America and a diplomat from let's say Mexico can't solve? So the answer here is if you need evolution and a change in diplomacy – it's changing whether you like it or not. It's not that the old fashion of diplomacy of Washington and Brussels or Washington and Tokyo goes away. It simply is not sufficient to cover all the things that are going on in the world.

CJLPP: What do you think accounts for that change? For example, would globalization be an influential factor?

Munter: A lot of things could be under the term "globalization"—we're thinking about that primarily in terms of changes of communication and economics. Certainly we know much more and therefore we are not able to kind

of ignore and compartmentalize as much as we could before. The fact that sovereignty is extended beyond just a few powerful states to many states—not that all states are equal, just that there are people in South Africa that have a lot more of an opinion—that opinion can be made public, and it can have an impact much more than it could have twenty years, fifty years, a hundred years ago. So yes, those trends you're talking about have caused that change, and the wise traditional diplomat, instead of resisting that, embraces it. I'll give you one example. When I was ambassador in Pakistan, one of my jobs was to spend a lot of the taxpayer's money to try to eliminate polio. There are three countries in the world where there is polio—Pakistan, Afghanistan, and Nigeria. So, Pakistan and Afghanistan, they have a common border so we thought—let's deal with this. For a lot of reasons—we were clumsy, there was a lot of terrorism, there was a lot of problem—we spent a lot of money and we failed. And so we did not eradicate polio.

When I left the foreign service in 2012 I became a consultant for the Bill and Melinda Gates Foundation. Now their job, among other things, is to eliminate polio. They went about it differently. They had more flexible approaches, they used different people to convince some of the people in the more remote areas to accept, you know, vaccinations and things of that sort. And probably by about 2018 they will have eliminated polio in Afghanistan and Pakistan. My point is not to say that Bill Gates is better than the U.S. government. He's different; he did it differently. He did it with different people, so that is when what is in the interest of the United States is actually carried out by someone who is not a government employee. So that new diplomacy is the diplomacy of coalitions, right? Rather than just saying "We do the diplomacy and you just stay home."

CJLPP: Can you tell us about your experience adjusting to life as an ambassador?

Munter: Part of learning to be an ambassador and learning to be a diplomat is really trying as hard as you can to be honest with yourself –what kind of life do you like? Some people would like to be an ambassador because it's cool and you live in a big house and you get to do things but they don't think about the fact that there are other elements to this life, you're uprooted a lot, that you're putting a lot of strain on your family, you're doing all these kinds of things –think about that stuff, be honest with yourself, before you go in. It's a lifestyle as much as it is a profession. People have said to me "What's the best thing you could study to be an ambassador?" and I say, only half-joking "Theatre arts." You do a lot of acting as an ambassador. And I'm not saying you're acting like you're being phony. You're taking on the personality that is necessary at a certain time. Part of what you need to do is you're playing a role, if you don't like playing roles, if you're excruciatingly "I'm always open and honest" then you might have problems being a diplomat. Because sometimes you're angry and you're not always allowed to show that you're angry. Sometimes you're not angry and you have to do a little bit of Kabuki and pretend you're angry. Because you're not there because you're you. You're representing your country. And if your country wants you to be angry, you act it out. You see what I mean? And the better diplomats are the ones who are acting just like in a movie. If it's obvious that you're acting, you're not a good actor, right?

But if you're sincere about it, you can do different things at different times. Now this sometimes leads people to say "Oh, diplomats. They're false. Diplomats speak with forked tongues…" That kind of thing. And what you have to realize is on the contrary, the only thing you have as a diplomat is your honesty. You don't have weapons to make people do things, you don't have a huge amount of money to buy them off. You've got to convince them. You've got to be able to say—"I'm going to act in this role as an American diplomat, as an American ambassador." And as I act in this role, I have got to be effective to get the other guys, say the people in China, or wherever, to see it my way. Part of it is seeing it their way. How do I know how to talk to them, what's their interest? And so you have to be extraordinarily conscious of communication. That's again—who else does this? Actors. So that's the quality that I think is really key. Obviously at a very basic level you've got to be a smart guy who's good at language, but the really good diplomats are those people who can play a role and play it sincerely.

CJLPP: What were your most rewarding experiences or interactions as an ambassador? We would be particularly interested in your experience as U.S ambassador to Pakistan given the context of Pakistan, and the events that took place in the country, during your Ambassadorship.

Munter: Well, being an ambassador is one thing. When you are a younger diplomat, you have more of an opportunity to get a more authentic experience–my first assignment was in the 1980s in Poland, when Poland was still a communist country. I was a pretty junior guy so I wasn't an ambassador, but I had the opportunity to get to know this culture at a time of real change. You know, just before the Berlin Wall fell. It's extremely rewarding to understand trends in a country which is not your own, and be able to send those ideas, to translate them back to your country when, as you hope, your country is doing the right thing. I would argue that in the late 1980s when we were against communism we were doing the right thing. So all these things align, and that's very satisfying. You're pushing for freedom, you're supporting a solidarity trade movement, you're trying to help people have dignity, you're pushing American interests and trying to make peace in the region and stability… When all those things come together, sometimes it's just an accident of history, that can be very satisfying. So that's not being an ambassador, that's being a diplomat.

Now as an ambassador, what's very satisfying, is when you see that you're able to… now the word "ambassador" in many languages, or in the French language comes out to mean "a messenger," someone who is in between. You

are not really someone who is making up policy, yes you are a little bit, but mainly your job is the "go-between", you're a messenger. So, what you really want to do as an ambassador is see that you are explaining your country's position clearly and honestly, and that you are seeing that people understand it, and doing the same when the other country says "x" and "y," that you are taking that back to Washington and they are understanding it. Now, it also goes beyond governments as I was saying earlier, but in general you are trying to make sure that both sides understand each other.

When I was in Pakistan, Serbia or when I served in Iraq, I was trying very hard to make sure the sides understood each other and that was the most satisfying. As it turned out, the period in which I was a senior officer in the American foreign service was a very unsettled time. So, the fact is, in addition to the satisfaction of making things work, you also have to cope with what happens when everything falls apart. In 2011, when I was in Pakistan, we had a series of disasters. I could argue that the single best thing I did as an ambassador was preventing those disasters from becoming worse. Now no one really likes to sit around and prevent things from getting worse, but I would have to say that one thing I'm proud of is there was one time during that year at the time of the so called Ramond-Davis case, this was a CIA spy who shot people there, where things could have spun out of control. There could have been very bad violence, and a rupture in relations, so I'm proud, whether or not I'm justified in being proud, I'm proud that things didn't get out of control. Preventing disaster isn't really in the job description, but that's what you have to do sometimes.

CJLPP: How do you feel your work advances the relationship between the United States and Pakistan?

Munter: I went to Pakistan partly because there were some people in Washington led by a guy named Richard Holbrook, a famous diplomat, Hillary Clinton, the Secretary of State at the time, and Barack Obama, who believed that there had been very bad relations between Pakistan and America. There had been misunderstandings and we wanted to get past that, we wanted to build trust in the relationship and make a relationship that was not just founded on how do they help us on the war on terror, but on how do we make sure they stay stable and peaceful, and, we hope, democratic. After all, with over 200 million people, and it being the sixth largest country in the world, and their possession of nuclear weapons, you don't want to get [the interaction and diplomacy] wrong. So we went into that relationship with the hopes that we could build trust and build a better relationship.

Many people thought that we were naive, and I would say that if you ask people in Washington now, they would say they were right, they would say, "you guys were naive, you went in there, and things went to hell in this period and now we are much more critical of Pakistan, and now the Pakistanis have it coming." There is a very strong anti-Pakistan feeling in Washington right now. And so, you ask if I advanced the relations? Objectively, its hard for me to say that US relationships with Pakistan is better than it was. I'd like to think that I made every effort to prevent the kind of conflict that comes out of people just shutting their eyes and being angry. So it's not a satisfying story, but it is part of what you are called upon as an ambassador, its when the situation is rough, how do you make sure it doesn't get even rougher.

CJLPP: How were relations between the U.S and Pakistan affected after the Bin Laden event, as you were involved in that aftermath and atmosphere?

Munter: What happened in the Bin Laden event was: the fact that we didn't tell the Pakistanis that we were coming in meant that we violated their sovereignty and one thing that's very important in a lot of country, that you can say about America too, no one likes to be humiliated. We decided as a country it was more important to us to have the secrecy to make sure we got him than it was to tell the Pakistanis, so we didn't tell them. And so I had a lot of cleaning up to do after that. There were enormous hurt feelings, there was shame because many of them were shamed, you know "how could we have this guy (Bin Laden) in our country and we didn't know", some of them were angry—they said "who does America think they are just, going in and killing people in other countries. You think you're God." So there was a lot of explaining, and this has to do with what I mentioned to you the above the water line and below the water line. Some of this was quiet talk with people in quiet situations, but a lot of it was going on and talking to the public. I was trying to convince them and trying to explain to them what was going through our minds while being more than happy to listen to them about why they feel a certain way.

I work now at a think tank [the EastWest Institute], a non-profit that does conflict mediation, we do a lot of work on China, we do a lot of work on Russia, we do a lot of work on Turkey. And people say "well gosh, you know that Putin and the Chinese Communist Party aren't big civil rights guys". And you say look "anyone can negotiate with Canada, the trick is how do you negotiate with people precisely when you have differences of opinion". So after the Bin Laden raid the differences of opinion were very stark and very conscious. I'm fairly proud of the fact that I think we kept a certain level of civility, and a certain level of mutual respect while we were talking about things we really didn't like about each other.

CJLPP: Moving onto your current position, at the conflict prevention and resolution think tank called the EastWest Institute, what are the most prominent security threats you have ascertained?

Munter: In a kind of conceptual sense, there is enormous mistrust in the world. And part of that is, not that any-

one is being good or bad, but the result of things like the hiccups in globalization like the economic crisis of 2008 or the result of the American wars in Iraq and Afghanistan, that there is a lot of questioning of the international global order. You can have an established order like the Americans made after 1945, where it was basically Americans policing the seas, setting the rules for trade, setting the rules for currency, setting the rules for the way the UN works, human rights, and things like that. No matter whether or not you liked this American moment, there was a structure of people brought into it. The biggest danger now is, and you can come down on whether you like the American structure or don't like the American structure, the biggest danger is that it's not clear what's going to happen. It's the uncertainty that's the greatest danger. So you have people challenging that, people like North Korea, and we're not sure what they'll do and they aren't sure what we'll do. And that uncertainty and the inability to predict what will happen and therefore to cut it off before it happens, is the biggest danger that I can see today. Yes, it's because of uncertainty and the anxiety that that produces when people are afraid that there's not a clear path ahead.

CJLPP: President Trump's foreign policy is often critiqued as isolationist. Would you agree? If so, what are your thoughts on President Trump's approach to foreign policy, and how will it affect the United State and its relations with its allies and adversaries?

Munter: In terms of his foreign policy, I don't think he is ideologically consistent. That is to say he changes all the time. He has said NATO is obsolete now, he says NATO is not obsolete, he said Obama you should stay out of Syria, and then he goes on and is bombing Syria. The things he was criticizing Obama for, now he's doing. You might call it pragmatic, you might call it utterly unprincipled, you can call it a lot of things, but the fact is, it's not ideologically consistent. So I think it's probably wrong to call him an isolationist. There are some isolationist elements to what he does, when he talks about trade protectionism for example, but it's not one thing or another. I think this is another thing we have to live with in the current era, that at a time when global trends bring uncertainty, he is adding to that uncertainty, which makes things even more tricky right now.

CJLPP: What threat does President Trump's foreign policy add to security threats?

Munter: One of the things that foreign policy professionals generally criticize about President Trump is that he is by design not predictable. Most of the things the man said while he was running for President was "I'm not going to tell people what I'm going to do, I'm going to keep them guessing." The thing is, with President Trump, is that being unpredictable might work when selling hotels, right? I don't mean to make fun of him, he is the president. But the point is, that unpredictability scares the hell out of a lot of foreigners, so this problem of the unpredictability being one of the biggest threats, he, unfortunately, intensifies that and so people are very scared around him.

CJLPP: Moving on to your most recent work in security, the EastWest Institute is particularly invested in the advancement of cyber-security. What is one aspect of cyber-security from a foreign policy perspective that most laymen may not even think about?

Munter: Remember, we started by talking about things you do above the waterline and below the waterline? In cyber, where we work is very much above the waterline. In cyber security, the problem is not that there are often no rules. And so, one of the things we do is the establishment of norms. The important thing that needs to be done is we need to figure out where is common ground. If the Germans are worried about data privacy and Americans are worried about internet freedom, and the Chinese are worried about state sovereignty over the internet, how do you find rules so that they don't crash into each other? The problem is that right now in cyberspace it is very difficult to do that. Now, we as an institution, what we at the EastWest Institute, is bring together governments—Israel, Russia, China, India—we bring together businesses and high tech companies, we bring together intelligence agencies and cops, we bring together think tank wonks and we try to get everyone to say, what is it that we all agree on? Where is the common ground? And so, in cyber, we are trying to work mainly on the establishment of conventions, the establishment of norms, so that there are ways that will prevent us from banging into each other in cyberspace.

CJLPP: Mr. Munter, it looks like we have run out of time, so we will not be able to get to the rest of our prepared questions, but thank you so much for taking the time out of your day to speak with us. Your insight, knowledge, and experiences are so profound, and we thank you for sharing them with us. •

Inadequacies in the Legal System: Rape and Sexual Assault

Bonnie Binggeli (SUNY-Fredonia '17)
Guest Contributor

Rape and sexual assault have rendered the face of domestic issues within the United States. It has been exemplified in the media that the U.S judicial and legal systems are not adequate in handling and prosecuting instances of sexual offenses. A series of highly publicized cases have shown how reform in the legal system is absolutely necessary. In the summer of 2016 the outcome of a case in which a woman under the influence of alcohol was brutalized by Stanford student Brock Turner flooded social and mainstream media.[1] The woman was discovered unconscious behind a dumpster with Turner on top of her.

Turner was supposed to serve a minimum six years sentence in prison for the three counts of felonies he was convicted of. However, at the discretion of Judge Aaron Persky, Turner's sentence was shortened so severely that he only served a mere fraction of the minimum sentence he was supposed to have been dealt.[2] One of the justifications that Judge Persky provided in deciding to shorten Turner's sentence indicated that he believed that alcohol was partly to blame for the defendant's actions. Judge Persky stated that because alcohol was present, Turner's judgement was clouded and he otherwise would have not committed such a heinous act.[3] Judge Persky also indicated that the crime was not committed with malice, and both were partially at fault because of the levels of intoxication. He did not believe that a minimum six year sentence was adequate because it would "ruin" the defendant's life. In this paper I will argue that existing state statutes are not apt to handle instances of sexually offensive crimes. In particular, I will focus on the inadequacies that lie in specific state statutes, and which elements may promote better application of justice. Although there are variations within individual state statutes that define and punish sexual offenses, the primary investigation here will pinpoint the specific language that is ineffective. The argument is that individual state statutes are too vague in addressing what instances should be considered as sexual assault or rape. Individual state statutes cannot properly identify instances of sexual offenses, and the corresponding legal system is not prepared to adequately prosecute cases. The essence of the problem lies in the discrepancies between state and federal definitions of sexual offenses, as well as differences in punishments for them. The legal definition of sexual offenses in one state are not the same in another. There is no national consensus on what is considered to be a sexual offense. This leads the various court systems across the U.S to dictate judicial justice based on their own interpretation of a situation.

The lack of proper legal provisions in state and national legislation indicates that the legal system cannot properly carry out its duties. Instances of rape and sexual assault are not crimes that have been recently entwined in U.S statutes. These crimes have been cited in legal statutes dating to the birth of the U.S. The law should have evolved to the point where adequate measures are properly put in place to punish assailants. The vague and lenient provisions that are provided in statutes that address sexual offenses do not consider crimes of this nature to be taken as seriously as they should. Michelle Anderson suggests that the traditional definition of rape, dating back to English common law, does not accurately depict how instances of sexual offenses are carried out. It was stated in English common law, which is the basis of the U.S legal structure, that rape only occurred if a woman was forcibly threatened, injured, and outwardly expressed resentment toward her attacker.[4] A woman who was raped must have promptly reported a complaint against her assailant, otherwise the instance was void in the eyes of the law. The elements of centuries old English common law has influenced the traditional American image of rape in which an incident must be extremely violent and performed by a stranger.[5] Anderson states that this type of attack is rare and underrepresents actual cases of sexual offenses.

The Uniform Crime Report, issued by the FBI, established a new, or "revised," definition of which acts constitute as rape in 2013. The definitions are not legally binding but reflect the norm and guidelines for how instances are generally perceived in a court of law. The revised definition is supposed to be more inclusive to all populations, particularly in cases of gender, as well as other acts that are not "traditionally" considered as sexually offensive. One of the biggest changes to the "legacy" definition is that "physical force," or resistance by the victim, does not need to be included as an element of an attack to classify an incident as a rape or sexual assault. This provision was included in the revised definition to protect victims that may be unconscious due to the use of alcohol or drugs.[6]

The legacy definition defines rape and sexual assault as the "carnal knowledge of a female forcibly and against her will."[7] The revised definition now defines rape as the "carnal knowledge of a person, without the consent of a victim, including instances where the victim is incapable of giving consent because of his or her age or because of his/her temporary or permanent mental or physical incapacity."[8] The revised definition also includes sexually offensive crimes in instances of sodomy and assaults that occur with the use of a foreign object. The importance of these definitions is how sexually offensive crimes are viewed, and how changing definitions can be applied to make legal statutes more effective in protecting victims.

The changed definitions are representative of the decreased stereotype in what acts may now count as a sexual offense. However, the revised definition is not yet universally accepted in legal statutes. These definitions are not legally binding in a court of law, but provide a basis for how a jury or judge will view an instance of rape or sexual assault. The definitions represent direct perceptions of how instances were viewed in the past, and provide

a good indication for how these crimes are going to be viewed and defined in future legislation. It will take time before the definitions have been fully integrated into legal statutes. It was indicated by the Uniform Crime Report that if all instances of the were included in the reporting of sexually offensive crimes in 2013, there would have been 41.7 percent increase in cases.[9]

In practical application, the Brock Turner case exemplifies how the legacy definition largely dictates how legal statutes are applied and carried out in the judicial system. The revised definition is designed to support specific instances to protect victims who are "mentally incapable," and hindered due to the presence of alcohol. The woman who was victimized by Turner will never be served proper justice because of severe lack of application of the revised definition. However, the large amount of public backlash that Turner and Judge Perky have received from the outcome of these cases represents a changing public dynamic in which there is an obvious desire for statute reform. Much progress has been made toward reforming the legal system in recent years, but there is still much to be done to combat the shortcomings in prosecution.

Kimberly Longsway and Joanne Archambault have partially attributed the prosecution's shortcomings due to the "justice gap" in the legal system. The justice gap refers to the difference in sexual offenses reported in proportion to those that are actually committed.[10] Longsway and Archambault worked to identify the aspects that widen the "justice gap." Data suggests that reported rapes and sexual assaults have dropped by 85 percent in the past 30 years.[11] Being so, some have praised the judicial system for improved prosecution when in fact there is a decrease in reporting of instances in proportion to those being committed. It is indicated that for every 100 rapes that are committed, 5-20 are reported, and of those cases that are reported only .4-5.4 are prosecuted, and of those cases that are prosecuted .2-5.2 are convicted.[12] Longsway and Archambault suggest that vagueness in legal jargon does not allow victims to be properly accepted as such in the legal system which lead to a wide gap in prosecutions.[13] Upwards of 50 percent of women who have been assaulted or raped will not state that they are victims due to the traditional perception of sexual offenses.[14]

The legal gaps and application of law can be seen and evaluated by analyzing individual state statutes. After evaluation it is quite evident that state applications do not have universal definitions of sexual assault and rape. Individual state statutes are not inclusive to all populations, are extremely vague, and in many cases are outdated. My research design is a comparative analysis between states of high and low rates of sexual offenses in distinguished regions. The data that is utilized in this study was published by the FBI's Uniform Crime Report (UCR) between the years 2009 and 2010. The unit of comparison between states was rapes per 100,000 people. The regions were separated into Southern, Northeastern, Western, and Midwestern parts of the United States. The cross comparison of individual states was used to identify specific statutes that may account for the different rates in the unit of comparison. Examination of the differences in state statutes regionally will highlight which positive and negative legal factors are more prevalent in a certain area. Once the regional differences are established, a national comparison between regions can be made.

The Northeastern region has the lowest combined rape and sexual assault rates for both states investigated within a region. The two states under investigation are Connecticut and New Hampshire. Connecticut had the lowest rate of the two states at 18.7 and 16.3 per 100,000, in 2009 and 2010, respectively.[15] New Hampshire's rates hovered around 30-31 per 100,000 between the years 2009 and 2010. In addition to differences in unit of comparison, there were also large discrepancies in arrest rates between Connecticut and New Hampshire. In 2010, Connecticut's arrest rate equated to 40 percent.[16] In comparison, New Hampshire's arrest rate were approximately 15 percent.[17] It is evident that Connecticut had a significantly higher arrest rate, in proportion to incidents that occurred, than New Hampshire. Being so, Connecticut appears to better address instances of sexual offenses. Connecticut depicts acts of sexual assault in the first degree in which a victim is coerced to "engage in sexual intercourse… by force of a third person…intercourse with another person and that person and such another person is under thirteen years of age and the actor is more than two years older than such a person… and sexual assault that is aided by two or more persons" as class A or B felony.[18] Chapter 952, Section 53a-70 also indicates that a person who engages in sexual activity with a victim who is mentally incapable can be convicted of a class A or B felony. A sexual assault in which a victim is under 16 years of age is also distinguished as a upon conviction. If a person is found guilty under Section 53a-70 a defendant's sentence will not be reduced by more than ten years if a victim is under the age of ten, or be reduced by more than five years if a victim is under the age of 16. A first offense will result in a 25-year sentence, while a second offense may be punishable up to 50 years.[19]

Section 53a-70c classifies acts of aggravated sexual assault of minors in the first degree. The definition here solely applies the traditional "meaning" of sexual offenses in which a victim is coerced with the force of a deadly weapon, and the assailant intended to cause bodily harm. A defendant found guilty of crime in this section will be convicted of a class A felony, and may serve up to 25 years in prison. Sections 53a-71 and 53a-73a have sexual assault in the second and fourth degrees categorized as either a C felony, or a class A misdemeanor.[20] These sections explicitly define instances of sexual assault in instances of cohabitation, physical helplessness, mental incapacitation, and those who are victimized in the presence of health care professionals. Those convicted of a class B or C felony must serve a sentence of two years and that cannot reduced by the courts. Acts that are categorized as a class A misdemeanor do not have minimum punishment unless the victim is under 16 years of age. If a victim is under 16 years of age the convicted persons will subjected to a minimum nine month sentence that shall be not shortened by the courts.[21]

New Hampshire's Title LXII Criminal Code sections 632-A: 2, 632-A: 3, 632-A: 4 depict how the state defines instances of sexual assault as either a felony or misdemeanor. Sections 632-A: 2 and 632-A: 4 address Aggravated Felonious Sexual and Felonious Sexual Assault,

respectively. Aggravated Felonious Sexual Assault outlined in section 632-A:2 consists of acts in which a person has used excessive force again a victim, and the victim expressed "physical helplessness."[22] Section 632-A:3 simply defines acts that abide by the traditional definition of rape.

Connecticut and New Hampshire have similar statutes at face value. They both use the traditional definitions of rape and sexual assault. However, Connecticut bestows harsher punishments on its assailants than New Hampshire. For example, New Hampshire allows for all crimes defined under Felonies and Aggravated Felonious Assault to be tried under class A misdemeanors if a victim is of a certain age. One possibility for the difference in the unit of comparison is that Connecticut's legal statute provides a strong deterrence for perpetrators. However, both states failed in explicitly applying the revised definition of rape. Felonious crimes did not address instances in which a victim may be unconscious, instances in which alcohol is present, acts of sodomy, and object penetration.

The Midwestern region has the largest difference in units of comparison between states. The two states investigated in the region were South Dakota and Wisconsin. South Dakota possesses the higher rate of sexual assault at 61.7 per 100,000 in 2009, and 47.9 per 100,000 in 2010.[23] In comparison, Wisconsin possesses one the lowest rates in this study at 16.8 and 20.9 per 100,000 in 2009 and 2010, respectively. Much like Connecticut and New Hampshire, the two states in the Midwestern region have similar arrests percentages that are reflective of the stark differences in rape rate comparison. South Dakota's arrest rate in 2010 equated to 12 percent[24], while Wisconsin's arrest rate equated 42 percent.[25]

South Dakota's legal statutes appear to be facially neutral. They generally apply the "legacy" definition with partial adaptations of the revised definition. Rape and sexual assault are defined in Title 22, Chapter 22, Section 1.[26] Subsection I defines acts against a victim who is less than thirteen years of age as a Class C Felony. Subsection II states that any acts with "use of force, coercion, or threats of immediate bodily harm" will be considered as rape in the second degree, or a Class I felony.[27] The next two subsections III and IV define acts in which a person is incapable of giving consent due to a of lack mental capacity because of the presence of an "intoxicating agent." Subsections III and IV are categorized as rape in the third degree and are Class II felonies. Section 22-22-2 also criminalize instances of sodomy and other forms of penetration, but does not indicate a minimum sentence or classification for how serious these crimes may be punished upon conviction. South Dakota does not impose a minimum sentence for perpetrators in which the victim is over the ages of 13 and 16, but does impose a higher minimum sentence for first time offenders who have contact with victims under said ages. A first time offender will receive a 15-year sentence, and will receive an additional ten years for a second offense in subsection I.[28] There is no designated protocol for instances defined in subsections, II, III and IV if a victim is older than 13 or 16 years of age.

Wisconsin appears to have more thorough statutes in defining sexually offensive crimes, but more generally applies the revised definition than South Dakota does. Wisconsin's sexually offensive crimes are defined in Chapter 940, Crimes against Life and Bodily Security, Section 225.[29] Sexual assault in the first degree depicts acts of intercourse that result in bodily harm induced by coercion, or with the use of force with a deadly weapon, are classified as a Class B felony. Sexual Assault in the second degree, categorized as a B felony, applies part of the revised definition that explicitly states sexual acts that occur when a victim is knowingly unconscious, or "intoxicated to the point" of not being able to give consent.[30]

Wisconsin appears to have applied the revised definition to a larger extent than South Dakota has. Both states are the only ones thus far that explicitly identify that a sexual offense is punishable by law even in the presence of alcohol or an additional "intoxicating agent." However, South Dakota statutes do not distinguish between rape and sexual assault, which indicates that the statutes could still largely adhere to the legacy definition when applied. This could influence statutes to apply more rigid definitions of sexual offenses and justifications during prosecution.

The Southern region accounted for 37.7 percent of national incidences in this study, which is the highest of all the regions. The states investigated in the Southern region were Arkansas and Virginia. Arkansas had a rape rate 47.7 was per 100,000 people in 2009, and 45.0 per 100,000 in 2010.[31] Out of the 1,312 incidents that occurred in 2010, there were only 164 arrests, which equates to a 12 percent arrest rate.[32] In comparison, Virginia has one of the lowest rates out of the states included in this study which capped out at 19 per 100,000 people in 2009 and 2010. In addition out of the 1,532 incidents that occurred in 2010, 366 arrests were carried out, which equates to an arrest rate double that of Arkansas at 23 percent.[33]

Arkansas' sexual offenses are outlined in Title 5 (Criminal Offenses) Subtitle 2 (Offenses Against the Person) Chapter 14 (Sexual Offenses) and subchapter 1 general provisions.[34] Section 5-14-103, defines rape as an act that uses "forcible compulsion" in which a victim is unable to give consent due to to mental and physical handicaps that present the victim as "helpless."[35] An act under this section is classified as a Class Y felony, which is most serious offense a person can be convicted of in Arkansas. Convictions that result in a class Y felony enforce a minimum sentence of 25 years if the victim is under the age of 14. Arkansas also explicitly defines instances of incest and bestiality as sexual offenses. Arkansas severely lacks in applying the revised definition, in which its statutes do not explicitly state that alcohol consumption or an intoxicating agent may be present during an assault. Evidently, the definition of rape applied in Arkansas primarily uses the legacy definition.

Arkansas makes a clear distinction between charges of rape and sexual assault in its statutes. Rape is a class Y felony, while sexual assault is categorized as either a Class A felony or misdemeanor. The provisions outlined in sexual assault statutes have much lower standards than those outlined in Arkansas's rape statutes. Sexual assault in the

first degree, section 5-14-124, pertains to acts in which a victim is in a subordinate position, such as a student, athlete, or a person under the care of a guardian.[36] Sexual assault in the third degree, section 5-14-125, states that a person may not commit an act against a person who is admitted in the justice system.[37] Sexual assault in the fourth degree, section 5-14-127, mainly addresses statutory claims in which there are large age discrepancies between two consenting parties.[38]

Arkansas' statutes mainly abide by the legacy definition of rape. However, Arkansas is also one of the only states to separate crimes of sexual assault and rape. The only difference between sexual assault and rape in the Arkansas' statutes is that sexual assault does not have to include elements of physical or mental helplessness. Therefore acts that may be not be seen as violent, due to lack of excessive force or resistance, may not be considered as serious offenses. Arkansas does not adapt elements of the revised definition, such as instances of penetration with an object or elements of sodomy, in its statutes. Arkansas has the least defined and exclusive laws out of the states that have been investigated thus far. This may indicate that Arkansas's statutes are interpreted broadly, and account for the state's consistently high rape rates.

Virginia's statutes contain an ideal balance of the revised and legacy definitions. Title 18.2 (Crimes and Offenses Generally), Chapter 4, (Crimes against the Person), Article 7 (Criminal Sexual) defines acts that constitute as sexual offenses.[39] Section 18.2-61 determines that if in a situation a victim is forced against their will to commit a sexual act by "threat or intimidation," or if a victim is "physically and mentally helpless," then this is an instance of rape. If a victim is under the age of 13 this offense will result in a minimum sentence of 25 years, or life, depending on the age difference between the victim and perpetrator.[40] The above statute is the only element that strictly adheres to the legacy definition. Virginia statutes mainly differ is in its explicit language that identifies acts of sodomy, sexual battery, object penetration, and attempted rape as serious offenses. None of the states under investigation thus far have been this explicit in identifying all sexual offenses included in the revised definition. Virginia's statutes show the willingness to prosecute crimes that other states have not yet fully recognized. Being so, its statutes are not exclusive and may be the most efficient in identifying sexually offensive crimes that are not "traditional." The one aspect of the revised definition that Virginia does not explicitly depict in its legal statutes is rape and sexual assaults in the presence of drugs and alcohol. However, Virginia does identify that physical restraint does not have to be present in order for an assault to result in a conviction, as specified in section 18.2-67.6.[41]

Both states analyzed in the Western region, Wyoming and New Mexico, have relatively high rape rates. Wyoming's rate per 100,000 fluctuated between 31.6 in 2009 and 29.1 in 2010[42], with an arrest rate that equated to 23 percent.[43] New Mexico's rate was higher at 53.2 per 100,000 in 2009 and 46.2 per 100,000 in 2009, with an arrest rate that equated to 11 percent.[44] The statutes that outline sexual offenses in both states are very similar upon comparison.

Wyoming's statutes addressing sexual offenses are primarily found in Title Six (Crimes and Offenses), Chapter 1 (General Provisions), and Article 3 (Sexual Assault).[45] Sexual assault in the first degree occurs when there is "submission of a victim" by actual application of force, or threat of death. Sexual assault in the first degree also identifies that victims may be "physically helpless," or mentally incapable of consenting to sexual acts. Sexual assault in the second and third degrees primarily pertain to behaviors that influence submission of victims by threat to outside actors. Sexual assault in the first degree is a crime that is punishable by up to 50 years in prison, with a minimum sentence of 20 years.[46] Sexual assault in the second degree has a minimum sentence of two years that may not exceed more than twenty years. Sexual assault in the third degree only states that punishments may not exceed that of fifteen years. The definitions and legal applications of sexual offenses in Wyoming exemplify the "legacy definition." Its statutes do not define various acts outlined in the revised definition.

New Mexico's sexual offenses are outlined in Article 9. Section 30-9-11 depicts acts of criminal sexual penetration from first to third degree felonies. First degree sexual penetration is defined as an act in which a victim is "unlawfully, or intentionally engaged in sexual intercourse… to any extent with any object," and may be accompanied by "force or coercion."[47] If a victim is under 13 years of age the act is also considered a first degree felony. Criminal sexual penetration in the second degree is limited to incidents in which the victim is between the ages of 13 and 18, victims who are inmates confined in prisons, coercion of a victim that results in bodily harm, or within the presence of deadly weapon. Second degree criminal penetration of a child results in a three-year minimum sentence. Section 30-9-12, criminal sexual contact, identifies acts of touching without penetration as a fourth degree felony and has the same outlines as section 30-9-11.[48] However, if criminal sexual contact is "coerced or forced" without injury to the victim, the crime is dropped to a misdemeanor. There is little to distinguish New Mexico's statutes from Wyoming's.

The evaluations of this study conclude that most state statutes have not caught up to the revised definition that was established in 2013. It can be indicated that states with the lowest rates of rape have generally applied most elements of the revised definition. However, states with low rates and elements of the revised definition did not apply these elements universally. Regardless of how the revised definition is applied, states whose statutes had more elements of the revised definition had lower rates of rape.

The findings here are meant to be an introductory step toward possible points of reform to improve the legal justice system in the United States. Obviously, legal recourse and statutes are the only elements investigated in this study. The results here only provide a fraction of an understanding as to why the "justice gap" exists. It can be concluded that as the revised definition becomes more accepted, and integrated into state statutes, that the legal system will be more apt in defining instances of sexual offenses. Eventually, there will be a universal definition that

will no longer be refuted in the court of law. Universally accepted definitions and comparable punishments for sexually offensive crimes across states will lead to higher rates of justice nationally. •

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Letter from the Founding Editor-in-Chief: An Origin Story

Professor Areshidze walked slowly around the classroom, a well-worn and aggressively annotated copy of John Locke's *Second Treatise On Government* in his hand. Smiling, he read, "[t]he reigns of good princes have been always most dangerous to the liberties of their people: for when their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent, and make them the standard of their prerogative, as if what had been done only for the good of the people was a right in them to do, for the harm of the people, if they so pleased."

To my surprise these turned out to be fighting words, sparking a heated class argument about Lockean prerogative and the proper limits of executive power that spanned questions surrounding the current era of mass-surveillance, the president's authority to initiate military operations without congressional approval, and even torture. The debate was passionate, with ideas flying back and forth around the room, thesis and antithesis, students exchanging friendly intellectual jabs as fast as the words could tumble from our mouths. The air pulsed with an electric energy, pregnant with the deepest questions about who we are as a people and how we should govern ourselves—questions often seem abstract and at a remove from daily life, but which are ultimately profoundly important. The whole class was engaged, engines running, wheels spinning.

Then, seemingly all of a sudden, class was over. As we trudged out of our classroom in Kravis Lower Court under the hot, sleepy Claremont sun, something changed almost immediately. The same students who had just minutes earlier fervently argued over deep questions of political philosophy, constitutional law, and public policy moved almost instantaneously to the subject of where the party that night would be. I was not surprised by this rapid shift, but I was a bit unnerved. Perhaps I read too much into that moment of abrupt transition, but it made me uneasy because it brought to mind the uncomfortable fact that sincere and intellectually rigorous civic debate is unfortunately more rare than it should be.

It was that day that I decided to help build a campus culture that would in some small way help sustain the kind of meaningful conversation about law and public policy that had abruptly ended as class ran out. I am deeply grateful to so many of my classmates at the Claremont Colleges who chose to do just that by embarking with me on the journey of building this journal, which I am glad to see is continuing to grow and thrive long after I graduated from CMC.

If our current political moment teaches us anything, it shows us that the Madisonian system of checks and balances that safeguards our republic is not immune to atrophy, nor is this system self-driving. Rather, our political system's health and proper function depend on an educated citizenry actively committed and perpetually re-committed to substantive participation in our shared civic life, bound together by broadly shared liberal democratic values, even as we vigorously contest the precise meaning of those values. That kind of substantive and respectful civic participation involves construction of inclusive discursive communities. Building these communities is hard—it is a perpetual civic challenge handed down from generation to generation, never complete, replete with setbacks. Nevertheless, if we want our democracy to not only survive but also to thrive, we cannot let the conversation stop.

Byron Cohen
Founder and Editor-in-Chief Emeritus

Byron Cohen is an alumnus of Claremont McKenna College, where he studied Philosophy, Politics, & Economics (PPE), was elected to Phi Beta Kappa, and graduated with honors in 2016. As a senior at Claremont McKenna, Byron was awarded a Senator George Mitchell Scholarship to pursue graduate study in Ireland, and completed a master's degree in public health at University College Dublin in 2017.