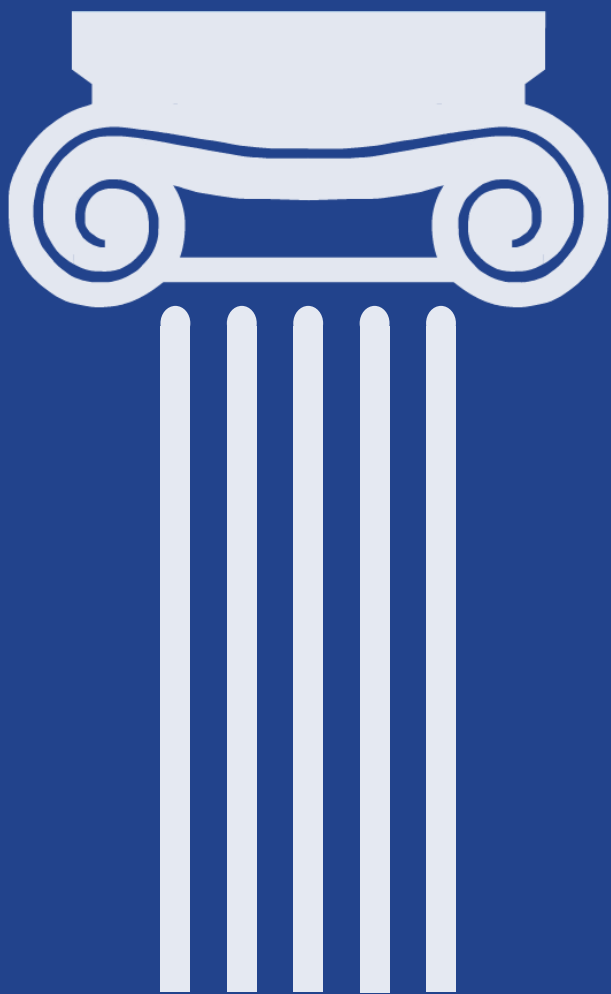


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Letter from the Editor-in-Chief

Dear Readers,

Welcome to the last print edition of this school year, Vol. 6 No. 3! We are proud to present an edition that features rigorous research on topics ranging from analysis of the Green New Deal's feasibility to questions of liability in outer space (you read that right!). This edition also includes interviews of Ben Rhodes, President Obama's former speech writer and foreign policy advisor, and Fatima Goss Graves, President of the National Women's Law Center. To read our weekly digital content, including submissions from across the U.S. and even overseas, visit our website at www.5clpp.com.

This edition and our online content were all created by our talented and diligent staff, who work during breaks and busy school weeks to produce these high-quality publications. I am honored to have worked alongside our many gifted writers; managing editor Isaac Cui; print edition editors Arthur Chang, Audrey Jang, Lea Kayali, Frankie Konner, and Désirée Santos; digital content editors Daisy Ni and Bryce Wachtell; interview editor Matilda Msall; webmaster Wentao Guo; design editor Grace Richey; and layout editor Sofia Muñoz. I am also pleased to introduce our impressive new print edition editors, who played a crucial role in the preparation of this print edition: Talia Bromberg, Ciara Chow, Calla Li, Katya Pollock, Scott Shepetin, and Sean Volke.

Since the publication of our last edition, we have hosted three campus-wide events that drew students interested in a variety of law and policy issues. First, we hosted UCLA Law School Professor Beth Colgan, who discussed public defense, the Eighth Amendment in the context of the recent Supreme Court case *Timbs v. Indiana*, and her career as both a lawyer and law professor. We also partnered with the 5C Debate Union to present a contentious debate about Colorado's proposition to decriminalize psilocybin, a hallucinogenic drug made from mushrooms. Most recently, we invited a panel of practicing lawyers to relay their experiences in the field and share their advice with students interested in attending law school. Thank-you to our ever-enthusiastic business side members: director, Ande Troutman, and project manager, Carol Chen, who have worked to prepare events throughout the year and helped ensure the smooth running of the Journal.

I would like to also thank our faculty advisor Prof. Ken Miller, the Salvatori Center, the Atheneum, and the 5C politics, legal studies, government, and public policy departments, for their continued support. We are always grateful to all of our readers, partners, and alumni. If you enjoy reading the Journal and are interested in submitting your own work for potential publication, we encourage you to visit the "Submissions" page on our website for details. If you feel that you could be a valuable addition to our team, we invite you to visit our "Hiring" page for potential openings. For any further inquiries, please email us at info.5clpp@gmail.com.

This letter is the last I'll write as Editor-in-Chief of CJLPP. While the publication of the last annual print edition is inevitably bittersweet for graduating seniors, the Journal's future seems too bright for us to lament the year's end. Over the past few months, our organization has only seen growth. Not only has our online readership drastically increased – last year, our maximum number of views per month amounted to 2,513, whereas this year it reached 6,414 – but our members have demonstrated greater engagement and commitment to the community than I've witnessed during my three years on the Journal. Our members "like" and share one another's work online, collaborate to organize campus-wide events, and attend weekly dinners and workshops to get to know each other better and strengthen working relationships. I attribute our recently increased readership to this increasingly supportive culture. I have no doubt that, with the leadership of our next Editor-in-Chief, Isaac Cui, and Chief Operating Officers, Daisy Ni and Bryce Wachtell (who will study abroad during alternating semesters next year), the Journal will continue on this upward trajectory prompted not only by the skill and dedication of our current members, but also the foundation laid by those who preceded us. I cannot wait to see what lies in store for CJLPP.

Yours in law and policy,

Greer Levin
Editor-in-Chief

About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

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Resolution 2436: *Cleaning Red Blood Off Blue Helmets*

Sabrina Marie Vera (PO '20)

Guest Contributor

The peace-symbolizing blue helmets are tainted by the red blood of violence. Since the first peacekeeping mission in 1948, the helmets have distinguished United Nations personnel while symbolizing the U.N.'s mission to create conditions that favor long-lasting peace.¹ However, the symbol of the blue helmets has arguably lost its respectability and deviated from its intended purpose. From the cholera outbreak in Haiti, to allegations of sexual abuse perpetrated by peacekeepers, to U.N. Stabilization Mission in Haiti (MINUSTAH) peacekeepers conducting violent raids and brushing the deaths off as “collateral damage,” many have claimed that the blue helmets have lost their integrity.² In 2018, the U.N. Security Council presented a solution, Resolution 2436, which was unanimously adopted by the Council on September 21. The resolution aims to improve the behavior, leadership, and accountability of peacekeepers as well as address core issues. Through the resolution, the entire Council expressed concerns regarding allegations of sexual harassment in peacekeeping operations, China and Russia emphasized the need to improve troop performance, and Ethiopia and the United States stressed the need for more transparency.³

The question thus arises: to what extent can Resolution 2436 mitigate and solve these core accountability issues of peacekeeping? The resolution is a necessary step toward greatly mitigating the issues highlighted by Council members. The twenty points present policy-based actions such as vetting personnel, repatriating units, and developing a comprehensive performance benchmark. All propositions attempt to further three core U.N. Peacekeeping ambitions to reprimand sexual assault, improve troop performance, and increase transparency. However, a detrimental caveat to consider is the lack of enforceability of these twenty points, which stifles Resolution 2346's ability to transform and improve U.N. Peacekeeping.

I. Reprimanding Sexual Violence

At the forefront of core accountability issues facing peacekeeping are the allegations of sexual harassment in peacekeeping operations. These issues cannot be dismissed as mere allegations or simple harassment. A 2017 *New Yorker* article on the disastrous MINUSTAH explicitly described that the U.N.'s

1 Edwidge Danticat, *A New Chapter for the Disastrous United Nations Mission in Haiti?*, *NEW YORKER* (Oct. 19, 2017), <https://www.newyorker.com/news/news-desk/a-new-chapter-for-the-disastrous-united-nations-mission-in-haiti>.

2 *See id.*

3 *Security Council Stresses Need to Improve Behavior, Leadership, Accountability in Peacekeeping, Unanimously Adopting Resolution 2436 (2018)*, UNITED NATIONS (Sept. 21, 2018), <https://www.un.org/press/en/2018/sc13518.doc.htm> [hereinafter Resolution 2436 Press Release].

immunity led to women, boys, and girls “being raped . . . by MINUSTAH peacekeepers.”⁴ These peacekeepers used “sex rings, offers of food, and other methods to trap their victims.”⁵ For those who reported abuse, “their rapists were rarely punished. They were simply sent home.”⁶ In order to address this violence, the United Nations replaced MINUSTAH with the U.N. Mission for Justice Support in Haiti (MINUJUSTH), which critics considered to be a “rebranding effort” and an attempt to erase MINUSTAH's past.⁷ The United Nations can attempt to leave the dark chapter of MINUSTAH's sexual violence behind, but it is critical to remember that Haitians will suffer the consequences of the peacekeepers' actions for years to come.

Resolution 2436 contains a plethora of language emphasizing the goal of curtailing sexual violence perpetrated by peacekeepers. During the resolution meeting, the Council affirmed its support for the Secretary-General's zero-tolerance policy on all forms of sexual harassment as well as urged all troop and police-contributing countries to “meet United Nations performance standards for personnel.”⁸ Lise Van Haaren, representing the Netherlands on the Security Council, emphasized fostering a “culture change” in order to combat sexual exploitation and abuse.⁹ Within the resolution itself, point sixteen directly addresses sexual abuse and the importance of a culture change. The Security Council underscores that any form of sexual abuse is “unacceptable” and reaffirmed its support “for the U.N. zero-tolerance policy.”¹⁰ It also welcomed the Secretary-General's “victim-centered approach” to strengthen the “remediation efforts against all form of sexual misconduct.”¹¹ Most importantly, the point emphasizes that all troop- and police-contributing countries must “redouble their efforts” to take steps to “vet and train” their personnel and “conduct investigations” into any allegations.¹² Section eighteen also encourages member states to provide training on “issues related to sexual violence in conflict, trafficking, and gender expertise.”¹³ Furthermore, this section calls for member states to nominate individual personnel to act as “focal points” to see these goals through in practice.¹⁴ The text of the resolution maps out concrete ways to curtail

4 Danticat, *supra* note 1.

5 *Id.*

6 *Id.*

7 *Id.*

8 Resolution 2436 Press Release, *supra* note 3.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

sexual abuse during peacekeeping missions. On the forefront is the support of a zero-tolerance policy; however, this policy has two main weaknesses. The first weakness is that the policy is centered around General Assembly Resolution 57/306, a non-binding resolution.¹⁵ Second, a zero-tolerance policy was published in 2003, a year before the atrocities were committed by MINUSTAH soldiers in Haiti.¹⁶ This raises a question regarding the zero-tolerance policy's weight and enforceability, considering the soldiers' lack of adherence in 2003. It is unclear whether sections sixteen, seventeen, and eighteen of the resolution truly can mitigate the large issue of sexual abuse. Nevertheless, unlike the 2003 zero-tolerance policy, the 2018 Resolution is legally binding, has been adopted by all Member States, and contains three very important features: (1) it adopts a survivor-centered approach, (2) it includes a section of zero-tolerance adherence in reports to the Security Council, and (3) it urges troop-contributing countries to vet and train troops on sexual violence.

Arguably, the biggest component missing from these sections is a consideration of removing immunity from peacekeepers who are proven guilty of sexual misconduct. The complication with immunity is that the division of labor within peacekeeping results in two main kinds of immunity: functional and full immunity.¹⁷ In Haiti specifically, the peacekeepers employed were "contingent military peacekeepers" that national governments contributed to the mission.¹⁸ According to the Memorandum of Understanding (MoU), agreed upon by the troop-contributing countries (TCC) and the U.N., only a TCC can prosecute its military members for crimes committed on mission, usually only in that TCC's military justice system.¹⁹ Thus, these peacekeepers are never held accountable in their host country's jurisdiction, even for serious crimes. Unfortunately, the extent to which TCCs take action varies; some TCCs actively investigate, try, and punish their soldiers, while other TCCs "turn a blind eye."²⁰ Thus far, member states have been reluctant to pursue tougher measures and hold their soldiers accountable for committing crimes. The MoU's lack of incentive for TCCs to uphold accountability has led to immunity and impunity becoming intrinsically tied. The complex issue of immunity and impunity is arguably the core cause of another issue: inefficient performance during peacekeeping missions.

II. Improving Peacekeeper Performance

In 2017, the United Nations reported that fifty-six peacekeepers were killed during the year, marking the highest number of deaths through violence for the peacekeeping force since

1994.²¹ Brazilian Lt. Gen. Carlos Cruz, former U.N. commander in Congo and Haiti, has stated that the increase in deaths is not a spike, but rather a rise to a continuing plateau of violence against U.N. peacekeepers.²² In Mali, U.N. forces corroborated this spike in violence and claimed they found themselves increasingly involved in counterterrorism measures rather than traditional peacekeeping.²³ In December 2017, fifteen peacekeepers were killed and dozens were wounded in eastern Congo where U.N. troops were mandated to conduct armed offensive operations.²⁴ The growing instances of counterterrorism and the use of violence to keep peace has been cited as evidence that the U.N. flag "no longer offers 'natural protection' for U.N. forces."²⁵ The violence perpetrated in Haiti made clear that there are U.N. peacekeepers who exploit their immunity, perpetrate violence, and ignore the pillars of their mission.²⁶ However, Resolution 2436 contains several methods to mitigate this issue by improving troop performance, leadership, and implementing realistic mandates. Improving troop performance is at the core of keeping troops and the civilians of host countries safe.

The detailed language of the resolution's first point shows clear commitment to the cause. This point is also the most integral when considering concrete ways to improve troop performance and, by extension, their safety. The point reaffirms the Council's support for the development of a "comprehensive and integrated performance policy framework" to identify "clear standards."²⁷ With these clear standards and a "defined benchmark," the resolution aims to evaluate "all U.N. civilian and uniformed personnel, create accountability, and ensure efficiency."²⁸ Point one continues, describing how efficiency will be achieved. It calls for the "full implementation of the mandate," as well as fostering a culture of recognizing and rewarding outstanding performance from "effective training" to "proactive leadership."²⁹ Regarding overall troop performance, the comprehensive resolution also emphasizes punitive measures to mitigate underperformance. These include "transparent public reporting, withholding reimbursement, repatriating or replacing units, change of duties, and dismissal or non-renewal of contracts" for civilian personnel.³⁰ This raises a question regarding how uniformed personnel will be held accountable and reprimanded for underperforming. Undoubtedly, the resolution would benefit from an explicit framework for uniformed personnel who directly carry out mandates on the ground.

However, the vagueness of language, particularly in points eight and nine, allows for ample initiatives to increase the

15 Special Measures for Protection from Sexual Exploitation and Sexual Abuse, United Nations Secretary-General's Bulletin, SGB/2003/13 (Oct. 9, 2003), http://www.un.org/en/ga/search/view_doc.asp?symbol=ST/SGB/2003/13.

16 *Id.*

17 Kathleen Jennings, *The Immunity Dilemma: Peacekeepers' Crimes and the UN's Response*, E-INTERNATIONAL RELATIONS (Sept. 18, 2017), <https://www.e-ir.info/2017/09/18/the-immunity-dilemma-peacekeepers-crimes-and-the-uns-response/>.

18 *Id.*

19 *Id.*

20 *Id.*

21 Adam Taylor, *U.N. Troops Told to Fight Back, Use Force as Peacekeeper Deaths Surge*, WASH. POST (Jan. 23, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/01/23/u-n-troops-told-to-fight-back-use-force-as-peacekeeper-deaths-surge/?utm_term=.ad25d5ad75a6.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 Danticat, *supra* note 1.

27 Resolution 2436 Press Release, *supra* note 3.

28 *Id.*

29 *Id.*

30 *Id.*

overall performance of both civilian and uniformed personnel; these points do not specify the type of personnel when referring to U.N. peacekeeping missions. Point eight calls on the Secretary-General to ensure the missions have “capable and accountable leadership” by improving “training and mentoring” and developing a “cadre” of experienced future leaders within peacekeeping as a whole.³¹ Point nine welcomes the commitment of member states to support this very initiative through improved training, including “inter alia, pre-deployment assessments, triangular partnerships, co-deployments, and smart pledging.”³² The language of both points fosters an understanding of unity and collaboration between all participating in missions, thus holding all personnel equally accountable.

Furthermore, point thirteen notes that the Secretary-General should undertake “regular strategic reviews”—a promising step to consistent improvement due to the nature of regularly conducted reviews reported directly to the Council.³³ On the same note of consistency and regular reporting, point fourteen requests that the Secretary-General include a summary of actions taken to address various mission challenges. These challenges can range from “lapses in leadership” to “national caveats” that affect the feasibility of mandates.³⁴ Of course, the ambitious goals of the resolution must be followed in order to mitigate any core issues, let alone solve them. That leaves the lacuna of exactly how all of these goals will be materialized. The answer is language from the resolution that increases institutional transparency. Increased transparency will inform mandate design and successfully shape future peacekeeping missions by ensuring regularly-made reports are reported back to the Council to confirm that benchmarks and mission goals are met. Tracking the progress of missions is a fundamental step towards ensuring the resolution’s enforcement. Through transparent internal communication between the Council, Secretary-General, and mission leaders, the ambitions of a peacekeeping mission will not only be managed, but the implications and results of the mission will be tracked and measured for future efficiency, safety, and monitoring.

III. Fostering Transparency

General Romero Dallaire, leader of the U.N. Peacekeeping mission in Rwanda, had been increasingly aware of dangers confronting the operation in 1993.³⁵ These fears intensified in January 1994, when an informant warned that Hutu elites were planning to exterminate all Tutsis.³⁶ To transform this plan into reality, extremists stockpiled and distributed weapons, created lists for assassinations, and organized hit teams. An impending genocide was clear, and Dallaire was made aware. Dallaire’s solution was drawn from the language of the mandate itself. The mandate established a weapons-secure area, which Dallaire believed meant that the U.N.’s Assistance Mission for Rwanda (UNAMIR) was permitted to use a range of tactics including

seizing weapons. However, the U.N. Department of Peacekeeping Operation (DPKO) requested that Dallaire not seize the weapons cache.³⁷ Iqbal Riza, then Assistant Secretary-General, explained they had to adhere to the mandate given by the Security Council. DPKO assumed that the Council was “in no mood to reinterpret UNMIR’s mandate.”³⁸ Arguably, DPKO expressed its own judgement and simply anticipated a UNSC rejection, which led to the rejection of seizing weapons used to carry out genocide. If DPKO, Dallaire, and the Security Council engaged in transparent communication, rather than assumption making, a proper mandate reform could have changed the history of UNAMIR and Rwanda.³⁹

In Resolution 2436, point ten clearly addresses the necessity of transparency while also emphasizing the importance of transparent communication when drafting successful and flexible mandates. It requests that the Secretary-General act urgently to initiate Special Investigations into alleged instances of significant performance failure.⁴⁰ It also underlines the importance of improving methodology and transparency of the investigations to “facilitate further engagement and dialogue” between the United Nations, troop-contributing countries, and stakeholders.⁴¹ This transparency and subsequent dialogue will inform decisions regarding mandate design, a crucial pillar for holistic peacekeeping. Additionally, point eight details that the Secretary-General must ensure U.N. missions have capable leadership by implementing a “transparent selection process” that is based on merit, competence, and the needs of the mission. Transparency is not only important with communication between members of a mission, but also a necessity to ensure peacekeepers have altruistic intentions. As seen with the disasters in Haiti, transparency is necessary to vet personnel on the ground who interact with the people. Overall, transparency is the basis for proper communication, and the Security Council’s must improve its tactics for future mission mandates based on comprehensive and revealing reports.

Furthermore, without a transparent selection process of troops, issues like the spread of disease and abuse of the peace symbolized by the blue helmet will continue to taint the core principles of peacekeeping. As aforementioned, transparency is at the center of informing mandates. In point six of the resolution, the Security Council stresses the importance of continued and further engagement by senior mission leadership. This should ensure that all mission components and all levels of the chain of command are properly informed, trained, and involved in peacekeeping’s main mandate to protect civilians.⁴² This point is imperative in establishing clear communication along the chain of command and creating transparency regarding information on civilian-protection mandates. Furthermore, these two points are vital to contemporary peacekeeping objectives and the UN’s principles of impartiality and non-use of force because they emphasize communication as the first course of

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 140 (2004).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 Resolution 2436 Press Release, *supra* note 3.

41 *Id.*

42 *Id.*

action.⁴³ Communication-focused mandates are key to peacekeeping, as shown by missions in Somalia, Bosnia, and Rwanda.⁴⁴ All three missions were ambitiously mandated and under-resourced. Peacekeepers were unable to coerce unwilling belligerents into a ceasefire, and history has revealed a lack of communication about reinterpreting the mandates. In this resolution, the UNSC demands transparency and dialogue regarding the mandates on all levels of the mission leadership—from the Secretary-General down to civilian and uniformed troops. One could argue that the minor references to transparency are simply not enough. The resolution would undoubtedly benefit from an added point similar to that of point one, which establishes a specific policy-centered framework to ensure accountability beyond determining whether a mission mandate is followed. This same language should be applied to transparent reporting, investigating, and communications while also assigning responsibilities of reporting to specific individuals, in the same way point eighteen establishes for the nomination of “focal points.”⁴⁵ A transparent approach to peacekeeping will strengthen the success of future missions, but none of the resolution’s goals will ever come to fruition without the devotion of those involved in peacekeeping missions

IV. Conclusion

Overall, Resolution 2436 presents tangible solutions to three main issues in peacekeeping: accountability of the troops, performance efficiency, and mission transparency. There are many issues that unmentioned, however—one of the largest is the feasibility of troops carrying out the promising goals in the resolution. The Trump administration has already announced its intent to cut American contributions to U.N. peacekeeping from 28.5 percent to 25 percent.⁴⁶ With regard to other countries, there is no way of predicting the extent to which they will uphold the resolution’s mission. China devotes the second-most troops, but it could follow the United States’ trend of trimming monetary contributions. The points being implemented are all highly contingent on the commitment of Security Council members, which is emphasized by the language of the resolution itself. Point two recognizes that effective implementation of peacekeeping is the responsibility of all stakeholders and is contingent on the political will of all members. Regardless of what has been specifically recognized, there will be no progress if the leaders who approved this resolution are not fully committed to carrying out its goals in practice. Unfortunately, the resolution and its language alone are not enough to rid the blue helmets of blood stains. However, if member states are committed, the detail, specificity, and policy-rooted solutions presented by this resolution will be imperative to restoring the blue helmets as symbols of peace.

43 *Id.*

44 See generally Jan Nederveen Pieterse, *Sociology of Humanitarian Intervention: Bosnia, Rwanda and Somalia Compared*, 18 INT’L POL. SCI. REV. 71 (1997).

45 *Our Performance Framework*, UNITED NATIONS DEP’T OF OPERATIONAL SUPPORT, <https://operationalsupport.un.org/en/performance-framework> (last visited Apr. 22, 2019).

46 Colum Lynch, *Trump Administration: \$1 Billion in Cuts to Peacekeeping*, FOREIGN POLICY (Mar. 23, 2017), <https://foreignpolicy.com/2017/03/23/trump-administration-eyes-1-billion-in-cuts-to-u-n-peacekeeping/>.

Should the United States Abolish the Right to Trial by Jury?

Clare Burgess (CMC '21)
Staff Writer

The right to trial by jury is one of the most explicit rights mentioned in the United States Constitution. Article III, Section 2 of the U.S. Constitution states that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”¹ Furthermore, the Sixth and Seventh Amendment of the Constitution address the concept of trial by jury. The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”² Similarly, the Seventh Amendment addresses trial by jury in civil cases. It says, “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”³ Given its extensive constitutional backing, the right to trial by jury is not often questioned. Beyond its obvious constitutionality, trial by jury has many other benefits: it promotes citizen involvement in government, is intended to promote freedom and justice, and lends legitimacy to the court system. Juries, however, are comprised of inherently flawed humans, and thus, are vulnerable to mistakes. The justice system is flawed. Would abolishing juries fix the problem?

I. History

In order to understand the modern purpose of trial by jury, it is imperative to investigate its historical purpose. Trial by jury is not an institution of America’s making. In fact, it can be traced back to Ancient Egypt.⁴ More recently, it was implemented by the Magna Carta in 1215, which reads, “No man shall be taken, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”⁵ Although this right faced a tumultuous history, with its disintegration in the sixteenth century in Great Britain and its reemergence only one hundred years later, the right to trial by jury has been a constant practice in the United States.

The right to trial by jury played a role in the decision to fight for independence from Great Britain. Great Britain attempted to restrict the use of trial by jury in order to maintain its power over its colonies.⁶ A trial by jury would disempower the colonial government because the colonized jurors would be sympathetic to

their fellow Americans. However, this action sparked great backlash, as revolutionaries often cited the limitation of trial by jury as a grievance against Great Britain.⁷ This historical institution was once perceived as a symbol of freedom and democracy; however, its history does not determine its present nor its future. Many argue that the trial by jury has progressed into an autocratic and unfairly biased system.⁸

II. Issues Facing the Jury System

The jury trial faces many criticisms: jury nullification, fairness, unanimity, bias. Jury nullification is when a jury returns a “not guilty” verdict despite clear evidence to the contrary.⁹ Fairness of a trial is jeopardized by possible media bias. Juries can often be influenced by media stories. For example, in the trial of O.J. Simpson, attorneys found it difficult to find jurors who had not seen the news coverage of him being chased by the police.¹⁰ Some question whether infamous crimes should be tried in the jurisdiction where the crime was committed due to the inherent bias of those residing in the area.¹¹

Another issue facing the jury system is the introduction of expert testimony. The use of expert testimony has been shown to significantly sway jurors in certain situations, especially when experts’ testimony “applies general theory and empirical findings to the case at hand.”¹² Research has shown that psychological expert testimony is extremely effective in (1) refuting eyewitness testimony; (2) discussing clinical syndromes, such as battered wife syndrome or repressed memory syndrome; (3) establishing insanity; and (4) estimating the future dangerousness of a defendant.¹³ Psychological expert testimony proves problematic because it is often a subjective opinion, such as a prediction of a defendant’s future violence or their insanity.

7 *Id.*

8 *See, e.g.*, Adam Benforado, *Reasonable Doubts About the Jury System*, ATLANTIC (June 16, 2015) <https://www.theatlantic.com/politics/archive/2015/06/how-bias-shapes-juries/395957/>.

9 *Future Prospects of the Jury System*, U.S. LEGAL, <https://courts.uslegal.com/jury-system/future-prospects-of-the-jury-system/> (last visited Apr. 22, 2019).

10 *Impartial Juries: Do They Really Exist?*, PENN. STATE UNIV. PSYCH 424 BLOG (Mar. 7, 2014), <https://sites.psu.edu/aspsy/2014/03/07/impartial-juries-do-they-really-exist/> (last visited Apr. 22, 2019).

11 *Future Prospects of the Jury System*, *supra* note 9.

12 DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 131 (New York University Press 2012).

13 Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL., PUB. POL’Y & L. 267, 274 (2001).

1 U.S. CONST. art. 3., § 2, cl. 3.

2 U.S. CONST. amend. VI.

3 U.S. CONST. amend. VII.

4 *History of Trial By Jury*, WEST VIRGINIA ASS’N FOR JUSTICE, <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury> (last visited Apr. 22, 2019).

5 *Id.*

6 *Id.*

Lastly, racial bias plagues the jury system. In the entirety of the criminal justice system, minorities experience a higher level of scrutiny and discrimination than white Americans. For example, one study of Oakland, California found that “60% of police stops were of African Americans, though they only make up 28% of the population in Oakland.”¹⁴ Furthermore, African Americans are “imprisoned at more than 5 times the rate of whites,”¹⁵ despite making up only 13.4% of the American population.¹⁶ The criminal justice system has obvious racial disparities; however, these disparities are exacerbated through the jury system. For example, peremptory challenges, which allow prosecutors to remove jurors without explanation, act as a vehicle for racial bias. According to one study, “prosecutors remove 20 percent of African Americans available in the jury pool, compared with about 10 percent of whites.”¹⁷ Although racism in peremptory challenges has legally been prohibited by the Supreme Court in *Batson v. Kentucky*,¹⁸ enforcing this ruling has proven impossible. Therefore, racism through peremptory challenges can persist. The profile of the jury has a large effect on the outcome of cases. So despite African Americans making up a large percentage of the criminal justice system, they are rarely represented in a jury.

III. Juries in Civil Cases

The Seventh Amendment is the legal basis for federal civil trials decided by a jury. Firstly, the Seventh Amendment declares that civil trials regarding “common law” and exceeding twenty dollars shall be decided by a jury. Secondly, the Seventh Amendment protects the factual findings of juries. No facts can be “re-examined” by any court. While the Seventh Amendment only guarantees juries for federal cases,¹⁹ many states protect the right to a trial by jury for civil cases in their state constitutions.

The argument against juries in civil cases is primarily practical. Patents, for example, are becoming increasingly difficult to describe to a jury that is uneducated in the technical subjects of engineering and law.²⁰ Although the decisions by juries and judges are often the same, juries “tend to decide whole cases,” despite the presence of separate issues.²¹ The fear is that juries make decisions based on unrelated or arbitrary factors. There

14 Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS IN PSYCHOL. SCI. 183 (2018).

15 Eli Hager, *A Mass Incarceration Mystery*, MARSHALL PROJECT (Dec. 15, 2017), www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery.

16 Census Bureau QuickFacts, U.S. CENSUS BUREAU, www.census.gov/quickfacts/fact/table/US/PST045218 (last visited Apr. 22, 2019).

17 Ronald Wright, Yes, *Jury Selection Is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html.

18 *Batson v. Kentucky*, 476 U.S. 79 (1986).

19 Renee Lettow Lerner & Suja A. Thomas, *Amendment VII: Jury Trials in Civil Lawsuits*, NAT'L CONSTITUTION CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-vii> (last visited Apr. 22, 2019).

20 Kimberly A. Moore, *Judges, Juries, and Patent Cases—an Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 365 (2000).

21 *Id.* at 368.

are several trends that jury trials present more so than a judge trial. For example, juries tend to favor the inventor or patentee. In a 1999 study, a group of legal scholars studied over fourteen hundred patent cases compiled by the Administrative Office of the United States Courts to determine that juries tend to favor the patentee sixty-eight percent of the time, while judges only favor the patentee fifty-one percent of the time.²² Additionally, juries tend to award large damages, but not as large as widely thought. However, the lower-than-expected discrepancy between damages awarded by a judge and jury might be due to the fact that parties in fear of large jury awards probably settle outside of court.²³ The difference between jury and bench trials, however, does not necessarily indicate an unfair jury. In fact, it proves the deep consideration juries have for justice. They want to ensure that hard-working Americans with unique ideas are justly protected in a corporate world dominated by greed.

Many opponents of the civil jury criticize its the high cost and time-consuming nature of these jury trials. According to Edward J. Devitt, a retired federal judge, decreasing the use of jury trials in civil federal cases would decrease the caseload of busy judges, reduce the backlog of cases, and lead to a more efficient administration of justice.²⁴ Juries do not participate in a variety of federal issues, including maritime issues, immigration and naturalization cases, bankruptcy cases, equity, admiralty, and habeas corpus decisions.²⁵ As Devitt views it, judges are likely more qualified than juries to determine the outcome of federal civil cases based in legal statutes and precedents. Juries in civil cases cannot keep up with the rapid inflow of cases; their slow decisions “cause court congestion as well as a waste of time for citizens called to jury duty.”²⁶ When framed this way, the issue of jury abolition depends on a cost-benefit analysis. In the federal system, jurors are paid fifty dollars per day but can receive up to sixty per day if the trial persists long enough.²⁷ However, the payment of juries is not the only cost. Many defendants have incurred higher costs due to rising court fees and fines.²⁸ The right to a jury trial has allowed some state courts to require additional fees to pay for the high cost of juries.

Jury trials result in higher costs for the government and for both parties involved. Juries are often unaware of the complexities in complicated legal cases, such as patents. Furthermore, juries tend to provide similar results to judge trials. So, why do we continue to waste people's time and cost all parties involved, including the taxpayer, more money?

IV. Juries in Criminal Cases

The argument against juries in criminal cases is more uncom-

22 *Id.* at 386.

23 *Id.* at 395.

24 Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 AM. BAR ASS'N J. 570, 570 (1974).

25 *Id.*

26 *Id.* at 571.

27 *Juror Pay*, U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Apr. 22, 2019).

28 Stephanie E. Levin, *Chilling the Right to a Jury Trial: the Unconstitutionality of Jury Costs* (2017) (B.A. thesis, College of William and Mary), <https://scholarworks.wm.edu/honorstheses/1021>.

mon than that in civil cases. However, there have been rising accusations of bias and inadequacy among juries. For example, the selection of the jury has been criticized for its unconstitutionality. Jury selection consists of three parts: the creation, the summoning, and the questioning.²⁹ Firstly, a list of eligible jurors is created by the court. People under eighteen, non-U.S. citizens, and most felons are unable to serve on a jury. Secondly, the court randomly selects jurors from its list. Thirdly, the potential jurors are questioned by the judge and often by the attorneys themselves. The prosecution and the defense may dismiss jurors without providing an explanation. Often jurors are dismissed if they seem biased towards a certain side. However, the prosecution and defense sometimes hire jury selection experts to cultivate a jury that will be most empathetic to their case. This aspect of questioning and dismissing jurors is often criticized for potentially facilitating unconstitutional motives, for it allows both parties to discriminate and profile the potential jurors. The jury was created with the intent to prevent governmental overreach via the judge and the prosecution. However, the prosecution has the ability to “select the very jury that is supposed to serve as a check against its power.”³⁰

Not only is the jury potentially unfairly selected, but jurors are also unable to comprehend certain psychological phenomena present during a criminal trial. According to the Innocence Project, over twenty-five percent of exonerated convicts had made a false confession.³¹ This high rate proves that confessions, though falsified, are highly persuasive to juries.³² In one psychological study of false confessions, eighty-one percent of innocent people who had falsely confessed to a crime were found guilty by a jury.³³ Although false confessions are an extremely real psychological phenomenon, juries cannot fathom what prompts a person to confess to a crime they did not commit. Juries are fallible, and they often provide unjust outcomes in criminal cases.

V. Benefits of Juries

The United States was founded on a general principle of democracy. For ordinary citizens, “jury duty is the most significant opportunity to participate in the democratic process.”³⁴ The ability to serve on a jury is a political right that is not afforded to most citizens of other countries. Jury duty is the most fundamental way that American citizens can check governmental power.³⁵ Conversely, the ability to be judged by a jury is also a unique opportunity. Instead of being convicted based on

a unitary opinion, defendants often can only be convicted by a unanimous decision of the jury. This forces the justice system to be prudent and certain about convictions. The jury preserves democracy and the essential doctrine of “innocent until proven guilty.” These benefits of a jury trial define our American democracy and the American definition of fairness.

VI. Conclusion

Although juries are oftentimes flawed, their benefits seem to outweigh their costs. While the jury in certain civil cases may seem unnecessary, the jury trial should not be entirely abolished. Many people have suggested reforms to the jury system without entirely abolishing the institution. For example, Malcolm Gladwell suggests putting defendants in a separate room to answer questions to avoid racial bias from jurors.³⁶ Furthermore, the jury promotes justice and inhibits unilateral government control. However, there are other aspects of the criminal justice system which hinder justice. Mandatory minimum sentences have expanded prosecutorial discretion and have created an incentive for guilty plea bargains as opposed to trials by jury.³⁷ Judges are experiencing fewer and fewer criminal jury trials every year. The number of criminal jury trials in 2016 was less than half that in 2005.³⁸ This indicates less access to justice. So while the public often views juries as barriers to justice,³⁹ they are actually synonymous with justice. Defendants are not criminals until they get their day in court.

29 Audrey Cleary, *Scientific Jury Selection: History, Practice, Controversy*, 28 VILLANOVA UNIV. CONCEPT 1, 4 (2005).

30 Brittany L. Deitch, *The Unconstitutionality of Criminal Jury Selection*, 26 WM. & MARY BILL RTS. J. 1059, 1059 (2018).

31 *False Confessions and Recordings of Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/false-confessions-admissions/> (last visited Apr. 22, 2019).

32 Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI 249, 249 (2008).

33 *Id.*

34 Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 843 (2014) (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

35 *Id.*

36 Joe Windish, *Malcolm Gladwell on Juries and Race*, THE MODERATE VOICE (Oct. 6, 2008), themoderatevoice.com/malcolm-gladwell-on-juries-and-race/.

37 Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html>.

38 *Id.*

39 Kenneth S. Klein, *Truth and Legitimacy (in Courts)*, 48 LOY. U. CHI. L.J. 1 (2016).

Puerto Rico and the Path to Statehood

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Puerto Rico has suffered from its territorial status for decades. However, in recent years, Puerto Rico's lack of statehood received increased attention due to the island's debt crisis¹ and Hurricane Maria.² Between September 2017, when Hurricane Maria hit Puerto Rico, and December 2018, 130,000 people have fled for the mainland.³ This exodus is part of a larger trend. The U.S. Census Bureau has reported over 530,000 Puerto Rican residents emigrating from the island since 2010.⁴ With little support from the United States government, Puerto Rico continues to feel the impact of a deteriorating economic situation compounded by natural disaster.⁵ In light of these crises, it has become clear that change is necessary. I argue that advocates for Puerto Rico should seek statehood, which is popular among Puerto Ricans and would give them full constitutional protections. But the territory cannot expect congressional action, and thus I suggest the Supreme Court should revisit and overrule its previous decisions in the *Insular Cases*, a set of early twentieth-century decisions in which the Supreme Court limited the scope of constitutional protections for Puerto Ricans. This would help address Puerto Rico's aforementioned legal and economic woes because Congress would no longer have legal grounds to neglect the island as a territory, and instead would be pushed by political necessity to address the crises, thus rightfully improving the livelihoods of Puerto Ricans.

I. Supreme Court Precedent for Inferior Treatment of Puerto Ricans

The mistreatment of Puerto Rico is grounded in the imperialist attitudes of the Supreme Court throughout the twentieth

1 Robert Rosenkranz, *The Puerto Rico Debt Crisis, Explained*, HUFFINGTON POST (July 27, 2016), <https://www.huffingtonpost.com/robert-rosenkranz/the-puerto-rico-debt-cris-b-7880796.html>; *Puerto Rico Debt Crisis: How Did We Get Here?*, BBC NEWS (Jan. 21, 2016), <https://www.bbc.com/news/world-us-canada-35368786>.

2 Laura Sullivan, *How Puerto Rico's Debt Created A Perfect Storm Before The Storm*, NPR (May 2, 2018), <https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm>; Bill Weir, *How the US turned Hurricane Maria from a natural disaster to a man-made catastrophe*, CNN (Sept. 21, 2018), <https://www.cnn.com/2018/09/21/us/puerto-rico-hurricane-maria-natural-disaster-human-catastrophe-weir/index.html>; Amanda Holpuch, *Hurricane Maria: Puerto Rico raises official death toll from 64 to 2,975*, GUARDIAN (Aug. 28, 2018), <https://www.theguardian.com/world/2018/aug/28/hurricane-maria-new-death-toll-estimate-is-close-to-3000>.

3 John D. Sutter, *130,000 Left Puerto Rico After Hurricane Maria, Census Bureau Says*, CNN (Dec. 19, 2018), <https://www.cnn.com/2018/12/19/health/sutter-puerto-rico-census-update/index.html>.

4 *Id.*

5 Sullivan, *supra* note 2.

eth century. Since the acquisition of Puerto Rico following the Spanish-American War, the United States has repeatedly denied Puerto Ricans fundamental rights. Though *Dred Scott v. Sandford* affirmed that legally-sanctioned racism was permissible in denying the citizenship and related constitutional rights of African descendants,⁶ the 1901 case *Downes v. Bidwell* extended the logic of *Dred Scott* to target Puerto Ricans as well. In *Bidwell*, a majority of the Court argued that the people of Puerto Rico were not necessarily protected under the Constitution due to their racial and cultural differences:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people and from differences of soil, climate, and production which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.⁷

The Court proposed that race can determine Congress' authority over someone's rights and may require Congress to legally undertake actions such as to "deprive such territory of representative government if it is considered just to do so."⁸ The majority reiterated this prejudiced sentiment against Puerto Ricans later in the opinion:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice according to Anglo-Saxon principles may for a time be impossible, and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.⁹

The Court justified a temporary denial of constitutional rights to Puerto Ricans on the basis of differing cultures, implying an inherently insufficient capacity of Puerto Ricans to comply with what the Court indicated to be a uniquely Anglo-Saxon system.

The decision to withhold the constitutional rights of Puerto Ricans derives from racist influences apparent in American history. Juan R. Torruella, a judge on the First Circuit Court of Appeals, draws attention to the nature of the Supreme Court during the era of the *Insular Cases*, the collection of cases in the

6 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857).

7 *Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

8 *Id.* at 245.

9 *Id.* at 287.

first half of the twentieth century that defined the bounds of Puerto Ricans' constitutional rights. He condemns America's treatment of Puerto Rico:

[O]f crucial importance in understanding the Court's aberrant action, the judicial composition of the Supreme Court at that crossroad in the constitutional history of Puerto Rico was, almost to a man, the same as that of the Court that decided *Plessy v. Ferguson* in 1896, establishing the "separate but equal" doctrine for people of color

.....¹⁰

Bidwell's classification of Puerto Rico as a territory unprotected by the Constitution was rooted in imperialist biases that subjugate people due to race. The series of *Insular Cases* that followed *Bidwell* defined Puerto Rico's status as an acquired but unincorporated territory, ensuring that the rights of its citizens were deprived. The Supreme Court ruled that Congress had the discretion to choose which constitutional rights to grant Puerto Ricans, leaving Puerto Rico subject to the will and whim of Congress.¹¹ In *Dooley v. United States*, Justice Brown's majority opinion reaffirmed this: "There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the states."¹² As a result, Puerto Ricans had little autonomy, and Congress held ultimate power over the territory's fate as long as its status remained the same.

In the 1903 case *Hawaii v. Mankichi*,¹³ the Court established that the Fifth and Sixth Amendments did not apply to a Hawaiian resident who committed a crime during the time between the annexation of Hawaii and the granting of citizenship. Due to cases like *Mankichi*, Puerto Ricans concluded that the key to gaining constitutional protection was to become American citizens.¹⁴ To their surprise, however, citizenship did not improve the issue of constitutional protection. In 1917, President Wilson signed into law the Jones-Shafroth Act, which established a civil government in Puerto Rico and granted American citizenship to Puerto Ricans.¹⁵ Despite the expectation set by legal precedent, America continued to deny the constitutional rights of Puerto Ricans, as demonstrated by the 1922 *Balzac v. Porto Rico* decision. Chief Justice Taft reasoned in his opinion for the Court:

In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in

such matters as judicial procedure, and not the status of the people who live in it.¹⁶

Taft's locality argument contradicted the holdings of cases such as *Mankichi* and *Rasmussen*, which also discussed issues of citizenship in territories geographically distant from mainland United States yet did not raise questions of locality. One could speculate about Taft's potentially derogatory insinuations regarding Puerto Rico's locality as inferior; regardless of his intent, however, the impact is clear. Despite being largely unsubstantiated by precedent, *Balzac* perpetuated Puerto Rico's constitutionally unprotected status even though the United States had conferred the people citizenship. Puerto Ricans were peculiarly deemed citizens without constitutional rights due to the island's unincorporated territorial status and the *Insular Cases*. Without statehood or any form of court-mandated constitutional protection, Puerto Ricans remained essentially colonized by America.

II. Absence of Congressional Accountability for Legislation Regarding Puerto Rico

With legal permission set by the Court to withhold constitutional rights from Puerto Ricans at will, Congress has passed legislation that relegates Puerto Ricans to second-class citizenship for over a century. Among other rights, the *Insular Cases* affirmed the legitimacy of Puerto Rico's lack of representation and voting power in Washington; the consequences of this became apparent when Congress passed the 1920 Merchant Marine Act, also known as the Jones Act. The Jones Act was one of the earliest acts to negatively impact Puerto Rico's economy and continues to do so today. It states that "a [non-U.S.] vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port[.]"¹⁷ The Jones Act includes Puerto Rico as part of the United States despite rejecting the island's people as part of the nation. As a result of this policy, foreign shipments are expensive for Puerto Rico, burdening the island economy that is dependent on marine shipments both for imports of intermediate production goods and exports.¹⁸ The Jones Act vastly limits the capacity of the Puerto Rican economy by restricting shipping options to only American ships.¹⁹ Since Puerto Rico is not a state, Puerto Ricans have no voting representation or other concrete means of expressing their discontent with the Jones Act, and the *Insular Cases* allow Congress to legislate for Puerto Rico however it deems fit. Thus, the Puerto Rican economy suffers the consequences of American legislation without the power to resist it.

The consequences of Congress' actions were recently highlighted by Puerto Rico's debt crisis, which emphasized the need for

10 Juan R. Torruella, *To Be or Not to Be: Puerto Ricans and Their Illusory U.S. Citizenship*, 29 *CENTRO J.* 108, 114 (Apr. 1, 2017).

11 *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Goetze v. United States* 182 U.S. 221 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901).

12 *Dooley v. United States*, 183 U.S. 151, 157 (1901).

13 *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

14 Torruella, *supra* note 10, at 115-16. *Cf.* *Rasmussen v. United States*, 197 U.S. 516 (1905) (upholding constitutional rights for Alaskan residents on the grounds that the acquisition treaty granted citizenship).

15 Jones-Shafroth Act, 64 Pub. L. 368, 39 Stat. 951 (1917).

16 *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922).

17 Merchant Marine Act, 46 U.S.C.A. § 55102(b) (Westlaw through P.L. 116-5).

18 Will Frankel, *Jonesing for Shipping Reform: The Merchant Marine Act in the 21st Century*, 5 *CLAREMONT J.L. & PUB. POL'Y* 22, 22 (2018).

19 RUSS KASHIAN, JEFF PAGEL & IKE BRANNON, THE JONES ACT IN PERSPECTIVE: A SURVEY OF COSTS AND EFFECTS OF THE 1920 MERCHANT MARINE ACT 11-13, GRASSROOT INST. OF HAWAII (2017), <http://assets.grassrootinstitute.org/wp-content/uploads/2017/04/Jones-Act-Final-4-8-17.pdf>.

increased protection for Puerto Rico from the federal government through paths such as statehood. A weak economy is not new for Puerto Rico; as an American territory, it must comply with regulations such as the federal minimum wage, which potentially reduce its competitiveness in the labor market,²⁰ and the Jones Act as discussed previously. However, the situation worsened in 2006 when the exemption from federal income tax on local profits expired, and the recession and debt crisis ensued.²¹ As it became clear that Puerto Rico was teetering on the edge of bankruptcy, the territory faced a legal obstacle. Whereas a state can file for bankruptcy with the federal government, the Bankruptcy Amendments and Federal Judgeship Act,²² enacted in 1984, makes territories like Puerto Rico ineligible to file for bankruptcy with the United States government. This decision is supported by *Harris v. Rosario*, which held that Congress is entitled to treat territories differently than states;²³ had Puerto Rico been a state, this issue would not have arisen. Judge Torruella condemned Congress for this prohibition:

Puerto Rico was suddenly and inexplicably barred from authorizing its municipalities as debtors under Chapter 9, depriving Puerto Rico of the means to resolve its debts in an orderly fashion This unexplained fit of congressional fancy has had devastating consequences for Puerto Rico, which faces a recession in full-blown progress as well as an unprecedented debt crisis, both largely attributable to Congress.²⁴

The island's non-statehood and the compounding effects of congressional decisions concerning Puerto Rico made without voting representation enabled this outcome. Though Puerto Rico and the United States collaborated to enact a plan to manage the debt,²⁵ the island remains economically weak and burdened by insurmountable debt as a result of these conditions.

Congress again failed Puerto Rico in the aftermath of Hurricane Maria, demonstrating its unwillingness to respond to the island's needs. During the crisis, President Trump instituted a ten-day waiver of the Jones Act so Puerto Ricans could receive more supplies, such as gas, from foreign ships. However, the White House denied requests for an extended one-year waiver and other forms of aid, arguing that such measures were not necessary to humanitarian relief.²⁶ But Puerto Rico

indeed needed more aid; one thousand households in Puerto Rico did not have electricity for ten months after Hurricane Maria, and the extraordinarily high gas prices resulting from the Jones Act made maintaining generators too costly for many families.²⁷ Furthermore, a report by the Milken Institute School of Public Health at George Washington University estimated that Puerto Rico suffered 2,975 excess deaths in the aftermath beyond the direct impact of the hurricane as a result of horrific conditions.²⁸ On the one-year anniversary of Maria, Governor Ricardo Rosselló pushed Congress and the White House to reevaluate the way they treat Puerto Rican citizens: "The ongoing and historic inequalities resulting from Puerto Rico's territorial status have been exacerbated by a series of decisions by the federal government that have slowed our post-disaster recovery, compared to what has happened in other jurisdictions stateside."²⁹ However, as noted before, there are two critical differences between the stateside jurisdictions to which the Governor refers and Puerto Rico. First, *Harris* and its predecessors, the *Insular Cases*, directly permit Congress to maintain absolute power over Puerto Rican-American citizens. Second, citizens in states have the power to elect representatives in Congress and the President, therefore motivating hurricane aftermath responses from the federal government. Thus, Puerto Rico receives only a fraction of the federal support extended to its mainland counterparts. In the aftermath of Hurricane Maria, the failure of the legislative and executive branches to properly support Puerto Rico's recovery once again emphasized the United States government's legally sanctioned disregard for and mistreatment of the territory as a result of the *Insular Cases*, which sanctioned the withholding of constitutional rights such as the right to vote from Puerto Ricans.

It should be no surprise that Congress has shown little interest in admitting Puerto Rico into the Union as a state, even though statehood is the most obvious means of achieving constitutional protection. The addition of Puerto Rico as a state would wreak havoc on the status quo of Washington. The current Resident Commissioner of Puerto Rico, Jenniffer González-Colón, who functions as a non-voting member of the House of Representatives, proposed legislation in June 2018 to grant Puerto Rico statehood.³⁰ However, this bill did not gain much traction in the then-Republican-dominated House because the admission of Puerto Rico as a state would shift the national political landscape by adding more Democratic votes into

20 Patrick Holland, *Help Puerto Rico by Repealing the Jones Act*, ECONOMICS21 (July 15, 2015), <https://economics21.org/html/help-puerto-rico-repealing-jones-act-1403.html>.

21 *Neither A State Nor Independent*, ECONOMIST (July 5, 2014), <https://www.economist.com/united-states/2014/07/05/neither-a-state-nor-independent>.

22 Bankruptcy Amendments and Federal Judgeship Act of 1981, 98 Pub. L. No. 353, 98 Stat. 333, 342 (July 10, 1984); see also 11 U.S.C.A. § 101(52) ("The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.") (Westlaw through P.L. 116-5).

23 *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980).

24 Torruella, *supra* note 10, at 121.

25 Stephen A. Nuño, *Congress Passes PROMESA Act for Puerto Rico Debt Crisis*, NBC NEWS (June 29, 2016), <https://www.nbcnews.com/news/latino/congress-passes-promesa-act-puerto-rico-debt-crisis-n601291>.

26 Niraj Chokshi, *Would Repealing the Jones Act Help Puerto Rico?*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/jones-act-puerto-rico.html>.

27 Oliver Laughland, *Ten Months Without Power: The Puerto Ricans Still Without Electricity*, GUARDIAN (Aug. 8, 2018), <https://www.theguardian.com/world/2018/aug/08/puerto-rico-hurricane-maria-electricity-ten-months>.

28 MILKEN INST. SCH. OF PUB. HEALTH, ASCERTAINMENT OF THE ESTIMATED EXCESS MORTALITY FROM HURRICANE MARÍA IN PUERTO RICO AT III, GEORGE WASHINGTON UNIV. (Aug. 28, 2018), <https://publichealth.gwu.edu/sites/default/files/downloads/projects/PRstudy/Acertainment%20of%20the%20Estimated%20Excess%20Mortality%20from%20Hurricane%20Maria%20in%20Puerto%20Rico.pdf>; John Wagner, *Puerto Rico's Governor Ramps Up Push for Statehood on Anniversary of Maria*, WASH. POST (Sept. 20, 2018), https://wapo.st/2DfVSSl?tid=ss_tw&utm_term=.354c0073df8c.

29 Wagner, *supra* note 28.

30 Puerto Rico Admission Act of 2018, H.R. 6246, 115 Cong. (2d Sess. 2018).

the electoral college and potentially increasing the number of Democratic seats in the Senate.³¹ Despite the new Democratic advantage in the House, congressional action remains unlikely given the Republican-dominated Senate and the general upheaval and uncertainty that Puerto Rican statehood would cause in Washington. Furthermore, incorporating Puerto Rico could force Congress to increase spending for the island and thus redirect funds away from politically advantageous issues for which members of Congress may strategically seek funding—Democrats appeared to demonstrate support for Puerto Rico recently; however, their support was markedly unrelated to the greater issue of political rights. In December 2018, Democratic lawmakers wrote a letter to the Financial Oversight and Management Board for Puerto Rico pushing for change in the territory's financial proceedings regarding debt. Additionally, Rep. Raúl M. Grijalva of Arizona vowed to utilize the incoming Democratic majority in the House to support Puerto Rico via his position on the House Natural Resources Committee, which handles Puerto Rican affairs related to the debt crisis, by declaring, "It's our responsibility as a committee — now as a majority — to treat the citizens of Puerto Rico as coequals."³² Despite their appearance of support, it is likely that Democrats will provide an economic solution as opposed to a politically promising one. Andrés L. Córdova, a law professor at the Inter American University of Puerto Rico, responded to the Democrats' statements in an opinion piece, writing, "Grijalva is repackaging the spent argument made by the pro-territorial Popular Democratic Party (PPD) and its allies, which claims that the political status of Puerto Rico not need to be tackled by Congress. As it should be clear to all by now, not addressing the issue is a backhand way of addressing the issue."³³ The shift to a Democratic House may impact the territory's temporary economic management but signifies little in terms of constitutional protection for Puerto Ricans and statehood.³⁴ Puerto Rico cannot expect change in Congress' historically blatant disregard for the territory and must look elsewhere for constitutional protection.

III. Turning to the Courts

Puerto Rico must continue to pursue equal treatment through the courts. There is precedent for the Supreme Court reversing decisions, especially those built on prejudice in a previous era. After discussing the evidence of the inherent injustice and psychological impacts of segregated schools, Chief Justice Warren wrote in *Brown v. Board of Education* for a unanimous Court: "Whatever may have been the extent of the psychological knowledge at the time of *Plessy v. Ferguson*, this finding is

amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."³⁵ Similarly in 1967, *Loving v. Virginia* determined that anti-miscegenation laws are inherently white supremacist and thus contradict the Fourteenth Amendment.³⁶ This decision overturned the 1883 *Pace v. Alabama* decision which had reaffirmed the legality of an Alabama law that prohibited sexual relations between white and black people due to the fact that the punishment for the crime was equal for offenders of any race.³⁷ When subjected to review in 1954 and 1967 respectively, the racist grounds of *Plessy* and *Pace* were no longer tolerated enough to uphold "separate but equal" sentiments; thus, their holdings were rejected. Like *Plessy* and *Pace*, the *Insular Cases* are based in racism from a time in history where such imperialist attitudes were tolerable.

Though America is not rid of its historical prejudices, the discriminatory nature of the *Insular Cases* is too blatant to withstand modern review. The Supreme Court has even begun to appeal to the changing times regarding Puerto Rico. In 2008, Justice Kennedy wrote for the majority in *Boumediene v. Bush*, "It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."³⁸ Overturning the *Insular Cases* would grant Puerto Rico full constitutional protection and prevent Congress from carelessly manipulating Puerto Ricans' rights and funding. Jose S. Dela Cruz, former Chief Justice of Commonwealth of the Northern Mariana Islands Supreme Court, wrote in 2016,

It is long overdue for Congress to turn its attention to the *Insular Cases* Doctrine and propose a constitutional amendment to correct the unfairness in its treatment of territorial citizens . . . Congress might wish to start off by enacting federal legislation that declares that Puerto Rico and the other U.S. territories are now incorporated territories immediately.³⁹

I agree with his sentiment that confronting the *Insular Cases* and some form of state-like incorporation for the territory must be the initial steps in improving conditions in Puerto Rico. However, advocates must be cautious of the difference between demanding action from Congress regarding the *Insular Cases* and figuratively begging for crumbs off the congressional table, as well as recognize the limits of expecting anything from Congress. For instance, Erica González, as Acting Director of Power 4 Puerto Rico, wrote an article demanding four specific legislative changes in spending and aid to Puerto Rico;⁴⁰ this advocacy is less effective given that Congress is not incentivized nor mandated to support territories as long as the *Insular Cases* stand. Judge Torruella summarizes this dilemma succinctly:

31 Ryan Struyk, *Here's What Would Happen to U.S. Politics If Puerto Rico Became a State*, CNN (Oct. 14, 2017), <https://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html>.

32 Jeff Stein, *Democrats Pledge to Use New House Majority to Investigate Puerto Rico's Oversight Board*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/business/2018/12/07/democrats-pledge-use-new-house-majority-investigate-puerto-ricos-oversight-board/?utm_term=.bef5a373eed8.

33 Andrés L. Córdova, *New Congress, Same Issues for Puerto Rico*, HILL (Dec. 9, 2018), <https://thehill.com/opinion/campaign/420485-new-congress-same-issues-for-puerto-rico>.

34 *Id.*

35 *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954).

36 *Loving v. Virginia*, 388 U.S. 1 (1967).

37 *Pace v. Alabama*, 106 U.S. 583 (1883).

38 *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

39 Jose S. Dela Cruz, *Time for Congress to Reassess the Insular Cases Doctrine*, SAIPAN TIMES (July 16, 2018), <https://www.saipantribune.com/index.php/time-for-congress-to-reassess-the-insular-cases-doctrine/>.

40 Erica González, *The Lame Duck Congress Has Four Opportunities to Help Puerto Rico Before It Goes Home*, HILL (Dec. 7, 2018), <https://thehill.com/blogs/congress-blog/politics/420198-the-lame-duck-congress-has-four-opportunities-to-help-puerto-rico>.

It is obvious that Congress will not correct the constitutional and moral injustices created by the democratic deficit that exists in the U.S.–Puerto Rico relationship, just as it failed to do so for African Americans, thus requiring the Supreme Court to redress their festering grievances after almost a century of those grievances being tolerated. Clearly, it is up to the courts as guardians of the Constitution, and as the originators of this unequal treatment when they validated it in the *Insular Cases*, to correct this condition.⁴¹

With the consistent absence of congressional support for Puerto Rico, advocates for Puerto Rican rights may find greater opportunity for success in the judicial system.

IV. Considering Alternatives to Statehood

Some contend that Puerto Rico should abandon the pursuit of statehood as a means of receiving constitutional protection entirely due to its complexities and opt for independence. Incorporating Puerto Rico as a state has unpredictable financial consequences for both it and the United States; the U.S. Government Accountability Office could only determine that there would indeed be fiscal impacts, though “the precise nature of such changes is uncertain” and would depend heavily on the terms and strategies of admission.⁴² To avoid this difficult integration process, Puerto Rico could attempt to become a sovereign nation. However, Puerto Ricans generally do not gravitate toward this option. In a 2017 referendum, ninety-seven percent of voters indicated a desire for statehood as opposed to remaining a commonwealth or seeking independence.⁴³ Historically, voters have opted for statehood for decades in elections, though the most recent election is an admittedly flawed way of gauging public sentiment because it faced issues such as boycotts in the midst of economic crisis, impacting turnout.⁴⁴ Nevertheless, there is a lack of support for independence and non-statehood options in Puerto Rico. Rather than pushing Puerto Rico not to pursue statehood and thus dismissing the will of the Puerto Rican people, advocacy for Puerto Rican rights must respect popular demand and support the pathway to statehood.

V. Conclusion

Statehood is the preferred option of Puerto Ricans to receive constitutional protection and to improve life on the island. It would remove Congress’ authorization under *Harris* and the *Insular Cases* to treat Puerto Rico differently; the island would no longer be a territory, and Congress would be incentivized to support its residents once they have voting power. However,

Congress’ historical aversion to supporting Puerto Rican interests should signal that advocates should focus their efforts on the Supreme Court. Puerto Rican officials must recognize the futility of their calls to Congress if statehood is their true objective. The flawed *Insular Cases* enable legislation that ignores the needs of Puerto Rico by deeming the island inferior to a state. Therefore, if the *Insular Cases* are found faulty under modern reassessment by the Supreme Court, then the decision would force Congress to alter their policies on Puerto Rico so that Puerto Ricans receive constitutional protection, even if it does not change the territories status altogether to being incorporated or even a state.⁴⁵ Pursuing the most effective path to constitutional protection and potential statehood is an increasingly dire issue. Hurricane Maria may have drawn temporary media attention to the crises in Puerto Rico, but the island faces far more permanent concerns amplified by territorial status that have been neglected by media coverage. Puerto Rico suffers from a declining population and a weak economy, setting the island on a path to greater problems that currently have no solutions or support from the United States. The accumulating crises in Puerto Rico will have no end in sight until advocates compel action on the part of the courts to reassess the *Insular Cases* and subsequently the United States government as a whole.

41 Juan R. Torruella, *U.S. Territories Commentary Series – Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of “Territorial Federalism”*, 131 HARV. L. REV. F. 65, 98 (2018).

42 GOV’T ACCOUNTABILITY OFF., GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES, at *2 (Mar. 2014), <https://www.gao.gov/assets/670/661334.pdf>.

43 Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html>.

44 *Id.*

45 Torruella, *supra* note 41, at 98; Córdova, *supra* note 33; Cruz, *supra* note 39.

Examining the Feasibility of the Green New Deal's Successful Passage and Implementation

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"The green dream, or whatever they call it, nobody knows what it is, but they're for it, right?"

– Nancy Pelosi, Speaker of the House¹

In her first year as a Congresswoman Alexandria Ocasio-Cortez (D-NY) has already made a splash: she has become a nationwide celebrity, been vilified by the far-right,² celebrated by the far-left,³ and is making her mark on Congress with ambitious proposals reflective of her self-proclaimed democratic socialist ideology.⁴ The most discussed of her proposals is the recently-introduced Green New Deal, developed in conjunction with Senator Edward Markey (D-MA) and delivered to Congress in the form of a House resolution calling for sweeping changes in the arenas of environmental, social, and economic policy.⁵

While there have been rumbles of a Green New Deal for over ten years, the term originating with *New York Times* columnist Thomas Friedman in 2007⁶ and later gaining traction with Jill Stein's and Bernie Sanders' 2016 presidential campaigns,⁷ this is the first time a congressional resolution on the subject has been introduced. Already, the resolution has sparked intense debate and galvanized the nation, drawing criticism⁸

1 Heather Caygle, Sarah Ferris & John Bresnahan, *'Too Hot to Handle': Pelosi Predicts GOP Won't trigger Another Shutdown*, POLITICO (Feb. 7, 2019), <https://www.politico.com/story/2019/02/07/pelosi-trump-government-shutdown-1154355> (last visited Feb. 22, 2019).

2 See, e.g., Ashley Reese, *Hideous Harpies and Pretty Idiots: The Right's Obsessive Fixation on Alexandria Ocasio-Cortez*, JEZEBEL, THE SLOT (Feb. 22, 2019), <https://theslot.jezebel.com/from-hideous-harpies-and-pretty-idiots-the-rights-obse-1832798483> (last visited Mar. 1, 2019).

3 Amanda Marcotte, *As Usual, Alexandria Ocasio-Cortez Is Right: There Should Be No Billionaires*, SALON (Jan. 22, 2019), <https://www.salon.com/2019/01/22/as-usual-alexandria-ocasio-cortez-is-right-there-should-be-no-billionaires/> (last visited Mar. 1, 2019).

4 Ian Kullgren, *Ocasio-Cortez Discusses 'Democratic Socialist' Label*, POLITICO (July 1, 2018), <https://www.politico.com/story/2018/07/01/democratic-socialists-ocasio-cortez-689647> (last visited Mar. 4, 2019).

5 Recognizing the duty of the Federal Government to create a Green New Deal, H.R. 109, 116th Cong. (2019) [hereinafter Green New Deal, H.R. 109].

6 Thomas L. Friedman, *A Warning From the Garden*, N.Y. TIMES (Jan. 19, 2007), <https://www.nytimes.com/2007/01/19/opinion/19friedman.html> (last visited Mar. 4, 2019).

7 David Roberts, *The Green New Deal, Explained*, VOX (Mar. 30, 2019), <https://www.vox.com/energy-and-environment/2018/12/21/18144138/green-new-deal-alexandria-ocasio-cortez> (last visited Mar. 4, 2019).

8 See generally, Noah Smith, *A Green New Deal Isn't Ready for Prime Time*, BLOOMBERG (Dec. 12, 2018), <https://www.bloomberg.com/opinion/articles/2018-12-12/a-green-new-deal-isn-t-ready-for-prime-time> (last visited Mar. 1, 2019).

and praise⁹ alike while guiding our country through a necessary conversation about how to combat climate change.

The legislation that the resolution calls for contains a myriad of proposals. First, with regard to environmental policy, the Green New Deal sets goals to cut the United States' carbon emissions and transition away from the use of nuclear energy in order to achieve net-zero greenhouse gas emissions. In lieu of nuclear energy, the resolution emphasizes massive public investment in and government subsidies for wind and solar projects. It aims to impact every part of America, with the goal of "upgrading all existing buildings"¹⁰ in the country to become more energy efficient as part of a complete infrastructure overhaul. The second proposal, which addresses agricultural infrastructure, is similar, with the authors stating an intent to work directly with farmers towards more sustainable agricultural methods.¹¹ The authors of the resolution set a ten-year timeframe—starting from the year that the legislation is passed—for the infrastructural upgrade to be completed and for the country to be "fully powered by renewable energy sources,"¹² according to the Sierra Club.

On the economic front, the resolution proposes providing every American with a guaranteed job, high-quality healthcare, and affordable housing, while also "ensuring that all jobs have union protections."¹³ The text of the resolution also states a commitment to "providing resources, training, and high-quality education, including higher education, to all people of the United States . . . so that all people of the United States may be full and equal participants in the Green New Deal mobilization."¹⁴ It concludes by resolving to provide everyone in the

9 See generally, David Roberts, *This Is An Emergency, Damn It: Green New Deal Critics Are Missing The Bigger Picture.*, VOX (Feb. 23, 2019), <https://www.vox.com/energy-and-environment/2019/2/23/18228142/green-new-deal-critics> (last visited Mar. 1, 2019).

10 Danielle Kurtzleben, *Rep. Alexandria Ocasio-Cortez Releases Green New Deal Outline*, NPR (Feb. 7, 2019), <https://www.npr.org/2019/02/07/691997301/rep-alexandria-ocasio-cortez-releases-green-new-deal-outline> (last visited Feb. 27, 2019).

11 Brian Barth, *Ocasio-Cortez's Green New Deal: What It Means for Food and Farming*, MODERN FARMER (Jan. 29, 2019), <https://modernfarmer.com/2019/01/ocasio-cortezs-green-new-deal-what-it-means-for-food-and-farming/> (last visited Apr. 15, 2019).

12 Heather Smith, *What Is This Green New Deal Anyway?*, SIERRA CLUB (Nov. 28, 2018), <https://www.sierraclub.org/sierra/what-green-new-deal-anyway-alexandria-ocasio-cortez> (last visited Mar. 4, 2019).

13 Roberts, *supra* note 9.

14 Green New Deal, H.R. 109, *supra* note 5, at 11.

United States with “high-quality health care; affordable, safe, and adequate housing; economic security; and clean water, clean air, healthy and affordable food, and access to nature.”¹⁵ In its entirety, the resolution totals about two thousand words and fourteen pages.

Rep. Ocasio-Cortez has proposed creating a bipartisan, fifteen-member House committee to draft legislation for these stated goals, with a 2020 deadline.¹⁶ This committee would be absent of any Congressperson who has taken campaign donations from the oil or gas industries in order to ensure the impartiality of its members.¹⁷

In this paper, I show that the Green New Deal is unlikely to be implemented in its current format, as its wide-ranging policies are unrealistic and will prove both politically unpopular and unpragmatic to implement. I note the many positive facets of the Green New Deal and use them to craft a different environmental policy proposal that incorporates the Green New Deal’s best ideas while setting realistic policy goals. My proposals take inspiration from the Green New Deal but have a stronger focus on solutions that can be implemented more easily and quickly. Climate change is one of, if not *the*, most pressing issues of our time. I believe that laws to address it must be passed as soon as possible.

I. The Misguided Idealism of the Green New Deal

The Green New Deal is wide-ranging to a fault. While it is admirable to outline numerous policy goals, Sen. Markey and Rep. Ocasio-Cortez do not acknowledge that the overly-broad quality of the Green New Deal may be its hamartia. When asked in an interview to respond to the Green New Deal’s critics, Rep. Ocasio-Cortez commented, “They’re trying to say that the Green New Deal is about what we have to give up . . . when in fact the Green New Deal itself is resolution to be more expansive.” Rep. Ocasio-Cortez and I agree that the Green New Deal seeks to be expansive, but we differ in our assessment of whether or not this will be beneficial to our citizens or achievable.

The resolution states an intent to bundle social and economic reforms with environmental reforms in the Green New Deal, an unrealistic goal in a time when legislative gridlock and public opposition make sweeping policy reforms far less feasible than in previous decades. The Congressmembers sponsoring this resolution have fallen into the trap of an “all-or-nothing” approach to policy, where either all or none of their reforms will be implemented. This stems from the format of the Green New Deal as a catch-all piece of legislation that seeks to improve the economy, society, and the environment simultaneously. In addition, they are attempting to create legislation that will have the same impact as the original New Deal,¹⁸ despite

15 *Id.* at 14.

16 Smith, *supra* note 8.

17 *Id.*

18 Green New Deal, H.R. 109, *supra* note 5, at 5 (“Whereas the House of Representatives recognizes that a new national, social, industrial, and economic mobilization on a scale not seen since World War II and the New Deal era is a historic opportunity . . . to create millions of good, high-wage

the differences in political, social, and economic circumstances between the 1930s and today. This is a flawed, overly idealistic approach.

II. Why “Green New Deal” is a Misnomer

The name “Green New Deal” is a deliberate choice by Rep. Ocasio-Cortez and Sen. Markey. In the official resolution, they make a call for “new national, social, industrial, and economic mobilization on a scale not seen since World War II and the New Deal.”¹⁹ The original New Deal was a series of domestic programs spearheaded by President Franklin D. Roosevelt to restore economic prosperity to Americans, particularly those most affected by the events of the Great Depression. But upon closer examination, the 1933 New Deal and the Green New Deal have little in common, and the Green New Deal’s inaccurate name does it a disservice. The New Deal’s ability to build a diverse coalition of support and the less-polarized political climate of the 1930s separate the original New Deal from its proposed successor. Hence, while the FDR-era New Deal was successfully implemented, this is no indicator that the Green New Deal will enjoy similarly good fortune.

One important factor setting the New Deal apart from its modern iteration is the unusually high degree of political unity and support for the administration in the 1930s. President Franklin D. Roosevelt, tasked with steering the country through the Great Depression and World War II, was elected with overwhelming public support for four straight terms, giving him a virtually unquestioned mandate with which to govern.²⁰ In the first 100 days of his presidency, he was able to pass a significant amount of legislation—including the Federal Emergency Relief Administration and the Agricultural Adjustment Administration—with the benefit of a completely Democratic-controlled Senate and House.²¹ The Democratic Party’s stronghold on Congress remained consistent throughout President Roosevelt’s time in office, with an average Senate majority of forty-four²²—enough to override any potential filibusters. The current proponents of the Green New Deal do not enjoy this same luxury.

In today’s more politically divided age, it is much more difficult²³ to push legislation through, largely due to the recent growth of obstruction tactics such as filibusters and lobbying. Filibusters

jobs in the United States; . . . to provide unprecedented levels of prosperity and economic security for all people of the United States; and . . . to counteract systemic injustices[.]”).

19 *Id.*

20 William E Leuchtenburg, *Franklin D. Roosevelt: Domestic Affairs*, MILLER CTR., <https://millercenter.org/president/fdroosevelt/domestic-affairs> (last visited Feb 26, 2019).

21 David Silbey, *A Quick Note On One Reason Why FDR Was Effective In Ways Obama Is Not*, CHRON. OF HIGHER EDUC. (Apr. 22, 2013), <https://www.chronicle.com/blognetwork/edgeofthewest/2013/04/22/a-quick-note-on-one-reason-why-fdr-was-effective-in-ways-obama-is-not/> (last visited Mar. 4, 2019).

22 *Id.*

23 See, e.g., John Lauritsen, *Good Question: Why Is It So Hard To Pass A Law?*, CBS MINNESOTA, WCCO (June 23, 2016), <https://minnesota.cbslocal.com/2016/06/23/good-question-passing-bills/> (last visited Mar. 3, 2019).

only gained popularity in the 1990s and 2000s, when partisan division was intensifying,²⁴ and have been prevalent in the Congressional chambers ever since.²⁵ Similarly, lobbying has not always played such a prominent role in American democracy. Lee Drutman of *The Atlantic* explains that “the self-reinforcing quality of corporate lobbying has increasingly come to overwhelm every other potentially countervailing force,”²⁶ noting also that business corporations spend approximately \$2.6 billion annually on lobbying.²⁷ Given the Green New Deal’s all-encompassing format, it is more likely that lobbyists or politicians will take issue with certain parts of the deal (such as the expensive economic proposals) despite agreeing with other parts and will thus oppose the entire deal. These are new issues that FDR, who benefited from a unified base and who did not have to contend with lobbyists or filibustering to the same degree, was free from as he constructed the New Deal.

Moreover, the Green New Deal appears likely to create further political division rather than resolve it. It does little, for example, to acknowledge the plight of Appalachian coal miners and other workers in the fossil-fuel industry who have suffered greatly²⁸ as a result of the economy’s shift towards more sustainable energy. In less than a decade, there has been a thirty-eight percent drop²⁹ in nationwide coal production; even more recently, since President Trump took office in January 2017, 20 of the nation’s 380 coal mines have closed.³⁰ The authors of the resolution only pay lip service to their issues with the brief, perfunctory inclusion of “depopulated rural communities”³¹ as a group that must be protected, but offer no real solutions for how to protect them.

In an interview I conducted with Pomona College Professor of Politics Richard Worthington, who specializes in environmental policy, Professor Worthington explained, “I think the wrong kind of attention is being paid to these people [disgruntled coal miners]. President Trump has paid a lot of attention to them, but the purpose is to save the coal industry, which doesn’t seem to be feasible; it’s in dire economic straits.”³² Indeed, as the economy shifts to producing electricity by natural gas, the number of coal plants is rapidly declining. Today, there are about 360, as compared to six hundred just a decade ago.³³ These coal-mining communities are being decimated, at no fault of their own, and are not receiving the attention they require. Professor Worthington succinctly commented of the

Green New Deal, “It’s not gonna happen . . . if there is not a place for everyone.”³⁴ In order to create a place for everyone, there must be special attention paid to the groups most affected by this industrial shift.

In contrast, the New Deal adhered to politically expedient ways of passing legislation despite its popularity and support, by focusing on the most underserved groups of the economy. Consider the Civilian Conservation Corps (CCC) and Works Progress Administration (WPA), cornerstones of the New Deal. These programs, designed to create jobs, worked in tandem to boost the economies of rural and urban areas alike.³⁵ But President Roosevelt did not stop there, also developing programs such as the Tennessee Valley Authority, designed specifically to foster economic development in the Southern region hit hardest by the Great Depression.³⁶ This approach helped to maintain President Roosevelt’s constant political support over four terms, by bringing white working-class citizens into the Democratic Party and forming a powerful support coalition³⁷ made up of socioeconomically, geographically, and racially diverse groups. The Green New Deal currently lacks the support of such a diverse coalition. While it nominally shares the goal of creating jobs through new projects, the Green New Deal neglects rural communities and other communities most at-risk of falling behind economically. An Appalachian news outlet wrote that “the vague promises of the GND proposal and lack of direct involvement with the rural communities presents a problem to many rural organizers.”³⁸ The organizers quoted in the article expressed concern over both the lack of attention paid to them as well as a desire to have a seat at the table in Green New Deal discussions.

For these reasons, the Green New Deal’s name and its promise to model itself after the original New Deal set expectations for the Green New Deal that cannot be reasonably lived up to.

III. Flaws Inherent in the Resolution

The Green New Deal, if implemented, would not be cheap. A recent study conducted by the American Action Forum, a center-right policy think tank, estimated its total regulatory cost at approximately \$1 trillion,³⁹ largely as a result of the expedited timeline for which the Green New Deal calls. While it is im-

24 *Filibuster*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/us-government/history-of-the-filibuster> (last visited Mar. 3, 2019).

25 *Id.*

26 Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> (last visited Mar 3, 2019).

27 *Id.*

28 Clifford Krauss, *Coal’s Decline Seems Impervious to Trump’s Promises*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/business/energy-environment/coal-miners.html> (last visited Mar 1, 2019).

29 *Id.*

30 *Id.*

31 Green New Deal, H.R. 109, *supra* note 5, at 4.

32 Interview with Richard Worthington, Pomona College Professor, in Claremont, California (2019).

33 Krauss, *supra* note 28.

34 Interview with Rick Worthington, *supra* note 32.

35 See generally Michael W. Sherraden, *The Local Impact of the Civilian Conservation Corps, 1933-1942*, 10 J. SOCIOLOGY & SOC. WELFARE 514 (1983).

36 Robert Krause, *Tennessee Valley Authority*, CTR. FOR STUDY OF SOUTHERN CULTURE (Apr. 15, 2018), <https://mississippiencyclopedia.org/entries/tennessee-valley-authority/> (last visited Mar. 4, 2019).

37 See, e.g., Bruce Nelson, *Give Us Roosevelt – Workers and the New Deal Coalition*, HISTORY TODAY (Jan. 1990), <https://www.historytoday.com/archive/give-us-roosevelt-workers-and-new-deal-coalition> (last visited Mar. 3, 2019).

38 Jan Pytalski, *Where is Rural in the Green New Deal?*, 100 DAYS IN APPALACHIA (Mar. 11, 2019), <https://www.100daysinappalachia.com/2019/03/11/where-is-rural-in-the-green-new-deal/> (last visited Apr. 15, 2019).

39 Dan Bosch, *The Regulatory Impact of the Green New Deal*, AMERICAN ACTION FORUM (Jan. 28, 2019), <https://www.americanactionforum.org/insight/the-regulatory-impact-of-the-green-new-deal/> (last visited Feb. 27, 2019).

portant to interpret the AAF's findings with caution given its political leanings, the analysis still raises important questions about whether the Green New Deal would strain national resources by leaving less money for other important government expenditures, such as spending on education, Social Security, deficit reduction, and more. It is important to ensure that there are specific plans to recuperate the trillions of dollars lost. Excessive spending can also lead to the "crowding out" effect, which can reduce private spending and investment, creating an overall decline in economic activity.⁴⁰ Additionally, an estimate from Bloomberg—which skews center-left—puts the annual cost of the Green New Deal at roughly \$6.6 trillion per year.⁴¹ The leaders of the resolution have been vague when asked how the Green New Deal will be funded. When pressed by a *National Public Radio* interviewer to specify how the Green New Deal will be financed, Rep. Ocasio-Cortez said only, "we're creating jobs,"⁴² and declined to specify further.

It is also necessary to acknowledge the numerous bureaucratic obstacles that impede any law—but particularly the most controversial or expensive—from taking effect. Take for example the floundering bullet-train initiative in California. The projected completion date of this project, which aims to construct a high-speed rail linking Los Angeles to San Francisco, continues to be pushed back, most recently from the year 2022 to the year 2033,⁴³ and its estimated costs have ballooned, doubling in size from an initial estimate of \$33.6 billion to an estimated \$77 billion.⁴⁴ The bullet-train has lacked political support, bogged down by its daunting cost and its failure to provide benefit for most Californians, who rarely need to travel across the state and have more pressing public transportation needs in their local communities.⁴⁵

Similarly, the Green New Deal carries a hefty price tag and pays less attention to specific community needs, foreshadowing its potential struggle to garner political support. And even though California is a solidly Democrat-controlled state, the bullet-train is encountering significant gridlock, showing that a primary cause of policy difficulties is often the infeasibility of the policy itself rather than partisan division. The more ambi-

tious the plan, the more difficult it is for it to be implemented. I predict that the trend we are seeing with the bullet train will hold true with the Green New Deal.

Even legislation that garners bipartisan support, such as the recently-passed First Step Act, is not without its own obstacles. This act, which sought to reform aspects of the criminal justice system and reduce recidivism, has experienced failures in its implementation, largely due to obstructions for which the legislation does not provide solutions. For example, one of the most notable inclusions in the law was the concept of "good time credits," which would reduce prison time for good behavior.⁴⁶ However, the policy has been halted by the Department of Justice, which needs to first develop a "risk and needs assessment program,"⁴⁷ a development process which can take an indefinite amount of time.

This botched implementation risks being repeated in the Green New Deal, which lacks a clear action plan to identify and address potential implementation challenges. Neither the Green New Deal nor the First Step Act identify or address potential implementation challenges in their text, which can significantly reduce the legislation's effectiveness. Proposals such as upgrading all buildings to become more energy-efficient or requiring all farmers to use more sustainable agricultural methods can take long periods of time to implement. They are also likely to require cooperation across multiple departments, such as the Department of Housing and Urban Development, the Department of Agriculture, and the Environmental Protection Agency, making the process more complicated. To avoid the same setbacks that recent legislation has faced, the Green New Deal must develop a clearer process for the implementation of its proposed plans.

It also bears noting that the format of the Congressional document as a nonbinding resolution weakens its potential to lead to meaningful environmental policy changes. It is difficult to take the Green New Deal completely seriously until it becomes a more concrete proposal, in the form of a drafted bill that addresses these concerns and lays out a clear set of steps that will help it avoid the common legislative pitfalls shown here.

IV. Taking Inspiration from the Green New Deal

To be sure, the Green New Deal is well-intentioned and contains many promising suggestions useful in combating climate change. This paper does not aim to dismiss Rep. Alexandria Ocasio-Cortez and her fellow members of Congress; her ambition and drive is to be respected. And perhaps the highest form of respect is to engage with the Green New Deal without unquestioning, blind support, instead pushing Congress to be its best. Thus, I seek not to destroy the Green New Deal but rather build on it constructively.

Prominent political figures on both sides of the aisle have writ-

40 See, e.g., Thomas Stratmann & Gabriel Lucjan Okolski, *Does Government Spending Affect Economic Growth?*, MERCATUS CTR. (June 10, 2010), <https://www.mercatus.org/publication/does-government-spending-affect-economic-growth> (last visited Apr. 7, 2019).

41 Noah Smith, *The Green New Deal Would Spend the U.S. Into Oblivion*, BLOOMBERG (Feb. 8, 2019), <https://www.bloomberg.com/opinion/articles/2019-02-08/alexandria-ocasio-cortez-s-green-new-deal-is-unaffordable> (last visited Mar. 11, 2019).

42 Steve Inskeep & Alexandria Ocasio-Cortez, *Ocasio-Cortez To Unveil Ambitious Plan To Combat Climate Change*, NPR (Feb. 7, 2019), <https://www.npr.org/2019/02/07/6922259103/ocasio-cortez-to-unveil-ambitious-plan-to-combat-climate-change> (last visited Feb. 26, 2019).

43 Melody Gutierrez, *California's Rush to Start Building High-Speed Rail Sent Costs Soaring*, S.F. CHRON. (Nov. 15, 2018), <https://www.sfchronicle.com/news/article/California-s-rush-to-start-building-high-speed-13396541.php> (last visited Mar. 1, 2019).

44 *Id.*

45 See, e.g., Michelle Robertson, *City-Sanctioned Report Finds SF Has Some of the Worst Public Transit of Major Metros*, SFGATE (July 27, 2018), <https://www.sfgate.com/travel/resources/transit/article/public-transit-muni-bad-worst-slow-bart-bus-13111924.php> (last visited Mar. 4, 2019).

46 Samantha Michaels et al., *Trump's one real bipartisan win is already turning into a mess*, MOTHER JONES (Feb. 5, 2019), <https://www.motherjones.com/crime-justice/2019/02/first-step-act-trump-confusion-good-time-credits/> (last visited Mar. 1, 2019).

47 *Id.*

ten off the Green New Deal. Senator Dianne Feinstein (D-CA) argued with a group of young children who advocated for the Green New Deal, telling them, “I know what I’m doing. You come in here and say it has to be my way or the highway. I don’t respond to that.”⁴⁸ Countless Republicans have denigrated the Green New Deal; Representative Mike Simpson (R-ID) referred to it as “crazy” and “loony,” a sentiment that has been echoed by many others on the right.⁴⁹ President Trump mocked it on Twitter, writing sarcastically, “I think it is very important for the Democrats to press forward with their Green New Deal. It would be great for the so-called ‘Carbon Footprint’ to permanently eliminate all Planes, Cars, Cows, Oil, Gas & the Military - even if no other country would do the same. Brilliant!”⁵⁰ This tweet is not only juvenile but also contributes to the spread of falsehoods, as the resolution contains zero mention of permanently eliminating these resources. I view both of these dismissive tactics as unproductive, and I disapprove of politicians’ unwillingness to listen to environmental advocates. The Green New Deal should not be the subject of ridicule or mockery, and should instead receive thoughtful consideration relevant to the facts of the deal.

Professor Worthington holds a relatively optimistic perspective on the resolution. In the same interview, he commented that it is reasonable to think that all-encompassing legislation such as the Green New Deal can be passed, “and therefore it deserves more consideration than being dismissed out of hand, as if it were a law of nature that you can’t make progress on both fronts [economic and environmental] at the same time.”⁵¹ He is correct of course; there is no law of nature prohibiting these proposals. I acknowledge that the Green New Deal could very well be passed someday, but I hold the position that it is more pragmatic to explore other approaches with a greater probability of successful implementation.

V. Concluding, and Moving Forward With a Solution

Unrealistically ambitious proposals such as the Green New Deal are counterproductive, as they prevent us from taking a step in the right direction towards addressing climate change. The attempt to simultaneously achieve both economic and environmental reforms will likely prevent us from accomplishing either. This paper’s critical approach to the Green New Deal should not, however, be construed as indifference towards the problem of climate change. Environmental issues threaten our nation and the entire globe, and they demand immediate attention. My argument does not downplay the nature of this threat; rather, it amplifies it. Nor am I dismissing the calls for universal health care or access to education; these are extremely

48 Lisa Friedman, *Dianne Feinstein Lectures Children Who Want Green New Deal, Portraying It as Untenable*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/climate/feinstein-sunrise-green-new-deal.html> (last visited Apr. 7, 2019).

49 Anthony Adragna & Zack Colman, *It’s Crazy. It’s Loony: Republicans Giddy as Democrats Champion ‘Green New Deal’*, POLITICO (Feb. 9, 2019), <https://www.politico.com/story/2019/02/09/gop-sees-political-advantage-in-green-new-deal-1160725> (last visited Apr. 15, 2019).

50 Donald Trump (@realDonaldTrump), Twitter (Feb. 9, 2019), <https://twitter.com/realDonaldTrump/status/1094375749279248385>.

51 Interview with Richard Worthington, *supra* note 33.

worthy initiatives that, if implemented, will be crucial strides toward equality. Yet, I maintain that this is not the avenue to effect real policy change. I therefore suggest a new framework for climate policy, one that emphasizes pursuing discrete, achievable reforms to preserve our environment.

The first concern is ensuring that no communities are left behind by the economic shifts caused by environmental reform. In formulating an action plan to address these communities’ needs, a helpful model comes from the 33-6-3 Workforce Development Model pioneered by Coalfield Development, a social enterprise based in the Appalachian region. The website for the organization explains its project: “Formerly unemployed people (especially laid-off coal miners) are hired on to work-crews . . . Each week, crewmembers complete thirty-three hours of paid work, six credit hours of higher education, and three hours of personal development mentorship. At the end of their 2.5 year contract, crew members have thus gained invaluable work experience, earned an Associate Degree, and gained clarity on life goals as well as the personal assets needed to attain those goals.”⁵² The format of this action plan, which pays specific attention to those struggling to find jobs, should be implemented on a greater scale. I suggest incorporating its ideas—the identification and the addressing of blue-collar workers’ needs through both employment and educational opportunities—into the Green New Deal. Ideally these “work-crews” could be working on projects benefiting the environment, such as the installation of updated, eco-friendly infrastructure. While the Green New Deal’s authors allude vaguely to the importance of job creation, programs such as these are a more concrete way of implementing a plan to offset the economic impact of environmental policies. These programs also focus on the workers most at risk of losing their jobs. This is an effective way to clearly show rural, working-class groups that they are seen, that they are important, and that they need not fear environmental progress because they will be given the resources to remain successful in a shifting economy.

Moreover, the proposal itself must be rebranded and reformatted. As previously explained, the Green New Deal should leave behind its name and take on a more accurate, less politically-charged name that does not also fold in economic and social concerns. There needs to be a separation between climate policy proposals and everything else contained in the Green New Deal. Instead, each goal should be pursued as its own discrete piece of legislation, lessening the likelihood of difficulties with bureaucracies or lobbyists that could have the potential to derail the entire deal, if it were instead pursued as a package of legislation. In other words, social, economic, and environmental reforms should not be bundled into one large piece of legislation but rather should be split up and pursued separately.

There also must be care taken to ensure that the goals of the legislation are, in fact, attainable. For one, the rigid ten-year timeframe must be extended. The year 2030 is too soon to realistically go carbon-neutral as the resolution proposes, as it

52 *33-6-3 Workforce Model*, COALFIELD DEVELOPMENT, <http://coalfield-development.org/33-6-3-workforce-development-model/> (last visited Mar. 4, 2019).

would require massive infrastructural overhauls and the enactment of a myriad of new legislation, including the banning of fossil-fuel powered cars.⁵³ Many scientists agree that 2050 is a more realistic target to set,⁵⁴ while still being soon enough to make a difference in protecting our environment.

Additionally, there must be a specific framework for how the policy changes will be funded. I propose using a combination of tax credits and government subsidies for renewable energy in order to incentivize both private citizens and corporations to use wind and solar energy instead of environmentally damaging oil and coal. Professor Worthington suggested “subsidies for getting electric vehicles” as well as “mobility options for lower-income people” that would make it easier for people to use public transportation, thereby reducing pollution.⁵⁵ Policies such as these are a promising step toward improving our environment.

Private citizens also have the responsibility to agitate for change and create a more productive conversation surrounding the issue of climate policy. Human-caused climate change is not an America-specific problem; it is occurring on a global scale, and large countries such as China are also significantly contributing to greenhouse gas emissions.⁵⁶ There must be increased political pressure placed on world leaders to strengthen the Paris Climate Accord, a 2016 United Nations agreement with 175 countries that the United States pulled out of in 2017, and hold future summits on climate change. In particular, all nations should adhere to one of the fundamentals of the Paris Accord—the commitment to transparency in disclosing emissions data, as well as reporting regularly on progress made towards decreasing emissions.⁵⁷ To enforce this, the United States and its allies can also impose economic sanctions on countries that do not comply with these requirements. Solving climate change requires the cooperation of all nations. Citizens, for their part, can apply direct pressure on political leaders through online, social media-based campaigns that channel the Green New Deal’s energy into global outreach. They can organize boycotts of companies harming the environment, encourage citizens of other countries to put pressure on their own leaders, circulate petitions, call their representatives, and fight against the spread of misinformation. Mobilizing public support has been shown to make a difference: petitions have led to laws that protect disabled children, helped to end anti-gay system-

ic discrimination in the Boy Scouts, and even forced a recall election that installed Arnold Schwarzenegger as governor of California.⁵⁸ We, too, have power to collectively effect change in our systems and in society.

Finally, we all must acknowledge that human-caused climate change is a reality. Environmental problems are an undeniable, inescapable aspect of our world and will be a part of the future. The importance of planning for this future cannot be overstated, and one of the best ways to do so is through education. The government must invest more heavily in science, technology, engineering, and mathematics (STEM) education, training more engineers and scientists while preparing all students to address the realities of climate change in the future, an idea proposed by *New York Times* contributor Rebecca Elliott.⁵⁹ Climate change is a problem with few short-term solutions. Quick fixes are not the route; instead, the steps towards solving it will occur over generations. Therefore, the responsibility rests upon today’s generation to set long-term goals and specific steps to address the issues incrementally. The Green New Deal is moving in the right direction, but the question to ask ourselves as the conversation continues to unfold should always be: can this really work?

53 Thomas Hornigold, *Can Hawaii Go Carbon Neutral by 2045?*, SINGULARITY HUB (June 12, 2018), <https://singularityhub.com/2018/06/12/can-hawaii-go-carbon-neutral-by-2045/#sm.00000jd61nxxael0zmc1okzonndnq> (last visited Mar. 11, 2019).

54 See, e.g., Emily Farnworth, *We Can Build a Carbon-Neutral World by 2050. Here’s How*, WORLD ECONOMIC FORUM (June 4, 2018), <https://www.weforum.org/agenda/2018/06/the-world-will-be-carbon-neutral-by-2050-but-at-what-cost/> (last visited Mar. 4, 2019).

55 Interview with Rick Worthington, *supra* note 33.

56 Keith Bradsher & Lisa Friedman, *China’s Emissions: More Than U.S. Plus Europe, and Still Rising*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/business/china-davos-climate-change.html> (last visited Mar. 4, 2019).

57 *What Is the Paris Agreement?*, UNITED NATIONS, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> (last visited Apr. 12, 2019).

58 JR Thorpe, *7 Petitions That Actually Changed The World*, BUSTLE (Jan. 31, 2017), <https://www.bustle.com/p/petitions-that-actually-changed-the-world-34309> (last visited Apr. 15, 2019).

59 Rebecca Elliott, *In Hurricane Harvey’s Wake, We Need a Green ‘New Deal’*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/opinion/in-hurricane-harveys-wake-we-need-a-green-new-deal.html> (last visited Apr. 15, 2019).

Land of the Setting Sun: An Examination of Japan's Policy Response to Its Population Crisis

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In December 2018, Japan's social media world was lit up by an absurd video that showed an elderly woman driving along a sidewalk in a rural area of the country, completely unaware of the dangers that her endeavors posed.¹ While the clip prompted laughter and disbelief among millions of Japanese social media users, it also demonstrated the momentous challenges that the country faces in managing and caring for a population that is aging exponentially.

Shinzo Abe, who in 2019 became Japan's fourth-longest serving prime minister, has vowed to tackle the impending crisis by instituting a series of reforms intended to boost workforce participation while also reducing the rising costs of elderly care.² Policies touted by Abe's government to tackle the crisis include laws meant to attract temporary foreign workers, expand parental care, and raise the retirement age.³ While Abe's plan offers many short-term solutions to the demographic shift, a close examination of the threat shows that as its magnitude grows over the coming decades, Japan must pursue expansive immigration policies or face catastrophic economic decline.

I. The Extent of Japan's Population Crisis

Following decades of improving life expectancy and shrinking fertility rates, Japan's population is disappearing. Each year there are close to four hundred thousand more deaths than births.⁴ While Japan's average life expectancy is the highest in the world at eighty-four years old, over twenty-eight percent of the population is older than sixty-five,⁵ placing a heavy labor and social burden on the country's working-age population.

1 Justin McCurry, *Car Travelling Down Sidewalk Highlights Japan's Problem with Old Age and Driving*, GUARDIAN (Dec. 27, 2018), <https://www.theguardian.com/world/2018/dec/28/car-trundling-down-pavement-highlights-japans-problem-with-old-age-and-driving>.

2 See, e.g., *Aging Population Japan's "Biggest Challenge": Re-elected Shinzo Abe Sets Out Priorities*, IZA WORLD OF LABOR (Oct. 23, 2017) <https://wol.iza.org/news/aging-population-japans-biggest-challenge-re-elected-shinzo-abe-sets-out-priorities>.

3 *How Japan's Prime Minister Plans to Cope with Daunting Demography*, ECONOMIST (Nov. 15, 2018), <https://www.economist.com/asia/2018/11/17/how-japans-prime-minister-plans-to-cope-with-daunting-demography>.

4 Simon Denyer & Akiko Kashiwagi, *Japan Passes Controversial New Immigration Bill to Attract Foreign Workers*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/world/japan-passes-controversial-new-immigration-bill-to-attract-foreign-workers/2018/12/07/a76d8420-f9f3-11e8-863a-8972120646e0_story.html?utm_term=.14b24f7c394c.

5 *Japan Crosses New Aging Milestone, With 20% Now 70 or Older*, NIKKEI ASIAN REV. (Sept 17, 2018), <https://asia.nikkei.com/Economy/Japan-crosses-new-aging-milestone-with-20-now-70-or-older>.

To put things into perspective, only around sixteen percent of Americans are in the same population bracket.⁶ While successive Japanese governments have attempted to institute policies to raise the country's fertility rate, the future prospects of its growth are dire. Japan's 2019 population of 127 million, currently the third highest in Asia, is expected to shrink by close to one-third over the next five decades.⁷ In this period, the proportion of over sixty-four year-olds, currently twenty eight percent of the population, is forecasted to reach thirty-eight percent.⁸ With such an outsized elder population, Japan's social services and welfare programs will come under greater pressure in the coming decades to meet its society's changing needs.

How is Japan, once Asia's perennial economic powerhouse, facing such a dire regression of its population? Though the years following the end of the Second World War saw a baby boom, birth rates began to diminish as Japanese people flocked to major urban areas for work,⁹ resulting in Japan's urban population rising to over ninety percent by 2009.¹⁰ Owing to a combination of work pressures, long commutes, and a lack of government support, urban Japan began to experience much lower fertility rates, stalling the country's population growth.¹¹

With a resurgent economy fueling improvements in health-care, education, and welfare, Japanese citizens also began living longer, placing an ever-greater burden on a shrinking population. The growing needs of Japan's changing demographics have already begun to bite. Tokyo's welfare state has become profoundly unaffordable, and the economy has suffered from an immense labor shortage. Public debt remains high at close to 253% of GDP.¹² Last year, a government study found that close to eighty-six percent of employers struggled to fill job

6 *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Apr. 21, 2019) (showing 15.6% of Americans aged sixty-five and older).

7 STATISTICAL HANDBOOK OF JAPAN 2017, STATISTICS BUREAU OF JAPAN (2017), <http://www.stat.go.jp/english/data/handbook/pdf/2017all.pdf>.

8 Isabel Reynolds, *Japan's Shrinking Population*, BLOOMBERG (May 16, 2017, 7:32 PM), <https://www.bloomberg.com/quicktake/japan-s-shrinking-population>.

9 *Id.*

10 *Japan – Urban Population as a Share of Total Population*, KNOEMA (2017), <https://knoema.com/atlas/Japan/Urban-population> (last visited Apr. 21, 2019).

11 NORIKO O. TSUYA, EAST-WEST CTR., ASIA/PACIFIC ISSUES NO. 131, LOW FERTILITY IN JAPAN-NO END IN SIGHT (June 2017), <https://www.eastwest-center.org/system/tdf/private/api131.pdf?file=1&type=node&id=36147>.

12 *Japan General Government Gross Debt to GDP 1998-2018*, TRADING ECONOMICS, <https://tradingeconomics.com/japan/government-debt-to-gdp> (last visited Apr. 21, 2019).

vacancies.¹³ Though measures introduced by the government to lower work hours and provide substantial parental support were meant to alleviate some of the pressure on the country's beleaguered work force and encourage more family building, progress on this front has been discouraging, with more measures clearly needed to arrest the crisis from getting worse.

II. Japan's Future Prospects

While advances in healthcare and technology, fueled by Japan's sturdy post-war economic growth, have greatly extended the average Japanese life expectancy, maintaining the quality and efficiency of this system places increasing pressure on the country's diminishing number of taxpayers and workers. This dramatic shift in demographics is threatening Japan's future growth prospects with its working-age population not large enough to fill gaps in the labor market left by retirees.

Recently released projections by the government found that Tokyo will be spending nearly one-fourth of its gross domestic product on social welfare by 2040, with nursing care expenditures forecasted to more than double in that period.¹⁴ Annual expenditure on programs covering medical and nursing care, pensions and child care are projected to reach close to 190 trillion yen (\$1.7 trillion) in 2040, a whopping increase of sixty percent from expenditures spent on those same programs in 2018.¹⁵ Though these estimates do not consider developments in technology that may reduce overall costs, the swelling of these figures serve to demonstrate the depth and enormity of the challenges facing the government.

Prime Minister Abe has acknowledged the depth of the challenges he faces, noting in an interview last November that "the decline of the birth rate and the ageing of Japanese society is accelerating at unprecedented speeds," and that his government needs to push for more "impactful policies" to tackle it.¹⁶ By 2050, Japan's dependency ratio—the number of aged dependents per worker—will rise to about seventy-five percent,¹⁷ the highest of any country, with the ratio of workers to pensioners projected to continue to swell. This is compounded further by the fiscal challenges posed by this outsized demographic ratio, with rising government spending on pensions and other age-related costs losing funding from a disappearing tax base.¹⁸

13 MANPOWER GROUP, 2016/2017 TALENT SHORTAGE SURVEY (2017), https://www.manpowergroup.com/wps/wcm/connect/389b7a9d-cfe2-4b22-bd61-f0febc709cd6/2016_TSS_Global_Infographic%20-Final.pdf?MOD=AJPERES&ContentCache=NONE.

14 *Japan Social Welfare Spending to Rise 60% By 2040*, NIKKEI ASIAN REV. (May 22, 2018), <https://asia.nikkei.com/Politics/Japan-social-welfare-spending-to-rise-60-by-2040>.

15 *Id.*

16 *How Japan's Prime Minister Plans to Cope with Daunting Demography*, ECONOMIST (Nov. 15, 2018), <https://www.economist.com/asia/2018/11/17/how-japans-prime-minister-plans-to-cope-with-daunting-demography>.

17 *Japan's Economic Outlook in Five Charts*, INT'L MONETARY FUND (Nov. 28, 2018), <https://www.imf.org/en/News/Articles/2018/11/27/na112818-japans-economic-outlook-in-five-charts>.

18 Thomas Wilson, *Japan, Short of Workers, Eyes Hiking Optional Pension Age Beyond 70*, REUTERS (Feb. 16, 2018), <https://www.reuters.com/article/us-japan-retirement/japan-short-of-workers-eyes-hiking-optional-pension->

III. The Abe Administration's Policy Response

Japan's ageing population, combined with its meagre birth rate presents an unprecedented challenge for the country's policy-makers. Speaking at a news conference following his successful re-election campaign in 2017, Abe identified Japan's decreasing and ageing population as "the biggest challenge" for his so-called Abenomics policies,¹⁹ which aim to strengthen Japan's economic recovery following years of deflation. Since then, Abe has introduced a series of reforms meant to boost Japan's workforce and subsidize the costs of supporting Japan's elderly.²⁰

With Japan's low fertility rate unable to generate enough workers for the economy, Prime Minister Abe recently introduced a program meant to increase the size of Japan's workforce by incentivizing female labor force participation.²¹ With the patriarchal nature of Japanese culture making the workplace a more male-dominated space,²² Abe's plan hopes to encourage more traditionally homebound women to seek jobs to relieve some of the country's workforce burden. This culminated in Abe setting targets for women leadership in government agencies and Abe's own leadership cabinet, with the government even sponsoring a bill that would require companies and agencies to set numerical targets for the employment and promotion of women.²³

Although Abe deserves praise for his strides to improve the involvement of women in the labor force, it is clear that more work still needs to be done to improve the patriarchal nature of Japan's work culture. Abe's cabinet, for one, still only has one female member out of its twenty positions. In this regard, appointing more females in important policy roles could help Abe back up his rhetoric with action.

As well as establishing new targets for the participation and advancement of women in the workforce, Prime Minister Abe's policies aim to increase the availability of daycare and after-school care while also expanding child care leave benefits.²⁴ With a greater support network for women and families at home and in the workforce, Abe is resolute that his plan can supplement some of Japan's labor shortage without hindering its birth rate. His plan follows a series of previous pro-family measures introduced by the government like the New Angel Plan of 1999 and the Plus One Policy of 2009 that were designed to encourage more couples to have children through

[age-beyond-70-idUSKCN1G106L](https://www.economist.com/asia/2016/11/24/japans-efforts-to-make-it-easier-for-women-to-work-are-faltering).

19 *See Aging Population Japan's "Biggest Challenge": Re-elected Shinzo Abe Sets Out Priorities*, *supra* note 2.

20 *See, e.g.,* James McBride & Beina Xu, *Abenomics and the Japanese Economy*, COUNCIL ON FOREIGN RELATIONS (Mar. 23, 2018), <https://www.cfr.org/backgrounder/abenomics-and-japanese-economy>.

21 *Id.*

22 *Japan's Efforts to Make It Easier for Women to Work Are Faltering*, ECONOMIST (Nov. 24, 2016), <https://www.economist.com/asia/2016/11/24/japans-efforts-to-make-it-easier-for-women-to-work-are-faltering>.

23 Vindu Mai Chotani, *Five Years On, Where Does Abe's 'Womenomics' Stand?*, J. INT'L AFFS. (July 30, 2017), <https://jia.sipa.columbia.edu/online-articles/five-years-where-does-abe's-womenomics-stand>.

24 *Id.*

allocating more funds to government childcare facilities, reducing education costs, and improving housing infrastructure.²⁵ Though designed to encourage families to have more children, its intended benefits have yet to bear fruit, with Japan's birth rate failing to rise to sustainable levels.

Given the difficulty countries face when trying to raise birthrates, Abe's plan has also targeted other policies meant to reduce the burden on Japan's working-age population. This has included investments in automation and technological innovation as a means to raise productivity, improvements in transportation and infrastructure to reduce the burdens of travel, and reductions in healthcare costs through a more streamlined approach meant to increase the service's efficiency.²⁶ To resolve Japan's labor shortages, Abe has proposed to raise the mandatory retirement age from sixty to sixty-five, while also encouraging more firms to follow suit with their employees.²⁷ This has seen companies raise their retirement ages while also rehiring previous retired workers, though many on a part-time basis. With a record-high eight million Japanese aged sixty-five or older holding jobs,²⁸ Japan currently has the largest number of working elders of any other advanced countries. By soliciting a plan to increase the public pension for those who decide to start drawing from it later than they are entitled to, Abe intends to incentivize more of Japan's elder population to work, a cost-effective solution to the country's labor shortages.

Yet, many of these policies remain a stop-gap solution to a problem in demographics that will only continue magnify over the coming decades. Immigration, a solution to ageing that many European countries have turned to in order to bolster regressing economic circumstances, has also been introduced by Abe, albeit very reluctantly. Because Japan's society is traditionally opposed to foreigners, successive governments have skirted around this solution to demographic decline. However, with Japan unable to stem its population crisis, Abe's government finally relented to increasing immigration.

In December 2018, Abe spearheaded new legislation that allowed hundreds of thousands of foreign laborers to live and work in Japan.²⁹ With currently only two percent of Japan's workforce being foreign-born, Abe hopes to grow this number by attracting blue-collar workers in various industries from countries like India, Brazil, and Myanmar.³⁰ To quell xenopho-

bic sentiment in Japanese society, these workers will receive visas of no more than five years, will not be allowed to bring their families, and must display some sort of language proficiency.³¹

By proposing greater support for women in the workforce, family care, investments in innovation, and a raising of the official retirement age, Abe aims to significantly reduce the labor burdens weighing on Japan's shrinking population. However, although these policies may provide some temporary relief for the impending crisis, Abe must realize that a more stringent long-term plan is needed.

Though a loosening of Japan's traditionally strict immigration laws shows that Abe is open to considering more sustainable policies, if his government truly realizes the extent of the population crisis and the potential dangers it poses, they must bolster their support for immigration as a source of labor.

IV. The Case for Increasing Immigration Flows

Given the formidable fiscal challenges that Japan's shrinking population poses to its economic and social longevity, it is imperative that Abe's government pursues the right policies to better prepare Japan for these demographic changes. While current policies aimed at family care, automation, and career longevity may assuage the crisis in the short-term, more long-term solutions must be considered to relieve the growing labor burden. In order to provide greater assurance for Japan's future, Abe must turn the tide against decades of Japanese antipathy towards immigration and promote further immigration flows as a means of stemming the country's population decline.

In a homogeneous country averse to outsiders, various prime ministers had turned to efforts at increasing the country's fertility rate as an alternative to immigration.³² As demonstrated in Japan's case, measures to boost birth rates often struggle to bear fruit. An IMF World Economic Outlook report released in 2018 noted that since advanced economies like Britain, the United States, and Japan face the likely prospect of being inundated by their elderly populations, more migrant workers must be attracted to confront economic challenges.³³ In its analysis, the report warned that "dramatic shifts in demographic structure projected in advanced economies could overwhelm the ability of policies to offset the forces of ageing."³⁴ With efforts at fertility boosting ineffective, the report doubled-down on "the need to rethink migration policies to boost labor supply in advanced economies."³⁵ With Japan's economy facing substantial increases in welfare and age-related spending over the coming decades, as well as growing labor demands, policies geared toward accelerating flows of immigration must be pursued and prioritized above all other measures that the government has enacted.

25 David Bloom et al., *Japan's Age Wave: Challenges and Solutions*, VoxEU (Dec. 3, 2018), <https://voxeu.org/article/japan-s-age-wave-challenges-and-solutions>.

26 *How Japan's Prime Minister Plans to Cope with Daunting Demography*, ECONOMIST (Nov. 15, 2018), <https://www.economist.com/asia/2018/11/17/how-japans-prime-minister-plans-to-cope-with-daunting-demography>.

27 Chris Butera, *Japan's PM Wants to Raise Retirement age Past 65*, CHIEF INVESTMENT OFFICER (Sept. 5, 2018), <https://www.ai-cio.com/news/japans-pm-wants-raise-retirement-age-past-65/>.

28 *Japan Crosses New Aging Milestone, With 20% Now 70 or Older*, *supra* note 5.

29 Mari Yamaguchi, *Japan OK's Divisive Bill Allowing More Foreign Workers*, AP (Dec. 7, 2018), <https://www.apnews.com/f312b64ceaf2402d8f85733c35ce41bc>.

30 *Why Japan Is Going to Accept More Foreign Workers*, ECONOMIST (July 13, 2018), <https://www.economist.com/the-economist-explains/2018/07/13/>

[why-japan-is-going-to-accept-more-foreign-workers](https://www.economist.com/the-economist-explains/2018/07/13/why-japan-is-going-to-accept-more-foreign-workers).

31 *Id.*

32 See, e.g., Craig Moran, *Will Immigration Rescue Japan, and the Region?*, WORLD POL'Y (Sept. 18, 2017), <https://worldpolicy.org/2017/09/18/will-immigration-rescue-japan-and-the-region/>.

33 INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: CYCLICAL UPSWING, STRUCTURAL CHANGE 71-74 (Apr. 2018).

34 *Id.* at 74.

35 *Id.*

While new regulations passed by Japan's Diet aims to expand the role of immigrants in the Japanese economy by placing workers into two categories of five- and ten-year visas, these regulations mainly apply to high-skilled professionals, like those in medical and financial sectors.³⁶ Conversely, immigrants in Japan in low skilled sectors, like manufacturing and agriculture, currently work under a blanket visa under the Technical Intern Trainee Program. Intended as a program to provide foreign trainees with vocational skills while working at businesses and farms in Japan for three to five years, the law has largely been used by Japanese firms as a means to utilize cheap labor. This has given rise to reports of foreign trainees working under abusive conditions and for excessively long working hours with little or no pay.³⁷ With Japan expected to face shortages in many low skilled sectors like manufacturing in the coming years, these rules need to be changed if Japan wishes to market itself as an attractive place to work. As such, clearer paths to residency and better legal protections for workers must be established in order to prepare Japan for these societal changes and to modernize its labor laws for immigrants.

By adopting immigration and providing clearer pathways to permanent residency status as a solution to its shrinking population problem, Japan can help contain a more significant decline of its population while also providing much needed fiscal and labor support for its economy and social welfare programs. With Abe's policies already providing positive incentives that encourage family building, lengthier career spans, and innovation, implementing immigration as an additional measure would show that his government is serious about preparing Japan for its future.

V. Gauging Likely Challenges

Acceptance of foreigners into mainstream Japanese society has always been a contentious issue in the archipelago. Discrimination of ethnic Korean residents of Japan, many of whom were forcefully taken to Japan during its colonial era for labor, is well-documented.³⁸ In this case, increasing flows of immigration risks unsettling and antagonizing the native-born population, which could pose a crucial element in the upcoming 2021 elections for Abe.

In 2015, Ayako Sono, a prominent Japanese author who had served as a government education advisor, penned an opinion piece for an influential conservative newspaper arguing that while Japan needed immigrants for its labor force, foreigners ought to be kept apart from Japanese.³⁹ Echoing the anti-immigrant beliefs of many elements of Japanese society, Sono

wrote in praise of the apartheid system of South Africa. She observed, "Ever since I learned of the situation in South Africa some 20 or 30 years ago, I have been convinced that it is best for the races to live apart from each other, as was the case for whites, Asians and blacks in that country."⁴⁰

While not necessarily reflective of the beliefs of all Japanese people, Sono's call for maintenance of Japan's homogeneity is indicative of anxieties held by many Japanese citizens about immigration and why the government is reluctant to promote it. In this case, in fear of losing political support, leaders like Abe have been traditionally resistant of making any declarations of support for immigration. Yet, as public recognition of Japan's population and labor struggles grows, beliefs may be changing.

A recent Pew study published last year found that more Japanese residents were concerned about emigration, or how many people were choosing to leave Japan, than the numbers of people that were entering the country.⁴¹ The survey noted that around six in ten Japanese respondents believed that people leaving Japan for jobs in other countries was a problem.⁴² When asked about whether Japan should accept more, fewer, or about the same number of immigrants, twenty-three percent of respondents stated that the Japanese government should allow more immigrants, while fifty-eight believed that immigration numbers should stay about the same and thirteen thought that fewer immigrants should be allowed.⁴³ While these numbers show that a degree of immigrant skepticism still permeates, the survey suggests that the public recognizes Japan's shrinking workforce issues and is comfortable with government support for immigration.

Abe surely recognizes the viability of immigration as a solution to Japan's challenges, but is wary of the political risks involved. In order to accelerate flows of immigration without further unsettling Japan's society, Abe must stress that the benefits of these policies far outweigh the costs or the alternative of a sinking country. If his government is to achieve its goal of keeping Japan's future population above one hundred million,⁴⁴ more immigrants must be accepted and given at least some pathway to permanent residency status. A U.N. report on the matter found that Japan would need to attract 647,000 foreigners a year in order to relieve the crisis.⁴⁵ Investments in programs focused on culture, language and skills training would allow these immigrants to more properly assimilate into mainstream Japanese culture and society. In addition, education programs

36 See, e.g., Emese Schwarcz, *Making Sense of Japan's New Immigration Policy*, DIPLOMAT (Nov. 30, 2018), <https://thediplomat.com/2018/11/making-sense-of-japans-new-immigration-policy/>.

37 *Id.*

38 See, e.g., Motoko Rich, 'We are Koreans': *Diaspora in Japan Looks to Trump-Kim Summit with Hope*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/world/asia/korea-japan-diaspora.html>.

39 Julian Ryall, *Why Is Racism So Big in Japan?*, SOUTH CHINA MORNING POST (July 20, 2018), <https://www.scmp.com/week-asia/politics/article/2123539/no-chinese-why-anti-china-racism-so-big-japan> (providing examples of racism in mainstream Japanese society).

40 *Id.*

41 BRUCE STOKES & KAT DEVLIN, PEW RES. CTR., *DESPITE RISING ECONOMIC CONFIDENCE, JAPANESE SEE BEST DAYS BEHIND THEM AND SAY CHILDREN FACE A BLEAK FUTURE* 16-18 (2018), <http://www.pewglobal.org/2018/11/12/perceptions-of-immigrants-immigration-and-emigration/>.

42 *Id.*

43 *Id.*

44 Reiji Yoshida & Mizuho Aoki, *Abe Aims Arrows at New Targets with Three Fresh Goals for 'Abenomics,' 20% Rise in GDP*, JAPAN TIMES (Sept. 24, 2015), <https://www.japantimes.co.jp/news/2015/09/24/national/politics-diplomacy/abe-outlines-new-goals-abenomics-20-rise-gdp/#.XHddQ5NKjzI>.

45 *The Incredible Shrinking Country*, ECONOMIST (Mar. 25, 2014), <https://www.economist.com/banyan/2014/03/25/the-incredible-shrinking-country>.

in multiculturalism should also be pursued by Abe's administration to assuage anxieties that many Japanese may have about immigration. While Abe has made the right policy moves by bolstering support for family programs, raising the retirement age, and investing in automation, the success of his plan to confront Japan's challenges is truly dependent on how well his government can increase immigration flows without losing the trust and support of voters.

VI. Conclusion

As much of the developed world faces issues with an outsized elderly population over the coming decades, the case of Japan demonstrates the dangers of confronting these issues with restrictive measures on immigration. While policymakers in Japan have instigated policies to promote family building, built a highly advanced healthcare system to extend the lifespan of its citizens and made great strides in technological innovation, little of this will matter if its population continues to regress at its current rate. With Japan's economy jittery as a result of years of deflation, its fragility and the inevitability of a future aging crisis must convince policymakers like Abe to utilize immigration as a solution to avoid potential disaster.

Japan has always been unafraid of transforming itself to meet formidable challenges; such is the Japanese spirit. The country famously modernized to catch up to the rest of the world after centuries of feudalism in the Meiji Restoration, recovered rapidly from the destruction of the Second World War to become one of the most economically advanced countries in the world, and has rebuilt after multiple destructive earthquakes throughout its history. Transformation in this case for Japan comes in the form of opening its doors up to greater amounts of immigrants. While public skepticism of this new reality may initially cause some cultural and societal friction, the long-term benefits of immigration would still make its adoption a more viable alternative. Facing a potentially catastrophic decline of its population and economy, acceptance of the need for immigrants and their role in Japanese society could represent another historic triumph for Japan in the face of dire adversity.

Ground Control to Major Elon: *Private Space Entities and the Interstellar Liability Question*

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Guest Contributor

Historically, private firms have been precursors to colonization. This is apparent from joint-stock companies such as the Virginia Company (through which the English settled Jamestown), the Dutch East India Company in Indonesia, and the British East India Company in India. Furthermore, private enterprises have spurred exploration. The establishment of settlements in Australia's often harsh and unforgiving interior, for example, was intended to exploit resources such as mining deposits.¹ This historical background raises an important question regarding another largely uncharted frontier—that of space. Private space entities are changing the landscape of space exploration. The company SpaceX has propelled innovation and has significantly decreased the costs of sending a payload into space, becoming the world's premier rocket contractor with the goals of revolutionizing space technology and enabling the human settlement of other planets. Other companies, such as Planetary Resources, intend to mine asteroids for rare-earth metals and minerals.² The entry of many firms to the extraterrestrial realm raises an important question: are private companies culpable for damages and liable for violations of international space law? This article aims to demonstrate that private companies are in fact liable, and without clear guidelines countries should follow the Spanish universal jurisdiction framework to seek restitution for damages.

I. The New Markets of Space

In 2018, the firms SpaceX and Tesla began using space to advertise their products. As technology becomes more advanced and it becomes cheaper to send weight into space, the interstellar arena will see a variety of new business uses, including tourism, mineral exploitation, and marketing, come to fruition. On February 6, 2018, CEO and co-founder of Tesla and SpaceX Elon Musk launched a 2008 Tesla Roadster into space on a SpaceX Falcon Heavy FH-001 rocket. The SpaceX launch stream became the second most-watched live event in the history of YouTube with 2.3 million viewers.³ Tesla Mo-

tors continues to use photos of the Roadster and its respective mannequin, which has come to be referred to as "Starman," at different points in the galaxy on its social media platforms to advertise its product.⁴

A. *Interstellar Crowding*

The potential environmental impacts of private space travel are striking. Earth's orbit is currently crowded with over 600,000 objects each larger than a centimeter in diameter.⁵ Debris of this size can be catastrophic in space when traveling at orbital speed; only about 19,000 of such objects can be tracked.⁶ The orbits of both terrestrial and extraterrestrial objects are affected by the gravitational pull of large objects within the universe. Within our galaxy, proximate objects that have major impacts on gravitational pull include the sun, planets, and the planets' respective moons. As more private firms enter space, Earth's orbital field will continue to become more populated with space debris. When Earth's orbit becomes cluttered, the following hypotheticals become more likely: (1) a terrestrial object collides with another terrestrial object, leading to a release of corrosive chemicals and the degradation of objects into space debris, leaving hazards and further crowding Earth's orbital field; (2) a terrestrial object collides with an asteroid, or another large extraterrestrial object, creating large boulder-sized projectiles or space dust particles with the propensity to orbit Earth, impacting terrestrial satellite navigation, or, in extraordinary circumstances, falling to the planet's surface.

B. *Terrestrial Danger Resulting from Space Debris*

The projectiles orbiting the earth are indiscriminate and unpredictable when they fall. On January 24, 1978, the Soviet reconnaissance satellite Kosmos 954 malfunctioned and re-entered Earth's atmosphere, scattering radioactive debris over portions of Northern Canada, leading to the cleanup mission Operation Morning Light.⁷ More recently, the People's Republic of China's Tiangong I satellite (China's first prototype space station) ceased functioning on March 16, 2016. The satellite was intended to return to Earth, but the location of where the satellite would strike could not be determined. Predictions of where the satellite would strike varied widely across northern

1 COLIN MICHAEL HALL, THE 'WORTHLESS LANDS HYPOTHESIS' AND AUSTRALIA'S NATIONAL PARKS AND RESERVES, *in* AUSTRALIA'S EVER-CHANGING FORESTS 441 (Kevin J. Frawley & Noel M. Semple eds., 1988).

2 *Planetary Resources Launches Latest Spacecraft in Advance of Space Resource Exploration Mission*, PLANETARY RESOURCES (Jan. 12, 2018), <https://www.planetaryresources.com/2018/01/planetary-resources-launches-latest-spacecraft-in-advance-of-space-resource-exploration-mission/> (last visited Nov. 1, 2018).

3 Micah Singleton, *SpaceX's Falcon Heavy launch was YouTube's second biggest live stream ever*, THE VERGE (Feb. 6, 2018), <https://www.theverge.com/2018/2/6/16981730/spacex-falcon-heavy-launch-youtube-live-stream-record> (last visited Nov. 3, 2018).

4 Hallie Detrick, *Tesla Starman Floats Past Mars At 44500mph*, FORTUNE (Nov. 6, 2018), <http://fortune.com/2018/11/06/spacex-starman-roadster-mars/> (last visited Nov. 3, 2018).

5 DIRK C. GIBSON, TERRESTRIAL AND EXTRATERRESTRIAL SPACE DANGERS: OUTER SPACE PERILS, ROCKET RISKS AND THE HEALTH CONSEQUENCES OF THE SPACE ENVIRONMENT 45 (2014).

6 *Id.*

7 LEO HEAPS, OPERATION MORNING LIGHT: INSIDE STORY OF COSMOS 954 SOVIET SPY SATELLITE (1978).

China, New Zealand, central Italy, the Middle East, Tasmania, the northern United States, and South Africa.⁸ To make matters worse, the satellite contained large quantities of a toxic chemical known as hydrazine. Exposure to this chemical often leads to severe symptoms such as pulmonary edema, seizures, coma, and organ damage to the kidneys, liver, and central nervous system.⁹ The satellite eventually made landfall in the waters northwest of Tahiti on April 2, 2018.¹⁰

C. Indemnification and Fostering Private Space Enterprise

This unpredictability of space infrastructure causes concern. Despite the leaps in innovation under private space entities, such entities are not infallible and they are subject to the same failures as state-owned space enterprises. A notable example of private space failure occurred on June 28, 2015, when a planned SpaceX launch did not go according to plan, leading to the explosion of the Falcon 9 rocket and an estimated revenue loss of \$112 million. (The company suffered from another explosion of a Falcon 9 rocket on September 1, 2016.¹¹) States have passed laws to encourage aerospace entrepreneurs and the proliferation of the private space industry, such as the United States' Aerospace and Competitiveness Act. The law extends the indemnity of U.S. launch providers for extraordinary catastrophic third-party losses through 2025 and limits the Federal Aviation Administration's (FAA) ability to enact restrictions regarding the space flight of participants.¹² The reduced cost to deliver a payload to space and the increasing number of entrants into the market add to the existing problem of space debris and increase the likelihood of interstellar collisions. As more clutter accumulates in the orbital field, the propensity for major disasters or environmental catastrophes increases.

The space taxi service planned by Boeing and SpaceX to start in early 2019 highlights a void in international oversight.¹³ Several questions arise regarding private space flight. Is a framework in place for preventing negative externalities in space, such as orbital crowding, resolving disagreements upon territory, deciding who maintains legal jurisdiction in space, and determining how environmental issues be monitored and by whom? Should limits be placed on space entities regarding exploration, resource exploitation, and private property rights?

8 Leanna Garfield, *A Chinese space station is hurtling toward Earth - here's how to track the crash as it happens*, BUS. INSIDER (Apr. 1, 2018), <https://www.businessinsider.com/chinese-space-station-crash-tiangong-1-how-to-track-2018-3> (last visited Oct. 17, 2018).

9 Mike Wall, *Farewell, Tiangong-1: Chinese Space Station Meets Fiery Doom Over South Pacific*, SPACE.COM (Apr. 2, 2018), <https://www.space.com/40101-china-space-station-tiangong-1-crashes.html> (last visited Nov. 16, 2018).

10 *Id.*

11 Dave Mosher, *SpaceX lost a quarter of a billion dollars after one of its rockets blew up*, BUS. INSIDER (Jan. 13, 2017), <https://www.businessinsider.com/spacex-financials-rocket-accident-costs-revenue-2017-1> (last visited Dec. 1, 2018).

12 United States Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, H.R. 2262 (2015), *codified at* 51 U.S.C. § 10101.

13 Michael Greshko, *NASA Announces Crews for Private 'Space Taxi' Project*, NAT'L GEO. (Aug. 3, 2018), <https://www.nationalgeographic.com/science/2018/08/news-nasa-commercial-crew-international-space-station/> (last visited Oct. 3, 2018).

II. Liability and International Frameworks

International space law was first developed in 1963 with the United Nations Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, enacted shortly after Soviet cosmonaut Yuri Gagarin became the first man to enter Earth's orbit.¹⁴ New provisions were added to the declaration in 1966 as a treaty, becoming the current international framework for space travel and components of modern space law, including the establishment of space as a territory not subject to any terrestrial state's jurisdiction.¹⁵ To address the liability shortcomings of the Outer Space Treaty, two international agreements were made—the Convention on International Liability for Damage Caused by Space Objects in 1972¹⁶ and the Principles Relevant to the Use of Nuclear Power Sources in Outer Space in 1992.¹⁷ The issue with the new agreements is that they hold states from which the source of damage originated liable for costs related to search, recovery, and cleanup conducted by an affected party. There are also two tenets of the 1967 Outer Space Treaty at odds with the later Nuclear Source Principles and Space Liability Convention. The third tenet of the resolution states, "Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of occupation use, or occupation, or by any other means,"¹⁸ while the fourth tenet states that "the activities of states in the exploration and use of outer space shall be carried on in accordance with international law in the interest of maintaining international peace and security and promoting international cooperation and understanding."¹⁹ This presents a conflict—if interstellar space activity is bound by international law, yet space is not subject to national sovereignty, how can international territory law govern interstellar disputes?

A. International Conventions and Maritime Law

The difficulties of exercising jurisdiction in areas where countries do not maintain sovereignty are reflected in maritime law. On January 16, 2018, the Federal Court of Canada held in *Administer of the Ship-Source Oil Pollution Fund v. Beasse* that an American was responsible for environmental remedy costs related to an oil spill of a sunken tugboat.²⁰ In this incident, the tugboat was lifted from waters close to the U.S.-Canadian

14 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962(XVIII), U.N. Doc. A/RES/1962(XVIII) (Dec. 13, 1963), [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1962\(XVIII\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1962(XVIII)).

15 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, G.A. Res. 2222(XXI), U.N. Doc. A/RES/2222(XXI) (Dec. 19, 1966), [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2222\(XXI\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2222(XXI)).

16 Convention on International Liability for Damage Caused by Space Objects, G.A. Res. 2777(XXVI), U.N. Doc. A/RES/2777(XXVI) (Nov. 29, 1971), [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2777\(XXVI\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2777(XXVI)).

17 Principles relevant to the Use of Nuclear Power Sources in Outer Space, G.A. Res. 47/68, U.N. Doc. A/RES/47/68 (Dec. 14, 1992), https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/47/68.

18 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* note 14.

19 *Id.*

20 Administrator of the Ship-Source Oil Pollution Fund v. Beasse, 2018 FC 39 (2018).

maritime border by the Canadian Coast Guard (CCG) during a routine patrol. The CCG extricated the boat, despite the defendant's attempts to prevent this measure. The defendant did not assist in the cleanup, arguing that the sinking of the ship was related to third-party tampering. Furthermore, the defendant claimed that the incident occurred in international waters, which therefore absolved any culpability (and thus relieved the defendant from making a payment to the Canadian Ship-Source Oil Pollution Fund). The court rejected the defendant's claims of third-party tampering and did not absolve a payout, even though the ship was not a Canadian vessel.²¹ The defendant was held liable under Section 165 of the Canada Shipping Act of 2001,²² establishing that persons are liable for all measures "taken to prevent, repair, remedy or minimize oil pollution damage from the ship."²³ This law was applied despite the ship's owner being an international citizen, as the Act relies on a multilateral maritime treaty—the United Nations Convention on the Law of the Sea (UNCLOS).²⁴ Section 166 (1) of the Act hold vessels and individuals liable for pollution within Canadian waters or the waters within the Exclusive Economic Zone (EEZ) of Canada, regardless of their origin.²⁵

The Canadian Ship-Source Oil Pollution Fund receives its funding from those who pollute under the "polluter pays" principle. The government of Canada in this case can exercise juridical jurisdiction over proximate oceanic territory due to international conventions governing oceanic law. The fund covers pollution or anticipated pollution from identified or unidentified ships occurring in Canadian waters (eleven miles past the coastline) or within the EEZ of Canada as defined by UNCLOS, which grants EEZ rights for resources no more than 200 miles beyond the coastline in open ocean.²⁶ Such international frameworks regulating global maritime borders may serve as examples for interstellar liability regulations. My proposed regulatory framework to regulate immediate interstellar cases is an amended doctrine of universal jurisdiction.

III. The Universal Jurisdiction Doctrine

The universal jurisdiction doctrine allows multilateral bodies or states to claim criminal jurisdiction over an accused individual, regardless of the individual's nationality, country of residence, relation, or lack thereof with the prosecuting entity. It allows for the trial of an alleged crime regardless of where the crime was committed. The most famous case of universal jurisdiction occurred in 1961 where former Nazi official Adolf Eichmann was tried and hanged in Jerusalem following extraordinary rendition by Israel in 1960 from Argentina.²⁷ The practice holds legitimacy in both the common and civil law

systems. An example of applying universal jurisdiction in common law tradition can be seen in the United States prosecution of Charles McArthur Emmanuel ("Chucky Taylor"), the son of former President of Liberia Charles Taylor. Chucky Taylor served as the commander of the notorious Anti-Terrorist Unit (ATU), also known as the "Demon Forces" for their egregious human rights violations. He was convicted in the United States for crimes committed in Liberia and is currently serving a 97-year long sentence.²⁸

A. *The Case of Spain*

In the civil court system, a state that has historically exercised universal jurisdiction is Spain, which has frequently taken up cases of human rights violations in the former territories of New Spain. This is seen in the Spanish attempt to extradite former Chilean dictator Augusto Pinochet for human rights violations²⁹ and the attempted prosecution of El Salvadorian officials for the massacre of six Jesuit priests (five of whom were Spanish).³⁰ The most notable usage of universal jurisdiction in the Spanish judicial system occurred with the successful prosecution of Argentinian naval commander Adolfo Scilingo for crimes and human rights abuses committed during the Dirty War between 1974 and 1983. Scilingo was sentenced initially to 640 years, which was later increased to 1084 years.³¹ The case was unique because the Spanish court found Scilingo, an Argentine citizen, guilty of crimes against humanity, which occurred outside the traditional jurisdiction of Spanish courts. There was no previously defined provision for that offense in the highly formalized Spanish criminal code, either at the time of the offenses or when proceedings commenced. As a result, the charges violated the *nullum crimen, nulla poena sine praevia lege poenali* principle that no crime can be committed, and no punishment can be imposed, without a previous penal law.³² However, the Spanish court upheld the charges, stating that Scilingo's actions "constitute crimes against humanity according to international law" and imposed a sentence without any legislative parameters.³³

For years, Spain continued to use universal jurisdiction, but on February 11, 2014, the Spanish Parliament voted to curtail the court's power after the National Court issued international warrants for China's former Prime Minister Li Peng and Pres-

28 Laura Richardson Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles "Chuckie" Taylor Jr.*, 9 WASH. U. GLOBAL STUD. L. REV. 331 (2010).

29 Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 176 (1999).

30 Alison Sacriponte, *Spain Court Upholds Jurisdiction in 1989 El Salvador Massacre Case*, JURIST (Oct. 7, 2014, 12:22 PM), <https://www.jurist.org/news/2014/10/spain-court-upholds-jurisdiction-in-1989-el-salvador-massacre-case/> (last visited Sept. 3, 2018).

31 *Adolfo Scilingo*, TRIAL INTERNATIONAL (May 21, 2012), <https://trialinternational.org/latest-post/adolfo-scilingo/> (last visited Nov. 27, 2018).

32 Alicia Gil Gil, *The Flaws of the Scilingo Judgment*, 3 J. INT'L CRIM. JUSTICE 1082 (2005).

33 Richard J. Wilson, *Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity*, AM. SOC'Y OF INT'L L. INSIGHTS (Jan. 30, 2008), <https://www.asil.org/insights/volume/12/issue/1/spanish-supreme-court-affirms-conviction-argentine-former-naval-officer>.

21 *Id.*

22 Canada Shipping Act, 2001, S.C. 2001, c. 26 (2001), <http://canlii.ca/t/53jg0> (last visited Apr. 9, 2019).

23 *Id.* s. 165.

24 United Nations Convention on the Law of the Sea, *effective* Nov. 16, 1994, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

25 Canada Shipping Act, 2001, *supra* note 22, at s. 166.

26 UNCLOS, *supra* note 24, at art. 57.

27 Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS (2001), <https://www.foreignaffairs.com/articles/2001-09-01/case-universal-jurisdiction>.

ident Jiang Zemin as part of a case concerning alleged human rights abuses committed in Tibet.³⁴ The Court is now limited only to cases that are not before another competent jurisdiction and that involve Spanish victims, perpetrators located in Spain, or Spanish interests.³⁵

Under these reforms, Spanish courts have the authority to apply universal jurisdiction to the Salvadoran massacre of Jesuits, as the offense involved Spanish citizens. However, the case against Scilingo would be unlikely under the amended revisions unless the Court made a compelling case that Scilingo's human rights abuses during the Dirty War impacted the national interests of Spain. The limitations placed on the Spanish exercise of the universal jurisdiction doctrine can serve as a model to regulate interstellar liability, as it is an area that lacks national sovereignty and the traditional grounds for criminal jurisdictions. A state's power would derive from the last portion of the amended guidelines: it can pursue charges on what impacts its national interests. Within the legal principles of international waters, a state would have grounds to seek recourse against defendants that have polluted water within its Exclusive Economic Zone, even though under UNCLOS the state does not exercise sovereignty over such bodies of water. In this case, the state can argue that pollution impacts national interests—such as its citizens' enjoyment of water and damages to fisheries—and it must shoulder the financial burdens for cleanup costs and environmental impacts.

B. A Framework for Space

This framework would be relevant to governments prosecuting private firms for damages that impact their interests, such as infringing upon a state's ability to conduct research in outer space. This space research may be intended to serve the public interest and is an extremely expensive process, making any interferences very costly. In such a situation, a state or private firm may hold the private firm responsible for the transgression liable and seek restitution. Consider this hypothetical scenario: space debris from a Planetary Resources launch module forces China's Tiangong-2 Space Lab to alter its trajectory, either interfering or invalidating an experiment regarding Earth's orbit. China would have valid grounds for a dispute if the research being conducted fell in line with the first tenet of the Outer Space Treaty ("the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind"³⁶).

Space remains a prohibitively expensive arena and only a handful of countries have participated in the endeavor of sending rockets into it. Furthermore, there are only two active space laboratories: (1) the International Space Station operated by a multilateral body consisting of Canada, the European Space

Agency, Japan, Russia, and the United States; and (2) Tian-gong-2 operated by China.³⁷ Although China does not exercise sovereignty in the space outside its module, it would still have recourse against Planetary Resources for its impact on research conducted for the public interest. In such a case, China could invoke the Spanish precedent of universal jurisdiction and seek recourse against Planetary Resources for interfering with their research, constituting a legitimate extranational usage of universal jurisdiction. As it currently stands, it is unlikely that the actions of private firms will interfere with terrestrial satellites or the two space stations orbiting Earth. However, as more states and private firms enter outer space, it is increasingly necessary to establish guidelines regarding culpability.

IV. United States Private Firms and Interstellar Flags of Convenience

Most private space firms are based in the United States. A question thus arises: will the United States hold such companies liable for international law violations? American corporations have historically been weak adherents to international law, and in some cases the United States has allowed and even assisted firms in flouting it. A notable example of this occurred in Guatemala in 1993. In 1983, Guatemala adopted the World Health Organization's (WHO) guidelines set forth in the International Code of Marketing of Breast-milk Substitutes³⁸ as Guatemala Government Agreement No. 841-87 and Guatemalan Law on the Marketing of Breastmilk Substitutes Decree 66-83.³⁹ In 1992, Gerber Products Company applied to have new "step by step" products introduced to the country's market. The government's Food and Drug Registration and Control Division stated the company's product must comply with Guatemalan labeling laws to be fit for sale in the country. Gerber then requested an injunction against the enforcement of the labeling laws but was denied by the Prosecutor General because the laws were in line with food regulations set by the Ministry of Health. The United States Department of State aligned with Gerber, threatening to revoke Guatemala's Most Favored Nation trading status for violating the Gerber trademark agreements, as the labeling laws prevented formula companies from advertising healthy babies on its products.⁴⁰ Guatemala ceded to American demands despite the fact that the World Trade Organization allows countries to retain autonomy in regulating health and consumer standards.⁴¹ The United States served as

37 Stuart Clark, *Two Crewed Space Stations Now Orbiting Earth*, Guardian (Oct. 20, 2016), <https://www.theguardian.com/science/2016/oct/20/two-crewed-space-stations-now-orbiting-earth-spacewatch> (last visited Apr. 1, 2019).

38 WORLD HEALTH ORGANIZATION, INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES (1981), https://www.who.int/nutrition/publications/code_english.pdf.

39 JUDITH RICHTER, HOLDING CORPORATIONS ACCOUNTABLE: CORPORATE CONDUCT, INTERNATIONAL CODES, AND CITIZEN ACTION 127 (Palgrave Macmillan 2001).

40 *Id.*

41 *Understanding the WTO: The Agreements*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Apr. 10, 2019). ("Commitments to liberalize do not affect governments' right to set levels of quality, safety, or price, or to introduce regulations to pursue any other policy objective they see fit. A commitment to national treatment, for example, would only mean that the same regulations would

34 Jim Yardley, *Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/world/europe/spanish-legislators-look-new-limits-on-universal-jurisdiction-law.html> (last visited Nov. 7, 2018).

35 Craig Peters, *The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide*, 39 SEATTLE U. L. REV. 165, 187 (2015).

36 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* note 14.

an enabling force to allow Gerber to violate the WHO Code, coercing the Guatemalan government to change its statutes.

The case of Gerber in Guatemala demonstrates an instance in which the United States allowed an American company to violate the laws of another state. With this precedent, will the United States hold private space firms accountable for damages incurred in space? The answer, in this case, is most likely yes. The United States currently maintains the largest interstellar presence of any country. The National Aeronautics and Space Administration (NASA) has a large amount of resources invested in space with a budget of \$21.5 billion USD in 2019.⁴² In the private arena, the United States retains the world's most successful private space firm in terms of sending spacecraft into space, SpaceX, which maintains contracts for several countries looking to send satellites or other materials into space. Furthermore, the world's six largest space agencies—China National Space Administration, the Indian Space Research Organisation, the European Space Agency, the Japan Aerospace Exploration Agency, and Roscosmos (the Russian state corporation)—all represent countries that are major trading partners with the United States and all, apart from CNSA, work with NASA.⁴³ The United States, with its booming private space exploration sector, would likely avoid setting a precedent that private firms maintain impunity in space and letting the atmosphere degenerate into a lawless frontier when the country has several expensive assets in space that could be affected.

A. *The Application of International Law in the American System*

According to Richard Bilder, legal scholar at the University of Wisconsin, the United States is beholden to international law. This includes treaties,⁴⁴ as the Constitution's Supremacy Clause states that "all Treaties . . . shall be the supreme Law of the Land."⁴⁵ The United States is a party to four of five treaties regarding space law ratified by the United Nations Committee on the Peaceful Uses of Outer Space. These treaties include the Outer Space Treaty,⁴⁶ the Space Liability Convention, the Rescue Agreement,⁴⁷ and the Registration Convention.⁴⁸ These

apply to foreign suppliers as to nationals. Governments naturally retain their right to set qualification requirements for doctors or lawyers, and to set standards to ensure consumer health and safety.")

42 Jeff Foust, *Final Fiscal Year 2019 Budget Bill Secures \$21.5 Billion for NASA*, SPACENEWS.COM (Feb. 17, 2019), <https://spacenews.com/final-fiscal-year-2019-budget-bill-secures-21-5-billion-for-nasa/>.

43 Ian Sample, *US Scientists Boycott Nasa Conference over China Ban*, GUARDIAN (Oct. 5, 2013), <https://www.theguardian.com/science/2013/oct/05/us-scientists-boycott-nasa-china-ban> (last visited Oct. 23, 2018).

44 Richard Bilder, *Integrating International Human Rights Law Into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1 (1981).

45 U.S. Const. art. IV, cl. 2. See generally Jordan J. Paust, *Customary International Law: Its Nature, Sources, and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990).

46 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* note 14.

47 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, G.A. Res. 2345(XXII), U.N. Doc. A/RES/2345(XXII) (Dec. 19, 1967), [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2345\(XXII\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2345(XXII)).

48 Convention on Registration of Objects Launched into Outer Space, G.A. Res. 3235(XXIX), U.N. Doc. A/RES/3235(XXIX) (Nov. 12, 1974), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/

international conventions were ratified by the U.S. Senate, but even if they were not, the United States would be beholden to their limitations regarding space because of maritime precedent established by the 1900 United States Supreme Court case *The Paquete Habana*.⁴⁹

In the majority opinion written by Justice Horace Gray, the Court supported the notion that international law does not require a treaty or legislation to be binding domestically, as international law is an integrated part of American law.⁵⁰ This notion has been supported by a number of prominent American legal experts, including international law scholar Louis Henkin, who in 1984 stated that "[i]nternational law is not merely law binding on the USA internationally but is also incorporated into USA law. It is 'self-executing' and is applied by courts in the USA without any need for it to be enacted or implemented by Congress."⁵¹ The United States has also stepped in to adjudicate cases involving foreign nationals and grievances against foreign multinational corporations accused of breaking international law under the Alien Tort Statute.⁵² It is likely that the United States would hold private space firms accountable for abuses in space rather than give the industry a special exemption.

B. *Flags of Convenience*

A concern may arise that private space firms, in order to abscond liability disputes, may pursue a flag of convenience space strategy. According to the Outer Space Treaty, each country retains control and jurisdiction over the usage of both governmental and nongovernmental spacecraft. States have the authority to determine appropriate regulations for both the public and private space industries. Some states may intentionally choose to impose minimal restrictions on private space operations, attempting to attract private space firms through a loose regulatory regime. As a result, a flag of convenience issue may arise where firms choose to register their spacecraft in states with minimal regulations to take advantage of lower operational costs, lower taxes, less onerous bureaucracies, and, in the case of space travel, equator-proximal launch sites. This issue is commonly seen in the maritime commerce industry where vessel operators will often register their ships in countries such as Egypt or Panama to take advantage of relaxed regulations and other benefits (excluding equator-proximal launch sites). Such positioning is unlikely to confer immunity for litigation against private firms if they choose to establish themselves in countries with little to no regulations on extraterrestrial exploration and exploitation.

According to the Outer Space Treaty, "States shall be liable for damage caused by their space objects," however, states are still sovereign and can choose not to abide by such international conventions.⁵³ However, a bigger impediment may pre-

[RES/3235\(XXIX\)](#).

49 *The Paquete Habana*, 175 U.S. 677 (1900).

50 *Id.* at 708; see also *id.* at 715-718.

51 Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV 1555 (1984).

52 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

53 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, *supra* note 14, at Tenet 8.

vent countries from establishing themselves as a flag of convenience country—only twenty-one states have active rocket launch sites, spaceports, or cosmodromes capable of launching rockets.⁵⁴ The infrastructure to build and maintain such facilities presents a significant fiscal barrier for many countries who might otherwise promote flag of convenience. The firm SpaceX's primary launch sites are Vandenberg Air Force Base Space Launch Complex 4, located in California, and Kennedy Space Center Launch Complex 39, located in Florida.⁵⁵ Costs to build, operate, and maintain these facilities run into the billions of dollars.⁵⁶ A private space firm looking to establish itself in a country with minimal regulations may have to make a significant initial investment to develop infrastructure, which is a risky proposition given the fact a host country can renege on its promises when faced with international pressure. Countries which market themselves as a flag of convenience and skirt international regulation have often reversed course when faced with international pressure. For example, the country of Niue attempted to become an offshore banking hub in the late 1990s by loosening regulations and establishing attractive tax regimes for the offshore financial industry. The island, however, abandoned such ventures following allegations of money laundering and the subsequent threat of sanctions by the Organisation for Economic Co-operation and Development (OECD) in 2002.⁵⁷ The chance of a state abandoning its position due to international pressure can serve as a major deterrent to private space firms from choosing to operate in a flag of convenience country. Actors within these firms, most notably Elon Musk of SpaceX and Peter Diamandis of Planetary Resources, are serial entrepreneurs. The blatant violation of customary law may lead to sanctions on their enterprises or personal sanctions from states and multilateral bodies. Such a proposition would be tantamount to economic suicide, and both individuals and companies would likely try to avoid such a negative outcome.

V. Conclusion

In the terrestrial realm, culpability can be difficult to determine, particularly in maritime disputes where oceanic borders are not clear. However, this challenge is greater in space, where borders are even more difficultly assigned. In the tool chest of international law, states with the capacity to travel to space can look to Spain's amended use of universal jurisdiction to seek damages in the interstellar arena. They may not exercise *de jure* sovereignty in space, but limiting universal jurisdiction to what

impacts national interests prevents arbitrary lawsuits. While space is still a blank space for legal jurisdiction, it is important for states to apply extranational universal jurisdiction in cases that warrant such measures. If international law is not applied and enforced in space, private space firms may be emboldened to operate with impunity. As it stands, relatively few countries have the infrastructure to reliably send objects into space. This infrastructure is costly to build, serving as a barrier for countries attempting to establish themselves as flag of convenience countries. However, technology improves exponentially and becomes cheaper likewise. In the future, developing reliable reliable launch sites will become cheaper, and they will be more prevalent. This was historically seen with airports and shipping ports—once such launch sites become abundant, it will be important for states and international bodies to apply pressure on states who blatantly violate international law with the hopes of attracting private space firms. The amended universal jurisdiction standard practiced by Spain protects the interests of both states and international bodies who do not exercise jurisdiction over space, but may retain space infrastructure and assets, including terrestrial satellites.

54 Michael Greshko, *See All the World's Active Rocket Launch Sites*,

NAT'L GEO. (Oct. 4, 2018), <https://www.nationalgeographic.com/science/2018/10/news-spaceports-cosmodromes-maps-world-space-week/>.

55 Stephen Clark, *SpaceX Leases Property for Landing Pads at Cape Canaveral, Vandenberg*, SPACEFLIGHT NOW (Feb. 17, 2015), <https://spaceflightnow.com/2015/02/17/spacex-leases-property-for-landing-pads-at-cape-canaveral-vandenberg/>.

56 Leonard David, *Spaceport's Construction Heralds Era of Commercial Space Travel*, SPACE.COM (Sept. 2, 2011), <https://www.space.com/12810-spaceport-america-construction-commercial-space-travel.html>.

57 *Russia, Dominica, Niue, and Marshall Islands Removed from FATF's List of Non-Cooperative Countries and Territories*, OECD (Nov. 10, 2002), <http://www.oecd.org/newsroom/russiadominicaniueandmarshallislandsremoved-fromfatfslistonon-cooperativecountriesandterritories.htm> (last visited Sept. 9, 2018).

Whistleblowers, Trade Agreements, and Cuba: An Interview with Ben Rhodes

Jackson Kinder
Staff Writer (PO '21)

Ben Rhodes was a key member of the Obama Administration. During his tenure in the White House, he acted as a speechwriter and foreign policy advisor, spearheading the Iran Nuclear Deal, normalizing relations with Cuba, and advising on military action in Syria and Libya. He came to Pomona College to speak about "The World As It Is," his 2018 memoir of his time in the Obama White House.

CJLPP: *The Obama administration heavily prosecuted whistleblowers, with a record number of cases pursued under the Espionage Act. Especially with the press in such a diminished state, how would you defend a policy that many viewed as draconian?*

Rhodes: I don't defend it. I don't agree with a number of the prosecutions. I do think one of the things that's hard to explain is that the judicial prosecutions are not directed from the White House. It's not like we were meeting and deciding whether to pursue a case against a journalist. Some of the prosecutions that took place under the Obama Administration started under Bush, and just kind of wound through the system. So, it's a fair criticism that we might have failed to try to hit the pause button on some of these things. But it wasn't an initiative of ours. One of the things that you lose sight of with Trump is there traditionally is this kind of wall between the White House and the Justice Department. So, I didn't personally support a number of those prosecutions. And the irony of it is I actually ended up getting ensnared in some of these things because I talked to journalists. Just because I talked to some of the journalists that were involved in some of the stories that were being pursued, I'm running up legal bills. I was kind of in a bizarre situation where this is a giant pain in my butt. I think that the answer to this is you need policies that establish more clearly what the protections are that should be in place. For instance, I do not think a journalist should ever be prosecuted. If a journalist has passed sensitive information, even if I don't like what that sensitive information is, I don't think you should criminalize journalism. I do think if an employee of the United States government violates the law by stealing classified information, it's hard to argue that this shouldn't be prosecuted.

I think what's going to be complicated now, we see with Assange, is this middle ground. You have someone like Assange, who is not a journalist or government employee. We need to have a debate so this doesn't seem ad hoc. To me, one of the things that was wrong about it was there were stories every day when I was in the White House when classified information appeared in the press. Why are some of these pursued criminally and why are some not? That logic was never clear to me. I think the bias should be towards not pursuing these cas-



es. The bias should certainly be towards not prosecuting journalists. And then I think you need to have some policy process between the White House and the Justice Department to try to set forward what are the guidelines here. You know, if we failed to do something, it was that.

CJLPP: *Across the world, and across ideology, there has been a rebellion against globalization and neoliberal economic policy. Pete Buttigieg, in an interview with the New Yorker, said that one of the constraints of the Obama presidency was that it was operating within a "Reagan consensus, when a conservative or neoliberal economic worldview really dictated how both Republicans and Democrats were supposed to behave."*

Rhodes: I don't agree with that. I think Bill Clinton was operating under that consensus. I just feel like Obama was pursuing the most progressive agenda since Lyndon Johnson. And frankly, we had a public option in our healthcare plan, we had a Medicare buy in, we just couldn't get the votes for it. So, I think our aims were—

CJLPP: *Well, what about something like the Trans-Pacific Trade Partnership (TPP), where you have Hillary Clinton in the 2016 primary turning against a policy that was a focal effort of her time in the Obama administration?*

Rhodes: TPP, I defend. You know, it's funny because I was

1 Peter Buttigieg on How He Plans to Win the Democratic Nomination and Defeat Trump, NEW YORKER (Apr. 2, 2019), <https://www.newyorker.com/news/the-new-yorker-interview/pete-buttigieg-plans-win-democratic-presidential-nomination-defeat-trump> (last visited May 7, 2019).

probably on the left end of the spectrum during the Obama administration. I truly don't believe that the answer to the problems of globalization is to just kind of stop the process of globalization. I think the answer is to try to fix the wiring of globalization. If you don't like trade, the answer is not to no longer have trade agreements. It's to have trade agreements that are more progressive. And you can argue about that criteria or not. But the basic concept that we should have a trade agreement with all of these countries holds for one simple reason. If we don't, then the Chinese are going to dominate all of these countries. And the Chinese are going to have very illiberal objectives in their trading relationships. So, you need some counter to that.

People can pick apart the dispute and resolution of the TPP— is it fair enough for the workers, and so on—I, in balancing the TPP, actually learned from some of the failures of NAFTA and the WTO to try to build in more transparency, more worker protections, and more environmental protections. We could have that debate. The bigger point that I do feel strongly about though is that the Democratic party, the liberals, in general, or people on the left, should find a way to reform structurally the terms of globalization which have fed inequality and all manner of problems. But the basic concept of the integration of nations and the migration of peoples is very consistent with the liberal worldview. And so I would hate to see us throw out the whole project. This is a fundamental debate within our own party that I think has to be sorted. Trump is the one who is kind of for turning back the clock, Make America Great Again, build a wall, and cancel all the trade agreements. I don't think that's where the Democratic party should be. I think we should be for better ways of managing wealth and trade and migration. Pete Buttigieg has some good ideas for that. I'm not saying we had all the right ones. The one thing I do feel strongly about is that we should be the party that stands for a form of international integration.

CJLPP: One of your signature achievements in the Obama administration was the normalization of relations with Cuba. Since then, President Trump has been intent on undermining this goal, an effort that became more material last month with the partial renewal of the Helms-Burton act. On the other hand, Miguel Diaz-Canel has succeeded Raul Castro as the new president of Cuba, and many expect him to continue his predecessor's policy of incremental change. How do you see diplomacy between Cuba and America evolving under these two leaders?

Rhodes: I think the frustrating thing to me in watching Cuba is that, inevitably, the future is the direction we were going in. There's going to be an opening between the United States and Cuba. Americans want to travel to Cuba. American businesses want to be in Cuba. The Cuban people want to be closer to America. More information is getting to Cuba, there's more internet connection in Cuba. The notion that just a few more sanctions are going to topple the Communist Party in Cuba—we have six decades of evidence that that is wrong. And if anything, that those sanctions are perpetuating both a dire poverty for the Cuban people and the entrenched elite in Cuba. So, Trump is trying to turn back the clock for very cynical political reasons rooted in Florida. And I really do think that with whoever the next president is, particularly a Democratic pres-

ident, what began under Obama will just accelerate. The issue I'd watch for the next year and a half is Venezuela. They [the Trump Administration] seem to be lumping Cuba and Venezuela together. I don't rule on anything with these guys. I'm not saying they're going to invade Cuba, but whatever starts in Venezuela could move somewhere else. So, that would be the wild card. Other than that, there's an inevitability that a country that's 90 miles from Florida that has an enormous diaspora in the United States ultimately draws closer, even if their political system isn't changing overnight.

CJLPP: *Thank you, Ben, for your time and expertise.*

Time's Up Now: *Fighting for the Future of Gender Justice in the Trump Era:* *An Interview with Fatima Goss Graves*

Megan Schmiesing
Staff Writer (PZ '20)

Fatima Goss Graves is the President and CEO of the National Women's Law Center as well as a co-founder of the TIME'S UP Legal Defense Fund. For over a decade of work at the Women's Law Center, she has dedicated her career to advancing and creating opportunities for women and girls in education, employment, healthcare and reproductive rights. Goss Graves received her B.A. from UCLA and her J.D. from Yale Law School in 2001. She is a widely recognized expert in her field and serves on multiple committees, regularly testifies before Congress, and contributes widely to a variety of publications. Goss Graves recently gave a talk on her work and the future of gender justice at Claremont McKenna College, and agreed to sit down for an interview with CJLPP.

CJLPP: *Over the years you have specialized mainly in women's rights and equality. How were you drawn to this particular area of the law?*

Goss Graves: You know, one of the things I've realized over the years is that the work to ensure that women can live, learn, work, and really be with dignity and equality or fairness is the lens that brings me the most passion for my justice work. It has led me to think about workplace policies, it has led me to think about healthcare policies, poverty policies, tax policies, reproductive rights policies, and the many, many ways in which all of those things touch women's lives. People don't divide themselves up by issue, they think about what their day to day is like. So, I have always been drawn to that, drawn to improving the lives of women and girls and using all of the tools I could think of to do it.

CJLPP: *Education has long been an area that has left women and girls, particularly women of color, vulnerable to bias and discrimination. How are Department of Education actions such as the revoking of Obama's discipline guides in schools or the proposed changes to Title IX impacting women's education and lives?*

Goss Graves: What's interesting is that schools are a place where people are formed and shaped in a lot of ways, and they are also really important institutions that allow for either bias to flourish or to be diminished. So, it has been a big part of our work at the National Women's Law Center thinking about how schools can actually be places where students can be successful and learn and thrive, places of joy, rather than places where they experience discrimination, bias and harm. We were excited when the Department of Education under President Obama put out school discipline guidance to give schools tools



to reduce disproportionate discipline, to deal with excessive discipline, and to deal with bias. We were excited to see the work, the really important work, that the last administration did to address sexual violence more broadly in schools. So, to see Secretary Betsy DeVos unravel that on purpose is disheartening because of the message that it sends, both to students and to schools around this country, about what their obligations are and about what their rights are. It is frustrating because of all the resources we are having to put into reminding people what the state of law actually is. We have had to sue the Department of Education over Title IX regulations; we have had to galvanize the public and have been really thrilled to see the public weigh in, in a very serious way around the rulemaking process for Title IX. But it is disheartening because what we really should be doing is setting the stage for students to thrive. That should be everyone's priority that we can work on.

Title IX, in particular, has long been an area where you can find a lot of bipartisan support, in part because—and this is sort of the old secret about it—it turns out men and women, people of all races, and conservatives and not, it turns out, they have daughters as well as sons. And when you start seeing that, you start understanding and seeing equality a little differently, and you want that for your children. So, that's what we are seeking. We view this as a threshold and critical fight, it is far from over and we are continuing to do this work. The

Department of Education is trying to finalize this rule against the objections of really everyone, and I mean everyone—it is really rare that school board associations, principals' associations, psychologist associations, pediatrics, people who represent students, domestic violence activists, and colleges from around this country have all joined together to say that the Department of Education has gone too far—and that is what is happening here. It is Betsy DeVos and extremist men's rights activists on one side, and everyone else together on the other. And we can do better.

CJLPP: *In what ways do you see the law and courts as a productive avenue for social justice and reform? What are some opportunities the law provides and what are some of its limitations?*

Goss Graves: At the National Women's Law Center we always thought of the law in its broadest sense. We use the law in all of its forms. The reason we think about it this way is because we do take on individual cases and do legal work in the sense that a lot of people think about it. But we also understand that sometimes you have to move to create new laws, sometimes you have to work for administrative interpretations of those laws, and sometimes your priority has to be that any of these changes are lasting. And that lasting change you cannot truly achieve without cultural change. Sometimes one is pulling the other. Right now, I really believe we are in a situation where our culture is dramatically outpacing our laws and policies. People have moved, and our policy-makers are some of the last to catch up with where our culture is. There are other times where our policy-makers are at the forward edge and are pulling our culture along. So, if you really want all of those things happening together at once, you need each of them. And there are times when even though you've made progress and you think you're done, you realize that you are not. That is a lesson we keep learning again and again, we're never done unfortunately.

CJLPP: *Returning to the idea of all methods working together: because policy-makers in Congress are so gridlocked right now, do you see the law and courts as way to advocate for the social change people are wanting to see happen?*

Goss Graves: Well, right now we are in this moment where there is a real celebration around the rule of law. That's one thing lawyers can agree on and get excited about. No matter the political climate, there are boundaries that we as a country, a nation that is governed by laws, respect. And that's being tested in my mind right now, in really important ways. Again and again, we have had courts who have stepped in to say, "actually, laws and rules matter and you haven't followed those and so what you are proposing to do, we won't let you do it." As a lawyer and someone who does believe in sort of a tradition sense in the rule of law, I find that very comforting. I find it comforting that political whims cannot get rid of our notions of laws and rules. I find it comforting that there is a backstop.

On the other hand, I'm deeply, deeply worried because I'm watching as there is a strategic effort to rapidly remake our courts, with the goal of making it so that the rule of law is diminished. And we can't ignore that. I'm worried because I have seen this administration flaunt the law and rules again and again, such that their rules and proposals have been

struck down, and eighty percent of the time they have been challenged. That's extraordinary, that is not typical. As someone who is a plaintiff in some of those cases and representing people in others, it has been a useful thing to be able to remind them that laws matter and to challenge what they are doing in the courts. But it's not a good thing for our democracy. Our democracy, in many ways, relies on people respecting rules.

CJLPP: *As a co-founder of the Time's Up Legal Defense Fund, what have been some of the greatest victories and greatest challenges on the legal side of the Time's Up movement?*

Goss Graves: I would say the biggest challenge is that we launched January 1, 2018, just a couple months after the Weinstein stories broke, just a couple months after Me Too went viral. In those early days, it was scrappy in many ways. We were sort of building a plane, flying the plane, getting it off the ground to respond to what was really an urgent energy. After what I still believe was one of the most creative and impactful mobilizations on the Golden Globes red carpet in 2018—a partnership between activists and artists who were amplifying voices and took over the red carpet and just turned it into a very different message—we got over 200 different people calling the Times Up Legal Defense Fund seeking assistance, just in that two-hour period. And I say that because the need is urgent, but the resources are not matching, in any way, our ability to serve all of the many people who are harmed in this moment.

On the other hand, people are responding so we have been able to raise 24 million dollars from 20 thousand different donors. We have been able to serve over 4,000 people who have experienced harassment or retaliation related to harassment at work. People who are looking for help, who are looking for lawyers, sometimes for media support, sometimes they are just looking for someone to walk them through what it means to come forward. We have been able to fund over one hundred cases, and we have over eight hundred attorneys in our network. On January 1, we didn't have any of that, so it's just been a little over a year. And over and over again, the people that we hear from are so glad we're here, many of them never thought they would need something like this, many of them feel inspired to come forward and take on harassment that they thought they couldn't take on before, but they see somebody else doing it and that makes them brave. So, it is the individual stories that keep driving me. It is the stories of people who have been willing to come forward; some have been publicly told, some we'll never be able to publicly tell but we know that their lives are better, that organizations are changing. And that is what's making a difference.

CJLPP: *Has the Time's Up Legal Defense Fund allowed for more vulnerable populations and low-income populations to be able to seek legal help and action for their cases?*

Goss Graves: One of the things it turns out is that it's hard for individuals who don't make that much money to bring a case generally. And one of the things that makes it hard is it's hard to convince attorneys to take those cases. These cases are expensive to bring, and the money that you're going to get on the back end might not be very much. And so maybe you'll

do a couple, but you're not really in the business of doing this full time. Many of the law firms that take these cases are small businesses themselves, and so they can't take that many of those kinds of cases, especially if it's not a class action. So, what this funding does in many ways, is that it makes it possible for people to take these cases. People have been inspired by what's going on and they want to be Time's Up attorneys, they want to help. So, our goal is to get the cases to be brought that should be brought and that would not be brought otherwise.

CJLPP: *You have long worked on abortion rights and patient's health advocacy and so I wanted to ask you: where do you think abortion rights stand today? How do you see the policies of the Trump administration and the recent Supreme Court justice selections impacting abortion rights going forward?*

Goss Graves: So, the irony is that there's a giant disconnect between where the public is and where our policy-makers are. The vast majority of people support access to abortion care, support access to safe and legal abortion, and are kind of like, "why are we talking about this?" We have tested this again and again and again, over seventy percent of independents support *Roe v. Wade*. People don't really want their policy-makers to spend their time policing women's bodies. It is not on the top of their minds. And then there's where our policy-makers are. One of the things you may notice is that especially in political years or political seasons, they seize upon misinformation about abortion care. They make up lies and don't mind spreading them in order to scare people, in order to demonize the people who actually need abortion care and make it easier to pass harmful provisions. If I tell you that it's not abortion and instead it's something else, then maybe you'll be okay with me passing laws that make it harder and harder for people to get the healthcare they need. That's the strategy right now. It's not what people are asking for. And it's scary. It's scary to see the race that states are engaged in, basically a race to the bottom with Georgia passing a law that effectively bans abortion and Alabama saying we'll beat you and make it worse and who's next? All of it is designed to try and get the Supreme Court to overturn *Roe v. Wade*. And the reason states think it's a good idea is that they like us, are very worried about the composition of the Supreme Court. They, like us, watched the hearings last fall and said okay, now is the time, abortion is at risk. Now I watched the hearings, and I watched Justice Kavanaugh say again and again that he did not plan to undermine access to abortion care so perhaps he won't. It is my expectation that he will abide by what he committed to.

But states are encouraged, we are going to keep seeing that. Over the last few years we have seen hundreds of efforts to undermine access to abortion care, so it's not a new idea. What is a little new is the extreme nature that they're taking. They're coming up with laws that basically say, "our goal is to put women who have abortions in jail." That is what their goal is, to criminalize abortion care. That's their end goal. So, they're showing their cards and you don't actually always get that. Sometimes when you are doing policy work, people will say one thing when they are trying to do another thing. Here they are totally upfront, their goal is to overturn *Roe*, their goal is to criminalize abortion care. So, we should all be deeply worried, this is not something to turn our heads away from. We should

meet the lies that they are peddling head on, we should call them for what they are, we should name what they are actually trying to do, and we should give people what they want. People really want our policy-makers to focus on things that matter in their day to day lives, we can give them that. We can give them an alternative.

CJLPP: *You mentioned the fact that in our culture, the majority of people are in favor of keeping *Roe v. Wade* and abortion care legal. What do you see as driving policy-makers in Alabama and Georgia to focus so intensely on this issue?*

Goss Graves: Because a small minority of people are against it. This is not a new campaign, this is a decades long strategy that they have been seeking. This has been a decades long strategy to try and criminalize abortion. So, it's not a new idea, what is new is seeing an opportunity to take that idea seriously. That is why we should worry. They don't care that the vast majority of people are opposed to it, they are going to try and scare you, and lie to you, and make you think they are doing something else.

CJLPP: *Can you talk a little about the history of the recently re-introduced Equality Act, and, if passed, what are some the rights and protections it would provide for women and LGBTQ people?*

Goss Graves: Yes, so there is actually going to be a hearing tomorrow in the Education and Labor Committee on the Equality Act, there was one a week ago in the Judiciary Committee in the House. Our hope and our expectation is that the House will move to pass it. That would be really significant. What the Equality Act would do is for the first time it would make it unmistakably clear in federal law that there is no discrimination based on sexual orientation and gender identity in housing, in the workplace, in education, in federal funding, or in public accommodations. What that would mean is that if you're wanting to shop in a store, if you're at school, if you're at your job, if you were just at home, that you have clear protections. The Equality Act also clarifies places in our federal civil rights law to state that sex discrimination protections exist. Right now, there are not protections that are broad in either federal spending on the basis of sex or in public accommodations on the basis of sex. What that means, in terms of federal protections is, if you are someone who is harassed in a store or in a taxi, unless your state has protections, you do not have federal rights. Or it means that if the federal government is spending money and it is not in education or in healthcare, they are not explicit protections against sex discrimination at all.

This bill also does something that I think is important, which is what the case law has already done but we have been fighting this battle, it talks about the many ways in which sex discrimination is inextricably linked to sexual orientation and gender identity discrimination. So, we clearly define sex discrimination to include discrimination based on gender identity, sexual orientation, sex stereotypes, and pregnancy. That's important so that people have a clear understanding of what we're talking about when we are talking about this form of discrimination. So, that's what it would do. It would be historic, it is not a small deal. And it's not a small deal to introduce it now and have the House pass it now at a time where actual-

ly this administration is seeking to undermine rights in all of these spaces. This would be an opportunity to show there is an alternative way to do this. Rather than coming up with new ways to discriminate against LGBTQ people as they are trying to do with transgender bans in the military or rolling back protections in education, this would say it is time for full equality. And I think it's time.

CJLPP: What role did your organization, the National Women's Law Center, play in crafting and advocating for this bill?

Goss Graves: We have been deeply involved in it, and we are one of the co-leads of the organizations that are working on it together with the Human Rights Campaign, the Leadership Conference in Civil & Human Rights, and the National Center for Transgender Equity. And all of us are really, really clear, together with a broad-based coalition of hundreds of organizations, that we are ready for and working for political equality.

CJLPP: For my last question, what advice do you have for students who are hoping to pursue law-related careers to fight for social justice?

Goss Graves: My big piece of advice is follow your passion. This is passion work, it is not work that you can sort of phone in. Most of the people I know who do this work and stay in this work, you get up thinking about it and you go to bed thinking about it. And in truth, even if you weren't doing the work, you would find a way to show up on the weekends in support of everyone else. Follow your passion.

CJLPP: Thank you so much for your expertise and for such an insightful and inspiring interview.

Letter from the Editor-in-Chief Emerita — *Learning to Love the Law*

April Xiaoyi Xu (PO '18)
Editor-in-Chief Emerita

August in Cambridge, Massachusetts was blue, gold, and red. The azure sky and golden sunlight offered a familiar warmth as I settled into my new home in crimson land.

Yet, as a first-year law student, I am here for a different color. Even though what awaits me is perhaps a golden world with no short supply of exciting reds and blues, I must be comfortable, as a lawyer-in-the-making, to live in the gray.

Gray is not boredom. Instead, the past few months have taught me that living in the gray in itself offers a whole palette of feelings that often bring me back to my Claremont days.

As a politics major and Spanish minor at Pomona, I strove to deepen my knowledge of the social sciences on the one hand, and further my longstanding passion for foreign languages, literature, and creativity on the other. Writing was the centerpiece that helped connect the dots throughout my intellectual journey in Claremont.

As a first-year eager to continue the journalistic work I had been doing for the *Huffington Post* and *South China Morning Post*, I sampled virtually all of the 5Cs' student-run publications. *Claremont Law Journal* (which would later evolve into the *Claremont Journal of Law and Public Policy*, "CJLPP") especially caught my attention, for law — full of tensions — attracted me in an indescribable fashion. Law is broad, for it is the most all-encompassing way in which society organizes itself; however, law is also narrow in demanding precise thinking and minute details in each case. Law embodies grandiose principles of justice, but even landmark U.S. Supreme Court decisions may involve great injustice. Often, three-pronged tests that courts develop and the apparently inconsistent way judges interpret the law can feel frustratingly arbitrary.

On a more personal level, law singularly magnified my internal tension between painstakingly precise academic writing on the one hand, and free-flowing creative writing on the other. To me, law clearly fits the first category, while being almost an antithesis to the latter, which has shaped much of who I am.

My early impressions of CJLPP confirmed these initial feelings about the law. I soon found that among the 11 student organizations that I had enthusiastically joined, CJLPP was the most efficiently-run: weekly meetings, which always started exactly on time throughout my four years, somehow defied the concept of "Claremont time"; we had a 48-hour response rule across the editorial team; my colleagues and I regularly exchanged long emails regarding all aspects of the journal.

Serving as an editor, and later, Editor-in-Chief, for CJLPP allowed me to sharpen precise thinking and writing skills, as I pored over our authors' articles, sentence by sentence, word by word, and punctuation mark by punctuation mark. Throughout the editing process, I relished the communication between myself and our writers, and later, between the writers and our readers — all through written words. In Contracts class in law school, we learned about "meeting of the minds"; I think we can apply this doctrine to effective writing as well. It is quite an art, as I came to appreciate, to first internalize a large body of existing scholarship and black-letter rules for your-

self, then to consider ways one can argue for both sides before finding your own position, and more importantly, to communicate such ideas in a logical, accessible way for readers who may not be familiar with the issue at all.

As a freelancer and fiction writer, I had generally considered writing a mostly solitary activity; my experience with CJLPP challenged me to expand my philosophy on the writing/editing process. Gradually, I came to agree with my CJLPP friends that writing is not a solitary activity, as much as it has meant for my individual growth as a writer. It is a truly collaborative process where the writer and editor alike engage in deep conversations and learn from each other, often through points of contention.

Meanwhile, my obsession with creativity would not allow me to surrender my creative instincts. One of the most memorable moments in my academic career at Pomona was one where I slipped into a judge's robe and held a gavel, fashioning myself into a Supreme Court justice in *Lau v. Nichols*, 414 U.S. 563 (1974), for my Spanish elective on bilingualism in the United States. If this presentation was painful for me in any way, the pain was purely self-imposed: for this final project of the class, students were free to choose any topic on bilingualism to present. I decided to do my first full-scale legal research project entirely in Spanish, and challenged myself further by making the format of my presentation as creative as possible, before writing an extensive research paper analyzing *Lau*.

I must admit that I had tons of fun working on the presentation. I had been inspired by Justice Sonia Sotomayor just one year prior when I had escorted her around our beautiful campus, and I daydreamed about the possibility of becoming a judge some day — I even started writing a novel partially set at the U.S. Supreme Court. Yet, my professor's comment was piercing to me at the time; while the audience and himself all found my presentation engaging, my professor questioned the value of my creative approach. Upon reflection, I agreed that I had been employing creativity almost exclusively for creativity's sake. The creative elements had not strengthened the substance of my presentation. That A- on the presentation, admittedly, had me in tears when I shared the story with my best friends over dinner, given how much effort I had put into the project. This failed first attempt at juxtaposing my interest in the law and my commitment to creativity was a wakeup call.

Can it be done?

Perhaps. To this day, I cannot claim that I have reached any sort of conclusion, but I do keep trying. With CJLPP, I actively rebelled against the notion that a law journal is supposed to be “dry and boring.” I constantly sought to add creative ingredients to the journal along with my wonderful fellow members of the journal. As one example, when my peers and I identified that there are just over 10 established undergraduate law journals in the U.S. and Canada, we encouraged our counterparts at other institutions to consider the relationship among our respective journals not as a zero-sum game for readership or strong submissions, but as a collaborative endeavor, especially having increasingly appreciated the collective efforts internally for CJLPP. As a result, the *Intercollegiate Law Journal*, a platform featuring the best undergraduate legal writing from across different North American universities, was born. As another example, when we kept noting staff turnover because juniors go abroad or do a semester in D.C., I created a new position, the D.C./foreign correspondent role, for CJLPP staff writers to take advantage of their experiences off-campus — a win-win situation for the writers and the journal alike.

In *One L*, Scott Turow's notorious memoir on his “turbulent” first year studying at Harvard Law School, there is a chapter titled “Learning to Love the Law.” As HLS Professor Noah Feldman shared with my 1L section over lunch one day, 1L is a process of deconstruction, of seeing everything through an X-ray. Instead of reading cases as normal human beings do, we focus on abstract elements of the law; as Professor Feldman analogized, nothing can look that pretty under an X-ray.

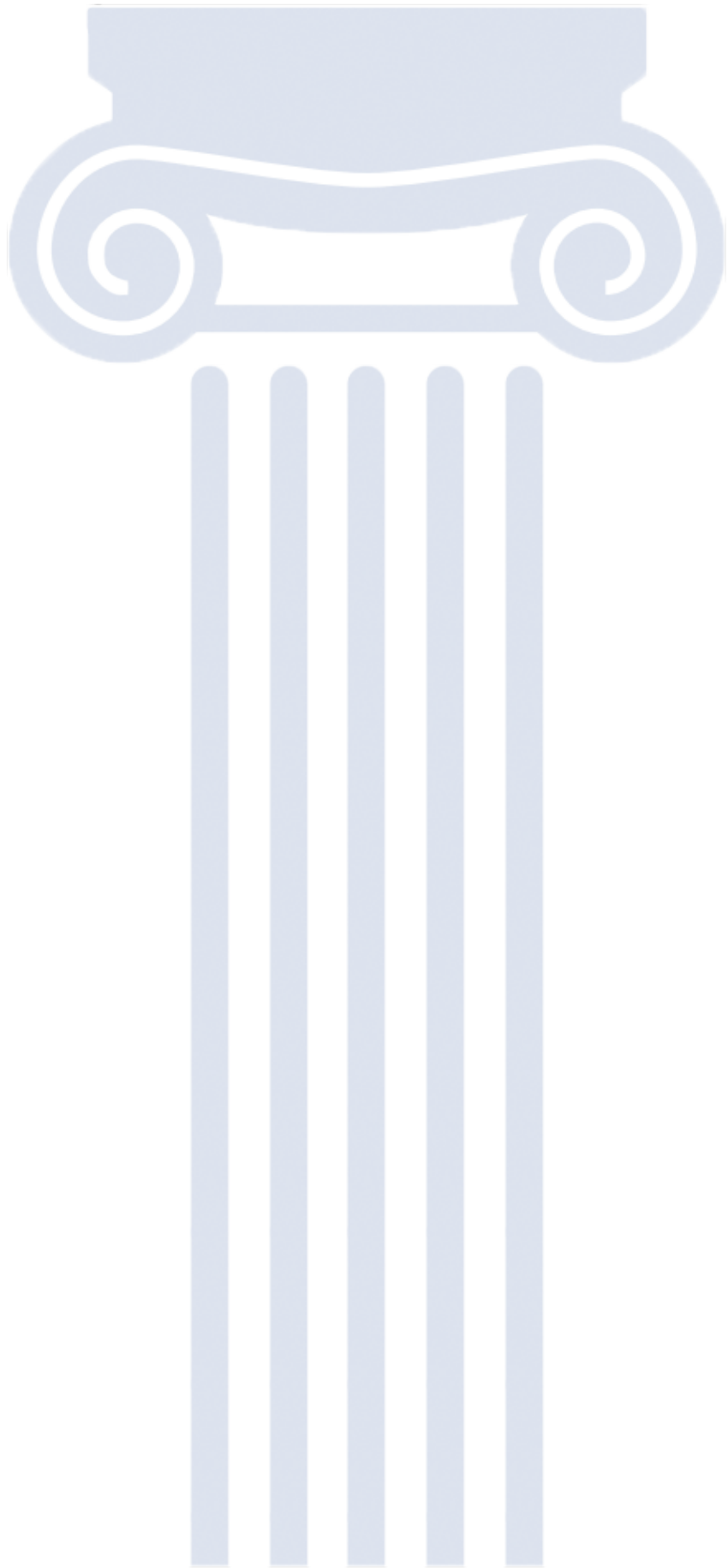
Although HLS has changed drastically since the highly competitive period when Turow studied here, I agree that 1L, and law school generally, provides a framework for one to “learn to love the law.” In my personal experience thus far, 1L has involved a whole spectrum of emotions that living in the gray evidently entails.

Often enough, I find my heart pounding. Sometimes, it is a criminal law case that triggered consecutive nightmares, haunting me with ethical questions. Sometimes, it is an appellate brief whose fact pattern is very unfavorable to my assigned position and issue given the relevant caselaw. Like solving a jigsaw puzzle, working on the brief invited me to confront the messiness within the case that the control-freak in me found initially disconcerting. Distilling elements from facts and precedents and framing them in a way that would make my arguments as strong as possible for each section, subsection, and sub-subsection felt incredibly rewarding. Head over heels, I fell genuinely in love with the law during these times. Other times, I would fall out of love with the law, frustrated by a real fear that the law would once again stifle my creative tendencies, perhaps once and for all. This cycle would continue — like the color gray that is neither black nor white, the law and my sentiments towards it involve more complexity.

Turow would graduate from HLS, enjoy his legal practice, and become a celebrated master of the modern legal thriller — a real-world example of someone who successfully managed to embrace both the law and creative writing.

As for you and me, I wonder what our future holds. Gold, red, blue, or gray? All of the above? Time will tell. In the meantime, I am grateful for CJLPP and my Claremont years for shedding light on my puzzle, and very much look forward to hearing about my fellow CJLPPers’ own questions — similar or dissimilar to mine — as you further your own academic and professional journeys. It is my sincere hope that CJLPP will continue to grow and prosper. Godspeed.

April Xiaoyi Xu graduated summa cum laude from Pomona College as the Phi Beta Kappa Graduate Award recipient of the Class of 2018. She was selected as a finalist for the Rhodes Scholarship. April is currently a Juris Doctor candidate at Harvard Law School, where she is Managing Editor-elect of the Harvard Negotiation Law Review and an executive board member of the Harvard International Law Journal.



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