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IN COLLABORATION WITH HANDONG INTERNATIONAL LAW SCHOOL

Volume 8 **Spring 2022**

ARTICLES

NOTES

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INTRODUCTORY NOTE

Putting together this volume has been one of the most rewarding experiences. We hope you find these articles captivating, educating, and thought-provoking. As Christians, we must engage with and fight to prevent issues that break the heart of God and that plague the world we live in. We hope this volume gives some insight into how you can begin to engage.

Kalina J. Vincent, *Editor-in-Chief*
Rebekah D. Bunch, *Executive Editor*

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RECIPROCITY AND RESPECT: STRENGTHENING A KEY ALLIANCE IN STRATEGIC COMPETITION

Major R. Scott Adams

INTRODUCTION

The equality of sovereign states is a canon of customary international law.[1] It is also fundamental to international relations and the very foundation of the United Nations Charter.[2] However, the principle of equality among sovereigns does not stop powerful states from exploiting superior bargaining power in bilateral agreements. But partnerships formed under such agreements are born of transactional diplomacy rather than mutual respect among equals. The United States (U.S.) has, quite naturally, created a large number of agreements that fall into this category of transactional diplomacy. In the short-term, these agreements are extremely effective. They meet U.S. interests abroad, while granting little or nothing to the weaker party. There is, perhaps, no better example of such agreements than the various non-reciprocal Status

[1] *See* Thomas H. Lee, *Case Studies in Conservative and Progressive Legal Orders: International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 L. & CONTEMP. PROBS. 147 (2004).

[2] U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members."). By way of example, the Vienna Convention on Diplomatic Relations is universally applied to all states, giving diplomatic privileges and immunities reciprocity in all host nations as a matter of customary international law. *See* Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L. Q. 1 (1988). Status of Forces Agreements are often compared to diplomatic privileges and immunities, and indeed, bilateral arrangements with some host nations provide U.S. service members the equivalent status of diplomatic administrative and technical staff. However, unlike diplomatic protections, SOFA protections are not given reciprocity in bilateral arrangements with the U.S. This result is incongruous with the customary principle that sovereign states are equals.

of Forces Agreements (SOFA) between the U.S. and its allies across the Indo-Pacific. This Article argues that such relationships will be insufficient to meet great power competition, and indeed, transactional diplomacy may no longer be strategically beneficial in the long run. The U.S. must instead shift its approach to bilateral agreements with allies and partners. It must seek to deepen alliances by demonstrating it is not a wounded superpower,[3] but rather a principles-based partner.

This Article proposes one simple and incremental change for the U.S. to begin on a new path of principles-based partnerships, while more effectively achieving national security goals. Specifically, it proposes the creation of a reciprocal SOFA between the U.S. and Australia.

The Indo-Pacific Region. Today's central challenge to U.S. security is strategic competition from revisionist powers,[4] expressly identified in the 2018 National Defense Strategy as China and Russia.[5] It is no accident that China is listed first. As the new Biden Administration stated informally: "It's China, China, China, Russia."[6] In December of 2020, John Ratcliffe, Director of National Intelligence, unequivocally stated, "China poses the greatest threat to America today."[7] The statement repeats a common theme during the Trump Administration,[8] which held that China and Russia "want to shape a world antithetical to U.S. values and interests."[9] This theme has generally continued into the Biden

[3] HENRY KISSINGER, ON CHINA 533–34 (2012 ed.) (noting that Chinese "hardliners" will argue that the U.S. is a "wounded superpower determined to thwart the rise of any challenger"). Some Australians, particularly younger Australians, often come to the same conclusion when discussing U.S.-China competition.

[4] U.S. DEP'T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 2 (2018) [hereinafter NATIONAL DEFENSE STRATEGY]. Revisionist powers is used here in reference to a state seeking to change or end the current international order. The international order, in turn, means many different things in official discourse, but generally has reference to the multi-lateral institutions, international law, and norms that emerged in the aftermath of the Second World War, centered on the United Nations. *See* Ben Scott, *But What Does "Rules Based Order" Mean?*, THE INTERPRETER (Nov. 2, 2020), https://www.lowyinstitute.org/the-interpreter/what-does-rules-based-order-mean.

[5] NATIONAL DEFENSE STRATEGY, *supra* note 4, at 2.

[6] Katrina Manson et al., *What Does a Biden Presidency Mean for the World?*, FIN. TIMES (Jan. 19, 2021), https://www.ft.com/content/75592d75-61ec-43f2-b435-c760db86394a.

[7] John Ratcliffe, Opinion, *China is National Security Threat No. 1*, WALL ST. J. (Dec. 3, 2020, 1:20 PM), https://www.wsj.com/articles/china-is-national-security-threat-no-1-11607019599.

[8] *See, e.g.*, Michael R. Pompeo, Sec'y of State, Address at the Richard Nixon Presidential Library: Communist China and the Free World's Future (Jul. 23, 2020).

[9] WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 25 (Dec. 2017) [hereinafter NATIONAL SECURITY STRATEGY].

Administration, with Secretary of State Antony Blinken calling China "the biggest geopolitical test" of this century.[10]

Key alliances. To meet this test, the National Security Strategy emphasizes the crucial role of alliances and friendships with South Korea, Japan, Australia, and others.[11] Similarly, the National Defense Strategy identifies "strengthening alliances as we attract new partners," as one of three lines of effort in strategic competition.[12] These alliances are often framed and managed through legal agreements, including SOFAs, and are especially important in the Indo-Pacific.[13] Strong alliances and partnerships provide pooled resources, access to critical regions,[14] and perhaps most significantly, create a collective weight of influence that no competitor can match.[15] As Blinken stated more simply, "we can approach Beijing most effectively when we are working together."[16]

Following the 2020 U.S. Presidential Election, the Biden Administration issued Interim National Security Strategic Guidance in March 2021.[17] Similar to his predecessor, President Biden's strategic guidance emphasized the role of allies and partners, referring to them as "America's greatest strategic asset."[18] Biden committed to "reinvigorate and modernize" alliances.[19] Further, he described the need to reaffirm alliances with expressly identified critical partners, including Australia.[20]

Strengthening the alliance. For Australia, and many other countries within the U.S.' "constellation of allies," the lines of demarcation

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[10] Simon Lewis & Humeyra Pamuk, *Biden Administration Singles out China as "Biggest Geopolitical Test" for U.S.*, REUTERS (Mar. 3, 2021, 9:07 AM), https://www.reuters.com/article/us-usa-china-blinken-idUSKBN2AV28C. Some commentators have expressed concern with the Trump Administration's rhetoric in describing competition with China, overstating it as an existential threat. The Biden Administration seems to be notably calmer in its use of language, but clearly remains "clear-eyed" about the threat posed by China. *See id.*

[11] NATIONAL SECURITY STRATEGY, *supra* note 9, at 46. The U.S., Japan, India, and Australia make up the quadrilateral cooperation, or "quad," that has joined efforts in securing a "free and open Indo-Pacific." *See* Press Release, The White House, Quad Leaders' Joint Statement: "The Spirit of the Quad" (Mar. 12, 2021).

[12] NATIONAL DEFENSE STRATEGY, *supra* note 4, at 5.

[13] *Id.* at 9.

[14] *Id.* at 8–9.

[15] *See id.* at 8.

[16] Antony J. Blinken, U.S. Sec'y of State, Remarks to the Press in Brussels, Belg., Sec'y Antony J. Blinken and High Rep. for Foreign Aff. Josep Borrell After Their Meeting (Mar. 24, 2021).

[17] WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE (Mar. 2021) [hereinafter INTERIM STRATEGIC GUIDANCE].

[18] *Id.* at 10.

[19] *Id.*

[20] *Id.*

in strategic competition are unclear.[21] These countries "do not regard themselves as elements in an American containment policy, nor of a revived Chinese tributary order."[22] Instead they hope for "good relations" with both "and will resist pressure to 'choose' between the two."[23] These countries may still hope for Henry Kissinger's ideas of "coevolution," in place of competition.[24] Kissinger concludes his famous 2011 book, *On China*, by calling for a merging of U.S.–China efforts "not to shake the world, but to build it."[25] In the past decade, however, an overwhelming and bipartisan consensus has emerged in the U.S., holding that the era of U.S.–China engagement "has come to an unceremonious close."[26] China's use of predatory economics and influence operations, combined with its clear pursuit of regional hegemony have challenged even the most quixotic advocates of cooperation.[27]

With this background, some policy experts, including National Security Advisor, Jake Sullivan, have advocated for a middle ground between zero-sum competition and naive cooperation, namely, "clear-eyed coexistence."[28] This coexistence may place competition first but simultaneously seeks opportunities for cooperation.[29] As Blinken has said, "[o]ur relationship with China will be competitive when it should be, collaborative when it can be, and adversarial when it must be."[30] This oscillating and nuanced approach requires "a new model of major power relations."[31] It requires humility[32] in exerting U.S. influence, and

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[21] Kurt M. Campbell & Jake Sullivan, *Competition Without Catastrophe: How America Can Both Challenge and Coexist with China*, FOREIGN AFFS. (Sept./Oct. 2019), https://www.foreignaffairs.com/articles/china/competition-with-china-without-catastrophe. To illustrate the ambiguity, Campbell and Sullivan argue that the very term "strategic competition" implies a certain level of uncertainty. *Id.* Just as "strategic patience" implies uncertainty about what to do, "strategic competition" implies uncertainty about the objective of competing. It must be clear that, contrary to the impressions of some foreign observers, US foreign policy is not that of a wounded superpower, fighting to stay on top. Instead, the US is seeking the triumph of principles. *See id.*

[22] KISSINGER, *supra* note 3, at 540.

[23] *Id.*

[24] *Id.* at 543–44.

[25] *Id.* at 530.

[26] Campbell & Sullivan, *supra* note 21. Similarly, though perhaps in a harsher tone, Secretary of State Mike Pompeo said in July 2020 that the past fifty years of U.S.-Chinese engagement has been a failure. Pompeo, *supra* note 8.

[27] *See* NATIONAL DEFENSE STRATEGY, *supra* note 4, at 2; Campbell & Sullivan, *supra* note 21.

[28] Campbell & Sullivan, *supra* note 21.

[29] *Id.*

[30] Lewis & Pamuk, *supra* note 10.

[31] Susan E. Rice, U.S. Nat'l Sec. Advisor, Address at Georgetown University: America's Future in Asia (Nov. 20, 2013).

[32] Campbell & Sullivan, *supra* note 21.

increased delegation of strategic autonomy to regional allies.[33] That is to say, the U.S. must strengthen alliances through mutual respect and principled partnerships, while moving away from transactional diplomacy.

This Article does not advocate an alarmist's view that the Australia–U.S. alliance is broadly at risk, but like many Indo-Pacific countries, Australia's place in the U.S.–China competition is not as simple as U.S. officials may sometimes assume.[34] While it is beyond question that the U.S. is Australia's primary security partner,[35] China is, by far, Australia's largest source of trade.[36] As it is for nearly all countries in the region, China is indispensable to the Australian economy.[37] Further, a growing generational divide exists within Australia, wherein younger Australians have begun to question their connection to the U.S.[38] When asked to choose Australia's "more important relationship," fifty-four percent of Australians under thirty years of age chose China.[39] Only thirty

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[33] RICHARD JAVAD HEYDARIAN, ASIA'S NEW BATTLEFIELD: THE USA, CHINA AND THE STRUGGLE FOR THE WESTERN PACIFIC 7 (2015).

[34] *See* Austl. Associated Press, *Scott Morrison Says Australia Will Not Pick Sides Between China and US*, SBS NEWS (Nov. 24, 2020, 8:12 AM), https://www.sbs.com.au/news/scott-morrison-says-australia-will-not-pick-sides-between-china-and-us ("'Our actions are wrongly seen and interpreted by some only through the lens of the strategic competition between China and the United States,' Mr. Morrison said. 'It's as if Australia does not have its own unique interests or views as an independent sovereign state. This is false and needlessly deteriorates relationships.'").

[35] Nathan Church, *The Australia-United States Defence Alliance*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/AustUSDefence (last visited Mar. 21, 2022).

[36] Anne Holmes, *Australia's Economic Relationships with China*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/China (last visited Feb. 5, 2022) ("Today, China is Australia's largest trading partner in terms of both imports and exports. Australia is China's sixth largest trading partner; it is China's fifth biggest supplier of imports and its tenth biggest customer for exports. Twenty-five per cent of Australia's manufactured imports come from China; 13% of its exports are thermal coal to China.").

[37] HEYDARIAN, *supra* note 33, at 12.

[38] *See, e.g.*, Laura Silver et al., *Unfavorable Views of China Reach Historic Highs in Many Countries*, PEW RSCH. CTR. (Oct. 6. 2020), https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/ (noting that 2020 saw a dramatic rise in unfavorable ratings toward China, in part, as a reaction to COVID-19 and that before 2020, about forty-five percent of Australians under thirty years-of-age viewed China unfavorably, which is far lower than that of older Australians).

[39] Natasha Kassam, *Generation Why? Younger Australians Wary of United States*, THE INTERPRETER (June 24, 2020, 6:00 AM), https://www.lowyinstitute.org/the-interpreter/generation-why-younger-australians-wary-united-states. Kassam correctly notes the study is largely influenced by a general distaste for Donald Trump, who

percent of Australians over sixty did the same.[40] In this environment, Australia's Prime Minister, Scott Morrison recently said, "pursuing [Australia's] interests in the midst of strategic competition between the U.S. and China is not straightforward . . . [Australia is] not to be forced into any binary choices."[41] Australia's connections to Beijing, and its resistance to binary choices, highlights a growing need to strengthen the alliance for the future.[42]

This Article will first place the proposed SOFA in the broader context of the Australia–U.S. strategic alliance and SOFAs more generally. It will then discuss the extant Status of U.S. Forces in Australia Agreement (Austl.–U.S. SOFA) more specifically. This will include consideration of its 1963 Protocol, which commits the parties to create a reciprocal SOFA in the future.[43] Finally, this Article will address the U.S.' historical objections to reciprocity and present policy and legal arguments in support of a reciprocal Austl.–U.S. SOFA. In the process, this Article will identify the best legal path for the accomplishment of SOFA reciprocity. A reciprocal SOFA will not be a panacea, but it presents an opportunity to reaffirm a key strategic alliance at a critical time.

I. AUSTRALIA

A. Historical Background — The Strategic Australia–U.S. Alliance

Australia sometimes escapes the notice of the world because it is stable and peaceful, and its continent-island is "mostly empty and a long way away."[44] But Australia, often described as a middle power of

according to polls, young Australians trusted less than Xi Jinping. *Id.* The numbers are likely different under the Biden Administration but would still likely reveal a generational divide and growing concern for the Australian perception of the U.S. relationship.

[40] *Id.* When asked if they prefer China or the U.S. to be the world's greatest superpower, the overwhelming majority of Australians choose the U.S.; however, the percentage is lower in Australia than it is in many Indo-Pacific countries, including Japan, Korea, and the Philippines. Richard Wike et al., *Most Prefer that U.S., not China, be the World's Leading Power*, PEW RSCH. CTR. (Oct. 1, 2018), https://www.pewresearch.org/global/2018/10/01/most-prefer-that-u-s-not-china-be-the-worlds-leading-power/. Nearly all Australians identify China as its most important relationship in Asia. See HEYDARIAN, *supra* note 33, at 262.

[41] Austl. Associated Press, *supra* note 34.

[42] Charles Edel & John Lee, *The Future of the U.S.-Australia Alliance in an Era of Great Power Competition*, U.S. STUD. CTR. (June 13, 2019), https://www.ussc.edu.au/analysis/the-future-of-the-us-australia-alliance-in-an-era-of-great-power-competition.

[43] Agreement with the United States Government Concerning the Status of United States Forces in Australia, and Protocol, Austl.–U.S., May 9, 1963, 14 U.S.T. 506 [hereinafter Austl.–U.S. SOFA].

[44] BILL BRYSON, DOWN UNDER: TRAVELS IN A SUNBURNED COUNTRY 2 (2000).

"considerable heft,"[45] is a crucial ally, with a strong military,[46] a large geographic footprint in the Indo-Pacific, and deep connections to the U.S.[47]

The Commonwealth of Australia came into being through an act of the United Kingdom (UK) Parliament in 1900.[48] Although Australia did not receive full *de jure* independence until 1986,[49] it expressly declared the U.S. to be its primary security ally as early as 1941.[50] That year, Prime Minister John Curtin publicly stated, "I make it quite clear that Australia looks to America," above all others, for mutual defense support.[51]

Curtin made the statement during World War II, wherein approximately 1,000,000 U.S. service members spent time in Australia.[52] For over 100 years, the U.S. and Australian militaries have held a "long-cherished and unwavering friendship,"[53] that includes fighting side-by-side in every major conflict since World War I.[54] In 2011, President Barack Obama said the U.S. "has no stronger ally than Australia."[55]

The Australia–U.S. alliance has also experienced its fair share of vicissitudes. Shortly before his 1975 dismissal, Australia's Labour Prime Minister Gough Whitlam briefly suggested withdrawal from the U.S. alignment due to his aggressive opposition to nuclear weapons and the

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[45] Richard Javad Heydarian, *Trump is Forcing China to Reassess its Strategy*, NAT'L INT. (Oct. 20, 2018), https://nationalinterest.org/feature/trump-forcing-china-reassess-its-strategy-33917?page=0%2C1.

[46] Sikder Taher Ahmad, *Australia Ranks World's 21st Military Power*, SBS BANGLA (Apr. 16, 2018), https://www.sbs.com.au/language/english/australia-ranks-world-s-21st-military-power.

[47] NATIONAL SECURITY STRATEGY, *supra* note 9, at 46; INTERIM STRATEGIC GUIDANCE, *supra* note 17, at 10.

[48] Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 (U.K.) (this Act is the enacting legislation for the Australian Constitution.).

[49] *See* Australia Act 1986, c. 2 (U.K.). It should be noted that Australia has been, and is today, within the Commonwealth of Nations, with the Queen as head of state. *Protocol Guidelines*, AUSTL. DEPT. OF FOREIGN AFF. AND TRADE, https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines (last visited Apr. 2, 2022) It has held de facto independence since 1901, however, the UK's formal authority to legislate over Australia was not removed until 1986. *See id.*

[50] *Australia–World War II*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Australia/World-War-II (last visited Mar. 21, 2022).

[51] *See* Penny Wong, *John Curtin's Turn to America, 75 Years on*, THE INTERPRETER (Oct. 1, 2016, 12:00 PM), https://www.lowyinstitute.org/the-interpreter/john-curtins-turn-america-75-years.

[52] *Battle of Brisbane*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Battle-of-Brisbane (last visited Mar. 21, 2022).

[53] Assoc. Press, *The Latest: Americans, Australians Celebrate in Rose Garden*, WASH. TIMES (Sept. 20, 2019), https://m.washingtontimes.com/news/2019/sep/20/the-latest-australias-pm-at-white-house-for-state-/.

[54] NATIONAL SECURITY STRATEGY, *supra* note 9, at 46.

[55] Barack Obama, Remarks by President Obama and Prime Minister Gillard of Austl. in Joint Press Conf. (Nov. 16, 2011).

conflict in Vietnam.[56] However, as Obama said in 2016, the Australia–U.S. alliance transcends party politics and endures temporary challenges;[57] notwithstanding its close relationship with the U.S., Australia also maintains a strong connection to China.[58]

B. Chinese Connections—Competition for Influence in Australia

Similar to the U.S., Australia established diplomatic relations with Beijing in 1972,[59] and has since become increasingly connected with China.[60] In 2014, Australia's conservative Prime Minister Tony Abbott described Australia and China's "comprehensive strategic partnership."[61] His immediate predecessor in the office, Kevin Rudd, spoke fluent Mandarin Chinese and was a subject matter expert on Chinese relations.[62] In formal messaging today, Australia's Department of Foreign Affairs acknowledges "differences of view on some important issues," but nonetheless explains, "the Australia-China bilateral relationship is based on strong economic and trade complementarities," and covers a wide range of mutual interests.[63] China accounts for nearly twenty percent of all Australian international trade,[64] more than twice as much as any other country.[65] Every year Australia hosts vast numbers of Chinese university students and Australia has recently increased its bilateral defense work with China, including military educational exchange programs.[66] Simultaneously, the Australia-China relationship often involves tension. In one recent example, a Chinese Government official created and

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[56] Kassam, *supra* note 39. The post-Vietnam era, in which Whitlam came to power, was one of five post-World War II waves of "declinist debates" in which the U.S. saw a substantial decrease in soft power. HEYDARIAN, *supra* note 33, at 6.

[57] Austl. Associated Press, *Obama Reassures Turnbull U.S.-Australia Alliance Will Transcend "Party Politics"*, THE GUARDIAN (Nov. 20, 2016, 4:41 PM), https://www.theguardian.com/world/2016/nov/21/obama-reassures-turnbull-us-australia-alliance-will-transcend-party-politics.

[58] *China Country Brief*, AUSTL. DEPT. OF FOREIGN AFF. & TRADE https://www.dfat.gov.au/geo/china/china-country-brief#:~:text=China%20is%20Australia's%20largest%20two,per%20cent%20during%20this%20period) (last visited Apr. 2, 2022).

[59] *Id.*

[60] *See id.*

[61] Tony Abbott, Prime Minister of Austl., Address to Parliament at Parliament House, Canberra (Nov. 17, 2014).

[62] The Honorable Kevin Rudd, Asia Soc'y Pol'y Inst. https://asiasociety.org/policy-institute/honorable-kevin-rudd (last visited Mar. 31, 2022).

[63] *China Country Brief*, *supra* note 58.

[64] *Id.*

[65] AUSTL. DEPT. OF FOREIGN AFF. & TRADE, AUSTRALIA-U.S. FREE TRADE AGREEMENT (July 12, 2021).

[66] *China Country Brief*, *supra* note 58.

published a fabricated image of an Australian soldier cutting the throat of a young girl in Afghanistan.[67] The Chinese Government published the image in the wake of a comprehensive investigation by the Inspector-General of the Australian Defence Force, which found Australia's Special Forces had committed war crimes in Afghanistan.[68] Australia's Prime Minister demanded an apology for the fake image, but the Chinese Government refused and further accused Australia of barbarism.[69] The row came during a tumultuous period of trade tensions over Chinese-imposed tariffs and trade blocks on Australian wine, barley, and beef.[70] These tensions arose soon after Australia called for an investigation into the origins of the COVID-19 pandemic.[71]

Yet within Australia's internal political discourse, some apologists are willing to overlook bullying by China.[72] These officials often invoke the excuse articulated by former Prime Minister Gough Whitlam, "Only the impotent are pure"—a phrase used to advocate opening relations with China in the 1970s.[73] In 2018, Australia's second most populous state, Victoria, independently signed onto China's Belt and Road Initiative to seek additional trade and infrastructure investment.[74] Victoria did not consult with the Department of Foreign Affairs, which held grave concerns

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[67] *See* Shaimaa Khalil, *Australia Demands China Apologise for Posting "Repugnant" Fake Image*, BBC (Nov. 30, 2020), https://www.bbc.com/news/world-australia-55126569 (The image included a caption that read, "don't be afraid, we are coming to bring you peace.").

[68] *Id.* The investigation found "credible evidence" of war crimes, specifically murder and abuse of detainees. The details of the Inspector General's report are not relevant to this paper. However, the prodigious investigation and reporting is of substantial pedagogical value, particularly as a case study of international criminal law, the practice of operations law, and the obligation to investigate suspected war crimes. *See* Paul Brereton, *Inspector-Gen. of the Austl. Defence Force Afg. Inquiry Rep.* (2020), https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf.

[69] Samantha Maiden & Ben Graham, *China Doubles Down on Sick Doctored Image Over Alleged War Crimes in Afghanistan*, NEWS.COM.AU (Dec. 1, 2020, 12:24 AM), https://www.news.com.au/national/politics/china-trolls-australia-with-sick-doctored-image/news-story/2f48f2199dfa76eb26c55b76d664cf23.

[70] Khalil, *supra* note 67.

[71] *Id.*

[72] *See* Frank Yuan, *When China Lashed Out*, THE INTERPRETER (Dec. 17, 2020, 5:00 AM), https://www.lowyinstitute.org/the-interpreter/when-china-lashed-out.

[73] *Id.* In Whitlam's time, the phrase also implied that a compromise of principles may sometimes be necessary for political success.

[74] Josh Taylor, *China's Belt and Road Initiative: What is it and Why is Victoria Under Fire for Its Involvement?*, THE GUARDIAN (May 25, 2020, 2:28 PM), https://www.theguardian.com/world/2020/may/25/chinas-belt-and-road-initiative-what-is-it-and-why-is-victoria-under-fire-for-its-involvement.

for China's use of the agreement as a propaganda victory.[75] Instead Victoria's Premier lectured the Federal Government on improving relations with China.[76] The same Victorian Government held fast to its agreement amid more recent trade tensions, and even criticized its own Federal Government for "vilifying" China.[77] The Federal Government responded by creating legislation that enabled the Foreign Minister to cancel international agreements between Australian states and foreign powers.[78] In late April 2021, Foreign Minister Marise Payne used this legislative power to cancel the Belt and Road Initiative in Victoria.[79]

Shortly before these events, the Northern Territory Government, in a less populated but regionally significant area,[80] signed a ninety-nine year lease of its Port of Darwin with the large Chinese firm Landbridge, a private company with close connections to the Chinese Communist Party.[81] The Royal Australian Navy and the U.S. military use the Port of Darwin heavily, particularly for the U.S. Marine Rotational Force in Darwin.[82] At the request of Landbridge, the Northern Territory granted statutory authority to the Chinese firm to board and search vessels in the port, despite strong opposition from the Federal Government.[83]

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[75] Anthony Galloway & Michael Fowler, *End Nears for Victoria's Belt and Road Deal Under Foreign Veto Laws*, THE AGE (Mar. 10, 2021, 6:56 PM), https://www.theage.com.au/national/victoria/end-nears-for-victoria-s-belt-and-road-deal-under-foreign-veto-laws-20210310-p579lf.html.

[76] *See id.*

[77] Taylor, *supra* note 74.

[78] *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) s 3 [hereinafter *Australia's Foreign Relations Act*].

[79] Evan Young, *Federal Government Rips Up Victoria's Controversial Belt and Road Agreements with China*, SBS NEWS (Apr. 21, 2021, 8:29 PM), https://www.sbs.com.au/news/federal-government-rips-up-victoria-s-controversial-belt-and-road-agreements-with-china/1f2b62d7-6304-4103-a3b7-0be2feea29fa.

[80] *See Bombing of Darwin*, AUSTL. WAR MEM'L, https://www.awm.gov.au/collection/E84294 (last visited Jan. 24, 2022) (The Port of Darwin sits on the northern tip of Australia, near the city of Darwin. *Id.* It is the largest city on Australia's vast, but largely uninhabited northern coast, and the only area in Australia to have been attacked during World War II.).

[81] *See* Jano Gibson, *Consider Reclaiming Darwin Port from Chinese Company Landbridge, Committee Advises Federal Government*, ABC NEWS (Mar. 17, 2021, 7:13 AM), https://www.abc.net.au/news/2021-03-17/government-urged-consider-reclaiming-ownership-darwin-port/13256968 [hereinafter *Consider Reclaiming Darwin Port*]. Public reporting indicates Landbridge is privately held, but its principal owner holds close ties to the Chinese Communist Party. *See* Angus Grigg, *China's "Invisible Billionaire" – The Port of Darwin's New Owner*, AUSTL. FIN. REV. (Nov. 23, 2015, 12:15 AM), https://www.afr.com/world/chinas-invisible-billionaire--the-port-of-darwins-new-owner-20151122-gl4rtn (discussing public reports indicating that Landbridge is privately held, its principal owner holds close ties to the Chinese Communist Party).

[82] *Consider Reclaiming Darwin Port*, *supra* note 81.

[83] *See Ports Management Act 2015* (N. Terr.) s 40 pt 5 div 2 (Austl.) (The authority is granted to the "port operator" in the legislation, which is the title given to

These and other events illustrate that the U.S. cannot take its alliance with Australia for granted. During this crucial time of strategic competition, China and the U.S. both seek more influence in Australia.[84] China often finds marginal gains in this effort through transactional diplomacy and economic bullying.[85]

C. Australia–U.S. Alliance: A Matter of Strategic Importance

Amid this web of competing interests, and in the face of increasing strategic competition between the U.S. and China, Australia has stood firm for the rule of law, even in strong opposition to China where necessary. Just one of many recent examples includes a March 23, 2021, statement wherein Australia unequivocally condemned "severe human rights abuses" in China.[86] Australia has also conspicuously reaffirmed that it is "a staunch and active ally of the United States."[87] In Australia's Defence Strategic Update for 2020—Australia's version of the National Defense Strategy—the Minister for Defence stated that Australia remains committed to "deepen" its alliance with the U.S.[88] Operationally, the U.S. and Australia have implemented a series of force posture initiatives to increase U.S. military presence and enhance air cooperation.[89] These measures are built on a robust 2014 Force Posture Agreement.[90]

Tactically, service-members from the United States and Australia maintain exceptionally close ties, created through deployments, training,

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Landbridge in a separate Northern Territory Gazette. Naturally, U.S. vessels would assert sovereign immunity where appropriate.).

[84] *See* Amy Searight, *Countering China's Influence Operations: Lessons from Australia*, CSIS (May 8, 2020), https://www.csis.org/analysis/countering-chinas-influence-operations-lessons-australia (discussing America's regional leadership in Australia and China's rising influence in Australia).

[85] *Id*. It should also be noted that the more conservative Federal Government passed legislation in 2020 to give authority to the Minister for Foreign Affairs to cancel agreements between state or territory governments and foreign entities. *See Australia's Foreign Relations Act*, *supra* note 78 (The Minister has not yet exercised this authority but is actively considering several agreements across Australia.).

[86] *See* Marise Payne, *Joint Statement on Human Rights Abuses in Xinjiang*, AUSTL. MINISTER FOREIGN AFF. (Mar. 23, 2021), https://www.foreignminister.gov.au/minister/marise-payne/media-release/joint-statement-human-rights-abuses-xinjiang.

[87] AUSTL. GOV'T DEP'T OF DEF., 2020 STRATEGIC UPDATE 22 (2020).

[88] *Id*. at 7.

[89] *See United States Force Posture Initiatives*, AUSTL. GOV'T DEP'T OF DEF., https://www.gov.au/Initiatives/USFPI/ (last visited Jan. 24, 2022) (The Force Posture Initiatives also include major exercises, marine rotational presence, and the creation of U.S. fuel storage facilities.).

[90] The Force Posture Agreement Between the Government of Australia and the Government of the United States of America, Austl.–U.S., Aug. 12, 2014, [2015] ATS 1.

and exchange positions.[91] Although there is no permanent U.S. base on Australian soil today, thousands of U.S. service members visit Australia every year on exercises and temporary rotations, and just under 1,000 U.S. Department of Defense (DOD) personnel are permanently stationed across the country under the Austl.–U.S. SOFA.[92] A similar number of Australian Defence Force personnel visit the U.S. for similar purposes but without the protection of a SOFA.[93]

II. STATUS OF FORCES AGREEMENTS — THE GATEWAY FOR DEFENSE COOPERATION

A. Legal Foundation

Broadly speaking, SOFAs define the legal status, protections, and privileges of military personnel, property and activities in a foreign country.[94] The U.S. has some form of SOFA with more than 100 countries around the world.[95] More than half are with NATO partners or modeled after the NATO SOFA.[96] Others come in the form of diplomatic notes, visiting forces or defense cooperation agreements.[97] Each of these different types of arrangements primarily seek to protect U.S. DOD personnel and ensure freedom to conduct DOD activities without undue restraint from host nation law.[98] Although SOFAs cover a wide variety of subjects, the

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[91] *U.S. Relations with Australia*, U.S. DEP'T OF STATE (Jan. 21, 2020), https://www.state.gov/u-s-relations-with-australia/.

[92] *See* Christian Senyk, *Detachment Provide Support for Servicemembers Across Australia LT COL Troy Saechao*, DVIDS (Aug. 9, 2019), https://www.dvidshub.net/video/752223/detachment-provide-support-servicemembers-across-australia-lt-col-troy-saechao (discussing U.S. service members' presence in Australia and what services they provide); *see generally* Agreement Between the Government of the Commonwealth of Australia and the Government of the United States of America Concerning the Status of United States Forces in Australia, Austl.–U.S., May 9, 1963, T.I.A.S. No. 5349, 469 U.N.T.S. 55.

[93] *See Australia-US Defence Relationship*, AUSTL. IN THE USA, https://usa.embassy.gov.au/defence-cooperation (last visited Jan. 29, 2022).

[94] INT'L SEC. ADVISORY BD., REPORT ON STATUS OF FORCES AGREEMENTS 1–2 (2015), https://2009-2017.state.gov/documents/organization/236456.pdf [hereinafter REPORT ON STATUS OF FORCES AGREEMENTS].

[95] *Id.* at 1.

[96] *Id.*

[97] *See id.* at 2–3 (listing the following types of SOFA-like agreements that exist around the world: (1) NATO SOFA, (2) bilateral agreements, (3) exchange of diplomatic notes, (4) defense cooperation agreements, (5) visiting forces agreements, (6) visiting forces acts, (7) UN model, and (8) no protection).

[98] *Id.* at 1–2.

most controversial subject has historically been criminal jurisdiction, an issue that strikes at the heart of territorial sovereignty.[99]

It is no accident that, with the notable exception of the NATO SOFA, these agreements are not reciprocal.[100] This is primarily because the U.S. has a strong interest in controlling its borders, controlling foreign government activities within those borders, and preserving jurisdiction over crimes that occur within those borders.[101] These interests are embodied by customary international law and have been articulated by the U.S. Supreme Court in Chief Justice John Marshall's expression of the territorial principle of jurisdiction in *Schooner Exchange v. McFaddon*.[102] Marshall wrote, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[103] Conversely, the principle of the "law of the flag," derived from maritime law, holds that a sending state retains jurisdiction over its forces in any location.[104] These two principles inevitably conflict and require comprise between the sending and receiving states. In recognition of this need to compromise, and notwithstanding the territorial principle, Marshall also wrote in *Schooner Exchange* that a host nation may be understood to "cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominion."[105] Marshall's opinion from *Schooner Exchange* and more recent commentary acknowledge that receiving and sending states share common defense interests that necessitate a harmonizing of conflicting jurisdictional interests.[106]

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[99] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 43 (1971).

[100] *See* 32 C.F.R. § 151.6 (1996) (noting that nothing abridges the U.S. from doing what it needs to safeguard its own security). Some reciprocity exists in visiting forces agreements with, for example, Israel and Singapore. *See* REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 25. However, these "counterpart agreement[s]" do not take precedence over inconsistent U.S. federal or state law. *Id.* at 6; *but see* United States v. Belmont, 301 U.S. 324, 332 (1937) (stating that the U.S. laws and policies do not have extraterritorial authority except when it comes to its own citizens).

[101] *Id.*

[102] Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812).

[103] *Id.* at 136.

[104] LAZAREFF, *supra* note 99, at 9.

[105] *Schooner Exch.*, 11 U.S. at 139. Some commentators argue that Marshall is expressly adopting, in *dicta*, the law of the flag principle, as an exception to the territorial principle. *See* LAZAREFF, *supra* note 99, at 14. That view seems to be the minority. *Id.* at 15 (This Article focuses on the implicit requirement to harmonize conflicting interest, which is accomplished through bilateral agreements.).

[106] *See Schooner Exch.*, 11 U.S. at 136; *see also* VLADIMIR ATANASOV ET AL., THE HANDBOOK OF THE LAW OF VISITING FORCES 170 (Dieter Fleck 2d ed. 2018) (2001).

B. Historical Background—The Status of U.S. Forces and Reciprocity

Jurisdictional interests between receiving and sending states were not often harmonized prior to 1914, primarily because friendly foreign visits were rare.[107] During World War I, the U.S. argued for exclusive jurisdiction of its forces under the law of the flag.[108] Most likely due to its relative bargaining power, the U.S. succeeded in obtaining exclusive jurisdiction in France, but not in the United Kingdom.[109] During World War II, as the UK Government became more desperate, the U.S. did obtain exclusive jurisdiction for its forces on UK soil.[110] For all other sending states, the United Kingdom imposed its *Allied Forces Act*, which generally withheld jurisdiction for criminal offenses.[111] Similarly, the U.S. gave special concessions to the United Kingdom during World War II, but did not provide similar protection to other states.[112]

At the conclusion of World War II, some commentators noted that an aggregated analysis of jurisdictional agreements shows that states tended to articulate positions in terms of the territorial jurisdiction or law of the flag principles.[113] However, these positions were flexible, and agreements depended primarily on the relative bargaining power of the parties.[114] Following World War II, agreements continued to be driven by political and economic power of the parties.[115] Thus, after World War II, the relative strength of the U.S. allowed it to "have its cake and eat it too."[116] The bilateral agreements created after the NATO SOFA seek to maximize U.S. privileges and protections overseas, while granting none to allies and partners in the U.S.[117]

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[107] *See* LAZAREFF, *supra* note 99, at 7.

[108] *Id.* at 11.

[109] MANUEL E. F. SUPERVIELLE, *The Legal Status of Foreign Military Personnel in the United States*, *in* THE ARMY LAW 3, 8 (John B. Jones, Jr. ed., 1994).

[110] Norman Bentwich, *The U.S.A. Visiting Forces Act, 1942*, 6 MOD. L. REV. 68, 70 (1942).

[111] Allied Forces Act 1940, 3 & 4 Geo. 6 c. 51 (U.K.). Serious common law offenses, such as rape and murder, were under the U.K.'s jurisdiction. *See also* Roland J. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 INT'L L. STUD. 141, 141 n.3, 155 (1958).

[112] *See* LAZAREFF, *supra* note 99, at 25 (As an act of symbolism, rather than necessity, the U.S. provided exclusive criminal jurisdiction to the UK for British forces in the U.S.).

[113] *Id.* at 28.

[114] *Id.*

[115] *Id.* at 45.

[116] SUPERVIELLE, *supra* note 109, at 25.

[117] *See* LAZAREFF, *supra* note 99, at 44.

C. Reciprocity Policy—An Increasingly Sensitive Matter

Although there is no authoritative document clearly outlining U.S. policy on reciprocity, the historical record indicates the U.S. has generally been inflexible in its bilateral SOFA negotiations.[118] Shortly after the dissolution of the Soviet Union, there was some indication of change.[119] In 1989, the U.S. Senate considered a bill that included a provision granting authority to the President to reciprocate SOFA rights for particular sending state forces.[120] The bill was defeated for reasons unrelated to the SOFA provision.[121] However, in advocating for the bill, the U.S. Senate Committee on Foreign Relations argued that SOFA reciprocity would facilitate additional base rights agreements with new partners.[122] Shortly after the bill was drafted, some commentators predicted a softened policy toward reciprocity.[123] However, no further movement followed the bill's defeat.[124]

Years later, the U.S. Department of State completed a comprehensive report in 2015 on SOFAs worldwide and similarly advocated for more flexibility in offering SOFA reciprocity.[125] The Department of State argued that offering reciprocity would substantially improve the negotiating climate for future SOFAs and other military agreements with allies.[126] The report held that "the absence of reciprocity has become a sensitive issue."[127] While recognizing the difficulty of implementing a reciprocal SOFA in U.S. law, the report stated that

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[118] *Id.* at 43.

[119] Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 BOST. U. INT'L L.J. 45, 136 (1995).

[120] S. 1347, 101st Cong. (1989). Whether the proposed bill would have survived a constitutional challenge is beyond the scope of the present Article. The point here is that at least some members of Congress were agreeable to granting broad reciprocity in the recent past.

[121] SUPERVIELLE, *supra* note 109, at 24. Supervielle notes that Australia, among others, requested reciprocity and that this request helped drive the draft bill. *Id.* at 3. The historical record on an Australian request for reciprocity is very scarce, but the initial term of the Austl.–U.S. SOFA would have expired in 1988, which may have been a catalyst for consideration of a new, reciprocal agreement. Obviously, it was never completed, and indeed, there is no evidence of a draft reciprocal SOFA from that time. After extensive research, this author could not find an explanation in the historical record.

[122] *Id.*

[123] *See id.* at 25 (stating that the changes in geopolitics make it more profitable for the U.S. to pursue reciprocal SOFA arrangements).

[124] *See id.* (indicating that the last time such an agreement was considered was in 1989).

[125] REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 6.

[126] *Id.*

[127] *Id.* at 23. (The reference is not directed at Australia in particular, but rather on an aggregate effect observed by the Department of State from various SOFA and SOFA-like negotiations.).

reciprocity "could help assuage host government concerns about incursions on sovereignty."[128] Between and after these two noteworthy events—the 1989 draft bill and the 2015 report—the United States has continued to hold inflexible and non-reciprocal SOFAs with its closest allies across the Indo-Pacific.[129]

III. AUSTL.–U.S. SOFA — THE START, NOT THE END

A. Background

The Australian and U.S. governments have over 200 extant legal agreements between their respective defense agencies.[130] Most of these agreements are targeted at a narrow set of activities, facilities, or positions.[131] All of the agreements reference the legal foundation of the Australian–U.S. alliance, a 1952 mutual security assistance treaty known as the "ANZUS Treaty."[132] The ANZUS Treaty declares that each party will act to meet any armed attack on the other.[133] It has only been invoked once in its long history—following the attacks in the U.S. on September 11, 2001—but remains a binding agreement today.[134] The Austl.–U.S. SOFA is second only to the ANZUS Treaty in significance and chronology.[135]

The Austl.–U.S. SOFA came into force in 1963 and remains unchanged since that date. It is often described as a comprehensive, bilateral agreement, modeled after the NATO SOFA,[136] excepting that it

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[128] *Id.* at 24.

[129] BEN DOLVEN & BRUCE VAUGN, INDO-PACIFIC STRATEGIES OF U.S. ALLIES AND PARTNERS: ISSUES FOR CONGRESS (2020).

[130] Telephone interview with Jim Waddell, Colonel in the Austl. Army, Dir. Legal at Headquarters Operations Command, in Canberra, Austl. (Oct. 6, 2020).

[131] *Id.*

[132] Security Treaty between Australia, New Zealand, and the United States of America, Apr. 29, 1952, T.I.A.S. No. 2493, 131 U.N.T.S. 83 [hereinafter ANZUS Treaty]. The ANZUS Treaty included New Zealand until the U.S. suspended its obligations to New Zealand in 1986, because of New Zealand's strict prohibition of nuclear submarines. *Security Treaty Between Australia, New Zealand, and the United States of America*, DEP'T OF FOREIGN AFF. TRADE, https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/4D4287DDC882C3D6CA256B8300007B4B (last visited Feb. 21, 2022). However, by exchange of letters on 11 August 1986, Australia and the U.S. reaffirmed their mutual commitment to each other under the Treaty. *Id.*

[133] ANZUS Treaty, *supra* note 132, art. IV.

[134] Peter J. Dean, *ANZUS Invoked: September 11 and Interpreting the Treaty*, AUSTL. OUTLOOK (Sept. 11, 2021), https://www.internationalaffairs.org.au/australianoutlook/anzus-invoked-september-11-and-interpreting-the-treaty/.

[135] *See generally* Austl.–U.S. SOFA, *supra* note 43.

[136] SUPERVIELLE, *supra* note 109, at 12 n.56.

is not reciprocal. The catalyst for the Austl.–U.S. SOFA was two-fold: (1) in 1956 the U.S. Congress reported a preference for creating a SOFA before sending regularly stationed U.S. forces into any country,[137] and (2) in 1960 the U.S. Navy sought to create a naval station in Western Australia as part of its global communications network.[138] The U.S. approached Australia in 1960 with requests for both a SOFA and permission to build the new U.S. Navy installation.[139] The Australian Government was initially uninterested, but in early March of 1963 the issue became central to Parliamentary elections.[140] After years of delay and inertia, the Austl.–U.S. SOFA was negotiated and completed over the course of one month in April of 1963.[141]

Among other things, the Austl.–U.S. SOFA creates generous entry privileges for U.S. DOD personnel,[142] and protects U.S. personnel from various taxes, import, and custom duties and other domestic requirements.[143] Further, it ensures the U.S. Military maintains primary criminal jurisdiction for offences committed in the course of duty or where the victims are also U.S. DOD personnel.[144] Australian negotiators frequently emphasized that Australia would not place the U.S. "in a dominant position," as in Japan and Korea.[145] However, a side-by-side

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[137] Interview by Hanno Weisbrod with D.W. Douglass, Captain in the U.S. Navy, U.S. Sending Officer, in Austl. (Jan. 1966).

[138] *See id.* The Naval station would also become the subject of an international agreement. *See Naval Communication Station Harold E. Holt (North West Cape)*, NAUTILUS INST. FOR SEC. & SUSTAINABILITY, https://nautilus.org/publications/books/australian-forces-abroad/defence-facilities/naval-communication-station-harold-e-holt-north-west-cape/ (last visited Feb. 25, 2022) (For many years, the Naval Station was a significant U.S. installation. Today, the station still functions but principally through remote means with only Australian contractors on site.).

[139] Interview with D.W. Douglass, *supra* note 137.

[140] Hanno Weisbrod, Australia's Security Relations with the United States 1957—1963 (1969) (Ph.D. dissertation, Australian National University) (on file with Australian National University Open Research Library).

[141] Interview with D.W. Douglass, *supra* note 137.

[142] Austl.–U.S. SOFA, *supra* note 43, art. 1. Civilians do require a passport, but not a visa. *Passport & SOFA Requirements*, YOKOTA AIR BASE, https://www.yokota.af.mil/About-Us/Units/337th-Air-Support-Flight/337-ASUF-Newcomers/Passport-SOFA-Requirements/#:~:text=However%2C%20U.S.%20Government%20civilian%20employees%20and%20all%20dependents,%28s%29%20and%20official%20passport%20%28s%29%20with%20SOFA%20stamp (last visited Mar. 19, 2022).

[143] Austl.–U.S. SOFA, *supra* note 43, art. 3.

[144] *Id.* at art. 8(1)(a). More specifically, it grants primary jurisdiction to "the military authorities of the United States" over "persons subject to the military law of the United States." *Id.* But this jurisdiction is limited to "offences solely against the property or security of the United States, or offences solely against the person or property of" U.S. DOD personnel in Australia. *Id.* art. 8(3)(a)(i). Additionally, it covers offenses "arising out of any act or omission done in the performance of official duty." *Id.* art. 8(3)(a)(ii).

[145] Interview by Hanno Weisbrod with Garfield Barwick, Chief Just. of the High Ct. of Austl., in Austl. (May 11, 1966) [hereinafter Interview with Garfield Barwick].

comparison of the criminal jurisdiction provisions of the Austl.–U.S. SOFA with those in Japan and Korea reveal remarkable similarities.[146] Indeed, the single difference in criminal jurisdiction provisions is that the U.S. may not impose the death penalty in Australia.[147]

1. Negotiation of 1963

Sir Garfield Barwick, then Minister for External Affairs, was the lead Australian negotiator for the Austl.-U.S. SOFA.[148] Less than one year after the Austl.–U.S. SOFA came into force, Sir Garfield became Australia's Chief Justice of the High Court (equivalent to the U.S. Supreme Court), a position he held for seventeen years.[149] Sir Garfield described the Austl.–U.S. SOFA negotiation as "quite a wrangle," with a flurry of messages passing between the two sides every day of April 1963.[150] The Australians insisted on reciprocity in these negotiations and the U.S. negotiators did not object in any meaningful way.[151] Indeed, the *travaux préparatoires* reveal that both sides assumed the Austl.–U.S.

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[146] *See* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan art. XVII, Jan. 9, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4510; *see also* Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea art. XXII, July 9, 1966, T.I.A.S. 6127.

[147] Austl.—U.S. SOFA, *supra* note 43, art. 8(7)(a). The express prohibition of the death penalty in Article 8 of the Austl.—U.S. SOFA is a product of Australia's strong objection to the capital punishment, in general, but also to the historical experience of World War II, wherein the U.S. Army executed, by hanging, Private Eddie Leonski in 1942. PETER PIERCE, *Leonski, Edward Joseph (1917-1942)*, *in* 15 AUSTRALIAN DICTIONARY OF BIOGRAPHY (2006), https://adb.anu.edu.au/biography/leonski-edward-joseph-10814. (Leonski had been convicted at U.S. court-martial for the murder of three Melbourne women and remains the only individual to be executed on Australian soil by a foreign authority.).

[148] Interview with Garfield Barwick, *supra* note 145; *see also* Austl.—U.S. SOFA, *supra* note 43.

[149] *The Rt Hon Sir Garfield Barwick*, HIGH CT. OF AUSTL., https://www.hcourt.gov.au/artworks/portraits-of-chief-justices/the-rt-hon-sir-garfield-barwick (last visited Feb. 21, 2022). Sir Garfield is the longest serving Chief Judge of the High Court in Australian history. *Id.* As an interesting side note, Sir Garfield was instrumental in the dismissal of Prime Minister Gough Whitlam by taking the unorthodox step of advising the Governor-General on the legality of the dismissal. *See 4. The Crisis of 1974—1975*, PARLIAMENT AUSTL., https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/platparl/c04 (last visited Feb. 28, 2022).

[150] Interview with Garfield Barwick, *supra* note 145.

[151] *Id.*

SOFA would apply in both countries.[152] Ultimately, however, pressure within the Australian Government compelled negotiators to complete the Austl.–U.S. SOFA before the 1963 election.[153] This pressure, coupled with the difficulty of U.S. ratification, forced the Australians to accept a promise for future reciprocity, rather than a reciprocal agreement that year.[154]

B. Protocol — Reciprocity Reserved for Another Day

The Austl.–U.S. SOFA has one protocol, which came into force the same day as the Austl.–U.S. SOFA.[155] It deserves to be quoted in full:

> The Government of the Commonwealth of Australia and the Government of the United States of America, having this day signed an Agreement concerning the Status of United States Forces in Australia, agree that at a future date they will enter into negotiations for the conclusion of a reciprocal agreement which would govern the status of the forces of each Government in the territory of the other.[156]

The Austl.–U.S. SOFA was initially set to last for a term of twenty-five years but does not terminate until either side provides 180 days written notice.[157] It has now been nearly sixty years since the Austl.–U.S. SOFA's Protocol came into force, but the parties have made no progress[158] toward the commitment for a reciprocal agreement.[159]

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[152] *Id*. (U.S. negotiators frequently declined certain provisions based on the belief that U.S. authorities would not permit it for Australian personnel in the U.S.).

[153] Interview with D.W. Douglass, *supra* note 137.

[154] *Id.*

[155] Austl.–U.S. SOFA, *supra* note 43, Protocol.

[156] *Id.*

[157] *Id*. art. 24(2).

[158] It may be noted that in 1995 the two Governments entered a Chapeau Agreement, by way of diplomatic notes. *See Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the United States of America Concerning Certain Mutual Defence Commitments*, [1995] ATS 35 (entered into force 1 December 1995). The Chapeau Agreement is intended to supplement the Austl.–U.S. SOFA by creating more specific terms of civil liability, but it is not relevant to the Protocol.

[159] In the mid-1990s there was some reporting about efforts to create a "counterpart agreement" with Australia, similar to that created with Israel, Singapore and others. *See* Erickson, *supra* note 119, at 134. This may have reference to the creation of the Chapeau Agreement, created through exchange of notes in 1995, referenced above. However, there is no other indication in the historical record of U.S. efforts to create a reciprocal agreement which would grant protection to Australian Forces under U.S. law.

1. Non-reciprocity — The Lasting Approach

The Australian Government does not appear to be ostensibly offended by the non-reciprocity, but the effect of non-reciprocity imposes burdens of both tangible and symbolic significance. The absence of a reciprocal SOFA requires Australians to, among other things, obtain a Foreign Government Official or "A-2" Visa to secure entry to the U.S. for training, exercises, or assignments.[160] Australian Force members are also fully subject to U.S. criminal jurisdiction while in the U.S., with no Australian policing authority.[161] Australia has a strong interest in maintaining jurisdiction over its personnel and the extraterritorial application of its *Defence Force Discipline Act 1982* (Cth), which operates similarly to the Uniform Code of Military Justice.[162] Non-reciprocity is also inconsistent with the treatment Australia receives from many of its other allies.[163] These are just some examples of concrete privileges and protections that U.S. DOD receives in Australia, but Australians do not receive in the U.S.[164]

On a less tangible, but perhaps more significant level, a non-reciprocal SOFA also tends to feed into a latent sentiment[165] that resents U.S. exploitation of superior bargaining power. The sentiment expressed long ago by the great Australian scholar and historian Gordon Greenwood remains relevant today: "Australians are inclined to wonder whether . . .

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[160] Telephone Interview with Elizabeth Power, Country Consular Coordinator for the U.S. Mission to Austl., U.S. Consulate in Sydney, Austl. (Dec. 10, 2020). The A-2 Visa requires significant lead time and fees, and often results in Australian Force Personnel missing out on training or operational visits to the U.S. due to insufficient advance time. *Id.*

[161] REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 23 (noting that under U.S. SOFA agreements host forces in the U.S. are fully subject to U.S. law).

[162] *See generally Military Justice System*, AUSTL. GOV'T DEP'T OF DEF., https://defence.gov.au/mjs/mjs.asp (last visited Jan. 30, 2022). *See also* U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 11 (1970).

[163] *Agreement Between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, signed 29 October 1998, [2005] ATS 12 (entered into force 27 May 2005) art 2; Press Release, Prime Minister of Australia, Reciprocal Access Agreement (Nov. 17, 2020), https://www.pm.gov.au/media/reciprocal-access-agreement; Agreement Between Japan and Australia Concerning the Facilitation of Reciprocal Access and Cooperation Between the Self-Defense Forces of Japan and the Australian Defence Force, Jan. 5, 2022, https://www.mofa.go.jp/files/100283786.pdf.

[164] Some practitioners have argued that the historical approach of relying on close diplomatic relations to resolve issues case-by-case has been sufficient. SUPERVIELLE, *supra* note 109, at 20. But others point out that legal ambiguity heightens the risk of disagreement and "bad feelings." *Id.* at 14.

[165] Australia does not express the idea held by some countries that the U.S. is "behaving like a neocolonial superpower" in its insistence on receiving favorable jurisdiction but refusing to grant it to others. *See Id.* at 17. But the inequality does not go unnoticed.

[a]t times there has been a tendency in the United States to assume that the essential function of an ally . . . is to accept unquestioningly the American outlook."[166] In January 2021, Australia's Leader of the Opposition harshly criticized the Australian Prime Minister for "pandering" to the U.S. in foreign policy.[167] He did this only months after Morrison conspicuously argued for Australia's independence from U.S.-China competition.[168]

Allies and partners of the U.S. accept non-reciprocal agreements because they determine it is worth the tradeoff. But arrangements of unilateral protection fail to provide two foundational elements of a strong alliance: (1) mutual respect[169] and (2) the symbolic recognition of equality among sovereign states.[170] In 2015, the Department of State expressed concern for these missing elements, and stated that, among other things, "the absence of reciprocity raises issues of pride and sovereignty."[171] Those issues present a barrier to a deeper, stronger alliance between the U.S. and Australia.

IV. THE STRATEGIC EFFORT TOWARD A RECIPROCAL AUSTL.–U.S. SOFA

A. General Objections—Barriers on Both Sides

Many U.S. officials hold general objections to SOFA reciprocity. Much has been written on this subject,[172] and a series of arguments have been presented to oppose reciprocity in general. Most of these policy arguments do not apply or sound disingenuous when directed at Australia. For example, some commentators have argued non-reciprocal

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[166] Gordon Greenwood, *Australia's Triangular Foreign Policy*, 35 FOREIGN AFF. 689, 697 (1957).

[167] Stephen Dziedzic, *Labor Leader Anthony Albanese Accuses Scott Morrison of Pandering to Donald Trump*, ABC NEWS (Jan. 19, 2021, 8:33 PM), https://www.abc.net.au/news/2021-01-19/albanese-calls-for-australia-to-be-assertive-in-us-relations/13071046.

[168] Austl. Associated Press, *supra* note 34.

[169] Mutual respect is expressly identified by the National Defense Strategy as foundational to strengthening alliances, one of the distinct lines of effort in strategic competition. NATIONAL DEFENSE STRATEGY, *supra* note 4, at 9.

[170] *See* Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV., 227, 236–37 (2002) (explaining how the U.S. justifies the inequality of states that results from the implementation of a unilateral reciprocal agreement).

[171] REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 23.

[172] See, e.g., Youngjin Junt & Jun-Shik Hwang, *Where Does Inequality Come From*, 18 AM. U. J. INT'L L. REV. 1103 (2003) (arguing that a reciprocal NATO SOFA, vice non-reciprocal Korean and Japan SOFAs is evidence of American discrimination against Asians).

agreements are justified by the fact that the U.S. sends far more personnel overseas than allied countries send to the U.S.[173] This argument may have some persuasive value in countries with large U.S. installations, such as Japan or Korea, but there are no significantly large U.S. installations in Australia.[174] Further, in 2018 alone the U.S. consulates in Australia issued approximately 4,000 A-2 visas to Australian Defence Force personnel for official travel to the U.S.[175] That number represents near parity to the number of U.S. forces that entered Australia the same year.[176]

Another argument—aimed at criminal jurisdiction—holds that there exists a disparity in perceived fairness between the two legal systems.[177] The argument essentially advances the idea that U.S. courts are more likely to provide a fair trial; therefore, foreign forces in the U.S. have less need for jurisdiction.[178] Aside from the obvious counterargument that foreign forces may prefer to be tried at home, there is no disparity for Australians. Australian criminal law and procedures generally meet or exceed U.S. standards of fair trial.[179]

However, apart from these and other less persuasive arguments, two common objections have direct application to Australia: (1) the extreme difficulty of implementing a SOFA in U.S. law, and (2) the risk that creating a reciprocal SOFA with Australia will be a catalyst for other allies to request similar treatment.[180]

B. SOFAs — Binding in the U.S.

The U.S. Constitution includes a specific Treaty Clause at Article II, Section 2, which grants power to the President to make treaties, "provided two[-]thirds of the Senators present concur."[181] The barrier of

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[173] SUPERVIELLE, *supra* note 109, at 15.

[174] *Contra* David Vine, *Not Just About Subs, AUKUS Expands U.S. Military Footprint in Australia, Too*, RESPONSIBLE STATECRAFT (Sept. 20, 2021), https://responsiblestatecraft.org/2021/09/20/not-just-about-subs-aukus-expands-us-military-footprint-in-australia-too/.

[175] Telephone Interview with Elizabeth Power, Country Consular Coordinator for the U.S. Mission to Austl., U.S. Consulate in Sydney, Austl. (Dec. 10, 2020).

[176] This excludes the large number of U.S. personnel (sometimes as high as 20,000) that visit on a bi-annual basis (not in 2018) for the multilateral exercise in Australia known as Talisman Sabre. Telephone Interview with Colonel Raymond Powell, U.S. Def. Attaché to Austl., in Canberra, Austl. (July 1, 2020).

[177] *See* JOHN WOODLIFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 182 (1993).

[178] *See id.*

[179] *See generally* Major R. Scott Adams, U.S. Dep't of Def. Country Law Study: Australia (Dec. 2020) (unpublished manuscript) (on file with author).

[180] *See* SUPERVIELLE, *supra* note 109, at 14–15.

[181] U.S. CONST. art. II, § 2.

two-thirds Senate concurrence has famously defeated many significant treaties throughout U.S. history, including the Versailles Treaty, the Nuclear Test-Ban Treaty,[182] and the United Nations Convention on the Law of the Sea,[183] among others. The only SOFA to have run through the Treaty Clause is the NATO SOFA.[184]

1. NATO SOFA — A Rare Example

President Dwight D. Eisenhower presented the NATO SOFA to the U.S. Senate at an unusual time in U.S. history.[185] The U.S. had recently fought in the Korean War and had just begun its policy of "active diplomacy . . . in meeting the threat of Soviet power."[186] Shortly after the completion of the NATO Treaty, but before the 1949 Geneva Conventions were ratified, Eisenhower presented the NATO SOFA to the Senate in 1953.[187] A minority of Senators were reluctant to support the NATO SOFA, including Senator John W. Bicker of Ohio.[188] After watching the Senate deliberate with some angst, Eisenhower sent a public letter to the Senate on July 14, 1953.[189] The letter, written personally by the former Supreme Allied Commander, stated that failure to provide a timely ratification "could undermine the entire United States military position in Europe."[190] One day later the Senate voted in favor of ratification, 72-15.[191]

The NATO SOFA differs significantly from the Austl.–U.S. SOFA in that the NATO SOFA is multilateral.[192] Further, it must be noted that the NATO SOFA did not establish precedent for future SOFAs, and indeed, many commentators note it was instead "a sharp break from

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[182] *See* Sen. Jon Kyl, Maintaining "Peace Through Strength": A Rejection of the Comprehensive Test Ban Treaty, 37 Harv. J. on Legis. 325, 325 (2000).

[183] Roncevert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/.

[184] Although it is difficult to state with confidence, the author's research indicates the NATO SOFA is also the only SOFA to have been submitted to the Senate for ratification.

[185] *See* 83 CONG. REC. 8779 (1953) (letter from President Eisenhower to Senator Knowland) [hereinafter Congressional Record].

[186] Arthur H. Dean, *The Bricker Amendment and Authority Over Foreign Affairs*, 32 FOREIGN AFF. 1, 3–5 (1953).

[187] *See* Congressional Record, *supra* note 185.

[188] *See id.* Senator Bicker was not fully opposed to the SOFA as a whole, but rather wanted a robust set of reservations to accompany the ratification.

[189] *Id.*

[190] *Id.*

[191] 99 CONG. REC. D508 (daily ed. July 15, 1953).

[192] R. CHUCK MASON, CONG. RSCH. SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1–2 (2012).

previous practice."[193] The resolution of ratification included some reservations, often referred to as the "sense of the Senate."[194] The reservations included an attempt to prevent any inference of precedent from the shared criminal jurisdiction provisions ("Article VII do[es] not constitute a precedent for future agreements.").[195] Some commentators have relied on this reservation to argue it is a bar to reciprocity,[196] but a close reading does not support such a broad conclusion. In 2015, the U.S. Department of State expressly rejected the idea that the Senate resolution bars future reciprocity,[197] and further, the Austl.–U.S. SOFA Protocol was created after the NATO SOFA resolution.[198] A reciprocal SOFA may be created again, but it is likely that treaty ratification will be more difficult today than it was in 1953.

2. Treaty Alternatives — Executive and Congressional Action

Notwithstanding Article II's Treaty Clause of the U.S. Constitution, more than ninety percent of international agreements with the U.S. have been concluded through a nontreaty mechanism.[199] These non–treaty agreements come in one of two forms: (1) an executive agreement, concluded under the President's plenary executive authority, or (2) a congressional-executive agreement.[200] The second of these is generally understood as an international agreement which receives a form of approval from a majority of both houses of Congress.[201] It is beyond the scope of this Article to discuss the constitutional authorities and other nuances of these different forms of agreement.[202] However, stated simply, a SOFA concluded through executive agreement alone, unlike a treaty or congressional-executive agreement, will not have sufficient authority to

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[193] WOODLIFE, *supra* note 177, at 172. It was, however, consistent with U.S.–UK relations during World War II.

[194] North Atlantic Treaty Status of Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846 [hereinafter NATO SOFA]; *see also* 32 C.F.R. § 151.6 (2002).

[195] *Id*.

[196] REPORT ON STATUS OF FORCES AGREEMENT, *supra* note 94, at 24.

[197] *Id*.

[198] *See* Austl.–U.S. SOFA, *supra* note 43; *see also* NATO SOFA, *supra* note 194.

[199] *See* S. REP. NO. 106-71, at 58 (2001) [hereinafter SENATE REPORT].

[200] John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 765 (2001).

[201] *Id*.

[202] For additional information on constitutional questions of international agreement implementation into U.S. law, *see* Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

override conflicting U.S. law, including state criminal jurisdictions.[203] Therefore, a reciprocal SOFA must be at least a congressional-executive agreement.

Congressional-executive agreements include three types: (1) congressional *ex ante* authorization, (2) legislation on foreign relations, and (3) *ex post* congressional approval of an international agreement negotiated by the President.[204] *Ex post* congressional approval has long since supplanted the Treaty Clause as the primary method of concluding binding international agreements in U.S. law.[205] However, the Senate has made clear through various advice and consent resolutions that agreements falling under certain subject matters must be submitted to the Senate under the Treaty Clause.[206] Consequently, arms control and human rights agreements, for example, are usually submitted as a treaty, rather than congressional-executive agreement.[207]

Senate preference is not a constitutional barrier to enacting an agreement, but it may affect congressional review.[208] In the 1990s in particular, the Senate consistently insisted on use of the Treaty Clause for "militarily significant" agreements.[209] Since that time, a number of defense related agreements have been approved through the congressional-executive agreement process, including some unilateral SOFAs.[210] In the recent past, an average of more than 17 congressional-executive agreements have been made every year for defense purposes.[211] Consistent with this normalized practice, the best vehicle for a reciprocal Austl.–U.S. SOFA would be by majority vote in both houses of Congress on *ex post* review of a concluded executive agreement.[212]

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[203] *See* United States v. Pink, 315 U.S. 203, 230–31 (1942) (explaining the general view of experts on this area of law: that a sole executive agreement may override inconsistent state law, but only if the agreement falls within the President's plenary powers). State criminal jurisdiction would not fall within that power. *See* U.S. CONST. art. II, § 2, cl. 1.

[204] *See* Yoo, *supra* note 200, at 765–66.

[205] *See* SENATE REPORT, *supra* note 199, at 42 tbl.2 (noting that between 1939 and 1989 the US entered 11,698 nontreaty agreements and 702 treaties, and the overwhelming majority of these identified nontreaty agreements took a statutory form).

[206] *See generally* Philip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT'L L. 55, 56 (1998).

[207] *See* Yoo, *supra* note 200, at 806.

[208] *See* SENATE REPORT, *supra* note 199, at 66 (explaining that the preference of Congress as to a particular agreement is one of several factors that should be considered when negotiating or signing a treaty).

[209] *See* Trimble & Koff, *supra* note 206, at 62–63; *see also* Yoo, *supra* note 200, at 806.

[210] *See* Hathaway, *supra* note 202, at 1266–67.

[211] *Id.* at 1260 tbl.2.

[212] This conclusion may come because a Austl.–U.S. SOFA is not likely to be seen as "military significant" or because the Senate is now less protective of Defense agreements

C. Australian Domestic Law and the SOFA

Absent ratification or congressional-executive agreement, opponents of reciprocity correctly point out that many SOFA provisions will conflict with existing federal and state law.[213] Indeed, the same is true of the Austl.–U.S. SOFA in Australian law.[214] Under the Australian Constitution, treaties and international agreements fall within the authority of the Executive.[215] The exercise of this authority falls on the Department of Foreign Affairs, which has primary responsibility to negotiate and finalize treaties and other international agreements.[216] However, because the Australian Constitution separately gives Parliament the exclusive power to create legislation, international agreements do not have independent force of law within Australia.[217] They must be implemented through domestic legislation.[218]

In some cases, Australia will implement an international agreement by adopting the full agreement into an act of Parliament, as it did with the Vienna Convention on Diplomatic Relations.[219] Alternatively, and far more commonly, Australia's Attorney-General and relevant ministers will review existing legislation for consistency with proposed treaties, followed by individually tailored amendments to impact statutes and regulations.[220]

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than it was in the past. Even if the Senate were to insist on use of the Treaty Clause, it is by no means certain that one third of the Senate would reject a reasonably drafted reciprocal SOFA with Australia. It should also be noted that a congressional-executive agreement would not be a *fait accompli*. Should the present Austl.–U.S. SOFA be copied, without change, into a new reciprocal SOFA, it would have effect on a variety of federal and state statutes, including the Immigration and Nationality Act (INA). A congressional-executive agreement would be sufficient exception to 8 USC § 1182(a)(7)(B), for example, which requires nonimmigrants to be in possession of a valid passport and visa to enter the U.S. However, an amendment to 22 C.F.R. § 41 would also be required to ensure all appropriate Agencies acted consistent with the terms of the SOFA.

[213] SUPERVIELLE, *supra* note 109, at 15.

[214] *See Minister of State for Immigr & Ethnic Affs v. Teoh* (1995) 183 CLR 273, ¶ 25 (Austl.).

[215] *See Australian Constitution* s 61.

[216] *Treaties*, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, https://www.dfat.gov.au/international-relations/treaties#:~:text= (last visited Feb. 26, 2022) (The power to enter into treaties is with the Department of Foreign Affairs and Trade.).

[217] Teoh (1995) HCA at 20.

[218] *Id.*

[219] *See Diplomatic Privileges and Immunities Act 1967* (Cth) (Austl.).

[220] *See Statements of Compatibility*, AUSTL. GOV'T ATTY-GEN'S DEP'T, https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility#will-a-statement-of-compatibility-need-to-be-approved-by-the-attorneygenerals-department (last visited Feb. 26, 2022).

In the case of the Austl.–U.S. SOFA, Australia did not adopt the full agreement into legislation.[221] Most, but not all of the Austl.–U.S. SOFA criminal jurisdiction provisions are implemented through the *Visiting Forces Act,* a federal statute, which was created shortly after the Austl.–U.S. SOFA came into force.[222] The *Defence Visiting Forces Act* creates a certification process to ensure Australian state authorities will not impose on U.S. primary criminal jurisdiction.[223] On request of the relevant commander, the Attorney-General certifies to the appropriate Australian state court that the individual in question is to be transferred to foreign military authorities.[224] Australian law is aided in this process in that, similar to the U.S. Supremacy Clause, the Australian Constitution makes Commonwealth legislation superior to contrary state or territory law.[225] Other provisions of the Austl.–U.S. SOFA were implemented through minor amendments to Australia's *Migration Regulations*, *Customs Tariff Act*, *Duties Act*, *Income Tax Assessment Act*, *National Transport Commission Regulations*, *Australian Postal Corporation Act,* and *Firearms Act*, among others.[226] All this to say that, similar to the U.S. law, it is extremely difficult for the Australian Government to create an international agreement with domestic effect. But Australia has, nonetheless, fully implemented all Austl.–U.S. SOFA privileges and protections for U.S. forces in Australia.[227] Similarly, the difficulty of implementing a reciprocal SOFA into US law is not a sufficient bar to preclude effort, especially where reciprocity may be obtained through the nontreaty mechanism, such as a congressional-executive agreement.[228]

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[221] See Diplomatic Privileges and Immunities Act 1967 (Cth) (Austl.).

[222] *See generally Defence (Visiting Forces) Act 1963* (Cth) (Austl.) (The Defence (Visiting Forces) Act 1963 applies to dozens of foreign forces, not just the U.S., and it is drafted broadly to reflect this fact.).

[223] *See id.* at § 18.

[224] *Id.* § 12(4) (Notably, the foreign force must initiate the certification process, and under a strict reading of the legislation, state courts are not strictly bound by the Attorney-General's certification.).

[225] *Australian Constitution* s 109.

[226] *See Migration Regulations 1994* (Cth) Div 5.6A; *Customs Tariff Act 1995* (Cth) pt 1 s 13A; *Duties Act 1997* (NSW) ch. 2 pt 8 div 1A; *Income Tax Assessment Act 1997* (Cth); *National Transport Commission (Road Transport Legislation – Driver Licensing) Regulations 2006* (Cth) sch 1 s 31; *Australian Postal Corporation Act 1989* (Cth) s 28A; *Firearms Act 1996* (NSW) sch 2 pt 2.2 s 1.

[227] *See id.*

[228] *Cf. Artll.S2.C3.2.2.1.1.3 Congressional Executive Agreements*, U.S. CONGRESS, https://constitution.congress.gov/browse/essay/artII-S2-C3-2-2-1-1-3/ALDE_00001151/ (last visited Feb. 27, 2022).

D. Additional Reciprocity Requests—A Potential Slippery Slope

Another common objection to reciprocity has been that a new reciprocal SOFA will open the proverbial floodgates to other partner requests for reciprocity.[229] This Article does not advocate open acceptance of all such requests. But the Australia–U.S. alliance is worth special consideration[230] for several strategic reasons. Primary among these is that the U.S. is already committed to creating a reciprocal SOFA with Australia. Further individuation is justified by Australia's status as a critical strategic ally in a crucial region, with whom the U.S. has exceptionally close connections.[231] The risk of additional requests is not a valid justification for rigid refusals to grant any reciprocity to anyone. On the contrary, all requests deserve individual consideration and should be given proper weight under the strategic impact of accepting or denying each one. More flexibility in assessing requests would be consistent with Department of State recommendations, and a prudent change of policy.[232] Indeed, a flexible approach to reciprocity would merely add another tool to the U.S. toolbox in efforts to strengthen alliances and attract new partners.

CONCLUSION

This Article advocates the creation of a reciprocal Austl.–U.S. SOFA as a concerted effort to strengthen the key strategic alliance with Australia, in the face of competition from revisionist powers—particularly China. A reciprocal SOFA will have a positive impact on strategic competition for three simple reasons of legal, symbolic, and practical significance. First, creating and adopting a reciprocal Austl.–U.S. SOFA will satisfy an unfulfilled legal commitment to a strategic partner. Second, reciprocity will reaffirm the alliance by symbolically conveying mutual

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[229] *See* REPORT ON STATUS OF FORCES AGREEMENT, *supra* note 94, at 23.

[230] There may be a marginal concern that granting reciprocity to Australia, and no one else, may generate a perception of cultural bias from those seeking reciprocity with Korea, Japan, or others.

[231] BUREAU E. ASIAN PAC. AFF., *US Relations with Australia: Bilateral Relations Fact Sheet*, U.S. DEPARTMENT OF STATE (Jan. 21, 2020), https://www.state.gov/u-s-relations-with-australia/.

[232] Antony J. Blinken, *Secretary Antony J. Blinken, Secretary of Defense Lloyd Austin, Australian Foreign Minister Marise Payne, and Australian Minister Peter Dutton at a Joint Press Availability*, U.S. DEP'T OF STATE (Sept. 16, 2021), https://www.state.gov/secretary-antony-j-blinken-secretary-of-defense-lloyd-austin-australian-foreign-minister-marise-payne-and-australian-defence-minister-peter-dutton-at-a-joint-press-availability/.

respect. Finally, reciprocity will facilitate further integration and interoperability between the two militaries.[233]

Commitment. The National Defense Strategy states "we will uphold our commitments" to allies.[234] However, for a variety of reasons the commitment for a reciprocal Austl.–U.S. SOFA remains unfulfilled. It must be noted that this commitment is not a clear mandate. The Protocol language requires a "negotiation" for a reciprocal SOFA at an unspecified "future date."[235] Similar to the language from Article VI of the Treaty of the Non-proliferation of Nuclear Weapons,[236] it will always be difficult to identify specific non-compliance with such a vague requirement. But ambiguity in the Austl.–U.S. SOFA Protocol does not justify indefinite inertia. Viewing the commitment through the lens of strategic shift or accelerated change, the commitment presents more than an imprecise legal requirement to uphold. It is rather an opportunity to be seized; a chance to reaffirm a key strategic alliance.[237]

Symbolism. The U.S. has often taken a Hobbesian worldview with its allies in the past.[238] It has, from time to time, relied on its superior bargaining power to meet U.S. interest overseas, while denying those same interests to allies. China clearly intends to continue on a similar Hobbesian path, with regional hegemony or a neo-Tributary system as its goal—to include strategic competition for influence in Australia. As if to illustrate the point, China's former Foreign Minister Yang Jeichi argued for special privileges to the Association of Southeast Asian Nations by arguing, "China is a big country and [you] are small countries; that's just a fact."[239] Where the U.S. holds firm to non-reciprocal arrangements, it

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[233] This final point will not be further explained in this Article. It is provided here on the natural assumption that a reciprocal Austl.—U.S. SOFA would facilitate additional interaction between U.S. Department of Defense and Australian Defence Force personnel. Additional shared exercises, training and exchange positions would serve to deepen interoperability, develop tactical relationships and further improve relations between the two militaries.

[234] NATIONAL DEFENSE STRATEGY, *supra* note 4, at 9.

[235] Austl.–U.S. SOFA, *supra* note 43, Protocol.

[236] Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 729 U.N.T.S. 161 (Article VI of the Non-proliferation Treaty obligates each nuclear state to undertake "to pursue negotiations in good faith . . . to nuclear disarmament, and on a treaty on general and complete disarmament.") The ambitious and ambiguous goal is, obviously, not approaching completion over 50 years later.

[237] INTERIM STRATEGIC GUIDANCE, *supra* note 17, at 9–10.

[238] The term "Hobbesian" has reference to Hobbesian Realism in international relations, which generally holds that self-interest is not constrained by international law, though specific agreements may help clarify and refine bilateral relations. *See* Michael M. Doyle, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant and Locke*, 46 COLUM. J. TRANSNAT'L L. 648, 652–53 (2008).

[239] Ben Lowsen, *China's Diplomacy Has a Monster in its Closet*, THE DIPLOMAT (Oct. 13, 2018), https://thediplomat.com/2018/10/chinas-diplomacy-has-a-monster-in-its-closet/.

may maximize U.S. legal rights in transactions, but it also undermines a more meaningful alliance.

While key allies attempt to balance connections to both the U.S. and China, the U.S. must demonstrate it is not a "wounded super power,"[240] but a principles-based partner.[241] Those principles must "uphold a foundation of mutual respect" that symbolically recognizes the equality of sovereign nations.[242] The U.S. is a fair and equitable nation that provides a more principled alternative to China. A concerted move toward SOFA reciprocity will broadly demonstrate that fact. The best and easiest way to begin this demonstration is to start negotiations on a reciprocal Austl.–U.S. SOFA.

[240] KISSINGER, *supra* note 3, at 533–34.

[241] SUPERVIELLE, *supra* note 109, at 19.

[242] *Id.* For most foreign governments, the issue of reciprocity is a significant matter of principle and symbolism.

A COMPARATIVE STUDY OF CAPITAL PUNISHMENT TRENDS: A CASE OF UGANDA AND THE UNITED KINGDOM

Robert Olet Egwea[*]

ABSTRACT

This Article analyzes some theories that have shaped various countries' penal policies while focusing specifically on the developments in the United Kingdom and Uganda, two neo-liberal countries that share some common history, although culturally different. Despite several authoritarian regimes around the globe that have been implicated in gross human rights abuses, there is a decline in capital punishment globally. The highest rate of incarceration is found in neo-liberal societies, where capitalism and individualism flourish. However, it is also in these societies that relentless campaigns by religious and human rights organizations and world bodies like the United Nations have resulted in the reduction of the death penalty in particular and penal reform in general.

INTRODUCTION

There has been a downward trend in the rate of executions of prisoners globally.[1] Consequently, many countries have adopted life imprisonment as a maximum penalty for offenders.[2] In 2017, the most significant decrease in executions took place in Africa, south of the Sahara, where the death penalty had been abolished by twenty countries, though in 1981, only one African country had abolished the practice.[3] Despite the positive developments, a small number of countries like Iran and Iraq conducted eighty-four percent of all the

[*] Northumbria University, Newcastle Upon Tyne, United Kingdom.

[1] *The Death Penalty: What's Changed Since 1977?*, AMNESTY INT'L UK (Jan. 12, 2018, 7:31 AM), https://www.amnesty.org.uk/death-penalty-amnesty-campaign-1977.

[2] DIRK VAN ZYL SMIT, LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS ix (2019).

[3] *See China Named "World's Top Executioner" as Global Rate Falls*, THE GUARDIAN (Apr. 12, 2018), https://www.theguardian.com/world/2018/apr/12/china-named-worlds-top-executioner-as-global-rate-falls [hereinafter *China Named "World's Top Executioner"*]; *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976 (last visited Mar. 31, 2022).

executions in the world in that year.[4] The methods of executions included beheading, hanging, lethal injections, and shooting.[5]

To better understand why there has been a decline in the death sentence globally, it is essential to analyze the penal policies of various countries since many factors appear to have contributed to such development. Since it is not possible to study all of the over one hundred countries globally within this research scope, this Article focuses on the United Kingdom (UK) and Ugandan penal policies. However, the starting point is an overview of the developments globally, including relevant theories. Thus, this Article is composed of the following sections: relevant theories, global perspective, rehabilitative purpose, UK penal policy, Ugandan penal policy, and the death penalty in the UK and Uganda, followed by the conclusion.

I. RELEVANT THEORIES

Today's penal policies have been shaped by arguments advanced by various scholars such as Michael Cavadino, James Dignan, Loïc Wacquant, David Nelken, Dario Malossi, and Richard Sparks.[6] Their various approaches have points of convergence as well as divergence.[7] For instance, on the one hand, Wacquant tends to agree with Cavadino and Dignan when they attribute the high level of punitiveness in some western countries like the United States of America (US) and the UK to neo-liberalism.[8] On the other hand, Nelken appears to disagree with Cavadino and Dignan when he questions the explanation that neoliberalism is the cause of increasing punitiveness by citing countries like China (which are not neo-liberal) with an extremely high rate of incarceration and countries like Russia and South Africa (which are emerging neo-liberal societies) that have decreasing prison populations.[9]

The thrust of Cavadino and Dignan's arguments is that different political economies, not differences in support for harsher

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[4] *China Named "World's Top Executioner*," *supra* note 3.

[5] *Death Penalty: Methods of Execution Used Around the World*, AMNESTY INT'L AU (Aug. 10, 2015), https://www.amnesty.org.au/death-penalty-methods-of-execution-used-around-the-world.

[6] *See* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (arguing the connection between American neoliberal government and incarceration); Michael Cavadino & James Dignan, *Penal Policy and Political Economy*, 6 CRIMINOLOGY & CRIM. JUST. 435 (2006) (connecting incarceration rate with political culture); DAVID NELKEN, COMPARATIVE CRIMINAL JUSTICE: MAKING SENSE OF DIFFERENCE 61 (2010) (comparing different countries and their treatment of crime); *see also* TRAVELS OF THE CRIMINAL QUESTION: CULTURAL EMBEDDEDNESS AND DIFFUSION (Dario Melossi & Richard Sparks, eds., 2011) (analyzing the "criminal question" broadly, with an emphasis on culture and diffusion of culture).

[7] *Compare* NELKEN, *supra* note 6, at 61 (presenting varying reasons for incarceration in different countries), *with* Cavadino & Dignan, *supra* note 6, at 435 (connecting incarceration rates with political culture and economy).

[8] WACQUANT, *supra* note 6, at 119; Cavadino & Dignan, *supra* note 6, at 447.

[9] NELKEN, *supra* note 6.

sentences, are the critical determinants of incarceration rates in various countries.[10] These scholars have provided typography of the political economies as follows: neo-liberal societies, conservative corporatist societies, social democratic societies, and oriental corporatist societies.[11] According to their theory, the highest incarceration rates are found in neo-liberal societies, where capitalism and individualism flourish because such societies follow social and economic policies that exclude minorities and the less privileged in society.[12] The best examples of neoliberal societies are the US and the UK.[13] Uganda, the East African country discussed in this Article, is also characterized as a neo-liberal country.[14]

In conservative corporatist societies, unlike in neo-liberal societies, protection against market forces is high.[15] Here, various interest and social groups, as well as traditional institutions like churches and families, play a significant role in shaping society.[16] Compared to neo-liberal societies, the rate of imprisonment here is relatively low.[17] The next typography is that of social democratic societies, like in Sweden, where prison populations are the lowest globally.[18] These societies are generous towards their residents in terms of welfare benefits.[19] Both conservative-corporatist cultures and social-democratic societies pursue a higher level of inclusiveness of their citizens, and this tends to avoid social exclusion, which is prevalent in neo-liberal societies.[20] Lastly, Cavadino and Dignan maintain that there is a low rate of imprisonment in oriental corporatist societies (for example, Japan), which are systems of authoritarian communitarianism where traditional oriental values are quite strong and thus control the rate of offending plus consequent imprisonment.[21] Oriental corporatism is inclusive and embraces more informal correction techniques through hierarchical systems instead of incarceration.[22]

While comparing two or more penal policies has benefits, Nelken warns of the dangers of ethnocentrism and relativism.[23] Nelken further explains that ethnocentrism can lead to the assumption that what is familiar is necessary and universally acceptable, while relativism is based on the claim that what others are

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[10] *Id.* at 59–60.
[11] *Id.* at 60.
[12] *Id.* at 60–61.
[13] *Id.* at 68.
[14] THE DYNAMICS OF NEOLIBERAL TRANSFORMATION 1 (Jörg Wiegratz, Giuliano Martiniello, & Elisa Greco, eds., 2018).
[15] Cavadino & Dignan, *supra* note 6, at 444–45.
[16] NELKEN, *supra* note 6, at 36–37.
[17] *Id.*
[18] *Id.* at 60.
[19] *Id.* at 61.
[20] *Id.* at 63.
[21] Cavadino & Dignan, *supra* note 6, at 446.
[22] NELKEN, *supra* note 6, at 36–37.
[23] *Id.* at 1, 56.

doing is never comprehensible and that there is no transcultural basis of knowing whether what different people are, or do, is right.[24] These two extremes can lead to inaccurate or distorted judgments when making comparisons.[25] It can also lead to being stuck in a system that may be archaic.[26] For example, while Uganda held on to the penal policy involving punitive measures, including the death penalty, the UK has moved on and abolished the death penalty altogether.[27] Could this be regarded as ethnocentrism or relativism on the part of Ugandans? As Nelken has stated, it is not straightforward to determine what is ethnocentric or relativistic.[28] In Uganda's case, several other factors have made the country retain the death penalty for so long.[29] In addition, the current Ugandan administration is considering introducing capital punishment for gay and lesbian people.[30]

II. GLOBAL PERSPECTIVE

As mentioned in the introduction above, the death penalty abolition movement has been on the rise globally since the beginning of the twentieth century. This development is not by coincidence, but because of concerted efforts against the death penalty by human rights organizations such as Amnesty International, which has been campaigning against capital punishment since 1977 when the death penalty dominated most states' penal policies.[31] Other anti-death penalty organizations are Human Rights Watch, Penal Reform International, World Coalition Against the Death Penalty, and many others.[32] More so, international and regional bodies such as the United

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[24] *Id.* at 18–19.

[25] *See id.*

[26] *Compare* AMNESTY INT'L, UGANDA: THE DEATH PENALTY: A BARRIER TO IMPROVING HUMAN RIGHTS 2, 7–8 (1993) [hereinafter UGANDA: THE DEATH PENALTY], *with United Kingdom Marks 50th Anniversary of Death Penalty Abolition*, DEATH PENALTY INFO. CTR. (Nov. 9, 2015), https://deathpenaltyinfo.org/news/united-kingdom-marks-50th-anniversary-of-death-penalty-abolition [hereinafter *United Kingdom, Death Penalty Abolition*]; *see also Britain Severs Ties with Uganda*, N.Y. TIMES (July 29, 1976), https://www.nytimes.com/1976/07/29/archives/britain-severs-ties-with-uganda-break-after-four-years-of-tension.html [hereinafter *Britain Severs Ties*].

[27] UGANDA: THE DEATH PENALTY, *supra* note 26; *United Kingdom, Death Penalty Abolition*, *supra* note 26; *Britain Severs Ties*, *supra* note 26.

[28] NELKEN, *supra* note 6, at 20.

[29] UGANDA: THE DEATH PENALTY, *supra* note 26, at 2–4, 7.

[30] Nita Bhalla, *Uganda Plans Bill Imposing Death Penalty for Gay Sex*, REUTERS (Oct. 10, 2019, 7:09 AM), https://www.reuters.com/article/us-uganda-lgbt-rights/uganda-plans-bill-imposing-death-penalty-for-gay-sex-idUSKBN1WP1GN.

[31] *Death Penalty*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/death-penalty/ (last visited Feb. 7, 2022).

[32] *See id.*; *Key Facts*, PENAL REFORM INT'L, https://www.penalreform.org/issues/death-penalty/key-facts/ (last visited Feb. 2, 2022); *see also How to Work with Parliamentarians for the Abolition of the Death Penalty*, WORLD COAL. AGAINST THE DEATH PENALTY (Oct. 10, 2021),

Nations and the European Convention of Human Rights have been very instrumental in fostering the abolitionist trend.[33] According to the United Nations Human Rights Office of the High Commissioner, the International Covenant on Civil and Political Rights (ICCPR) has already started to have an impact, although many countries still allow the death penalty.[34] Ultimately, in 2017, eighty-five states had ratified various agreements that restrict or prohibit the use of the death penalty.[35]

Although the movement to resist the death penalty started as early as the eighteenth century in Britain, the abolitionist trend got an accelerated push from the European Convention on Human Rights.[36] The convention is a legally binding international treaty that came into force in 1953.[37] The convention guarantees the right to life and prohibits torture or inhumane and degrading treatment.[38] The trend has been championed by European Council members who, in 1985, signed Protocol No. 6 to the convention, abolishing the death penalty in peacetime.[39] In 2003, all the Council of Europe member states except Armenia, Azerbaijan, and Russia signed Protocol No. 13 to the convention, abolishing the death penalty in all circumstances.[40] In 2013, the ECHR ruled that it was unlawful to impose life sentences without the possibility of parole.[41] The case had been brought by three people sentenced to life in England.[42] Thus, the ruling gave the convicts the "right to hope" because it placed an obligation on the British government to offer the prisoners a chance for rehabilitation and release at some point in their sentence.[43]

It should, however, be noted that while there are official figures on the number of executions, unreported executions still take place in many countries, including those that claim to have low

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https://worldcoalition.org/2021/10/10/publication-of-a-new-guide-on-working-with-parliamentarians-to-abolish-the-death-penalty/; *Human Rights Watch Submission to the UN Human Rights Committee in Advance of its Review of Egypt*, HUM. RTS. WATCH (Jan. 28, 2022, 10:15 AM), https://www.hrw.org/news/2022/01/28/human-rights-watch-submission-un-human-rights-committee-advance-its-review-egypt.

[33] The Death Penalty and the EU's Fight Against It, EUR. PARL. DOC. (PE 635.516) (2019); G.A. Res. 73/175, ¶ 2, 4 (Dec. 17, 2018).

[34] *Death Penalty*, U.N. OFF. OF THE HIGH COMM'R OF HUM. RTS., https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx (last visited Feb. 28, 2022).

[35] *Key Facts*, *supra* note 32.

[36] JULIAN B. KNOWLES, THE ABOLITION OF THE DEATH PENALTY IN THE UNITED KINGDOM 11 (2015); *The ECHR and the Death Penalty: A Timeline*, COUNCIL OF EUR., https://www.coe.int/en/web/portal/death-penalty (last visited Feb. 28, 2022).

[37] KNOWLES, *supra* note 36.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Vinter v. United Kingdom, 2013-III, Eur. Ct. H.R. 317, 346.

[42] *Id.* at 323.

[43] *Id.* at 358 (Power-Forde, J., concurring); *European Court Gives Lifers "Right to Hope"*, BHAT MURPHY SOLICS (Feb. 20, 2018), https://www.bhattmurphy.co.uk/in-the-news/news-archive-4/archived-european-court-of-human-rights-stories/european-court-gives-lifers-right-to-hope.

numbers of death penalty implementations.[44] For instance, the rate of executions in China is believed to surpass that of the rest of the world combined, and execution data is missing altogether from some countries.[45] This caution is echoed by Human Rights Watch, which has stated that some countries regard death penalty statistics as top secret, including Belarus, China, and Vietnam.[46] Besides executions arising from death sentences, extrajudicial killings take place in many countries around the world.[47] While most European countries have embraced the European Convention on Human Rights and are relatively transparent, many countries in other parts of the world, including the countries which have officially abolished the death penalty, are not so open and have been implicated in extrajudicial executions.[48] For example, in 2016, over 100 people, including children, were executed in Western Uganda when government troops stormed a traditional institution compound and other homes in Western Uganda.[49]

Despite this trend, prison numbers in several countries remain high.[50] For instance, the U.S. appears to have one of the highest numbers of prisoners in the world.[51] According to Alexi Jones, over two million people were behind bars in the US in 2018.[52] This number did not include the 6.7 million people under correctional control (on probation or parole), of which 4.5 million adults were under community supervision.[53] The published official figures of people behind bars do not necessarily give the real picture of the overall number of people subjected to punitive measures in many countries.[54] The US situation appears to be mirrored in the UK, where the number of people behind bars is very high compared to other European countries.[55] The similarity between the UK and US penal policies have been highlighted by Tonry, who states that the two countries are in a league of their own in their move "towards harsher penal systems

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[44] AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2013 (2014).

[45] *Id.*

[46] Michael G. Bochenek, *Doing Away with the Death Penalty*, HUM. RTS. WATCH (Apr. 11, 2017, 11:01 AM), https://www.hrw.org/news/2017/04/11/doing-away-death-penalty.

[47] *Death Penalty*, *supra* note 31, at 60 n. 66.

[48] *Id.*

[49] HUM. RTS. WATCH, UGANDA: EVENTS OF 2017 (2017).

[50] ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (2015), https://nicic.gov/world-prison-population-listeleventh-edition.

[51] *Id.*

[52] Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html.

[53] *Id.*

[54] *See id.*

[55] Noah Robinson, *UK Prison Population Third Highest in Europe and Suicide Rate Twice the Average*, JUST. GAP (Apr. 13, 2021, 7:32 AM), https://www.thejusticegap.com/uk-prison-population-third-highest-in-europe-and-suicide-rate-twice-the-average/.

across the board."[56] Although both the US and UK are neo-liberal countries, there are several differences in their penal policies.[57] For instance, in 2019, the incarceration rate, per 100,000 inhabitants, in the UK was 139, and in 2015, the incarceration rate in the US was 698, yet the prison density of the UK in 2019 (110%) was higher than that of the US (103%) in 2015.[58] The similarities and differences simultaneously are in line with Nelken's caution about generalization when doing a comparative study.[59]

The abolition of the death penalty in many countries worldwide has given rise to the increased use of life imprisonment in many countries, though this is considered "a slow, torturous death."[60] There are different kinds of life imprisonment, broadly categorized as formal and informal.[61] In 2018, 183 countries out of 216 imposed formal life imprisonment, but thirty-three countries were found to have no life imprisonment.[62] Because of its tortures, life imprisonment has been seriously opposed by human rights organizations as much as the death penalty.[63] Instead, the campaigners have been advocating for more early release rehabilitative interventions in prisons.[64]

III. REHABILITATIVE PURPOSE

There are many reasons why offenders are put behind bars, including prevention or deterrence from offending, incapacitation of the offender, rehabilitation, and reintegration of the offender.[65] Out of these objectives, there has been an emphasis on the use of rehabilitative methods to change the lives of prisoners in the past few decades.[66] *Rehabilitation* can be defined as "a planned intervention which aims to bring about change in some aspect of the offender that is thought to cause the offender's criminality, such as attitudes, cognitive processes, personality or mental health."[67] In the case of

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[56] Michael Tonry, *Determinants of Penal Policies*, 36 CRIM. & JUST. 1, 5 (2007).

[57] *See id.* at 6–7.

[58] *Comparison Tool: United States of America & United Kingdom*, PRISON INSIDER, https://www.prison-insider.com/en/comparer/outil-de-comparaison?profiles=120314-125851 (last visited Mar. 21, 2022).

[59] NELKEN, *supra* note 6.

[60] Olivia Rope, *Life Imprisonment: A Sentence in Dire Need of Reform*, PRISON INSIDER (June 14, 2021), https://www.prison-insider.com/en/articles/la-perpetuite-une-condamnation-a-reformer-d-urgence.

[61] *Id.*

[62] Dirk van Zyl Smit & Catherine Appleton, *A Policy Briefing on Life Imprisonment*, PENAL REFORM INT'L (2018) https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Life-Imprisonment-Briefing.pdf.

[63] *See About Us*, PENAL REFORM INT'L, https://www.penalreform.org/about-us/ (last visited Feb. 28, 2022).

[64] *See id.*

[65] Amanda Dissel, *Rehabilitation and Reintegration in African Prisons, in* HUM. RTS. IN AFR. PRISONS 156 (Jeremy Sarkin ed., 2018).

[66] *Id.* at 157.

[67] *Id.* at 156.

people serving life sentences, it might seem like there is no point rehabilitating them because, after all, they will die in prison, especially in countries where early prisoner release is not considered. However, many studies have highlighted the benefits of rehabilitation, regardless of length or type of sentences.[68] For instance, in their research on jailed sexual offenders, Blagden and Wilson found that prisoner–staff relationships were vital in cultivating a positive prison environment and positively impacting the offenders.[69] They also found that doing something useful can have a positive influence and be beneficial to the prisoner.[70] Another study explored the experiences of inmates exposed to vocational and higher education while in prison.[71] The result was that training helped the prisoners understand their crimes and gain valuable skills.[72] Therefore, it can be deduced from the above studies that rehabilitative interventions can make a positive impact on the lives of prisoners and thus change them into useful citizens.

Both the UK and Uganda provide several activities aimed at rehabilitating prisoners inside their institutions.[73] Rehabilitation seems to make sense in the UK, where prisoners, including those on life sentences, do not generally serve their full sentences but are released on parole at some point.[74] However, there appears to be no evidence to suggest that Uganda has been releasing prisoners early.[75] This apparent gap in information could be because most of the literature on African prisons is dominated by information on the jails' appalling situations or because there is a lack of documentation on correctional activities in such prisons.[76] Yet, rehabilitation and reintegration of prisoners are some of the significant activities in African prisons.[77]

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[68] Nicholas Blagden & Kirsten Wilson, *"We're All the Same Here"– Investigating the Rehabilitative Climate of a Re-Rolled Sexual Offender Prison: A Qualitative Longitudinal Study*, 32 SEXUAL ABUSE J. RSCH. TREATMENT 727, 734, 736, 738 (2019).

[69] *Id.* at 736, 738.

[70] *Id.* at 730.

[71] Robin M. Myers-Li, From Prison to Reentry: A Journey of Change Through Rehabilitation, Education and Nurturing Opportunities Within Sites of Resilience (May 2017) (Ed. D. dissertation, University of Southern California) (on file with University of Southern California library).

[72] *Id.*

[73] *Information Pack for British Prisoners in Kenya*, BRIT. HIGH COMM'N KENYA 6, 8 (May 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714024/PRISONERS_PACK_2018__1_.pdf [hereinafter BRIT. HIGH COMM'N]; Dissel, *supra* note 65, at 155–56.

[74] BRIT. HIGH COMM'N, *supra* note 73, at 10.

[75] *See* Dissel, *supra* note 65, at 155.

[76] *See Even Dead Bodies Must Work: HRW's New Report on Uganda's "Colonial" Prison System*, ANGELO IZAMA (July 19, 2011), https://angeloizama.com/even-dead-bodies-must-work-hrws-new-report-on-ugandas-colonial-prison-system/ [hereinafter *Even Dead Bodies Must Work*].

[77] Dissel, *supra* note 65, at 155.

Rehabilitative interventions can be delivered in many forms, such as education and training. In Uganda, for instance, prisoners are offered adult education as well as primary, secondary, and tertiary level education.[78] Others do various vocational and skills training.[79] The rehabilitation programs are aimed at enabling inmates to acquire skills as well as earn some income.[80] There is an emphasis on vocational skills training which includes carpentry, crafts, and hairdressing.[81] However, this varies from prison to prison.[82] What appears to dominate prison activities, especially in the facilities upcountry, is hard labor in farms and not rehabilitation, as found in a study conducted by Hamza.[83] The researcher asserts that, despite legal requirements intended to safeguard prisoners' rights, prison labor in Uganda is forced on the prisoners in a manner that is oppressive and exploitative.[84] A Human Rights Watch commissioned report in 2011 titled *Even Dead Bodies Must Work* suggests that instead of rehabilitation, prisoners are subjected to hard labor and abuse, a system that has not changed since the colonial times.[85] More so, it seems there is a lack of therapeutic rehabilitation of prisoners in Uganda, according to Dissel.[86]

Nevertheless, in Luzira Maximum Prison, the facility that is normally cited in various reports on Ugandan prisons, there appear to be many rehabilitative activities, especially for women, according to Prison Insider.[87] The activities include health and beauty, tailoring, arts and crafts, and other courses, including a Common Law course conducted by the University of London.[88] The prison also has exceptional facilities and services for pregnant women.[89] Children born in prison stay with their mothers for four years and then move on to daycare facilities.[90] Another positive development in Luzira Maximum Prison is the use of sports as a form of rehabilitation of inmates, including those serving life sentences, as highlighted by an article in the Guardian titled *The Prison Where Murderers Play For*

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[78] *Id.* at 165.

[79] *Id.* at 166.

[80] *Id.*

[81] *Id.* at 166–67.

[82] BRIT. HIGH COMM'N, *supra* note 73, at 11.

[83] *See* Hamza Sewankambo, *Punishment or Correction? A Rights-Based Study of Prison Labour in Uganda: The Case of Kirinya Prison-Jinja.*, MAKERERE UNIV. INST. REPOSITORY, http://makir.mak.ac.ug/handle/10570/4344 (last visited Apr. 11, 2022).

[84] *Id.*

[85] *Even Dead Bodies Must Work*, *supra* note 76.

[86] Dissel, *supra* note 65, at 156.

[87] *Uganda*, PRISON INSIDER, https://www.prison-insider.com/countryprofile/prisonsinuganda?s=populations-specifiques#populations-specifiques (last visited Jan. 24, 2022).

[88] *Id.*

[89] *Id.*

[90] *Id.*

Manchester United.[91] The report paints a picture of happy and healthy prisoners who have set up various football clubs and watch big-screen televisions that connect them to English clubs like Manchester United.[92]

The poor prisoner rehabilitative program in Uganda contrasts with UK interventions where, apart from education and training, various therapeutic interventions take place to deal with mental health problems and drug addiction issues.[93] In UK prisons, there are personality disorder units and therapeutic communities aimed at providing a conducive environment for prisoners to deal with their offending behavior.[94] Since rehabilitation is a vital component of the UK's criminal justice system, various activities, both within and outside prison, are geared towards addressing the risk of harm and reducing reoffending.[95] UK prisoners are also offered help and advice to handle financial issues, find suitable accommodation when released, and continue having appropriate support when in the community.[96]

Despite the emphasis on rehabilitation in the criminal justice system by various UK governments over the years, the program has been highly criticized because it appears not to be reducing the number of those reoffending.[97] The Prison Reform Trust has said that the overall reoffending rates are at about fifty percent.[98] According to Politics.co.uk, there have also been complaints from the public that the improved prison conditions intended for rehabilitation actually make imprisonment soft and do not prevent reoffending.[99] More so, the rehabilitation level in prisons is regarded as inadequate due to a lack of resources.[100] Criticism of prisoner rehabilitation in the UK has also been echoed by Zanchi, who, in his article on the need for rehabilitative prison reform, noted that reoffending is high and violence is rampant

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[91] David Goldblatt, *The Prison Where Murderers Play for Manchester United*, THE GUARDIAN (May 28, 2015, 1:00 PM), https://www.theguardian.com/football/2015/may/28/the-prison-where-murderers-play-for-manchester-united.

[92] *Id.*

[93] *Prison Rehabilitation*, POLITICS.CO.UK, https://www.politics.co.uk/reference/prison-rehabilitation/ (last visited Mar. 15, 2022).

[94] *Rehabilitation and Release Planning*, HM INSPECTORATE OF PRISONS, https://www.justiceinspectorates.gov.uk/hmiprisons/our-expectations/prison-expectations/rehabilitation-and-release-planning/ (July 22, 2021).

[95] *Id.*

[96] *Id.*

[97] Diane Taylor, *Prisoner Rehabilitation Doesn't Work, Says Former Prisons Boss*, THE GUARDIAN (Oct. 29, 2019, 2:00 PM), https://www.theguardian.com/society/2019/oct/29/prisoner-rehabilitation-does-not-work-says-former-prisons-boss.

[98] *Does Prisoner Rehabilitation Work?*, THE WEEK (Oct. 30, 2019), https://www.theweek.co.uk/104032/does-prisoner-rehabilitation-work.

[99] *Prison Rehabilitation*, *supra* note 93.

[100] *Id.*

in UK prisons.[101] The article implies that even in the UK, a developed nation, unlike Uganda, which is still a very young democracy, rehabilitative interventions aimed at reducing reoffending are not working.[102]

IV. UK PENAL POLICY

The United Kingdom is a neo-liberal society composed of three penal systems: England and Wales, Scotland, and Northern Ireland.[103] England and Wales have ten times more prisoners than Scotland and Northern Ireland combined.[104] The population of the UK is 58,744,600, and the country is a constitutional monarchy.[105] The human development index is 0.922 (14/188), and the homicide rate per 100,000 inhabitants is 1.2.[106] These figures are for England and Wales only, because Scotland and Northern Ireland are devolved and thus governed by different systems.[107] According to Prison Insider, private companies run a substantial proportion of the UK prison service, a characteristic of the way prisons are managed in neo-liberal societies where capitalism and individualism determine how the state is run.[108]

According to the Howard League for Penal Reform, the prison systems in Britain have experienced a series of transformations for decades, as summarized here.[109] In the sixteenth and seventeenth centuries, the punishing of suspected criminals tended to be done publicly to name and shame as a form of deterrence.[110] The death sentence was typical.[111] Many people were held in prison without trial.[112] Prison conditions were appalling, and many people died in jail due to the poor conditions, diseases, poor sanitation, etc.[113] However, there was stiff opposition to the death penalty in the eighteenth century.[114] That era was dominated by hard labor in the prisons.[115] Prisons were unisex at that time.[116] State prisons were introduced in

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[101] Victor Zanchi, *Rehabilitation, Not Retribution, Is How We Reform Our Prisons*, RENEW (Aug. 15, 2019), https://web.archive.org/web/20200113063957/https:/www.renewparty.org.uk/rehabilitation_prison_reform.

[102] *Id.*

[103] *Uganda*, *supra* note 87.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *History of the Penal System*, HOWARD LEAGUE FOR PENAL REFORM, https://howardleague.org/history-of-the-penal-system/ (last visited Jan. 24, 2022).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

the nineteenth century.[117] Hard labor was abolished, and emphasis was put on productivity both for the prisoner and the prison industry.[118] Penal reforms continued into the nineteenth and twentieth century, a period characterized by active advocacy by religious and voluntary organizations for prisoners' fair treatment.[119] The Church of England, Quakers, and Evangelical groups played a vital role in the movement.[120] During this period, key developments included the Probation Order of 1907, the Criminal Justice Act of 1948 (which abolished prison servitude, hard labor, and flogging), and the Murder (Abolition of Death Penalty) Act.[121] Today's penal policies in the UK are based on the above developments.[122]

V. UGANDAN PENAL POLICY

Just like the U.K., Uganda is also regarded as a neo-liberal country.[123] The country's political system is a parliamentary democracy.[124] The Uganda Prisons Service (UPS), which falls under the Ministry of Internal Affairs, has the responsibility of administering the prisons.[125] Uganda was a British colony from 1884 until 1962, when it gained independence.[126] According to a brief history of Ugandan prisons found on Mongabay, the main penal facility during the colonial administration was Luzira Prison, which has remained the central prison.[127] This website also states that during the 1970s, when a military government was in power, prison conditions were horrible, and some inmates reported that they survived through cannibalism.[128]

It was in the 1970s that the remnants of the extremely harsh penal policy introduced by the colonial administration were implemented to extreme proportions.[129] The death penalty, which was designed to reinforce colonial authority over a population perceived by the British to be "violent and dangerous," remained ingrained in many African countries, including Uganda, well after independence.[130]

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[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Uganda*, *supra* note 87.
[124] *Id.*
[125] *Uganda Profile – Timeline*, BBC (May 10, 2018), https://www.bbc.com/news/world-africa-14112446.
[126] *Uganda-Prison System,* MONGABAY, https://data.mongabay.com/history/uganda/uganda-prison_system.html#ykTYjfuozv2131MV.99 (last visited Jan. 30, 2022).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Andrew Novak, *The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda*, 11 LOY. J. PUB. INT. L. 19, 42 (2009).

During colonial times, public executions were meant to deter Africans from committing a crime and impress the colonial government.[131] Therefore, it is not surprising to hear of the continuation of public executions in Uganda, especially during the 1970s while a British-trained soldier, Idi Amin, was in power.[132] In 1973, a televised public execution of twelve people accused of subversion took place.[133] Families of the suspects and members of the public were forced to watch the suspects being gunned down.[134] O'Cleirigh described how the victims were stripped naked, blindfolded, and showered with bullets as hundreds of terrified people attended.[135] The executions marked the end of the rule of law in Uganda.[136]

Many aspects of the harsh prison regime left behind by the colonial administration have remained to date, though the country is gradually moving towards conformity with international standards of upholding human rights in prisons, as evidenced by the abolitionist trend in the country.[137] Evidence of appalling prison conditions can be found in various human rights reports.[138] For instance, Human Rights Watch observed in 2014 that the state of overcrowding in the prisons had gone beyond 200% capacity and that food and water were scarce.[139] Many prisoners were kept behind bars for several months without trial, and diseases such as tuberculosis and AIDS are widespread.[140] Although the UPS appears on paper to have set very high standards with regards to human rights, the "prisons in Uganda are failed and fragile" because of excessive numbers of inmates and deplorable living conditions.[141]

VI. THE DEATH PENALTY IN THE UK AND UGANDA

While the UK is located in Europe, where most countries have abolished the death penalty, Uganda has not yet abolished the death penalty and is still implicated in various human rights abuses, including extrajudicial executions of people seen to oppose the government.[142] The UK has not carried out any executions since

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[131] *Id.*

[132] *Id.*

[133] NOEL O'CLEIRIGH, RECOLLECTIONS OF UGANDA UNDER MILTON OBOTE AND IDI AMIN, loc. 1201 (2004) (ebook).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON STRATEGIES TO REDUCE OVERCROWDING IN PRISONS, at 34 (2013) (ebook).

[138] Joseph Amon, *Hard Life in Ugandan Prisons*, HUM. RTS. WATCH (July 14, 2011, 12:35 AM), https://www.hrw.org/news/2011/07/14/hard-life-ugandan-prisons.

[139] *Id.*

[140] *Id.*

[141] Tomas Max Martin, *Scrutinizing the Embrace of Human Rights in Ugandan Prisons: An Ethnographic Analysis of the Equivocal Responses to Human Rights Watch Reporting*, 9 J. HUM. RTS. PRAC. 247, 248 (2017).

[142] Novak, *supra* note 130.

August 1964, and the government has remained committed to the abolition of the death sentence.[143] More so, in Protocol 13, Article 1 of the Human Rights Act, abolition of the death penalty was enshrined in law.[144]

Being a former colony of Great Britain, Uganda inherited the British penal policy and continues to share good practices from the UK.[145] That may explain why Uganda has been making progress toward the complete abolition of the death penalty, just like the UK. Indeed, *The East African* reported that Uganda abolished the mandatory death penalty for some crimes.[146] The paper also stated that there were "133 inmates on death row[,] and no[]one ha[d] been executed in the last 20 years."[147] However, the Ugandan government was also planning to revive a bill that would impose a death sentence on gay people.[148] The "Kill the Gays" Bill was introduced in 2014 but was shelved at that time due to lack of support.[149]

Although Britain officially abolished the death penalty as a punishment option in 1998, capital punishment was passed on to the British colonies, including Uganda, who retained it.[150] The former colonies of Great Britain appear to have been slow to abolish the death penalty, not only in Africa but in other countries outside Europe, although Oceania is reported to have been a top abolitionist region in the world.[151] Globally, the mandatory death penalty declined drastically by the mid-twentieth century following developments in the UK and the US.[152] Although the former colonies were slow to abolish the death policy, they continued to be influenced by events in Britain.[153] In 2009, the Supreme Court of Uganda upheld a Constitutional Court decision in the case of *Attorney General v. Kigula*, finding the mandatory death penalty to be unconstitutional.[154] This is in line with the Constitution of Uganda, Article 22(1), which states:

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[143] CARSTEN ANCKAR, DETERMINANTS OF THE DEATH PENALTY: A COMPARATIVE STUDY OF THE WORLD 77 (Routledge ed. 2004).

[144] *Article 1 of the Thirteenth Protocol: Abolition of the Death Penalty*, EQUAL. & HUM. RTS. COMM'N, https://www.equalityhumanrights.com/en/human-rights-act/article-1-thirteenth-protocol-abolition-death-penalty (June 3, 2021).

[145] Novak, *supra* note 130, at 61.

[146] BBC, *Uganda Abolishes Mandatory Death Penalty*, THE E. AFR. (Aug. 21, 2019), https://www.theeastafrican.co.ke/news/ea/Uganda-abolishes-mandatory-death-penalty/4552908-5243370-rfierez/index.html.

[147] *Id.*

[148] Nita Bhalla, *Uganda Plans Bill Imposing Death Penalty for Gay Sex*, THOMSON REUTERS FOUND. (Oct. 10, 2019), https://news.trust.org/item/20191010103819-wbt6x/.

[149] *Id.*

[150] Novak, *supra* note 130, at 20; Ama Lorenz, *When Was the Death Penalty Abolished in the UK?*, FAIRPLANET (Dec. 12, 2019), https://www.fairplanet.org/story/when-was-the-death-penalty-abolished-in-the-uk/.

[151] Novak, *supra* note 130, at 19; ANCKAR, *supra* note 143, at 18.

[152] Novak, *supra* note 130, at 20.

[153] *Id.*

[154] *Id.* at 22.

> No person shall be deprived of life intentionally except in execution of a sentence passe in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.[155]

The trend of challenging the mandatory death penalty in former British colonies resulted from pressure by a human rights group based in London, known as the Death Penalty Project.[156] The Death Penalty Project has been campaigning against executions and prison conditions through several test cases in Caribbean and African countries.[157] The abolitionist trend in the Commonwealth countries, including Uganda, has followed a similar pattern.

CONCLUSION

There has been a gradual decrease in the implementation of the death penalty and an increase in life imprisonment globally over the last few decades. The trend in reducing the death penalty and penal reform is, in large part, a result of relentless campaigns by religious and human rights organizations and world bodies like the United Nations. Campaigners regard both the death penalty and life imprisonment as harsh measures against fundamental human rights. As a result, there has been an emphasis on rehabilitative methods to change the lives of prisoners in the past few decades.[158] However, rehabilitative programs have also been criticized for failing to prevent reoffending in the UK.

This Article focused on a comparison of the UK and Ugandan penal policies. Both the UK and Uganda are neo-liberal countries that share some common history, and yet they are very different culturally and politically. Uganda was a colony of Britain for more than a half-century and inherited most of the British criminal justice system's aspects. However, while the UK has been implementing various penal reforms since the nineteenth century, Uganda has made slower progress in reforming its prison system, which has its roots in the colonial administration. For example, the UK no longer uses corporal punishment and the death penalty in prisons, but Uganda has retained both forms of punishment. In spite of internal resistance to reform, exemplified by the attempt to introduce the death penalty for gay and lesbian people, Uganda is slowly moving towards abolition.

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[155] CONSTITUTION OF UGANDA 1995, ch.4 art. 22(1).
[156] Novak, *supra* note 130, at 20 n.6.
[157] *Id.*
[158] Myers-Li, *supra* note 71, at 14.

RIGHT TO PERSONAL LIBERTY IN NIGERIA

Yinka Olomojobi, (PhD)[*]

ABSTRACT

The right to personal liberty is one of the most central human rights, as it is connected to the essential rudiments of an individual's physical freedom. The right to liberty requires that the arrest or detention of an individual must be in accordance with the law. The right therefore protects the individual against the excesses of the government and its agents. The right to personal liberty is essentially a personal freedom in which no government can abridge. This right is juxtaposed with other human rights and can be formally traced back to the English Magna Carta of 1215.

One of the main quagmires of the right to liberty in Nigeria is that the executive arm of government in Nigeria, at most times, permits continuous detention without trial. Detention without trial includes persons detained by the state without criminal charges. Furthermore, there is a persistent lack of will by the judiciary to eliminate a vast number of cases where the individual is detained without recourse to the time they would have served if convicted for the crime in question. In addition, the problem continues when individuals are not released from prison even though they have completed serving their jail terms.

To understand the broad concept of this right, this Article explores the right to liberty from various international frameworks, then from a regional perspective (the African Charter on Human and Peoples Rights), and lastly, bringing it to the center, a domestic perspective with Nigeria as the focal point. Whilst exploring the right to liberty in Nigeria, this paper investigates the constitutional interpretation of the right.

INTRODUCTION

The right to personal liberty is essential in any democratic society. According to His Lordship, Justice Oputa, personal liberty "implies freedom from external coercion in the use of one's good or faculties. It is the status of not being the property or chattel of another."[1] Lord Denning observed that the right to personal liberty means: "the freedom of every

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[1] Beatrice N. Okpalaobi & Chino N. Nzewi, *Medical Malpractice and Negligence in Nigeria: Human Rights Enforcement as a Remedy*, 3 INT'L J. COMPAR. L. & LEGAL PHIL., no. 2, 2021, at 194, 200.

law-abiding citizen to think what he will, to say what he will . . . on his lawful occasions, without let or hindrance from any other person."[2]

According to the father of the rule of law, A.V. Dicey, personal liberty is the "right not to be subject to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification."[3] The right to personal liberty is a crucial component in human rights, as it involves the issues surrounding the individual's freedom.[4] The existence of this right started with the imposition of the Magna Carta, the charter of English in 1215.[5] Later, the Habeas Corpus Act of 1679 was promulgated to secure persons from arbitrary arrest and detention.[6] The Habeas Corpus Act is aptly described by Blackstone: "Magna Carta only, in general terms, declared, that no man shall be imprisoned contrary to law: the habeas corpus act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him."[7] In 1789, France promulgated the *Declaration of the Rights of Man and Citizen*, which was based on the crux and values of the French Revolution.[8] The French Declaration of Rights ensured that the right to liberty was guaranteed to all persons.[9] This declaration has inspired freedom and democracy in the western world.[10]

Equality before the law is synonymous with liberty.[11] In other words, liberty implies freedom.[12] In linking these concepts together, it is readily noticed that democracy could be added to form a triangular pattern as equality and freedom are essential components of a democratic society.[13] In a democratic society, the freedom to choose political

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[2] ALFRED DENNING, FREEDOM UNDER THE LAW, 5 (1949).

[3] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 124 (8th ed. 1915).

[4] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (discussing how all are entitled to life and liberty).

[5] *See* DAVID CARPENTER & DAVID PRIOR, MAGNA CARTA & PARLIAMENT 4, 8 (2015).

[6] *See* Helen A. Nutting, *The Most Wholesome Law – The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 529 (1960) (explaining the legal procedures needed to make the Act effective against wrongful imprisonment).

[7] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 1765–1769, at 432 (Univ. Chi. Press 1979).

[8] *See* DECLARATION OF THE RIGHTS OF MAN AND CITIZEN [CONSTITUTION] Aug. 26, 1789 (Fr.).

[9] *Id.* art 1.

[10] *See* GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 2 (1901) (discussing how European law has been influenced by the 1789 French document).

[11] *See* IMER FLORES, LAW LIBERTY, AND THE RULE OF LAW (IN A CONSTITUTIONAL DEMOCRACY) 99 (Imer B. Flores & Kenneth E. Himma eds., Springer Netherlands 2013).

[12] *Id.*

[13] *See id.*

representatives and to hold dissenting views against an elective government showcases the right to an individual's personal liberty.[14] The right to liberty ensures that the individual can access the just administration of the criminal justice system.[15] Thus, where an individual is suspected of committing a crime, such a person is, according to the doctrine of equality, within the ambit of "presumption of innocence" until proven guilty.[16] In deciding whether a person is guilty of an offence, it is the duty of the court to enquire whether the process of finding such person guilty is in accordance with the criminal justice system, ensuring the person's liberty has not been unjustly tampered with.[17]

Liberty does not consist of the freedom to do any acts, but the freedom to do acts that do not impede other persons.[18] The seizure of personal liberty is a preventative measure to guarantee that a person is arrested and detained when they are suspected of having committed an offence or when the person is being punished for committing a crime.[19] Lord Atkin, dissenting in the case of *Liversidge v. Anderson***,** noted that: "[I]n English law every imprisonment is prima facie unlawful and . . . it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge."[20]

I. INTERNATIONAL PROTECTION

Assembled below is a series of intentional articles seeking to protect the rights and personal liberties of persons.

Article 3 of the Universal Declaration of Human Rights states: "Everyone has the right to life, liberty and security of person."[21] Article 9 continues: "No one shall be subjected to arbitrary arrest, detention or exile."[22] The International Covenant on Civil and Political Rights (ICCPR) provides a wider meaning, showing that the right to personal liberty is implicit, as the right to the safety of the law is the implementation of the right to liberty.[23] This means that the right to liberty extends to conditions

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[14] *See* G.A.I. Nwogu, *Democracy: Its Meaning and Dissenting Opinions of the Political Class of Nigeria: A Philosophical Approach*, 6 J. EDUC.& PRAC. 131, 132 (2015).

[15] G.A. Res. 217 (III) A, *supra* note 4, art. 10–11.

[16] U.N. OFF OF THE HIGH COMM'R FOR HUM. RTS. WITH INT'L BAR ASS'N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS, at 190, 196, U.N. Sales No. E.02.XIV.3 (2003) [hereinafter ADMINISTRATION OF JUSTICE].

[17] *Id.* at 192.

[18] FLORES, *supra* note 11.

[19] ADMINISTRATION OF JUSTICE, *supra* note 16, at 164.

[20] Liversidge v. Anderson [1942] A.C. 206, 245 (Nigeria).

[21] G.A. Res. 217 (III) A, *supra* note 4, art. 3.

[22] *Id.* art. 9.

[23] International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 175 (entered into force March 23, 1976).

other than the formal deprivation of liberty.[24] Under Article 9 of the ICCPR, "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[25] This Article continues:

> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[26]

Article 10 of the ICCPR focuses on the rights of persons based on their status as human beings, as seen here:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> . . . .
>
> 3. The penitentiary system shall comprise treatment of

[24] *Id.*
[25] *Id.*
[26] *Id.*

> prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.[27]

Article 37 of the Convention on the Rights of the Child requires parties to the Convention to respect the dignity of children by adhering to the following principles:

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[28]

Seeking to protect migrant workers, Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states:

> 1. Migrant workers and members of their families shall have the right to liberty and security of person.

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[27] *Id.* art. 10.

[28] Convention on the Rights of a Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 10 (entered into force September 2, 1990).

> 2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats, and intimidation, whether by public officials or by private individuals, groups, or institutions.
>
> . . . .
>
> 4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. [29]

Article 17 governs the deprivation of liberty of migrant workers and their family members.[30]

Finally, the Convention on the Rights of Persons with Disabilities states in Article 14:

> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> a) Enjoy the right to liberty and security of person;
>
> b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
>
> 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this present Convention, including by provision of reasonable accommodation.[31]

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[29] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 16, Dec. 18, 1990, 2220 U.N.T.S. 93, 99–100 (entered into force July 1, 2003).

[30] *Id.* art. 17.

[31] Convention on the Rights of Persons with Disabilities art. 14, Dec. 13, 2006, 2515 U.N.T.S. 3, 79 (entered into force May 3, 2008).

II. REGIONAL PROTECTION

Assembled below are excerpts from the various authorities that seek to protect these liberties in Africa. To begin, Article 6 in the African [Banjul] Charter on Human and Peoples' Rights states: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."[32]

The African Commission on Human and Peoples Rights in *Aminu v. Nigeria* investigated the arrest, detention, and torture of Mr. Ayodele Ameen.[33] Allegations were made that Mr. Ameen was "being sought after by the Nigerian security agents as a result of his political inclination[s]."[34] Mr. Ameen attempted to receive help from the courts but was not successful.[35] The complaint received by the Commission alleged that the treatment of Mr. Ameen violated "Articles 3(2), 4, 6, and 10(1)."[36] Mr. Ameen was arrested and detained multiple times without reason or explanation by security officials, causing him to go into hiding.[37] The Commission found Mr. Ameen's treatment to be in violation of Articles 3(2), 4, 6, and 10(1), confirming that Nigerian Security officials will be held accountable when they deprive a citizen of their freedoms and liberty arbitrarily.[38]

III. THE RIGHT TO LIBERTY IN NIGERIA

Section 35(1) of the 1999 Constitution, as amended, states: "Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law."[39] The meaning of personal liberty was construed by the court in *Adewole v. Jakande*.[40] The court held in this case that the closure of private schools by the Lagos State government was a

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[32] African (Banjul) Charter on Human and Peoples' Rights art. 6, Oct. 21, 1986, 21 I.L.M. 58.

[33] Kazeem Aminu v. Nigeria, Communication 205/97, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 11, 2000).

[34] *Id.* ¶ 3.

[35] *Id.* ¶ 4.

[36] *Id.* ¶ 7.

[37] *Id.* ¶ 15.

[38] *Id.* ¶¶ 18, 26.

[39] CONSTITUTION OF NIGERIA (1999), § 35(1).

[40] *See* Kayode O. Fayokun & Segun O. Adedeji, *Legal Issues in Educational Management in Nigeria*, 4 MAKERERE J. HIGHER EDUC. no. 2, 2013, at 187, 197 (citing Adewole v. Jokande [1981] 1 NCLR 262, 278 (H.C. of Lagos)).

violation of the personal liberty of parents to train their children where and how they deem fit.[41] The court particularly stated that:

> "[p]ersonal liberty" means privileges, immunities, or rights enjoyed by prescription or by grant. It denotes not merely freedom from bodily restraint, but rights to contact, to have an occupation, to acquire knowledge, to marry, have a home, children, to worship, enjoy and have privileges recognized at law for happiness of free men.[42]

The court further approved the definition of "personal liberty" found in U.S. cases holding that personal liberty also entails the right or "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[43]

Osita Ogbu opined that a better interpretation of Section 35 of the Constitution is that

> [it] contemplates physical restraint against the individual. This construction becomes obvious when the two legs of the provisions the one giving to every person the right to personal liberty and the one setting out the circumstances and the manner in which a person's liberty may be taken away- are read together.[44]

Furthermore, Ogbu argued that the Nigerian version of the right to personal liberty is different from that of America.[45] The American right guarantees both freedom from physical restraint and freedom of private enterprise that is:

> the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or a vocation, and for that purpose enter into all contracts which may be proper,

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[41] *Id.*

[42] *See My Right to Personal Liberty*, CONST. RTS. AWARENESS LIBERTY INITIATIVE (2018), https://knowyourrightsnigeria.com/my-right-to-personal-liberty/ (citing Adewole 1 NCLR at 278) (quoting the court's definition of personal liberty).

[43] Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (quoting the U.S. definition of personal liberty).

[44] OSITA NNAMANI OGBU, HUMAN RIGHTS LAW AND PRACTICE IN NIGERIA 190–91 (2d ed. 2013).

[45] *Id.* at 191.

> necessary or essential to his carrying out a successful conclusion the above mentioned activities.[46]

A. Limitations to the Right to Personal Liberty

The right to personal liberty under Nigerian law avails not only citizens but even aliens.[47] The right is, however, not absolute.[48] It can be deprived in circumstances prescribed by any law in accordance with the Constitution.[49] Denton-West, J.C.A., in *Bobade Olutide v. Adams Hamzat*, stated:

> [T]he right to liberty as enshrined in Section 35 of our Constitution and Article 6 of the African Charter that nobody shall have right to liberty taken away, abridged, or violated is not absolute, especially when there is reasonable suspicion that a criminal offence had been committed as in this instant case.[50]

In accordance with Section 35(1) of the Constitution, a person's right to personal liberty may be limited in the following situations:

> a. in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
>
> b. by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;
>
> c. for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
>
> d. in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare;

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[46] *Id.*

[47] *See* CONSTITUTION OF NIGERIA, §§ 25–35.

[48] *Id.*

[49] B.O. NWABUEZE, THE PRESIDENTIAL CONSTITUTION OF NIGERIA 420 (St. Martin's Press 1982).

[50] Bobade Olutide v. Adams Hamzat [2016] 1 LCRN 8095.

> e. in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
>
> f. for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition, or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto[.][51]

By virtue of these provisions, the courts are empowered to impose imprisonment as sentences for crimes.[52] Accordingly, the Criminal Code provides that "subject to the provisions of any other written law, the punishments which may be inflicted under this code are death, imprisonment, caning, fine, and forfeiture."[53] This provision requires that to deny a person his liberty, it must be in accordance with a laid down procedure.[54] However, it must be noted that the court punishes contempt in the exercise of its inherent jurisdiction under section 6(6)(a) of the Constitution, and with no laid down procedure to govern the exercise of that power, it seems that the courts' power to commit a person on a charge of contempt is not in accordance with the Criminal Code.[55] The express provisions of the Constitution will supersede the inherent powers of the court.[56] However, when the contempt involves violation of a court order, it can be justified under Section 35(1)(a)–(f).[57]

Subsection 35(1)(b) also forms the foundation for the power of the courts to issue a subpoena or order of arrest for the purpose of enforcing judgements where there is default from any of the parties.[58] It can also be used by the courts to order arrest for failure to pay taxes and rates.[59] However, the law imposing such taxes or rates must have made provision for the deprivation of liberty of defaulters.[60] The Constitution, however, provided that a person who is charged with an offence and who has been

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[51] CONSTITUTION OF NIGERIA, § 35(1).
[52] *Id*.
[53] Criminal Code Act (1990) ICFNL, § 17.
[54] *See Id.*
[55] *See* CONSTITUTION OF NIGERIA, § 6(6)(a); *see also* Criminal Code Act, *supra* note 53.
[56] OGBU, *supra* note 44, at 193.
[57] CONSTITUTION OF NIGERIA (1999), § 35(1)(a)–(f).
[58] *Id*. § 35(1)(b).
[59] *Id*.
[60] *See id*. § 35(1).

detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.[61] It has also been argued that the Constitution is wide enough to accommodate the powers of the National Assembly and State Assemblies to issue a summons for the purpose of compelling witnesses to appear before them.[62]

In 2012, the Enugu State House of Assembly exercised this power by ordering the Commissioner of Police to effect the arrest of the State's Commissioner for Human Resources and Poverty Reduction, Mr. Godwin Ogenyi, for failing to appear before the house at the time stipulated in the summons and thereby keeping the honourable members waiting.[63] This has however been criticized by Osita Ogbu, who argues that this is a very flimsy reason to arrest a Commissioner.[64] The writer argues that this is against the Constitution which allows the House to exercise such powers only on allegations of gross misconduct.[65]

Whether this provision is broad enough to engulf all the circumstances that may warrant the denial of the right to liberty is at issue.[66] A prominent scholar, Professor Nwabueze, has stated that the provisions are sufficient as far as the limitation of the right to personal liberty is concerned.[67] He also argues further that a person should not be deprived of his liberty on the orders of a tribunal or any authority other than a competent court.[68] He notes that the powers vested in the Code of Conduct Tribunal, for instance, do not empower them to imprison any person because it is not a court exercising judicial powers as envisaged by Section 35(1)(a) of the 1999 Constitution.[69] This issue came before the court in *Doherty v. Tafawa-Balewa*.[70] The provision of the Tribunals and Inquiry Act, which empowered a Commission of Inquiry to impose imprisonment or fine as a sentence, was held to be null, void, and inconsistent with Section 20(1) of the 1960 Constitution which prohibits the breach of the right to personal liberty by any other authority except

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[61] *Id*. § 35(1)(f).

[62] *See generally* Abiola Ojo, *The Investigatory Powers of the National Assembly Under the 1979 Constitution: Sections 82 and 83 Considered*, 12 NIGERIAN L.J. 49, 55 (1984).

[63] Ameh Comrade Godwin, *Enugu Commissioner Arrested for Disobeying Lawmakers*, DAILY POST NIGERIA (Dec. 19, 2012), https://dailypost.ng/2012/12/19/enugu-commissioner-arrested-disobeying-lawmakers/.

[64] *See* OGBU, *supra* note 44, at 193 n.11.

[65] *See id.* at 192–93.

[66] *Id*. at 192.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Summary of Doherty v. Tafawa-Balewa [1961]*, HBRIEFS, https://hbriefs.com/cases/dohertybalewa1961.php (last visited Oct. 10, 2021, 5:39PM).

the courts.[71] It must, however, be noted that a judicial tribunal has the same powers as a regular court and can restrain or commit a person to prison.[72]

It has been also held that the right to personal liberty can be limited for the purpose of protecting national security. In *Dokubo-Asari v. FRN*,[73] the Supreme Court, concurring with the court of appeal, held that if the nation's security is threatened or there is a real likelihood of it being under threat, personal liberty and the fundamental human rights of persons perpetrating such must be limited until national security can be sufficiently protected.[74] His Lordship Muhammad, JSC. held:

> [t]he pronouncement by the court below is that where National Security is threatened or there is the real likelihood of it being threatened human rights or the individual right[s] . . . must be suspended until the National Security can be protected or well taken care of. This is not anything new. The corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.[75]

Osita Ogbu disagrees with this decision.[76] He contends that Section 45 of the 1999 Constitution, which deals with the derogation of human rights, shows clearly that the only circumstance that can warrant the derogation of personal liberty is a period of emergency.[77] Also, to limit personal liberty during emergencies, a state of emergency must be formally declared in accordance with the Constitution.[78] Furthermore, an Act of the National Assembly is required to suspend the right to personal liberty during such an emergency, and such suspension must be limited to the extent required to deal with such an emergency.[79] Threats to national security should not be grounds to automatically deprive the accused persons of their right to personal liberty indefinitely.[80] This

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[71] *Id*.

[72] *See* OGBU, *supra* note 44, at 192.

[73] Dukubo-Asari v. FRN [2007] 12 NWLR 320.

[74] *Id*. at 333.

[75] *Id*. at 336.

[76] See OGBU, *supra* note 44, at 207–08.

[77] *Id*. at 207.

[78] CONSTITUTION OF NIGERIA (1999), § 45(3) (providing a definition of period of emergency).

[79] See OGBU, *supra* note 44, at 207–08.

[80] *Id*. at 208.

provision does not avail members of the armed forces.[81] The Constitution provides that nothing shall invalidate

> any law by reason only that it authorises the detention for a period not exceeding three months of a member of the armed forces of the federation or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the federation or of the Nigeria Police Force, in respect of an offence punishable by such detention of which he has been found guilty.[82]

B. Right to Remain Silent When Arrested

Any person who is arrested is entitled to remain silent or refuse to answer any question posed to him prior to seeing his counsel.[83] Section 35(2) of the Constitution provides that "any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice."[84] This right continues even beyond the period of arrest, as the accused can choose to remain silent throughout the period of the trial.[85] Inherent in this right to remain silent is the right to counsel chosen by the accused.[86]

This provision is, however, disregarded with impunity by the security agencies.[87] The police resort to torture to obtain information and extract confessional statements from accused persons in violation of their right to remain silent.[88] In *State v. Rabiu*, the Supreme Court per Ngwuta, J.S.C., lamented this ugly development.[89] His Lordship stated that a confessional statement obtained by the police in contravention of Section 35(2) of the Constitution is illegal and inadmissible as evidence in accordance with Section 29(2) of the Evidence Act.[90]

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[81] CONSTITUTION OF NIGERIA (1999), § 35(7)(b).
[82] *Id*.
[83] *Id*. § 35(2).
[84] *Id*.
[85] Adekunle v. State [2006] 14 NWLR 717, 724–25.
[86] CONSTITUTION OF NIGERIA (1999), § 35(2).
[87] Esa Onoja, *The Relationship Between the Constitutional Right to Silence and Confessions in Nigeria*, 6 AFR. J. LEGAL STUD. 189, 189 (2013).
[88] *Id*.
[89] State v. Rabiu [2013] 8 NWLR 585, 594–96 (Nigeria).
[90] *Id*. at 595–96.

C. Right to be Informed of the Facts and Grounds of Arrest

By virtue of Section 35(3), the accused person "shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention."[91] This is similar to the position of the law in England, which was enunciated by Lord Simmons in *Christie v. Leachinsky*, stating:

> it is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen. Is citizen bound to submit unresistingly to arrest by citizen in ignorance of the charge against him? I think, my Lords that cannot be the law of England. Blind unquestioning obedience is the law of tyrants and of slaves. It does not yet flourish on English soil. . . . It is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested.[92]

Thus, before a person gives himself up for arrest, the police must inform him of the reason for his arrest.[93] The Constitution provides that this must be done within twenty-four hours of the arrest.[94] Failure to comply with this will make the arrest unconstitutional.[95] According to Mowoe, this right is essential as it affords the accused the opportunity to clarify any misunderstanding or call the attention of the police officers to any other person for whom he might have been mistaken.[96] This aids the police in their investigation and probably frees the accused from the shackles of false accusation.[97] Where the accused person is arrested in the midst of the commission of a crime, this right may not avail him.[98] In *Agbaje v. Commissioner of Police*, where the accused person was detained for about ten days and was not informed of the reasons for his arrest, the court held that his arrest was illegal and a violation of the Constitution.[99]

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[91] CONSTITUTION OF NIGERIA (1999), § 35(3).
[92] Christie v. Leachinsky [1947] AC 573 (HL) 591 (appeal taken from Eng.).
[93] KEHINDE M. MOWOE, CONSTITUTIONAL LAW IN NIGERIA 332–33 (2008).
[94] CONSTITUTION OF NIGERIA (1999), § 35(3).
[95] MOWOE, *supra* note 93, at 333.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* (citing Agbaje v. Comm'r of Police [1969] 1 NMLR 137).

D. Right to be Charged to Court Within Reasonable Time

Section 35(4) states that a "person who is arrested or detained in accordance with Subsection (1)(c) of this section shall be brought before a court of law within a reasonable time."[100] If this requirement is not met within

> a. two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
>
> b. three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.[101]

In Subsection 5, the term "reasonable time" was defined for the purpose of Subsection 4 as follows:

> a. in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and
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> b. in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable. [102]

These provisions are not amenable to easy interpretation. Accordingly, Osita Ogbu observes that the only thing clear about the provisions is that "a person who is arrested or detained must be brought to court of competent jurisdiction within 24 hours or 48 hours as the case may be depending on the availability of a court within a radius of 40 kilometres or otherwise."[103] The court construed this provision in *Eda v. Commissioner of Police.*[104] It was held that where a person is arrested or

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[100] CONSTITUTION OF NIGERIA (1999), § 35(4).

[101] *Id.*

[102] *Id.* § 35(5).

[103] *See* OGBU, *supra* note 44, at 199.

[104] Chukwunonso Nathan Uwaezuoke, *The* Pacta Sunt Servanda *Solace for Persons Detained Indefinitely in Nigeria on Suspicion of Committing Capital Offenses*,

detained for allegedly committing an offence, the police is under a duty to bring him before a court within the period of one or two days notwithstanding the provision of any other law to the contrary.[105] The court therefore held on this backdrop that Section 17 of the Criminal Procedure Act and Section 27 of the Police Act, which empowers the Police to charge an accused person as soon as practicable, is unconstitutional as it breaches Section 32(1)(c), (4), and (5) of the 1979 Constitution.[106] These provisions stipulate that an accused must be brought to court within a reasonable time, which it defines as one or two days depending on the distance of the court within 40 kilometres of the place of arrest and detention.[107]

In the case of *Amodu v. Commissioner of Police of Lagos State & Anor*,[108] Iyizoba, J.C.A stated categorically that:

> [t]he Constitution of the Federal Republic of Nigeria requires that a person who is arrested and detained on suspicion of having committed a criminal offence shall be brought before a court of law within a reasonable time and if he is not tried within a period of two months from the date of his arrest or detention, he shall without prejudice to any further proceedings that may be brought against him be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.[109]

In *Folade v. Attorney General of Lagos State*, it was held that the court has the discretion to determine what amounts to reasonable time and can declare a period beyond two days as reasonable based on the circumstances of the case before it.[110]

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4 AFR. J. CRIM. L. JURIS. 108, 111–12 (2019) (citing Eda v. Comm'r of Police [1982] 3 NCLR 219).

[105] MOWOE, *supra* note 93, at 333 (citing Eda 3 NCLR at 219).

[106] The Periodic Report on Nigeria's Human Rights Record to the African Commission on Human and Peoples' Rights, No. 24/93, Afr. Comm'n on Hum. and Peoples' Rts., High Comm'n of the Fed. Republic of Nigeria, (Apr. 1, 1993), https://www.achpr.org/public/Document/file/English/staterep1_nigeria_1992_eng.pdf (discussing Eda v. Comm'r of Police [1982[3 N.C.L.R 219).

[107] CONSTITUTION OF NIGERIA (1999), §§ 35(1)(c), 35(4), 35(5).

[108] *Mr. Buba Amodu v. The Commissioner of Police Lagos State & Anor (2014)*, LAW CARE NIGERIA, https://lawcarenigeria.com/mr-buba-amodu-v-the-commissioner-of-police-lagos-state-anor-2014/ (last visited Oc. 10, 2021).

[109] *Id*.

[110] MOWOE, *supra* note 93, at 333 (discussing Folade v. Att'y Gen. of Lagos [1981] 2 NCLR 771).

In compliance with this provision, the court has held that the "holding charge"[111] often practiced by the police is a violation of the Constitution.[112] Accused persons have been held in custody for periods ranging from two to ten years based on this holding charge.[113] His Lordship Onu J.C.A. (as he then was) in *Enwere v. Commissioner of Police* considered the issue of holding charge and held that:

> [a]s it is palpable that the appellant in the instant case up till 8th March, 1993 when he was granted bail by this court still being detained under what is called a purported "holding charge" without any information filed against him before any law court, I hold that this act constitutes improper use of power or a flagrant abuse of power by the police for which they stand condemned. This particular abuse of power is all the more condemnable when it is known that there have not been exhibited proofs of witnesses "evidence evidencing police desire to prosecute the appellant placed before the trial court."[114]

The provision of the Corrupt Practices and Other Related Offences Act permits the ICPC to arrest and detain people indefinitely until the person complies with the summons of the anti-graft agency.[115] This Act was challenged in *A.G. Ondo State v. A.G. Federation*.[116] The Supreme Court held that Section 35 of the Corrupt Practices and Other Related Offences Act is a violation of the right to personal liberty protected by Section 35 of the Constitution.[117]

Where the suspect is not charged to court within the stipulated time, he is entitled to be granted bail either conditionally or unconditionally.[118] The Court held in *Olugbusi v. Commissioner of Police* that where a person charged with an offence is not tried within a reasonable time, he is entitled to be released either unconditionally or

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[111] This refers to the practice whereby the police keep a suspect person in custody pending the conclusion of investigation on the matter or preferment of information by the Attorney General. *See generally* OGBU, *supra* note 44, at 209–10.

[112] Enwere v. Comm'r of Police [1993] 6 NWLR 333.

[113] *See* CLEMENT NWANKWO ET AL., THE FAILURE OF PROSECUTION: A REPORT ON THE CRIMINAL SUSPECTS IN NIGERIA 3 (2006).

[114] *Enwere*, 6 NWLR at 335.

[115] Corrupt Practices and Other Related Offences Act (2000) Cap. 407, § 35.

[116] Att'y Gen. of Ondo v. Att'y Gen. of the Fed'n [2002] 9 NWLR 222, 310.

[117] *Id.*

[118] CONSTITUTION OF NIGERIA (1999), § 35.

upon such conditions that are reasonably necessary to make sure he does not elope from trial at a later day. [119]

In *Onu Obekpa v. Commissioner of Police*, the accused person was arrested on August 30, 1980, on an allegation of theft.[120] He was brought to court on September 1, 1980.[121] His offence was a bailable one.[122] His counsel applied for his bail, which the prosecution opposed on the ground that some of the co-accused persons were still at large, and that if the bail was granted, it might be difficult to arrest the other suspects.[123] The Magistrate agreed with the prosecution and refused the bail application.[124] The applicant applied to the High Court for bail.[125] This was opposed by the State Counsel on the ground that the accused had not stayed up to two months in detention because Section 32(4)(1) of the 1979 Constitution did not apply.[126] Idoko J., rejecting the argument of the State Counsel, stated that:

> [t]he spirit behind the provisions in section 32(4) and (b) of the Constitution (1979) is to keep an accused person out of incarceration until found guilty through the process of court trial. It is a conditional privilege which he is entitled under the constitution.[127]

The judge also went further to remark on the merits of this provision of the Constitution in the following words:

> [i]t allows those who might be wrongly accused to escape punishment which any period of imprisonment would inflict while awaiting trial; to stay out of prison guarantees easy accessibility to counsel and witnesses who ensure unhampered opportunity for preparation of defence. Of much further advantage in this regard is this fact that unless the right to bail or to freedom before conviction is

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[119] Olugbusi v. Comm'r of Police [1970] 1 (H.C. of Lagos M/240/69) (citing CONSTITUTION OF NIGERIA (1999), § 20(3)).

[120] Chukwunonso Nathan Uwaezuoke, *Limits to Duration of Criminal Trials in Nigeria: Time for the Courts to Coalesce Right to Fair Hearing with Right to Personal Liberty*, 2 PORT HARCOURT J. OF BUS. L. no. 1, 2016, at 1, 8 (citing Obekpa v. Comm'r of Police [1981] 2 NCLR 420).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See* Uwaezuoke, *supra* note 120.

[127] 2 CHARLES MWALIMU, THE NIGERIAN LEGAL SYSTEM: PRIVATE LAW 904 (2009) (citing Obekpa 2 NCLR 420).

> preserved, protected and allowed the presumption of innocence constitutionally guaranteed to every individual accused of a criminal offence would lose its meaning and force.[128]

The judge went further to hold that where a person is charged for a non-capital offence, bail is a basic right, and, undoubtedly, his right to be released before trial was more basic if his trial would last beyond two months.[129]

Kanu J. in *Commissioner of Police v. Amalu*, reasoned differently when he held that that right to pre-trial bail avails only suspects who have not been charged before a court.[130] The Court of Appeal concurred with his reasoning in *Danbaba v. The State*, where Galadima, J.C.A. stated thus:

> [t]o my mind the constitutional right to pre-trial bail in section 35(4) is applicable where the suspect has not been charged before a court of law within the stipulated time. See COP v. Amalu [1984] 5 NCLR 443. It would appear that the provision does not mean that a suspect must be released on bail if trial is not concluded within 2 or 3 months as the case may be. The learned counsel for the appellant relied on the authority of the High Court decision in Obekpa v COP [1981] 2 NCLR 420 to buttress his argument that for non-capital offences, bail is a constitutional right. An interpretation of section 35(4) suggesting that the constitution intended an obligatory release, under any circumstances, after two or three months, without giving the trial Judge before whom the application is brought any discretion in the matter cannot be supported.[131]

In *Bamaiyi v. The State & Ors*, the appellants were charged with conspiracy to commit murder and attempted murder.[132] They pled not guilty and were remanded to prison.[133] They filed an application for pre-

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[128] Ndubuisi Madubuike-Ekwe & Olumide Obayemi, *Assessment of the Role of the Nigerian Police Force in the Promotion and Protection of Human Rights in Nigeria*, 23 ANN. SURV. INT'L & COMP. L. 19, 32 (2019) (citing Obekpa 2 NCLR 420).

[129] Emmanuel Olugbenga Akingbehin, Capital Punishment in Nigeria: A Critical Appraisal 237 (October 2011) (Ph.D. dissertation, University of Lagos) (on file with the school of postgraduate studies, University of Lagos) (citing Obekpa 2 NCLR 420).

[130] Comm'r of Police v. Amalu [1984] 5 NCLR 443.

[131] Danbaba v. State [2000] 14 NWLR 396, 400.

[132] Bamaiyi v. State [2001] 8 NWLR 270, 272.

[133] *Id.*

trial bail, which was denied by the trial court.[134] Aggrieved, they appealed to the Court of Appeal, which held that Section 35(4) does not create an automatic right to pre-trial bail.[135] Oguntade J.C.A. (as he then was) held in leading judgment that:

> [i]t seems to me that the purpose of section 35(4) above is to ensure that once a person is arrested and put in custody and such a person is not granted bail, he shall within a reasonable time be brought before a court and his trial commenced within a period of two months after taking him into custody. To interpret it as meaning that the trial must be concluded in two months will create serious implementation problem as the country has not yet the manpower and other allied facilities to ensure that trials of persons who because of the seriousness of the offences alleged against them cannot be granted bail are concluded in two months.[136]

The above reasoning was also echoed in the case of *Alaya v. State*, where Agube, J.C.A., stated that:

> [b]y virtue of section 35(4) and 36(5_ of the 1999 Constitution, an accused person is entitled to his unfettered liberty and is presumed innocent until proved guilty, and the onus is on the prosecution to prove that an accused person is not entitled to bail. However, the presumption of innocence and the right to liberty as enshrined in sections 36(5) and 35(4) respectively of the Constitution can only be invoked where there is no prima facie evidence against the accused, it would be foolhardy to allow him on bail because the Constitution could not have envisaged a situation where accused persons of every shade could be allowed bail just at the mention of the magic words of presumption of innocence and right to liberty. Thus, the provision in section 36)5) of the 1999 Constitution states that nothing in the section shall invalidate any law by reason only that the law impose upon any such persons the onus of proving particular facts.[137]

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] Alaya v. State [2007] 16 NWLR 483, 487–88.

However, over-stringent conditions for bail may be inconsistent with the Constitution, as held in *Comptroller of Nigerian Prisons v. Adekanye*.[138] The court in this case considered the conditions for bail under the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Act, which provides that the accused person must deposit one quarter of the amount involved in the crime he was charged with as security for bail and also provide security for the remaining balance of the amount involved in the offence he allegedly committed.[139] The court held that this provision imputes a presumption that the accused is already guilty as charged and is hence unconstitutional.[140]

E. Right to Bail for Capital Offences

The right to bail is unavailable for persons charged with capital offences due to the severity of the offence they are charged with.[141] In *Atiku v. State*, the accused persons who were charged with murder applied for bail, which was denied by the trial court.[142] They appealed to the Court of Appeal which dismissed the appeal and held that:

> [t]he position of the law regarding or governing the right of an accused person being detained in connection with any offence under our laws to be released on bail pending his trial by any court of competent jurisdiction is governed by the respective states Criminal Procedure Laws . . . and section 35(4) and (7) of the 1999 Constitution . . . .
>
> It is quite clear from the provision of the Constitution of the Federal Republic of Nigeria quoted above that bail pending trial is not normally granted as a matter of course where the offence for which the applicant for bail is charged is a capital offence or punishable with death as in the present case . . . [because] it is not in the public interest . . . . However, special circumstances may arise in any particular case to warrant the exercise of discretion by any High Court trying the accused person to release him on bail pending his trial . . . .
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> In all these cases, the special circumstances, which to my mind, guided this court in allowing the appellant's

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[138] Nigerian Prisons Serv. v. Adekanye [1999] 10 NWLR 400, 421.

[139] Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (2004) Cap. (F2), § 21.

[140] Adekanye 10 NWLR at 421.

[141] CONSTITUTION OF NIGERIA (1999), § 35(7)(a); *see* Oladele v. State [1993] 1 NWLR 294, 299.

[142] Atiku v. State [2002] 4 NWLR 265, 266–67.

> appeal and granting them bail is the fact that the appellants were being detained for a long time without even the knowledge when their trial would begin at the High Court having jurisdiction to try them in line with the fundamental requirements of the presumption of their innocence enshrined under section 33(4) of the 1979 Constitution then in force.[143]

The court should however not remand the accused person indefinitely unless the prosecution has provided prima facie evidence of the commission of the offence charged.[144] In *Anaekwe v. Commissioner of Police*, the appellants were charged with conspiracy and murder.[145] They were remanded by the Chief Magistrate, and the appellant applied for bail at the High Court of Onitsha.[146] The High Court refused the application on the ground that the appellants were charged with murder.[147] The appellants further appealed to the Court of Appeal which held that, although the Constitution makes provision for pre-trial bail, it is generally unavailable for persons accused of capital offences.[148] The court further held that:

> [u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. [And] [t]he constitutional presumption of innocence enshrined under S.33(5) of the 1979 Constitution can be invoked in a capital offence where a *prima facie* case has not been established against the accused. However, the issue of presumption of innocence cannot arise if there is sufficient probability of guilt on the part of the accused. This is because, if the constitutional provision is applied to the letter in a bail decision, then every accused must be released on bail while awaiting trial and this will not be in the interest of enforcement of the criminal process.[149]

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[143] *Id.* at 276–78.
[144] See *id.* at 274–75.
[145] Anaekwe v. Comm'r of Police [1995] 3 NWLR 320, 322.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 331.
[149] *Id.* at 323.

F. Arrest and Detention

Section 35(1)(c) permits the authorities to deprive an individual of his right to personal liberty upon reasonable suspicion of a criminal offence or to a reasonable extent for the purpose of preventing the individual from committing a criminal offence.[150] This section tries to aid the work of the security agencies by counter-balancing it with human rights.[151] A person cannot therefore rely on his right to personal liberty to shield himself from arrest by the police.[152] This was the position of the court in *Attorney General of Anambra State v. Uba*, where it held that an individual cannot initiate a court process to prevent or shield himself against criminal investigation or prosecution.[153] Such is an interference with the powers constitutionally vested on the law enforcement agencies in criminal investigation.

The police however are not to arrest and detain an accused person until there is evidence which establishes a prima facie case against him.[154] The mere invitation to the police station for interrogation does not constitute arrest if obeyed by the affected person willingly.[155] Accordingly, it was held in *Ateze v. Momoh* that where:

> [a constable asks a man to] accompany him to the charge office[,] and he does[,] [t]here is no arrest, no legal process, no submission and no constraint. The man is entitled to refused [sic] accompanying the constable. [I]f he does the constable is entitled to arrest and bring him with him, but he cannot compel him to come unless he arrest[s] him . . . .[156]

G. Arrest of Another Person in Lieu of the Accused Person

The police in exercise of this power cannot arrest a person for the offence of another, such as arresting a parent for the offence of the child.[157] Punishment is personal and must be levied on the appropriate offender.[158]

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[150] CONSTITUTION OF NIGERIA (1999), § 35(1)(C).

[151] *See id*; *see also* Odogu v. Att'y Gen. of Fed'n [1996] 6 NWLR 508, 522.

[152] *See id.*

[153] Att'y Gen. of Anambra v. Uba [2005] 15 NWLR 40, 50.

[154] Olugbusi v. Comm'r of Police 1 [1970] (H.C. of Lagos M/240/69).

[155] *See* Criminal Procedure Act (1945) Cap. P19, § 3.

[156] Muhammad Bello Alle, *Arrest in Nigeria Procedural Laws*, 1 BEAM: J. ARTS & SCI. 134, 140, 144 (1997) (citing Ateze v. Momoh [1958] NRLNR 127).

[157] *See* African Charter on Human and Peoples' Rights art. 7, June 27, 2981, 21 I.L.M 58.

[158] *Id.*

Such arrest is a violation of Section 36(1) of the 1999 Constitution.[159] In the case of *A.C.B v. Okonkwo*,[160] the Court of Appeal per Niki Tobi J.C.A. (as he then was) held thus:

> I know of no law which authorizes the police to arrest a mother for an offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred . . . . A police officer who arrested "A" for the offence committed by "B" should realize that he has acted against the law. Such a police officer should, in addition to liability in civil action, be punished by the police authority.[161]

H. Remedies for Breach of Right to Personal Liberty

In *Nemi v. A. G. Lagos & Anor*, the court held that under Section 32(6) of the 1979 Constitution (now Section 35(6) of the 1999 Constitution) a violation of an individual's right to personal liberty is remediable, at the insistence of the victim, by the appropriate authority's compensation, public apology, and the victim's release if he or she is still being held in unlawful detention.[162] Also, in *Jim-Jaja v. Commissioner of Police,* the Supreme Court established that where the plaintiff proves unlawful arrest and detention under Section 35(6) of the 1999 Constitution, he is entitled to compensation and public apology as relief, even where he did not claim any specific amount.[163] Where asked for a specific amount, the court will evaluate the claim and determine the amount that will be reasonable to compensate the plaintiff.[164]

CONCLUSION

Though Nigeria is said to have a solid legal framework on the right to personal liberty, this right is not effectively upheld. Those in authority must respect the laws put in place for the upholding of the right to personal liberty, and the following issues need to be addressed. First, the snail-like movement of the trial and prosecution of cases within the court system more often than not leads to the infringement of personal liberty

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[159] CONSTITUTION OF NIGERIA (1999), § 36(1).

[160] Afr. Cont'l Bank v. Okonkwo [1996] 1 NWLR 194.

[161] *Id.* at 196.

[162] Nemi v. Att'y Gen. of Lagos [1996] 6 NWLR 42, 55; *see also* Odogu 6 NWLR at 513–14.

[163] Jim-Jaja v. Comm'r of Police [2012] 6 NWLR 225, 231; *see* Odogu 6 NWLR at 513–14.

[164] Jim-Jaja 6 NWLR at 254.

in Nigeria.[165] Second, there is a lack of a mechanism or a check system to ensure that an accused's right to interpretation, right to be informed of charges against him, and right to be conveyed to a court after arrest within a reasonable time are upheld by the police.[166] Third, corruption within the police prevents a legal practitioner from gathering adequate evidence where his client's right has been violated.[167] Fourth, judges and courts exhibit a lackadaisical attitude towards personal liberty cases brought before them.[168] Finally, there are numerous contradictory provisions of law, an example of which can be found in the examination of *Ohimieokpu v. Commissioner of Police*, where Section 101 of the Criminal Procedure Act could be stated to be conflicting with Section 35 of the Constitution.[169]

RECOMMENDATIONS FOR PROTECTION OF PERSONAL LIBERTY

Clear and unambiguous laws should be drawn out, eradicating all existing contrary provisions to the Constitution which would infringe on an accused's rights.[170] Individuals who have not been told the charges brought against them should be released after twenty-four hours, in accordance with the Writ of Habeas Corpus, which states that individuals detained must be read the charges brought against them within twenty-four hours of being detained.[171] This will in turn decongest the prisons.[172] Effectiveness should be ensured at the judiciary level by creating checks on the appearance of judges at court at the stipulated time and preventing whimsical adjournment of cases.[173] Adequate enforcement mechanisms should be established to ensure all accused persons enjoy their rights and to prevent trial inmates having to wait of over five years.[174] Punishment

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[165] *See* Ben Ezeamalu, *Why Nigeria's Criminal Justice System is Slow — Judge*, PREMIUM TIMES (Jan. 19, 2018), https://www.premiumtimesng.com/news/more-news/256056-nigerias-criminal-justice-system-slow-judge.html.

[166] *See* Madubuike-Ekwe & Obayemi, *supra* note 128, at 35–43.

[167] *Id.* at 32–34.

[168] *See* Ezeamalu, *supra* note 165.

[169] Mohammed Enesi Etudaiye & Muhtar Adeiza Etudaiye, *A Legal and Constitutional Blueprint on Functionalizing "Time Frames" in Some Civil and Political Rights – A Study of Chapter IV of the Constitution of the Federal Republic of Nigeria 1999*, 7 ESSEX HUM. RTS. REV. 49, 59–62 (2011 (summarizing Ohimieokpu v. Comm'r of Police [1959] NRNLR 1); CONSTITUTION OF NIGERIA (1999), § 35; Criminal Procedure Act (1945) Cap. § 101.

[170] Etudaiye & Etudaiye, *supra* note 169.

[171] CONSTITUTION OF NIGERIA (1999), § 35(4), § 35(5).

[172] U.N. Off. on Drugs and Crime, Ten Years of Justice Sector Reform in Nigeria: A 360 Degree View, 14 (Apr. 2–3, 2009) [hereinafter UNODC].

[173] *See generally* Peter Chukwuma Obutte, *Corruption, Administration of Justice and the Judiciary in Nigeria*, SSRN, 3, 12 (Feb. 3, 2016), https://ssrn.com/abstract=2727319.

[174] *See* Shima, V.A. and Bem Abojo, *Trial Within a Reasonable Time Under Nigerian Law: A Legal Myth or Reality?*, 9 BENUE ST. UNIV. L.J. 352, 353 (2019).

should be meted out to defaulting police officers that exceed their powers and infringe rights in a bid to gather evidence from the accused.[175] Awareness programs should be organized in various local areas with more non-educated individuals in a bid to make them informed on the various rights they have as citizens against the law enforcement agencies which tend to override their rights and mistreat them.[176]

Finally, it is this author's opinion that to effectively prevent the infringement and violation of one's right to personal liberty and combat these challenges, there has to be an analysis and well-mapped out reworking of the entire Criminal Justice System in Nigeria.[177]

[175] *See* Omoba Oladele Opeolu Osinuga, *An Agenda for Effective Policing in Nigeria*, SSRN, 1, 8, 12, 13 (Aug. 11, 2010), https://ssrn.com/abstract=1657221.

[176] UNODC, *supra* note 172, at 11.

[177] Madubuike-Ekwe & Obayemi, *supra* note 128, at 44–48.

SHACKLED BY SHARI'A: SAUDI WOMEN STILL CONTROLLED BY MALE GUARDIANSHIP SYSTEM DESPITE PRESENT (COSMETIC) REFORMS

*Rebekah D. Bunch**

INTRODUCTION[1]

Saudi Arabian women have long had their legal status entrapped in customs, laws, and regulations that have subjected them to male authority.[2] These rules are derived from the religious discourse of Islam: Shari'a Law.[3] More specifically, the male guardianship system is guided by a fundamentalist interpretation of Shari'a Law.[4] Under the male guardianship system, a guardian is granted full control over a woman's life from birth until death.[5] Every woman must have a guardian. Therefore, a woman's husband or *mahram*, which is an unmarriable male relative such as a father, brother, or son, has the power to make critical decisions on her behalf.[6] Because every decision is made for them, Saudi women are left to play a game of chance to see how "open-minded" their guardian is.[7] This has led to men abusing the male guardianship system by "twisting it in their favor and using its rules to subject women to gross injustices."[8]

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[1] There are many additional issues that have been reformed or still need to be reformed that are not covered in this Note but deserve further research and notice.

[2] Eman Alhussein, *Saudi Changes to Guardianship System Ease Restrictions on Women*, ARAB GULF STATES INST. WASH. (Aug. 7, 2019), https://agsiw.org/saudi-changes-to-guardianship-system-ease-restrictions-on-women/.

[3] *Saudi Arabia: 10 Reasons Why Women Flee*, HUM. RTS. WATCH (Jan. 30, 2019, 12:00 AM), https://www.hrw.org/news/2019/01/30/saudi-arabia-10-reasons-why-women-flee [hereinafter *10 Reasons*].

[4] Mariam Nabbout, *Saudi Arabia Takes Step Against Abusers of Male Guardianship System*, STEPFEED (June 21, 2019), https://stepfeed.com/saudi-arabia-takes-step-against-abusers-of-male-guardianship-system-4539.

[5] *10 Reasons*, *supra* note 3.

[6] *Who are the Mahrams of a Woman?*, ISLAMWAY (Mar. 18, 2014), https://en.islamway.net/article/23767/who-are-the-mahrams-of-a-woman; *10 Reasons*, *supra* note 3.

[7] Nabbout, *supra* note 4.

[8] *Id.*

Under the male guardianship system, women are not given basic human rights and are legally treated as permanent minors.[9] Women are not granted full citizenship, which requires them to have their guardian's permission in a wide range of matters such as education, employment, travel, obtaining a passport, healthcare, family rights, legal rights, and many other things.[10] Throughout their entire lives, women encounter systematic discrimination.[11] Within the male guardianship system, some women are even exposed to domestic violence and are left with few to no places to receive protection when they are abused.[12] This leads domestically abused women to dangerously attempt to escape and flee Saudi Arabia.[13]

For many years, Saudi women have been fighting for the shutdown of the male guardianship system.[14] Crown Prince Muhammad bin Salman fronts that he is a women's rights reformer, but women's rights activists have proven that Crown Prince Salman's reformer persona is "laughably at odds . . . [with] reality when the authorities try to hunt down fleeing women and torture[] women's rights activists in prison."[15] The male guardianship system remains the most significant restriction on women's rights in Saudi Arabia.[16] Although the guidelines which control the lives of Saudi women are beginning to loosen, Saudi Arabia has done little to end the male guardianship system.[17] There is still such a long way to go. So, the question to ask is whether Saudi Arabia can effect real change in the male guardianship system when the current reforms are only cosmetic, intending to mask ongoing women's rights abuses?

The purpose of this Note is to examine the current situation of women's lives in Saudi Arabia and explain why the Saudi Arabian government and community should take steps toward the abolition of the male guardianship system. Section I introduces the origins of the male guardianship system. It discusses where the system came from, how the system started, and the history behind the system. Section II analyzes a limited number of the present reforms for women's rights in Saudi Arabia that have been implemented before the creation of this Note. Section III discusses some of the restrictions on women that need reformation. Section IV explains how the Saudi Arabian government and community

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[9] *Id.*; *10 Reasons*, *supra* note 3.

[10] Alhussein, *supra* note 2; *Ending Male Guardianship In Saudi Arabia*, EQUAL. NOW, https://www.equalitynow.org/ending_male_guardianship_in_saudi_arabia (last visited Nov. 17, 2020) [hereinafter EQUAL. NOW].

[11] *10 Reasons*, *supra* note 3.

[12] *Id.*

[13] *Id.*

[14] Nabbout, *supra* note 4.

[15] *10 Reasons*, *supra* note 3.

[16] *Id.*

[17] EQUAL. NOW, *supra* note 10; *10 Reasons*, *supra* note 3.

continue to obstruct reformations of the male guardianship system. Section V examines the present reforms of the male guardianship system to analyze whether these reforms have been anything but cosmetic. Section VII provides two steps for the Saudi Arabian government and community to take in order to progress toward the complete abolition of the male guardianship system.

I. ORIGINS OF THE MALE GUARDIANSHIP SYSTEM

Saudi Arabia adheres to Islamic principles and values.[18] Islamic teachings are the way of life for the citizens of Saudi Arabia.[19] Islam is the basis of all the kingdom's laws, decisions, actions, and goals.[20] Saudi Arabia's interpretation of Islam is strictly fundamental, which is the most traditional and conservative form of Islam.[21] This fundamentalist interpretation is known as Wahhabism.[22] Wahhabism is a textual interpretation of the Qur'an, which tolerates neither Islamic traditions nor modern changes.[23]

The male guardianship system is a part of the kingdom's strict and rigid adherence to Islam and the Qur'an.[24] The male guardianship system is not a law or codified set of laws.[25] Instead, the male guardianship system is an institution built upon the idea that women are legally minors.[26] The male guardianship system denies women economic and academic opportunities.[27] Even though the male guardianship system is itself not a set of laws, it has crept into different laws and regulations that restrict women's freedom of choice and independence.[28] Some guardians restrict and punish the women under their control.[29] The issue with the male guardianship system is that it denies women their God-given rights because of archaic traditions.[30] However, opposers of

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[18] *History and Heritage*, VISION 2030, https://www.vision2030.gov.sa/thekingdom/explore/history/ (last visited Sept. 12, 2021).

[19] *Id.*

[20] *Id.*

[21] Dalia Fahmy, *5 Facts About Religion in Saudi Arabia*, PEW RSCH. CTR. (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/5-facts-about-religion-in-saudi-arabia/.

[22] *Id.*

[23] *Id.*

[24] EQUAL. NOW, *supra* note 10.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Alhussein, *supra* note 2.

[29] *Id.*

[30] Kristine Beckerle et al., HUM. RTS. WATCH, BOXED IN: WOMEN AND SAUDI ARABIA'S MALE GUARDIANSHIP SYSTEM 57 (2016), https://www.hrw.org/sites/default/files/report_pdf/saudiarabia0716web.pdf.

development and progress in getting rid of these traditions try to defend the male guardianship system's restrictions as rules of the Qur'an that are meant to protect women.[31]

II. PRESENT REFORMS

Saudi Arabian women's freedom has been seriously limited by legal and social restraints.[32] Activists have worked to advocate for the reform of certain aspects of the male guardianship system.[33] The kingdom has made important changes throughout the years that have loosened the restrictions against women and improved their status and lives.[34] These reforms have empowered women in the kingdom to continue to address the decades–long discrimination against them.[35]

A. Identification Cards

Saudi women are now able to have their own identification card.[36] In the past, women were not given their own identification cards, but were instead listed by name as a dependent on their *mahram's* or husband's identification card.[37] These identification cards included no photo of the woman listed; therefore, others could not know for certain if the woman before them was the same woman listed on the identification card.[38] This provided the possibility of guardians abusing women's rights.[39]

Many religious authorities opposed the idea of providing women with their own identification card because their face would be shown on the card.[40] However, the Saudi government ultimately decided to allow women to obtain photo identification cards.[41] In the first phase of this reform, women could only obtain their own identification card if their

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[31] *Id.*

[32] Fawziah Al-bakr et al., *Empowered but not Equal: Challenging the Traditional Gender Roles as Seen by University Students in Saudi Arabia*, 4 F. FOR INT'L RSCH. EDUC., 52, 56 (2017).

[33] EQUAL. NOW, *supra* note 10.

[34] Alhussein, *supra* note 2.

[35] *As Society Opens, Saudi Women Surge into Job Market*, THE NEW ARAB (Apr. 28, 2020), https://english.alaraby.co.uk/english/news/2020/4/28/as-society-opens-saudi-women-surge-into-job-market [hereinafter *Job Market*].

[36] Purva Desphande, *The Role of Women in Two Islamic Fundamentalist Countries: Afghanistan and Saudi Arabia*, 22 WOMEN'S RTS. L. REP. 193, 203 (2001).

[37] *Id.*

[38] A.E.H. Mobaraki & B. Söderfeldt, *Gender Inequity in Saudi Arabia and Its Role in Public Health*, 16 E. MEDITERR. HEALTH J. 113, 116 (2010).

[39] *Id.*

[40] Desphande, *supra* note 36, at 203–04.

[41] Mobaraki & Söderfeldt, *supra* note 38, at 116.

guardian consented to it.[42] If a woman did not have her own identification card, she had to be accompanied by her *mahram* or husband so that he could identify her.[43] In 2013, the Council of Ministers passed a law that stated Saudi women must have their own national identification card within seven years of the passage of the law.[44] After seven years, a woman's identification card would be the only way to prove her identity.[45] Now, in the year 2020, every woman should have her own identification card.

B. Driving

Prior to lifting the ban in 2018, Saudi Arabia was the only country that continued to forbid women from driving.[46] The driving ban long interfered with women's lives in the public sphere.[47] Due to the ban, women were not able to participate in the labor market or public activities.[48]

Talk of lifting the ban began in 1979 when the United States of America established its presence in Saudi Arabia with the production of oil and the creation of the Arabian American Oil Company.[49] American engineers and oil executives moved to Dhahran and American women were seen unveiled and driving cars, which Saudi women were forbidden to do.[50] Saudi women began asking for the rights of American women and there were formal discussions, but they soon stopped.[51] Even though Saudi Arabia was advancing on all economic and social levels, the kingdom was still determined to uphold the religious and social traditions.[52]

During the Gulf War of 1990 ("Desert Storm" as Americans refer to it), Saudi women again saw American women driving military vehicles around Riyadh, the kingdom's capital, and east coast cities.[53] During this war, Saudi women became frustrated with their restricted way of life and

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[42] *Id.*

[43] Jassim Abuzaid, *IDs a Must for Saudi Women*, ARAB NEWS, https://www.arabnews.com/news/446108 (last updated Mar. 27, 2013).

[44] *Id.*

[45] *Id.*

[46] Shannon Van Sant, *Saudi Arabia Lifts Ban On Female Drivers*, NAT'L PUB. RADIO (NPR) (June 24, 2018, 6:23 PM), https://www.npr.org/2018/06/24/622990978/saudi-arabia-lifts-ban-on-women-drivers [hereinafter NPR]; Al-bakr et al., *supra* note 32, at 56.

[47] Al-bakr et al., *supra* note 32, at 56.

[48] *Id.*

[49] Amani Hamdan, *Women and Education in Saudi Arabia: Challenges and Achievements*, 6 INT'L EDUC. J. 42, 43 (2005).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

staged a protest when they realized they would not be able to drive their children to safety during the war unless they were joined by a *mahram* or their husband.[54] During the protest, almost fifty women dismissed their drivers and drove (or rode with a woman driving) through the downtown area of Riyadh.[55] These women were immediately arrested, but they were not charged and were released soon after; however, some religious leaders called for these women to be beheaded.[56] The women's actions were investigated by a Royal Commission, which held that the women's actions did not break any Qur'anic laws.[57] Yet, after the protest, the Interior Ministry passed a law to ban women from driving, stating that "women should not be allowed to drive motor vehicles as the Shari'a instructs that things that degrade or harm the dignity of a women must be prevented."[58]

Finally, after years of waiting, the ban on women driving was lifted in 2018.[59] The days of depending on drivers, *mahrams*, or husbands to travel anywhere by car is now over.[60] However, this freedom did not come without sacrifice.[61] Prior to lifting the ban, many women's activists were arrested for driving and accused of undermining security.[62] Some of these women are still detained today.[63] Women's lives have slightly improved since the ban was lifted.[64] However, lifting the ban did not interfere with established social norms, such as the structure of the male guardianship system, that still affect Saudi women each day.[65]

C. Employment

The number of women working outside the home has nearly tripled since 1992.[66] In 2019, there were reports of women making up thirty-five percent of the labor force.[67] Women have quickly worked their

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[54] Desphande, *supra* note 36, at 200.

[55] *Id.*

[56] *Id.*

[57] *Id.* (In 1990, the ban on women driving was based off the Qur'an, not an actual law. The Qur'an was written when cars did not exist, and the major form of transportation was camel. The Qur'an allows women to lead camels, therefore, Saudi women should have been allowed to drive today's major form of transportation.).

[58] *Id.*

[59] NPR, *supra* note 46.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Fadi al-Qadi, *Do Not Forget the Jailed Saudi Women's Rights Activists*, ALJAZEERA (Mar. 8, 2020), https://www.aljazeera.com/opinions/2020/3/8/do-not-forget-the-jailed-saudi-womens-rights-activists/.

[64] Alhussein, *supra* note 2.

[65] *Id.*

[66] Al-bakr et al., *supra* note 32, at 54.

[67] *Job Market*, *supra* note 35.

way into senior positions.[68] However, these women still struggle with organizational and professional challenges due to their gender.[69] Most of these challenges deal with lack of participation in decision-making and planning.[70] Women in senior positions do not receive the same support for growth and opportunities for training, networking, and expanding their skills as their male counterparts do.[71] This shows that these women are willing and capable of achieving and maintaining leadership positions, but that they are not receiving the support one needs to succeed.[72]

Many women are teachers or work in administration, but they are striving to break into male-dominated fields.[73] Women are currently able to hold jobs in multiple fields such as banking, business, and financing, among other professions.[74] However, there are still fields women are struggling to break into.[75] King Abdullah bin Abdul Aziz al-Saud has advocated for women's employment in industrial fields by adopting policies that encourage women to keep persevering.[76] The King has shown that the kingdom needs women in these male-dominated fields so that the kingdom can continue to advance economically as well as socially.[77] For example, women are still not allowed to be judges.[78]

Although women are allowed to work, there are still significant hoops for them to jump through in their everyday lives on the job. For example, even though the government does not impose guardianship restrictions on working women, the authorities do not punish employers who require a woman's guardian's consent for her to work or who restrict women from working their jobs.[79] Further, there are strict segregation policies that disincentivize employers from hiring women because they will have to implement different workplace policies.[80] However, some women do not mind the strict sex-segregation policies.[81] These women

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[68] Al-bakr, et al., *supra* note 32, at 55.

[69] *Id.*

[70] Nouf Alsuwaida, *Women's Education in Saudi Arabia*, 12 J. OF INT'L EDUC. RSCH. 111, 114 (2016).

[71] *Id.*

[72] *See id.*

[73] Ahmed Al-Asfour, Hayfaa A. Tlaiss, Sami A. Kahn, & James Rajasekar, *Saudi Women's Work Challenges and Barriers to Career Advancement*, 22 CAREER DEV. INT'L 184, 190 (2017).

[74] *Job Market*, *supra* note 35.

[75] *10 Reasons*, *supra* note 3; Al-Asfour et al., *supra* note 73.

[76] Alsuwaida, *supra* note 70, at 113.

[77] *Id.*

[78] *10 Reasons*, *supra* note 3.

[79] *Id.*

[80] *Id.*

[81] Hamdan, *supra* note 49, at 58.

state that segregation gives them a professional advantage and more access to jobs where they do not have to compete with men.[82]

III. NEEDED REFORMS

Even though progress has been made to restore some women's rights, there are still many reforms to be made in order for Saudi women to truly achieve equality.[83] A guardian's permission is still needed for women to marry, to divorce, and to leave prison.[84] Women can still have disobedience cases filed against them by their guardian.[85] Women continue to be subjected to domestic violence with no escape.[86]

A. Marriage

1. Choosing a Spouse

Women cannot freely enter into marriage; guardian permission is required.[87] Although a woman must orally consent at the marriage ceremony, she has no choice in when or who she marries.[88] The presence of a woman's guardian is essential at the ceremony because a woman and her guardian are both required to sign the marriage contract.[89]

In 2020, a female council member of the Shura Council, the formal advisory council of the kingdom, proposed an approach that allowed women to contract their marriage without their guardian.[90] The approach called for the Judicial Council of the Shura Council to work with the Ministry of Justice to amend the laws and implement the new approach to marriage.[91] However, the Judicial Committee of the Shura Council rejected the proposal.[92] The reason for the rejection was that "a male guardian's presence is a key condition to legislate a marriage."[93]

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[82] *Id.*
[83] EQUAL. NOW, *supra* note 10.
[84] *Id.*
[85] *Id.*
[86] *10 Reasons*, *supra* note 3.
[87] *Id.*
[88] *Id.*
[89] *Saudi Shura Council Rejects Proposal to Let Women Marry Without a Male Guardian's Permission*, THE NEW ARAB (May 30, 2020), https://english.alaraby.co.uk/english/news/2020/5/30/women-cant-marry-without-male-guardians-permission-saudi-council [hereinafter *Saudi Shura Council*]; *10 Reasons*, *supra* note 3.
[90] *Saudi Shura Council*, *supra* note 89.
[91] *Id.*
[92] *Id.*
[93] *Id.*

2. Multiple Spouses

Polygamy is allowed in Saudi Arabia for males, though it is neither encouraged nor required.[94] Currently, men are allowed to marry up to four wives.[95] This trend is common in the kingdom, but it is becoming increasingly unpopular amongst Saudi women.[96] In fact, the percentage of divorces increased throughout the coronavirus pandemic because wives were discovering that their husbands had multiple wives.[97] The Shura Council rejected proposals that would have required husbands to reveal if they had multiple wives.[98] However, the Shura Council did recommend that the Ministry of Justice establish a court system that would reveal if a man is already married to a possible spouse.[99]

However, some families willingly engage in polygamy.[100] In this situation, it is required that the husband treats each wife equally and justly and that all wives must have the same status and rights when it comes to their shared husband.[101] Yet, women engaged in polygamy can suffer from negative impacts on their physical and mental health, struggle with higher levels of distress, face more problems in their marital relationships, and lack satisfaction in life more than those wives engaged in monogamous marriages.[102]

3. Child Marriage

There are no minimum age requirements for marriage in the kingdom.[103] In fact, there have been reports of girls as young as eight years old being subjected to child marriages.[104] In 2019, the Shura Council passed a regulation that prohibited marriage for girls and boys under the age of fifteen years old.[105] However, there is an exception that girls between fifteen years old and eighteen years old can marry with approval from a specialized court.[106] Prior to this regulation, there were no other

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[94] Mobaraki & Söderfeldt, *supra* note 38, at 116.

[95] *10 Reasons*, *supra* note 3.

[96] *Saudi Shura Council Postpones Reforms Forcing Husbands to Come Clean About Having Multiple Wives*, THE NEW ARAB (June 25, 2020), https://english.alaraby.co.uk/english/news/2020/6/25/saudi-postpones-reforms-forcing-husbands-to-disclose-multiple-wives.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* Mobaraki & Söderfeldt, *supra* note 38, at 116.

[101] *Id.*

[102] *Id.*

[103] *10 Reasons*, *supra* note 3.

[104] *Id.*

[105] *Id.*; EQUAL. NOW, *supra* note 10.

[106] *10 Reasons*, *supra* note 3; EQUAL. NOW, *supra* note 10.

statutes that govern the legal age of marriage in the kingdom.[107] Even though the regulation is a step in the right direction, the exception paired with women needing permission from their guardian to marry contributes to the vulnerability of women being forced into marriage.[108]

4. Divorce

Husbands may divorce their wives without any limitations.[109] A wife does not need to be in court for her husband to acquire a divorce decree.[110] In fact, a husband does not even need to notify his wife of his intent to divorce her.[111] In the past, this left many women without the knowledge that they were even divorced.[112] In 2019, Saudi authorities established a text notification system that notifies a woman when her husband files the divorce in court.[113] Still, many men simply declare the divorce orally by stating "I divorce you" three times.[114] This forces women to prove the divorce in courts themselves.[115]

A woman's right to obtain a divorce is much more difficult and restricted than a man's.[116] The process that a wife must go through in order to obtain a divorce is lengthier and more costly.[117] A woman can seek *khul'* divorce, a form of divorce when a woman's husband agrees to allow a divorce if she returns the full amount of her dowry or something else she received from her husband.[118] Another option for a woman seeking divorce is to apply for a fault-based divorce, where she must prove a fault of her husband in court.[119] However, there is no family law in the kingdom, so the judge will determine whether he believes there was a fault.[120] A

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[107] EQUAL. NOW, *supra* note 10.

[108] *Id.*

[109] *10 Reasons*, *supra* note 3.

[110] *Id.*

[111] *Id.*

[112] Lin Taylor et al., *Saudi Women to Be Told of Divorce by Text Message Under New Law*, REUTERS (Jan. 6, 2019, 2:17 PM), https://www.reuters.com/article/saudi-women-divorce/saudi-women-to-be-told-of-divorce-by-text-message-under-new-law-idUSL8N1Z60IB.

[113] *10 Reasons*, *supra* note 3.

[114] Katherine Lemons, At the Margins of Law: Adjudicating Muslim Families in Contemporary Delhi, 118–19 (2010) (Ph.D. dissertation, University of California, Berkeley) (eScholarship).

[115] *10 Reasons*, *supra* note 3.

[116] *Id.*

[117] *Id.*

[118] MUSAWAH FOR EQUAL. IN THE FAM., THEMATIC REPORT ON MUSLIM FAMILY LAW AND MUSLIM WOMEN'S RIGHTS IN SAUDI ARABIA 21 (2018), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT_CEDAW_NGO_SAU_30191_E.pdf.

[119] *See id.*

[120] *10 Reasons*, *supra* note 3.

woman's husband maintains the authority to control her as her guardian throughout all divorce proceedings.[121]

B. Domestic Violence

Many women are subjected to domestic violence and the male guardianship system causes these women to have an extremely difficult time seeking protection and legal action.[122] The male guardianship system promotes domestic violence because it allows guardians control over a woman's every movement.[123] Research from Human Rights Watch showed that women have issues trying to report their abuse to police, social services, or courts without their guardian, who is usually their abuser; in fact, when women flee an abusive spouse or family, they can be arrested and returned to their abuser.[124] Sometimes after a woman flees to a shelter, she cannot return to her biological family unless there is reconciliation or an arranged marriage because shelters do not encourage women to live independently.[125]

The National Family Protection Program in Saudi Arabia has determined that thirty-five percent of women have experienced some form of domestic violence.[126] In 2013, Saudi Arabia decided to criminalize domestic violence; yet, many activists have claimed that there has been no enforcement of the law.[127] The legislation created shelters for victims of abuse and obligates authorities to follow up on abuse reports.[128] However, this legislation can only be backed up by changed social perspectives because the male guardianship system is deeply rooted in Saudi culture and law.[129]

Further, the ways to report abuse are still very limited.[130] When the legislation was passed, women were not able to drive, so the only way they could get to the police was if their guardian drove them there.[131] Now, women face emotional challenges when deciding to report their abuse; women all over the world face the same issues of confusion, fear, and the

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[121] *Id.*

[122] Beckerle, *supra* note 30, at 32.

[123] *See id.* at 30.

[124] *10 Reasons*, *supra* note 3.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Nesrine Malik, *Saudi Arabia's Domestic Violence Law is a First Step to Changing Attitudes*, MUSLIM INST. (2017), https://musliminstitute.org/freethinking/world-affairs/saudi-arabias-domestic-violence-law-first-step-changing-attitudes.

[129] *Id.*

[130] *Id.*

[131] *Id.*

challenge of proving their abuse.[132] Many women are still afraid to report their abuse because of the possibility that the police will try to convince them to drop the charges.[133] If a reporting woman is not removed from her situation, her act of defiance could lead to more abuse.[134]

In fact, the Ministry of Labor and Social Development stated that it came across 8,016 cases of physical and psychological abuse between spouses over a one-year period from October 2014 to October 2015.[135] It seems that Saudi Arabia will continue to allow the male guardianship system to promote abuse and prevent victims from reporting their abuse.[136]

C. Disobedience Laws

If a woman does not obey her guardian, he may file a complaint of "disobedience" against her and have her arrested.[137] A woman's husband can go as far as interpreting her refusal to his sexual advances as disobedience.[138] In fact, a woman who is abused is more likely to be charged with disobedience than her guardian is to be charged for abuse.[139] One woman was beaten by her father and kicked out of the house.[140] He then reported her to the police for disobedience.[141] It is clear that as long as guardians can still file complaints of disobedience against women and women are able to be charged and punished for their "disobedience," Saudi Arabia will continue to be unwilling to take the necessary steps to abolish the male guardianship system and improve women's lives.[142]

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[132] *Id.*

[133] Ban Barkawi, *"Why I Didn't Report It": Saudi Women Use Social Media to Recount Harassment*, REUTERS (Apr. 6, 2020, 1:59 PM), https://www.reuters.com/article/us-saudi-women-violence-trfn/why-i-didnt-report-it-saudi-women-use-social-media-to-recount-harassment-idUSKBN21O2J7.

[134] *Id.*

[135] *10 Reasons*, *supra* note 3.

[136] Tom Throneburg Butler, *The Times: Are They a-Changin'? Saudi Law Finally Addresses Domestic Violence with Its Regulation on Protection from Abuse*, 100 IOWA L. REV. 1233, 1255 (2015).

[137] Margaret Coker, *How Guardianship Laws Still Control Saudi Women*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/world/middleeast/saudi-women-guardianship.html.

[138] LIV TØNNESSEN, CHR. MICHELSEN INST., WOMEN'S ACTIVISM IN SAUDI ARABIA: MALE GUARDIANSHIP AND SEXUAL VIOLENCE 15 (2016), https://www.cmi.no/publications/5696-womens-activism-in-saudi-arabia.

[139] *See id.*

[140] Barkawi, *supra* note 133.

[141] *Id.*

[142] *Saudi Arabia's Reforms: A Facade for Systematic Persecution of Women Rights Activists*, EUR. CTR. FOR DEMOCRACY AND HUM. RTS. (June 2020), https://www.ecdhr.org/?p=933.

D. Prison

Women are only allowed to leave Saudi prisons and juvenile detention centers with the consent of their guardian.[143] They must be released into their guardian's care as well.[144] When a woman's family refuses to consent to her release, the woman is forced to remain in prison until reconciliation with her family happens.[145] One way to get around this is if she obtains a new guardian, which usually only happens after an arranged marriage.[146]

IV. SAUDI ARABIA'S OBSTRUCTION OF REFORMS

Saudi Arabia has established major social changes since Crown Prince Salman came into power.[147] However, along with these reforms, there have been efforts to suppress any further disagreement with Saudi Arabia's male guardianship system.[148] The leadership in Saudi Arabia is still so strongly opposed to change for their women that they have imprisoned women's rights activists and journalists who have fought and are fighting for the equal rights of humans.

A. Women's Rights Activists Imprisoned

In May of 2018, leading women's rights activists were arrested in Saudi Arabia.[149] These women's rights activists are still detained for demanding an end to the male guardianship system.[150] These women continue to face abuse while in prison and are even deprived of contact with their families.[151] The treatment of these women is inhumane. They have been subjected to solitary confinement and various forms of torture, including but not limited to beatings, waterboarding, sexual harassment, and threats of rape and murder.[152]

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[143] *10 Reasons, supra* note 3.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Job Market*, *supra* note 35.
[148] *Id.*
[149] *Saudi Arabia's Leading Women Activists Mark Two-Year Prison Anniversary Despite Kingdom's "Reform Drive"*, THE NEW ARAB (May 16, 2020), https://english.alaraby.co.uk/english/news/2020/5/16/two-years-on-saudi-womens-rights-activists-await-trials [hereinafter *Two-Year Prison Anniversary*].
[150] EQUAL. NOW, *supra* note 10.
[151] *Id.*
[152] *Two-Year Prison Anniversary*, *supra* note 149.

Saudi Arabian authorities have charged these women with various crimes linked to their activism.[153] The authorities held what are criticized as "sham trials" beginning in March 2019.[154] These trials consisted of closed-door hearings in which the defendants were prohibited from speaking and lawyers and others were prohibited from attending.[155] In addition to these "sham trials," these women's trial dates have been and continue to be postponed due to the coronavirus pandemic.[156]

May 15, 2020 marks the two-year anniversary of the arrest of these women's rights activists.[157] Lynn Maalouf, Amnesty International's Middle East Research Director, stated that "it is heartbreaking that two years have now passed with these brave women still behind bars, especially as during this time Saudi women have been enjoying some of the newfound rights they had fought so hard for."[158] To commemorate the anniversary, seventeen non-governmental organizations wrote a letter calling for Saudi Arabian authorities to terminate their strategy to silence disagreement and stifle freedom of expression and release and drop the charges against the women's rights activists.[159] These organizations urged the United States and other governments to press for the women's release.[160] Thirty-six countries then pressured Saudi Arabia to release the women's rights activist because they are being imprisoned for exercising their fundamental rights.[161]

B. G20 Riyadh Summit

The G20 Riyadh Summit was held on November 21, 2020.[162] Using its presidency, Saudi Arabia ensured that meaningful discussions of women's rights and human rights did not take place.[163] In fact, gender was

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[153] *Saudi Arabia Has Dragged Its Imprisoned Female Activists Back into Court. How Will Biden Respond?*, WASH. POST (Nov. 30, 2020), https://www.washingtonpost.com/opinions/global-opinions/saudi-arabia-has-dragged-its-imprisoned-female-activists-back-into-court-how-will-biden-respond/2020/11/30/a1ee4c30-3337-11eb-b59c-adb7153d10c2_story.html [hereinafter *How Will Biden Respond?*].

[154] *Two-Year Prison Anniversary*, *supra* note 149.

[155] *Id.*

[156] *Id.*

[157] *Activists & Women Human Rights Defenders Continue to Face Reprisals*, CIVICUS (Aug. 14, 2020), https://monitor.civicus.org/updates/2020/08/14/activists-women-human-rights-defenders-continue-face-reprisals/.

[158] *Two-Year Prison Anniversary, supra* note 149.

[159] *Id.*

[160] *Id.*

[161] *How Will Biden Respond?*, *supra* note 153.

[162] *G20 in 2020*, G20, https://www.g20.org/about-the-g20.html (last visited Oct. 11, 2021).

[163] *Two-Year Prison Anniversary*, *supra* note 149.

not mentioned in any outputs from G20.[164] This omission angered many western delegates who planned to attend the summit.[165] Several members of the groups that create policy ideas about human rights, women's empowerment, and other issues for the summit leaders backed out of their planned discussions.[166] It was clear that Saudi Arabian organizers "gender-washed" the summit with the goal of suppressing discussions of women's rights, while also turning the summit into a public relations sham to achieve their true goal: a perception of reform and change in Saudi Arabia.[167] Director of Freedom Forward, Sunjeev Bery, stated that the summit was "all about the Saudi monarchy parading itself under the global spotlight and dodging questions over its abysmal record on basic freedoms."[168] Saudi Arabia has been described as the worst place in the world to be a woman.[169] Bethany Alhaidari, a women's rights campaigner at Freedom Forward, stated that going to the summit, engaging with the Saudi Arabian government, and pretending everything is normal while Saudi Arabian heroes, reformers, and women's rights activists are sitting and dying in prison is ridiculous.[170]

V. THE REFORMS ARE COSMETIC

Many people believe that the present reforms of Saudi Arabia were merely passed with the intent to promote Crown Prince Salman as a reformer.[171] These reforms have been further criticized by human rights organizations and Saudi regime critics as being the kingdom's "smokescreen" to continue to cover up reports of human rights abuses.[172] Some critics believe these reforms are only being passed with the intent

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[164] James Reinl, *How Saudi Arabia Is Using G20 Talks to Hide Its Terrible Record on Women's Rights*, THE NEW ARAB (May 7, 2020), https://english.alaraby.co.uk/english/indepth/2020/5/7/saudi-accused-of-stifling-womens-rights-in-g20-talks.

[165] *Id.*

[166] *Id.*

[167] Emma Beswick, *Virtual G20 Hosted in Saudi Arabia Amid Human Rights Criticisms and Coronavirus Pandemic*, EURONEWS (Nov. 20, 2020), https://www.euronews.com/2020/11/20/virtual-g20-hosted-in-saudi-arabia-amid-human-rights-criticisms-and-coronavirus-pandemic.

[168] Reinl, *supra* note 164.

[169] *Id.*

[170] *Id.*

[171] *Saudi Shura Council Postpones Reforms Forcing Husbands to Come Clean About Having Multiple Wives*, THE NEW ARAB (June 25, 2020), https://english.alaraby.co.uk/english/news/2020/6/25/saudi-postpones-reforms-forcing-husbands-to-disclose-multiple-wives.

[172] *Id.*

to encourage more "foreign investment and tourism" in the kingdom while it tries to work its way out of oil dependency.[173]

In 2001, Saudi Arabia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[174] CEDAW put forth various general recommendations for countries to follow in order to decrease systemic discrimination against women.[175] Saudi Arabia, as a signatory of CEDAW, is bound to implement policies that will eliminate discrimination of women.[176] CEDAW describes discrimination of women as "any distinction, exclusion or restriction made on the basis of sex which has the purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[177]

However, when Saudi Arabia ratified CEDAW, it did so with reservations.[178] These reservations allow the kingdom to apply the treaty as it sees fit.[179] One of the reservations states that "in case of contradiction between any term of the Convention and the norms of Islamic law, the kingdom is not under obligation to observe the contradictory terms of the Convention."[180] This reservation shows that the Saudi Arabian government believes "it is legitimate to deny women human rights on the basis of cultural particularism . . . since they purport to rest on divine authority."[181] Saudi Arabia thought that just signing CEDAW would be enough to show their interest in reforming women's rights, but it is proven that just signing CEDAW does not change community perception.[182]

Upon recommendation from CEDAW, Saudi Arabia publicly stated that the kingdom would officially abolish the male guardianship system and all discrimination against women by passing effective legislation.[183] Since then, the kingdom has implemented only small changes.[184] The kingdom has failed to implement CEDAW's

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[173] *Id.*

[174] EQUAL. NOW, *supra* note 10.

[175] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979 1249 U.N.T.S. 13 [hereinafter CEDAW].

[176] EQUAL. NOW, *supra* note 10.

[177] CEDAW, *supra* note 175.

[178] EQUAL. NOW, *supra* note 10.

[179] *Id.*

[180] *Id.*

[181] Ann Elizabeth Mayer, *Islamic Reservations to Human Rights Conventions: A Critical Assessment*, 15 RECHT VAN DE ISLAM 25, 28 (1998).

[182] *See CEDAW Review Shows Limits of Saudi Arabia's Gender Policies*, AMS. FOR DEMOCRACY & HUM. RTS. IN BAHR. (Mar. 19, 2018), https://www.adhrb.org/2018/03/cedaw-review-shows-limits-of-saudi-arabias-gender-policies/.

[183] *See id.*

[184] *Id.*

recommendation by continuing to restrict women's rights through the practice of the male guardianship system.[185]

With the present reforms that women have achieved comes a "deepening repression and abusive practices meant to silence dissidents and critics."[186] Human Rights Watch reported that there are still many abusive practices happening in the kingdom, and the abusers are not being held accountable.[187] This shows that the rule of law is still weak and can be undermined by political leadership.[188] Crown Prince Salman has worked hard to get rid of anyone who stands in the way of this political uprising.[189]

VI. STEPS TOWARD ABOLITION

"I'll give you the best solution: abolish the male guardianship system."[190] Saudi women do not want the male guardianship system to be merely amended; they want it to end. In fact, in order for Saudi women to grow in their potential, the male guardianship system must end.

It is not feasible to believe that the male guardianship system can be completely abolished within a short time. Saudi Arabia has much work to do to lead it down this path. To guide Saudi Arabia down the road to abolition of the male guardianship system, this Note proposes two starting points. First, the male guardianship system should be elective. Saudi women are treated as legal minors their whole life.[191] However, the age of adulthood in Saudi Arabia is eighteen years old.[192] Upon reaching the age of adulthood, women should be given the option of whether they want to have a guardian or not. If women decide to stray from the male guardianship system, they should not be shunned from their homes but taught how to navigate life with their new freedom. Women who choose to live freely may have the option to return to the male guardianship system at any time during their lives if they wish. If women decide to continue following the tradition of the male guardianship system and keep their guardian, they should be able to change their mind regarding their freedom of choice at any time throughout their lives. This freedom of

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[185] *See id.*

[186] *Saudi Arabia: Change Comes with Punishing Cost*, HUM. RTS. WATCH (Nov. 4, 2019, 12:00 AM), https://www.hrw.org/news/2019/11/04/saudi-arabia-change-comes-punishing-cost.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Nabbout, *supra* note 4.

[191] *10 Reasons*, *supra* note 3.

[192] Ayesha Saldanha, *Saudi Arabia: Age of Adulthood is Now 18*, GLOB. VOICES (Nov. 27, 2008), https://globalvoices.org/2008/11/27/saudi-arabia-age-of-adulthood-is-now-18/.

choice would allow women to become independent, free-thinking individuals who will grow and develop into citizens who further the kingdom's mission of economic prosperity. Also, giving women the choice to participate in the male guardianship system will enhance the support of the male guardianship system while simultaneously decreasing the negative connotation attached to the male guardianship system because only those who wish to follow the tradition will be led to do so. While others will elect to opt out of the male guardianship system, the two groups will support each other's freedom of choice, resulting in a more accepting culture and community in the kingdom.

Second, women who have reached the age of adulthood and have decided to keep their guardian should have the opportunity to challenge their guardian's decisions in court. This opportunity to challenge will not mean that they do not wish to have a guardian any longer but will give them the ability to voice their concerns with some of their guardian's decisions in their lives. It will allow women to seek additional unbiased guidance and opinions on matters that contribute to critical life decisions which will ultimately direct the path of their lives. Further, the option to challenge the guardianship will develop communication and collaboration skills between men and women throughout the kingdom by establishing a joint goal of satisfactory relationships and furtherance of traditions. Because families will not want to spend time in the court system, they will work to negotiate decisions that will be mutually beneficial and pleasing to all individuals. This option gives women a chance to have some control over their lives while choosing to keep a Saudi tradition alive.

There are two possible ways for the kingdom to implement this solution. First, the Court of the First Instance of the Shari'a Courts would have jurisdiction over a woman's challenge of her guardian's decision.[193] This would subject the challenge to a decision by one judge, with the possibility of appeal.[194] Second, the kingdom could create a new special committee for guardianship challenges.[195] The committee for guardianship dispute would be an independent judicial committee, meaning that it is initiated by an act and its decisions cannot be appealed.[196]

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[193] *Legal and Judicial Structure*, THE EMBASSY OF THE KINGDOM OF SAUDI ARABIA, https://www.saudiembassy.net/legal-and-judicial-structure-0 (last visited Oct. 25, 2021); *Introduction to the Saudi Legal and Court Systems*, ABDULAZIZ I. AL-AJLAN & PARTNERS, https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1384896_1.pdf (last visited Nov. 8, 2021) [hereinafter *Saudi Legal*].

[194] *Saudi Legal*, *supra* note 193.

[195] *Id.*

[196] Ahmed A. Al-Ghadyan, *The Judiciary in Saudi Arabia*, 13 ARAB L.Q. 235, 248 (1998).

Implementing these solutions will give Saudi women the freedom they deserve. If women elect to opt out of the male guardianship system, they will have the opportunity to date and choose their own spouse instead of being restricted to arranged marriages. These solutions will also limit the number of men who have multiple spouses as women will have more choice in participating in monogamous or polygamous relationships. Further, if a woman receives knowledge that her husband is unfaithful and/or has another wife, she will be able to leave her home and file for a divorce without issue. If a woman finds herself in an abusive relationship, she will be able to escape to terminate the marriage and find safety. Shelter will be more accessible to these women under these solutions because disobedience laws will be abolished, and women will not be required to obtain consent from their abuser to leave these shelters. If a woman chooses to keep her guardian, she will still have the opportunity to opt out of the system if she encounters a situation in which her marriage becomes unsatisfactory or abusive. A woman who participates in the system can choose to divorce her husband and receive a new guardian upon the filing of divorce documents.

If these solutions are successful, women who are subjected to domestic violence will be able to flee their situations without repercussions. These women would be able to seek protection and legal assistance because they would no longer need a guardian's approval. These solutions would eliminate the detainment of women who escape their abusers and finally enforce the 2013 law which criminalized domestic violence. Even though women may still face emotional limitations while deciding to report their abuser, at least they will no longer be limited by physical restraints or fear of more abuse.

Under these solutions, disobedience laws would essentially be abolished because a woman will be allowed to live her life as she pleases. She would be an equal to her husband and other male family members. Therefore, they would not be able to file disobedience complaints against her. Even if a woman's guardian or other family member tried to sue her in the court system, she would finally be able to use her voice to defend and stand up for herself. Also, women would be able to leave prisons after their sentence was served and they were released; they would no longer need a guardian's consent.

The purpose of these two starting points is to give Saudi women the freedom over their lives that they deserve. With these two steps, women are afforded the opportunity to decide for themselves the amount of freedom they wish to possess. In order to implement these solutions, Crown Prince Salman needs to pass laws calling for the immediate integration of these solutions. The kingdom's leadership should encourage social acceptance of these changes through media outlets, workplace reforms, community reforms, trainings, classes, and familial discussions.

CONCLUSION

The male guardianship system has boxed in Saudi women for decades. Women's lives should not be on hold while they wait for their guardian to approve or deny their requests. Women should not have to wonder what version of their guardian they will interact with each day. The male guardianship system must be reformed in order for these women to truly live and reach their full potential. The abolition of the male guardianship system will not only improve the lives of women, but family dynamics and the kingdom's economy.

This Note discussed the fundamentalist Islamic view that the citizens of Saudi Arabia follow which led to the creation of the male guardianship system. Section II examined a limited number of present reforms implemented for Saudi women and how these reforms improved women's everyday lives. The restrictions on women that still need reformation were addressed, as well as how the Saudi Arabian government is continuing to actively obstruct further reformations by imprisoning activists and suppressing the discussion of women's rights at one of the world's biggest summits. These obstructions prove that the reformations that have been implemented are nothing but cosmetic reforms with the intent to create a façade that the kingdom fosters women's rights.

Although the present reforms may be cosmetic, Saudi Arabia can effect real change in the male guardianship system by switching their intention from covering up ongoing women's rights abuses to taking the necessary steps toward abolition. First, the kingdom must stray away from the fundamentalist view of Islam. If it returns to the moderate view of Islam, more reforms for women will be easily achieved. Shari'a can evolve with Saudi Arabia to address the needs of the society today. This is possible because Shari'a was not revealed by Allah but interpreted by the creators of the Qur'an and the words and actions of the Prophet Muhammad. When Shari'a was created, the people included common and cultural practices from their time and society.

Shari'a is not a legal system, but a moral religious system. This means that Shari'a must be followed voluntarily. If not, Muslims no longer have freedom to choose different views and make good choices to be rewarded by Allah. Because Shari'a gives individual believers free will, a law needs to be implemented in the kingdom that calls for the above proposed solutions. These solutions allow followers of Shari'a to have free will by giving them the freedom of choice for their own participation in the male guardianship system. The removal of forced male guardianship over all Saudi women allows for each individual to have different outlooks and to make their own decisions which will determine their path to meet their

god, Allah. Since Shari'a is a voluntarily religious discourse of Islam, any system created under Shari'a, such as the male guardianship system, should also be followed voluntarily by all participants.

Based on the pushback of the male guardianship system, it is clear that Saudi citizens are striving to live in a kingdom where everyone is treated justly and equally. This type of community in the kingdom can only be established by the kingdom's leadership. Therefore, the Crown Prince must lead his people by example, make real changes in the Kingdom of Saudi Arabia that go beyond cosmetic reforms, and establish precedents that future generations can build upon.

BEYOND BOSTOCK: JUSTICE GORSUCH'S FREE EXERCISE JURISPRUDENCE AS A MODEL IN ADDRESSING THE CONTEMPORARY CRISIS IN RELIGIOUS LIBERTY

*Nathan J. Moelker**

INTRODUCTION

"Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[1]

"In far too many places, for far too long, our first freedom has fallen on deaf ears."[2]

Perhaps no Supreme Court decision of the 2019–2020 term caused more controversy than *Bostock v. Clayton County*.[3] The Court held that "homosexuality and transgender status are inextricably bound up with sex." Such that if an employer fires an individual based on these factors, the employer has still ultimately fired the individual because of sex, an action prohibited under the Civil Rights Act.[4] Many conservatives were outraged at Justice Gorsuch's actions in writing the opinion for the majority after he claimed to be a textualist.[5] However, other conservatives have argued that *Bostock* should be examined with more nuance,

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[1] Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), REVOLUTIONARY SERV. AND CIVIL LIFE OF GENERAL WILLIAM HULL, 265–66 (Maria Campbell, ed., Applewood Books 2009) (1848).

[2] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020).

[3] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[4] *Id.* at 1742 (Title VII of the Civil Rights Act prohibits sex discrimination).

[5] *See* Michael Knowles, *Justice Gorsuch Owes Me A Refund, So I Wrote Him A Letter*, DAILY WIRE (June 19, 2020), https://www.dailywire.com/news/knowles-justice-gorsuch-owes-me-a-refund (arguing that Justice Gorsuch's opinion was such a rejection of textualism that Gorsuch should send out refunds for his book and make a public repudiation of the title textualist).

emphasizing that the Civil Rights Act's broad language may allow this result.[6]

This Article's purpose is not to relitigate *Bostock* or to examine the exact parameters of the Civil Rights Act. *Bostock* was decided 6-3, and none of the Justices who made the decision show any indication of changing their mind. Instead, this Article examines the nature of Justice Gorsuch's jurisprudential philosophy through the lens of the Free Exercise Clause of the Constitution. This Article provides a systematic overview of all the cases in which Justice Gorsuch joined in or authored related to the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[7] Examining these cases will demonstrate that, regardless of *Bostock*, Justice Gorsuch has demonstrated a deep commitment to protect free exercise for religious beliefs and practices, regardless of their popularity or social acceptance. This commitment provides a means to protect the religious rights of ideological minorities, even when their religious practices face social disfavor and discrimination.

Justice Gorsuch's jurisprudence continually returns to the foundational idea that "[t]he Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[8] Rather than carving out areas, opinions, or beliefs exempt from religious protection, Justice Gorsuch has fought to protect free exercise for all religious views, popular and unpopular. If the government can intrude into unpopular religious practices, those with deep faith leading to disfavored behaviors cannot live "true to their religious convictions."[9] While free to disagree with Justice Gorsuch in *Bostock*, or any other case for that matter, conservatives need not worry about Justice Gorsuch's jurisprudential philosophy. Justice Gorsuch's holding in *Bostock* can only be socially tolerable upon the foundation of a firm structure of religious liberty.[10] This Article seeks to show Justice Gorsuch's profound commitment to religious liberty, evidenced in well known cases like *Fulton* and *Masterpiece Cakeshop*, is fundamental to his basic philosophy of jurisprudence, and has been his commitment even since his time as a circuit judge. Further, Justice Gorsuch has consistently sought to develop

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[6] Ilya Shapiro, *After* Bostock, *We're All Textualists Now*, NAT'L REV. (June 15, 2020), https://www.nationalreview .com/2020/06/supreme-court-decision-bostock-v-clayton-county-we-are-all-textualists-now/.

[7] U.S. CONST. amend. I; 42 U.S.C.S. §§ 2000bb-1, 2000cc-1.

[8] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018).

[9] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring).

[10] Adam White, *Is Religious Liberty "Dismantling" Progressive Legal Victories – or Making Them Possible in the First Place*, MEDIUM (July 12, 2020), https://medium.com/adamjwhite/is-religious-liberty-dismantling-progressive-legal-victories-or-making-them-possible-in-the-5bcce0482c6c.

a full orbed religious liberty jurisprudence that is not limited to traditional religions or popular beliefs, but protects wholeheartedly the religious beliefs of all individuals, popular and unpopular. Rejecting a *so-called* restraint that fails to attend to a judge's duty to defend the Constitution, Justice Gorsuch is wholeheartedly committed to the judicial task under the First Amendment.

I. BOSTOCK V. CLAYTON COUNTY: ITS HOLDING AND ABIDING QUESTION

The general perception is that in *Bostock v. Clayton County*, the Supreme Court held that Title VII of the Civil Rights Act of 1964's prohibition of sex discrimination is also a prohibition of discrimination based on sexual orientation and gender identity.[11] While this popular summary is not entirely inaccurate, the Court's decision was more nuanced and did not explicitly add these categories to discrimination law. In *Bostock,* the Court did not hold that there are new categories within discrimination law, but that "homosexuality and transgender status are inextricably bound up with sex," such that if an employer's decision in hiring or firing was upon the basis of these factors, the employer still fired the individual because of the individual's sex.[12] The Court did not claim that the 1964 drafters of the Act intended this result.[13] Justice Gorsuch, writing for the majority, recognized,

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . .. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[14]

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[11] *Compare* Dan McLaughlin, *The Supreme Court Decides Who Is a Woman*, NAT'L REV. (June 15, 2020), https://www.nationalreview.com/2020/06/the-supreme-court-decides-who-is-a-woman/ (article from the right, critiquing the decision for applying Title VII "to discrimination based not only on sex but also on sexual orientation and transgender status"), *with* Tim Fitzsimons, *Supreme Court Sent 'Clear Message' with LGBTQ Ruling, Plaintiff Gerald Bostock Says*, NBC NEWS (June 16, 2020), nbcnews.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190 (article from the left, praising the decision for the same result).

[12] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

[13] *Id.* at 1757 (Alito, J., dissenting) ("[T]here is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted.").

[14] *Bostock*, 140 S. Ct. at 1737.

In this way, Justice Gorsuch characterized the decision not in terms of "changing social norms," but as a matter of applying the clear, "express terms of a statute."[15]

Bostock's factual issue was simple. Long-time employees were fired for revealing their homosexuality or transgender status and sued for sex discrimination.[16] The problem presented was thus whether such a discharge violated Title VII.[17] Justice Gorsuch emphasized throughout his analysis the need to apply the plain meaning of the statute.[18] "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. . .."[19] Relying upon this commitment to textualism and plain public meaning, Justice Gorsuch examined Title VII's words, that it is an unlawful employment practice "for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex."[20]

The Court gave "sex" the biological definition relied upon by the defendants and did not argue that its definition should be broadened to sexual orientation.[21] Instead, Gorsuch centered on the adjectival phrase in the statute, "because of."[22] According to Supreme Court precedent, this "because of" standard is satisfied when the employment result would not have occurred "but for" the discriminatory act.[23] Congress could easily have taken a narrower and stricter approach, but instead wrote a law broad enough to encompass multiple forms of discrimination.[24] For example, instead of prohibiting actions taken "because of" specific categories, Congress could have prohibited actions taken solely "because of" those categories.[25] "But none of this is the law we have."[26] No matter how appropriate a narrow test may appear, a narrow test is not the test Congress enacted or the test the Court must apply.[27]

Because the language of the Act applies broadly, Title VII applies to many discriminatory actions.[28] An employer violates the law "[i]f the

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[15] *Id.*
[16] *Id.* at 1734, 1737.
[17] *Id.* at 1737.
[18] *Id.* at 1750.
[19] *Id.* at 1738.
[20] *Bostock*, 140 S. Ct. at 1738.
[21] *Id.* at 1739.
[22] *Id.*
[23] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343, 348 (2013).
[24] *Bostock*, 140 S. Ct. at 1739.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 1740.

employer intentionally relies *in part* on an individual employee's sex when deciding to discharge the employee."[29] Upon this basis, the Court held that it is impossible to discriminate against a person for being homosexual or transgender without discriminating at least in part based on the person's sex.[30] The Court used the example of two employees attracted to men, one a woman and one a man.[31] "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[32]

Justice Gorsuch's holding in this momentous case has caused a variety of responses. Some accused Gorsuch of a halfway textualism that built "an elaborate textualist framework on a shaky foundation."[33] Justice Alito's dissent in the case argued that "[t]here is only one word for what the Court has done today: legislation."[34] A few conservative commentators have gone so far as to compare Justice Gorsuch with Justice Souter.[35] Liberals have made textualist arguments in favor of Gorsuch's result.[36] Some on the left have gone as far as arguing that "the plain language of the text" mandated the result.[37] Moderates emphasized that this holding, along with the religious liberty cases of the 2019-2020 term, is designed to encourage greater pluralistic recognition of sincere claims of conscience.[38]

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[29] *Bostock*, 140 S. Ct. at 1741 (emphasis added).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/.

[34] *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting). *See also id.* at 1755–56 (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society.").

[35] Damon Linker, *Justice Gorsuch Fires a Torpedo at Trump's Re-election*, THE WEEK (June 15, 2020), https://theweek.com/Articles/920057/justice-gorsuch-fires-torpedo-trumps-reelection.

[36] *See* Ilya Somin, *Bostock v. Clayton County and the Debate over the Meaning of "Ordinary Meaning,"* VOLOKH CONSPIRACY (June 19, 2020), https://reason.com/2020/06/19/bostock-v-clayton-county-and-the-debate-over-the-meaning-of-ordinary-meaning/; Walter Olson, *With Nod to Scalia, Surprise Plain Meaning Carries Day for LGBT Plaintiffs*, CATO (June 15, 2020), https://www.cato.org/blog/nod-scalia-surprise-plain-meaning-carries-day-lgbt-plaintiffs.

[37] Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020).

[38] William J. Haun, *The Supreme Court Wants Religious Americans—and Those who Disagree with Them—to Live and let Live*, WASH. POST (July 14, 2020),

The fairest reactions to the case have recognized that in many ways, the ambiguous Title VII in *Bostock* presented "a case of statutory interpretation with no clear answer."[39] Before taking his seat upon the Supreme Court, Gorsuch published the book, *A Republic, If You Can Keep it.*[40] In opposition to those who "perceive a judge to be just like a politician who can and must promise (and then deliver) policy outcomes that favor certain groups,"[41] Gorsuch emphasized that "the judge's job is only to apply the law's terms as faithfully as possible."[42] Judges must "ensure that their decisions aren't based on which persons or groups they happen to like or what policies they happen to prefer."[43] If conservatives had read Justice Gorsuch's book more carefully, they would have seen that in examining difficult textual questions, such as the one raised in *Bostock*, Gorsuch would remain focused on the original public meaning of the law's language, not the debates of public policy. The accuracy of the holding is not in debate here. However, *Bostock* raises the crucial issues of how religious liberty will fare because of the decision.

Justice Alito argued in his dissent that the holding would "threaten freedom of religion."[44] Gorsuch did not ignore religious liberty in his opinion. "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[45] However, no religious liberty claim was brought before the Supreme Court in *Bostock*.[46] "[W]hile other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties."[47] This Article examines what "careful consideration" Justice Gorsuch is likely to provide when such free exercise concerns will be raised in future cases.

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https://www.washingtonpost.com/opinions/2020/07/14/supreme-court-wants-religious-americans-those-who-disagree-with-them-live-let-live/. (This is largely the approach taken throughout this Article, although it does not focus upon the precise contours of the textual issues raised in the case.).

[39] Shapiro, *supra* note 6.

[40] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019) (ebook).

[41] *Id.* at 6.

[42] *Id.* at 7.

[43] *Id.*

[44] *Id.* at 1778 (Alito, J., dissenting).

[45] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

[46] *Id.*

[47] *Id.*

II. THE FREE EXERCISE JURISPRUDENCE OF NEIL GORSUCH, AS BOTH JUDGE AND JUSTICE

A. Gorsuch's 10th Circuit Opinions: Protecting Unpopular Religions

Many seem to believe today that religious liberty is a shield used by the religious right to hide "discriminatory" views that are out of step with contemporary society.[48] Some claim that the religious right seeks to "create a special class of rights" that exists for itself alone.[49] A pair of early cases from then-Judge Gorsuch demonstrates the falsity of such a mischaracterization. Gorsuch has protected religious liberty for unpopular religions with vigor. He has emphasized the constitutional need to show particular deference to the tenets and practices of religions that are not commonly practiced.[50]

In *Abdulhaseeb v. Calbone*,[51] Gorsuch analyzed a claim under RLUIPA, a law designed to protect prisoners when their religious practices had been substantially burdened.[52] An Islamic prisoner was denied permission to eat halal food according to his religious belief and was forced to choose between "starving to death" and violating his religion.[53] The court held that the prison had acted to violate RLUIPA, and Gorsuch wrote a concurrence uniquely underscoring the constitutional importance of the individual's religious liberty claims.[54] The prisoner "has been forced to choose between violating his religious beliefs and starving to death. Whatever else might be said about RLUIPA, redressing this sort of Hobson's choice surely lies at its heart."[55]

Most importantly, the majority had argued that "[t]he standards under RLUIPA are different from those under the Free Exercise Clause."[56] The majority attempted to distinguish the heightened scrutiny of religious claims required by RLUIPA from the protections offered by the Free

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[48] *See* Paul Waldman, *The Supreme Court Just Helped the Trump Administration Limit Access to Contraception*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/opinions/2020/07/08/supreme-court-just-helped-trump-administration-limit-access-contraception/ ("Religious conservatives . . . have an ally in that war: a conservative majority on the Supreme Court, one that is determined to create a class of special rights that in practice are enjoyed only by conservative Christians. . . . [R]eligious conservatives have looked to the courts to expand their 'religious liberty,' which in practice means giving them exemptions from laws they don't like.").

[49] *Id.*

[50] Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

[51] Abdulhaseeb v. Calbone, 600 F.3d 1301, 1325 (10th Cir. 2010).

[52] *Id.*

[53] *Id.* (Gorsuch, J., concurring).

[54] *Id.* at 1309, 1324.

[55] *Id.* at 1324.

[56] *Abdulhaseeb*, 600 F.3d at 1314.

Exercise Clause itself, viewed as a limited right against laws that are not generally applicable.[57] In contrast, Gorsuch argued that the claim was governed directly by *Sherbert v. Verner*, a case applying heightened scrutiny of religious claims.[58] His argument drew a close connection between the protections offered by RLUIPA and the Free Exercise Clause.[59] While both the majority and Gorsuch's concurrence applied RLUIPA, Gorsuch applied the RLUIPA standard as viewed in accordance with prior Supreme Court precedent, under which strict scrutiny of religious claims is the general rule, and religious liberty is robustly emphasized.[60]

Likewise, in *Yellowbear v. Lampert,* Gorsuch authored an opinion analyzing the RLUIPA claims of a Native American prisoner.[61] Yellowbear was a member of the Northern Arapaho Tribe, denied "access to the prison's existing sweat lodge to facilitate his religious exercises."[62] In his analysis of the prison's actions, Gorsuch stressed that RLUIPA is not a general protection of any claim of conscience but protects the heightened, constitutional value set upon religious liberty.[63]

> RLUIPA requires the plaintiff to show a *religious* exercise. The law does not protect from governmental intrusion every act born of personal conscience or philosophical conviction. It protects only those motivated by religious faith—in recognition, no doubt, of the unique role religion, its free exercise, and its tolerance have played in the nation's history.[64]

Rather than merely stating and applying RLUIPA, Gorsuch highlighted the constitutional protections RLUIPA is designed to protect.[65] Gorsuch urged the Court to recognize the unique role the Constitution itself, in the light of the importance of tolerance and free exercise, sets on the public role of religion.[66]

Gorsuch likewise emphasized, in utilizing RLUIPA to protect Yellowbear's religion, that "federal judges are hardly fit arbiters of the world's religions."[67] The sincerity of a plaintiff's religion, or the centrality

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[57] *Id.*
[58] *Id.* at 1325. (Gorsuch, J., concurring).
[59] *Id.*
[60] *Id.*
[61] Yellowbear v. Lampert, 741 F.3d 48, 52–53 (10th Cir. 2014).
[62] *Id.* at 53.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Yellowbear*, 741 F.3d at 54.

of a particular tenet of that religion, is beyond the scope of a court's authority.[68] "Just as civil courts lack any warrant to decide the truth of a religion, in RLUIPA, Congress made plain that we also lack any license to decide the relative value of a particular exercise to a religion."[69] Courts cannot determine in an individual's behalf the extent to which that individual has been affected by a regulation burdening free exercise.[70]

Gorsuch particularly emphasized the need to avoid unnecessary scrutiny of unpopular or unfamiliar beliefs.[71] "That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, *perhaps especially the teachings of less familiar religions*—but also favoritism for religions found to possess a greater number of 'central' and 'compelled' tenets."[72] A judge or justice is simply not equipped to determine which beliefs are central to a religion, especially when a religion is unfamiliar or strange to that judge.[73] Gorsuch stresses the need to protect the religious beliefs of religious minorities whose beliefs are not accepted or understood throughout society.[74] The courts cannot examine the sincerity of a religious belief or delineate the importance of that belief to the individual.[75] "[T]he inquiry here isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise: we can't interpret his religion for him."[76]

B. Gorsuch's 10th Circuit Opinions: Protecting Unpopular Beliefs

The 10th Circuit was the lower court for one of the most significant Supreme Court religious liberty cases in the last several years, *Hobby Lobby Stores, Inc. v. Sebelius.*[77] Gorsuch's concurrence in that case highlighted the need to protect unpopular religious beliefs and practices against majoritarian discrimination.[78]

In *Hobby Lobby Stores, Inc. v. Sebelius,* the 10th Circuit held that RFRA allowed for relief against the mandate that corporations purchase

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 54–55.
[71] *Yellowbear*, 741 F.3d at 54.
[72] *Id.* at 54 (emphasis added).
[73] *Id.*
[74] *Id.* at 54–55.
[75] *Id.*
[76] *Id.* at 55.
[77] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
[78] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152–53 (Gorsuch, J., concurring).

contraceptive abortifacients for their employees.[79] Gorsuch's concurrence emphasized the significance of the religious claims of the individuals in the case, the Green family, who were Hobby Lobby's primary owners.[80] His concurrence focused on the need for the Greens themselves to determine the extent to which their religious practice has been affected, not a judge making a value judgment.[81] "[R]eligion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability."[82] The Green's conviction that they are morally culpable if their company helps purchase contraceptive abortifacients is itself a matter of religious conviction, not a belief that can be recontextualized or dismissed by the 'superior' reasoning of a court.[83] The Greens not only had a sincere religious belief in opposition to the use of contraception, but they also had a sincere religious belief that "the ACA's mandate requires them to violate their religious faith by forcing them to lend an impermissible degree of assistance to conduct their religion teaches to be gravely wrong."[84]

Gorsuch drew upon the Supreme Court's analysis in *Thomas v. Review Board*,[85] wherein the Supreme Court affirmed a Jehovah's Witness's decision to make sheet steel but not tank turrets for the war effort in the Second World War.[86] "The Supreme Court acknowledged this line surely wasn't the same many others would draw, and that it wasn't even necessarily the same line other adherents to the plaintiff's own faith might always draw."[87] *Thomas* demonstrates that the courts must not determine whether an individual made a decision of religious conscience that rightly reflects the individual's religion, but must respect the sincere commitments of religious practice.[88] In other words, when a religious believer draws a sincere line regarding what practices are religiously permissible, it is not for the courts to redraw the line.[89]

Justice Gorsuch argued not only for the importance of RFRA generally but for the importance of taking religious claims at their word concerning the extent to which the individual has been substantially burdened.[90]

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[79] *Id.* at 1124–25.
[80] *Id.* at 1152 (Gorsuch, J., concurring).
[81] *Id.* at 1153.
[82] *Id.* at 1152.
[83] *Id.* at 1152–53.
[84] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152 (Gorsuch, J., concurring).
[85] Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 711 (1980).
[86] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1153 (Gorsuch, J, concurring).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1153–54.

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.[91]

RFRA lacks effect if the courts are free to recontextualize as insubstantial the unpopular beliefs they do not believe merit protecting.[92] The courts must not determine for individuals what religions teach or what behavior is permissible.[93]

Gorsuch emphasized the Constitution's protection of counter-majoritarian beliefs from the scorn of the majority.[94] The protection of the free exercise of religion "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."[95]Although "[s]ome may even find the Greens' beliefs offensive,"[96] Gorsuch emphasized that the sincerity of their religious beliefs must be recognized and not dismissed, minimized, or recontextualized.[97]

C. Masterpiece Cakeshop and the Need to Respect Religious Claims

Gorsuch further developed his emphasis on the need to recognize the sincere claims of religious conscience when he came to serve on the Supreme Court. His jurisprudence continually demonstrates the need to take religious claims sincerely, rather than courts determining people's closely held religious beliefs for them or the centrality of those beliefs.[98] *Masterpiece Cakeshop v. Colorado Civil Rights Commission* concerned one of the most significant issues of contemporary religious liberty concerns, the conflict between religious liberty and the interests of the LGBTQ community. Joining in the opinion of the majority, finding in favor of a religious baker, Justice Gorsuch wrote his own concurrence, highlighting

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[91] *Id.*
[92] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1153–54 (Gorsuch, J, concurring).
[93] *Id.*
[94] *Id.* at 1153–54.
[95] *Id.* at 1152–53.
[96] *Id.* at 1152.
[97] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152–54 (Gorsuch, J, concurring).
[98] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018).

the importance of recognizing and protecting the claims of religious conscience, even when those claims are considered socially distasteful.[99]

Justice Gorsuch emphasized the danger of allowing the Colorado Civil Rights Commission to dismiss the beliefs of Mr. Philips, the baker, as offensive.[100] "That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[101] The Commission had presumed prejudice in the case of a religious believer acting according to his religious belief, while not making such a presumption in other contexts, demonstrating an intentional desire to discriminate toward the claims of religious conscience.[102]

In critiquing the Commission, Gorsuch emphasized the necessity to protect free exercise for all religious beliefs, popular or unpopular.[103] "[N]o bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny."[104] While the majority focused on the unusually hostile nature of the Commission's actions, Gorsuch emphasized that any discrimination against or condemnation of religious practice is intolerable.[105]

For Gorsuch, vigilantly protecting the First Amendment is most needed when the beliefs requiring protection are considered "offensive."[106] "Just as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive."[107] Religious liberty is meaningless if it does not include the protection of unpopular beliefs and practices.[108] "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[109] It is not the place of any legal body to determine which religious beliefs are worth valuing and which are not.[110] "The

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1737.
[104] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[111]

Also, Gorsuch highlighted the inability of the Court to determine the sincerity of Mr. Philip's religious belief.[112] It is beyond the Court's authority to tell Mr. Philips that it is "just" a cake.[113]

> It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.[114]

The courts cannot tell Mr. Philips or anyone else the religious significance of particular actions.[115] Gorsuch made the same argument that he made in *Hobby Lobby*.[116] Religious principles not only define the content of an individual's beliefs, but they also define the scope and reach of those beliefs.[117] Courts must never redefine religious commitment by redefining the extent of the burden on religious practice.[118]

Courts must heed Justice Gorsuch's call to take religious claims honestly and not condemn "a sincerely held religious belief as 'irrational' or 'offensive.'"[119] There is an increasing perception among some in our society that sincerely held religious beliefs on controversial matters serve as shields for "bigotry and discrimination."[120] Addressing this concern requires judges to take sincere religious claims seriously, recognizing that religion often includes convictions regarding the effect of a regulation on one's religious practice. "Whether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of

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[111] *Id.* at 1734.

[112] *Id.* at 1739–40.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Compare* Masterpiece Cakeshop, Ltd., 138 S. Ct. at 1739–40 (Gorsuch, J., concurring), *with* Hobby Lobby Stores, Inc, 723 F.3d at 1153–54 (Gorsuch, J., concurring).

[117] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1739–40 (Gorsuch, J., concurring).

[118] *Id.*

[119] *Id.* at 1737.

[120] *The Administration's Religious Liberty Assault on LGBTQ Rights: Hearing Before the Comm. on Oversight & Reform H.R.*, 116th Cong. 50 (2020) (statement of The Hon. Alexandria Ocasio-Cortez). *See also* David G. Savage, *In L.A. Case, Supreme Court Rules Job Discrimination Laws Don't Protect Church-School Teachers*, L.A. TIMES (July 8, 2020), https://www.latimes.com/politics/story/2020-07-08/court-rules-catholic-schools-are-free-to-fire-teachers-who-sue-over-discrimination (arguing that hearing religious claims on controversial matters "elevates a distorted notion of religious freedom over fundamental civil rights").

faith we must respect."[121] Unpopular religious beliefs merit just as much protection as popular, and beliefs regarding the extent of an obligation just as much protection as beliefs regarding the nature of that obligation.

D. Gorsuch's Critique of the Distinction between Status and Use

Another critical aspect of Justice Gorsuch's jurisprudence is his critique of any distinctions between religious status and use in the Court's jurisprudence. A variety of reasons underlie his reluctance. First, there is nothing in the Constitution itself that provides for this distinction, but it "protects the right to *act* on those [religious] beliefs outwardly and publicly."[122] Second, the distinction between one's religious status and one's actions as a religious person is often a matter of perspective, leaving far too much in the subjective hands of a judge.[123] Third, Gorsuch has demonstrated that the right to "religious status," without the protections of religious actions, ultimately provides no protection at all.[124]

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* Justice Gorsuch wrote a concurrence critiquing the distinction drawn by the majority between religious status and religious use.[125] The Court's decision held that it was a violation of the Free Exercise Clause to deny a generally available benefit to a preschool solely based on the preschool's religious identity.[126] The Court held that a policy barring religious organizations from participating in funds for a schoolyard paving system "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[127]

Gorsuch's concurrence argued that such a distinction is difficult to apply, and there's no reason why the "Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief."[128] The use/status distinction ultimately makes the same mistake as the distinction between belief and practice drawn in

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[121] *Hobby Lobby Stores, Inc.*,723 F.3d at 1153 (Gorsuch, J., concurring).

[122] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring).

[123] *Id.* at 2275.

[124] *Id.* at 2278.

[125] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring).

[126] *Id.* at 2019 (majority opinion).

[127] *Id.* at 2021.

[128] *Id.* at 2026 (Gorsuch, J., concurring).

Reynolds v. U.S, protecting religious beliefs without recognizing the freedom to practice those beliefs in the public sphere.[129]

However, Gorsuch's concern with the use/status distinction did not lead to an argument for the overruling of *Locke v. Davey,* wherein a bar of scholarships for theology decrees was upheld.[130] Rather than rejecting *Locke*, Gorsuch argued that *Locke* only permits a bar on the use of public funds to train clergy.[131] *Locke* ultimately does not concern whether a student is discriminated against for his use of funding or for his status as a religious individual.[132] Unlike a status/use distinction, *Locke* does not necessitate any examination of subjective examination of the effects of the law on the individual conscience.[133] *Locke* is a discrete rule based in part on the establishment clause, not a general test applicable to every situation.[134]

Further applying *Trinity Lutheran,* in *Espinoza v. Montana Department of Revenue*,[135] the Supreme Court held that the no-aid provision of the Montana Constitution, barring the use of public funds by religious schools,[136] violated the First Amendment.[137] In striking down this portion of the Montana Constitution, the Court emphasized that "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools."[138] Chief Justice Roberts, writing for the majority, focused his analysis on statutory language that discriminated against institutions and individuals based on their religious status.[139] As he did in *Trinity Lutheran*, Justice Gorsuch wrote a separate concurrence.[140] This concurrence brought his critique of the distinction between religious status and use into sharper relief.[141] He centered on the constitutional need to protect religious practices, not merely protecting religious beliefs.[142]

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[129] Reynolds v. United States, 98 U.S. 145, 166–67 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[130] Locke v. Davey, 540 U.S. 712, 725 (2004).

[131] Trinity Lutheran Church of Colom., Inc. v. Comer, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (Gorsuch, J., concurring).

[136] Such provisions, often described as Blaine Amendments, have their origins in anti-Roman Catholic discrimination and prejudice in the 19th century, as Justice Alito demonstrated in *Espinoza*, 140 S. Ct. at 2267–68.

[137] *Espinoza*, 140 S. Ct. at 2256 (majority opinion).

[138] *Id.* at 2255.

[139] *Id.*

[140] *Id.* at 2274–78.

[141] *Espinoza*, 140 S. Ct. at 2275 (majority opinion).

[142] *Id.*

Gorsuch argued that "any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers," devolving into subjective jurisprudence that fails to actually consider the religious claims of the parties.[143] Ultimately, a distinction between religious status and use is arbitrary and does not provide sufficient protection for the religious conscience.[144] "Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion."[145]

In addition to being complicated and capricious, this arbitrary line drawing ultimately exceeds the courts' constitutional authority and responsibility.[146] "The Constitution . . . protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly."[147] Religious actions must be protected with just as firm a commitment as religious mental beliefs because the Constitution itself protects both rights with vigilance.[148] Courts have a duty to carefully protect religious actions, not merely preserving people's right to have a religious status.[149]

Gorsuch highlighted the impossibility of protecting religious beliefs while disfavoring religious practice.[150] "The right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[151] If the government may intrude into religious practice, those with deep faith resulting in unpopular actions cannot carry out "lives true to their religious convictions."[152] Ultimately, focusing on religious status obscures the constitutional violations at the heart of the no-aid provisions.[153] "Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same."[154]

Gorsuch highlights how the Court's precedents are united in recognizing the importance of free exercise in both belief and practice, without limitation merely to internal belief.[155] For example, in *McDaniel*

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[143] *Id.*
[144] *Espinoza*, 140 S. Ct. at 2275.
[145] *Id.* (emphasis in original).
[146] *Id.* at 2276 (Gorsuch, J., concurring).
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Espinoza*, 140 S. Ct. at 2276.
[151] *Id.* at 2277 (Gorsuch, J., concurring) (emphasis in original).
[152] *Id.* at 2278 (Gorsuch, J., concurring).
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2277 (Gorsuch, J., concurring).

v. Paty,[156] the Court struck down a state law banning clergy from serving in the legislature because the law discriminated based on "status, acts, and conduct."[157] The Court's analysis in *McDaniel* did not center on some nebulous distinction between religious use and practice but on the need to robustly protect religious practice in all its forms.[158]

Any attempt to protect religious practice while prohibiting specific religious uses is sure to end in disaster.[159] "The right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[160] If the courts are only required to protect the religious status of an individual but are free to curtail the religious manner in which he uses generally available benefits, there are few constitutional protections for religion left.[161]

E. Covid-19 and Religious Liberty

The Covid–19 health crisis has brought issues of religious freedom to the center of the national consciousness. Justice Gorsuch's work in these cases has highlighted the dangers of a philosophy of "Judicial Modesty" that fails to fully protect constitutional liberties and the paramount importance of Free Exercise in times of crisis.[162] During Covid-19, Gorsuch has demonstrated his fundamental interpretative commitment to the protection of religious liberty and enumerated rights.

In *Calvary Chapel Dayton Valley v. Sisolak*,[163] Justice Gorsuch joined a lengthy dissent by Justice Alito, highlighting how the Nevada Covid-19 restrictions targeted places of worship.[164] Justice Gorsuch also authored his own brief dissent, emphasizing the clarity of the Constitution.[165] In this dissent, he highlighted the way the executive order revealed the priorities of the State of Nevada, which contrast sharply with the priorities of the Constitution.[166]

> In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First

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[156] McDaniel v. Paty, 435 U.S. 618 (1978).
[157] *Id.* at 627.
[158] *Espinoza*, 140 S. Ct. at 2278 (Gorsuch, J., concurring).
[159] *Id.*
[160] *Id.* at 2277 (Gorsuch, J., concurring).
[161] *Id.*
[162] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020); Roman Cath. Diocese, 141 S. Ct. 63, 69 (2020); Fulton v. City of Phila., 141 S. Ct. 1868, 1926 (2021).
[163] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).
[164] *Id.* at 2604 (Alito, J., joined by Gorsuch & Kavanaugh, JJ., dissenting).
[165] *Id.* at 2609 (Gorsuch, J., dissenting).
[166] *Id.*

> Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.[167]

Likewise, when the Court denied injunctive relief to California churches facing similar restrictions, Justice Gorsuch joined in the dissent written by Justice Kavanaugh, which objected to California's twenty–five percent occupancy cap for places of worship that did not apply to any other businesses.[168]

These coronavirus cases culminated in *Roman Catholic Diocese v. Cuomo.*[169] The Court issued a per curium opinion prohibiting the Governor of New York from enforcing ten and twenty–five–person occupancy limits on religious worship, when the ban was not proportionate to restrictions in place on similarly situated businesses.[170] Justice Gorsuch wrote a separate concurrence to underscore the importance of active commitment to the Free Exercise Clause in times of crisis.[171]

Gorsuch stressed the incompatibility of allowing gatherings for all purposes except religious practices with the Free Exercise Clause, particularly when religious gatherings comply entirely with safety precautions.[172] "The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces."[173] Such a disfavoring and dismissal of religion is never constitutionally permissible.[174] While a pandemic may justify some limitations upon religious practice, it cannot allow for a dismissal of religious practice as "unessential."[175] "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[176]

Gorsuch accentuated the need for an active commitment to enumerated rights, particularly the Free Exercise Clause.[177] The enumerated rights of the Constitution require more vigilant protection than the nonexplicit rights developed beyond the Constitution.[178] "Even if

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[167] *Id.*
[168] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020).
[169] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020).
[170] *Id.* at 68.
[171] *Id.* at 69 (Gorsuch, J., concurring).
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Roman Cath. Diocese*, 141 S. Ct. at 69.
[176] *Id.* at 70 (Gorsuch, J., concurring).
[177] *Id.*
[178] *Id.*

judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise."[179]

Justice Gorsuch also critiqued the impulse towards judicial restraint that leads Courts to stay out of matters that are the courts' responsibility.[180] There is "a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."[181] There must not be any "sacrifice of fundamental rights in the name of judicial modesty."[182] Judges must not use judicial modesty as an excuse to avoid maintaining the protections offered by the Constitution, even in times of social crisis.[183]

F. Employment Division v. Smith and Solicitation for Religious Freedom

One impulse demonstrated throughout all of Gorsuch's opinions is the inclination to overrule *Employment Division v. Smith.*[184] The argument for overruling *Smith,* a case which held that the Free Exercise Clause does not apply to neutral and generally applicable laws,[185] is not a new one and was made extensively throughout *Fulton v. City of Philadelphia.*[186] Members of the Supreme Court have extensively critiqued *Smith* ever since the holding was reached.[187] The scholarly

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[179] *Id.* at 70–71.

[180] *Id.* at 71 (Gorsuch, J., concurring).

[181] *Roman Cath. Diocese*, 141 S. Ct. at 71.

[182] *Id.* at 72.

[183] *Id.*

[184] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 887–90 (1990).

[185] *Id.* at 878.

[186] *See generally* Brief for the Robertson Constitutional Center as Amicus Curiae Supporting Petitioners, Fulton v. Phila., 141 S. Ct. 1868 (2021) (No. 19-123). This Article was originally written before *Fulton* was released in anticipation of that decision, but no analysis needed to be changed as a result of the outcome in that case, as Justice Gorsuch's concurrence in *Fulton* was in full agreement with the rest of his free exercise jurisprudence.

[187] City of Boerne v. Flores, 521 U.S. 507, 544–45 (O'Connor, J., joined by Blackmun, J., dissenting) ("I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court's holding there. . . . If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in Smith, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that Smith improperly restricted religious liberty.").

community has also extensively critiqued the Court's decision.[188] It would exceed the scope of this Article to reiterate all the critiques against *Smith.* Rather, Justice Gorsuch's response to *Smith* provides a window into his jurisprudence, emphasizing the importance of robust protections for religious conscience. His attack on *Smith* in *Fulton* is but the culmination of a principled opposition to that approach visible throughout his jurisprudence.[189]

The general tone of Justice Gorsuch's jurisprudence calls *Smith* and any narrow view of the Free Exercise Clause into question. Gorsuch emphasized in *Masterpiece Cakeshop* that "it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive."[190] This language contrasts with the Court's fear in *Smith* of making the "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[191] In contrast with *Smith*'s skepticism of religious claims, Gorsuch has emphasized respect for sincere religious exercise, whether popular or "offensive."[192] "When a sincere religious claimant draws a line ruling in or out a particular religious exercise, 'it is not for us to say that the line he drew was an unreasonable one.'"[193] For Gorsuch, unlike the Court in *Smith*, the freedom to determine religious actions based on religious conscience is a feature of our constitutional system to be celebrated, not something to be feared.[194]

Justice Gorsuch has also critiqued the dangers of an unhealthy judicial restraint, calling *Smith*'s reasoning into question. The Court's holding in *Smith* was premised on a concern to avoid excessive judicial entanglement with religious affairs.[195] *Smith* warned that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[196] While *Smith's* solution to dangerous interference with the scope of religious beliefs was to order that courts step out of religious claims, Justice Gorsuch has instead emphasized the need to have restraint even in our

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[188] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990).

[189] Fulton v. City of Phila., 141 S. Ct. 1868, 1926 (2021) (Gorsuch, J., concurring).

[190] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[191] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds, 98 U.S. at 145).

[192] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[193] Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014).

[194] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[195] *Emp. Div.,* 494 U.S. at 889 n.5.

[196] *Id.*

judicial restraint.[197] There is "a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack."[198] While Justice Gorsuch has highlighted the critical importance of judicial modesty in terms of reading statutory texts as they are written,[199] he has just as strongly warned against the "sacrifice of fundamental rights in the name of judicial modesty."[200] His jurisprudence emphasizes that judges must be willing to actively protect constitutional rights and not shirk from their constitutional duties.

Justice Gorsuch's examination of *Smith* itself is critical to any understanding of his opinion on the case. He acknowledged the controversy and critique of *Smith* in *Masterpiece Cakeshop,* stressing the fact that "*Smith* remains controversial in many quarters."[201] Although he went on to highlight the manner the Colorado Commission's actions in *Masterpiece Cakeshop* violated even *Smith,*[202] no one who believes *Smith* to be firm precedent would describe a decision in this manner. Justice Gorsuch also joined in a concurrence in *Kennedy v. Bremerton School District*, in which Justice Alito argued that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause."[203]

Perhaps Gorsuch's most extensive discussion of *Smith* before *Fulton* came while he served on the 10th Circuit Court of Appeals. He summarized the history of free exercise in *Yellowbear* while applying RLUIPA, arguing that *Smith* stands for the proposition that "[t]he devout must obey the law even if doing so violates every article of their faith."[204] This summary's tone is hardly favorable to *Smith's* holding. He went to argue that "[w]hat protections *Sherbert* appeared to afford religious observances, *Smith* appeared ready to abandon."[205] While, as Circuit Judge, Gorsuch did not have the authority to overrule the Court's precedents, this summary demonstrates a belief that *Smith* erred.[206] Gorsuch's negative opinion of the holding's reduction of religious liberty is

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[197] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

[198] *Id.*

[199] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–39 (2020).

[200] *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

[201] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

[202] *Id.*

[203] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Gorsuch, Kavanaugh, and Thomas, JJ., concurring).

[204] Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014).

[205] *Id.*

[206] *Id.*

apparent, as his preference for robust protections for religious observances.

Also, Gorsuch has relied upon the cases which *Smith* rejected or recontextualized. In contrast with *Smith,* which treated earlier cases like *Wisconsin v. Yoder* as mere footnotes to history, involving "not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections,"[207] Gorsuch has emphasized, especially in *Espinoza*, that in *Yoder* "the Court held that Amish parents could not be compelled to send their children to a public high school if doing so would conflict with the dictates of their faith."[208] In other words, rather than accepting the hybrid rights theory put forward by *Smith* to explain away cases like *Yoder*,[209] Gorsuch takes *Yoder* on face value as involving the principles of faith.[210] Likewise, in contrast to *Smith's* recontextualization of *Sherbert v. Verner*, in *Espinoza,* Gorsuch looked to *Sherbert* to "illustrate the point" with "terms that speak equally to our case."[211] While *Smith* explicitly limited *Sherbert* to unemployment contexts,[212] Gorsuch argued that *Sherbert* had general relevance to free exercise issues.[213]

In the 2020–2021 term, the Supreme Court decided *Fulton v. Philadelphia,* a case concerning Philadelphia's ban of a Catholic adoption agency because of its religious refusal to place children with homosexual couples, and whether *Smith* should be overruled.[214] In oral arguments, Justice Gorsuch pointed out the challenge in applying *Smith* is determining whether a law is sufficiently generally neutral. [215] His concurrence highlights his critique of *Smith* and attacks it directly.[216] Gorsuch particularly critiqued the majority's finding that Philadelphia's policy is not generally applicable, arguing that the Court was sidestepping the real issues in the case.[217] He argued that the majority utilized arguments and laws not actually addressed in the briefs, ignoring the adversarial process.[218] In particular, Gorsuch attacks the majority for

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[207] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

[208] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2776 (2020) (Gorsuch, J., concurring).

[209] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 2 (2016); *see also* William J. Haun, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. U. L. REV.1, 2 (2011)..

[210] *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring).

[211] *Id.* at 2277.

[212] *Emp. Div.*, 494 U.S. at 873.

[213] *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring).

[214] Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

[215] Transcript of Oral Argument at 106, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123).

[216] *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring).

[217] *Id.* at 1926–27.

[218] *Id.* at 1927.

utilizing the state's definition of public accommodation, rather than the broad definition of the city, the actual subject of the suit.[219] The majority then found that foster agencies are not places of public accommodation, a question of state law, despite the lack of Pennsylvania law establishing this rule. Gorsuch reiterates again and again his critique of the "majority's circumnavigation of *Smith*."[220] "Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith's* fate that it is willing to say pretty much anything about municipal law and the parties' briefs."[221] For Gorsuch, these circumnavigations and convoluted rules only heighten the need to directly and immediately protect religious liberty.[222] Under the majority's approach, there are so many loopholes that "this litigation is only getting started."[223] Gorsuch emphasized:

> *Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. . . . The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. Justice ALITO has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?[224]

For Gorsuch, the majority's position is "studious indecision" that fails to actually address the problems of *Smith*.[225] The majority wishes to avoid picking a side on controversial matters. "But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is* picking a side."[226]

Justice Gorsuch's concern with an overly restrained judiciary, unwilling to take Constitutional rights seriously, was clearly articulated in *Fulton v. Philadelphia*.[227] He described the majority's goal as trying "to turn a big dispute of constitutional law into a small one."[228] Throughout his opinion, while wholeheartedly rejecting Smith, he critiqued the

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[219] *Id.*
[220] *Id.* at 1928.
[221] *Id.* at 1929.
[222] *See generally Fulton*, 141 S. Ct. at 1929–31.
[223] *Id.* at 1930.
[224] *Id.* at 1931.
[225] *Id.*
[226] *Id.*
[227] *Id.* at 1926.
[228] *Fulton*, 141 S. Ct. at 1926–27.

majority for its "studious indecision" in being unwilling to do the same.[229] Justice Barrett expressed concern about the various disputes that would arise as a result.[230] Gorsuch acknowledged that challenging questions may arise.[231]

> But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to Smith until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, the Court should overrule it now, set us back on the correct course, and address each case as it comes.[232]

In a way, Justice Gorsuch is expressing as vigorous a view of stare decisis as Justice Thomas, at least in the context of Free Exercise Clause. Perhaps most strikingly, Justice Gorsuch expresses the need to overturn Smith as a moral commitment, and not merely a legal one.[233] "We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created."[234] Sometimes religious freedom matters are portrayed as individuals going to the courts, pleading for largesse. For Gorsuch, it is the exact opposite, and it is the Court who has a fundamental obligation, perhaps even a sacred obligation to return to the Constitutional text and overturn Smith.[235]

Smith leaves religious liberty protections to the majority, and in so doing leaves religious liberty undervalued.[236] As Justice Gorsuch emphasized in *Masterpiece Cakeshop*, "[p]opular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[237] As traditionally widespread beliefs become more disfavored in society, protection of unpopular religious beliefs becomes ever more critical. Justice Gorsuch has emphasized the need to take religious claims seriously and robustly in both belief and practice.[238]

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[229] *Id.* at 1931.

[230] *Id.* at 1883 (Barret, J., concurring).

[231] *Id.* at 1931 (Gorsuch, J., concurring).

[232] *Id.* (citation omitted).

[233] *Id.*

[234] *Fulton*, 141 S. Ct. at 1931.

[235] *Id.*

[236] *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990).

[237] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[238] *Id.*

Rather than tacitly assuming the appropriateness of laws that are "generally applicable," Gorsuch has stressed the need to always protect the sincere claims of religious conscience.[239] "Smith committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow."[240] After *Fulton*, it is clear that Gorsuch not only believes that *Smith* should be overturned. He believes that overturning *Smith* is an urgent mandate and an absolute requirement when "the costs are so many."[241] Refusing to give the people "the benefit of what we know to be the correct interpretation of the Constitution is picking a side," and Gorsuch has made very clear that this is not the side he has chosen.[242]

CONCLUSION

Justice Gorsuch has cautioned against partisan views of the nature of the judiciary. "It is a warning sign that our judiciary is losing its legitimacy when trial and circuit-court judges are viewed and treated as little more than politicians with robes."[243] We have developed a culture that has become addicted to utilizing judges and lawyers to affect social change.[244] Rather than neatly aligning with one particular party or another, judges must commit to fairly and justly decide the case that comes before them.[245] The "responsibility in picking judges is to help the nation find objectively excellent public servants, not to turn the process into an ideological food fight."[246] "Ideological Food Fight" is a term that could aptly apply to any of the Supreme Court nominations, and most of the Circuit Court nominations, of recent memory. Both political parties would be wise to heed this warning. For Gorsuch, judges should be defined by their constitutional duties to such first-order principles as religious liberty, not preferred public policies.

In our constitutional republic, judges and citizens will disagree on textual interpretation and have a wide variety of public policy opinions. But certain principles are fundamental issues that we should unite on, regardless of our disagreement on other matters. A recognition of the necessity and importance of religious liberty is one such matter, a foundational constitutional commitment. As Justice Gorsuch has shown,

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[239] *Id.*

[240] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring).

[241] *Id.*

[242] *Id.*

[243] Neil Gorsuch, *Liberals'N'Lawsuits*, NAT'L REV. (Feb. 7, 2005, 12:42 PM), https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/.

[244] *Id.*

[245] *Id.*

[246] *Id.*

we must be "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[247]

Judicial restraint is often praised as a restraint upon judicial activism's excesses, particularly by legal conservatives.[248] There are certainly many circumstances where a claim is beyond the Court's scope and is better left to the discussions of civil society. Free exercise is not one of those areas, particularly as certain religious beliefs grow more and more unpopular. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[249] Unlike non-judicial political concerns, "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[250]

One of the courts' primary roles is to vigilantly protect the enumerated rights laid out in the Constitution.[251] While all the enumerated rights are in crucial need of defending, the Free Exercise Clause is at the core of our constitutional system. The courts cannot surrender the responsibility to protect it in the face of cultural pressures.[252] "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."[253]

Gorsuch has concentrated on the importance of the courts taking every religious believer as they find them, recognizing the significance to the individual of the claims of religious conscience. Justice Gorsuch has critiqued a distinction drawn between discrimination based on religious status and discrimination based on religious use, pointing to the effect of religious identity on all of life.[254] He has emphasized the critical necessity of a robust understanding of religious liberty in American public life, that is not regulated to the shadows of the public sphere but is embraced as critical to functioning civil discourse.[255]

The Court did not overrule *Smith* in *Fulton*, and it may not officially end the status-use distinction in some other future case. But for

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[247] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).

[248] *See, e.g.*, Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442 (2008).

[249] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[250] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[251] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 69–71 (2020) (Gorsuch, J., concurring).

[252] *Id.* at 70–71.

[253] *Id.* at 71.

[254] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring).

[255] *Id.* at 2026.

it to maintain its role as the defender of liberties in our republic, it should heed Justice Gorsuch's jurisprudence, particularly his emphasis on taking religious beliefs seriously. Courts lack the freedom to reinterpret people's religious beliefs whenever they deem those beliefs offensive. They also do not have this discretion for religious claims regarding the new sexual liberties recognized by cases like *Bostock*. Any concerns regarding *Bostock* should be mitigated by an acknowledgment that Gorsuch only could allow that result upon the basis of a focus on the protection of religious convictions amid changing social norms. If and when the Court does take the necessary step of overturning *Smith*, Justice Gorsuch will certainly show himself to be forefront in that effort and in his commitment to robust religious protection for all. As he emphasized in *Fulton*, "[t]hese cases will keep coming until the Court musters the fortitude to supply an answer."[256]

It is easy to praise religious freedom in the abstract, but it is far harder to robustly protect those claims when raised in practice. Nonetheless, protecting these claims is our constitutional responsibility. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[257] For Gorsuch, judges, particularly the Justices of the Supreme Court, have a fundamental duty and obligation to give people "the benefit of what we know to be the correct interpretation of the Constitution."[258]

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[256] Fulton v. City of Phila., 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring).

[257] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[258] *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).

FOUR DIMENSIONS OF HUMAN TRAFFICKING PREVENTION

Deanna Longjohn[*]

ABSTRACT

At its core, human trafficking is the exploitation of vulnerability. Minimizing the vulnerabilities that traffickers prey on can prevent, disrupt, and reduce the prevalence of trafficking and its long-term consequences on individuals, families, and communities. By taking a multidimensional approach to human trafficking prevention, we can reduce harm and avoid unnecessary costs associated with this multibillion-dollar criminal industry. Primary prevention focuses on reducing vulnerabilities to prevent human trafficking from happening in the first place. Intervention prevention is about ending exploitation that is already occurring and preventing further abuse. Survivor restoration helps to ward off future exploitation and prevents the passing on of vulnerabilities to the next generation. Lastly, disruptive prevention creates awareness of human trafficking, equipping people to play a role in the other three dimensions of prevention.

INTRODUCTION

Human trafficking is the exploitation of vulnerability. The International Labor Organization estimates that there are over 40 million people in human trafficking situations across the globe.[1] Of these, one in four victims are children,[2] and women and girls are disproportionately represented.[3] Human trafficking is a public health crisis with devastating and long-term effects on our nation and the world.[4] While helping those who have been exploited is a critical component of anti-human trafficking work, to move the needle on the health and criminal repercussions, we must move further upstream to prevent it from happening in the first place.

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[1] INT'L LAB. ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOR AND FORCED MARRIAGE 9 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

[2] *Id.* at 10.

[3] *Id.*

[4] *Applying a Public Health Approach to Human Trafficking,* U.S. DEP'T OF HEALTH & HUM. SERVS., https://nhttac.acf.hhs.gov/soar/eguide/guiding-principles/applying-public-health-approach-to-human-trafficking (last visited Apr. 12, 2022).

There are four types of human trafficking prevention: before it occurs, intervention during a trafficking situation, survivor restoration to prevent future victimization, and disruptive prevention through awareness training.[5] Each form of prevention affects a different aspect of trafficking and is vital to reducing harm and preventing more people from being victimized. Achieving the greatest impact will require a multidimensional, integrated approach to trafficking prevention. Failing to address any one facet will result in gaps that can lead to greater harm and more victims.

I. WHAT IS HUMAN TRAFFICKING?

A. The Definition

Human trafficking is a federal crime in the United States.[6] The Department of Justice defines "severe forms of trafficking in persons" as

> [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[7]

By definition, then, adult victims of sex and labor trafficking must experience some type of "force, fraud, or coercion."[8] Force usually includes physical threats or harm.[9] Fraud can present as a threat or a false job promise.[10] Coercion is a little more nuanced and involves creating a culture of fear and intimidation and asserting power and control over another individual or group of people.[11] However, when a minor is trafficked for sex, force, fraud, and coercion are irrelevant.[12] Notably,

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[5] *See generally id.*

[6] *See generally* 18 U.S.C. §§ 1581–97 (explaining the criminal penalties for peonage, slavery, and trafficking in persons).

[7] 22 U.S.C. § 7102(11).

[8] *Id.*

[9] *Force*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[10] *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] *Coercion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[12] *Understanding Human Trafficking*, U.S. DEP'T OF STATE (Apr. 26, 2022), https://www.state.gov/what-is-trafficking-in-persons.

when it comes to the selling of a child for sex, there is no such thing as a child prostitute.[13] They are, by definition, victims of human trafficking.[14]

B. Who are the Victims?

There is no single profile of a human trafficking victim. Trafficking knows no boundaries and does not discriminate.[15] The United States' Department of Justice asserts that "[v]ictims of human trafficking can be anyone—regardless of race, color, national origin, disability, religion, age, gender, sexual orientation, gender identity, socioeconomic status, education level or citizenship status."[16] Anyone can be a victim of human trafficking.

While this is true, however, traffickers typically lure individuals that are already vulnerable.[17] The Department of Justice shares that "some of the most vulnerable populations for trafficking in the United States include American Indian/Alaska Native communities, lesbian-gay-bisexual-transgender-questioning individuals, individuals with disabilities, undocumented migrants, runaway and homeless youth, temporary guest-workers and low-income individuals."[18] These groups have increased vulnerabilities that are often exploited by traffickers.[19]

The Center for Disease Control asserts that certain populations are at higher risk to human trafficking.[20] These populations include

> [m]igrant and seasonal workers, refugees, or asylees; disconnected or homeless youth or runaways; people with physical emotional or cognitive disabilities; native persons; Lesbian, gay, bisexual, transgender, queer or questioning, intersex . . . and Two-Spirit . . . individuals; persons with a substance use disorder or with a history of substance use; those transitioning out of child welfare, foster care, or juvenile justice and prison systems; members of lower socio-economic groups; survivors of other forms of violence.[21]

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[13] *Id.*

[14] *Id.*

[15] *What is Human Trafficking?*, U.S. DEP'T OF JUST., https://www.justice.gov/humantrafficking/what-is-human-trafficking (Oct. 13, 2020).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Human Trafficking in the Wake of a Disaster*, CDC, https://www.cdc.gov/disasters/human_trafficking_info_for_shelters.html (Aug. 26, 2020).

[21] *Id.*

A particularly vulnerable population are youth who have runaway or those who experience homelessness.[22] Between a lack of social support structures and residing in an unfamiliar area, these youth have increased vulnerabilities and are at a higher risk of manipulation.[23] These youth lack basic needs such as shelter, food, clothing, and human relationships.[24] Traffickers can find these needs and fulfill them temporarily, thus creating a sense of indebtedness that can be exploited later. Of this group of youth who have experienced homelessness, 40% identify as LGBTQ+.[25] Youth who have runaway or have experienced homelessness are often at higher risk of survival sex.[26]

Youth who encounter the foster care system are another vulnerable population.[27] An article by Combat Human Trafficking states, "60% of the child sex trafficking victims recovered as part of a FBI nationwide raid from over 70 cities were children from foster care or group homes."[28] An article from Children's Rights states that "1 in 7 runaways reported missing were likely sex trafficking victims, and of those[,] 88% were in the care of social services or foster care when they ran."[29] Youth who encounter the foster care system also tend to carry extra vulnerabilities such as an unstable family, history of abuse or neglect, and movement between schools and social groups, among other things.[30]

Another population that is at a significantly higher risk are those with a history of trauma and violence in their lives.[31] The National Human Trafficking Hotline shared that "individuals who have experienced violence and trauma in the past are more vulnerable to future exploitation, as the psychological effect of trauma is often long-lasting and

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[22] *The Victims*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/victims (last visited Mar. 27, 2022).

[23] *Id*.

[24] NAT'L COAL. FOR THE HOMELESS, HOMELESS YOUTH 1–2 (2008), https://www.nationalhomeless.org/factsheets/youth.pdf.

[25] POLARIS, SEX TRAFFICKING AND LGBTQ+ YOUTH 1 (2016) https://polarisproject.org/resources/sex-trafficking-and-lgbtq-youth/.

[26] *Id*.

[27] Kara Napolitano, *At Greater Risk: Human Trafficking and the Child Welfare System*, LAB'Y TO COMBAT HUM. TRAFFICKING (Dec. 8, 2016), https://combathumantrafficking.org/blog/2016/12/08/at-greater-risk-human-trafficking-and-the-child-welfare-system/.

[28] *Id*.

[29] *Child Sex Trafficking*, CHILD.'S RTS., https://www.childrensrights.org/newsroom/fact-sheets/child-sex-trafficking/ (last visited Apr. 3, 2022).

[30] *See generally* Sarah A. Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 SOC'Y FOR RSCH. IN CHILD DEV. 1, 9 (2020).

[31] *The Victims*, *supra* note 22.

challenging to overcome."[32] Particularly, women who have been victimized though intimate partner violence are at higher risk of sex trafficking.[33] Traffickers can identify the markers of the previous trauma and abuse and can exploit those vulnerabilities. These individuals typically have higher rates of Adverse Childhood Experiences (ACEs) and are at a statistically higher risk of trafficking.[34]

While these populations listed above are a few of those that are vulnerable to trafficking, it is not an exhaustive list. Anyone who has a need, especially a chronic or deep-felt need, can be exploited. Traffickers look for these vulnerabilities to find people that are susceptible to exploitation.

II. PREVENTION TYPE 1: BEFORE TRAFFICKING BEGINS

A. Why Prevent Trafficking?

We must prevent trafficking because the cost is too high. Trafficking leaves devastating, lifelong effects on victims and survivors.[35] Survivors have many mental and physical effects from their trafficking.[36] Some mental health effects include "feelings of severe guilt, posttraumatic stress disorder, depression, anxiety, substance abuse (alcohol or narcotics), and eating disorders," among others.[37] Physical effects tend to include concussions, bruising, broken bones, drug addiction, sexually transmitted infections, and other effects.[38]

In addition to the physical and mental effects, the legal ramifications of human trafficking can be devastating to the healing process. Often survivors incur legal charges for prostitution, gun possession, drug possession, robbery, and assault, among other charges.[39] These charges cannot be expunged or vacated in many states and can

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[32] *Id.*

[33] Samantha Davey, *Snapshot on the State of Black Women and Girls: Sex Trafficking in the U.S.*, CONG. BLACK CAUCUS FOUND. (May 2020), https://www.cbcfinc.org/wp-content/uploads/2020/05/SexTraffickingReport3.pdf.

[34] *The Original ACE Study*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://nhttac.acf.hhs.gov/soar/eguide/stop/adverse_childhood_experiences (last visited Apr. 12, 2022).

[35] Micah Hartmann, *Causes and Effects of Human Trafficking*, EXODUS ROAD (July 6, 2021), https://theexodusroad.com/causes-effects-of-human-trafficking/.

[36] *Id.*

[37] *Human Trafficking Task Force e-Guide: Mental Health Needs*, U.S. DEP'T OF JUST., https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/mental-health-needs/ (last visited Apr. 12, 2022).

[38] *Id.*

[39] *The Importance of Criminal Record Relief for Human Trafficking Survivors*, POLARIS (Mar. 20, 2019), https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/.

follow survivors forever.[40] A record of being incarcerated is often a barrier for gaining stable housing, a fulfilling job, or custody of children.[41] Legal charges and a history of incarceration leave survivors in a difficult and devastating position.

The cost of human trafficking is too high. Education is a vital part of preventing a trafficking situation from occurring and preventing the associated costs. Prevention education centers around equipping our most vulnerable populations with the tools they need to identify, prevent, and avoid trafficking situations.[42] This education should be in all school systems to protect youth before they are drawn into dangerous relationships.

B. Education for Vulnerable Populations

There is no single profile of a human trafficking victim, but with increased vulnerabilities comes increased risk of human trafficking occurring in an individual's lifetime. Youth are one of the most at-risk groups to human trafficking.[43] Of the estimated 21 million trafficked individuals in the United States, around 5.5 million are youth.[44]

Young people are the next generation of leaders and world-changers. They are the ones who are shaping culture and the world. If they are equipped with the tools to stay safe, reduce demand for trafficking, and protect others, they can change the world and help eliminate trafficking for good. Empowering students through education is the way to prevent trafficking in the future.

The Prevention Project program's middle school and high school editions equip and empower them to prevent trafficking in their lives and

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[40] *See* MICHELLE KIRBY, LAWS PERMITTING VACATING CONVICTIONS FOR HUMAN TRAFFICKING VICTIMS 3–10 (2021), https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0018.pdf (summarizing states' vacatur relief and expungement laws).

[41] JoAnne Page, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, HUM. RTS. WATCH (Nov. 17, 2004), https://www.hrw.org/report/2004/11/17/no-second-chance/people-criminal-records-denied-access-public-housing/.

[42] *See generally* Elizabeth Barnert et al., *Commercial Sexual Exploitation and Sex Trafficking of Children and Adolescents*, 17 ACAD. PEDIATRICS 825–29 (2017).

[43] U.S. DEP'T OF EDU., HUMAN TRAFFICKING IN AMERICA'S SCHOOLS: WHAT SCHOOLS CAN DO TO PREVENT, RESPOND, AND HELP STUDENTS TO RECOVER FROM HUMAN TRAFFICKING 4 (2d ed. 2021).

[44] *End Trafficking Toolkit*, UNICEF, https://media2-production.mightynetworks.com/asset/34224295/End_Trafficking_Toolkit.pdf?_gl=1*1dbdajf*_ga*MTU4MTU5ODc5MS4xNjMzMDExNzI0*_ga_T49FMYQ9FZ*MTY0MzI5MjIzNy41Ni4wLjE2NDMyOTIyNDMuMA (last visited Mar. 7, 2022).

the lives of others.[45] Through an empowerment model, the Prevention Project curriculum propels students forward to create a healthy culture and prevent trafficking throughout the rest of their life.[46]

A Prevention Project alumnus recently shared that the program provided her with vital information that is not typically shared in the classroom.[47] She said that

> the Prevention Project gave [her] an essential foundational education of a complex problem. The recognition of victims is one that isn't typically portrayed in popular media or most traditional classrooms. The signs, warnings, and situations are ones that every student in every classroom should be aware of prior to graduation. Through this education, identifying victims and perpetrators in situations of trafficking is possible when it otherwise wouldn't be.[48]

Every school around the nation needs to have some form of human trafficking prevention education to protect their students. This education should be built to empower students to become world changers and equip them to prevent trafficking from occurring in their communities.

C. Providing a Comprehensive Safety Net

Teachers and other school professionals are among the most important groups to equip with information about human trafficking because they have the unique position of getting to know their students on a daily basis and can see incremental changes in them before many others may notice. They are also constantly evaluating their students and can see slips in performance earlier than others.

Human trafficking prevention education is essential to have in schools to prevent the next generation from being trafficked. A study on the most effective human trafficking education in schools found that "[m]any experts agree that teachers who are trained in [human trafficking education] and schools that provide [human trafficking education] to students thereby creating and raising awareness, are essential for

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[45] *Prevention Project: Project Overview*, PREVENTION PROJECT, https://www.prevention-project.org/home/prevention-project-program/ (last visited Mar. 7, 2022) [hereinafter *Project Overview*].

[46] *Id.*

[47] Prevention Project (@prevproj), INSTAGRAM (last visited Mar. 4, 2022), https://www.instagram.com/p/CasUXTEl-Ed/.

[48] *Id.*

trafficking crimes to be prevented, detected, and addressed."[49] Shared Hope International, in their state report cards, recommends mandating "trafficking-specific prevention education training for school personnel."[50] It is important that teachers are also trained to provide students with a comprehensive safety net.

Even when the law provides a requirement for human trafficking education within the school system, there are not always comprehensive training options for the teachers who will be implementing these curricula.[51] When teachers are not equipped with knowledge about the issue, they may not be able to confidently answer students' questions. If these teachers are not equipped, they can miss the signs and a student can slip through the cracks.[52]

Teachers, school professionals, and anyone who works with youth need to be equipped to identify when a student is involved in a trafficking situation, as well as how to support that student once identified. Teachers need to be prepared with a safety plan to care for their students who come forward and tools like the protocol from the National Human Trafficking Resource Center's Educator Tool Kit.[53]

Teachers need to be prepared to spot trafficking in their students, and this starts with training like the Youth Service Provider edition of the Prevention Project program. This program equips anyone who is background checked and works with youth to know the signs of the grooming process, the signs of victimization, how to safely intervene in trafficking situations, and how to report them to the correct authorities.[54] This training is vital for providing a comprehensive safety net for students. It can save the lives of students across the nation.

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[49] Lumina S. Albert, *Trauma Informed Strategies for Human Trafficking Education in Urban Schools: An Attachment Theory Perspective,* 54 EDUC. & URB. SOC'Y 1, 3 (forthcoming).

[50] SHARED HOPE INT'L INST. FOR JUST. & ADVOC., 2021 REPORT CARD ON CHILD & YOUTH SEX TRAFFICKING – ANALYSIS REPORT VIRGINIA 25 (2021) [hereinafter REPORT CARD].

[51] *See* ELZBIETA GOZDZIAK & MICAH N. BUMP, VICTIMS NO LONGER: RESEARCH ON CHILD SURVIVORS OF TRAFFICKING FOR SEXUAL AND LABOR EXPLOITATION IN THE UNITED STATES 78 (U.S. Dep't of Just., ed., 2008).

[52] *See id.* at 9.

[53] POLARIS PROJECT, TOOLS FOR EDUCATORS (2011), https://humantraffickinghotline.org/sites/default/files/Educator%20Assessment%20Tool.pdf.

[54] *Prevention Project: Program FAQ*, PREVENTION PROJECT, https://www.prevention-project.org/home/tpp-faqs/ (last visited Apr. 25, 2022) [hereinafter *Program FAQ*].

Youth are one of the most vulnerable groups to be drawn into human trafficking.[55] All schools across the country should provide human trafficking prevention education to their students and equip their teachers with the tools they need to provide a comprehensive safety net. This form of primary prevention can prevent individuals from being trafficked and the associated devastating effects.

III. PREVENTION TYPE 2: INTERVENTION DURING A TRAFFICKING SITUATION

A. Why Intervention Prevention?

There are many different people who encounter trafficking victims throughout their victimization: members of law enforcement, the criminal legal system, the child welfare system, and the education system, to name a few.[56] As mentioned above, a comprehensive training on how to safely intervene in human trafficking situations is important for teachers and other school personnel. Trafficking prevention education is vital for other professions as well.

B. Law Enforcement Professionals

Law enforcement should be trained on how to identify the signs of human trafficking, and this training should be ongoing. Shared Hope explains that the state of Virginia "does not mandate trafficking-specific training on victim-centered investigations and prosecutions for prosecutors."[57] The crime of human trafficking is constantly changing and adapting to current cultural trends and technological improvements.[58] 40 years ago, traffickers were not using different social media platforms to traffic victims because those platforms did not yet exist.[59]

Trafficking prevention education for law enforcement is important because it helps them identify victims when they are looking at people that could be perpetrating another crime like prostitution or drug possession. In 2016, the National Survivor Network conducted a survey of

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[55] *Human Trafficking: About Human Trafficking*, PREVENTION PROJECT, https://www.prevention-project.org/home/about/ (last visited Apr. 25, 2022) [hereinafter *About Human Trafficking*].

[56] GOZDZIAK & BUMP, supra note 51, at 75, 78, 83.

[57] REPORT CARD, supra note 50, at 24.

[58] KEVIN BALES & STEVEN LIZE, TRAFFICKING IN PERSONS IN THE UNITED STATES 7 (U.S. Dep't of Just., ed., 2005).

[59] See Mitzi Perdue, *The Darkest Side of Social Media*, PSYCH. TODAY (July 30, 2021), https://www.psychologytoday.com/us/blog/end-human-trafficking/202107/the-darkest-side-social-media.

130 survivors.[60] Of those 130 survivors, 123 (90.8%) reported being arrested at one point.[61] When a police officer looks at an individual who is working a street corner, they may not necessarily think they could be a victim of trafficking. If they do not have the requisite training on how trafficking victims present or what trafficking is, they may arrest that person for prostitution, fully unaware that they are a trafficking victim. If that same officer was trained on what human trafficking is and what to look for, they might identify the individual as a victim, preventing further harm to them.[62]

Law enforcement professionals are often a human trafficking victim's first encounter with the criminal legal system.[63] If an officer arrests them and treats them as a willing criminal and does not handle them with care and respect, that victim's view of the criminal legal system could be colored forever. This change in perspective often makes it difficult for victims to come forward for help or to cooperate with officers to convict their trafficker.[64]

To prevent future trafficking, it is important to train law enforcement professionals on how to identify human trafficking victims and how to engage with them in a trauma-informed way.[65] Without this training, law enforcement professionals may continue to arrest victims and perpetuate the cycle of harm.[66] To effectively intervene in trafficking situations, law enforcement professionals need to be trained on how to identify and safely engage in these situations.

C. Criminal Legal System Professionals

Another group of professionals that desperately need to be trained on how to identify and interact with victims of trafficking are criminal

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[60] BETH JACOBS, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING (Nat'l Survivor Network., ed., 2016) (with the assistance of CAST Attorney Stephanie Richard).

[61] *Id.*

[62] *See* VERA INST. OF JUST., SCREENING FOR HUMAN TRAFFICKING: GUIDELINES FOR ADMINISTERING THE TRAFFICKING VICTIM IDENTIFICATION TOOL 7 (U.S. Dep't of Just., ed., 2014).

[63] POLICE EXEC. RSCH. F., HOW LOCAL POLICE CAN COMBAT THE GLOBAL PROBLEM OF HUMAN TRAFFICKING: COLLABORATION, TRAINING, SUPPORT FOR VICTIMS, AND TECHNOLOGY ARE KEYS TO SUCCESS 3 (James McGinty, ed., 2020), https://www.policeforum.org/assets/CombatHumanTrafficking.pdf [hereinafter LOCAL POLICE].

[64] *See id.*

[65] *Id.* at 24.

[66] *Id.*

legal professionals.[67] From judges to attorneys to guardian ad litems, these individuals are often working with victims of trafficking.[68] Victims of trafficking often have other legal charges attached to their arrests.[69] Their attorneys could identify their situation if they know what to look for. If criminal legal professionals are trained on the signs of the grooming process, they may be able to identify if their clients are in unsafe relationships.

For example, if a prosecuting attorney is trained on the signs a trafficking victim typically exhibits, they can identify the individual's situation, assign appropriate charges, or agree to a reduction in sentence. If they are trained on how to connect trafficking victims to services and safely help them exit their situation, they can help a person leave a cycle of abuse. Criminal legal professionals are often working with trafficking victims when they are the most negatively activated and vulnerable.[70] If they are trained in trauma-informed practices, they can help prevent future harm by treating these individuals with the utmost care and respect.[71]

On the other side, if criminal legal professionals are not trained, they may let individuals fall through the cracks. Many states, like Virginia, do not mandate this type of training for juvenile justice system workers.[72] These professionals may interact with an individual that they see as a "delinquent" engaged in commercial sex and not identify them as a victim of trafficking. They may interact with an immigrant without proper documentation and only see an "illegal immigrant" and not the vulnerable person forced to work in unsafe conditions out of a necessity to survive.

To prevent human trafficking, proper screenings and protocols need to be put into place. Additionally, criminal legal professionals need to be trained on how to spot a trafficking situation and how to best serve victims to prevent further victimization. If all criminal legal professionals had continuing education on what human trafficking looked like, they could identify more victims, provide trauma-informed services, and assign appropriate charges to victims.

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[67] Kavitha Sreeharsha, *Taking on Human Trafficking: A Role for Every Lawyer and Every Bar Association*, B. LEADER, July–Aug. 2013, americanbar.org/groups/bar_services/publications/bar_leader/2012_13/july_august/taking_human_trafficking_role_every_lawyer_every_bar_association/.

[68] *Id.*

[69] LOCAL POLICE, *supra* note 63, at 20.

[70] NAT'L DIST. ATT'YS ASS'N, NATIONAL HUMAN TRAFFICKING PROSECUTION BEST PRACTICES GUIDE, WHITE PAPER 34 (Women Prosecutors Section, ed. 2020).

[71] *See* LOCAL POLICE, *supra* note 63, at 25.

[72] REPORT CARD, *supra* note 50, at 23.

D. Child Welfare System Professionals

Individuals who experience the foster care system are at an increased risk of trafficking.[73] In the state of Virginia, individuals employed by the child welfare system are not required to receive trafficking-specific training.[74] Child welfare professionals need to be trained on how to identify human trafficking victims. They are often the only consistent adult in the lives of these youth.

A child welfare professional, like a social worker, sees an individual throughout their placements and helps them to find a family and belonging.[75] If they were aware that the lack of belonging associated with experiencing the foster care system made that youth more vulnerable to trafficking, they might notice signs of and work to prevent dangerous situations for the child.

Foster parents, if trained on the signs of an unsafe relationship, could be more informed when monitoring where their foster child is going and who they are talking to. If they were trained on the physical and emotional signs of an individual being trafficked, they might be able to identify the child's situation and get them help. If they were trained in trauma-informed practices specific to trafficking, they would be able to better support a victimized child on their journey to restoration.[76]

Finally, youth who are about to age out of the child welfare system should be trained on how to spot, identify, and prevent human trafficking in their life because this population is extremely vulnerable.[77] This population is thrust into adulthood, often without the tools to get a job, continue education, or find stable housing.[78] They often lack a stable family or support system to assist them in progressing into adulthood and are left without resources once they turn eighteen years old.[79] Youth aging

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[73] LOCAL POLICE, *supra* note 63, at 21.

[74] REPORT CARD, *supra* note 50, at 23.

[75] Rashad Skinner, *Social Work in the Child Welfare System*, DEGREE CHOICES, https://www.degreechoices.com/blog/social-work-in-the-child-welfare-system/ (June 13, 2022).

[76] CHILD WELFARE CAPACITY BLDG. COLLABORATIVE, IDENTIFYING MINORS AND YOUNG PEOPLE EXPLOITED THROUGH SEX TRAFFICKING: A RESOURCE FOR CHILD WELFARE AGENCIES 3 (Children's Bureau 2016), https://capacity.childwelfare.gov/states/resources/minors-and-young-people-sex-trafficking-resource; ELLIOT GLUCK & RRICHA MATHUR, CHILD SEX TRAFFICKING AND THE CHILD WELFARE SYSTEM 3–5 (State Pol'y Advoc. and Reform Ctr. 2014).

[77] GLUCK & MATHUR, *supra* note 76, at 3, 6.

[78] Karen Romero, *The Intersection of Human Trafficking and Homelessness*, NAT'L ALL. TO END HOMELESSNESS (Jan. 15, 2020), https://endhomelessness.org/blog/the-intersection-of-human-trafficking-and-homelessness/.

[79] Amita Sharma, *Many Penniless Former Foster Kids Call the Streets Home*, KPBS (Apr. 6, 2011 3:26 AM PDT), https://www.kpbs.org/news/living/2011/04/06/many-penniless-former-foster-kids-make-call-street.

out of the foster care system should be empowered with the tools they need to prevent trafficking in their life and in the lives of others.

To prevent the continuation of human trafficking, intervention prevention is necessary to equip members of law enforcement, the criminal legal system, the child welfare system, the education system, and other professions with the tools to identify trafficking situations and safely intervene. If not, individuals who are already being trafficked can slip through the cracks and their trafficking can continue. Their traffickers can also continue exploiting others and more individuals may be exploited.

IV. PREVENTION TYPE 3: AFTER EXITING A TRAFFICKING SITUATION, SURVIVOR RESTORATION

A. Why Support for Survivors?

Human trafficking leaves lasting effects on survivors and makes the next generation more vulnerable.[80] Survivors have a trauma history that haunts them and can be passed down to the next generation.[81] It is important to support survivors on their restoration journey to help them fully heal, keep them from returning to commercial sex, and prevent the next generation from being trafficked. Survivor restoration is a vital part of human trafficking prevention.

B. Trauma

Human trafficking traumatizes victims.[82] Trauma, as defined by the American Psychological Association (APA), is "an emotional response to a terrible event like an accident, rape or natural disaster."[83] There are short term responses such as shock and denial but also long-term responses such as "unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea."[84] The APA states that psychological support can be helpful in the healing process.[85] Often, survivors do not identify themselves as victims because their trauma is so great.[86]

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[80] *See* GOZDZIAK & BUMP, *supra* note 51, at 27.

[81] Tori DeAngelis, *The Legacy of Trauma*, AM. PSYCH. ASSOC. (Feb. 2019), https://www.apa.org/monitor/2019/02/legacy-trauma.

[82] GOZDZIAK & BUMP, *supra* note 51, at 17.

[83] *Trauma*, AM. PSYCH. ASSOC. (2022), https://www.apa.org/topics/trauma.

[84] *Id.*

[85] *Id.*

[86] *What is Human Trafficking?*, BLUE CAMPAIGN, https://www.dhs.gov/blue-campaign/what-human-trafficking (last visited Apr. 25, 2022).

Survivors often suffer from an even more difficult form of trauma called complex trauma.[87] Complex trauma is "a traumatic event that is repetitive and occurs over an extended period of time, undermines primary caregiving relationships, and occurs at sensitive times with regard to brain development."[88] While there is debate about the exact definition of a complex trauma event, the basic types of events include "physical abuse, sexual abuse, emotional abuse, neglect, witnessing domestic violence, exposure to community violence, and medical trauma."[89] Many of these events are seen throughout the life of a survivor of human trafficking.[90] Between threats of violence, repeated rape, and constant violence within the home, complex trauma events occur throughout a survivor's life.[91]

Trauma's lifelong effects make it difficult for survivors to heal, not go back to commercial sex, and have healthy relationships with others.[92] The effects of trauma include "deficits in relationships and attachment, emotional and behavioral dysregulation, cognitive/attentional deficits, and biological changes that may affect physical health. Further, symptoms such as dissociation, changes to self-perception, and overall shifts in beliefs about the world are frequently seen among youth who have experienced complex trauma."[93] One paper on complex trauma explains that trauma rewires the brain and engages the stress response system.[94]

Between physical and chemical changes and emotional and relational changes, trauma makes it difficult for a survivor to relate to the world in a healthy manner.[95] This can result in a survivor returning to unhealthy relationships or unhealthy patterns.[96] Prevention education is essential to supporting survivors in their restoration journey. Survivors

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[87] *No Escape: The Enduring Effects of Trauma on the Emotional Health of Human Trafficking Survivors*, AYLSTOCK, WITKIN, KREIS & OVERHOLTZ, PLLC, https://awkolaw.com/no-escape-the-enduring-effects-of-trauma-on-the-emotional-health-of-human-trafficking-survivors/ (last visited Apr. 25, 2022).

[88] Matthew Kliethermes et al., *Complex Trauma*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 339, 340 (2014).

[89] *Id.*

[90] *Entry into the Life*, LIFE STORY, https://thelifestory.org/entry-into-the-life (last visited Mar. 31, 2022).

[91] Kliethermes et al., *supra* note 88, at 340.

[92] Marti Castaner et al., *How Trauma Related to Sex Trafficking Challenges Parenting: Insights from Mexican and Central American Survivors in the US*, PLOS ONE 1, 2 (June 16, 2021), https://doi.org/10.1371/journal.pone.0252606.

[93] Kliethermes et al., *supra* note 88, at 340.

[94] *Id.* at 342.

[95] *Id.* at 340.

[96] *Preventing Adverse Childhood Experiences*, CDC, https://www.cdc.gov/violenceprevention/aces/fastfact.html (last visited Mar. 15, 2022) [hereinafter *Preventing*].

should gain insight into the ways their bodies and mind have been changed and should be made aware of opportunities for healing. Services should be provided to survivors by trauma-informed professionals to help them heal. If they do not heal fully, they cannot have a full life, and they are at risk of being re-trafficked themselves or passing down unhealthy patterns that could lead to the trafficking of the next generation.

C. Adverse Childhood Experiences

Adverse Childhood Experiences (ACEs) are deeply connected to the perpetuation of human trafficking.[97] ACEs are defined by the Centers for Disease Control and Prevention as "potentially traumatic events that occur in childhood (0–17 years)."[98] The original study by the CDC and Kaiser Permanente lists these ten ACE's: "Emotional abuse; Physical abuse; Sexual abuse; Parent treated violently; Household substance abuse; Mental illness in household; Parental separation or divorce; Criminal household member; Emotional neglect; Physical neglect."[99] These experiences are types of abuse, neglect, and household dysfunction.[100] ACE scores show increased vulnerability and susceptibility to trafficking.[101]

ACEs cause physical and mental illnesses later in life and make people more vulnerable.[102] In general, children who are exposed to a lot of toxic stress struggle with jobs, relationships, and mental health illnesses, and they can pass down this stress to their children.[103] ACEs are found at high rates within groups of human trafficking survivors.[104] One study by the National Crittenden Foundation found that "thirty-three percent of women with a trafficking history had ACE scores of 4–7 while 48% had scores of 8 or higher."[105]

Jeannette from Advocates for Girls and Young Women shares that "the incidence of ACE scores of 8 or more are rare in the general population–but not rare among girls and young women who experience commercial sexual exploitation or are domestically trafficked for sex.

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[97] *Id.*

[98] *Id.*

[99] *About the CDC-Kaiser ACE Study*, CDC, https://www.cdc.gov/violenceprevention/aces/about.html (last visited Mar. 24, 2022) [hereinafter *About ACE Study*].

[100] *Id.*

[101] Preventing, *supra* note 96.

[102] *Id.*

[103] *Id.*

[104] *Birth into Inequality*, LIFE STORY, https://thelifestory.org/birth-into-inequality (last visited Mar. 25, 2022).

[105] *Id.*

Early exposure to chronic adversity is a pathway to later exploitation."[106] This chronic adversity and developmental trauma places individuals with high ACE scores in a vulnerable state that is ideal for traffickers to exploit.[107]

We cannot talk about trauma, however, without talking about resilience. Resilience is "the process of adapting well in the face of adversity, trauma, tragedy, threats, or significant sources of stress."[108] Resilience is not just about healing from past trauma but also about growing through the pain. Through access to trauma counseling and therapy, individuals with high ACE scores can be equipped with the tools to grow and not to be further victimized. Providing a comprehensive support network of resources for survivors can help prevent the next generation from being trafficked. Providing these same resources for those with high ACE scores can prevent trafficking in their families before it begins.

D. Prevention in Survivor Restoration

Human trafficking survivors that are also parents are at risk of passing down unhealthy patterns that leave their children vulnerable to trafficking.[109] A study done on complex trauma and depression in parenting showed that "[h]igher rates of trauma exposure were related to decreased parenting satisfaction, reports of child neglect, use of physical punishment, and a history of protective service reports. These links were partially mediated by the relationship between trauma exposure and increased maternal depression."[110] A study on veterans with PTSD (post-traumatic stress disorders) who are also parents showed that the children of those suffering with PTSD suffered different negative outcomes: "parental PTSD symptoms have an effect on children's internalizing and externalizing symptoms, including depression, social emotional adjustment in young children, increased anxiety in early childhood, and adjustment problems in school-age children."[111]

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[106] *Id.*

[107] *Id.*

[108] *Building Your Resilience*, AM. PSYCH. ASS'N, https://www.apa.org/topics/resilience/building-your-resilience (Feb. 1, 2020).

[109] *Birth into Inequality*, *supra* note 104.

[110] Victoria L. Banyard et al., *The Impact of Complex Trauma and Depression on Parenting: An Exploration of Mediating Risk and Protective Factors*, 8 J. AM. PRO. SOC'Y ON ABUSE CHILD. 334, 334 (2003).

[111] Suzannah K. Creech & Gabriela Misca, *Parenting with PTSD: A Review of Research on the Influence of PTSD on Parent-Child Functioning in Military and Veteran Families*, FRONTIERS PSYCH. (June 30, 2017), https://www.frontiersin.org/articles/10.3389/fpsyg.2017.01101/full.

Parenting can be especially hard for survivors of trafficking because of the added mental and emotional stress associated with raising a child. A study of women who had experienced sex trafficking and were now mothers showed that "many participants also experienced feeling emotionally withdrawn from their children when they felt they could not control them (i.e. tantrums, fights between siblings, and anxieties about school)."[112] Victims of trauma who have experienced abusive interpersonal relationships struggle with attachment to their child.[113] Not being able to appropriately relate to a child and having to pull away leaves the child lacking appropriate emotional relationships.[114] Either a lack of deep relationships with others or overly-attached parenting can create vulnerabilities that traffickers could exploit.

Even if a survivor has a good bond with their child, they can still pass down trauma through transgenerational or intergenerational trauma.[115] Intergenerational trauma is "trauma that gets passed down from those who directly experience an incident to subsequent generations."[116] Dr. Gayani DeSilva found that "[t]rauma affects genetic processes, leading to traumatic reactivity being heightened in populations who experience a great deal of trauma."[117] Dr. DeSilva explains that though anyone is at risk for generational trauma, there are vulnerable populations that include "[b]eing systematically exploited, enduring repeated and continual abuse, racism, and poverty are all traumatic enough to cause genetic changes."[118] Dr. DeSilva specifically found domestic violence, sexual assault, and sexual abuse as acts that can trigger generational trauma.[119]

Intergenerational trauma symptoms are some of the same things that make people the most vulnerable to human trafficking. Symptoms of generational trauma "include hypervigilance, a sense of shortened future, mistrust, aloofness, high anxiety, depression, panic attacks, nightmares, insomnia, a sensitive fight or flight response, and issues with self-esteem and self-confidence."[120] These symptoms being passed down can make the next generation more vulnerable to trafficking.

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[112] Castaner et al., *supra* note 92, at 13–14.

[113] *Id.*

[114] *Id.* at 13.

[115] *Id.* at 13, 24.

[116] Fabiana Franco, *Understanding Intergenerational Trauma: An Introduction for Clinicians,* GOOD THERAPY BLOG (Jan. 8, 2021), https://goodtherapy.org/blog/Understanding_Intergenerational_Trauma.

[117] Claire Gillespie, *What is Generational Trauma? Here's How Experts Explain It*, HEALTH (Oct. 27, 2020), https://www.health.com/condition/ptsd/generational-trauma.

[118] *Id.*

[119] *Id.*

[120] *Id.*

Restoration of survivors needs to be bolstered with comprehensive, wrap-around support. Each survivor should have access to adequate counseling, financial, and court support to help them heal from their trauma history. If survivors are not supported in their healing journey, they can pass down their trauma to the next generation, causing them to be more vulnerable to trafficking. If survivors are not supported, they could fall back into commercial sex and be re-victimized. Support for survivors is a large part of preventing future trafficking.

V. PREVENTION TYPE 4: DISRUPTIVE PREVENTION

It is important that everyone has access to prevention education and human trafficking awareness because trafficking happens in many communities and across all fifty states. Trafficking looks slightly different in every community and is happening all over the nation.[121] When someone encounters a trafficking situation, it is important for them to already be equipped with the ways to identify and alert someone to get them help.

There are many individuals that touch the lives of survivors. Each of these people, if trained with prevention education, could help by intervening in their life. A teacher could see the signs of vulnerability in a student and equip them with the tools they need to stay safe from trafficking. An attorney could see the signs of a trafficking victim and support them on their journey to restoration. A counselor could see a survivor struggling to parent well and support them in ways that minimize increased vulnerability. All these instances of disruptive prevention require awareness and training.

Disruptive prevention is when an individual can step into the life of another and prevent victimhood or further victimization.[122] This form of prevention requires training and awareness before the individual encounters a situation of vulnerability or trafficking.[123] It requires preemptive education and support on the front end.[124] The Prevention Project program engages in disruptive prevention by equipping youth and

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[121] *Hotline Statistics*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/states (last visited Mar. 30, 2022).

[122] Fam. & Youth Servs. Bureau, *Human Trafficking Prevention: Strategies for Runaway and Homeless Youth Settings*, ADMIN. FOR CHILD. & FAMILIES 4–5 (Nov. 2020), https://www.acf.hhs.gov/sites/default/files/documents/fysb/acf_issuebrief_htprevention_10202020_final_508.pdf.

[123] *Human Trafficking: Frequently Asked Questions*, PREVENTION PROJECT, https://www.prevention-project.org/home/human-trafficking/frequently-asked-questions/ (last visited Mar. 31, 2022) [hereinafter *Frequently Asked Questions*].

[124] *Program Overview*, *supra* note 45.

youth service providers to be able to identify vulnerabilities, identify trafficking, and support survivors on their journey to restoration.[125]

Anyone can engage in disruptive prevention, and it is a major way to combat trafficking.[126] There are few ways for an individual to engage in actively combatting human trafficking, but one of the main ways is by being trained and aware and spreading that awareness to others.[127] The more people that are trained, the larger the safety net for individuals. With a larger safety net, fewer individuals will fall through the cracks, and traffickers will not get away with this crime.

CONCLUSION AND RECOMMENDATION

Human trafficking is an intricate and multifaceted crime that demands a multidisciplinary response.[128] The most fundamental and vital response is prevention. We need to prevent the next generation from being trafficked, support those currently being exploited to safely leave their situation, and support survivors throughout their process of restoration. We can do this by engaging in the four areas of prevention.

First, initial prevention before human trafficking begins needs to be strengthened. Students and teachers need to be equipped with the knowledge of what human trafficking is, what the grooming process looks like, the signs of human trafficking, and how to protect themselves from exploitation. They also need to be empowered to protect their communities. One way to do this is by establishing laws that mandate human trafficking prevention training for school professionals and the classrooms of all middle and high school students.

Second, intervention prevention should be led by members of law enforcement, the criminal legal system, the child welfare system, the education system, and other professions who are equipped with the tools to identify trafficking situations and safely intervene. These professionals need ongoing education to prevent trafficking from occurring in communities nationwide.

Third, survivor restoration helps to prevent the next generation from being trafficked. A survivor's healing journey affects the passing on of trauma to the next generation,[129] so minimizing their vulnerabilities is

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[125] *Program FAQ*, *supra* note 54.

[126] Family & Youth Services Bureau, *supra* note 122, at 5–8.

[127] *20 Ways You Can Help Fight Human Trafficking*, U.S. DEP'T OF STATE, https://www.state.gov/20-ways-you-can-help-fight-human-trafficking/ (last visited July 1, 2022).

[128] *National Strategy to Combat Human Trafficking*, U.S. DEP'T JUST. (Jan. 2017) https://www.justice.gov/humantrafficking/page/file/922791/download.

[129] *Program FAQ*, *supra* note 54.

vital to preventing the next generation from being trafficked.[130] Breaking the cycle will require more resources to support long-term survivor restoration.

Finally, more people need to be trained in human trafficking awareness so they can disrupt trafficking in their communities. The more individuals trained, the larger the safety net. The larger the safety net, the more trafficking will be stopped or prevented from ever occurring.

[130] *Id.*

THE MISSING PIECE: PREVENTING DOMESTIC SEX TRAFFICKING THROUGH EARLY INTERVENTION

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INTRODUCTION

Domestic sex trafficking in the United States (U.S.) is a social justice and human rights issue that violates an individual's right to be treated fairly. There are risk factors that make someone more susceptible to domestic sex trafficking. A review of research, policy analysis, and an application of domestic sex trafficking within a theoretical framework will provide an extensive view of this issue and current efforts to mitigate the problem, specifically in Mecklenburg County, North Carolina. Additionally, a potential prevention strategy, as well as ideas to consider for future domestic sex trafficking prevention work in the social work framework, will be explored to see if domestic sex trafficking can be stopped before it starts.

I. SOCIAL JUSTICE ISSUE

A. Description of Social Justice Issue

Sex trafficking is defined in U.S. Federal law as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for a commercial sex act," and "severe forms of trafficking in persons" are defined as trafficking "in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[1] The U.S. National Human Trafficking Hotline found that in 2019 there were 8,248 reported situations involving sex trafficking in the United States and 14,597 survivors of human trafficking who were connected to those situations.[2] In the U.S. Department of State's *2019 Trafficking in Persons Report*, 72% of trafficking survivors served by victim service providers approved by the Department of Justice were U.S. citizens and 66% were victims of sex

[1] 22 U.S.C. § 7102.

[2] *2019 Data Report: The U.S. National Human Trafficking Hotline*, POLARIS, https://polarisproject.org/wp-content/uploads/2019/09/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf (last visited Apr. 9, 2022) [hereinafter POLARIS].

trafficking.[3] Assuming that not every case of sex trafficking is reported, there may be several unreported cases.

II. SOCIAL JUSTICE LITERATURE REVIEW

A. Domestic Sex Trafficking in Mecklenburg County and North Carolina

Similar to national data, North Carolina had 266 calls for human trafficking in 2019, and sixty-five percent of them were sex trafficking cases.[4] It was reported in 2018 that 174 minors and adults were identified as suspected or confirmed victims of human trafficking receiving services in Mecklenburg County, North Carolina;[5] this is more than half of the human trafficking cases for the state reported to the hotline, which could indicate potential under-reporting.[6] Eighty-six percent of the individuals identified as human trafficking survivors in Mecklenburg County were involved in sex trafficking, and seventy-one percent of these victims were trafficked within Mecklenburg county itself.[7] Of 242 at-risk minors screened in Mecklenburg County, twenty-six percent were of clear concern (a high level of risk) regarding sex trafficking.[8]

B. Vulnerabilities Leading to Domestic Sex Trafficking

There are several risk factors for domestic sex trafficking that have been outlined in literature and in Mecklenburg County, the key vulnerabilities for sex trafficking correlate with national literature.[9] The

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[3] U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT 486–87 (June 2019).

[4] *North Carolina Spotlight: 2019 National Human Trafficking Hotline Statistics*, POLARIS, https://polarisproject.org/wp-content/uploads/2020/11/2019-North-Carolina-State-Report.pdf (last visited Apr. 9, 2022).

[5] Shawna Pagano, Exploitation in Mecklenburg County: An Examination of Human Trafficking and Risk Factors 2–3 (2019) (executive summary prepared in conjunction with research grant) (on file with author).

[6] *North Carolina*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/state/north-carolina (last visited Apr. 10, 2022).

[7] Pagano, *supra* note 5, at 4.

[8] *Id.* at 2.

[9] POLARIS, *supra* note 2 (noting the "Top 5 Risk Factors/Vulnerabilities" for sex trafficking victimization as the following: substance use concern, runaway homeless youth, recent migration/relocation, unstable housing, and mental health concern, based upon 2019 data collected by the U.S. National Human Trafficking Hotline); Pagano, *supra* note 5, at 4 ("The two greatest risk factors for adults were housing instability/homelessness (54.8%) and exposure to domestic violence (45.2%). Other risk factors were substance abuse (26.1%) and immigrant status (13.0%)."); Joan A. Reid et al., *Human Trafficking of Minors and*

top vulnerabilities in Mecklenburg county were found to be housing instability or homelessness, abuse, substance misuse, and child welfare involvement.[10] The vulnerabilities that lead to domestic sex trafficking also lead to substance misuse and domestic violence.[11] Domestic sex trafficking has several potential root causes and is most present in childhood.[12]

1. Homelessness

Literature suggests a correlation between homelessness and domestic sex trafficking.[13] Unstable housing was identified as a top risk factor for sex trafficking victimization in the U.S. and Mecklenburg County[14] with 54.8% of trafficking victims in the county citing homelessness as the top risk factor of their trafficking situation.[15] Homelessness exists in Mecklenburg County and leaves thousands of

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Childhood Adversity in Florida, 107 AM. J. FOR PUB. HEALTH 306, 309–10 (2017) (examining common risk factors specific to youth).

[10] Pagano, *supra* note 5, at 4–5.

[11] *See The Intersection of Domestic Violence, Mental Health, and Substance Abuse*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2–4 (Jan. 18, 2019), https://www.acf.hhs.gov/sites/default/files/documents/fysb/acf_samhsa_signed_intersection_of_dv_mh_su_01182019_0.pdf ("While DV affects every community, people living in poverty experience higher rates of abuse."); Healthwise Staff, *What Increases Your Risk of Becoming a Victim of Domestic Abuse or Violence?*, CIGNA, https://www.cigna.com/individuals-families/health-wellness/hw/what-increases-your-risk-of-becomiing-a-victim-of-tm7093 (last updated Jul. 1, 2021) (stating that certain groups may be exposed to unsafe situations creating higher risk for assault, to include the following: the homeless, sex workers, people with substance use disorders, and teens); *Drug Addiction (Substance Use Disorder)*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112 (last visited Apr. 11, 2022) (describing factors which affect the likelihood of developing a drug addiction); *Human Trafficking in America's Schools: Vulnerable Populations*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, https://safesupportivelearning.ed.gov/human-trafficking-americas-schools/vulnerable-populations (last visited Apr. 11, 2022) ("Particularly vulnerable groups of students tend to share histories of poverty, family instability, physical and sexual abuse, and trauma.").

[12] Hannabeth Franchino-Olsen, *Vulnerabilities Relevant for Commercial Sexual Exploitation of Children/Domestic Minor Sex Trafficking: A Systematic Review of Risk Factors*, TRAUMA, VIOLENCE, & ABUSE REV. J., 2019, at 8–10.

[13] *See, e.g.*, Karen Romero, *The Intersection of Human Trafficking and Homelessness*, NAT'L ALL. TO END HOMELESSNESS (Jan. 15, 2020), https://endhomelessness.org/blog/the-intersection-of-human-trafficking-and-homelessness/; Melinda Sampson, *Homelessness and Human Trafficking: COVID-19 Creates a More Vulnerable Population*, NAT'L SEXUAL VIOLENCE RES. CTR. (Dec. 2, 2021), https://www.nsvrc.org/blogs/homelessness-and-human-trafficking-covid-19-creates-more-vulnerable-population.

[14] POLARIS, *supra* note 2; Pagano, *supra* note 5, at 4.

[15] Pagano, *supra* note 5, at 4.

individuals susceptible to sex trafficking.[16] In June 2020, there were 3,111 people experiencing homelessness in the county.[17] One study indicated youth involved in domestic sex trafficking experienced complications in their living situation that lead to homelessness.[18] Other studies said homeless teens reported feeling pressure to participate in commercial sex to secure a place to sleep.[19] An individual may enter domestic sex trafficking because it provides a place to stay or allows an escape from their unstable living situation.

2. Abuse

A common vulnerability of domestic sex trafficking survivors is abuse.[20] For adults, the abuse reported is domestic violence[21] and for minors, it is sexual abuse.[22] Research on this area shows that sexual abuse was the strongest risk factor leading to minor human trafficking: 2.52 times greater risk for girls and 8.21 for boys.[23] Mecklenburg County reflected national data with at least 40.4% of sex trafficked minors having a history of sexual abuse.[24] In the *Statistics for Mecklenburg County, North Carolina* report, Child Protective Services (CPS) reported 13,910

[16] POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 16–18 (July 2018), https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking-Housing-and-Homelessness-Systems.pdf (discussing survey respondents' reports of being homeless or experiencing unstable housing when trafficking situation started).

[17] UNC Charlotte Urb. Inst. *Charlotte-Mecklenburg 2020 State of Housing Instability & Homelessness Report*, MECKLENBURG HOUS. DATA (Sept. 2020), https://secureservercdn.net/166.62.110.60/z4b.66d.myftpupload.com/wp-content/uploads/2020/09/2020-SoHIH-Report_FINAL.pdf.

[18] Monica Landers et al., *Baseline Characteristics of Dependent Youth Who Have Been Commercially Sexually Exploited: Findings From a Specialized Treatment Program*, 26(6) J. OF CHILD SEXUAL ABUSE 692, 692–98 (2017).

[19] *E.g.*, Karen Countryman-Roswurm & Brien L. Bolin, *Domestic Minor Sex Trafficking: Assessing and Reducing Risk*, 31 CHILD & ADOLESCENT SOC. WORK J. 521, 527 (2014).

[20] *The Problem*, SHARED HOPE INT'L, https://sharedhope.org/the-problem/ (last visited Apr. 9, 2022) (explaining that one "vulnerability factor" making an individual more susceptible to trafficking is being abused or neglected).

[21] Pagano, *supra* note 5, at 4.

[22] Andrea N. Cimino, et al., *Child Maltreatment and Child Protective Services Involvement Among the Commercial Sexually Exploited: A Comparison of Women Who Enter as Juveniles or as Adults*, 26 J. CHILD SEXUAL ABUSE 352, 354 (2017).

[23] Joan A. Reid, et al., *Human Trafficking of Minors and Childhood Adversity in Florida*, 107 AM. J. PUB. HEALTH 306, 306 (2017).

[24] Pagano, *supra* note 5, at 5.

cases of child maltreatment and abuse.[25] There were over 1,500 adult and child victims of domestic violence served within the county in 2017 per the *FY17 Community Report on Domestic Violence in Mecklenburg County* report.[26] Both of these reports show individuals in Mecklenburg County who are at risk for domestic sex trafficking due to their exposure to abuse.[27]

Some sex traffickers use the same tactics as the perpetrators of domestic violence;[28] due to comfortability, if an individual has been in a domestic violence relationship, they may be more likely to succumb to sex trafficking when the trafficker acts like a romantic partner.[29] For minors in abusive homes, they may seek care outside of their living environment, and that can come in the form of a sex trafficker.[30] Overall, exposure to abuse, both domestic violence and sexual abuse, has an impact on a person's level of vulnerability to domestic sex trafficking.[31]

3. Child Welfare Involvement

Child welfare encompasses an array of services focused on assisting children with needs and includes government and non-government service providers who assist children.[32] Interaction with the child welfare system is a high-risk factor for domestic sex trafficking.[33] In Mecklenburg County, 42.6% of sex-trafficked youth had child welfare involvement before being trafficked.[34] High involvement with child welfare systems through Child Protective Services (CPS) and the foster care system in Mecklenburg County is evident from the number of CPS reports and the number of children placed in foster care.[35] Similar to homeless situations, when minors are involved with child welfare, they

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[25] *Statistics for Mecklenburg County, North Carolina*, NORTH CAROLINA CHILD WELFARE MEASURES, http://fosteringcourtimprovement.org/nc/County/Mecklenburg/ (last visited Apr. 19, 2022).

[26] FY17 COMMUNITY REPORT ON DOMESTIC VIOLENCE IN MECKLENBURG COUNTY, MECKLENBURG COUNTY COMMUNITY SUPPORT SERVICES DEPARTMENT, https://www.mecknc.gov/CommunitySupportServices/PI/dvi/PublishingImages/Pages/Statistics/2017%20DV%20Data%20Warehouse%20Full%20Report.pdf (last visited April 19, 2022) [hereinafter FY17 COMMUNITY REPORT].

[27] *Id.*

[28] Shannon Drysdale Walsh, *Sex Trafficking and the State: Applying Domestic Abuse Interventions to Serve Victims of Sex Trafficking*, 17 HUM. RTS. REV. 221, 222 (2016).

[29] *Id.*

[30] Monica Landers et al., *Baseline Characteristics of Dependent Youth Who Have Been Commercially Sexually Exploited: Findings from a Specialized Treatment Program*, 26 J. CHILD SEXUAL ABUSE 692, 693 (2017).

[31] Cimino, et al., *supra* note 22, at 355.

[32] *Id.* at 356.

[33] Pagano, *supra* note 5, at 4.

[34] *Id.*

[35] FY17 COMMUNITY REPORT, *supra* note 26.

tend to seek acceptance from someone outside of their caretakers, and traffickers prey on this by providing support.[36]

III. POLICIES AND LEGISLATION

Several federal laws have an impact on domestic sex trafficking in the U.S. 18 U.S.C. § 1591 makes it a federal offense to "knowingly . . . recruit[], entice[], harbor[], transport[], provide[], obtain[], [or] maintain[]" someone under the age of 18 "to engage in a commercial sex act."[37] Under this same statute, it does not matter whether someone knowingly had a child engage in sex trafficking or did so with reckless disregard: their consequences still carry the same weight.[38] It is important to note that when someone is under the age of 18, proof is not required that the trafficker used "force, threats of force, fraud, [or] coercion" to get the child to engage in sex trafficking.[39] Additionally, there are other laws, like 18 U.S.C. §§ 2421 – 2423, that make it illegal to commit other crimes related to the sex trafficking of a minor like transportation across state lines or using various forms of technology to get a child to engage in illegal sexual activities.[40]

For adult survivors of sex trafficking, federal courts must prove that they was "force, fraud, or coercion" into commercial sex for it to be considered sex trafficking.[41] The Victims of Trafficking and Violence Prevention Act (TVPA), introduced in 2000, was "reauthorized and updated" a total of five times and was created to define trafficking on the federal level and fight against trafficking in persons.[42] In addition to the TVPA, the only other major piece of federal legislation for adult sex trafficking survivors is the Mann Act of 1910 which "makes it a felony to . . . persuade, induce, entice, or coerce an individual to travel across state lines to engage in prostitution."[43]

Policies and laws in North Carolina are influenced by national legislation and have a direct impact on confirmed and potential victims of

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[36] Cimino, et al., *supra* note 22, at 366.

[37] *A Citizen's Guide to U.S. Federal Law on Child Sex Trafficking*, DEP'T. OF JUSTICE, https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-sex-trafficking (last updated May 28, 2020).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Fact Sheet: Human Trafficking*, ADMIN. FOR CHILD. & FAMILIES (Nov. 21, 2017), https://www.acf.hhs.gov/otip/fact-sheet/resource/fshumantrafficking; *Policy & Legislation*, POLARIS, https://polarisproject.org/policy-and-legislation/ (last visited Aug. 27, 2022).

[42] *Id.*

[43] *Human Trafficking Laws & Regulations*, U.S. DEP'T HOMELAND SEC. https://www.dhs.gov/human-trafficking-laws-regulations (last updated Jan. 21, 2022).

domestic sex trafficking. The Safe Harbor/Victims of Human Trafficking (GS 14.430-20) law "decriminalizes prostitution-related offenses for minors" and creates a reporting process where every time a child engages in commercial sex, they are placed in the Department of Social Services care.[44] This legislation provides minors with services to prevent them from obtaining prostitution charges that would impact them later in life, however, the research mentioned previously found that the involvement of the child welfare system creates a heightened risk of sex trafficking.[45]

Legislation GS 115C-81(el)(4a) and SL 2019-245 focus on prevention.[46] According to these laws, sex trafficking awareness and prevention must be included in the public school curriculum, and all school personnel are required to go through child sex trafficking training.[47] They also provide good-faith immunity to someone who reports potential child sex trafficking which encourages citizens to report without the fear of legal backlash.[48] Lastly, SL 2019-158 allows survivors of trafficking to sue their traffickers for damages, increases the legal consequences for sex buyers to decrease the demand for sex trafficking, and expands the list of charges that can be expunged off of a trafficking survivor's record.[49] These laws increase access to services, awareness, and education, and decrease demand for sex trafficking.

IV. VULNERABILITY AMONG THE AFRICAN AMERICAN POPULATION

African Americans are impacted by domestic sex trafficking at disproportionate levels.[50] In 2018, African Americans were one of the top three reported racial groups for trafficking reports in the U.S. at seventeen percent, while they are only thirteen percent of the population.[51] During a two-year reporting period, sex trafficking victims were more likely to be female at ninety-four percent and African American at forty percent.[52] For minors, African American and Latino children accounted for almost seventy-eight percent of child sex trafficking cases

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[44] N.C. DEP'T OF ADMIN., WHAT IS HUMAN TRAFFICKING? (2022), https://ncadmin.nc.gov/advocacy/women/human-trafficking/what-human-trafficking#human-trafficking-laws.

[45] Cimino, *supra* note 22, at 353.

[46] N.C. DEP'T OF ADMIN., *supra* note 44.

[47] *Id.*

[48] 2019 N.C. Sess. Laws 2.

[49] *Id.* at § 4.2(a).

[50] CENSUS BUREAU, QUICK FACTS (2020); DEP'T OF JUST., SPECIAL REPORT: CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010 (2011).

[51] CENSUS BUREAU, *supra* note 50; DEP'T OF JUST., *supra* note 50.

[52] DEP'T OF JUST., supra note 50.

that were investigated by the U.S. Department of Justice.[53] In Mecklenburg County, African American minors made up just over seventy percent of minor sex trafficking cases while this population accounts for thirty-three percent of the county's population.[54]

The research discusses the historical context of why African American females may be more vulnerable targets for domestic sex trafficking, and one is the sexualization of African American women.[55] During times of legal slavery, African American women were viewed as property to be sold and used for sex and reproduction.[56] This thinking has continued through generations, and according to today's research, African American teens are viewed as less innocent than their Caucasian counterparts when it comes to sexuality;[57] there is a strong consensus that the media portrays African American females as more sexually aggressive or irresponsible in their sex lives.[58] Additionally, in the U.S., African Americans make up forty percent of the homeless population;[59] African Americans make up seventy-nine percent of the homeless population in Mecklenburg County,[60] and homelessness has been identified as a risk factor for sex trafficking, making African Americans more likely to be exposed to certain sex trafficking vulnerabilities.

V. THEORETICAL FRAMEWORK

Systems theory states there are influences or systems that an individual or a community will interact with that have an impact on how they function.[61] Systems theory has been used to assess the current state of survivor care, and the theory can evaluate domestic sex trafficking risk factors because risk factors can be understood as multiple systems that someone has interacted with.[62] This assists people to identify areas for

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[53] *Id.*

[54] Pagano, *supra* note 5; CENSUS BUREAU, *supra* note 50.

[55] Cheryl N. Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1469–70. (2015).

[56] *Id.* at 1484, 1492.

[57] *Id.* at 1485.

[58] Jeannine Amber, *Our Teens' Secret Sex Lives*, ESSENCE, https://www.essence.com/love/our-teens-secret-sex-lives/ (last visited Apr. 18, 2022).

[59] Andrew Fraieli, *African Americans have Highest Rate of Homelessness in Minorities for a Decade Running*, HOMELESS VOICE (Aug. 12, 2020), https://homelessvoice.org/african-americans-have-highest-rate-of-homelessness-in-minorities-for-a-decade-running/.

[60] UNC CHARLOTTE URBAN INSTITUTE, 2020 STATE OF HOUSING INSTABILITY & HOMELESSNESS REPORT 73 (2020).

[61] CHARLES H. ZASTROW & KAREN K. KIRST-ASHMAN, UNDERSTANDING HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT 23 (10th ed. 2016).

[62] JACQUELYN C.A. MESHELEMIAH & RAVEN E. LYNCH, THE CAUSE AND CONSEQUENCE OF HUMAN TRAFFICKING: HUMAN RIGHTS VIOLATIONS 80–81 (2019).

intervention and prevention efforts in domestic sex trafficking.[63] According to research mentioned previously, several systems like schools, the child welfare system, families, online platforms, hospitals, and mental health services, can make someone vulnerable to entering or reentering sex trafficking if the systems are not functioning properly.[64]

Another theory that coincides with domestic sex trafficking is the Person-Centered Theory. This theory moves away from the thought that professionals, like social workers and therapists, know what is best for a client and move toward the thought that every person wants to and can fulfill his or her potential.[65] A form of care found to be effective when assisting survivors of human trafficking is victim-centered care.[66] This is based on a similar premise to the person-centered theory and addresses the needs of a survivor of trafficking (or other crimes) by making sure that clients are active participants in their care.[67] With at-risk trafficking populations, the person-centered theory can still be used, as literature shows sex trafficking victims have been subjected to crimes like abuse before entering a sex trafficking situation which would call for the victim-centered approach to be enacted.[68]

VI. SPECIALIZED SOCIAL WORK PRACTICE

Domestic sex trafficking prevention efforts exist across the U.S., including Mecklenburg County, North Carolina; however, there is limited research on best practices in the prevention of domestic sex trafficking. Research appears to focus on interventions that address the vulnerabilities that can lead to domestic sex trafficking, like early intervention. Using these existing practices, the development of new evidence-based domestic sex trafficking prevention programs can occur.

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[63] *Id.*

[64] *See generally* Cimino et. al., *supra* note 22, at 354–55, 365–66.

[65] ZASTROW & KIRST-ASHMAN, *supra* note 61.

[66] *Implementing a Victim-Centered, Trauma Informed Program for Survivors of Human Trafficking*, OFFICE FOR VICTIMS OF CRIME (Sept. 24, 2020), https://htcbc.ovc.ojp.gov/sites/g/files/xyckuh311/files/media/document/Q_A_Implementing%20a%20Victim%20Centered%20Trauma%20Informed%20Program%20for%20Survivors%20of%20Human%20Trafficking_508c.pdf.

[67] HUMAN TRAFFICKING TASK FORCE E-GUIDE, OFFICE FOR VICTIMS OF CRIME § 1.3, https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/#:~:text=A%20victim%2Dcentered%20approach%20seeks,role%20in%20seeing%20their%20traffickers (last visited Apr. 20, 2022).

[68] *Sex Trafficking*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/sexualviolence/trafficking.html (Feb. 4, 2022).

VII. BEST PRACTICES LITERATURE REVIEW

The U.S. reported that their prevention efforts increased through educational and training activities for internal personnel and community stakeholders as well as outreach events for at-risk populations, and legal means through harsher penalties for traffickers.[69] Although forms of domestic sex trafficking prevention are being used, there is limited research on evidence-based prevention interventions for domestic sex trafficking. Vulnerabilities of domestic sex trafficking like homelessness, abuse, and involvement in child welfare systems[70] are also some of the vulnerabilities that would be considered Adverse Childhood Experiences, also known as ACEs.[71] ACEs have been connected with involvement in sex trafficking,[72] therefore, programs that address the vulnerabilities mentioned in ACEs, like the Attachment, Regulation and Competency (ARC) Framework and mentoring, may be effective in addressing domestic sex trafficking prevention. Literature shows that early intervention programs, like those with the ARC framework component or mentoring, have positive impacts in decreasing ACEs vulnerabilities that can lead to crimes like domestic sex trafficking.[73]

A. Attachment, Regulation, and Competency (ARC) Framework

The ARC framework is an evidence-based intervention that focuses on three domains in a clinical approach for youth who have experienced adverse experiences leading to trauma: attachment, self-regulation, and competency.[74] This intervention focuses on self-regulation so the child can cope with symptoms of trauma and provides the child with community resources to encourage self-regulation.[75] The ARC Framework also improves the relationship between the child and their caregiving system through family sessions and community resources for the family

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[69] STATE DEP'T, *United States, in* 2020 TRAFFICKING IN PERSON REPORT 515, 515-23 (2020), https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf.

[70] *Understanding Human Trafficking*, POLARIS, https://polarisproject.org/understanding-human-trafficking/ (last visited Apr. 12, 2022).

[71] *Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/aces/fastfact.html (Apr. 6, 2022).

[72] *The Original ACE Study*, NAT. HUM. TRAFFICKING TRAINING AND TECH. ASSISTANCE CTR., https://nhttac.acf.hhs.gov/soar/eguide/stop/adverse_childhood_experiences (last visited Apr. 12, 2022).

[73] *What is ARC?*, ARC FRAMEWORK, https://arcframework.org/what-is-arc/ (last visited Apr. 12, 2022).

[74] *Id.*

[75] *Id.*

as a whole which is the attachment portion of the practice.[76] In several studies, the ARC framework was found to be effective in behavioral and cognitive mental health symptoms for both children exposed to ACEs and their caregivers in various populations like adopted children,[77] youth in the juvenile justice system,[78] and elementary and preschool-age children in high ACEs communities.[79] One study showed that children with ACEs and their caregivers with high stress had improved functioning after the implementation and follow-up of the ARC treatment.[80] The literature identifies the ARC Framework as a key to stopping the development of destructive behaviors in children and an intervention that can change the future trajectory of a child's life.[81]

B. Mentorship

Programs with a mentorship component have a positive impact on childhood ACEs and deter a child's formation of harmful behaviors.[82] One study suggested that having constant interaction with a trusted adult during childhood decreased the impact of the adversities children faced.[83] Literature showed that quality relationships with mentors can assist abused children in using positive coping skills, and no relationship was found between mentoring and children's avoidance of coping skills.[84] Peer to peer mentoring has also shown positive outcomes on mental health symptoms for children who have experienced ACEs as long as the mentor relationships have trust, open communication, and connectedness.[85]

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[76] *Id.*

[77] *About ARC: Research*, ARC FRAMEWORK, https://arcframework.org/what-is-arc/research/ (last visited Apr. 12, 2022).

[78] *Id.*

[79] Cheryl Holmes et al., *A Model for Creating a Supportive Trauma-Informed Culture for Children in Preschool Settings*, 24 J. CHILD FAM. STUD. 1650, 1656 (2015).

[80] *About ARC: Research*, *supra* note 77.

[81] *See* Hilary B. Hodgdon et al., *Development and Implementation of Trauma-Informed Programming in Youth Residential Treatment Centers Using the ARC Framework*, 28 J. FAM. VIOLENCE 679, 690 (2013); *see also* Cheryl Holmes et al., *supra* note 79, at 1652, 1658.

[82] Mark A. Bellis et al., *Does Continuous Trusted Adult Support in Childhood Impart Life-Course Resilience Against Adverse Childhood Experiences - A Retrospective Study on Adult Health-Harming Behaviours and Mental Well-Being*, 17 BMC PSYCHIATRY 1, 10 (2017); *see* Ashley A. Chesmore et al., *Mentoring Relationship Quality and Maltreated Children's Coping*, 60 AM. J. MTY. PSYCH. 229, 238 (2017); *see also* Lesley J. Douglas et al., *Rewriting Stories of Trauma Through Peer-to-Peer Mentoring for and by At-Risk Young People*, 28 INT'L J. MENTAL HEALTH NURSING 744, 753 (2019).

[83] Bellis et al., *supra* note 82.

[84] Chesmore et al., *supra* note 82.

[85] Douglas et al., *supra* note 82.

C. Domestic Sex Trafficking Outreach Prevention Programs in Mecklenburg County

This Author gathered detailed information from six organizations working in Mecklenburg County as part of her work for The A21 Campaign, Inc., a global anti-human trafficking non-profit organization.[86] Three of the organizations had prevention programs.[87] All three used education and awareness prevention to the public and outreach prevention programs that work with populations believed to have a high risk of victimization of domestic sex trafficking.[88] Only one of the outreach prevention programs was identified as an early intervention program and even though this early intervention program addresses all of the ACEs, there is a lack of longitudinal data on the program's ability to prevent domestic sex trafficking from occurring.[89] Two of the programs stated they did not have a prevention program, but they provide education for the community about human trafficking.[90]

This author researched other organizations working in Mecklenburg County that did not directly report to The A21 Campaign, Inc. Of those organizations, seven had prevention programs on their website in the area of education but the education was not listed as human trafficking prevention.[91] Only two organizations listed a prevention

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[86] *Home*, JUST. MINISTRIES, https://www.justiceministries.org/ (last visited Aug, 15, 2022); *Join the Fight*, PROJECT FIGHT, https://www.salvationarmycarolinas.org/projectfight/join-the-fight (last visited Apr. 18, 2022); *Our Solution*, A21, https://www.a21.org/content/our-solution/grdphc (last visited Apr. 16, 2022); *Prevention & Intervention Strategies*, PRESENT AGE MINISTRIES, https://presentageministries.org/prevention/ (last visited Apr. 16, 2022) [*hereinafter* PRESENT AGE MINISTRIES]; *Prevention and Education*, PAT'S PLACE CHILD ADVOC. CTR., https://www.patsplacecac.org/what-we-do/prevention-and-education/ (last visited Apr. 16, 2022) [*hereinafter* PAT'S PLACE CHILD ADVOC. CTR.]; *Sexual Assault Treatment at Atrium Health*, ATRIUM HEALTH, https://atriumhealth.org/medical-services/emergency-services/sexual-assault-strangulation-treatment (last visited Aug. 15, 2022).

[87] PRESENT AGE MINISTRIES, *supra* note 86; *see* PAT'S PLACE CHILD ADVOC. CTR., *supra* note 86; *see also Our Solution*, *supra* note 86.

[88] *Id*.

[89] PRESENT AGE MINISTRIES, *supra* note 86.

[90] Pagano, *supra* note 5, at 5; *Humans Should Never Be For Sale*, PROJECT FIGHT, https://www.salvationarmycarolinas.org/projectfight/ (last visited Aug. 15, 2022).

[91] *See Community Outreach*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about/community-outreach (last visited Apr. 20, 2022); *Prevention Work*, MECKLENBURG CNTY. GOV'T, https://www.mecknc.gov/CommunitySupportServices/PI/Prevention/Pages/Home.aspx (last visited Apr. 20, 2022); *Resource Center*, COUNCIL FOR CHILD.'S RTS., https://www.cfcrights.org/resource-center/#resources (last visited Apr. 20, 2022); *Sexual Trauma Resource Center*, SAFE ALL., https://www.safealliance.org/programs/sexual-trauma-resource-center/ (last visited Apr. 20, 2022); *Battered Immigrant Project*, LEGAL AID OF N.C., https://www.legalaidnc.org/about-us/projects/battered-immigrant-project (last visited Apr. 19, 2022); *Our Mission*, LILY PAD HAVEN, https://www.lilypadhaven.org (last

program specific to human trafficking in the form of legal assistance to victims.[92] Overall, the prevention efforts in Mecklenburg County are reflective of prevention efforts in the United States; there are an array of prevention definitions and very few, if any, mention the use of long-term data for evidence-based prevention practices.

VIII. EMPOWERMENT-BASED SPECIALIZATION DESCRIPTION

A lack of evidence-based practices in the field of U.S. domestic sex trafficking prevention, specifically in early intervention programs, calls for the creation and implementation of an early intervention domestic sex trafficking prevention program that assesses, treats, connects, and supports minors pre-domestic sex trafficking. The intervention would provide qualifying at-risk minor clients and their caregiving systems with trauma-informed clinical services using the ARC framework and connect them with a paid mentor. This intervention incorporates evidence-based practices that address ACEs in children and create a future course void of domestic sex trafficking.

To find appropriate participants, at-risk minor clients should be screened using the ACEs survey in public and private schools as early as kindergarten, hospitals and medical offices, the Department of Social Services, homeless and domestic violence shelters, local directories like 211, and mental health facilities. The program should include bi-weekly meetings with a licensed social worker both individually with the at-risk minor client as well as with the at-risk minor client's caregiving system utilizing the ARC framework. The goal of each meeting should be to focus on providing coping skills of self-regulation for the child and caregiving system and providing them community resources to address needs and further encourage the use of those coping skills. Another goal of the meetings would be to address any issues with attachment between the child and their caregiving system. The program would also include bi-weekly one-on-one time with the at-risk minor client and a paid mentor to engage in activities the client enjoys. This program would continue until the at-risk minor client reaches the age of 18, then services would move to an as-needed basis where the social worker and mentor will contact the at-risk minor client and caregiving system monthly to see if they have a need that must be addressed.

This proposed intervention would address the social work values of service and social justice by helping children in need who encounter

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visited Apr. 19, 2022); s*ee also Human Trafficking Pro Bono Project*, MOORE & VAN ALLEN, https://www.mvalaw.com/pp/flexpage-Human-Trafficking-Pro-Bono-Project.pdf?19813 (last visited Apr. 19, 2022).

[92] *See Battered Immigrant Project*, *supra* note 91: *see also Human Trafficking Pro Bono Project*, *supra* note 91.

ACEs and providing them services to prevent them from domestic sex trafficking[93] which is a social justice issue violating people's rights. Empowerment within and outside the client would be the key empowerment practices highlighted in this proposed intervention. At-risk minor clients would feel empowered to engage in positive coping skills, self-regulation, and positive activities in the community through the skills they learn in the ARC framework. Additionally, at-risk minor clients, their caregiving system, and mentors would feel empowered with one another to work towards a common goal, which is the prevention of domestic sex trafficking.

IX. ENGAGEMENT AND ASSESSMENT

The early intervention domestic sex trafficking prevention program engages at-risk minor clients individually and within their respective communities. Prospective clients would be assessed by a licensed social worker using the ACEs survey to see whether they would qualify for the program based on the number of ACEs they experienced. An ACE score of four or higher has been found to indicate a high risk for toxic stress,[94] so this score would qualify someone for the intervention. Qualifying clients and their caregiving system (parent, guardian, foster parent, treatment facility, etc.) would meet with a licensed clinical social worker to assess their needs linked to ACEs; ACEs include physical, emotional, and sexual abuse, physical and emotional neglect, and household dysfunctions including mental illness, an incarcerated relative, a parent treated violently, substance abuse, and divorce.[95] The program would empower an at-risk minor client through mentors who encourage the client to utilize their strengths, coping skills, and resources to prevent poor behaviors from forming.

X. INTERVENTION AND EVALUATION

To evaluate whether the intervention is effective in the prevention of domestic sex trafficking, longitudinal studies on the reduction of the at-risk minor client's vulnerabilities and lack of entry into domestic sex

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[93] *Read the Code of Ethics*, NAT'L ASS'N OF SOC. WORKERS, https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English (last visited Apr. 19, 2022).

[94] *ACE Screening Clinical Workflows, ACEs and Toxic Stress Risk Assessment Algorithm, and ACE-Associated Health Conditions: For Pediatrics and Adults*, ACES AWARE (Apr. 2020), https://www.acesaware.org/wp-content/uploads/2019/12/ACE-Clinical-Workflows-Algorithms-and-ACE-Associated-Health-Conditions.pdf.

[95] *Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/aces/riskprotectivefactors.html (Jan. 5, 2021).

trafficking would be conducted both during and after the intervention. Since the prevention program's main focus is addressing ACEs and vulnerabilities in children that often lead to domestic sex trafficking, it is important to utilize a tool that assesses these vulnerabilities. The International Justice Mission's Assessment of Survivor Outcomes (ASO) is a validated evaluation tool that assesses individuals on safety, legal protection, mental wellbeing, economic empowerment and education, social support, and physical well-being because these are vulnerabilities that research shows lead to human trafficking.[96] The ASO is completed at the start of an at-risk minor client's services, quarterly during the receipt of the intervention, and yearly post-intervention to determine how successful the intervention is in decreasing the level of vulnerability and prevention of entering domestic sex trafficking.

XI. IMPLICATIONS FOR PROFESSIONAL SOCIAL WORK

A. Intersection with Core Values

An early intervention domestic sex trafficking prevention program encompasses several values of social work. This potential program is at no cost to the at-risk minor client and their caregiving system because the goal is not for the organization running the program to make money, but to provide services to prevent a vulnerable child from entering a domestic sex trafficking situation. An intervention that assists clients with social issues using their skills and knowledge with no minimal expectation of significant financial return is a clear alignment with a social worker's values.[97]

One of the intentions of the potential early intervention program is to prevent a vulnerable population from entering domestic sex trafficking due to their risk factors. An important social work value is that of social justice, where social workers challenge social injustice through efforts of change for vulnerable populations to make sure that members of those vulnerable populations have opportunities that match those around them.[98] A large percentage of domestic sex trafficking victims are African Americans,[99] so this potential intervention must focus on areas with high African American populations. A focus on this population follows social

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[96] *Assessment of Survivor Outcomes: Guidance Manual*, INT'L JUST. MISSION (2018), https://ijmstoragelive.blob.core.windows.net/ijmna/documents/studies/ASO-Guidance-Manual.pdf.

[97] *Read the Code of Ethics*, *supra* note 93.

[98] *Id.*

[99] *See* DUREN BANKS & TRACEY KYCKELHAHN, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010, at 6 (2011); *see also* Pagano *supra* note 5, at 3–4.

work values of social justice because the intervention assists African Americans by decreasing their risk of being disproportionately impacted by domestic sex trafficking.

Relationships are at the heart of the potential early intervention domestic sex trafficking prevention program. The relationship between the child and their caregiving system will be fostered through the ARC framework sessions and long-term consistent relationships will be built between mentors and the child. Social workers understand that relationships built, like the ones in this intervention, can lead to effective change.[100] Instead of forming a relationship where the client obtains all of their support from the social worker, social workers use community relationships through mentors and existing relationships within the client's caregiving system to support the client. The social worker acts as a partner with the client and facilitates positive relationships outside of themselves instead of creating a dependency, which is a value of social work.[101]

B. Ethical Implications

As social workers, there are standards to assist in navigating ethical dilemmas.[102] With the potential early intervention domestic sex trafficking prevention program, several ethical issues may arise. There are a number of ways to combat these issues if they arise. When assisting an at-risk minor client and their caregiving system in the early intervention program, there could be situations where the needs of the minor and the needs of the caregiving system conflict. For example, if an at-risk minor client builds enough rapport with their mentor and reveals they are in a relationship with someone, but this new partner identifies as a gang member, this could pose a potential safety risk to the caregiving system. However, this disclosure allows the mentor to explore with the client why this relationship is comfortable for them and provide resources that may give the same sense of comfort to replace the comfort the client is obtaining from their new relationship.

This situation, and ones similar to it, pose two ethical conflicts. Whose interests and rights are best served: the rights of the client or the rights of the caregiving system? Also, does the mentor need to disclose information to the client's caregiving system or social worker? The prevention program staff and mentors must always remember that their commitment is to the client's care and privacy, not the caregiving system. A social worker's commitment to their client and the client's interest is

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[100] *Read the Code of Ethics*, *supra* note 93.
[101] *Id.*
[102] *Id.*

always primary and unless any incidents would require a staff member or mentor to report incidents of abuse or neglect, the primary client's interests, in addition to their right to privacy, always come first.[103]

Another area where an ethical issue could present itself in the potential intervention surrounds when the client's services should end. From the age of entry to the program to the time the client is eighteen years old, the client and their caregiving system are active participants in the program. After the age of eighteen, the client and their caregiving system are no longer in the program so it would mean bi-weekly social worker meetings would cease, and the mentor will no longer be paid. Due to this service change, there may be a question of whether the mentor and the social worker have a responsibility to continue a relationship with the client after the age of eighteen. Mentors and social workers should follow the social worker's ethical principle of the termination of services. Social workers should end a client's services and their professional relationship if the services they are providing no longer serve the needs or interests of the client.[104] However, a mentor's job may never end, paid or unpaid. Their service to the client is to emotionally support them and talk about life issues that arise; this is something that can continue well after an individual turns 18 years old. Additionally, since domestic sex trafficking is something that does not just target children, it would be best to leave contact between the client, the client's caregiving system, and the social worker, open after the client turns eighteen years old. This way, if the client or caregiving system encounters any issues that may place them in a situation leaving them vulnerable to a domestic sex trafficking situation, they have a social worker who can connect them with appropriate steps and resources that minimize the impact of a potential vulnerability. The transition from bi-weekly contact with the client and caregiving system, to an as-needed service, is something that could be perceived as abandonment on behalf of the client. However, it is the social worker's job as the client reaches the age of eighteen to have consistent communication with the client, outline the new relationship, and explain the benefits of the new relationship in order to mitigate feelings of abandonment.[105]

C. Moving Forward

As prevention programs are developed and implemented, it is important to consider several factors moving forward. Oftentimes, victims and potential victims are viewed as individuals coming from upper-middle-class Caucasian families, which dates back to the "white slavery"

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[103] *Id.*
[104] *Id.*
[105] *See generally id.*

movement.[106] It is important to note that research shows the majority of domestic sex trafficking victims, both adults and minors, are African Americans,[107] therefore prevention programming should not only address the African American community, but also employ active participation from this community in the development of such programs. Furthermore, shifting some, but certainly not all, efforts and funding of domestic sex trafficking prevention programs from education, awareness, outreach, and legal to early intervention could have positive outcomes in preventing individuals from entering domestic sex trafficking situations. Equally as important, longitudinal research on the effectiveness of various prevention programs of all forms would be beneficial in seeing which prevention efforts are most effective in stopping domestic sex trafficking before it starts.

CONCLUSION

Much of the literature covers domestic sex trafficking in the U.S., its vulnerabilities, its legislation, and existing prevention interventions at the national, state, and county levels. It also indicates a clear gap in evidence-based domestic sex trafficking early intervention prevention programs both nationally and at individual state levels, as shown in the case example from Mecklenburg County, North Carolina. Addressing the prevention of domestic sex trafficking and mitigation of further victimization will require clear distinctions in prevention definitions as well as the implementation of and evaluation of evidence-based early intervention programs. Populations like the African American community will remain exceptionally vulnerable to domestic sex trafficking until systemic needs are addressed in the creation and implementation of any actions moving forward.

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[106] Butler, *supra* note 55, at 1489–90.

[107] *See* BANKS & KYCKELHAHN, *supra* note 99, at 5; Pagano, *supra* note 5, at 3–4.


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