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ARTICLES

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MISSION STATEMENT

The Michigan Undergraduate Law Review is the first and only undergraduate legal publication at the University of Michigan. We provide students interested in careers in law, academia, and policy the opportunity to publish long-form articles on topics in legal scholarship.

LETTER FROM THE EDITOR

Dear Reader,

On behalf of the editorial staff and the executive team, I am thrilled to present to you the inaugural edition of the Michigan Undergraduate Law Review.

This semester, the Michigan Undergraduate Law Review went from pure ideation to a fully-formed organization with a coordinated mission, a talented editorial staff, and now, a final product that displays the best of the University of Michigan's undergraduate scholarship in the field of law. I am awed to see this vision realized. This would not have been possible without above-and-beyond contributions from every member of this publication, and the unparalleled commitment of our dedicated leadership team. Without those who took on tasks beyond the scope of their duties on the staff, those who took the drive to suggest and execute creative ideas for the betterment of the journal, and those who spent their late hours researching, creating, and editing content to meet the highest standards, this edition would not be before you today. Its publication is the culmination of hundreds of hours of brilliance, belief, and grit. Every single name on this masthead has earned its place.

It is my honor to present seven articles designed to challenge the reader's assumptions, pique their curiosity, and expand their horizons regarding the field of law and the possible. Their topics range from reflections on HIV criminalization law in the state of Florida, to frameworks for recognizing de facto states with specific regard to the AANES, to a conception of mathematical logic as a vehicle for visualizing legal change. Their variety and breadth reflect the intellectual diversity and vigor of our staff, as well as their genuine commitment to capturing the complexity of today's issues. It is my ardent hope that the experiment in inquisitiveness represented by this inaugural journal, and indeed by this organization's existence, continues to inspire undergraduate legal scholarship at the University of Michigan for generations to come.

Sincerely,

Ashwath Subramanian
Editor-in-Chief, Michigan Undergraduate Law Review

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MINIMIZING LEGAL REDUNDANCY:
An Exploration of Florida's HIV Criminalization Laws

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I. Introduction

In 1981, the United States reported its first cases of human immunodeficiency virus (HIV).[1] In response, state legislatures rapidly enacted laws to criminalize HIV-positive individuals who allegedly exposed others to the virus. The goals of these laws were to control the behavior of positive individuals in hopes of minimizing the spread of HIV.[2] By 1986, the first HIV-specific law was enacted in the state of Florida, and today, 34 additional states have passed laws that criminalize exposing others to HIV.[3] This review will focus on two specific criminalization laws: Florida's revised code § 384.24(2) and § 796.08(5).[4] The first statute (§ 384.24(2)) declares it unlawful for a person with HIV to engage in sexual intercourse without disclosing their disease to a partner.[5] The second statute (§ 796.08(5)) specifically criminalizes offering or soliciting prostitution that is likely to transmit HIV.[6] If a person is found guilty under either law, they will be convicted of a third-degree felony and can face up to five years in jail.[7] This paper will review whether both Florida Statutes § 384.24(2) and § 796.08(5) should be repealed because there are existing legal remedies that achieve justice for victims without further ostracizing marginalized communities. This paper will be structured in three main sections. First, the paper will explain the current Florida laws and their implications. Second, the paper will illustrate how other states with similar HIV laws amended their code in light of new scientific or social understandings of HIV. Additionally, this section will discuss how other criminal and civil laws—not HIV laws—are used to punish offenders in all states. Third, the paper will posit that there are various other legal remedies to take if the person does not intend to transmit HIV. Ultimately, this review will argue that pursuing legal charges based in existing laws instead of ones centered around HIV can support the victim without weaponizing a stigmatized disease against a defendant.

II. An Overview and the Implications of Florida's HIV Laws

The two specific criminalization laws Florida's revised code § 384.24(2) and § 796.08(5) share two key characteristics: neither the transmission of the disease nor the intention to transmit are required for a conviction.[8] First, contraction of HIV is not required for a successful felony conviction. The mere exposure or potential for transmission is enough for a guilty verdict. Second, the law also does not require a defendant to desire that the person exposed contract HIV. It is important to note that a failure to disclose does not immediately constitute an intention to transmit. For example, a person with HIV may not disclose their status but use a condom during

[1]Deanna Cann, Sayward E. Harrison, Shan Qiau, *Historical and Current Trends in HIV Criminalization in South Carolina: Implications for the Southern HIV Epidemic,* 23 AIDS AND BEHAVIOR (2019).
[2]*Ibid.*
[3]*Ibid*.
[4]Florida Code § 381.0041 and § 775.0877 also are laws centered around HIV. The first is about the donation of blood and human tissue. The second explains that in any case in which a person has been convicted of or has pleaded nolo contendere or guilty to, the court shall order the offender to undergo HIV testing. This review solely focuses on the two laws about *direct action* between two individuals that pose risk for transmission. Fla. Stat. § 381.0041 (2022); Fla. Stat § 775.0877.
[5]Fla. Stat. § 384.24 (2022).
[6]Fla. Stat. § 796.08 (2022).
[7]Amira Hasenbush, HIV-CRIMINALIZATION in FLORIDA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV/AIDS (2018) at 6.
[8]Fla. Stat. § 384.24 (2022); Fla. Stat. § 796.08 (2022).

intercourse in hopes of preventing transmission, and still be convicted of a crime. Instead of transmission and intent, the law merely requires a person to know that they have HIV and then fail to disclose this status to a sexual partner.

The Florida law results in a number of dangerous implications as the statutes disincentivize testing, disproportionately impact minorities, and fail to consider modern scientific understanding of the disease.

For a conviction, prosecutors must prove a defendant knew their diagnosis prior to engaging with a sexual partner. This means that a person never tested for HIV cannot be charged under these laws. In turn, Floridians can avoid criminal liability by not getting tested. If the intention of the Florida legislature is to decrease the spread of HIV, the law adds another reason some may choose to avoid testing, counteracting the law's intended purpose.

A review of the prosecutions under this law reveals disparate enforcement of HIV laws in Florida, as it has been used to particularly target African Americans and sex workers. From 1986 to 2017, Florida officials arrested 874 individuals under charges related to HIV.[9] On average, there were 36 HIV-related arrests annually.[10] Black women were overrepresented in these detentions as they made up nearly 25% of those arrested while only comprising 18% of the people living with HIV in Florida.[11] Separate from race, another group largely targeted were sex workers. Recall Florida Section Code § 796.08(5) which specifically focused on prostitution. In Florida, the majority of sex workers are people who identify as female.[12] This may explain why white women are the group most disproportionately arrested under these laws. White women made up nearly 40% of HIV-related arrests but only 4% of Floridians diagnosed with the disease.[13] The disproportionate effects of the application of the law are made worse by the fact that marginalized groups within society are more likely to be affected by HIV. Consider that the rate of Black females living with an HIV diagnosis is 16.5 times that of White females while the rate for Black males is 4.3 times that of White males.[14] Additionally, nearly 75% of men in Florida recently diagnosed with HIV are gay men, which further perpetuates the stigma that HIV is a 'gay disease.'[15] This belief is dangerous in two ways. Firstly, it could cause heterosexual individuals to be less conscious about the risk of HIV, which could in turn lead to lower prevalence of appropriate preventative measures, including testing. Secondly, the LGBTQ+ and Black communities are already victims of prejudicial biases and discrimination. Laws that specifically criminalize HIV could further perpetuate stigmas surrounding these communities.

There is a relatively new medicine for people without HIV to take that significantly reduces the potential for infection. Pre-Exposure Prophylaxis (PrEP) is a medication that, when taken as prescribed, can reduce the risk of contracting HIV from sex by 99 percent.[16] PrEP protects users from contracting HIV by preventing the virus from entering the cell walls of that

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[9]HASENBUSH, *supra* note 7, at 3.
[10]HASENBUSH, *supra* note 7, at 3.
[11]HASENBUSH, *supra* note 7, at 12.
[12]Mike Vogel, *Prostitution: A Florida snapshot*, FLORIDA TRENDS (DEC. 13, 2017), https://www.floridatrend.com/article/23577/prostitution-a-florida-snapshot.
[13]HASENBUSH, *supra* note 7, at 3.
[14]AIDSVU, https://aidsvu.org/local-data/united-states/south/florida/#:~:text=The%20rate%20of%20Black%20males,times%20that%20of%20White%20females, (last visited Apr. 16, 2023).
[15]*Ibid*.
[16]CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html#:~:text=How%20effective%20is%20PrEP%3F,99%25%20when%20taken%20as%20prescribed (Last visited Apr. 14, 2023).

person. With 1.6 million people using PrEP worldwide, only 6 infections have been documented in which the person maintained high adherence to their medication regimen.[17] If someone knew their partner was properly taking PrEP, then their failure to disclose their HIV status—although not technically legally permissible—ought to minimize their liability. Under the current law (the purpose of which is to prevent the spread of HIV), there is no legal difference if the medication is taken. Court cases in which a person exposed to HIV while not taking PrEP are treated identically to those where the person exposed was taking PrEP. However, in the latter scenario, the risk of transmission is nearly non-existent.

Antiretroviral therapy makes transmission between treated partners nearly impossible.[18] If the medication is taken properly, it can reduce the amount of HIV in the body to an extremely low level. In turn, the immune system can continue working properly and prevent the onset of AIDS. The medication ultimately suppresses the viral load, making the virus undetectable. If a person has an undetectable viral load, they cannot sexually transmit HIV to others.[19] Even though there is zero risk transmission, the Florida laws do not explicitly mention this as a defense to the crime. It is not in line with the stated intents of these laws to prosecute someone for engaging in consensual activities which pose no potential for transmission. A person who is HIV-negative and a HIV-positive undetectable person both pose zero risk for transmission. Even so, under the existing law, if the person on medication does not disclose their status, they could hypothetically face criminal charges.[20] The law does not consider the viral load. It merely considers disclosure. Florida law should reflect modern medicine and ensure that someone engaging in consensual activities that pose little to no risk are treated differently under the law.

III. Amending Versus Repealing

In recent years, a number of states with existing HIV criminalization laws have amended their state statutes. These changes came about following conversations about the law's disparate impact and recent medical advances. Consider the following examples in comparison to Florida's:

- In 2022, Georgia Governor Brian Kemp signed Georgia Senate Bill 164 into law, which made the courts require intentional transmission of the disease for conviction. In other words, for a person to receive a felony sentence, they must know of their status and

[17]Report, San Francisco AIDS Foundation, Sixth case of rare PrEP failure reported–here's what to know (October 5, 2018); WORLD HEALTH ORGANIZATION, https://www.who.int/groups/global-prep-network/global-state-of-prep#:~:text=There%20were%20about%201.6%20million,in%20eastern%20and%20southern%20Africa (last visited Apr. 20, 2023).

[18]CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hiv/risk/art/index.html#:~:text=This%20is%20called%20viral%20suppression,called%20an%20undetectable%20viral%20load (last visited Apr. 14, 2023).

[19]*Ibid*.

[20]In the State of Iowa, Governor Branstad signed Senate File 2297 into law making treatment to reduce the possibility of transmission a defense to prosecution. *HIV Criminal Law Reform, Before and After: Iowa, CHLP (2020)*, CHLP: MAKING POSITIVE CHANGE POSSIBLE, https://www.hivlawandpolicy.org/resources/hiv-criminal-law-reform-and-after-iowa-chlp-2020 (last visited Apr. 15, 2023).

intentionally not disclose their status in an active attempt to transmit the disease.[21] Recall that, in Florida, a person does not have to have intent to transmit for a felony conviction.

- In 2017, then-California Governor Jerry Brown signed California Senate Bill 239, making it unlawful for sex workers with HIV to be subjected to felony conviction.[22] Recall that Florida section § 796.08(5) specifically makes a sex worker with a positive HIV status susceptible to felony charges.[23]
- In 2019, then-Michigan Governor Rick Snyder signed Michigan House Bills 1620 and 1621, making it unlawful to prosecute sexual activity that poses little risk for transmission (such as oral sex).[24] Recall that under Florida law, what matters is the failure to disclose, rather than risk of transmission. As a result, people who took proper medication could still hypothetically face prosecution. Furthermore, Florida has pursued other cases which pose minimal threat for transmission, such as biting.

These state legislatures have taken various avenues to lessen the extent to which HIV is criminalized.[25] Although these states (along with some others) have all passed amendments altering their statutes, there remains one legal consistency across all states that have any HIV criminalization laws: people with a positive HIV status can still face prosecution under other criminal or civil laws. In Georgia, people with HIV can face prosecution for aggravated assault.[26] In Michigan, people with HIV can face sexual assault charges.[27] In California, people with HIV can face prosecution for posing a criminal threat (i.e, physical harm resulting in sustained fear).[28] As a result there are existing legal avenues outside of HIV criminalization statutes, resulting in redundancy in the law.

There is value in designing laws to minimize redundancy—writing more efficient laws saves time in already under-resourced court systems. As there are similar counts that can be pursued, it lengthens the judicial process. For example, an individual in Florida can face both a charge under the HIV laws and other applicable laws. Overlapping laws or doctrine can also result in inconsistency between judges, lawyers, and defendants.[29] This could undermine the fairness of a court if two cases with similar facts resulted in wildly different outcomes. By eliminating HIV criminalization laws, there will be clear and distinct legal doctrines applied to

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[21] *HIV Criminal Law Reform, Before and After: Georgia, CHLP (2022)*, CHLP: MAKING POSITIVE CHANGE POSSIBLE, https://www.hivlawandpolicy.org/resources/hiv-criminal-law-reform-and-after-georgia-chlp-2022 (Last visited Apr. 16, 2023).

[22] *HIV Criminal Law Reform, Before and After: California, CHLP (2020)*, CHLP: MAKING POSITIVE CHANGE POSSIBLE, https://www.hivlawandpolicy.org/resources/hiv-criminal-law-reform-and-after-california-chlp-2020 (Last visited Apr. 16, 2023).

[23] MULR makes an effort to ensure legal information is accurate, but the law is often changing. The accuracy of these laws cannot be guaranteed at the time of reading this review.

[24] *HIV Criminal Law Reform, Before and After: Michigan, CHLP (2020)*, CHLP: MAKING POSITIVE CHANGE POSSIBLE, https://www.hivlawandpolicy.org/resources/hiv-criminal-law-reform-and-after-michigan-2020 (Last visited Apr. 16, 2023).

[25] There are also additional states that have taken different approaches as well including but not limited to North Carolina, Illinois and Colorado. *Timeline of State Reforms and Repeals of HIV Criminal Laws, CHLP (updated 2022)*, CHLP: MAKING POSITIVE CHANGE POSSIBLE, https://www.hivlawandpolicy.org/resources/timeline-state-reforms-and-repeals-hiv-criminal-laws-chlp-updated-2022 (Last visited Apr. 16, 2023).

[26] *Supra* note 23.

[27] *Supra* note 25.

[28] *Supra* note 24.

[29] John M. Golden, *Redundancy: When Law Repeats Itself*, 94 Tex. L. Rev. (2016), at 629.

similar cases. Overlaps in criminal statutes tend to place a substantial amount of power in the prosecutors' hands since they have a number of avenues to pursue legal remedies—prosecutors have enormous discretion in choosing what charges to bring.[30] Prosecutors may also "stack" charges, adding to the unpredictability of—for certain types of cases—a fair and predictable system. This imbalance will result in inconsistent prosecution within a respective state. Every state that has amended their HIV criminalization laws retains civil and criminal codes that can be utilized in lieu of these HIV criminalization laws. Other laws can serve the same purpose as HIV criminalization laws without focusing prosecution on a misunderstood and deadly disease. Therefore, this paper will not argue that Florida should amend its laws similar to how other states have. Instead, this paper will illustrate that existing civil and criminal laws can serve the purpose of the judicial process without HIV criminalization laws.

IV. Scenarios

This section will go through six different scenarios of potential HIV exposure. These examples will go through a number of scenarios to consider if the exposure resulted in transmission, if the exposure was intentional, or if the case involved sex workers. The purpose of this section is to demonstrate that, even as the law stands, there are existing Florida codes that can provide meaningful justice in various situations. The redundancy between other code and HIV criminalization will prove that the state of Florida can repeal revised code § 384.24(2) and § 796.08(5) and still achieve justice.

A. Scenario 1: No Sexual Activity

- A man living with HIV was charged after he attempted to bite a deputy while being arrested for shoplifting.[31]
- A 27-year-old woman living with HIV was sentenced to five years' imprisonment after biting a police officer during an arrest.[32]

The Florida Code § 384.24(2), the law states it is illegal to engage in sexual activity in a manner likely to transmit HIV after a previous positive HIV test.[33] The law requires the action to be sexual; however, prosecutors have pursued charges under this statute for biting. Not only is biting not sexual intercourse but scientific evidence suggests transmission of HIV through human bites, although possible, is extremely unlikely.[34] In these cases, the law was abused in an attempt to punish these individuals, and particularly targeted them for having a positive HIV status. Instead, there are existing laws which can be used to prosecute individuals who bite police officers. Consider Florida Code § 784.07: Assault or battery of law enforcement officers.[35] This can serve as a better alternative that allows legal punishment to occur without prosecuting someone on the grounds of having a transmissible disease. Furthermore, a person biting the police officer is most likely acting sporadically, potentially fighting back or resisting arrest. Their action may demonstrate that they intend to harm law enforcement, but it does not appear their

[30] *Id*. at 706.
[31] HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE (February 2022) at 2.
[32] *Ibid*.
[33] Fla. Stat. § 384.24 (2022).
[34] Jeffrey Barrett, *Human Bites,* MEDSCAPE (Mar. 4, 2021).
[35] Fla. Stat. § 784.07 (2022).

reason for retaliation was to spread HIV. Therefore, it is even more appropriate and legally consistent to pursue an assault charge than an HIV-criminalization claim. These examples of prosecuting biting under the HIV law are rare, but they are still permitted under the law. The remainder of this section will address cases that are more common, but can also be solved through existing code. Therefore, regardless of the severity and commonality of these scenarios, all of them can be pursued through different legal means, without HIV-specific laws.

B. Scenario 2: No Transmission, No Intent

- A 52-year-old man diagnosed with HIV was arrested after not disclosing his status to partners, though condoms were always used during sexual intimacy.[36]

As the man used a condom, it is fair to assume that he did not intend, want, or desire to transmit the disease.[37] This is because condoms are highly effective in preventing HIV and other sexually transmitted diseases.[38] However, although the man took legitimate health steps to stop the spread of HIV, the current laws do not take this into account since intent is not required for conviction. Rather than arresting a person on felony charges in cases where there was no transmission and no intent, the victim could instead pursue a negligent infliction of emotional distress claim in Florida. If the court sides with the plaintiff, they will receive economic compensation for their damages.

C. Scenario 3: Transmission, No Intent

- A 38-year-old man was sentenced for not disclosing his HIV status to a sexual partner who later tested positive for HIV.[39]

If the victims contracted the virus they can pursue the aforementioned emotional distress claim. For example, the court can award victims compensation for past or future medical bills. In addition, the loss of wages or financial losses due to the contraction of HIV can also be recovered as compensation from the defendant. Moreover, if a plaintiff can prove damage to their reputation, embarrassment, or physical pain they could receive further compensation.[40] A victim can also pursue a personal injury claim and potentially prove that the defendant acted negligently by failing to disclose their status. The plaintiff would have to prove that the defendant owed them a duty of care (to disclose their status) and failed to do so, directly resulting in harm. This type of claim could even become gross negligence, if the plaintiff wants to prove that not disclosing was a deliberate act of carelessness. This could be pursued under Florida Statute 768.72.[41] The redundancy between other Florida code and HIV criminalization demonstrates that Florida does not need specific HIV laws to achieve justice for the victims.

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[36] *Supra* note 32, at 2.

[37] Condoms are only effective when used properly. As a result, this is a more nuanced scenario. Even with a condom, there is still a potential for HIV. However, the mere decision to use one can be used as circumstantial evidence that the defendant does not have the intention to spread HIV. CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/condomeffectiveness/index.html (Apr. 15, 2023).

[38] CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hiv/risk/condoms.html (Apr. 15, 2023).

[39] *Supra* note 32, at 1.

[40] SUING OVER AN STD: IS IT WORTH IT?, https://www.levineblit.com/blog/suing-over-an-std-is-it-worth-it/ (Apr. 16, 2023).

[41] Fla. Stat. § 768.72 (2021).

D. Scenario 4: No Transmission, But Intent

- A 35-year-old man living with HIV in Florida was charged with attempted murder when he allegedly yelled that he had HIV and threatened to kill a police officer before biting him.[42]

It is important to note that in this case criminal code was already applied. The person who bit the officer was convicted of aggravated battery on a law enforcement officer. The officer did not test positive for HIV, but the prosecution was able to prove that harm occurred because the officer had to avoid intimate contact with his wife for nearly a year. The State of Florida already has precedent for using code without HIV criminalization laws. Furthermore, there is also a potential for a civil claim: intentional infliction of emotional distress. In these claims, four elements must be proven: (1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused the emotional distress; and (4) the distress was severe.[43] The desire to transmit HIV and informing a victim after the exposure of this intent is deliberate, outrageous, and can result in severe emotional distress. Therefore, the victims can receive damages after a person intends to transmit the disease, even if they are not successful.

E. Scenario 5: Transmission and Intent

If someone attempts and is successful in transmitting HIV, there are a number of criminal remedies the court can take, such as charging the individual with sexual assault, rape, or sexual battery. The HIV-criminalization law, if applied as well, will not help to stop the spread of HIV. Instead, a damages claim will help support the victim financially.

F. Scenario 6: Sex Workers

- A 32-year-old sex worker was arrested after allegedly offering to perform a sexual act on an undercover officer for $20.[44]
- A 19-year-old sex worker was arrested after offering to perform a sex act on an undercover police officer. She was charged with offering to commit prostitution and criminal transmission of HIV.[45]
- A 36-year-old woman living with HIV was arrested during an undercover prostitution sting. She was charged with failing to disclose her HIV status to her sexual partners.[46]

In all of these examples, transmission never occurred. Although there was technically a potential for transmission, the sex workers never engaged in sexual acts with the officers. It is also important to note that if a prostitute ends up only performing oral sex, the risk of transmission is extremely low.[47] However, if someone believes these actions should be prosecuted, there are existing legal avenues instead of specifically using a law that targets a disease. Under Florida Statute § 796, there are a number of unlawful acts related to prostitution.[48]

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[42] *Supra* note 32, at 2.
[43] Fla. Stat. § 784.07 (2022).
[44] *Supra* note 32, at 4.
[45] *Supra* note 32, at 4.
[46] *Supra* note 32, at 4.
[47] CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-oral-sex-fact-sheet.pdf (last visited Apr. 22, 2023).
[48] Fla. Stat. § 796 (2018).

Specifically, the law deems it illegal to offer to commit or engage in prostitution. Anyone found in violation of this Florida Statute will be guilty of a felony in the third degree. Recall that this is the exact same degree classification as the HIV-criminalization laws.

V. Conclusion

This paper argued that both Florida Statute § 384.24(2) and § 796.08(5) ought to be repealed, as existing legal remedies already exist to achieve adequate justice for victims without confusing our justice system and further stigmatizing the stigmatized. By limiting redundancy in laws, states will reduce the discretion that prosecutors have when bringing closely-related charges. In turn, this allows for states to have an expectation that similar actions will be punished with similar severity. The civil remedies available allow the victims themselves to pursue charges against the aggrieved party. When civil remedies are pursued, the power is placed back in the hands of the victims. They are able to decide whether or not to pursue a case for damages, instead of the prosecutor. Those community members and people most affected by HIV have the personal choice whether or not to pursue punishment. Additionally, by repealing these laws, prosecutors will be unable to pursue more unreasonable charges including instances of biting or offering to have sex, all with little to no risk of transmission. Instead, the judicial system can prosecute these individuals without relying on their disease. This approach will help to achieve justice without focusing on HIV itself, a disease that already impacts the lives of the defendants.

The Future of "May-Issue" States and Gun Control:
NYSRPA v. Bruen

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Winter 2023

I. Introduction

Courts in the United States are changing the adjudication of Second Amendment challenges, stemming from a recent US Supreme Court case that offers hope to supporters of the right to "keep and bear arms" and creates uncertainty for gun control advocates.[49] On June 23, 2022, the Court decided in *New York State Rifle & Pistol Association v. Bruen* that a longstanding New York State concealed carry licensing law requiring "proper cause" was unconstitutional, after applying a new framework built on *District of Columbia v. Heller* (2008) *and McDonald v. Chicago* (2010).[50] Post-*Bruen,* lower courts will now forgo use of the widely accepted "two-part" test in evaluating Second Amendment challenges and will apply a new "history and tradition" test in its place. Using this new test, courts must now prove that restrictions of firearms outside the home are "consistent with the nation's historical tradition of firearm regulation."[51]

Parts II and III of this case note will discuss the facts of the case, the decision, and the Court's reasoning in *Bruen*—decidedly the Court's most important Second Amendment decision in over a decade.[52] The implications of *Bruen* will then be considered in Part IV, advancing the idea that gun restriction legislation in other "may-issue" states with laws similar to New York's are threatened by the decision, shown by calls to strengthen existing legislation in California and New Jersey. Finally, the paper will analyze implications of the "history and tradition" test put forth by *Bruen* in respect to new case decisions from lower courts, concluding that *Bruen* puts effective gun control legislation across the nation at risk.

II. The Facts of *Bruen*

In the State of New York, the law states that it is illegal to possess a firearm inside or outside of the home without a license.[53] The most common gun licenses New York residents apply for include concealed carry (unrestricted licenses) allowing permit holders to carry a firearm on their person, or premises licenses, which allow license holders to carry a firearm at specified locations such as their home or business.[54] The dispute in the *Bruen* case arose when plaintiffs sought an unrestricted license in order to carry a firearm in public, or outside of the home. The case, *New York State Rifle & Pistol Association v. Bruen* considers a New York law known as Sullivan's Law, which requires law-abiding citizens in pursuit of an unrestricted firearm license to prove "proper-cause" in order to carry a handgun in public. Amended in 1913, Sullivan's Law states that "proper-cause" is attained if a person proves they have a "special need for self-protection" compared to the general population.[55] Therefore, unrestricted licenses for

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[49]U.S. CONST. AMEND. II; THE EDITORIAL BOARD, "THE SUPREME COURT VINDICATES THE SECOND AMENDMENT," *The Wall Street Journal* (Updated June 23, 2022). https://www.wsj.com/articles/vindicating-the-second-amendment-11656024307.

[50]*New York State Rifle & Pistol Association v. Bruen* No. 20-843 (2022).

[51]*Id*. at 2.

[52]Margaret J. Finerty, "The Supreme Court's Bruen Decision and Its Impact: What Comes Next?" *New York State Bar Association* (August 9, 2022). https://nysba.org/the-supreme-courts-bruen-decision-and-its-impact-what-comes-next/#_ednref15.

[53]N. Y. Penal Law Ann. §400.00(2)(f) (2010).

[54] "Apply for a Firearms License," *The State of New York* (Accessed April 16, 2023). https://www.ny.gov/services/how-obtain-firearms-license.

[55]*supra* note 50.

concealed carry in the state of New York were given solely on a "may-issue" basis, requiring the final approval of a government official who determines if "proper-cause" is indeed met.[56] This is in contrast to 43 "shall-issue" states where unrestricted licenses are issued after a person meets the specified criteria for the license.[57] Six other populous states in addition to New York are considered "may-issue" states and enforce similar "proper-cause" standards for concealed carry, such as California and New Jersey. Generally, meeting the "proper-cause" requirement in New York is deliberately difficult, with state officials requiring evidence of "particular threats, attacks, or other extraordinary danger to personal safety."[58]

In *Bruen*, the Court decided that New York's proper-cause requirement was in violation of the Fourteenth Amendment by "preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."[59] The "due process" clause of the Fourteenth Amendment is frequently litigated as it was in *Bruen*, as the first ten amendments of the US Constitution are made applicable to the states through this clause. Through the process known as selective incorporation, the Second Amendment has been fully incorporated to the states as a result of the *McDonald* decision.[60] Therefore, a State can be in violation of the Fourteenth Amendment by violating one's Second Amendment right to "bear arms."

Petitioners Brandon Koch and Robert Nash were two New York citizens whose applications for unrestricted licenses to carry a handgun in public for self-defense were denied due to failure to show proper-cause, according to the State.[61] Subsequently, Koch and Nash, along with the New York State Rifle and Pistol Association, sued the state officials who oversaw the application in 2018, claiming the licensing officials violated their Second and Fourteenth Amendment rights.[62] The United States District Court for the Northern District of New York dismissed the complaint while the Second Circuit Court affirmed the ruling in 2020.[63] Both courts relied on a previous case from the Second Circuit, *Kachalsky v. County of Westchester* (2012), which upheld New York's proper-cause requirement as the law was "substantially related to the achievement of an important governmental interest."[64] The case was then granted certiorari by the Supreme Court in 2021, questioning whether New York's law was constitutional under the Second Amendment.[65]

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[56]*Id*. at 2 (Kavanaugh, J., concurring).
[57]*Id*. at 2124 n.1.
[58]*Id*. at 2125-27.
[59]*Id*. at 2111, 2122.
[60]"Incorporation Doctrine," *Legal Information Institute* (Accessed April 16, 2023). https://www.law.cornell.edu/wex/incorporation_doctrine#:~:text=The%20incorporation%20doctrine%20is%20a,applies%20both%20substantively%20and%20procedurally.
[61]*supra* note 50, at 2124-25.
[62]New York State Rifle & Pistol Ass'n, Inc. v. Beach, 354 F. Supp.3d 143 (N.D.N.Y. 2018), aff'd, 818 F. App'x 99 (2d Cir. 2020), rev'd and remanded sub nom. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).
[63]New York State Rifle & Pistol Ass'n v. Beach, 818 F.App'x 99 (2d Cir. 2020).
[64]Bruen, 142 S. Ct. at 2123 (quoting In re Klenosky, 75 A.D.2d 793 (1980)).
[65]New York State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021).

III. Decision and Reasoning

In a 6-3 decision, the Supreme Court found New York's "proper-cause" requirement to be in violation of the Constitution.[66] In the majority opinion, the six conservative-leaning justices rejected a longstanding test used by lower courts in adjudicating Second Amendment challenges commonly known as the "two-part" test.[67] In the years since the *Heller* and *McDonald* cases, which upheld the right to keep and bear arms for self-defense under the Second and Fourteenth Amendments, lower courts have used a "two-part" test to determine if gun restrictions outside the home violate the Second Amendment. In the first step, courts rely on historical analysis to assess if firearm regulations are protected or not protected under the Second Amendment. In most cases, regulations will be deemed "not categorically unprotected," in which courts will advance to step two.[68] Here, courts apply intermediate scrutiny and question whether the regulation achieves an "important governmental interest," balancing the regulation with the burdening of a person's Second Amendment right.[69]

In *Bruen*, the majority opinion of the Court regarded the "two-part" test as being "one step too many."[70] The Court's issue lies in step two, as analysis of the firearm regulation does not utilize historical context and is based solely on "means-end scrutiny."[71] Based on *Heller* and *McDonald*, the Supreme Court ruled that governments must now prove that their firearm regulations are part of the historical traditions of the Second Amendment. Lower courts will now use this "history and tradition" test when adjudicating Second Amendment challenges and will have to prove that regulations are "consistent with this Nation's historical tradition of firearm regulation."[72]

Under this new test, the Court questioned whether New York's "proper-cause" requirement was consistent with this nation's history, ultimately finding that the law was inconsistent with both the Second Amendment's text and the historical context of its writing, and thus that it failed the "history and tradition" test. After considering historical sources brought forth by the respondents, the Court ruled that the right to concealed carry for self-defense is supported historically, while no other constitutional rights require a show of "proper-cause."[73] The Court also anticipated the respondents' characterization of New York's proper-cause requirement as a "sensitive-place" law, where firearm regulation would be permitted. The respondents defined a "sensitive place" as "all places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available."[74] The Court stated that this definition was too broad, and would cause entire cities to be exempt from Second Amendment protections. Therefore, the Court ruled that New York could not declare Manhattan as a "sensitive place," simply because it was crowded and protected by law enforcement, while firearm regulation could not be permitted as there were no traditions of similar regulations in United States history.[75]

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[66] 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).
[67] *Id*. at 2125-28.
[68] *Ibd*.
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] *Id*. at 2125-27.
[73] *supra* note 52.
[74] 142 S. Ct. 2111 (2022).
[75] *Ibid*.

IV. Analysis and Implications of *Bruen*

The *Bruen* case changes how Second Amendment challenges are adjudicated in courts across the nation, with the constitutionality of gun control legislation falling under a new "history and tradition" test. It is clear that after *Bruen,* gun regulations in many states will need to be altered to ensure public safety with several "may-issue" states attempting to heighten concealed carry licensing requirements. The decision also threatens existing gun control legislation, leaving states to grapple with creating effective legislation that is adequately in line with the nation's history.

A. Responses from "May-Issue" States

The effects of *Bruen* are already being seen in other "may-issue" states with similar "proper-cause" requirements to New York's Sullivan Law for issuing concealed carry licenses. In addition to New York, California and New Jersey are rushing to pass heightened requirements for obtaining unrestricted licenses as well as adding locations to the "sensitive place" law that prohibits the carrying of firearms in sensitive places– all while staying within *Bruen's* confines. The State of New York was the first to alter its laws, responding swiftly to the *Bruen* decision, while other "may-issue" states followed suit.

Only eight days after the *Bruen* decision, New York Governor Kathy Hochul signed the Concealed Carry Improvement Act into law, intending to address issues of public safety, foreseeing increases in the number of people carrying concealed weapons in New York post-*Bruen.*[76] The legislation attempts to decrease the number of firearms in public places by adding many "sensitive locations" where it is now considered a felony to carry a gun in. Some of these locations include but are not limited to, "places of worship; educational institutions; courthouses; federal, state and local government buildings; polling sites; public transportation such as subways and buses; [and] health and medical facilities…."[77] Additionally, the new legislation heightened requirements for issuing concealed carry permits in an effort to replace the "proper-cause" requirement, namely, "four character references, firearm safety training courses, live fire testing, an in-person interview, information on the applicant's former and current social media accounts from the past three years, in addition to background checks."[78] While New York moves to decrease the number of guns present in public spaces, legal challenges to the Concealed Carry Improvement Act are already underway. These lawsuits are challenging the sensitive locations put forth by the legislation, arguing that restricting firearms in these locations would be a violation of the Second Amendment.[79] In *Bruen,* the Court recognized that there were very few locations where firearm carry could be restricted, supported by history, advancing the idea that New York's new legislation would not survive under *Bruen*.[80] However, the Supreme Court allowed New York to continue enforcing the new legislation after challenges to the law rose to the Court. Additionally, the Supreme Court asserted that the challengers can return if the Second Circuit Court does not consider their appeal within a reasonable time frame.[81]

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[76]Finerty, *supra* note 52.
[77]S.51001/A.41001.
[78]*Ibid.*
[79]Finerty, *supra* note 52.
[80]Bruen, 141 S.Ct. at 2133.
[81] Amy Howe, "Court Allows New York to enforce new gun-control law while legal challenge proceeds," *SCOTUSblog* (January 11, 2023).

Along with the State of New York, California took additional measures to strengthen their existing concealed carry laws post-*Bruen* as Governor Gavin Newsom announced the introduction of SB 2 authored by State Senator Anthony J. Portantino to "ensure every Californian is safe from gun violence."[82] The bill would function similarly to New York's by identifying certain sensitive places where concealed carry will be restricted along with the strengthening of storage and training requirements of firearms.[83] This legislation has also elicited challenges in the courts, with the Legislative Director of the California Rifle and Pistol Association stating the law is going to get "challenged and defeated in the courts."[84]

New legislation in another "may-issue" state was already struck down in federal court, as New Jersey's ban on carrying firearms in sensitive places was halted by a restraining order granted to the plaintiffs, stopping enforcement of the law.[85] The Court utilized the "history and tradition" test outlined by *Bruen,* ruling that New Jersey failed to provide a "historical analogue for any of its restrictions."[86] The sense of urgency shown by New York, California, and New Jersey to pass new legislation to counteract the increases in concealed carry firearms in public demonstrates the perceived risks of *Bruen* to long-standing "may-issue" laws in these states. The adherence to "may-issue" laws by these states leads to the question of whether these laws were effective in promoting public safety with regard to gun violence—a question clearly present in the dissenting judges' opinion.

B. The Effectiveness of "May-Issue" Laws

In *Bruen,* the dissenting and concurring opinions of the Court disagreed on whether the impact of "may-issue" laws and guns in general on American society were relevant to the matter at hand. In Justice Samuel Alito's concurring opinion, he argued that the effect of firearms on American society was irrelevant to the case, while the dissenting judges declared that states should be allowed to pass gun restrictions in order to decrease deaths caused by gun violence.[87] The dissenting judges also asked for reports on the effects of "may-issue" laws on crime and violence.[88] It is clear from 14 different studies over the last four years that right-to-carry laws

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https://www.scotusblog.com/2023/01/court-allows-new-york-to-enforce-new-gun-control-law-while-legal-challenge-proceeds/.

[82]"Gov. Newsom, Attorney General Bonta, and Senator Portantino Announce Legislation Strengthening California's Concealed Carry-Laws," *Senator Anthony Portantino: Representing the 25th District* (February 1, 2023). https://sd25.senate.ca.gov/news/2023-02-01/governor-newsom-attorney-general-bonta-and-senator-portantino-announce-legislation.

[83]*Ibid*.

[84]Liz Freutz, "Gov. Newsom backs bill to place limits on where people can carry a gun in public," *ABC7 News* (February 1, 2023). https://abc7news.com/sb2-california-concealed-carry-ca-gun-laws-gavin-newsom/12759930/.

[85]Bernie Pazanowski, "NJ Ban on Concealed Guns in 'Sensitive Places' Stopped by Court," *Bloomberg Law* (January 9, 2023). https://news.bloomberglaw.com/us-law-week/nj-ban-on-concealed-guns-in-sensitive-places-stopped-by-court.

[86]*Ibid.*

[87]"New York State Rifle & Pistol Association Inc. v. Bruen," *Oyez*, (Accessed March 23, 2023). https://www.oyez.org/cases/2021/20-843

[88]Lisa Vicens, Samuel Levander, and John J. Donahue III, "'NYSRPA V. Bruen': Studies Show Direct Link Between Right-to-Carry and Violent Crime Increase," *National Law Journal* (November 4, 2021). https://www.law.com/nationallawjournal/2021/11/04/nysrpa-v-bruen-studies-show-direct-link-between-right-to-carry-and-violent-crime-increase/?slreturn=20230401201846#:~:text=%27NYSRPA%20v.-,Bruen%27%3A%20Studies%20Show%20Direct%20Link%20Between%20Right%2Dto%2DCarry,of%20homicide%20and%20violent%20crime.

such as those in "shall-issue" states are strongly correlated with violent crime.[89] In one study, overall violent crime rates rose 13-15% within ten years of states adopting permissive right-to-carry laws.[90] Additionally, another study found that states with similar laws to New York's "may-issue" law have 17% lower firearm homicide rates in large cities.[91] The growing amount of statistical evidence that supports "may-issue" laws was undoubtedly clear to the dissenting judges, as they wrote in their dissent that the Court's decision to strike down New York's law "severely burdens" states' efforts to decrease gun violence deaths through gun regulations.[92]

C. The "History and Tradition" Test

The *Bruen* decision not only threatens longstanding gun restrictions in "may-issue" states, but fundamentally alters the legal understanding of the constitutionality of gun laws across the United States. Under the "history and tradition" test, any gun law that regulates firearms must be consistent with how firearms were regulated historically, without taking into account any governmental interest in creating the gun law. That being said, use of the "history and tradition" test is not unprecedented, with other landmark decisions such as *New York Times v. Sullivan* (1964) and more recently *Dobbs v. Jackson Women's Health Organization* (2022), relying on similar historical tests invoked by the Supreme Court.[93]

The origin of the "history and tradition" test stems from *Meyer v. Nebraska* (1923), where Justice James Clark McReynolds questioned whether a law aligned with "privileges long recognized as common law."[94] Since then, the "history and tradition" test has been cited by the Court and has subsequently evolved throughout years of Supreme Court decisions, most recently redefining how enumerated rights are consistent with this Nation's history. Issues arise when utilizing historical tradition to evaluate modern laws: defining which parts of history are relevant to a certain right and which are not, how to separate historical analysis from legal reasoning, and understanding that evaluating historical events does not consider *why* an event occurred and only *what* occurred. When using the "history and tradition" test to evaluate Constitutional rights (such as in *Bruen*), courts ought to consider the contemporary context of the Constitution's text rather than simply basing their interpretation on historical understandings.[95]

Regarding Second Amendment challenges, the case *United States v. Rahimi* (2023) quickly demonstrated the immediate consequences of the *Bruen* decision and the "history and tradition" test on a gun law applicable in Texas, Louisiana, and Mississippi.[96] In *Rahimi,* the Fifth Circuit Court struck down a federal law prohibiting individuals from "possessing a firearm while under a domestic violence restraining order," by directly applying the "history and tradition"

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[89]*Ibid*.

[90]John J. Donahue, Abhay Aneja, and Kyle D. Weber, "Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis," *Journal of Empirical Legal Studies* 16 no. 2 (June 2019) at 198-247. https://doi.org/10.1111/jels.12219

[91]Michael Siegel, Benjamin Solomon, Anita Knopov, Emily Rothman, Shea W. Cronin, Ziming Xuan, and David Hemenway, "The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States, 1991-2016," *The Journal of Rural Health* 36, no. 2 (Spring 2020) at 255-265. https://doi.org/10.1111/jrh.12387

[92]"New York State Rifle & Pistol Association Inc. v. Bruen," *supra* note 87

[93]376 U.S. 254 (1964); 142 S. Ct. 2228 (2022).

[94]262 U.S. 390 (1923)

[95]Erwin Chemerinsky, "History, Tradition, the Supreme Court, and the First Amendment", 44 Hastings L.J. 901 (1993). Available at: https://repository.uchastings.edu/hastings_law_journal/vol44/iss4/7

[96]United States v. Rahimi, No. 21-11001 (5th Cir. Jun. 8, 2022).

test.[97] The law was considered unconstitutional under the Second Amendment, noting that the ban on possessing firearms was an "outlier that our ancestors would have never accepted."[98]

In another case in West Virginia, a federal judge ruled that federal bans on owning a gun without a serial number was unconstitutional under the Second Amendment, citing that the law was not consistent with historical traditions of firearm regulation as serial numbers were not widely used until 1968, placing them outside of historical tradition.[99] The number of plaintiffs filing suit against states' gun restrictions around the nation are rising, clearly showing that *Bruen's* impact is here to stay.

V. Conclusion

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court did much more than simply strike down a century-old New York State law that required citizens to show "proper-cause" to obtain concealed carry licenses—the Court fundamentally altered the way Second Amendment challenges will be adjudicated around the nation, for years to come. As courts use the "history and tradition" standard to replace the *Heller* and *McDonald's* "two-part" test, evidence-supported gun control laws are now threatened by legal challenges and countless revisions in order to align with "historical traditions of gun restrictions." Courts, legislators, lawyers, and scholars alike now have a novel, uncertain path to take in supporting gun control legislation that works to save lives. The consequences of the *Bruen* decision will be felt around the nation, as states continue to rework gun control legislation in an era marked poignantly by fatal gun violence.

[97]Marcia Coyle, "Analysis: How a Supreme Court ruling led to the overturning of a guns and domestic violence law," *PBS News Hour* (February 8, 2023).
https://www.pbs.org/newshour/politics/analysis-how-a-supreme-court-ruling-led-to-the-overturning-of-a-guns-and-domestic-violence-law

[98]*Ibid*.

[99]Brendan Pierson, "Ban on guns with serial numbers removed is unconstitutional- U.S. judge," *Reuters* (October 13, 2022).
https://www.reuters.com/legal/ban-guns-with-serial-numbers-removed-is-unconstitutional-us-judge-2022-10-13/

Preventing the Death of the Kurdish Polity in Syria:

An Expanded Concept of De Facto Statehood under International Law Applied to the AANES

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I. Introduction

In 2012, the Kurdish-majority provinces of northeastern Syria began to establish independent institutions and declared autonomy within greater Syria. Today, the Autonomous Administration of North and East Syria (AANES)—formerly and colloquially referred to as Rojava—is caught in an impossible bind between the Turkish and Syrian states.[100] These twin threats are facilitated by a legal problem: the tension between de facto statehood in the AANES and the lack of legal protections for its existence, prompting questions about self-determination under international law.

Since 2016, Turkey, officially the Republic of Türkiye, has increasingly taken part in border clashes, carried out drone strikes, and made threats to invade northeastern Syria.[101] Throughout 2022, Turkish President Recep Tayyip Erdoğan made multiple threats to invade the region and oversaw 130 drone strikes.[102] Since late 2022, the AANES has been warning its population of imminent Turkish invasion.[103] At the same time, the AANES has been cornered into a Faustian bargain with the Syrian government. To ensure protection from a Turkish invasion, the AANES reached a deal with the Syrian government in 2019 which allowed for a Syrian army presence in the AANES's northern territory.[104] The Syrian government has maintained that it has authority over the region, and there has been no substantive movement toward an integration of the AANES as an autonomous region. Thus the AANES is threatened by Syrian recontrol of the state, meaning an end to autonomy.

The entity which has now become the AANES emerged as a Kurdish "third force" between Bashar al-Assad's Syrian government and its oppositional forces during the early Syrian Civil War. Starting in 2012, Kurdish communities in the north began to militarily organize themselves under the Democratic Union Party (PYD) into People's Protection Units (YPG).[105]

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[100]The name of this Kurdish-majority autonomous region of Syria is contested and has changed over time. The region is most commonly known as "Rojava," as this was its original title and is still used among some activists. "Rojava" implies Western Kurdistan and thus emphasizes the Kurdish identity of the polity. The name was officially changed to "The Autonomous Administration of North and East Syria" in 2016. This paper will use this latter name to recognize the ethnic and religious diversity of the polity. *See* Harriet Allsopp & Wladimir van Wilgenburg, THE KURDS OF NORTHERN SYRIA (2019), at 89.

[101]Throughout the Syrian Civil War, Turkey has carried out multiple operations in northern Syria. Ostensibly, Turkey's interest in the region is related to its wider national security concerns in the ongoing Turkish-Kurdish conflict. Eastern Turkey is populated by a Kurdish minority and is home to the militant Kurdistan Workers' Party (PKK), with which Turkey has a longstanding conflict. Turkey has emphasized ties between the PKK and AANES' military arm, the YPG, to justify such operations. *See* Megan A. Stewart, "What's at stake if Turkey invades, again," MIDDLE EAST INSTITUTE (2022), https://www.mei.edu/publications/whats-stake-if-turkey-invades-syria-again.

[102]Gregory Aftandilian, "Syrian Kurds Are Hoping for, but Not Banking On, Continued US Partnership," ARAB CENTER WASHINGTON DC (2023). https://arabcenterdc.org/resource/syrian-kurds-are-hoping-for-but-not-banking-on-continued-us-partnership/.

[103]Hogir Al Abdo, "Syria's Kurds express concerns over possible Turkish attack," AP NEWS (2022). https://apnews.com/article/islamic-state-group-europe-middle-east-syria-turkey-2303d841e1d0db909354fbe5adb0f422.

[104]Throughout much of the war, the AANES has called for the federalization of Syria and has maintained a non-aggression pact with the state. In 2019, the Syrian Democratic Forces—the military coalition of the AANES, in which the YPG is a primary component—struck a deal with the Syrian state, thereby installing a Syrian Army presence in the region. *See* Tom Perry & Rodi Said, "Russia takes part in talks between Syria and Kurdish-led SDF," REUTERS (2019), https://www.reuters.com/article/uk-syria-security-turkey-kurds-damascus-idUKKBN1WS0MQ.

[105]The north Syrian Kurds did not originally imagine themselves as carrying out a revolution but instead as ensuring their own protection in the conflict between Assad's forces and the opposition. Their mobilization into militant forces that began organizing political structures only occurred in the second and third year of the war. *See* Michael

In July 2012, the YPG took control of three Kurdish majority regions—Kobanî, Dêrîk, and Afrîn—establishing competing institutions that are broadly incompatible with Syria's state.[106] Nonetheless, the AANES administrative institutions have declared "autonomy" rather than independence.

This case embodies the unresolved tension between de facto self-governance and the rights of states. The distance between the realized operations of the AANES as an autonomous government, and the lack of protections given to such an entity, means that the risk of the AANES's destruction along with its claims to self-determination are legitimized under international law.

Thus, the departure point of this paper is a legal defense of the AANES's existence as an autonomous region. To gesture toward a resolution of this problem in the case of the Autonomous Administration of North and East Syria, I propose a codification of the concept of *de facto statehood* within international law as the best defense. This paper will first discuss the concepts of statehood and personality under international law; second, it will explore the tensions between these concepts and will demonstrate the threat to de facto states; third, it will propose an expansion of the concept of de facto statehood; and finally, it will apply this to the case of the AANES.

II. Background: Concepts in International Law

To approach the rights of the AANES under international law, this paper chooses to focus on the concept of statehood. Previous studies of greater Kurdistan under international law have focused on concepts such as autonomy, secession, and self-determination.[107] Although the latter is also focused on in this paper, the principle of effective statehood is the main method of asserting the rights of the AANES as outlined here. This is because the AANES is particular among Kurdish movements, both having extensively established governmental institutions *and* being unrecognized.[108] To discuss the legal denial of the AANES' existence despite its longstanding institutions, the concepts of statehood and recognition must be explored.

Knapp et al., REVOLUTION IN ROJAVA: DEMOCRATIC AUTONOMY AND WOMEN'S LIBERATION IN SYRIAN KURDISTAN (2016), at 49-59.

[106] *Ibid*.

[107] Regarding Iraqi Kurdistan and the application of "secession," *see* Dylan Evans, "The Kurdish Quest for Independence and the Legality of Secession under International Law," WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW (2020). Regarding Iraqi and Syrian Kurdistan and the application of "autonomy", *see* Loqman Radpey, "Kurdish Regional Self-rule Administration in Syria: A new Model of Statehood and its Status in International Law Compared to the Kurdistan Regional Government (KRG) in Iraq," JAPANESE JOURNAL OF POLITICAL SCIENCE (2016).

[108] *Ibid*. Greater Kurdistan spans over Turkey, Iraq, Iran, and Syria. Kurdish nationalist movements vary across these countries, and each has a different legal condition. In Iran and Turkey, the Kurdish movements do not exert any governmental control and are largely viewed as terrorists. The Kurdistan Regional Government in Iraq is the most similar to the AANES in its establishment of legitimate governmental institutions but is recognized as an autonomous region of the Iraqi state. Thus, the question of de facto statehood is specific to the AANES.

A. Statehood and Effective Sovereignty

The AANES is a particular category of political entity—or *polity*—in the international system.[109] It can be categorized as a *de facto state*.[110] Fundamentally, this concept describes a polity that has a monopoly of government institutions over a territory—thus having established a state in political science terminology—and yet is not internationally recognized, thus not fulfilling the criteria to be a de jure state under international law.[111] The "state" in international law is a functional concept: a state is a state because it has been recognized as such by other already established states in the world system. Beyond this element, there are legal criteria according to which an entity should be recognized as a state. The 1933 Montevideo Convention on the Rights and Duties of States established the internal conditions in which statehood is asserted: "the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."[112] It has been previously asserted by some legal scholars that upon fulfillment of these criteria, existing recognized states are obligated to recognize the newly established state.[113] This is however not an established principle within international law. Legal states are thus defined by two traits: internal sovereignty and external sovereignty. De facto states meet the requirements defined at Montevideo to assert internal sovereignty, but do not have legal recognition and thus are not accorded external sovereignty under the law.

For the de facto state, internal sovereignty is gauged according to the principle of effective statehood. Effectiveness, as used here, is the principle that there is normative legal significance to factual conditions: in other words, that facts should have bearing upon law.[114] Thus, de facto state attains the status of effective statehood because it factually fulfills the criteria outlined in Montevideo. In Sergo Turmanidze's study of de facto states in terms of effectiveness, the author concluded that "the principle of effectiveness fulfills … a normative

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[109]I choose to use the term "polity" to describe a territorial body that organizes itself politically. Other language is used across the law such as "self-determined territory" or "body politic." The term "polity" is used for brevity and to connect to the term "policide" to describe all political entities, including states, empires, federations, counties, etc. This use is captured in United States law by the definition of "body politics" as "a group of citizens organized of the purpose of exercising governmental function." *See* Uricich v. Kolesar, 132 Ohio St. 115, 5 N.E.2d 335 (1936).

[110]Other legal concepts may be used to describe the case of the AANES, for example, national liberation movements or autonomy. An explication of all such concepts, however, is out of the scope of this paper. I have preferred to highlight de facto statehood because of my own interest and little attention given to this category under international law.

[111]The difference between the concept of statehood in international law and social science poses confusion in this paper's use. Under international law, "statehood" refers to the constrained concept of those polities who have been recognized by other members of the world system. In social science, "statehood" is concerned with the factual existence of a central governmental apparatus in a region. This conception is summarized by Ernst Gellner, for example, who writes that "the 'state' is that institution or set of institutions specifically concerned with the enforcement of order … the state exists where specialized order-enforcing agencies, such as police forces and courts, have separated out from the rest of social life." *See* Ernest Gellner, NATIONS AND NATIONALISM (1983), at 4.

[112]Montevideo Convention on Rights and Duties of States art. 1, Dec. 12, 1933, 165 L.N.T.S. 19.

[113] *See* Hersch Lauterpacht, "Recognition of States in International Law," THE YALE LAW REVIEW (1944). Lauterpacht's assertion of this claim although a normative interpretation of international law is based upon legal precedent.

[114]Effectiveness was in fact the principle by which territorial matters were evaluated in classical international law,i.e., pre-1945. Effectiveness is the legal principle that material facts should or do inform the law. In summary, "in the analysis of unlawful territorial situations in international law, the term effectiveness recalls … the material part of a certain situation." *See* Enrico Milano, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL (2006), at 21.

function which guarantees that the *de facto state*, not enjoying the full international legal personality applicable *erga omnes*, does not 'develop' into legal nullity."[115]

Because of this discrepancy in law-fact interaction, de facto states are not afforded the same protections afforded to de jure states under international law because they do not have the international legal personality of de jure states. Scott Pegg writes that "by definition, the *de facto* state lacks juridical standing in the society of states."[116]

B. The Value of International Legal Personality

While de facto states *may* be granted recognition "in spite of the lack of formal diplomatic relations," this does not mean that they are naturally endowed with the personality of states. For example, in *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1923), the United States granted sovereign immunity to the Soviet government even though it was unrecognized as a state by the US.[117] However, this case also demonstrated that some kind of legal recognition is required for the extension of states' legal rights. In the absence of any such recognition, a de facto state is not granted the same rights as de jure states under international law. The state thus derives certain rights and responsibilities from its international legal personality. Importantly for this paper, the principles of territorial integrity and self-determination are reserved solely to de jure states through this process. No other international entity receives such rights. Territorial integrity implies the protection of any state from another actor's infringement of its territorial control.[118] Self-determination, in its most constrained scope, implies the right of any state to control its form of government from outside influence.[119]

III. Problem: De Facto States and Policide

The fundamental issue that de facto states face is that they cannot unambiguously claim international personality. They are not endowed with statehood even if they may in reality organize themselves like any recognized state. There is no existing body of law that unambiguously endows these polities with many of the rights provided to states, and thus it will be assumed here that they do not have these rights.

Specifically, because they have no right to territorial integrity, de facto states face the threat of *policide*.[120] If a de facto state's "mother state" takes military action according to the

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[115]Sergo Turmanidze, STATUS OF THE DE FACTO STATE IN PUBLIC INTERNATIONAL LAW (2010), at 383.
[116]Scott Pegg, INTERNATIONAL SOCIETY AND THE DE FACTO STATE (1998).
[117]Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138, N.E. 24 (1923).
[118]Olivier Corten, "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law," LEIDEN JOURNAL OF INTERNATIONAL LAW (2011).
[119]The principle of self-determination is stated in the UN Charter and has been interpreted as a right through a number of General Assembly Resolutions and cases. For example, *see* UN General Assembly, "Declaration on the Granting of Independence to Colonial Countries and Peoples" (1960) . However, the actors who may claim self-determination are disputed but generally restricted to existing states and secessionist movements under colonial regimes. *See* Zubeida Mustafa, "The Principle of Self-Determination in International Law," THE INTERNATIONAL LAWYER (1971). Generally, the right of non-colonial states to territorial integrity is theoretically and practically understood as outweighing the potential right of other actors to self-determination—if such a right can even be said to exist in international law. *See* Michael M. Gunter, "Self-Determination or Territorial Integrity: The United Nations in Confusion," WORLD AFFAIRS (1979).
[120]The term "policide" is frequently confused with "politicide;" these definitions are even used interchangeably by some academics. "Politicide" indicates the mass murder of individuals subscribing to a particular ideology. *See*

legal rules regarding the use of force—asserting self-defense and avoiding crimes against humanity—they may legally reassert control over the de facto state's territory, thus destroying it as a polity. UN Charter 7(51) states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[121] Per UN Charter 2(4), the threat to a state's territorial integrity by the existence of a militarily organized de facto state fulfills the criteria for legal use of force by a mother state based on self-defense.[122] Furthermore, as long as an outside state follows the same norms and coordinates with the mother state, they too may legally destroy the de facto state as a polity. The threat of policide does not mean the right by any state to destroy the *people* of a de facto state: international law still governs this scenario.[123] Rather, the threat of policide is the possibility that a de facto state's institutions, organization, and rights in their present configuration are eliminated by a hostile party. Policide is the primary legal predicament and threat facing any de facto state and particularly the AANES.

A. Application to the AANES

The AANES complies with the definition of de facto statehood: effective statehood and nonrecognition. It also faces the legitimate threat of policide. The AANES effectively fulfills all four criteria of statehood outlined at Montevideo. By the notion *ex factis jus oritur*—that there is or should be a law-creating nature of facts—this is significant. Regarding criterion (a), the AANES is currently populated by between roughly 2 million and 4.25 million permanent inhabitants.[124] Regarding (b), the administration of the AANES is tied to a generally fixed region. Although the exact borders of the AANES have changed over time by virtue of the region's civil war, this criterion only implies reference to a state's territoriality.[125] The AANES *is* fixed upon a territory in northeastern Syria. Regarding (c), the AANES, as discussed above, has established effective governance over northeastern Syria through a democratic confederalist system and

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Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia*, 93. "Policide," though, indicates the destruction of a polity. This is typically used to discuss the state of Israel; former Israeli Prime Minister Benjamin Netanyahu claimed credit for this term. "I think I coined this phrase "policide," which is the destruction of a state [or polity], and [Yasser Arafat] meticulously pursues by promoting a cult of suicide." *See* Benjamin Netanyahu, "Former Prime Minister Benjamin Netanyahu Addresses Congress," CNN, http://www.cnn.com/TRANSCRIPTS/0204/10/se.02.html. I use the same definition as Netanyahu in this paper but attempt to recover the concept from the cynical use by many Israeli statesmen and intellectuals.

[121]United Nations Charter, ch. 7, art. 51, https://www.un.org/en/about-us/un-charter/chapter-7.

[122]United Nations Charter, ch. 2, art. 4, https://www.un.org/en/about-us/un-charter/chapter-7.

[123]Although the domestic law governing a de facto state is disputed, all norms *jus cogens* are universal and thus apply to the territory of a de facto state. All atrocity crimes are generally understood to have *jus cogens* standing. The argument being expressed here is not that recognized states have the legal ability to commit atrocity crimes against the population of a de facto state—which is explicitly not the case—but that they have the legal ability to destroy the polity or specific political configuration of a de facto state. For more on the role of international norms in de facto states, *see* Christopher Waters, "Laws in Place That Don't Exist," DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY (2006).

[124]This first estimate is outdated—being written in 2006—but is frequently cited. *See* Jordi Tejel, "Les Kurdes de Syrie, de la 'dissimulation' à la 'visibilité'?", REVUE DES MONDES MUSULMANS ET DE LA MÉDITERRANÉE (2006). This second estimate comes from the AANES' official estimation, although it includes the population of regions claimed by the administration but currently occupied by Turkey including Afrîn. *See* "Regional Administrations," AANES GOVERNMENT, https://aanesgov.org/?page_id=394.

[125]Alfred van Staden & Hans Vollard, *The Erosion of State Sovereignty: Towards a Post-territorial World?,* in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Gerard Kreljen et al., 2002).

several specialized committees (analogous to ministries).[126] Regarding (d), the AANES possesses a Foreign Relations Office authorized to represent the government in international relations. The AANES has both engaged heavily with non-governmental organizations and has hosted recognized states' delegations.[127] Concerning political recognition, the AANES has not yet reached any recognition that would qualify the endowment of international legal personality. In 2021, the AANES invigorated relations with foreign states, meeting delegations from Russia, Sweden, France, Denmark, the US, and Finland.[128] Belgium also pledged to seek recognition of the AANES in 2022.[129] Although these are good signs for the AANES' recognition, the only formal recognition provided as of the writing of this piece has been from the autonomous region of Catalonia in 2021.[130] In fact, global powers have been deliberately avoiding recognition of the AANES. For example, in 2019, European Union representatives declared that "any recognition in the national sense of the word is of course not on the agenda. The territorial integrity of Syria is fundamental."[131]

Secondly, the AANES is legitimately threatened by policide as defined above. As demonstrated in the paper's introduction, the AANES is threatened by destruction both from its mother state, Syria, and a hostile external state, Turkey. Both states have the military capacity to either occupy or reassert control over the region. Since Turkey is also hostile to Syria, an operation to occupy the AANES would not be prosecuted on the grounds of the AANES's policide but instead on Turkey's use of force against Syria: thus, although somewhat different from the logic provided above, the AANES suffers the legitimate threat of policide by twin forces.

These conditions help to make the case for the AANES's consideration as a de facto state and further demonstrate that it does suffer from the threat of policide. The specific predicament facing the AANES may be clearly illustrated through a series of premises and conclusions:

P1.1. De facto states do not have the legal standing of recognized states nor their rights under international law;
P1.2. Recognized states have the particular rights to territorial integrity and legal sovereignty under international law;
C1.1. De facto states do not have the right to territorial integrity or legal sovereignty under international law

[126]Michael Knapp & Joost Jongerden, "Communal Democracy: The Social Contract and Confederalism in Rojava," COMPARATIVE ISLAMIC STUDIES (2016).
[127]Regarding NGOs, *see* "Explainer: NGOs in North and East Syria – political and humanitarian obstacles," ROJAVA INFORMATION CENTER (2020), https://rojavainformationcenter.com/2020/08/explainer-ngos-in-north-and-east-syria-political-and-humanitarian-obstacles/.
[128]Akram Barakat, "2021… Year for Political Recognition of AANES," ANHA HAWAR NEWS AGENCY (2021), https://www.hawarnews.com/en/haber/2021-year-for-political-recognition-of-aanes-h28236.html.
[129]Rahaf Youssef, "Belgium seeks recognition of AANES – Belgium envoy to Syria," NORTH PRESS AGENCY (2022), https://npasyria.com/en/79517/.
[130]Hoshang Hassan, "Catalan parliament recognizes AANES as a political entity," NORTH PRESS AGENCY (2021), https://npasyria.com/en/66487/.
[131]Mose Apelblat, "EU condemns Turkey again while sticking to its position on the Kurdish administration in north-east Syria," THE BRUSSELS TIMES (2019), https://www.brusselstimes.com/all-news/eu-affairs/84361/eu-condemns-turkey-again-while-sticking-to-its-position-on-the-kurdish-administration-in-north-east-syria.

∴ De facto states are at threat of policide as long as hostile states follow rules on the use of force;

P2.1. The AANES is a de facto state;
P2.2. The AANES is at threat by Turkey and Syria;
C2.1 The AANES is at threat of legal policide

That the AANES is under threat of policide is injurious to international society at large for a number of *normative* reasons. The most important of these is the discrepancy between the inexistence of the AANES as a legal personality with enforceable rights and the AANES's effective sovereignty over its inhabitants. This is a problem from the perspective of a rational legal system: in the case of the AANES, legal effectiveness is not fulfilled. Beyond the positive operation of existing international law, there is no ontological difference between the potential destruction of the AANES from any recognized state. From the perspective of social science, the AANES *is* a state. The aspirations of its citizens and their relationship to its institutions are no different from a citizen of any state. It is only by arbitrary legal rationalism that the AANES as a polity is thrown to the wayside and recognized states are not. Of secondary importance are issues based more upon value judgments. Firstly, the right of self-determination enumerated in international law is too constrained when regarding normatively legitimate claims such as the AANES's. If one takes the moral assertions of self-determination made in the Wilsonian moment seriously, then it is wrong for the Kurdish-majority polity not to claim the right of self-determination. Secondly, from the position of the betterment of global society, I contend that the AANES is a valuable experiment in ecology, economics, feminism, and democracy that should be defended.[132]

IV. Proposal: An Expanded Concept of De Facto Statehood

The threat of policide is not particular to the AANES but appears when any de facto state faces a hostile mother or external state able to use the rather flexible concept of self-defense as a pretense for military action. However, de facto states face varying levels of recognition and integration into the world system.[133] The inconsistency between the integration of these de facto states is not based on these states' generally equal standing regarding effective sovereignty and claims to self-determination. Rather, because recognition is a political action, discrepancies across the integration of de facto states are based on their varying conditions and the political interests involved. This means the protection and recognition of de facto states are not based on effective statehood or legitimate claims to self-determination but on political maneuvering. De facto states thus need a legal mechanism that is able to provide protection in reference to the principle of effectiveness but that does not result in political disruption.

[132]This statement is made *personally* in reference to the social revolution in the AANES. Considering critiques of liberal democracy and democratic backslide among many states, I am inspired by the AANES' implementation of a direct democratic system governed through local councils; considering the economic and environmental crises endemic to and produced by core states, I am personally inspired by the AANES' implementation of PYD's "Social Economy Plan" and "social ecology"; and amongst continuing social oppressions throughout the world, I am inspired by the AANES' ideological basis in feminism and implementation of joint women's councils for all mixed-gender institutions. For more on the AANES' social revolution, *see* Michael Knapp et al., REVOLUTION IN ROJAVA: DEMOCRATIC AUTONOMY AND WOMEN'S LIBERATION IN SYRIAN KURDISTAN (2016).
[133]Nina Caspersen, UNRECOGNIZED STATES (2012), at 18-20.

A. A De Facto State Mechanism?

A possible solution which balances these dangers and the de facto state's aspirations is to carve out a mechanism in international law or organizations specifically for the treatment of the de facto state. The form this could take—institution, court, or legal process—or how such a mechanism could be implemented is not the concern of this paper. Rather, I demonstrate here a solution to the contradictions presented in international law thus far. The proposed de facto state mechanism (hereinafter referred to as "the DFSM") should contain the following features:

- Solely juridical powers and no political powers, akin to the International Court of Justice
- Membership composed of legal experts
- Power to extend the temporary right of territorial integrity to unrecognized states based on the fulfillment of three criteria: (a) effective statehood, factually satisfying the guidelines outlined in Montevideo; (b) a legitimate *moral* claim to self-determination (not breaking international norms except of course secession and territorial integrity);[134] and (c) the threat of policide
- Ability for foreign relations ministries of de facto states to invoke the DFSM through international bodies

Such a DFSM negotiates the political interests of recognition by placing the endowment of a right to territorial integrity—and thus protection from policide—not in the hands of politically-minded states but an impartial legal mechanism. The implementation of a DFSM only makes it *illegal* for states to infringe on a de facto state's territorial integrity for a temporary period. Furthermore, no recognized state is required to take a diplomatic stance against the mother state by recognizing the de facto state.

Further, this proposal ensures the protection of de facto states with legitimate claims to self-determination but does not create barriers to action against de facto *rogue states*.[135] In the context of Syria, the Islamic State at one point also established what might be considered a de facto state.[136] No matter one's attitudes toward states' use of force, it would be a difficult case to make that there should be greater barriers towards any actor's offensive against IS's "territorial integrity." This problem is addressed by the second criterion of the DFSM, which provides certain discretion for members to be refused temporary protection based upon the failure to meet international norms.

A form this may take is the embedding of the DFSM within the International Criminal Court. Thus, a state's violation of extended territorial integrity would be prosecutable as a crime of aggression. But an application to the ICC demonstrates once again the difficulties in imagining DFSM or a solution suitable to the legal problems facing the de facto state. This is because the ICC itself is dependent upon states for all of its functions outside of the juridical, for

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[134]The Islamic State during the Syrian Civil War at one point fulfilled many of the criteria provided at Montevideo. However, it was also characterized by "contempt for international norms, persecution of [its] own population, and the export of disorder." *See* Noah Benjamin Novogrodsky, "Is ISIS a State? The Status of Statehood in the Age of Terror," BERKELEY JOURNAL OF INTERNATIONAL LAW (2018). Some recognized states engage in the same behavior but criteria (b) of the DFSM would allow rejection of appeals to territorial integrity upon noncompliance to international norms.

[135]The term "rogue state" has primarily been used polemically by national security focused authors and politicians. For example, regarding Iran and North Korea, *see* "At U.N., Trump Singles Out 'Rogue' Nations North Korea and Iran," THE NEW YORK TIMES (2017), https://www.nytimes.com/2017/09/19/world/americas/united-nations-general-assembly.html. However cynical this use is, there is such a category of states and de facto states that by nature abuse their citizens. I rely upon this term out of ease.

[136]*supra* note 134.

example, arrest. That is, the court has a certain political basis.[137] However, as an application to the ICC also demonstrates that no matter the still-existing level of political maneuvering, the DFSM increases the ability of de facto states to appeal to the wider international community in a legal capacity.

B. Application to the AANES

This mechanism would function for any de facto state fulfilling its requirements e.g. the AANES. Thus, the AANES could have its territorial integrity defended without any "great power" staking its own diplomatic relations with Turkey or Syria. It has already been discussed that the AANES is characterized by effective statehood and the threat of policide, thus fulfilling criteria (a) and (c) of the DFSM. Regarding criterion (b), I contend that the AANES certainly demonstrates a commitment to international norms and self-determination. On self-determination, the AANES is a Kurdish-majority entity. It seems just that the Kurds should have their de facto state recognized on the grounds of self-determination.

Providing a mechanism whereby the AANES' territorial integrity is legally defended for a period of time would be essential to protect it from the threat of policide. Under the current ambiguity regarding who is endowed with self-determination, no matter the law, the AANES has no authority to assert its own claims to territorial integrity. The actions of a potential Turkish invasion or Syrian reclamation are very unlikely to be prosecuted—at least on grounds of destroying the AANES. Thus, the DFSM provides one solution, among a limited set, to immediately resolve the threat of policide and protect the AANES.

V. Conclusion

This proposal—the creation of an independent international mechanism for de facto states—is admittedly fantastical: its proposal and implementation are not likely to happen, and its application to the AANES would likely occur beyond the threat of its policide. However, this fantasy demonstrates the need for creativity in international law when approaching de facto states.

As demonstrated by this paper, the AANES suffers the legal threat of disappearance as a political entity. While the AANES may be legally defended on several grounds, none of these can so unambiguously protect the AANES' territorial integrity. This paper has focused on the concept of de facto statehood in addressing the AANES to illuminate the difficulties facing unrecognized political entities in a state-based legal regime. The implementation of a de facto state mechanism is one way to solve this issue, though it is admittedly implausible. Creative thinking to solve this problem that faces unrecognized polities, however, is necessary for resolving outstanding issues surrounding self-determination and statehood. Moving beyond theorizing, the fate of millions of individuals committed to their state institutions, just like any people, is in the hands of a preoccupied international law. For its part, the AANES represents a novel response to 21st-century political, ecological, and economic crises. Its experiments in women's liberation, direct democracy, social ecology, and communitarian economics supplement the failures of many core states, including Western liberal democracies. The potential destruction of the AANES within completely legal auspices would deprive the globe of a shining light amidst the crisis.

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[137]Steven C. Roach, "How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy," GLOBAL GOVERNANCE (2013), at 507-508.

Applicability of Preemptive Strikes to Humanitarian Strategy

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I. Introduction

War and conflict are two of the forces that dominate the 21st century world. Despite efforts after World War II to limit military aggression, conflicts have persisted. Conflicts have largely moved away from the traditional model of two nation states' professional armies (known as "symmetric warfare") to a more asymmetrical model in which a large, organized army is in conflict with a smaller force dispersed throughout a region. These smaller forces are typically insurgencies or terrorist groups organized around a certain cause, whether political or ideological, and often have little regard for civilian lives in their attacks which frequently target civilian centers.[138] As a result, humanitarian issues have become more of a pressing concern for countries that deal with these insurgents or terrorists. Conflicts with these smaller groups have become far more prevalent over the past century, as traditional symmetric warfare fades and asymmetric warfare becomes more common.[245]

However, the Russian invasion of Ukraine in early 2022 has reintroduced symmetric warfare to the world stage. As one of the largest and most aggressive symmetric wars in the past fifty years, this war has created dilemmas in international accountability, primarily the enforcement of international law. This is especially concerning based on the causes that Russia has used in justifying its military invasion. Drawing upon the United Nations' principle of "Responsibility to Protect," Russia has justified its invasion on the basis of protecting ethnic Russians from discrimination in foreign countries. Beginning in 2008 with the Russian invasion of Georgia, Russia cast ethnic Russians in post-Soviet bloc countries as a marginalized community that needed military and political assistance from Russia against Eastern European governments.[139] The right to protect relies on three pillars: first, a state's responsibility to protect its civilian population from mass atrocity crimes; second, international responsibility to support other states in meeting this goal; and third, internationally *legal* action under the foundational United Nations Charter.[140]

Russia's invasion of Ukraine represents a return to Cold War strategies of growing a sphere of influence throughout the world. In particular, Russia's recent consideration of adopting a strategic policy of preemptive strikes signals future imperialist ambitions.[141] This policy would include developing weapons systems that would allow Russia to hit an adversary's strategic targets with precision-guided weapons anywhere in the world within one hour.[142]

Russia's potential weapons policy raises important questions. What are the implications for expansive and far-reaching preemptive strike capabilities? How do they tie into Russia's assertion of humanitarianism? How will it fit into their imperialist ambitions? Based on Russia's military objectives, preemptive strikes as a matter of military strategy have become significantly

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[138]George R. Lucas, ETHICS AND MILITARY STRATEGY IN THE 21ST CENTURY: MOVING BEYOND CLAUSEWITZ (New York: Routledge, 2019), at 132.

[139]Heather Ashby, "How the Kremlin Distorts the 'Responsibility to Protect' Principle." *United States Institute of Peace.* (Published April 7, 2022). https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle.

[140]"What Is R2P?" *Global Centre for the Responsibility to Protect* (October 13, 2022). https://www.globalr2p.org/what-is-r2p/.

[141]Aamer Madhani and Tara Copp. "Putin Says Russia Could Adopt US Preemptive Strike Concept." *Associated Press News* (Published December 9, 2022). https://apnews.com/article/putin-moscow-strikes-united-states-government-russia-95f1436d23b94fcbc05f1c2242472d5c.

[142]*Ibid.*

more important in examining international conflicts and politics. Examining preemptive strikes' role in expansionist policies that seek to broaden existing country's borders is critical to analysis of future military conflicts. The majority of legal scholarship and research on this topic has sought to determine the implications for preemptive strikes in international aggression, and to delineate the existing international law and precedent related to it.

This article will assert that preemptive strikes are a useful tool of humanitarianism (albeit in a way that is more aligned with international law) as it allows countries to quickly and decisively respond to military crises before they can cause humanitarian crises. Section II will explain what preemptive strikes are in depth, clarifying some common misconceptions of how they tie into military strategy through the use of historical examples. This section will also set up necessary information to examine international law cases on this topic. Section III will discuss Just War Theory, how it fits into international law, and how preemptive strikes fit into the military ethics discussion of self-defense. Following this, Section IV will employ these concepts while examining three separate cases from the International Court of Justice, the UN Charter, and existing frameworks as they apply to preemptive strikes and their usage. As preemptive strikes are a form of self-defense, much of the international law that will be examined deals with self-defense and its legality under the UN Charter, and what constitutes legal self-defense. Section V will synthesize these cases into a framework for examining preemptive strikes, and answer the question of their potential usage as a humanitarian tool. Finally Section VI will conclude by examining implications of this argument and the usage of preemptive strikes.

II. Preemptive Strikes: Definition and Description

The idea of "attack first, ask questions later" has strong roots in modern conflict—whether striking critical centers to harm another country in preparation for a war, or as a means of preventing a future conflict. As it relates to preemptive strikes, this idea is often wrong. The decision to preemptively strike another country involves considering a variety of factors, including the violation of sovereignty, retaliation for a previous attack, and the breaking of international law. However, it is necessary to first understand *what* a preemptive strike is before understanding its implications. A preemptive strike is defined as a military operation or series of operations to begin a conflict with an enemy.[143] This is often confused with preventive war, which is a war that a country initiates when it believes that attack by another party, while not imminent, is inevitable, and that if it does not initiate conflict first then it will be attacked or invaded.[144] Preemptive strikes are often a part of preventive war and usually refers to the very first strike in both preventive wars *and* wars of aggression. Essentially every preventive war includes a preemptive strike, but not all preemptive strikes are part of preventive wars. The difference comes down to a matter of exigency, and scope. As a matter of exigency, preemptive strikes are much more time-sensitive, but are smaller in scope than preventive wars. Strikes are intended to cripple an essential part of military infrastructure, or to drastically harm morale of an opposing country. Wars on the other hand, are intended to wholly eliminate a threat to a country before the opponent's military capabilities have been built up enough to constitute a major threat.

[143]Barry Strauss, "Preemptive Strikes and Preventive Wars: A Historian's Perspective." *Hoover Institution* (Published August 29, 2017).
https://www.hoover.org/research/preemptive-strikes-and-preventive-wars-historians-perspective.
[144]Stephen M. Walt, TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO US PRIMACY (New York: W.W. Norton, 2010), at 224.

Both preemptive strikes and preventive wars have had several examples in world history. In regard to preemptive strikes, one of the most commonly used examples is the 1967 "Six-Day War" between Israel and the coalition of Egypt, Jordan, and Syria. In 1967, Gamal Abdel Nasser, the President of Egypt, based on advice from the Soviet Union, closed the Straits of Tiran (a major shipping lane to Israel) and mobilized his army.[145] After years of anti-Israel rhetoric, these sudden measures convinced the Israeli government that an attack was imminent, resulting in them committing a preemptive strike against Egyptian air bases.[146] In this instance, the preemptive strike was considered by the Israeli government to be a response to an act of war, and it was intended to preempt Egypt's military strategy, which was largely based in the use of airpower. In terms of preventive wars, an example is the Russo-Japanese War of 1904, when Russia and Japan's expansions into Korea made it clear that war was going to break out. For both countries, delaying would only allow the other to build up military capabilities, making a conflict more prolonged.[147]

III. Just War Theory

Although armed, battlefield conflict has become less common relative to asymmetric warfare, the theories of why countries go to war and why they engage in conflict continue to hold true in military theory. One such theory is the Just War Theory (JWT). This theory gives conditions for two aspects of a conflict: 1) whether the involvement in a conflict is justified (*jus ad bellum*), and 2) whether the conduct of an actor (country, organization, terrorist or insurgency group) is just within the conflict (*jus in bello*). As this article focuses more on the rationale for committing preemptive strikes, it will focus on the tenets of *jus ad bellum*. The explanations below will discuss the dimensions of *jus ad bellum* and *jus in bello* most relevant to the discussion and analysis of Just War Theory.

A. Tenets

i. Just Cause

This simply mandates that the country going to war must have a just cause. This commonly refers to self-defense, but variations on the tenet like humanitarian intervention exist as well. This clause is important in analyzing the UN Charter, as aggressive wars for territorial gain or to destroy another country are not considered just.

ii. Right Intention

The idea of this clause is that a nation conducting war should do so for the right reasons, such as self-defense. This relates strongly to just cause of war, but can be subject to more moral and cultural relativism as ideas of right intention can vary from state to state.

iii. Proportionality

This idea relates more to the response of a country to an aggressor or an attack, or any perceived slight. This response must be proportional to the incident which prompted it. For instance, if Country A attacks Country B, Country B, in its response, can only resolve that specific conflict and (on the assumption of victory) cannot annex Country A's territory, as that is effectively beyond the scope of the war.

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[145]"Arab-Israeli War of 1967." *U.S. Department of State*.. Accessed March 28, 2023. https://2001-2009.state.gov/r/pa/ho/time/ea/97187.htm.

[146]*Ibid*.

[147]"The Treaty of Portsmouth and the Russo-Japanese War, 1904–1905." *U.S. Department of State*. (Accessed March 27, 2023). https://history.state.gov/milestones/1899-1913/portsmouth-treaty.

iv. Last Resort

War as a course of action must only be committed to after all other diplomatic options have been resolved. This is to discourage war from being a more common option for states, and to encourage more diplomatic resolution of conflicts.

Examining Just War Theory is critical to understanding broader international law. The Just War Theory has been highly prevalent in international law and plays a major role in the decision process leading up to war, and by extension influences the arguments surrounding preemptive strikes. Looking at preemptive strikes as fulfilling the last resort, or as being proportional to any provocation from another country, frames such strikes in an ethical and legal context, which helps those analyzing the topic and decisions to see from the eyes of those committing preemptive strikes and going to war. This is especially critical in this article, as it seeks to examine preemptive strikes through a humanitarian lens, aside from conventional military aggression.

IV. International Precedent: Case Law

This section will analyze the critical factors surrounding international law and case law precedent regarding preemptive strikes. Specifically, it will examine three questions: 1) what self-defense is; 2) what its relation to international law is; and 3) whether this relationship includes preemptive strikes.

When analyzing international law, one of the most critical documents to examine is the UN Charter. In the context of defense and security, the UN Charter in Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) refers to the UN Security Council in responding to threats against the peace.[148] Articles 39, 41, and 42 affirm the right of the Security Council to both determine the existence of any threat to peace and to take any action, both non-military and military-based, against the perpetrator of conflict in this situation.[149] However, Article 51, the most critical one to discussions of defense by any one country, states that:

> Nothing in the present charter can impair the right of individual or collective self-defense if an armed attack happens against a UN member, until the Security Council has taken measures necessary to maintain international peace and security.[150]

As much of international law affirms the idea of sovereignty and protects each country's right to it, this article essentially affirms the right of any country to respond to attacks on their sovereignty. In relation to concepts from Just War Theory, this article primarily relates to the principle of last resort, just cause, and right authority. As self-defense is sanctioned by the United Nations and is determined by the sovereign, the right authority clause is fulfilled. The principles of Last Resort and Just Cause in the JWT rely on the idea of retaliation and self-defense, and a proper reason for conducting military activities. Clearly, in relation to the UN Charter and Just War Theory, self-defense is fully permitted under international law, at least until such time as the full Security Council is able to take action.

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[148]United Nations. 1945. Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51).
[149]*Ibid.*
[150]*Ibid.*

This sanction of self-defense is affirmed in *Nicaragua v. US* (1986), a case in the International Court of Justice that is particularly influential in discussions of preemptive strikes.[151] In this case, the United States funded paramilitary and insurgent groups in Nicaragua (such as the Contras group), and also carried out attacks by land, air, and sea against Nicaragua in the early 1980s on behalf of El Salvador, Guatemala, and Costa Rica.[152] Later Nicaragua filed a case against the United States, claiming that it had committed aggressive actions that were in breach of the UN Charter and prohibition against aggressive conflicts.[153] The United States justified its military operations under the principle of collective self-defense, claiming that prior attacks by Nicaragua against the three aforementioned countries led to the United States being called on to act against Nicaragua.[154] The US cited Article 51, saying that it was acting on the inherent right of self-defense. This essentially left the Court to determine the answers to two questions: 1) whether an attack occurred (examining what constitutes an attack, and whether it happened), and 2) whether the actions taken by the US, supposedly in self-defense, were legally justified as a matter of collective self-defense. The Court found that the United States had violated Nicaragua's sovereignty through aggressive military actions and operations, and was required to pay reparations for the violation.[155] This decision negated the reasoning of self-defense that the United States used because the Court ruled that the United States' motivations were more political than altruistic to justify a collective self-defense argument. As the excuse of self-defense permits actions which would ordinarily be unlawful, the removal of the excuse left no doubt that the United States was in the wrong.

There were two significant precedents set by the *Nicaragua* case. The first is in terms of defense. The Court ruled that the "exercise of right of self-defense is subject to [the] state concerned having been the victim of an armed attack." Essentially, it established that the state that retaliates in self-defense should have been the one harmed.[156] In this situation, that could have been El Salvador or any of the other countries, but not the United States. Along with this reasoning the Court determined that while an armed attack would give rise to entitlement to collective-self defense the use of force to a lesser degree, such as funding and supplying armed groups, would not.[157] To put this in context, under this reasoning, Israel could have retaliated for armed attacks against it across the border from Syria and Jordan in the 1967 Arab-Israeli War, but the United States can't intervene in Nicaragua on behalf of El Salvador as the US was not directly involved in the conflict.

The second precedent that came out of the *Nicaragua* case was explicitly about preemptive strikes. In its ruling, the Court stated that it "expresses no view on lawfulness of a response to imminent threat of armed attack," essentially taking no stance on preemptive strikes whatsoever.[158] However, Judge Schwebel, one of the presiding judges on this case, wrote in his dissenting opinion that "it can be assumed that the court's judgment in Nicaragua might have an interpretation of inferring that a state may react in self-defense, only if an armed attack occurs."[159] This creates a persuasive argument that the *Nicaragua* case really only permits

[151]"Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States"), [1986] ICJ Rep 14.
[152]*Ibid.*
[153]*Ibid.*
[154]*Ibid.*
[155]*Ibid.*
[156]*Ibid.*
[157]*Ibid.*
[158]*Ibid.*
[159]*Ibid.*

self-defense *after*, and not before, an armed attack.[160] Overall, within the *Nicaragua* case, collective self-defense was upheld as a practice but with a high standard of armed attack that must be cleared for it to be internationally permissible. This permits humanitarian intervention only after an armed attack has occurred, as discussed in the introduction to this paper according to Responsibility to Protect principle, but *Nicaragua* denied a preemptive operation to intervene on behalf of a marginalized minority.

The conflict between the permissibility of self-defense before and after an armed attack creates a need to look at existing frameworks for preemptive strikes, specifically the Caroline Test. This test was created by then-Secretary of State Daniel Webster, and was named after a US steamer boat in the early 1800s that was destroyed by the British during the Canadian Insurrection. This legal test established a way of looking at the legality of preemptive strikes through the three criteria of necessity, proportionality, and immediacy.[161]

The necessity criterion states that the preemptive strike must have a significant exigence. For example, in the 1967 war between Israel and Egypt, the USSR falsely reported the possibility of an attack, and then President Nasser took provocative actions, like forcing UN peacekeepers out of the Sinai and closing the Straits of Tiran, both of which were highly provocative moves that came after hawkish rhetoric from Egypt. Therefore, the subsequent strike by Israel was necessary based on the likelihood of Egyptian aggression.[162]

The proportionality criterion, borne out of the incident with the *Caroline*, is similar to the Just War Theory in its framing. This relates to the idea that any perceived slight must be proportional to the incident which caused it.[163] For instance, if Egypt was making harsh statements and causing damage to Israel's economy by closing off the Straits of Tiran prior to the 1967 war, Israel's response must be proportional to the actions taken, such as economic embargoes or sanctions. However, there are very few proportional responses beyond rhetoric, as much of the necessity for preemptive strikes is mostly made up of either a) smaller attacks by guerilla or insurgent groups funded by another country (see *Nicaragua*), b) harsh hawkish rhetoric against the other country, or c) moving troops. Striking an opposing country certainly classifies as disproportionate under this test, yet may be justified in situations where there is a high likelihood of attack by the opposing country.

Finally, the immediacy criterion of the Caroline Test says that a preemptive attack should take place while the threat is still ongoing. In the context of Israel and Egypt, this means that a preemptive strike by Israel should occur while Egypt is moving troops and undertaking these "pre-war" actions. However, if the threat is a number of different actions with a reasonable expectation that they were going to continue, the international community should view the immediacy of the self-defensive action in the light of those acts as a whole.[164] The idea behind the immediacy test is to prevent attacks being done in revenge or retaliation for past actions: the action of preemptively striking must be done in self-defense, with a high necessity for it.

A separate case that illustrates this idea of preemptive strikes being in self-defense is *Iran v. United States* (2003), also known as the *Oil Platforms* case, in the International Court of Justice. In this case, Iran alleged that the destruction caused by several warships of the United

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[160]Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J.14, 181 (June 27) (dissenting opinion of Judge Schwebel).
[161]Adam P. Tait, "The Legal War: A Justification for Military Action in Iraq," 9 Gonz. J. Int'l L. 96 (2005).
[162]Leo Van den hole, "Anticipatory Self-Defence Under International Law," AM. U. INT'L L. REV. NO. 1 (2003), at 99-101. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1160&context=auilr.
[163]*Supra* note 244
[164]*Id at 104-105*.

States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a breach of international law.[165] Iran argued that only self-defense that is justified by Caroline is permissible under international law, and preemptive military action associated with deterrence and retaliation do not constitute lawful self-defense.[166] Though the Court did negate the United States' self-defense argument, it invalidated Iran's push for reparations on a commercial basis as the oil rigs were under construction and thus inoperable at the time.[167] However in terms of Iran's security argument, which the Court agreed with, issues within the proportionality test render Caroline difficult to fulfill, as very few to no preemptive strikes would pass even the proportionality test, rendering humanitarian strikes all but impossible.

A final case that is important to examine is *Congo v. Uganda* (2005) in the ICJ, a case with strong similarities to *Nicaragua*. The case dealt with an attack by Uganda on the Congo, which Uganda claimed was self-defense, alleging that the Congolese government had been allegedly funding Ugandan rebel groups and providing them with safe haven (strikingly similar to *Nicaragua*). To prove this, they advanced two criteria: 1) direct participation of the state in action of armed groups which would amount to attacking the other state, and 2) the state;s lack of control over armed groups on its territory, which makes the state harboring such armed bands open to self-defense a self-defense claim under Article 51.[168] The difference between this case and *Nicaragua* is that it discusses a singular actor acting in its own self-defense, rather than as part of a collective action. Congo countered this argument by saying that Uganda's use of force in response does not meet the requirements of proportionality or necessity under Caroline. Congo claimed that Uganda believes that it is permissible to turn to military force as a more readily available option rather than first exhausting diplomatic negotiations, violating the necessity criteria.[169] This also directly contradicts the Principle of Last Resort clause of the Just War Theory, and in Caroline could violate the necessity test. Additionally, the attack by Uganda was seen by the Congolese as disproportionate to the allegation that Congo was funding armed groups in Uganda.[170] At the time, the Congolese state was still experiencing sectarian violence and fragmentation from the Second Congo War, in which this case originated.[171] Therefore, the possibility of diplomatic resolution was difficult with the Congolese government lacking full control of the state. In the end, the ICJ found Uganda guilty and required it to pay reparations to Congo for the military misconduct and war crimes it had committed.[172] This meant Uganda's attack in alleged self-defense was not valid under international law, implying that self-defense itself must be a last course of action undertaken by countries, otherwise following the Caroline necessity test.

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[165]Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6) (Reply and defense to counter-claim, submitted by Islamic Republic of Iran).
[166]*Ibid.*
[167]*Supra* note 248
[168]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), [2005] ICJ Rep 168 (2005)(Verbatim record 2005/12, translation).
[169]*Ibid.*
[170] *Ibid.*
[171]Center for Preventive Action, "Conflict in the Democratic Republic of Congo | Global Conflict Tracker." *Council on Foreign Relations* (Updated April 25, 2023) .. https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo.
[172]*Ibid.*

V. Framing and Argument

The International Court of Justice of preemptive strikes consistently used the Caroline Test in these three cases as a metric to determine the legality of the strike. However the Caroline Test itself has significant limitations. As identified earlier, the proportionality criterion in particular is problematic as it proscribes virtually any strike by a state, no matter how necessary or immediate the action was needed. As a metric, the Caroline Test is flawed. It is based on the Just War Tradition (drawing inspiration from it regarding necessity, immediacy, and proportionality), but the Just War Tradition was created in a time of symmetric conflict and traditional warfare that rarely involved preemptive strikes.[173] As such, as a legal framework it is unable to account for the nuances of the circumstances that preemptive strikes are used in. The proportionality standard that it creates is virtually impossible for states to fulfill in any definition of what preemptive strikes are, or their usage. Additionally, as pointed out earlier, in the *Oil Platforms* case Iran argued that preemptive military action associated with deterrence and retaliation cannot be counted as lawful self-defense, and only self-defense that is justified by Caroline is permissible under international law. This is problematic because Caroline in and of itself is flawed, and under Iran's argument no preemptive strike would be permissible, negating its possible use for humanitarian reasons.

But why is it important to look at preemptive strikes in a humanitarian lens? As previously seen, asymmetric warfare has become one of the dominant forms of warfare in the international community. One factor is regional conflicts which have created areas of land where government control has been eroded, and paramilitary and terrorist organizations or insurgent groups have taken control. For example, the 1980s civil war in El Salvador caused instability in the region and led to the creation of the FMLN, just as the 1982 invasion and withdrawal of Israel into Lebanon allowed for the rise of Hezbollah.[174] Military interventions by the Soviet Union and United States in Afghanistan and Iraq respectively have also provided power vacuums which were opportunities for the Taliban and then ISIS respectively to gain greater control. These paramilitary and terrorist groups create significant instability, which often lead to forced displacement and human rights crises; thus, it is critical for countries that have the resources to act to be decisive in preventing instability from growing, which preemptive strikes allow for. With growing instability and autocracy throughout the international community, being decisive in military action is essential to preventing prolonged asymmetric conflicts that lead to human rights violations and refugee crises.

These conflicts are becoming more common in the international community. As discussed earlier, conflicts (primarily asymmetric ones but symmetric as well) create instability within countries that increases displacement as well as persecution of marginalized communities. Additionally, wider trends like climate change, and its ability to create global catastrophes, have a strong likelihood of creating instability in countries that negate a government's ability to administer its countries. This gives the chance for local militias or terrorist groups to take power in areas where government control is weakest, increasing humanitarian issues of persecution and displacement. Ultimately, this creates a necessity for decisive military action that decreases the likelihood of a prolonged conflict while balancing the humanitarian needs of a population.

[173]The Just War Tradition refers to the full range of historical and political context associated with the Just War Theory.

[174]Mazen Kurdy, "The Israeli Military's Key Relationship to Hezbollah Terror," Electronic Theses and Dissertations, 2004-2019 (University of Central Florida, 2011), https://stars.library.ucf.edu/etd/1861/

Humanitarianism is fast becoming one of the most critical parts of modern day conflicts. In order to prevent the continuation of human rights abuses I argue that preemptive strikes are a useful tool for humanitarianism, because they allow for decisive military action to avert a lengthy conflict that may lead to regional escalation, and prolonged humanitarian conflict. To balance the decisive power of a preemptive strike with the strict tests for such an action outlined by the above case law, I propose the following framework for a military authority on the world stage. The UN and the ICJ should sanction a group of countries drawn from all world regions for specified counterinsurgency military operations, but only in the case that diplomatic resolution of an issue fails. These countries are to be governed by the International Court of Justice rather than the United Nations Security Council, as the Security Council has often been divided by partisan politics. Because of these partisan politics, it is critical that the ICJ also plays a role in the group's creation to strengthen its humanitarian role in the international community, as the primary purpose of the organization is to address potential human rights catastrophes.

In practice, the International Court of Justice would have control of this group of countries (hereafter referred to as the Global Humanitarian Organization [GHO]), and would have the discretion in deciding where and when to use preemptive strikes to avert a possible humanitarian crisis. This would be an external action by the International Court of Justice, as sanctioned by the United Nations. In cases of conflict where the humanitarian issue is determined (by an ICJ panel) to be caused by the leader of that country, then no approval by the country's leader is necessary. However in all other cases, the ICJ would have discretion over what areas to strike. This would deal exclusively with asymmetric conflicts or internal conflicts within countries, overriding the sovereignty issue (see framework below), as symmetric conflicts would fall under the purview of the UN Security Council as a result of Article 51 of the UN Charter.

The advantage of such a body is that its power to conduct military strikes does not rest solely with one actor, and disperses the decision-making process so as to reduce bias. Secondly, with this power ultimately vested in and sanctioned by the International Court of Justice, this ensures accordance with international law beyond the issue of whether preemptive strikes themselves are allowed. As the court is able to negotiate disputes between member organizations, this provides an internal arbitration mechanism to address disputes between countries. Thirdly, as outsiders to conflicts this body of countries will be better equipped to determine the humanitarian impact of a conflict and associated preemptive military action compared to an actual stakeholder in a conflict.. This in particular will fit with the intended use of preemptive strikes as a tool of humanitarianism. It is imperative that such a body develop a method for determining preemptive strike legality that is separated from, though influenced by, existing case law; this method will be detailed below.

In terms of compliance with the UN Charter, Article 51 does not explicitly prohibit preemptive strikes; however in order to prevent preemptive strikes on the basis of a war of aggression and to comply with ICJ decisions in *Nicaragua*, *Iran*, and *Congo,* a new framework to establish the "justness" of preemptive strikes can be created.

1. Do preemptive strikes count as self-defense? (*Congo, Iran*)
2. What counts as a justification for self-defense? (*Nicaragua, Congo*)
3. Can other state actors commit preemptive strikes to promote a certain vision, either humanitarian, political, or military, on behalf of a third party? (*Nicaragua*)
4. Is the violation of sovereignty justified? (*Nicaragua, Iran*, necessity clause of Caroline)

This framework is crucial, as within international law, sovereignty is one of the most fundamental concepts, preserving the right of each country to govern themselves without interference or threat of invasion from others. As biases may influence even larger blocs that have collective decision-making, creating and enforcing this framework is necessary to prevent aggressive preemptive strikes. Making sure that preemptive strikes are used for a humanitarian purpose against autocratic regimes and non-state actors creates a balance of power where no singular country can promote imperialist or aggressive actions without severe repercussions.

VI. Application of Framework

In viewing the applicability of this framework, viewing it in the context of a conflict helps to view both effectiveness and compliance with international law. One conflict that has high applicability in this situation is the Kargil War. It was fought between India and Kashmiri insurgents in the Jammu and Kashmir region of South Asia in 1999.[175] Though the Kashmiri insurgents were supplied and supported by the Pakistani government, it remains an example of asymmetric warfare between a larger government-controlled military and smaller insurgents.[176] This conflict was especially concerning for the region as both India and Pakistan were nuclear-armed countries at the time, and if the conflict had escalated it would have led to significant risk of nuclear war between the longtime rivals.[177]

This conflict shows a necessity for the preemptive strike doctrine and intervention by the GHO as if it had escalated slightly more into a war between the two countries, could have had a possibility for nuclear conflict between the two. Adding to the situation a long history of enmity between the two, further conflict would have had a disastrous effect on populations living in Jammu and Kashmir, particularly civilians caught between both sides.

This situation, if occurring with the GHO in existence, would have been a justified use of preemptive striking against the attacking party of the Kashmiri insurgents. In terms of framework, Criteria 1 and 2 of the framework established above are subject to Criteria 3, and under the GHO's mission and establishment the ICJ would agree to the usage of preemptive strikes to promote a humanitarian vision. Criteria 4 in this situation is an exception to typical views on sovereignty, as the international sovereignty of Jammu and Kashmir is heavily disputed. However in typical situations, Criteria 3 and the potential of humanitarian catastrophe by nuclear war would justify the breach of sovereignty of the state. The necessity criterion of the Caroline Test would be fulfilled, as diplomatic resolution to an already underway conflict would be difficult, especially with the long-standing negative relationship between the two countries. In terms of self-defense, as this action of preemptively striking Kashmiri insurgents would count as neither retaliation nor deterrence, it would fulfill conditions laid out by Iran in the Oil Platforms Case. Under both *Nicaragua* and *Congo*, as this preemptive strike targets only the Kashmiri insurgents who began the conflict, and not the nation supplying and helping them (Pakistan), it's

[175]Tellis, Ashley J., C. Christine Fair, and Jamison Jo Medby. "Summary." Essay. In Limited Conflicts under the Nuclear Umbrella: Indian and Pakistani Lessons from the Kargil Crisis, ix-xii. Santa Monica, CA: Rand, 2001. https://www.rand.org/pubs/monograph_reports/MR1450.html.

[176]*Ibid.*

[177]Riedel, Bruce. "How the 1999 Kargil Conflict Redefined US-India Ties." Brookings. Brookings Institution, March 9, 2022. https://www.brookings.edu/blog/order-from-chaos/2019/07/24/how-the-1999-kargil-conflict-redefined-us-india-ties/

permissible under both cases. Overall, the usage of preemptive strikes within the 1999 Kargil War would have greatly diminished the conflict, particularly if it happened in modern day.

VII. Conclusion and Implications

The way that countries undertake conflict is going through an unprecedented change. In the largest change in military action since the 1600s, military strategy and policy has become less focused on wars of aggression between two equal groups, and has instead become more politicized than seen previously. With the increase in ideological groups and autocratic countries waging war for one cause or another, human rights, rules of conduct, and civilian protections have all taken a backseat to the all-out war that these groups practice. In that same idea, countries and organizations fighting against this movement have to adapt to this new paradigm or risk defeat. The ability to reign in human rights abuses from countries and paramilitary groups is an objective that the UN must focus upon, which it can accomplish through preemptive strikes. Currently, the ability to reign in authoritarian countries committing human rights abuses remains highly limited. As UN peacekeepers are only able to enter a country with the consent of the main parties to the conflict, this prevents any effective method of policing human rights abuses.[178] Investing that sanction of preemptive strikes in just one country puts too much of a chance for abuse of that power—however the effective power-sharing agreement of a larger organization under the purview of the International Court of Justice means that they are in the best position to respond to humanitarian crises throughout the world. The past years have seen a regression into territory-based wars of conflict like with Russia and Ukraine, religious-based wars in the Middle East, and insurgencies in South America and South Asia. The ideology of preemptive strikes creates a method for countries with a history of human rights advocacy to protect humanitarian interests worldwide, and ensure a safer, less conflict-filled future for the international community.

[178] *"Principles of Peacekeeping." United Nations Peacekeeping. (Accessed March 28, 2023). https://peacekeeping.un.org/en/principles-of-peacekeeping.*

Privacy Issues in Federal Prisons:
The Prison Camera Reform Act of 2021

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I. Introduction

With over two million individuals imprisoned as of 2023, the United States has the highest incarceration rate in the world.[179] Under the umbrella of the Federal Bureau of Prisons (BOP), 180,000 of these inmates are housed in federal penitentiaries of varying security designations.[180] The rising prevalence of surveillance in criminal justice has created a hotbed for debate regarding privacy issues within prisons since 1984. In 2021, President Biden signed the Federal Prison Camera Reform Act into law, enacting sweeping changes to the state of prison surveillance infrastructure and usage. While the PCRA alleviated many concerns regarding inmate privacy rights, a variety of legal loopholes still exist through which disciplinary malpractice may occur.

II. Historical Context

The basis of governance surrounding surveillance stemmed from broader inmate privacy issues that go back to the late 1900s. *Hudson v. Palmer* (1984) addressed the issue of Fourth Amendment violations as it pertained to an inmate's right to privacy within their own cell.[181] Palmer sought to sue the superintendent of the Virginia Penal Colony, claiming that a cell shakedown and seizure of his property without a warrant or probable cause stood as a violation of his Fourth Amendment rights. In face of these claims, the Supreme Court ruled in favor of the superintendent, holding that the Fourth Amendment's protection from unreasonable search and seizure did not apply to prisoners in the same context as it applied to free citizens. In the majority opinion, Justice Burger wrote that prisoners have a "diminished expectation of privacy due to the nature of their confinement," and that the need for security clearly outweighed any privacy intrusion on the inmate's behalf.[182]

Not without opposition, the decision was criticized as giving excessive power to prison officials and undermining the Fourth Amendment's Equal Protection Clause. Acknowledging this, the Court also recognized that "the privacy interests of prisoners are entitled to some measure of protection against arbitrary or purposeless searches." These protections do not include the right to privacy within bathrooms in an institutional setting, however. [183]

Under the Eighth Amendment Standards set by *Board v. Farnham* (2005), "institutional security justifies monitoring inmates everywhere, even in bathrooms and regardless of the gender of the observer."[184] This precedent can be viewed as problematic from a humanitarian standpoint as seen in *Courtney v. DeVore* (2014), an appeal filed in the 7th Circuit Court. This set of standards may result in the subjugation of inmates for reasons outside the scope of the administration of justice. Courtney, a Muslim man, filed an appeal for his grievance against the Marion County Jail in their use of cameras in restrooms. Despite religious restriction and filed protests, the petitioner was surveilled by female guards resulting in the onset of post-traumatic stress disorder.[185] While the appeal was inevitably denied by the Court, *Courtney v. DeVore* and

[179]Prison Policy Initiative, Mass Incarceration: The Whole Pie 2021 (2021), available at https://www.prisonpolicy.org/reports/pie2021.html.
[180]Prison Policy Initiative, supra note 1.
[181]Hudson v. Palmer, 468 U.S. 517 (1984).
[182]Hudson, supra note 3.
[183]Hudson, supra note 3.
[184]United States v. Doe, No. 03-2628, 405 F.3d 634 (7th Cir. 2005).
[185]Courtney v. Devore, 2018 WL 5306848 (9th Cir. Oct. 26, 2018).

other cases similar to it provide an important basis for inmate privacy reforms as seen in the Federal Prison Camera Reform Act of 2021.

III. Cameras and Their Usage

As it pertains to the specific discussion of surveillance camera usage in federal prisons, it has been established through *Hudson* that inmates may be physically or digitally surveilled due to a more reserved access to Fourth Amendment rights.[186] While immune to unreasonable searches and seizures, a legitimate penological interest can and has been argued for most constitutional right violation cases that concern surveillance.[187] Under the umbrella of "maintaining security" and "investigating misconduct," recorded materials from cameras are frequently admitted as evidence due to the trait of scope.[188] In order to maintain due process, the three-pronged test of reliability, relevance, and prejudice must be fulfilled. Through the volume of a surveillance camera's abilities to capture and record, it is difficult to argue prejudicial use as any misconduct captured can be presented as happenstance under typical 24-hour use.

The use of cameras in federal prisons is also subject to oversight by internal and external watchdogs, such as the BOP's Office of Inspector General and the Department of Justice's Civil Rights Division, to ensure that they are not being used to violate inmates' rights or engage in unlawful behavior.[189]

IV. Camera Usage Limitations

The protection of attorney-client privilege in federal prisons and how it pertains to a legal ability to surveil has been the subject of several court cases over the past two decades. In *United States v. Montoya* (2001), the court held that "the bedrock principle of attorney-client privilege" applies equally to inmates and that "any interference with this privilege must be strictly limited."[190] In *United States v. Levin* (2007), the court held that a prison policy that required inmates to submit written requests for legal materials violated the Sixth Amendment because it created a risk that the communications would be intercepted or delayed.[191] In addition to court cases, federal regulations also provide specific protections for attorney-client communications. For example, 28 C.F.R. § 543.11 requires that "legal calls shall not be monitored or recorded, and staff shall not listen to the content of the call."[192] Similarly, 28 C.F.R. § 543.16 provides that "mail to or from an attorney, a court, or a governmental agency shall be sealed and given to the inmate for mailing without being inspected, read, or copied."[193] These regulations help ensure that attorney-client communications remain confidential and that inmates have access to legal representation without fear of reprisal or interference via surveillance.

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[186]Hudson, supra note 3.
[187]Hope v. Pelzer, 536 U.S. 730 (2002).
[188]Hope, supra note 8.
[189]U.S. Department of Justice. Attorney General Merrick B. Garland issues memorandum limiting the use of surveillance tools in DOJ civil rights investigations and assessments, Press Release (Sept. 3, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-issues-memorandum-limiting-use-surveillance-tools-doj-civil.
[190]United States v. Montoya, 703 F.3d 1181 (10th Cir. 2013).
[191]United States v. Levin, 874 F.3d 316 (3d Cir. 2017).
[192]28 C.F.R. § 543.11 (2021).
[193]28 C.F.R. § 543.16 (2021).

V. Present Day Context

With an ever-rampant rise in technology coinciding with an increase in funding for federal prisons, the use of cameras in correctional facilities has increased significantly in recent years, with 86% of state and federal facilities using cameras to monitor common areas in 2020.[194] The same report found that the use of cameras was associated with lower rates of staff misconduct, inmate assaults, and property damage, indicating that cameras can be an effective tool for promoting safety and accountability in prisons.[195] In contrast to this, there has been a rise in weapon and drug smuggling in federal prisons as older camera systems begin to sink into obsolescence. Through the manipulation of blind spots and technological fallibility attributed to the nature of dated camera hardware, the statistical increase in misconduct is detailed as follows:

> According to a report by the Department of Justice, in 2018 there were over 3,300 incidents of drug smuggling and over 1,100 incidents of weapon smuggling in federal prisons. This represents an increase in both drug and weapon smuggling incidents from previous years. The report also notes that inmates' families and friends are the most common source of contraband, with visitation being a common way to smuggle in drugs and weapons.[196]
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> Another report by the Bureau of Justice Statistics found that in 2016, 17% of state and federal prisoners reported being able to obtain drugs while in prison. The most commonly reported ways of obtaining drugs were through other inmates (10%) and staff (5%) with over 3% of state and federal prisoners reporting access and possession of a weapon while in prison.[197]

With the statistical increase of contraband infractions over the past decade, the technological and legal reform of prison camera surveillance has been long overdue. As a step to alleviate this growing issue, the Prison Camera Reform Act of 2021 works to improve and increase the quality and quantity of cameras throughout the federal prison system.

VI. Prison Camera Reform Act of 2021

The Prison Camera Reform Act (PCRA) of 2021 made several changes to the legislation regarding the use of cameras in federal prisons. Prior to the PCRA, the use of cameras in federal prisons was regulated under the 2018 First Step Act, which authorized the use of cameras for the purpose of enhancing the safety and security of inmates and staff.[198] The PCRA modifies the First Step Act by imposing additional restrictions on the use of cameras and enhancing privacy protections for inmates. Some of the key changes introduced include:

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[194]National Law Enforcement and Corrections Technology Center, 2020 Correctional Security Report (2020), https://nlectc.org/corrections/2020-correctional-security-report.
[195]NLECT, supra note 15.
[196]U.S. Department of Justice, Office of the Inspector General, Top Management and Performance Challenges Facing the Department of Justice - 2019, at 20 (2019), https://oig.justice.gov/sites/default/files/reports/19-132.pdf.
[197]Bureau of Justice Statistics, Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009 (2019), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf.
[198]First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

- Limitations on camera use: The PCRA limits the use of cameras in certain areas, such as bathrooms and medical facilities, and requires the Bureau of Prisons to conduct a privacy impact assessment before installing new cameras.[199]
- Protection of attorney-client privilege: requires that cameras not be used to monitor or record communications between inmates and their attorneys, except under limited circumstances.[200]
- Data retention and use: sets standards for the retention and use of camera footage, including requirements that footage be retained for a limited period of time and that it not be used for disciplinary purposes unless authorized by policy.[201]
- Accountability and transparency: requires the Bureau of Prisons to develop policies and procedures for the use of cameras, and to report regularly to Congress on camera use and any privacy concerns.[202]

Overall, the PCRA represents an effort to balance the need for enhanced safety and security in federal prisons with the privacy rights of inmates. By placing limits on camera use and enhancing privacy protections, the PCRA seeks to ensure that cameras are used in a responsible and transparent manner. However, due to the vague structure of the language in the Act, there exists the potential for issues to arise via legal loopholes with respect to previously-installed cameras.

VII. Policy Ramifications and Legal Standing

While the PCRA seeks to address concerns of medical and mental health information being used against inmates, the structure for an individual to take advantage of existing surveillance camera infrastructure exists. Seeing as only the future installation of cameras are governed by a privacy impact assessment, cameras that have been installed prior to 2021 are not subject to the same limitations. Through HIPAA, as long as an inmate's acquisition of their own medical records poses no risk to others, accessing and keeping the documentation in their dorm is their prerogative.[203] As an inmate passes from their cellblock to areas with privacy designation, documentation may be viewed and potentially used against them in a disciplinary manner. The outlined assessment could mitigate these concerns; however, the installation of cameras and the conduction of this assessment could also occur in non-protected areas. More specifically, it might occur within areas not explicitly designated as zones where medical and mental health information is discussed.

Similarly, newly installed surveillance infrastructure could be abused for the intent of violating attorney-client privilege. While information discussed between an inmate and their attorney is considered protected, any documentation passed between could be accessed through strategically placed cameras outside of designated areas. In addition to this, the PCRA looks to protect rights and prevent the improper installation of surveillance cameras. However, the use of

[199]Prison Camera Reform Act of 2021, Pub. L. No. 117-321, 134 Stat. 5033.
[200]*Id.*
[201]*Id.*
[202]*Id.*
[203]Elizabeth F. Cohen, "The Health Insurance Portability and Accountability Act: A Powerful Tool for Prisoners Seeking Access to Their Medical Records," 18 J.L. & Health 401 (2003).

current surveillance infrastructure is only loosely regulated throughout the act, giving rise to further ramifications born via misuse. While the information obtained via misuse of installed camera systems may be inadmissible in court as evidence, the everyday lives of inmates could be drastically altered through disciplinary issues that may arise.

Aside from the physical potential for abuse via existing camera infrastructure, the PCRA's promotion of camera installation could arguably be in violation of an inmate's right to due process. While the PCRA's rivacy impact ssessment may alleviate privacy concerns at face value, due process requires the government to provide individuals with fair procedures before depriving them of their life, liberty, or property interests. With respect to this clause, the PCRA's governing principles fall short as there is no declaration of buffer time between the conduction of a privacy assessment and the installation of cameras. If cameras are installed without the appropriate channels available for inmates to voice their concerns, the fundamental structure of due process would be undermined in this regard. This premise is bolstered by the Supreme Court's rulings on due process in the case of solitary confinement. The governing principle was set forth by the decision in *Wilkinson v. Austin* (2005) where the court ruled in favor of the inmate, stating that prisoners retain rights under the Due Process Clause to a hearing on the decision to place them in administrative segregation, and to periodic review of their confinement.[204] While this upheld the government's right to use solitary confinement as a disciplinary measure, it also introduced the inmate's right to challenge said measures in a variety of ways.

While the idea of physical isolation and digital surveillance are fundamentally different, an inmate's right to challenge limitations on their existing freedoms overlaps in this case. The *Wilkinson* Court stated in their decision that "the Constitution... requires that deprivation of [a protected liberty] interest be preceded by notice and opportunity for hearing appropriate to the nature of the case." With a right to privacy qualifying as a "protected liberty," the PCRA's disclusion of surveillance installation notice stands as a potential due process violation.

With "no-snitch" culture being prevalent throughout the American prison system as a whole, in addition to an existing lack of accountability via qualified immunity, the governing statistics on prison official malfeasance are likely an underestimate. Simple inadmissability in court is not enough to deter the abuse and violation of the limited civil rights inmates have access to. In order to alleviate these issues, the physical and legal infrastructure through which disciplinary malpractice may occur must be removed.

Specifically, the PCRA's privacy impact assessment should be conducted in a thorough manner to encompass all current camera installations in addition to all potential replacements. This would allow for the removal of any camera systems that could be abused for the purposes of disciplinary malpractice. In addition, the supplementary inclusion of a channel via which specific remonstrances could be voiced would prove beneficial in avoiding any violations of due process.

VIII. Conclusion

The use of surveillance cameras in federal prisons has been a hotly debated topic for decades, with concerns over inmates' privacy and Fourth Amendment rights. While the *Hudson v. Palmer* decision established that inmates have a diminished expectation of privacy due to the nature of their confinement; there are still concerns about the potential abuse of surveillance by prison officials. Through the passage of The Federal Prison Camera Reform Act of 2021, these

[204] *Wilkinson v. Austin*, 545 U.S. 209 (2005)

concerns began to be addressed, setting standards for the use and placement of cameras in federal prisons. Despite the potential benefits of cameras in maintaining security and investigating misconduct, there are drawbacks to the installation of their infrastructure. While the PCRA limits potential abuse of newly installed surveillance cameras via privacy assessments, there remain a variety of physical and legal loopholes that could be taken advantage of by prison guards to the detriment of inmates. Overall, the PCRA is a strong step in balancing privacy rights and the goal of maintaining safety and security in prisons, however, there is a need for continued oversight and regulation to ensure that cameras are not being used to violate inmates' privacy or due process rights or engage in unlawful behavior.

The Incorporation of Workers' Dignity Into Antitrust Law:

An Analysis of the Shortcomings of Current Antitrust Law and the Path Forwards

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I. Introduction

Should we care if companies become extremely large, or if they control large swaths of the market? Is whether or not goods are being delivered to consumers at a fair price all that matters? This is exactly what the area of antitrust explores. The premier antitrust enforcement agencies in the United States, the Federal Trade Commission (FTC), and the Department of Justice's (DOJ) antitrust division, state that their missions are "to promote economic competition" and "[to protect] the public from deceptive or unfair business practices and from unfair methods of competition" respectively.[205] I will explore the standard that should be used to gauge fair economic competition and what the appropriate considerations should be when it comes to determining the limits of a firm's power. Given how U.S. courts currently evaluate antitrust issues only through the consumer welfare standard, should an ideal judicial standard incorporate considerations of market power and worker welfare? I will argue that an ideal judicial standard on antitrust issues should incorporate considerations of market power and worker welfare. Although the Sherman Antitrust Act, which founded the antitrust doctrine of the United States, was initially created to protect smaller producers, it is imperative that workers are also considered in this standard. This is so that they are not exploited by monopsonies, especially in rural areas, where regional concentrations of power can have a much more negative effect upon workers.

II. Origins of Antitrust Law in the United States

The origins of the antitrust law in the United States can be traced back to small, individual farmers in the Midwest in the late nineteenth century. According to Matt Stoller, while states did not allow one corporation to buy stock in another corporation, a new financial tool called a "trust" was created by John D. Rockefeller in order to concentrate industries across state borders and legally work around the aforementioned state regulation.[206] This financial innovation allowed companies to horizontally integrate and concentrate within industries, which hurt small and midsize businesses in America, such as independent farmers. For example, once farmers produced their respective goods, they would have to pay such high rates to a railroad company, which would be a part of a trust, to transport their goods to a market and actually make money off of it. Thus, a populist movement emerged to regulate such trusts and ensure that smaller producers like farmers were protected by regulations from unchecked corporate power.

From these populist origins, Congress established the Interstate Commerce Commission (ICC) in 1887 and passed the renowned Sherman Antitrust Act in order to address the concerns of middle America.[207] According to the Federal Register, the ICC was established in order to protect the public "against railroad malpractices and abuses."[208] Meanwhile, the Sherman Antitrust Act was created to break up the trusts that were created, such as Rockefeller's Standard Oil. There two main sections of the Sherman Antitrust Act are: Section 1, which states that any

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[205]"About The Antitrust Division," *The United States Department of Justice* (2015). https://www.justice.gov/atr/about-division.

[206]Matt Stoller, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (New York: Simon & Schuster Paperbacks, 2019), at 8.

[207]*Id.* at 9.

[208]"Agencies - Interstate Commerce Commission," FEDERAL REGISTER (Accessed May 1, 2023). https://www.federalregister.gov/agencies/interstate-commerce-commission.

contract that forms any kind of trust is illegal if it restrains trade or commerce; and Section 2, which states that any person who monopolizes or attempts to monopolize is guilty.[209] Though the populist origins of antitrust policy are clear, the original intentions of the Sherman Antitrust Act to protect smaller producers were limited in practice because of interpretations from the courts and judges.[210] The initial reigns on corporate power were clearly established because of firms' concerns, not consumers'. Other producers, being price-gouged by these trusts, were the victims in this scenario, and, thus, laws were established to crack down on concentrations of market power in order to protect firms.

III. The Turning Point of Antitrust Law

If we classify the late 19th century as the beginning of the antitrust era, then the 1970s should be classified as a turning point for antitrust law. This is primarily due to the impact of Robert Bork, who revolutionized the ideology and enforcement of antitrust law. Bork advocated for a shift in focus from producers and market suppliers in antitrust law to the consumer welfare standard. Although Bork is primarily known for the controversy around his nomination to the Supreme Court in 1987, his main impact on the United States is his influence upon antitrust law that still remains today.[211] The consumer welfare standard in antitrust law came about due to Bork's 1978 publication *The Antitrust Paradox*.[212]

Robert Bork integrated his economic ideals with antitrust law. According to Barak Orbach, one of the primary historians on Robert Bork, Bork's views emerged due to concerns about economic efficiency not being taken into consideration in antitrust law.[213] Prior to Bork, the focus of antitrust law was to protect small businesses. Regardless of the effectiveness of antitrust law at the time, it was built upon the same concerns that founded antitrust law: protecting small firms from unchecked corporate power and price gouging. However, in *The Antitrust Paradox*, Bork states that Congress designed the Sherman Antitrust Act as a "consumer welfare prescription."[214] If one approaches antitrust law with this lens, then corporate concentration of power is not a bad thing *unless* it causes prices to rise for consumers. In fact, according to Bork's vision of antitrust law, massive businesses and firms can actually be a good thing for consumers if they can show how their economies of scale are positively impacting consumers. Economies of scale occur when companies increase production and costs are lowered because the costs that are associated with production are spread over the increased number of

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[209]"Sherman Anti-Trust Act (1890)," *National Archives* (2021). https://www.archives.gov/milestone-documents/sherman-anti-trust-act.

[210]William L. Letwin, "Congress and the Sherman Antitrust Law: 1887-1890," U. CHI. L. REV. 221 (1956), at PAGE 222. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2942&context=uclrev.

[211]NCC Staff, "On This Day: Senate rejects Robert Bork for the Supreme Court," *National Constitution Center* (Published October 23, 2022). https://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court.

[212]Barak Y. Orbach, *THE ANTITRUST CONSUMER WELFARE PARADOX*, 7 JOURNAL OF COMPETITION LAW & ECONOMICS 133 (2011).

[213]Dylan Matthews, *'Antitrust was defined by Robert Bork. I cannot overstate his influence.,'* WASHINGTON POST, Nov. 25, 2021, https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence/ (last visited Nov 23, 2022).

[214]*supra* note 299.

goods produced.[215] For example, it would be easier for a large firm than a smaller firm to invest in technology that makes production more efficient. This is because, since the company is large, it has the profits to invest in the technology that ramps up production; the increase in production will reliably cover the investment cost.

Thus, we can see the economic rationale behind Bork's ideas. Whereas the Sherman Antitrust Act intended to preserve small businesses for the sake of competition and fairness, Bork changed antitrust to presume an intent to protect consumers via the prioritization of efficiency, which ignores concerns about the relative size and market power of businesses. Even though this presumption of efficiency was applied to all businesses, it primarily benefits bigger businesses due to the economies of scale argument. One of the other crucial mistakes Bork makes here is the fact that he treats the protection of small businesses in the market and efficiency as mutually exclusive. Although the economies of scale argument can definitely be true, the vice versa where small businesses are not efficient is not true all of the time. In fact, many neoclassical economists would argue that competition breeds efficiency, and competition is most prevalent in industries where many producers exist.

Section 1 of the Sherman Antitrust Act states that any action "in restraint of trade" is illegal.[216] Here, we can analyze the changes advocated for by Bork.[217] According to William L. Letwin, "[During the 1880s], other [lawyers] were beginning to believe that the true test was whether the restraint was 'reasonable,' and that courts would consider unreasonable any restraint broader than the party imposing it needed or than the interest of the public can tolerate."[218] Even though a firm may not "need" to restrain trade at all, the second part of this statement is translatable to a "Borkian" view of antitrust. Letwin describes the interest of the public as including both other producers and consumers, but Bork narrowed this scope to purely focus on consumers. If firms are monopolizing an industry or shutting other firms out of the industry, it is acceptable as long as consumers benefit from it. Since Bork's alterations, the illegality of the "restraint of trade" has narrowed to the "unreasonable restraint of trade," where unreasonable is defined as anything directly hurting consumers.

Even though this might seem clear at first glance, determining if costs are being increased on consumers is quite difficult. Additionally, even if consumers are treated as the primary group of concern, it still fails to address consumer interests outside of cost. For example, if consumers want to make sure that the products they buy are ethically produced or they want to make sure they are buying from a producer that aligns with their values, this standard ignores these concerns, despite consumers, in this scenario, preferring these over marginal decreases in the prices of the goods or services they are consuming.

IV. Antitrust Case Law in the United States

Two cases that illustrate the origins of antitrust ideals in the United States are 1) *Standard Oil Co. of New Jersey v. United States* and 2) *Northern Securities Co. v. United States*. John D. Rockefeller's brainchild, the Standard Oil Company, was one of the foremost trusts in the United

[215]Will Kenton, "Economies of Scale: What Are They and How Are they Used?," *Investopedia* (Updated June 11, 2022). https://www.investopedia.com/terms/e/economiesofscale.asp.

[216]15 U.S.C. § 1 (1890)

[217]While Robert Bork was a circuit court judge, his main contributions to the field of antitrust took place from his position as an academic in the "Chicago school." This is described at length by Matt Stoller in Chapter 9 of *Goliath*. *supra* note 295.

[218]Letwin, *supra* note 299.

States, since it controlled the vast majority of oil production and the oil market in the United States. Rockefeller was able to do this by colluding with railroads, raising rents on competitors, and then eliminating or buying them out.[219] The father of Ida Tarbell, the reporter who ended up exposing the Standard Oil monopoly, was one of the victims of Rockefeller's strategy of crushing competitors through price wars.[220] According to King, "dozens of small oil producers in Ohio and Western Pennsylvania, including her [Ida Tarbell's] father, were faced with a daunting choice… sell their businesses to… Rockefeller and his newly incorporated Standard Oil Company, or attempt to compete and face ruin."[221]

Under the Sherman Antitrust Act, President Theodore Roosevelt brought an antitrust suit against the Standard Oil Company. Subsequently, the Supreme Court ruled that Standard Oil had to be broken up because of their attempts to price fix and eliminate competition.[222] Even though the company was broken up, in the majority opinion, Chief Justice Edward White amended the Sherman Act to include the word "unreasonable" in the restraint of trade clause.[223] White stated that what made Standard Oil's actions unreasonable were their profits and the fact that their collusion forced other competitors out of business for the sake of increasing profits, not out of desperate self preservation measures. Additionally, White wrote that the word "unreasonable" had to be added to the Sherman Antitrust Act due to restraints of trade being acceptable when rates are being increased to levels that are "reasonable." Though this argument is sound when considering that businesses, big and small, need to raise their prices at times when their costs are going up, it weakens the Sherman Antitrust Act via "judicial legislation." Thus, the breaking up of Standard Oil served as a Pyrrhic victory for anti-monopolists.

In *Northern Securities Co. v. United States*, the Supreme Court ruled that the trust of numerous railroad companies was essentially a railroad monopoly and thus violated the Sherman Antitrust Act.[224] Similar to Rockefeller's monopoly on oil, the railroad monopoly allowed railroad companies to increase transportation rates and reduced any price competition. This collusion not only negatively impacted firms that would use the railroad to transport their goods, but it would also hurt any smaller firms in the railroad industry that would encourage innovation. This case was crucial in establishing the federal government's ability to regulate monopolies by ruling that the Sherman Antitrust Act fell under the commerce clause of the Constitution.

Both of these cases illustrate the crucial considerations of monopoly power that initially existed in US antitrust law. These considerations create a more holistic ideation of antitrust law compared to the "Borkian" lens of consumer welfare. Additionally, this is crucial as the judges in these cases, at least in *Northern Securities Co.*, considered what legislators wrote and voted on in the relevant law. As we can see now in the *Standard Oil Company* case and will see later, judges arbitrarily deciding that a certain standard works better, one that is not prescribed in the text of

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[219]The Editors of Encyclopaedia Britannica, "Standard Oil | History, Monopoly & Breakup," *Britannica* (Updated March 31, 2023). https://www.britannica.com/topic/Standard-Oil.

[220]Gilbert King, "The Woman Who Took on the Tycoon," *Smithsonian Magazine* (July 5, 2012). https://www.smithsonianmag.com/history/the-woman-who-took-on-the-tycoon-651396/.

[221]*Ibid*.

[222]Robert Jiminson et al., "Standard Oil Co. of New Jersey v. United States (1911)," *U.S. Conlawpedia*, (2016), https://sites.gsu.edu/us-constipedia/standard-oil-co-of-new-jersey-v-united-states-1911/.

[223]"Standard Oil Company of New Jersey v. United States," *Oyez* (Accessed November 23, 2022). https://www.oyez.org/cases/1900-1940/221us1.

[224]Donald Scarinci, "Northern Securities Co. v. United States: Upholding Antitrust Act," *Constitutional Law Reporter* (2016). https://constitutionallawreporter.com/2016/02/09/supreme-court-uphold-antitrust-act-in-northern-securities-co-v-united-states/.

the law, is detrimental to the spirit of the law and our democracy. In the *Standard Oil Company* case, the judge simply "amended" the Act to fit their ideal of what the law should look like. By doing so, the entire scope of antitrust law was dramatically changed. After this decision, a monopoly could be deemed reasonable as long as it provided some surplus to at least one party. For example, if a monopoly extracted profits from a smaller business it was putting out of business and then redistributed some of those profits to consumers, this would be legal because consumers are technically "better off." The word "unreasonable" adds a vast amount of subjectivity to the interpretation of the law.

Chief Justice White's amendment of the Sherman Antitrust Act can be accurately described by Julia Tomassetti's explanation of the origins of at-will employment in the United States. Even though the two seem unrelated, the process by which at-will employment was established is eerily similar to White's amendment. Tomassetti writes that "at-will presumption is a creature of the common law" and "only a few states have codified it."[225] Here, Tomassetti describes how even though legislatures, which are elected directly by citizens (who are workers), never chose to legislate the norm of at-will employment, it is still the norm due to the common law system in the United States. Similarly, White's amendment to include the word "unreasonable" is a norm that is created, even though the word itself has not been codified by the legislature that initially passed the law. In this case, this seems inherently undemocratic due to the amendment subverting the intention by which the law was passed and should be treated as such. This is because even though this may seem unimportant, it creates massive implications as we shall see with subsequent cases.

One of the first cases in which the consumer welfare standard was applied was in *Reiter v. Sonotone Corp.* In this case, the plaintiff brought a class action suit claiming that the manufacturer engaged in monopolistic behavior to artificially fix prices of hearing aids.[226] The Court's decision ruled in favor of the plaintiff stating that even though the damages weren't commercial or business in nature, the claim was still valid due to a different interpretation of the Clayton Act (another antitrust law). However, University of Michigan Law Professor Daniel Crane notes that, in the decision itself, the Supreme Court "cites Bork's work on the legislative history of the Sherman Act in holding that antitrust law is, quote, a consumer welfare prescription."[227] Here we can see the larger implications of the common law system. One can argue that the plaintiff was "empirically" correct and that the company was price-fixing. Thus, the Court should have found that, even though the company violated the antitrust doctrine determined by the Sherman Act, it should dismiss the case on the belief that consumers don't have the standing to bring antitrust cases since they are not damaged in a commercial or business nature. However, it is imperative to note that substituting standards in antitrust law to prioritize consumer welfare has massive negative implications for small businesses. By specifically citing Bork's standard, a whole new analytical framework that was never prescribed in the law was created to evaluate antitrust issues. Tomassetti's point about regulatory norms being created by courts rings true. In regard to consumer welfare, we will see the implications of this standard in

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[225]Julia Tomassetti, "The Powerful Role of Unproven Economic Assumptions in Work Law," *Economic Policy Institute* (May 20, 2022). https://www.epi.org/unequalpower/publications/the-powerful-role-of-unproven-economic-assumptions-in-work-law.

[226]Reiter v. Sonotone Corp., 442 U.S. 330 (1979): Case Brief Summary, *Quimbee* (Accessed November 24, 2022). https://www.quimbee.com/cases/reiter-v-sonotone-corp.

[227] Meghna Chakrabarti & Hilary McQuilkin, "More than money: Defining American antitrust law, from Bork to Khan," *WBUR* (February 17, 2022). https://www.wbur.org/onpoint/2022/02/17/more-than-money-antitrust-monopolies-are-defined-from-bork-to-khan.

future cases. For example, in both of the following cases, we will see that, despite this standard being used, consumers and smaller producers are negatively impacted.

In 2018, the DOJ's Antitrust Division attempted to block a merger between AT&T and Time Warner, arguing that it violated the Clayton Antitrust Act, since it would reduce competition in the relevant markets and would harm consumers via increased prices.[228] In the vein of the aforementioned economies of scale argument, Judge Richard Leon ruled in favor of AT&T, stating that it would actually benefit consumers and it would be able to compete against other "big tech" companies. According to Matt Stoller, "AT&T made many commitments on which it didn't follow through…AT&T immediately raised prices on DirecTV after the deal closed" and "made Time Warner content exclusive to its own paywall."[229] In fact, according to Stoller, AT&T decided to undo some of its merger by separating "its content arm from its telecommunications service" due to considerable inefficiencies in the merger and actually suffering losses on Wall Street. This case illustrates how the consumer welfare standard has horribly distorted antitrust in the United States. This presumption of efficiency that Bork initiated through the consumer welfare standard has led to increased market power in the name of consumer welfare. Subsequently, these companies do not innovate and actually harm consumers by raising prices and even have increased administrative costs at times.

In 2019, the DOJ Antitrust Division lost another attempt to block a merger, this time between CVS and Aetna, at the hands (or mind) of Judge Richard Leon.[230] This time the DOJ did less to block the merger leading to the harmful effects of the merger still being prevalent. According to the New York Times, the massive consolidation of the chain pharmacies has led to disastrous and noxious working conditions. Pharmacists are overworked due to CVS understaffing pharmacies and not providing appropriate working conditions. Additionally, pharmacies are incentivized or even pressured to over prescribe medication.[231] Moreover, according to Stoller, the increase in mergers in this industry has led to independent pharmacists, who often serve rural and underserved areas, being reimbursed less by insurance companies (in this case, CVS's insurance arm), which leads them to actually lose money "depending on the medicine they are filling for customers."[232] The pharmaceutical industry is the perfect example of the outcome of the consumer welfare standard. This presumption of efficiency has not only led to a loss of consideration for producers and general trade when presiding over these decisions, but also consumers being negatively impacted due to the inherent virtuousness of corporate power.

V. The Missing Aspect of Antitrust: Workers

One characteristic that has always been missing from the United State antitrust doctrine is the consideration of workers, specifically those between poverty and the middle class. As mentioned previously, the Sherman Antitrust Act was created because it was correctly believed that when companies grow bigger and control a significant portion of the market, it poses a risk to the viability and well-being of smaller producers, which can be harmful to the producers and

[228] *United States of America v. AT&T Inc., DirecTV Inc., and Time Warner Inc* No. 18-5214. (2017).
[229] Matt Stoller, "Mergers Ruin Everything," *BIG by Matt Stoller* (February 4, 2022). https://mattstoller.substack.com/p/mergers-ruin-everything.
[230] *United States of America, et al v. CVS Health Corporation and Aetna Inc.* No. 18-2340 (2019).
[231] Ellen Gabler, "How Chaos at Chain Pharmacies is Putting Patients at Risk," *The New York Times* (Published January 31, 2020). https://www.nytimes.com/2020/01/31/health/pharmacists-medication-errors.html.
[232] Matt Stoller, "The Red Wedding for Rural Pharmacies," *BIG by Matt Stoller* (March 28, 2022). https://mattstoller.substack.com/p/the-red-wedding-for-rural-pharmacies.

the community that the producers serve. However, this belief still misses the fact that when a company does grow big, it gives them more power over the workers in the region, not just other producers and consumers. Especially in rural areas, a big company can pose a danger to the local labor force.

Hypothetically, if we imagined a big oil company coming into a rural area, then we can model this relationship. Let us say that the big company forecloses their rivals by raising their costs (through collusive agreements with shipping companies) and then buys the local company out. Subsequently, now all the oil workers who worked for the local companies now have to get a job with the bigger company. As a result, the bigger company is the only employer. This is called monopsony power. This big company can pay the local oil workers lower than a "would-be" competitive wage, out of a profit-maximization model. Additionally, the company can also cut corners with workplace safety in order to decrease costs.

If we take this framework back to the *Standard Oil* case, then it is crucial to see what the effects were on those who worked for Standard Oil. According to Ohio History Central, throughout the Gilded Age, even though massive corporations emerged and were wildly successful, "the vast majority of the population, including farmers and industrial workers struggled to survive."[233] Additionally, like it was mentioned in our model, the company's disproportionate power leads to harsh working conditions, pitiful wages, "long hours, and few safety provisions."[234] Clearly, the rapid economic growth from the Gilded Age did not apply to workers, as they were taken advantage of due to the consolidation of workers.

We can also explore the cause of this by going back to the experience recounted by Ida Tarbell's father. Ida Tarbell writes that "things were going well in her father's business," until the 1872 South Improvement scheme, which was "a hidden agreement between the railroads and refiners led by John D. Rockefeller" to acquire nearly all of its competing oil refineries.[235] Even though this scheme was not particularly successful, the consolidation of industries still eventually happened leading to the aforementioned disparities between the working class and the owners of capital.

In order to prove that a monopsonistic or oligopsonistic market exists, it would be helpful to discuss data and experiments around the minimum wage. One such study is mentioned in the Journal of Economic Perspectives in the American Economic Association. In the article, "Oligopsony and Monopsonistic Competition in Labor Markets," Venkataraman Bhaskar, Alan Manning, and Ted To explore the theoretical shortcomings of the assumption of perfect competition in labor markets. In a perfectly competitive labor market, if a minimum wage is implemented as a price floor above the market equilibrium wage, then there will be unemployment due to the gap between quantity demanded and quantity supplied. However, Bhaskar, Manning, and To cite a study that shows otherwise, disproving the theory of perfectly competitive labor markets. They write, "they [Card and Krueger] found that New Jersey's 1992 minimum wage increase did not result in a fall in fast food employment and may even have resulted in an increase in New Jersey's employment relative to Pennsylvania." Furthermore, they state that "while [it is] difficult to explain in a conventional competitive setting, Card and Krueger's findings are easy to understand in an oligopsonistic labor market…when firms have

[233]"Gilded Age", *Ohio History Central (*Accessed December 9, 2022). https://ohiohistorycentral.org/w/Gilded_Age.
[234]*Ibid.*
[235]"Ida Tarbell | American Experience | PBS," *PBS* (Accessed December 9, 2022). https://www.pbs.org/wgbh/americanexperience/features/rockefellers-tarbell/.

market power."[236] Some might say that this data is limited to the fast food industry or even New Jersey alone. However, according to Manning, when the U.S. "raised the federal minimum wage from $4.75 an hour to $5.15," the percentage of hourly paid workers reporting a wage of $4.75 dropped, while the percentage of the same workers reporting a wage of $5.15 jumped, illustrating this imperfect model on a larger scale. Thus, we can see here that the perfectly competitive labor market fails when we apply data and real world occurrences to the model. Connecting this back to antitrust, we can see here that employers have clear market power in the labor market. As we can see from the Standard Oil example, this can lead to clear noxious effects on workers.

We can also observe these noxious effects on workers by extremely large companies in the meatpacking and pharmaceutical industries. The meatpacking industry is notorious for being concentrated. According to a report co-authored by Nathan Miller, a professor in economics at Georgetown University, since 2009, the 4-firm [HHI] concentration ratio has been consistently above 80%. The 4-firm concentration ratio can be interpreted as the share of the market the largest 4 firms in that market control. The report also states that "there are thousands of ranchers, stockers, and feedlots, but only a handful of packers."[237] However, one may argue that this actually has to be the case with meatpacking needing to be a consolidated industry from an economies of scale argument. However, this has not always been the case, since in 1977, the 4 firm concentration ratio was 0.25 in the beef packing industry, 0.35 in the poultry industry, and 0.33 in the pork industry. Nowadays, the respective ratios are 0.82, 0.54, and 0.66.[238] Additionally, according to the White House, the consolidation in this industry has coincided with "half of food at home price increases" since December 2020 and record profits for meat-processors occurring during the COVID-19 pandemic. While it seems immoral that a company can make record profits during a time where the majority of the population is suffering, this is exacerbated by how the industry treated its workers in this time.

The meatpacking industry is also notorious for its working conditions. Although the meatpacking industry is generally known as a dangerous place to work, the lack of competition in this market has led to an increasing disregard of workplace safety. According to an investigative report by The Guardian, "the meatpacking industry worked to take bargaining power away from the workers" leading to workers being treated as "disposable" parts of the assembly line. Additionally, "meatpacking plants were connected to 6% of 8% of all early-pandemic COVID cases and 3% to 4% of all early-pandemic COVID deaths."[239] This illustrates the dangers of consolidation that are permitted under the consumer welfare standard of antitrust law. The dangers are more prevalent here because of how important meat is in the American food system. Since meat is important for Americans, it was necessary for the industry to pump out the good. Because of this, the meatpacking industry held so much control over how

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[236]Venkataraman Bhaskar, Alan Manning & Ted To, "Oligopsony and Monopsonistic Competition in Labor Markets," *Journal of Economic Perspectives* 16, no. 2 (Spring 2002), at 167. https://www.aeaweb.org/articles?id=10.1257/0895330027300.

[237]Francisco Garrido et al., "Buyer Power in the Beef Packing Industry: An Update on Research in Progress," (Accessed December 10, 2022). http://www.nathanhmiller.org/cattlemarkets.pdf

[238]Brian Deese, Sameera Fazili & Bharat Ramamurti, "Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families," *The White House* (September 8, 2021). https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/.

[239]Alvin Chang et al., "The pandemic exposed the human cost of the meatpacking industry's power: It's enormously frightening,'" *The Guardian* (November 16, 2021). https://www.theguardian.com/environment/2021/nov/16/meatpacking-industry-covid-outbreaks-workers.

they were treating their workers in addition to pricing power. This illustrates the disproportionate power that is an outcome of consolidated industries.

These trends are also prevalent in other industries as a result of the current antitrust doctrine. One example is the pharmaceutical industry, with CVS illustrating the consequences of a consumer welfare standard. CVS is an example of horizontal and vertical integration. Since 1972, CVS has been through a series of mergers with drug store chains and healthcare corporations resulting in its having 9,900 pharmacies, which is 26% of the national drug store market.[240] In addition to controlling many of these clinics and drug stores, CVS also has massive control over the middleman between drug stores and health insurers, called a pharmaceutical benefits manager (PBM). According to Matt Stoller, CVS controls 70% of the PBM industry, which gives it the power to "negotiate prices with drug companies and pharmacies, and processing prescriptions." The effects of this have been local and independent pharmacies having their revenues slashed because of price cuts by CVS, leading to CVS having more power to acquire these pharmacies.[241] This is another example of massive consolidation having a large negative impact on smaller producers. However, there is also a missing piece of the effect on workers.

With chain pharmacies, there has been a massive negative impact on workers, and these effects actually get passed down to consumers as well. Many pharmacists have sent letters to state regulatory boards describing workplaces that are chronically understaffed and overworked leading to "difficulty to perform jobs safely, putting the public at risk of medication errors."[242] According to Gabler, those employed by CVS openly admit that the companies' practices endanger the public, and that this is mostly because of the control these companies have over workers.

Another negative externality of this consolidation can be seen with the opioid crisis. According to NPR, Walmart has also controlled many pharmacies (5,000+), where pharmacists employed by Walmart have testified to the improper filling of prescriptions and a massive increase in opioid sales. Even after whistleblowing, "Walmart did nothing except continue to dispense thousands of opioid pills."[243] Trained pharmacists, when searching for a job, see their only option as getting a job with one of these chain pharmacies. Subsequently, seeing how alternative employers are far and few in between, these pharmacists have no choice but to be subject to the dominance of their employers.

VI. The Ideal Judicial Standard and Secondary Effects

From all of these examples, the solution clearly needs to be a multi-faceted one. It is not enough to simply focus on producers or simply focus on consumers or simply focus on workers. There needs to be a balance between thinking about all three groups, while also making sure we

[240]Alexandra Biesada, "CVS Caremark Corporation
Company profile from Hoover's } 401-765-15…, *Archive.vn* (Accessed December 10, 2022).
https://archive.vn/L8HNn.
[241]Matt Stoller, "How CVS Became A Health Care Tyrant," *BIG by Matt Stoller* (February 1, 2020).
https://mattstoller.substack.com/p/how-cvs-became-a-health-care-tyrant.
[242]Gabler, *supra* note 21.
[243]Brian Mann, "Former Walmart Pharmacists Say Company Ignored Red Flags As Opioid Sales Boomed," *NPR* (January 3, 2021).
https://www.npr.org/2021/01/03/950870632/former-walmart-pharmacists-say-company-ignored-red-flags-as-opioid-sales-boomed.

are considering efficiency in these industries. I believe that an ideal judicial standard should be primarily focused on other producers and workers in the industry, and secondly consider consumers. The reasoning for this is based on the belief that when other producers and workers are prioritized, two things happen. The first is that the market becomes more competitive, leading to more innovation when smaller producers are protected from consolidation. This preserves the efficiency of the market due to producers competing with each other. The second is that when workers are prioritized, workers get more of a say in their workplace. Workers, being the ones who keep companies running, can actually increase productivity when given a say. They know the process in and out leading to them being able to voice their input and improve production processes. It is imperative that when mergers or acquisitions are proposed, they are evaluated with a standard prioritizing other producers and workers first and then consumers. To be clear, all of these are important considerations, but prioritizing workers and producers can lead to secondary beneficial effects on workers, such as decreased data breaches and the selling of data and increased respect for consumers' privacy.

An additional solution is the reconsideration and reevaluation of merger policies by antitrust regulatory agencies. In the 1980s, the Reagan administration adjusted their merger guidelines by "raising the threshold market share percentages at which the Department [of Justice] will challenge horizontal mergers and abolishing the vertical and conglomerate prohibitions in the Guidelines."[244] Subsequently, there was a massive increase in mergers and acquisitions, as from 1982 to 1987, the dollar volume of mergers and acquisitions increased from $60 billion to nearly $240 billion.[245] This in itself does not illustrate anything inherently bad or immoral, but given the facts laid out previously about the harmful effects of concentration of industries, the logical connection can be made between the consolidation of industries and the current noxious effects on consumers, smaller producers, and workers. Additionally, these guidelines have been maintained by the Clinton, Bush, Obama, and Trump administrations, showing how these industries have become consolidated without a legitimate challenge put up by the federal government.

Under the current process, any merger or acquisition above $111.4 million would have to be filed with the FTC or the DOJ Antitrust Division. Once jurisdiction is established by either of the agencies, if the merger is not approved, then the agency with jurisdiction would have to file a preliminary injunction in federal court.[246] One simple solution to address "litigation waste" would be to give the agencies with oversight authority to simply block a merger without a court order. This would hypothetically be done through legislation in Congress. Thus, the onus would be on the firms to prove that the effects of their merger or acquisition would not be anticompetitive in nature. While this would not address the main problem at hand, it would give the FTC and the DOJ Antitrust Division the appropriate tools to ensure that they really do have the legal authority to maintain competitive and fair markets.

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[244]"Giant Steps: Remarks Of Charles A. James Assistant Attorney General, Antitrust Division," *The United States Department of Justice Archives* (2015).
https://www.justice.gov/archives/atr/giant-steps-remarks-charles-james-assistant-attorney-general-antitrust-division (last visited Dec 10, 2022).

[245] Stoller, *supra* note 318.

[246]"Premerger Notification and the Merger Review Process," *Federal Trade Commission* (Accessed April 9, 2023). Federal Trade Commission (2013),
https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process.

The main avenue to accomplish the aforementioned changes would be through passing legislation in Congress. Akin to the Clayton Antitrust Act of 1914, this new legislation would bolster the strength of antitrust regulatory agencies as well as add new guidelines that would add worker considerations to antitrust review. The piece of legislation that would most mirror this is the Anticompetitive Mergers Act of 2022. This legislation would make certain mergers illegal, overhaul merger review processes, and enable the FTC and the DOJ Antitrust Division to conduct retrospective reviews on completed mergers.[247] While this would not apply to cases that have been litigated for criminal offenses, it would apply to the vast majority of merger and acquisition deals that fall under civil or administrative proceedings.[248]

If we applied this new standard to the example of the meatpacking industry earlier in this article, then we can see the positive effects on workers. If we took it as given that there were no noxious effects on consumers, rather there are substantial benefits from the economies of scale resulting due to consolidation, then a new evaluation of mergers in the industry from the perspective of workers would shed a lot of light on the situation. Specifically, the ability for regulatory agencies to conduct retrospective review would enable the usage of the horrific effects on workers during COVID-19 as evidence to dismantle the consolidation in the industry. High market consolidation, monopsony power, and drastic declines in standard of living for workers in these industries would act as sufficient evidence for agencies to start the process of breaking up these companies through administrative court proceedings.

VII. Conclusion

We can see that, over time, antitrust issues have gone from considering market power to purely focusing on the consumer and eventually presuming positive intent on behalf of producers. The origins of antitrust law are crystal clear. Legislators prioritized the needs of firms negatively impacted by unchecked corporate power by passing the Sherman Antitrust Act. However, the common law system in the United States created a unique situation where judges have undemocratically revised laws and antitrust doctrine through their decisions and twisted antitrust to represent something completely different today. It is clear how the precedent set from Bork onwards (and even Chief Justice White's amendment) have set up toxic circumstances for small producers and workers in this industry. Thus, it is imperative that the federal government enact new antitrust laws reflecting and reinforcing the need to protect smaller producers and workers in their respective industries.

[247]While this can be seen as a policy change, antitrust "policy" is constantly adjudicated in courts. Thus, a policy akin to the Sherman Antitrust Act or the Clayton Antitrust Act would be the primary manner in which a systematic change in how we consider antitrust cases would occur. *See* "Warren, Jones Introduce Bicameral Legislation to Ban Anticompetitive Mergers, Restore Competition, and Bring Down Prices for Consumers," *U.S. Senator Elizabeth Warren of Massachusetts,* (March 16, 2022), https://www.warren.senate.gov/newsroom/press-releases/warren-jones-introduce-bicameral-legislation-to-ban-anticompetitive-mergers-restore-competition-and-bring-down-prices-for-consumers.

[248]The double jeopardy clause of the Fifth Amendment prohibits the prosecution of a person twice for the same offense. Thus, it seems logical that firms or people that have been found not guilty in criminal proceedings would not be able to be prosecuted again, even if the ability to conduct retrospective reviews was granted.

A MATHEMATICAL CHARACTERIZATION OF SOME JUDICIAL PHILOSOPHIES

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I. Introduction

Law and mathematics are similar in an interesting way. They both use well-defined techniques of proof to discover truth, but while law is often concerned with observable nuances of human behavior, mathematics often abstracts away from empiricism towards theory. The potential for an intellectual collaboration between the two disciplines is compelling but tenuous. Mathematical models provide detail to law that it could certainly benefit from, because they provide quantitative information, which can often be more precise than qualitative information. Certainly, though, these models cannot adequately account for unpredictable aspects of law, like the impact of human emotions or politics. They often cannot provide cunning or description, which can be useful for those responsible for the execution or interpretation of law. They cannot consider emotion or unpredictability, which many consider to be core human qualities. They are often used maliciously to provide inaccurate information, backed by the facade of a rigorous mathematical methodology.[1]

To remedy this, it's most natural to think of mathematical models as a descriptive framework to understand some of the more complex processes of law.[2] They allow users to organize their thoughts logically, and follow the process according to well-defined rules and procedures. They can also provide some quantitative or theoretical detail that would be unachievable from a qualitative analysis, which can be useful when deciding a degree of severity or probability of an event. They create a scaffolding of theory that analysts can apply to a variety of schemes. Although the models cannot be relied upon exclusively, they can still prove useful in some organization and interpretation.

This paper applies this framework to an understanding of judicial systems and how they interact with law. This framework is not tied to a specific user or jurisdiction, because it only uses the definition of courts provided in this paper to derive its model. This means it does not depend on a unique scale or position.

Specifically, this paper formalizes courts as a mathematical function that acts upon law, and attempts to provide rigorous details about *how* courts interact with law. This model can provide information on how to characterize a court as a mathematical object, which could be particularly useful in comparative analysis, because it provides some notion of "sameness" between courts. To begin, though, we must define courts as they are used in this paper, because all derivations will be based on this definition, from the United States government:

Court: A legal body that interprets a law, which dictates how that law is enforced[3]

Notice that this definition does not indicate that courts represent *society's* interpretation of law, because most of the time, they do not. Even if the court is supposed to represent the will of the people, often it does not. The purpose of interpreting law is to inform other members of government on how the law should be enforced.

In this model, the executive branch of a government should act as agentive body that carries out exactly the court's interpretation of law, and does not dilute this with its own voice. In practice,

1. Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," *Harvard Law Review* 84, no. 6, 1329, https://doi.org/10.2307/1339610.

2. "Mathematics in the Social Sciences | Encyclopedia.com," https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/mathematics-social-sciences.

3. "Overview - Rule of Law | United States Courts," https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law.

executive agents like bureaucracy often include their own will in the execution of law, but theoretically, this would not happen. Whether or not this theoretical model is realistic enough is at the discretion the reader.

II. Background

Many legal scholars develop mathematical models to describe complex phenomena. Some are related to jurisprudence, like conflict theory in the 2022 paper "Towards a simple mathematical model for the legal concept of balancing of interests," which uses a mathematical model to analyze balancing of interests during a legal conflict.[4] The researchers quantify information using indices to decide whether one party has a right to privacy or not.

There are also several models related to judicial systems themselves. The most famous is by mathematician and statistician Simeon Poisson, namesake of the Poisson distribution, who calculated the (unconfirmed) amount of people wrongly convicted in France in the first half of the 18th century.[5] He used a version of Bayes' Law to conclude the probability that someone was wrongly convicted by a jury. He generalized Bayes' Law to include a jury of any amount of people, and created a function to describe the probability someone was wrongly convicted. The full discussion can be reviewed in an article from the Connecticut Law Review referenced at the end of this paper. Bernard Grofman conducted a similar probability-based analysis in his paper "Mathematical Models of Juror and Jury decision-making," using continuous distributions to assess the probability of error by a jury instead of discrete event probabilities that Poisson used.[6]

Some scholars have even modeled courts systems. For example, researchers Charles Cameron and Lewis Kornhauser at Princeton University and NYU School of Law published a paper in 2017 titled "What Courts Do ... And How To Model It," which directly models the actions of judges on the courts, which this paper seeks to expand on.[7] Cameron and Kornhauser analyze judicial decision-making as a series of "cutoff functions," saying that for a judge (or judges) to change their position on an issue, they must cross some ideological threshhold. Theirs is a more complete analysis, however, because it includes higher government, including legislative bodies and local governments. However, their paper presented a binary "yes or no" representation of judicial dispositions, whereas this paper will present a continuum of dispositions, which may be more realistic given the spectrum of ideologies that judges can have. This paper, however, does not include other legal or governing bodies.

III. Important Assumptions

As in other mathematical explorations of social science, certain assumptions must be made for the purpose of this model's functionality. Because of the complexity of studying human decision-

4. Frederike Zufall, Rampei Kimura, and Linyu Peng, "Towards a simple mathematical model for the legal concept of balancing of interests," *Artificial Intelligence and Law*, (November 2022), https://doi.org/10.1007/s10506-022-09338-3.

5. David H. Kaye, "Mathematical Models and Legal Realities: Some Comments on the Poisson Model of Jury Behavior,"
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411744.

6. Bernard Grofman, "Mathematical Models of Juror and Jury Decision-Making," in *The Trial Process*, Series Title: Perspectives in Law & Psychology (1981), 305–351, https://doi.org/10.1007/978-1-4684-3767-6_9.

7. Charles M. Cameron and Lewis A. Kornhauser, "Chapter 2: What Courts Do . . . And How to Model It," *SSRN Electronic Journal*, (2017), https://doi.org/10.2139/ssrn.2979391.

making, certain variables are assumed to be constant, and some of the legal structures being modeled in this paper will be simplified for the purpose of mathematical abstraction. A list of this paper's assumptions and their justifications are listed below:

1. All laws are initialized with some starting "interpretation." It is possible for a law to be passed by the law-making body and for that law to never reach a court. In this case, it is assumed that the enforcing power (usually bureaucracy) gives a law an initial interpretation that is used to enforce the law.

2. It is assumed that enforcing powers like bureaucracy do not include their own interpretation while executing the law, after the court has provided one. Instead, we assume that they carry out the exact interpretation of the court without diluting or modifying it at all. Of course, by assumption 1, we are assuming that each law is initialized with some interpretation, which may be given by the bureaucracy. However, once the court has provided its interpretation, we assume that the bureaucracy does not include their own voice in execution.

3. Notice the actual value of interpretation does not say anything about the discretion used by enforcement agents, only about how strongly that law should be enforced. This value is innately relative, since a "strength" of enforcement only makes sense in respect to other laws.

4. It is assumed that political spectrums are continuous; all possible degrees between the two extremes of the spectrum are considered possible ideologies.

All of these assumptions are inherently debatable, but they will be taken axiomatically for this paper. Readers are encouraged to discuss the soundness of these assumptions, but they will be treated as given truths, as this will allow this model and method to operate properly.

IV. Overview

Courts are an important decision-making body in legal studies. They have a direct impact on how law is interpreted, which should in turn directly affect how that law is enforced. This paper attempts to model our qualitative understanding of how courts interact with the law mathematically, using principles from mathematical statistics to reflect decision-making processes that can occur in courts.

From the previous definition on page 2, we can understand that courts *interpret* laws, so we will define courts as a mathematical object that acts on laws, which are themselves mathematically characterized.

We also understand, however, that courts are not simplistic or uniform in their interpretation of law. Sometimes, the same court can interpret two similar laws very differently, or even change the interpretation of the same law differently at two different times. Likewise, sometimes one law can be interpreted in different ways simultaneously by different courts.

We address this reality by using random variables, which gives us the ability to describe a court's legal philosophy. Random variables are endowed with a probability density function, which will allow us to describe how *likely* courts are to change interpretation in certain ways (*e.g.* create change, preserve status quo, or neither). This is consistent with our understanding of courts,

which are often likely to change the interpretation of a law in a certain way, dictated by the legal philosophy of the court.

Overall, this mathematical model allows us to create more accurate predictions for court decisions, because it will give us accurate and precise estimates for the probability of a certain decision (represented by a value of scalar A). Furthermore, it also gives us a way to logically compare courts, by comparing their legal philosophy distributions.

V. A Primary Mathematical Definition of Courts

To create a formal definition for courts, we must create a mathematical definition that formalizes the one given previously, without adding new assumptions or information. This way, our mathematical definition is simply a re-characterization of our previous definition, and can be used in the same ways without diluting it. Because we think of courts as bodies that *interpret* law, it makes sense to associate them with *functions*, which take laws as inputs and produce interpretations as outputs. This leads us to a couple necessary definitions:

A court's *Laws Under Review* is a set of laws that a court is reviewing, each associated with an interpretation. Generally, *Laws Under Review* L is defined :
$L := \{l | l$ is a law with a *unique* associated **interpretation value** $\|l\| \in \mathbb{F}\}$, where $\mathbb{F}$ is some field.

We say here that a law l's interpretation is some value associated with it, $\|l\|$, which expresses how strongly that law should be enforced by executive agents. This can be thought of as the magnitude of the law, and it is defined this way to create a convenient way of thinking of interpretations as mathematical objects that can be manipulated or combined.

This "magnitude" can be thought of as some notion of "how this law is enforced," and really only makes sense given the scale they're placed on. For example, take a linear scale where a magnitude of 100 means a liberal enforcement and a magnitude of 200 means a conservative enforcement of a law. Then if $\|l\| = 150$ for some law l, it should mean that law l is enforced with a centrist ideology, directly between a liberal and conservative enforcement.

The assignment of these values should be decided by the user of this model, and as long as they are consistent, the model is sound. Whether or not the interpretation values assigned to the laws are adequate is not a problem addressed by this paper, and will be left to the reader.

In that case, a definition of courts, which change the legal interpretation of a law becomes intuitive:

A court can be associated with an *interpretation* function

$$I : L \to L$$
$$I(l) = al, \text{ so that } \|I(l)\| = a\|l\| \text{for some } a \in \mathbb{F}.$$

This is to say that courts *scale* the interpretation of a law by some amount a. They take a law with an associated interpretation and output that law with a different interpretation (they multiply it by some scalar). That is, they *change* how law is enforced by enforcement agents. This is exactly equivalent to the first definition given, so it is complete.

However, this definition is not descriptively adequate. Although it complies directly with our definition of courts, it does not apply the same way we imagine courts actually would. In this description, courts scale *all* laws the same way every time. For example, for two different laws l_1 and l_2, $I(l)$ will always scale the interpretations $\|l_1\|$ and $\|l_2\|$ by the same scalar a, which indicates that courts always change interpretations of laws the same way. Intuitively, we know that this is not true. Courts often scale different laws in different ways, and sometimes the same court can even scale the same law in different ways,

It is true, nonetheless, that courts usually scale the interpretation of a law according to some *legal philosophy*. For example, a court that tends towards change is most likely to scale laws' interpretations up or down, whereas courts that tend against change are likely to not scale a law's interpretation at all. In modern political terms, as an example, we can see that left-leaning courts are likely to strengthen the interpretation of left-leaning laws and unlikely to strengthen the interpretation of right-leaning laws. The opposite is true for right-leaning courts. In these cases, we can intuit that courts favor some legal ideologies over others. Formally, this is to say that they experience each value of our scalar with a certain *probability*, which changes how likely they are to interpret laws according to a certain ideology. They do not experience any single value with absolute certainty, which is what our current model suggests. Rather, they experience different values of scalar a with different likelihoods, or probabilities. To account for this, we will need a nuanced definition of our scalar a that accurately reflects this *probability*.

For our formal definition of courts, we will define them as a tuple, which is an ordered list of mathematical objects. There are two object in a court's tuple, an associated set of *Laws Under Review* and a relevant *Interpretation Function*. This accounts for the fact that different courts review different laws and that each court has its own ideology that informs how it interprets those laws. Formally:

A *court* C is a tuple with a set of *Laws Under Review* L and an Interpretation function $I(l)$

$$C := < L, I(l) >$$

We will now address the problem stated before: our current definition of *Interpretation Function* does not adequately address the fact that the same court can interpret laws differently, and that courts usually favor certain ideologies over others with some *probability*.

VI. Accounting for Change

To remedy this problem, we can let our scalar a instead be a random variable A with a probability density function that describes the probability that $A = a \in \mathbb{F}$.

We redefine C as follows:

$$C : L \to L$$
$$I(l) = Al, \text{ so that } \|I(l)\| = a\|l\| \text{ for } A = a \in \mathbb{F} \text{ with probability } f(a).$$

This is a more descriptive way to describe courts, because now, as different laws are passed through, the random variable A can take different values. It allows the court function to scale different laws in different ways. It even allows a court to scale the same law in different ways, because

A is not dependent on the law that passes through C. This represents the real scenario where one law can pass through a court two different times and receive two different interpretations.

This also accounts for our idea of *probability*. The shape of the court's probability density function, $f(a)$, describes its *legal philosophy*, because it describes how likely a court is to scale a law a certain way. This will correspond to how likely a court is to scale a law up or down, change its interpretation, or not scale a law at all. In terms of the model, it will correspond to the value a that the random variable A takes.

When we introduce a spectrum of scalars, we can even see how the court might scale *towards* a political ideology, like Labour and Conservative in the UK or Democratic and Republican in the US. Political spectrums like these provide useful scales to describe the scalar values taken by A.

VII. An Important Example

For example, we could assign certain values to a one ideology, denoted M and other values to it's opposite ideology, denoted N.

Consider the field

$$\mathbb{F} := \{rM \text{ and } sN | r,s \in \mathbb{R}\}$$

where a value like $2M$ means an interpretation of magnitude 2 in the M direction. Likewise, a value like $3N$ would mean an interpretation of magnitude 3 in the N direction In this case, if $A = 2M$, then the court is scaling up the interpretation in the M direction. If $A = 1/2N$, then the court is scaling down the interpretation in the N direction. Let's look at some common characterizations of court systems in the world and see how it would be reflected by the model.

It is necessary to define multiplication in this field, because our interpretation function involves multiplying two values. We will define multiplication in this field as such:

$$\forall rM, sN \in \mathbb{F}, rM \times sN = (r \times s)M \text{ and } sN \times rM = (s \times r)N$$

. This is to say we will multiply the real parts to represent a familiar notion of "scaling" and will consider the product to be in the direction of whichever element was applied last.

Let's walk through an example of how this will work. Consider a Court C reviewing law l with magnitude $\|l\| = 2M$. This represents an initial interpretation of 2 in the M direction. Let's say this particular court favors the N direction, and when it interprets law l, it wants to double the interpretation of l, but in the N direction, instead of the M direction. This is equivalent to saying $I(l) = 2Nl$ so that the new interpretation $\|2Nl\|$ now equals $2N \times \|l\| = 2N \times 2M = 4N$. This is saying that the court has doubled the magnitude of interpretation, and now it has flipped the interpretation towards the N-ideology instead of the M-ideology.

This is directly analogous to how positive and negative signs work for real numbers. For analogy, let M=(+) and N=(-). Analogously, $1M = 1$ and $1N = -1$. Then $1N \times 1M = 1N$ is analogous to $-1 \times 1 = -1$. Here, we intentionally avoid using negative and positive a we do not suggest that any political ideology is morally "positive" while the other is morally "negative".

VIII. Typical Legal Philosophies

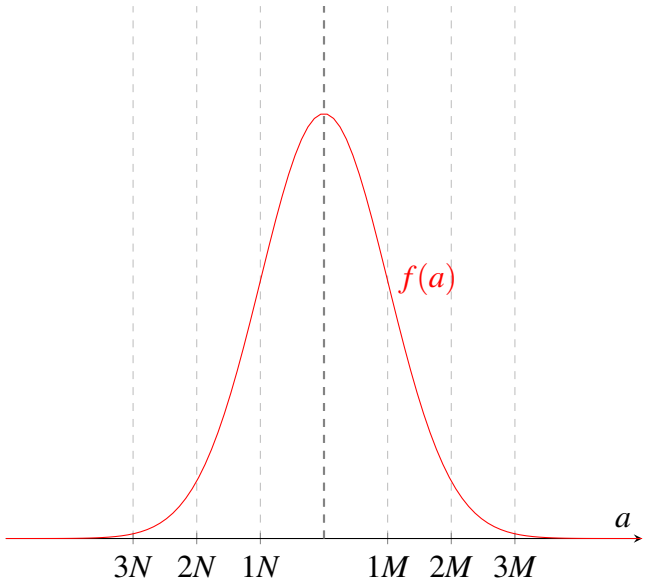
Here we will look at five prototypical legal philosophies. Notice that these prototypes are extremely uncommon in their pure forms in reality, and are meant only to be landmarks to understand what various legal philosophies might look like. Most court systems will experience some combination of these five cases. We will take$\mathbb{F} = \{rM \text{ and } sN | r,s \in \mathbb{R}\}$ as defined above.

Centrist Court Philosophy

A centrist court is one that tends towards *centrality*, whatever that may mean in the context of their society. This corresponds to a legal interpretation of 0, which is not a realistic or useful representation, because it would suggest that the court's interpretation is to just "not enforce this law in any way." This almost never happens in a judicial system, because courts usually interpret law to have some enforcement power. In this case, the court would essentially nullify the effect of the law. This is a highly theoretical example and is only meant to illustrate an extreme case.

In this case, the court would be most likely to scale all legal interpretations towards 0, to preserve centrality. If this is the case, then the scalar A is most likely to take a value close to 0, and less likely to take values farther away from zero. A plot of its probability density function, denoted by $f(a)$, is illustrated below.

Legal Philosophy Distribution for a Centrist Court

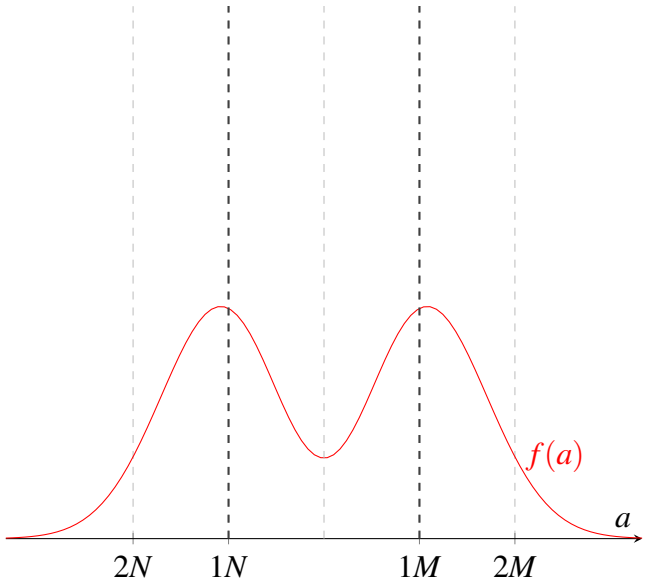


Conservative Court Philosophy

A conservative court is one that tends to preserve the status quo. This means that whatever the interpretation of laws has been, the court will preserve these interpretations. It is important to note that the court is preserving an *ideological* status quo. It does not just preserve the interpretation of all laws. If a new law is introduced that goes against the current philosophical status quo, the court will modify that law to comply with the status quo. An entirely conservative court is rare, because it would mean little to no change in law or legal interpretation. However, almost all modern nations experience conservatism, when the law (and enforcement of it) remains static.

In this case, the scalar A would be centered around $1M$ or $1N$, depending on the prevailing ideology. This is because for any law l with interpretation $\|l\| = tM$, a scalar of $A = 1M$ would mean that $I(l) = 1Ml = l$, indicating that the courts did not change the interpretation of law l at all. The same would be true is $\|l\| = tN$, which would require a scalar value of $A = 1N$. This would also suggest that $I(l) = 1Nl = l$, meaning the courts preserved the interpretation of law. It's possible for the court to change the interpretation of the law, which would correspond to $A \neq 1M$ or $1N$, but this is unlikely, and becomes increasingly unlikely as values move farther from $1M$ and $1N$. A plot of a possible probability density function is shown below.

Legal Philosophy Distribution for a Conservative Court

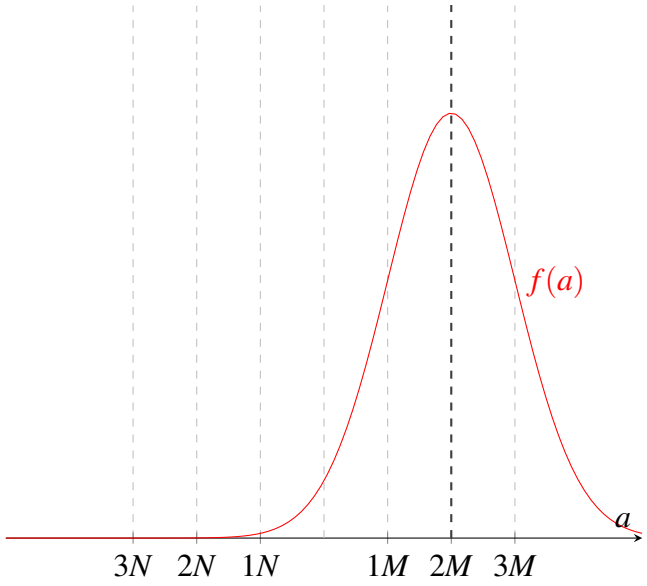


M-Leaning Reformist Court Philosophy

A *reformist* court is one that tends towards change in some way, whether it is strengthening or weakening of interpretation. This example, like the others, is rare by itself, because courts are not likely to want change unilaterally. Instead, they would probably encourage change in some areas and conservation in others. Regardless, in this extreme case, a court is *most* likely to encourage change. An M-leaning reformist court is likely to create change in an M-leaning direction. For this example, the right direction is indicated by positive values,

In this case, A is most likely to take M values other than 1. A could be centered around $2M$, which would indicate that a court is most likely to double the interpretation of a law in an M-direction, or it could be centered around $1/2M$, indicating a tendency to weaken laws, but still in an M-direction. Both of these indicate change. A possible plot of an M-leaning reformist court is shown below.

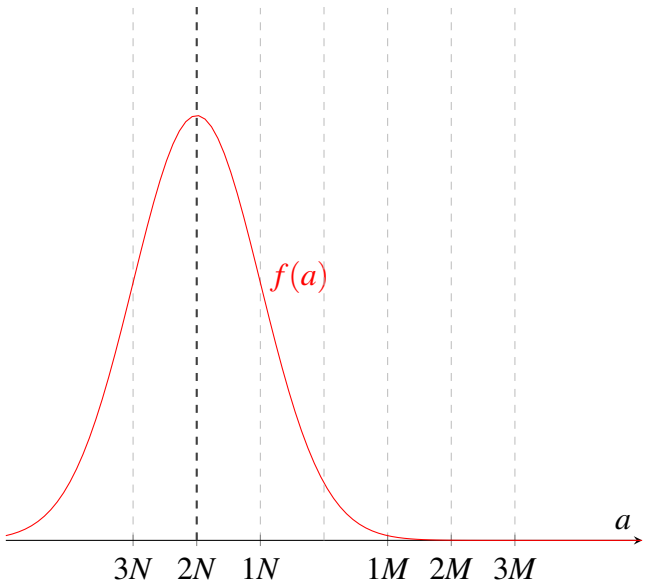
Legal Philosophy Distribution for an M-Leaning Reformist Court



N-Leaning Reformist Court Philosophy

This is the same case as the M-leaning reformist court philosophy, but for N-leaning courts. In this case, A is likely to be centered around N values, which indicates a tendency to scale legal interpretations in the N-direction. The rest is the same as above, but for N values instead of M ones. A possible plot of an N-leaning reformist court is shown below.

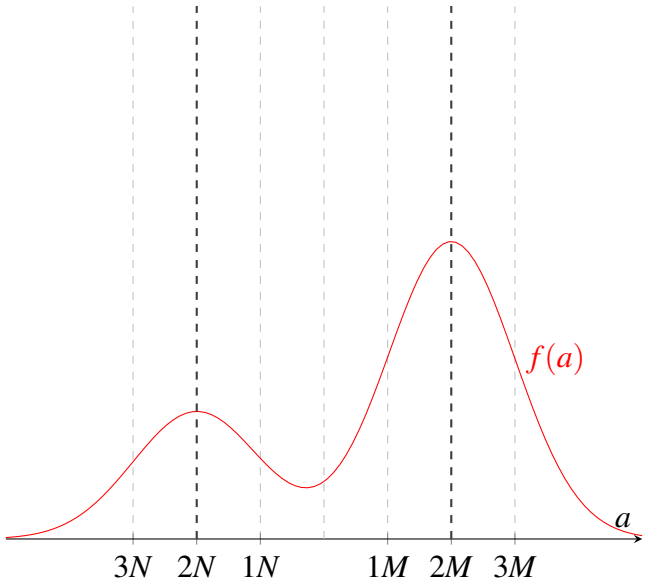
Legal Philosophy Distribution for an N-Leaning Reformist Court



Generally Reformist Court Philosophy

Generally reformist courts are simply likely to create change, in either direction. This means A is likely to be either an M value or N value, as long as $A \neq 1M$ or $1N$. The modes of $f(a)$ describe the most likely outcomes in terms of strength. For example, if A has modes at $2N$ and $1/2M$, then it is most likely to double interpretations in the N-direction or half interpretations in a M-direction. it is possible for a generally reformist court to have multiple modes, because it may be likely to create change in different directions by different amounts. A possible probability density function plot of one is below. This plot describes a court that is *very* likely to double interpretations in an M-direction and *a little likely* double interpretations in an N-direction.

Legal Philosophy Distribution for a Generally Reformist Court



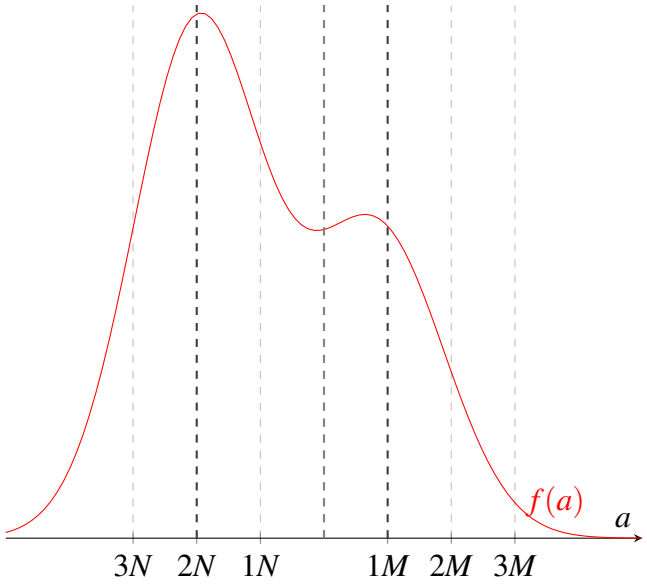
Addressing Actual Court Philosophies

The five examples above are extreme and theoretical examples; in reality, most courts appear to be combinations of these five cases. As we discussed before, most courts are likely to scale interpretation in certain way(s), which will describe the mode(s) of its probability density function. The different likelihoods of a court to scale interpretations will define its probability density function. Let's take an illustrative example. Consider the court system of MULRland. MULRland has some of the following tendencies:

1. *Likely to* conserve laws in the M-direction, corresponding to a scalar of $A = 1M$
2. *Somewhat likely to* scale an interpretation to 0, indicating centrality
3. *Very likely* to double the interpretation of a law in the N-direction.

The probability density function plot of MULRland's court system may look something like:

Legal Philosophy Distribution for MULRland's Court



IX. Discussion and Conclusion

A natural question that emerges after this discussion is: why use math at all? If the mathematical definition is just a symbolic representation of the original qualitative definition, then would it not be easier to just use the original definition? Even definitions of likelihood, which we used to derive the idea of A as a random variable with some representative probability density function, were modeled on our qualitative understanding of how courts interact with law and legal interpretation. In this case, is this kind of analysis even necessary? And if so, what new information does it provide?

The first thing it provides is *detail*.[8] If we use historical data of courts, we can create a probability density function for the court's philosophies by deciding what proportion of their decisions fall at each value of A. (The idea of how much a law is "scaled" will have to be subjective, but as long as it is consistent the model is adequate). This would provide some notion of how probable the court is to experience each value of A for future rulings. Although this is not always possible, there exist methods to fit data to a distribution that can be used to find a formula for a probability density function constructed from data. Given this probability density function, we can find exact numerical probabilities for a court's decision. For example, we can find *exactly* how probable it is for a court to double a law's interpretation in a M-direction direction, or for it to half the interpretation in a N-direction direction, or for it to scale the interpretation to 0. This quantitative model gives us access to far more precise measurements of probability, which is useful when predicting a court's impending decision. If a probability of a decision type can be calculated, then a prediction can be formed based on the most probable outcome.

The second thing the model provides is *comparison*.[9] In mathematical statistics, two distributions (random variables) are considered to be the same if they have the same probability density function. Thus, we can say that two courts have the *same ideology* if their legal philosophies follow the same distribution, because then their interpretation functions will be the same. (Formally, if $I_1(l) = Al, I_2(l) = Bl$, and $A = B$, then $I_1 = I_2$). This is particularly useful in comparative studies of courts, because it provides a notion of "sameness" that is easy to evaluate. It's also useful in a historical evaluation of a single court, because one can evaluate if any two periods of a court's history were the "same" by seeing if those two historical courts had the same probability density function. This would be useful in tracking ideological cycles of court systems.

This model provides a detailed, quantitative way to model our understanding of courts. Courts are legal bodies that change the interpretation, or enforcement power, of a law. We defined courts to be a function that scale the value of a law's interpretation. However, courts sometimes scale laws in complex ways, and to account for this, we modified our scalar to be a random variable. This way we can account for a court's legal philosophy, which is its likeliness to scale laws one way or another. This paper provides an elementary framework for modeling courts, but it is descriptively adequate. Whether it holds up to data requires more analysis, but it is without a doubt, a good start.

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8. "Everything You Need To Know About Mathematical Modeling," https://www.indeed.com/career-advice/career-development/mathematical-modeling.

9. "The Mathematical Sciences in 2025," *National Academies Press*, (2013), https://doi.org/10.17226/15269.