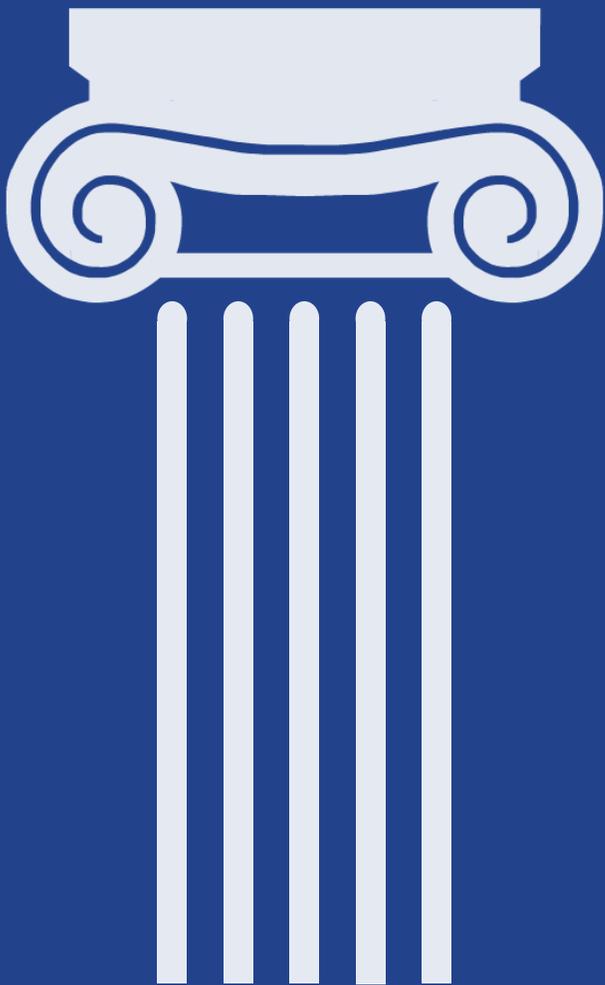


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Letter from the Editor-in-Chief

Dear Reader,

Welcome to the fifteenth edition — Volume 7, Number 1 — of the *Claremont Journal of Law and Public Policy*! Volume 7, Number 1 includes analyses of forced institutionalization, China’s Belt and Road Initiative, facial recognition technology, and more. We are also excited to bring you an interview with Shadi Hamid, a Senior Fellow at the Brookings Institution, who discussed topics ranging from labeling the Muslim Brotherhood a terrorist organization to the 2020 Democratic Presidential Primary. In addition, the *CJLPP* will continue its active online presence; be sure to visit us at www.5clpp.com.

This print edition benefited from a completely new editorial team that worked with our dedicated contributors throughout the summer to bring you rigorous and incisive commentary. I am grateful to our new Print Edition Editors: Talia Bromberg, Scott Shepetin, Sean Volke, Katya Pollock, Ciara Chow, and Calla Li. The print edition’s design is the result of the hard work of Sofia Muñoz, our new Design Editor. I am also excited to welcome Lauren Rodriguez (who conducted our interview with Shadi Hamid) as our incoming Interview Editor; Alison Jue as our next Campus Policy Editor; Aden Siebel as our new Webmaster (his work is also featured in this edition!); and Ali Kapadia as our next Business Director. I also want to introduce Daisy Ni and Bryce Wachtell as our new Chief Operating Officers. The two together led our digital content team last year and their advice over the summer was invaluable in preparing this print edition. And of course, I thank our writers — both digital content and staff writers — who form the backbone of our organization. The *CJLPP* could not exist without them.

As I begin my tenure as the Editor-in-Chief, I want to recognize the previous Editors-in-Chief who created this organization and its heritage of excellence: Byron Cohen (CMC ’16), Martin Sicilian (PO ’17), April Xiaoyi Xu (PO ’18), and Greer Levin (SCR ’19). I am humbled by the *CJLPP* members’ choice to elect me to build on the work of our previous Editors-in-Chief.

Going forward, I intend to emphasize our organization’s original mission: to educate students and the general public about pressing political and legal issues. For me, all of our work — writing, editing, events — should contribute to our shared project of becoming better citizens of this world. Members of the *CJLPP*, I hope, are united by a belief in the virtues of academic rigor, civic engagement, and open discussion about difficult political issues. In a democratic government, Justice Louis Brandeis once wrote, “the deliberative forces should prevail over the arbitrary.”¹ He recognized the dangers of hatred and oppression, and he believed that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies” and that “the fitting remedy for evil counsels is good ones.”² I hope the *CJLPP* continues to provide good counsel, in the form of rigorously-researched and -reasoned writing, to all who wish to understand and change law and policy for the better.

Finally, I want to thank our faculty advisors, Professors Ken Miller and Amanda Hollis-Brusky, for their kind sponsorship. The *CJLPP* is also indebted to the 5C student governments, the Salvatori Center, the Athenaeum, and the 5C politics, legal studies, government, and public policy departments. For those who are interested in joining us, please see the “Hiring” section of our website or email us at info.5clpp@gmail.com. We also always welcome submissions to our blog and future print editions; for more information, see the “Submissions” section of our website.

I hope you enjoy Volume 7, Number 1. Happy reading!

Best,

Isaac Cui
Editor-in-Chief

¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

² *Id.*

About

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

Submissions

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

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

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

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Correcting Criticism: A Review of American Responses to China's Foreign Investment

Jordan Hollinger (PZ '19)
Staff Writer

The Belt and Road Initiative — China's global infrastructure-focused investment program — is persistently harangued by American media. Prominent American think-tanks and politicians attest China has created a self-serving system predicated on the wanton, spendthrift use of “rogue aid.”¹ Accusations of “debt trap diplomacy”² have greatly influenced the popular image of China in Western news sources. Beijing has become a bully, according to such accusations, even a modern equivalent to the European colonial powers of the 18th and 19th centuries.³ However, much of the criticism levied against the Belt and Road Initiative is unfounded. Unsubstantiated allegations of “debt trap diplomacy” and comparisons between China and Western colonialism only weaken American political legitimacy in the realm of international finance, while poisoning the well for genuine criticisms of Chinese foreign investment.

I. The Belt and Road Initiative

Unveiled during a tour of neighboring Asian states in 2013, Xi Jinping's premier international economic scheme is as expansive as it is ambitious. Including both land- and sea-based infrastructure projects, the Belt and Road Initiative is Beijing's strategy to augment China's connections with other states and to develop China's position as a leader within global financial markets. Nearly seventy countries have reached agreements with China

to develop local infrastructure thus far, primarily nations across Africa, Central Asia, and Southeast Asia.⁴

Emphasizing specific regional development areas, China's flagship foreign investment project creates a system by which states and corporations agree to receive Chinese funding for local infrastructure and transportation development. These projects include transcontinental rail routes spanning the Eurasian continent, sea ports and airports, international highways, and even domestic electrical and plumbing systems.⁵ Of particular interest for the Initiative are several key “Economic Corridors,” including the regions of China-Pakistan, China-Mongolia-Russia, and the China-Indochina Peninsula, which are of strategic value as thoroughfares connecting China to other developed markets.

As with many of China's political endeavors, the Belt and Road Initiative is couched in somewhat abstract yet deliberate terminology. When discussing the Initiative domestically, Xi Jinping and other leaders consistently refer to the program as the foundation for a “community of common destiny.”⁶ However, this “community” refers specifically to partnerships between China and developing nations; when discussing Chinese relations with developed Western nations, the term used instead is the “community of common interests.”⁷ Like many of Beijing's policy attempts, this distinct nomenclature comes from an effort to appear both universal and neutral. Beijing likely does

1 See, e.g., Moises Naím, *Rogue Aid*, FOREIGN POL'Y (Oct. 15, 2009, 4:39 PM), <https://foreignpolicy.com/2009/10/15/rogue-aid/> (last visited July 25, 2019).

2 E.g., John Pomfret, *China's Debt Traps Around the World Are A Trademark of Its Imperialist Ambitions*, WASH. POST (Aug. 27, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/08/27/chinas-debt-traps-around-the-world-are-a-trademark-of-its-imperialist-ambitions/?noredirect=on&utm_term=.cbd31818d57e.

3 E.g., Nick Van Mead, *China in Africa: Win-Win Development, Or a New Colonialism?*, GUARDIAN (July 31, 2018, 8:00 AM), <https://www.theguardian.com/cities/2018/jul/31/china-in-africa-win-win-development-or-a-new-colonialism>.

4 HELEN CHIN & WINNIE HE, FUNG BUS. INTELLIGENCE CTC., *THE BELT AND ROAD INITIATIVE: 65 COUNTRIES AND BEYOND* (2016), https://www.fbicgroup.com/sites/default/files/B%26R_Initiative_65_Countries_and_Beyond.pdf.

5 *Backgrounder: Economic Corridors Under Belt And Road Initiative*, GLOBAL TIMES (May 9, 2017, 1:51 PM), <http://www.globaltimes.cn/content/1046027.shtml>.

6 Denghua Zheng, *Finding the 'Community of Common Destiny'*, ASIA & THE PACIFIC POL'Y SOC'Y (Apr. 20, 2018) <https://www.policyforum.net/finding-community-common-destiny/>.

7 *Id.*

not want to remind developed nations of any potential rivalry, but it also aims to appear more ambitious and prosperous when dealing with developing nations.

Beijing has, however, recently attempted to de-emphasize such rhetoric,⁸ likely in order to cool strained relations with potential partners that have come to see China as aggressive, economically and otherwise. Similarly, in response to criticism that politically-inspired infrastructure projects are prone to unnecessary risk, Chinese media has explicitly stated that the Belt and Road Initiative is primarily a commercial venture, focused on the development of state-owned enterprise through international markets.⁹ The Initiative is described as wholly distinct from aid — Beijing insists all new contracts are strictly dictated by profitability.¹⁰ Always with keen attention to public image and international reputation, Beijing continues to stress the Belt and Road Initiative as central to both foreign policy and domestic finance.

II. Allegations of “Debt Trap Diplomacy”

A common allegation against the Belt and Road Initiative is that such loan-based investments are predatory, creating “debt traps” in which countries are obliged to pay inordinate amounts in exchange for under-performing investment projects and insubstantial local economic growth.¹¹ Such allegations ultimately suggest that China’s underlying goal through the Initiative is to create a network of economically-dependent developing nations which are forced into political subservience to China. It does not stand to reason, however, that China is intentionally indebting developing countries in order to claim land rights, or even to colonize said countries, for a variety of reasons.

The bulk of Belt and Road Initiative-funded projects are not directly financed through the Chinese state but are instead overseen through the increasingly independent system of state-owned enterprises (SOEs). As semi-private companies, China’s SOEs are necessarily driven by profit foremost, though politics play some role, for instance in

managerial appointments within the companies. Despite this layer of governmental oversight, competition is still prevalent between SOEs, especially over the high-profile contracts made through the Belt and Road Initiative. As one critic writes, “viewing Chinese SOEs as simply ‘Beijing’s bricklayers’ — contractors dependent on Chinese finance — does not capture the reality of their current or future operations. Instead, these firms are now becoming operators, investors, and owners, thereby taking up long-term commercial and strategic stakes in countries around the world.”¹² SOEs concerned foremost by profit are not motivated to “debt-trap” potential countries by proffering investments intended to fail, particularly as the international public eye increasingly views Chinese loans as predatory. Coupled with the upward trend of SOEs independently financing, contracting, and even operating foreign projects,¹³ we can conclude that Chinese investment is reaching a level of maturity and reciprocity that should seem impossible for an openly predatory market system.

Further, Chinese investments are increasingly targeting South Asia and Europe.¹⁴ This trend strongly indicates that China is not specifically targeting under-developed African nations to assert political dominance but instead is offering loans on a purely for-profit basis, as these South Asian and European regions already contain larger, more developed economies. Of course, the Initiative is political in that Beijing believes it to be the most effective method of bolstering the Chinese financial market — but these actions refute the claim that China is politically targeting specific countries in order to create vassal states through predatory debt-traps.

While some infrastructure projects might ultimately prove unprofitable, this still does not necessarily warrant the label of “debt trap.” Hambantota Port, a recent construction project in Sri Lanka primarily funded through the Belt and Road Initiative, has been identified by Western critics as an example of China offering intentionally predatory loans to a developing nation with the intent of reclaiming the rights to the project. Yet the specific loan issued by China toward this project comprised less than three percent of Sri Lanka’s total outstanding debt at the time, and Chinese debt in its entirety comprised merely

⁸ *China’s Belt and Road Cracks Down on Corruption in Image Revamp*, BLOOMBERG NEWS. (Apr. 22, 2019, 2:00 PM), <https://www.bloomberg.com/news/articles/2019-04-22/china-belt-and-road-cleanup>.

⁹ See, e.g., DELOITTE CHINA, *EMBRACING THE BRI ECOSYSTEM IN 2018*, at 9 (2018), https://www2.deloitte.com/content/dam/insights/us/articles/4406_Belt-and-road-initiative/4406_Embracing-the-BRI-ecosystem.pdf.

¹⁰ *Id.* at 13.

¹¹ See, e.g., Pomfret, *supra* note 2.

¹² Wendy Leutert, *The Overseas Expansion and Evolution of Chinese State-Owned Enterprises*, MEDIUM (July 11, 2019), <https://medium.com/fairbank-center/the-overseas-expansion-and-evolution-of-chinese-state-owned-enterprises-3dc04134c5f2>.

¹³ *Id.*

¹⁴ DELOITTE CHINA, *supra* note 9, at 11.

eight percent of outstanding debt for the nation.¹⁵ Further, to claim that this result is the direct intent of China does not stand to reason. If Chinese banks invest in a specific project, it must ultimately provide some return on investment — either in a direct return from the project itself or in an opening-up of new markets to Chinese exports and investors. To imply that China is selectively choosing to offer loans with the intent of their debtors surrendering ownership of the finished project as payment would assume such projects will then turn a profit once under Chinese ownership — despite not doing so under domestic control. Further, this argument assumes indebted countries would willingly surrender a location with desirable geopolitical importance instead of paying the debt in some other way — or by turning to other regional powers such as the United States or India, which would likely offer substantial support to prevent any such Chinese gains. Sri Lanka already has engaged in a sort of bidding war between Indian and Chinese financial markets, accepting aid from both sides to bolster its own economic sustainability. According to one critic, “while accepting of China’s economic interests to advance its own development, Sri Lanka is actively offsetting any Chinese militaristic strategic overtures by leaning into defense cooperation with other partner nations, such as the United States and India.”¹⁶ Similarly, as one Belt and Road Initiative analyst writes, “China has a history of sticking it out in large-scale development projects [such as at Hambantota] and rarely cuts its losses and runs, especially when so much leverage, geopolitical positioning and face is at stake.”¹⁷ The most likely explanations for Hambantota’s failure, then, are that the Chinese market over-estimated the present need for such a port in Hambantota, that the local government failed to properly manage or to effectively market the port, or simply that not enough time has passed for the project to reach fruition.

This is not to imply that Chinese investment is intrinsically good or better than other forms of transnational investments. One commonly-heard critique of the Initiative is that Chinese loans do not result in economic

15 Ajith Nivard Cabraal, *Response to Claims that Sri Lanka Was in a ‘Debt Trap’ in 2014 due to ‘Chinese Loans’*, DAILY FT (Sept. 17, 2018), <http://www.ft.lk/columns/Response-to-claims-that--Sri-Lanka-was-in-a--debt-trap--in-2014-due-to--Chinese-loans-/4-662923>.

16 Priyanka Moonesinghe, *Playing Both Sides of the Fence: Sri Lanka’s Approach to the BRI*, SOUTH ASIAN VOICES (May 9, 2019), <https://southasianvoices.org/both-sides-of-the-coin-sri-lankas-approach-to-bri/>.

17 Wade Shepard, *Sri Lanka’s and China’s Hambantota Debacle May Now Be ‘Too Big To Fail’*, FORBES (Aug. 4, 2016), <https://www.forbes.com/sites/wadeshepard/2016/08/04/sri-lanka-and-chinas-hambantota-debacle-is-too-big-to-fail/#12ea5c0d18d4>.

improvement for many recipient countries.¹⁸ A common repercussion of Chinese investment is a sudden influx of inexpensive Chinese imports, which can potentially destabilize local industries, particularly in countries with under-developed local industries. Furthermore, Beijing requires on some contracts that Chinese companies receive first bid on projects, potentially resulting in overpriced projects that fail to provide meaningful local employment involved with construction.¹⁹

However, evidence indicates that as Chinese investment in a particular region matures, local employment within Belt and Road projects increases steadily,²⁰ thereby fostering the development of local industry. Likewise, as the Belt and Road Initiative increases in scope, related projects will progressively advance from energy and infrastructure into industries including trade, manufacturing, and tourism²¹ — industries which rely largely on local labor. Ultimately, it is not accurate to simply say that China is “debt-trapping” smaller countries. Rather, there are fundamental challenges present in any large-scale investment program, particularly when focusing on investments in developing nations. Asserting the label of “debt-trap” merely serves to cloud honest discussion on the benefits and risks such an initiative holds.

III. Comparisons to Colonial Europe

Even more egregious is the claim that Chinese lending is a direct evolution of European colonial practices and that China is treating Africa the same way European colonizers did.²² This portrayal of China as a neocolonialist power is seen regularly among Western political leaders and policy writers. Such arguments generally rely on the

18 See, e.g., Anja Manuel, *China Is Quietly Reshaping the World*, ATLANTIC (Oct. 17, 2017), <https://www.theatlantic.com/international/archive/2017/10/china-belt-and-road/542667/>.

19 *Id.*

20 See BARRY SAUTMAN & YAN HAIRONG, HKUST ISNT. FOR EMERGING MKT. STUDIES, LOCALIZING CHINESE ENTERPRISES IN AFRICA: FROM MYTHS TO POLICIES 2 (2015), https://iems.ust.hk/assets/publications/thought-leadership-briefs/tlb05/hkust_iems_thought_leadership_brief_tlb05.pdf (“Localization of workforces at Chinese enterprises is already well-developed and, generally, the longer Chinese firms are in Africa, the more they localize.”); see also *id.* at 1 (“Our database on workforce localization shows that, on average, locals are more than four-fifths of employees at 400 Chinese enterprises and projects in 40-plus African countries.”).

21 DELOITTE CHINA, *supra* note 9, at 14.

22 See, e.g., Panos Mourdoukoutas, *What Is China Doing In Africa?*, FORBES (Aug. 4, 2018, 11:20 AM), <https://www.forbes.com/sites/panosmourdoukoutas/2018/08/04/china-is-treating-africa-the-same-way-european-colonists-did/#534a7c8298ba> (“The reason Chinese corporations are in Africa is simple; to exploit the people and take their resources. It’s the same thing European colonists did during mercantile times, except worse.”).

assumption that Chinese investment in Africa is predatory, that Chinese investment projects are exceptionally likely to be unprofitable, and that Chinese foreign policy aims to extract wealth from under-developed countries in Africa and South Asia without regard to local interests. Former Secretary of State Rex Tillerson has regularly indicated that Africa is harmed through its business relationships with China. The Chairperson of the African Union has denounced such claims as paternalistic and insulting to “not only the Africans but to all people of African descent around the globe.”²³ Former Secretary of State Hillary Clinton has made strikingly similar remarks to African leadership as well, saying of China, “We don’t want to see a new colonialism in Africa.”²⁴

However, such accusations are often unfounded, or even demonstrably false. In a report by the Center for International Forestry Research, investigators concluded that “China is not a dominant investor in plantation agriculture in Africa, in contrast to how it is often portrayed.”²⁵ In fact, the report found that the United Kingdom was the largest investor by land area, followed by the United States, India, and Norway²⁶ — dispelling the belief that China is “grabbing” African land. Claims that Chinese investment projects do not provide any increase in local job growth are similarly unfounded. As of 2013, eighty-five percent of employees among all “key Chinese enterprises” were local workers, one report finds.²⁷ In certain major industries, including extractive industries, manufacturing, and construction, eighty to ninety-five percent of the workers at Chinese-owned firms continent-wide are local workforce.²⁸ This steady upward trend of increased local workforce among African-based Chinese corporations is unsurprising; as the Chinese domestic market grows, Chinese workers demand higher wages and better working conditions, making local labor more attractive for project investors. Local employment rates among Chinese companies have thus improved dramatically in recent years. Of course, we must remain cautious as to the working

conditions of local employees, for mere employment is not enough to ensure improved quality of life. Similarly, the Belt and Road Initiative in many ways innately involves a rather one-directional power dynamic between China and its debtors, particularly so for those countries that have little choice in international funds besides China. Seemingly whenever America imposes sanctions on nations such as North Korea or Iran, China gracefully fills these holes left by Western investors.²⁹ The citizens and governments of these countries, then, are left with little choice for financial investment.

And, of course, the Belt and Road Initiative is subject to the same criticisms which follow any profit-driven, market-based form of international finance. Yet these hiring statistics alone indicate the difference between Western colonial history in Africa and modern Chinese investment strategies. While both systems are ultimately a scheme to profit from poorer societies, Chinese investments also aim to achieve some level of mutual benefit, at least nominally.³⁰ Western colonialism, however, sought to establish a consistent flow of income and resources from a conquered nation to the more powerful colonizing nation, largely established through martial and economic violence. To imply broad similarities between the two blatantly removes the agency and sovereignty of developing nations. Worse still, it willfully ignores the horrific abuse and lingering trauma inflicted upon the same developing nations by the Western institutions that now falsely accuse China of practicing colonialism. Western critics must reconsider the belief that China ought to be castigated for such investment practices without themselves simultaneously offering to these nations alternative investment routes.

IV. Filling the Vacuum of U.S. Leadership

For many of these developing nations, the “IMF-World Bank orthodoxy” has failed to produce substantial economic benefit, oftentimes leaving China as the sole source willing or able to invest to meet these increasing needs.³¹ China is thus actively creating international monetary

23 Kylie Atwood, *Tillerson: US Commitment to Africa “Quite Clear”*, CBS NEWS (Mar. 8, 2018, 7:46 AM), <https://www.cbsnews.com/news/tillerson-u-s-commitment-to-africa-quite-clear/>.

24 *Clinton Warns Against “New Colonialism” in Africa*, REUTERS (June 11, 2011, 3:14 AM), <https://www.reuters.com/article/us-clinton-africa/clinton-warns-against-new-colonialism-in-africa-idUSTRE75A0RI20110611>.

25 George C. Schoneveld, *The Anatomy of Large-scale Farmland Acquisitions in Sub-Saharan Africa* 7 (Ctr. for Int’l Forestry Research Working Paper 85, 2011), http://www.cifor.org/publications/pdf_files/WPapers/WP85Schoneveld.pdf.

26 *Id.* at 6.

27 SAUTMAN & HAIRONG, *supra* note 20, at 2.

28 *Id.*

29 *See China Tipped to Profit After Donald Trump Quits Iran Nuclear Deal*, SOUTH CHINA MORNING POST (May 18, 2018, 3:54 PM), <https://www.scmp.com/news/china/diplomacy-defence/article/2146768/china-tipped-profit-after-donald-trump-quits-iran>.

30 *See Xu Wei, Countries welcomed to join in mutual benefits of Belt, Road*, CHINA DAILY (Sept. 4, 2018), <http://www.chinadaily.com.cn/a/201809/04/WS5b8dbec9a310add14f3895db.html>.

31 *See Abdi Latif Dahir, The Growing Membership of a China-led Development Bank Challenges the IMF-World Bank Orthodoxy*, QUARTZ AFRICA (May 9, 2018), <https://qz.com/africa/1273424/kenya-joins-china-led-asian-infrastructure-investment-bank-aiib>.

systems parallel to those traditionally led by America. Whereas long-standing institutions such as the IMF or the United States Agency for International Development (USAID) have historically given America significant sway over the global financial market, China has established alternative routes for nations to seek competitive investment. China is thus empowered to contend with America's international presence as the unitary financial superpower.

Through China's investment practices through the Belt and Road Initiative, we can see a fundamental underlying aim of Chinese foreign policy. Above all else, the Chinese government seeks to achieve economic and political self-determination. While the current American presidential administration further withdraws America from its once inexorable position of global leadership, China rapidly looks to fill this void. The American government has struggled to maintain a coherent playbook on international affairs, often oscillating between isolationist tendencies and pioneering leadership roles. While President Trump has repeatedly stated his opposition to multilateral, transnational agreements — such as his well-publicized distaste for the Paris Climate Accords on emissions reduction or his withdrawal from the Trans-Pacific Partnership — the House of Representatives and even individual states and cities have acted separately, oftentimes antagonistically, to the President's international goals.³² Similarly, the Trump Administration has placed more formal tariffs and free-trade restrictions on allies than on China,³³ including his tariff on steel and aluminum imports from Germany and his recent declaration to impose tariffs on Mexican vehicle imports despite pending treaties between the United States, Mexico, and Canada which would restrict such tariffs.³⁴ These conflicts strengthen the image of America as conflicted and indecisive policy-wise. Even concerning America's direct political connections to other key allies — such as with the Philippines³⁵ — the current Administration has regularly ceded positions of global influence

32 See, e.g., Umair Irfan, *Nancy Pelosi Is Trying to Force Trump to Return the US to the Paris Climate Agreement*, VOX (Mar. 27, 2019, 2:20 PM), <https://www.vox.com/2019/3/27/18283831/pelosi-climate-change-green-new-deal>.

33 Heather Long, *Trump Has Officially Put More Tariffs on U.S. Allies Than on China*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china>.

34 Katie Lobosco, *Trump's Threat to Override New NAFTA with Tariff on Mexican Cars Could Undermine Ratification*, CNN (Apr. 5, 2019, 6:08 PM), <https://www.cnn.com/2019/04/05/politics/mexico-auto-tariffs-trump/index.html>.

35 See Timothy McLaughlin *A U.S. Ally is Turning to China to 'Build, Build, Build'*, ATLANTIC (May 8, 2019), <https://www.theatlantic.com/international/archive/2019/05/philippines-us-ally-china-investment/588829/>.

to other nations, particularly China.

America's hesitancy to cooperate with Chinese investment is not necessarily shared by other Western nations, however. The German port city of Duisburg, for instance, has seen substantial economic development in recent years, due largely to the city's shipping arrangements with Chinese railway corporations.³⁶ In 2018, Portugal became the first Western European state to accept Belt and Road Initiative funding, rapidly enmeshing its financial markets with those of China.³⁷ And, in early 2019, Italy became the first G7 member state to accept Belt and Road funds, contracting nearly \$2.8 billion in infrastructural projects largely centered around port infrastructure in cities including Trieste, Genoa, and Palermo.³⁸ Whether these projects prove profitable for Europe will not be known for years to come. What can be seen, however, is that European states are beginning to see China as a viable source of investment funding, a trend that is likely to only gain momentum.³⁹

V. Conclusion

As with any economic policy of such immense size, there are many significant systematic faults and governmental missteps where the Belt and Road Initiative has suffered. That a disconcerting level of Chinese-backed infrastructure projects fail to result in a profit within a reasonable timeframe is worthy of critique. Likewise, evidence seems to indicate that direct aid to African governments tends to have more positive results towards development than do loans,⁴⁰ which raises the question of why China has steadily decreased direct aid to Africa in the past three years.⁴¹ As SOEs attain heightened influence over foreign countries' domestic markets, for instance, it becomes par-

36 Phillip Oltermann, *Germany's 'China City': How Duisburg Became Xi Jinping's Gateway to Europe*, GUARDIAN (Aug. 1, 2018, 2:15 AM), <https://www.theguardian.com/cities/2018/aug/01/germanys-china-city-duisburg-became-xi-jinping-gateway-europe>.

37 See Portugal, *the Atlantic Coast of the Belt and Road Initiative*, OBOREUROPE (Oct. 12, 2018), <https://www.oboreurope.com/en/portugal-atlantic-bri>.

38 Andrew Chatzky, *China's Belt and Road Gets a Win in Italy*, COUNCIL ON FOREIGN RELATIONS (Mar. 27, 2019), <https://www.cfr.org/article/chinas-belt-and-road-gets-win-italy>.

39 See, e.g., Sophie Beach, *MERICs Interview: China's Influence in Europe*, CHINA DIGITAL TIMES (June 8, 2018), <https://chinadigitaltimes.net/2018/06/merics-interview-documenting-chinas-influence-in-europe/>.

40 See Yun Sun, *China's Aid to Africa: Monster or Messiah?*, BROOKINGS INST. (Feb. 7, 2014), <https://www.brookings.edu/opinions/chinas-aid-to-africa-monster-or-messiah>.

41 *Data: Chinese Foreign Aid*, JOHNS HOPKINS UNIV. SCH. OF ADVANCED INT'L STUDIES: CHINA-AFRICA RESEARCH INITIATIVE, <http://www.sais-cari.org/data-chinese-foreign-aid-to-africa> (last visited July 25, 2019).

ticularly crucial that leadership positions within SOEs are filled not just as political offices but as independent corporate entities. That the Chinese government obviously does not give foreign nations or corporations a say in how SOEs are run lends Chinese domestic politics an outsized role over the international stage. Such criticisms are valid and necessary. However, labeling the Belt and Road Initiative as innately flawed, directly harmful, or intentionally predatory — as the American government and media seem keen to do — prevents meaningful discussion regarding Chinese foreign investment policy from taking place.

Recently, America has taken some action towards reaffirming its stance as global leader. Ongoing trade negotiations with Mexico and Canada have led to changes on certain aspects of NAFTA, on issues broadly including intellectual property rights, trade-specific minimum wage regulations, and tariff exceptions on goods shipped by small- and medium-sized enterprises.⁴² Further, within the last year America, Japan, and Australia reaffirmed their commitment to multilateral trade across the Indo-Pacific financial market,⁴³ emphasizing the heightened importance of international regions perceived susceptible to Chinese encroachment.

While these affirmations and renegotiations are necessary, they do not nearly match the commitment China has placed on developing its international financial sway. If America is to contend with China in the upcoming decade, then reciprocating China's ambitious foreign investment strategies will likely become vital for America to preserve its role as global superpower. Rescinding certain trade sanctions, such as those against Iran, would preclude China from entering new markets. Likewise, aggressively matching Chinese financial investments in developing nations would both increase American clout within capital-hungry markets and allow America to silence any claims that Chinese political and financial preeminence is an inevitability. America should not seek profit from such investments; offering sweeter deals to potential investors while running little to no initial return will prevent China's relative gains as a superpower and will cement America's own dominance. Yet if China continues to surpass

America in terms of foreign investment, then America will only see its international influence shrink.

⁴² See *United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> (last visited July 25, 2019).

⁴³ See *Australia-Japan-United States Trilateral Strategic Dialogue Joint Ministerial Statement*, U.S. DEPT OF STATE (Aug. 5, 2018), <https://www.state.gov/r/pa/prs/ps/2018/08/284940.htm>.

Sex Work in the United States: Constitutional and Policy Arguments for Decriminalization

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In this paper, I argue that laws criminalizing sex work make this work significantly more dangerous and are counterproductive to the aim of protecting sex trafficking victims. First, I discuss the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act (SESTA/FOSTA) and the negative impact of these laws on sex workers. Next, I analyze several legal arguments which conclude that the criminalization of sex work is unconstitutional. I examine *Woodhull Freedom Foundation v. United States*, the first prominent case with the potential to strike down the SESTA/FOSTA legislation. I elaborate on *Woodhull's* central free speech argument and contend that it does not adequately address the dangers created by SESTA/FOSTA for sex workers. Then I analyze another case, *Erotic Service Provider Legal Education and Research Project v. Gascon*, in order to examine legal arguments advocating for the protection and legal rights of sex workers. As part of this examination, I consider the opinion of the Ninth Circuit Court of Appeals when dismissing this case and assert that it is rife with misperceptions about sex work that affect broader legal thought about the profession. Finally, I argue that laws criminalizing sex work reflect moral judgements, which do not present a legitimate basis on which to create laws.

I. SESTA/FOSTA

In 2017, Congress passed two bills entitled the Stop Enabling Sex Traffickers Act¹ and the Allow States and Victims to Fight Online Sex Trafficking Act.^{2,3} SESTA/FOSTA implemented the following four measures to target online sex trafficking conducted over third-party websites:

1) It limited the legal immunity offered to online service providers by amending Section 230 of the Communications Act of 1934.⁴ Previously, this law ensured that online service providers could not be held legally responsible for the actions of their users. For example, prior to SESTA/FOSTA, the owner of a web blog could not be held responsible for

defamatory statements posted in the site's comments section because of Section 230 of the Communication Decency Act of 1996.⁵ Under SESTA/FOSTA, Section 230 now excludes protection for online service providers whose users promote or facilitate sex trafficking on their sites.

2) It amended the federal criminal code to impose penalties on those who, through any means of interstate commerce, use an online service to promote or facilitate prostitution.⁶

3) It increased penalties for any person who "1) promotes or facilitates the prostitution of five or more persons, or 2) acts with reckless disregard that such conduct contributes to sex trafficking."⁷

4) It expanded the definition of "participating in a venture" of sex trafficking to include knowingly assisting, supporting, or facilitating a sex trafficking violation.⁸

In the language of these laws, there is significant slippage between the terms "sex work" and "sex trafficking." According to Human Trafficking Search, sex work is the "willing engagement in commercial sex."⁹ Sex trafficking, however, involves "force, coercion, and deceit."¹⁰ No one becomes sex trafficked willingly; sex work is by definition consensual. Although the terms "sex work" and "prostitution" are interchangeable, I prefer to use "sex work" given the historical connotations of the term "prostitution" with crime and immorality.¹¹

The goal of SESTA/FOSTA is to eliminate entirely websites which serve as online marketplaces for sex, such as Backpage.com, as well as sections of larger websites such as Craigslist's "personals" page. Backpage and Craigslist's "personals" page were platforms for sex workers to advertise and arrange meetings with clients. For a small fee, anyone could create a post

5 SECTION 230 PROTECTIONS, ELECTRONIC FREEDOM FOUND., <https://www.eff.org/issues/bloggers/legal/liability/230> (last visited July 25, 2019).

6 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, at § 3 (codified at 18 U.S.C. § 2421A).

7 *Id.* (codified at 18 U.S.C. § 2421A(b)).

8 *Id.* § 5 (codified at 18 U.S.C. § 1591(e)(4)).

9 Anne Paglia, *Sex Trafficking vs. Sex Work: What You Need to Know*, HUMAN TRAFFICKING SEARCH (2017), <https://humantraffickingsearch.org/2017725sex-trafficking-vs-sex-work-what-you-need-to-know/>.

10 *Id.*

11 See generally *Understanding Sex Work in an Open Society*, OPEN SOCIETY FOUND. (Apr. 2019), <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society>.

1 Stop Enabling Sex Traffickers Act of 2017, S.1693, 115th Cong. (2017).

2 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified in scattered sections of 18 U.S.C. and 48 U.S.C.) (2018).

3 The original proposed SESTA law was left in Senate committee. Its provisions were added into FOSTA, and the combined laws are typically referred to as SESTA/FOSTA or FOSTA-SESTA.

4 47 U.S.C. § 230 (1996), amended by Pub. L. No. 115-164.

advertising adult services. However, these sites were also hotbeds for sex trafficking, including that of children.¹² In a recent lawsuit, fifty women sued Salesforce, a software company which provided services to Backpage, claiming that they were sexually exploited and trafficked through Backpage. The ages of the plaintiffs in this case ranged from twelve to mid-twenties.¹³ Allegations of sex trafficking on these sites should be taken seriously and result in immediate and effective action to protect victims. However, SESTA/FOSTA is an ineffective solution to this trafficking crisis.

Backpage was used by some as a forum for trafficking women and children, but the website also had a history of assisting law enforcement officials in investigations. Sites like Backpage produce online trails which have been used to catch sex traffickers.¹⁴ Shutting down Backpage has not stopped online trafficking but has instead forced sex traffickers onto sites which are not based in the United States and are less cooperative with U.S. law enforcement.¹⁵ Programs which track the presence of sex trade advertising online noted an immediate decrease in the quantity of such advertisements after Backpage was seized. Only four months later, however, in August 2018, the number of sex trade advertisements had returned to seventy-five percent of the initial number before the law passed, suggesting that any reduction in sex trafficking activity was only temporary.¹⁶

Online sex marketplaces have been used for years by sex workers who utilize the sites in order to advertise, screen, and choose clients. This process is vital to sex workers' safety, as it allows them to vet clients online before meeting up with them in person. Furthermore, sex workers can use online resources to share information about potential clients, thereby establishing a communal verification network.¹⁷ Sex work is dangerous — the worksite homicide rate for female sex workers is around 204 per 100,000,¹⁸ the highest of any female occupation in the

12 David Warren, *What is Backpage.com? A Q & A in Wake of Executive's Arrest*, Associated Press. (Oct. 2016), <https://www.apnews.com/36dbf770dce146ba840d160b590e3505>.

13 Kate Ryan, *Salesforce Sued by 50 Women Sex Trafficked on Backpage.com*, REUTERS (Mar. 27, 2019, 4:49 PM), <https://www.reuters.com/article/us-usa-trafficking-salesforce/salesforce-sued-by-50-women-sex-trafficked-on-backpagecom-idUSKCN1R82QS>.

14 Tom Jackman, *Under Attack, Backpage.com Has Its Supporters as an Anti-Trafficking Tool. But Many Differ*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack-backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm_term=.490a001daa96.

15 *Id.*

16 Glen Kessler, *Has the Sex-Trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, WASH. POST (Aug. 20, 2018), <https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/>.

17 Michael Nedelman, *After Craigslist Personals Go Dark, Sex Workers Fear What's Next*, CNN (April 2018), <https://www.cnn.com/2018/04/10/health/sex-workers-craigslist-personals-trafficking-bill/index.html>.

18 Scott Cunningham, Gregory DeAngelo & John Tripp, *Craigslist Reduced Violence Against Women 2* (Feb. 2019) (unpublished manuscript under review), <https://www.scunning.com/craigslist110.pdf> (citing John J.

United States.¹⁹ In February 2019, three researchers released a study which provided compelling evidence of Craigslist's impact on sex workers' safety. Because Craigslist's "Erotic Services" category (defunct as of 2010) began operating in different cities at different times, these researchers had a wealth of comparative data demonstrating the rates of violence before and after "Erotic Services" went live. The study found that between ten and nineteen months after the launch of "Erotic Services," female homicide rates in a city decreased by ten to seventeen percent.²⁰

Without access to online resources, sex workers lose a significant amount of power in negotiating the terms of their business. Some workers choose to work the streets, which "has a death by homicide rate over 13 times higher than the general population."²¹ Others choose to work with intermediaries, such as pimps and brothels.²² These organizations are often exploitative, taking a large sum of a sex worker's earnings without guaranteeing their safety. Sex workers who willingly enter into contracts with agencies, pimps, and brothels are more vulnerable to sex trafficking.²³

SESTA/FOSTA may be well-intentioned, but the laws have been disastrous for the safety of sex workers and victims of sex trafficking. The laws have made it more difficult for law enforcement to apprehend sex traffickers, limited sex workers' control over the terms of their employment, and will likely increase the female homicide rate. Accordingly, a lawsuit filed by the Woodhull Freedom Foundation, which seeks to strike down SESTA/FOSTA, is underway.

II. *Woodhull Freedom Foundation v. United States*

The *Woodhull* litigation began when a complaint was filed on June 28, 2018 by plaintiffs Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley, and The Internet Archive.²⁴ The plaintiffs argued that SESTA/FOSTA should be deemed unconstitutional for various reasons pertaining to their individual occupations and missions.

Human Rights Watch, Jesse Maley, and Woodhull Freedom Foundation advocate for the legalization of sex work and provide resources to sex workers online. These plaintiffs expressed

Potterat et al., *Mortality in a Long-term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778 (2004)).

19 *Id.* at 1.

20 *Id.*

21 *Id.* at 2.

22 *Id.*

23 Samantha Cole, *Pimps are Preying on Sex Workers Pushed Off the Web Because of FOSTA-SESTA*, VICE (Apr. 30, 2018, 10:09 AM), https://www.vice.com/en_us/article/bjppqvz/fosta-sesta-sex-work-and-trafficking.

24 Complaint for Declarative and Injunctive Relief, *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. June 28, 2018), <https://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2018cv01552/198188/1>.

concern that their advocacy work could be interpreted as facilitating prostitution and thus would be illegal under SESTA/FOSTA. These concerns have stopped plaintiffs from conducting their advocacy, at cost to their missions.²⁵ Another plaintiff, Eric Kosyzk, used an online platform since shut down by SESTA/FOSTA to run advertisements for his massage parlor, a registered business. Kosyzk alleges that he has suffered monetary injuries as a result of the advertising loss.²⁶ The final plaintiff, The Internet Archive, is concerned with freedom of speech on the internet and claims that SESTA/FOSTA unconstitutional-ly regulates this freedom.²⁷

The plaintiffs' case is built upon the argument that SESTA/FOSTA infringes upon their freedom of speech as protected by the First Amendment of the Constitution.²⁸ They contend that the legislation has forced them to self-censor and that it has unduly restricted their access to online platforms on which they would engage in otherwise protected speech.²⁹ The plaintiffs also argue that SESTA/FOSTA is too broad; while it intends to censor sex trafficking online, it has resulted in the censoring of parties who are in no way involved in sex trafficking.³⁰

Woodhull was filed in the United States District Court for the District of Columbia at the end of June 2018. In late September 2018, the court dismissed the case and the plaintiffs' request for a preliminary injunction against SESTA/FOSTA. It ruled that the plaintiffs lacked sufficient standing to challenge the constitutionality of the law package because they had not yet been injured by the statute³¹ and because the possibility of injury was not realistic for some plaintiffs.³² *Woodhull* is now scheduled for a hearing in the United States Court of Appeals for the District of Columbia in late September.³³

In addition to *Woodhull*, other advocacy groups have been testing legal arguments which could succeed in striking down SESTA/FOSTA. It is imperative that these groups not lose sight of what should be the guiding goal of their legal action: the decriminalization of sex work. The plaintiffs in *Woodhull* are focused on the constitutional protection of speech on the internet, including that criminalized by SESTA/FOSTA. These

arguments may be critical to protecting internet freedom, itself a worthy cause, but they do not center on rights and protections for sex workers. SESTA/FOSTA allows us to examine the precarity of sex work and to understand how well-intentioned legislation can strip safety from workers in the sex industry. The movement against SESTA/FOSTA should be widened beyond a fight against two laws to include the greater goal of ending the extreme risk of violence and homicide faced by sex workers. Cases against SESTA/FOSTA must be built on a right to autonomy, privacy, and work. If a legal defense of sex work can be established, then there will be far greater progress than the simple repeal of SESTA/FOSTA.

III. *Erotic Service Provider Legal Education and Research Project v. Gascon*

On March 4, 2015, the Erotic Service Provider Legal Education and Research Project (ESP) filed a complaint seeking relief against the State of California to enjoin and invalidate California Penal Code Section 647(b), which classifies prostitution as a misdemeanor.³⁴ The plaintiffs were three former erotic service providers, as well as a man who wished to purchase sex from an erotic service provider.³⁵

The plaintiffs alleged that Penal Code Section 647(b) violated the substantive due process right to privacy interpreted through the Fourteenth Amendment.³⁶ This right to privacy had secured the right to contraception in *Griswold v. Connecticut*³⁷ and the right to sexual intimacy between same-sex couples in *Lawrence v. Texas*,³⁸ a case referenced heavily in ESP's argument. In that case, John Lawrence was charged with a misdemeanor after a sheriff's deputy entered his home (following a neighbor's report that an armed man had entered Lawrence's apartment) and found him engaged in an act that was then illegal under Texas' anti-sodomy laws.³⁹ In its decision, the Supreme Court affirmed that freedom extends into the home and that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁴⁰ Citing this statement, ESP argued that the state could not legally govern the private actions of two consenting adults and that the preservation of this vital right to privacy exceeded the state's power to regulate commercial exchange.⁴¹ The plaintiffs also argued that, even if *Lawrence* was not extended to cover sex work as a fundamental due process right, the law should still

25 *Id.* at ¶ 2.

26 *Id.*

27 *Id.*

28 See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); see also Complaint, *supra* note 24, at ¶¶ 126-67. Note that the plaintiffs also brought Fifth Amendment and *ex post facto* clause challenges. See *id.* ¶¶ 148-55 (Fifth Amendment vagueness challenge), ¶¶ 168-74 (*ex post facto* argument).

29 Complaint, *supra* note 24, at ¶ 2.

30 *Id.* at ¶ 1.

31 That is, their proposed injury was hypothetical or had not yet happened. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 201 (D.D.C. 2018).

32 *Id.* at 201-03.

33 *Woodhull Files Federal Lawsuit Challenging FOSTA*, WOODHULL FREEDOM FOUND., <https://www.woodhullfoundation.org/our-work/fosta/> (last visited July 25, 2019).

34 *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 454 (9th Cir. 2018). Note that the opinion was amended, but only as relevant to its (originally misleading) discussion of commercial speech. 881 F.3d 792 (9th Cir. 2018).

35 *Gascon*, 880 F.3d at 454.

36 *Id.* at 455.

37 381 U.S. 479 (1965).

38 539 U.S. 558 (2003).

39 See *id.* at 562-63.

40 *Id.* at 562.

41 *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 455-56 (9th Cir. 2018) (explaining ESP's *Lawrence* argument).

fall when examined under rational basis review.⁴² ESP therefore argued that Section 647(b) was not justified by an important governmental interest, and that Section 647(b) did not further an important governmental interest.⁴³ Furthermore, the plaintiffs alleged that the Fourteenth Amendment provides for freedom of association, which they argued protects the relationship between sex worker and client.⁴⁴ They also argued that this section of California's penal code violated the freedom of contract guaranteed by the Fourteenth Amendment⁴⁵ and that, as similarly argued by the plaintiffs in *Woodhull*, soliciting prostitution constituted protected commercial speech.⁴⁶

The case was first dismissed in the District Court for the Northern District of California, and the dismissal was affirmed on appeal by the Ninth Circuit. The opinion written by the Ninth Circuit Court of Appeals demonstrates, however, that legal thought surrounding sex work is based on misinformation and prejudice.

The court found that under rational basis review, the state has legitimate reasons for criminalizing prostitution because it is "discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases."⁴⁷ However, as noted earlier in this Article, criminalizing sex work drives women and children into circumstances that make them more vulnerable to trafficking and violence.⁴⁸ The court's opinion cites a study finding that sex work creates an environment which is conducive to violence against women.⁴⁹ However, the opinion fails to consider that criminalizing sex work makes this environment dangerous for women by restricting access to resources such as online support and advertising, which are available to legal businesses and which would allow sex workers to secure means of protection.⁵⁰ Furthermore, there is evidence to suggest that decriminalizing sex work leads to safer sex practices and fewer cases of diseases such as HIV. A 2018 meta-analysis of twelve different studies on sex worker health internationally found that sex workers who work under repressive policing conditions are twice as

likely to contract HIV or other STIs.⁵¹

In dismissing the plaintiffs' freedom of association argument, the Ninth Circuit cited *Roberts v. U.S. Jaycees*,⁵² which the panel characterized as extending "the right of intimate association to marriage, child bearing, child rearing, and cohabitation with relatives."⁵³ These rights are specifically identified to extend privacy to sexual relationships, particularly the sexual relationships of women.⁵⁴ Given the court's apparent interest in protecting the sexual rights and bodily autonomy of women, it is surprising that this protection of sexual privacy does not extend to the relationships of sex workers with clients, but is instead limited to sexual interactions which occur within the context of heteronormative relationships and reproduction.

IV. Conclusion

I believe that *Lawrence v. Texas* should serve as the principal guide in judging the constitutionality of sex work. Although the Court's opinion in *Lawrence* explicitly excludes sex work as a protected "intimate relationship," it nevertheless provides valuable direction for understanding laws which govern the profession. The opinion's author, Anthony Kennedy, recognized that previous decisions upholding the criminalization of sodomy were "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family,"⁵⁵ and that "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."⁵⁶ Kennedy addresses this by quoting the Court's opinion in *Planned Parenthood of Southeastern Pa. v. Casey*: "Our obligation is to define the liberty of all, not to mandate our own moral code."⁵⁷

I submit that national legislation prohibiting sex work has also been "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." In following the precedent set by the Supreme Court, this is not a legitimate basis for creating law. As the research cited in this Article demonstrates, the argument that the existence of sex work brings social troubles upon society is also unreasonable. In fact, laws which criminalize sex work increase instances of violence, trafficking, and sexually-transmitted diseases.⁵⁸ As argued by the plaintiffs in *Erotic Service Provider Legal Education and Research Project v. Gascon*, there is a myriad of constitu-

42 See *id.* at 456-57 (concluding that Ninth Circuit precedent required the panel to conclude that laws regulating sex work do not implicate fundamental liberty interests and are therefore reviewed for a rational basis).

43 *Id.* at 457. As the Ninth Circuit noted, rational basis review consists of a "two-tiered inquiry": first, courts determine "whether the challenged law has a legitimate purpose"; and second, courts "address whether the challenged law promotes that purpose." *Id.* (citing *Jackson Water Works, Inc. v. Pub. Util. Comm'n of Cal.*, 793 F.2d 1090, 1094 (9th Cir. 1986)).

44 *Id.* at 458

45 *Id.* at 459.

46 *Id.*

47 *Id.* at 457.

48 Susie Steimle, *New Laws Forced Sex Workers Back On SF Streets, Caused 170% Spike in Human Trafficking*, KPIX 5 CBS SF BAY AREA, (Feb. 3, 2019, 11:41 PM), <https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/>.

49 See *Gascon*, 880 F.3d at 457-58.

50 Cunningham, DeAngelo & Tripp, *supra* note 18.

51 See generally Lucy Platt et al., *Associations Between Sex Work Laws and Sex Workers' Health: A Systematic Review and Meta-Analysis of Quantitative and Qualitative Studies*, 15 PLOS J. MEDICINE e1002680 (2018), <https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1002680&type=printable>.

52 468 U.S. 609 (1984).

53 *Gascon*, 880 F.3d 459 (summarizing the holding of *Roberts*).

54 *Id.*

55 *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

56 *Id.*

57 *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

58 Cunningham, DeAngelo & Tripp, *supra* note 18.

tional provisions which should protect sex work, including the Fourteenth Amendment and the First Amendment.

SESTA/FOSTA makes this cause now urgent; for those who rely on sex work as a means of survival, living has become far more difficult and dangerous as a result of SESTA/FOSTA.⁵⁹ Challenges to SESTA/FOSTA must center on the safety and right to privacy of sex workers, an ever-vulnerable yet enduring sector of American working society.

⁵⁹ Rose Conlon, *Sex Workers Say Anti-Trafficking Law Fuels Inequality*, MARKETPLACE (Apr. 30, 2019, 1:00 PM), <https://www.marketplace.org/2019/04/30/business/sex-workers-fosta-sesta-trafficking-law-inequality>.

An Analysis of Regulatory Options for Commercial Facial Recognition

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As the utility and relevance of facial recognition become clear, companies have flocked to develop their own implementations. Meanwhile, the U.S. government and other organizations have increasingly utilized facial recognition, alongside other algorithms, to assist with law enforcement. But like with many other technologies, it is unclear how much the American government and the general public understand about facial recognition and the growing shadow it casts over society. In this paper, I argue that government regulation on facial recognition is long overdue and discuss the merits and drawbacks of three possible avenues for regulation.

I. The Challenge of Facial Recognition Technology

Facial detection and recognition are technologies which automatically recognize, identify, and categorize faces. Facial recognition can be implemented in a variety of ways, but most methods rely on consuming comprehensive data sets of faces to train their recognition systems on what a face is likely to resemble. Facial detection and recognition are widely used in modern technologies, like Apple's iPhone X biometric security system or Facebook's suggested tagging feature, which helps users more quickly identify who is in a photo.¹ But facial recognition is not just a social media gimmick: it has a wide array of uses, some of them troubling, in government and industry.

Governments are increasing the use of automated facial detection and recognition systems for defense and law enforcement. In China, mass surveillance is being combined with facial recognition technologies and a social credit system, in which citizens are rated and granted privileged based on their record of following laws and regulations.² The government can track the whereabouts of each of its citizens and their actions constantly and effortlessly, leading to increased arrests, public shaming for crimes like jaywalking, and penalties in China's social credit

system.³ Far from being limited to completely authoritarian regimes like China, however, the United States is increasingly using facial recognition and detection in order to help automate law enforcement. For instance, some law enforcement agencies in the United States use an automated facial recognition system powered by Amazon's Web Services. Amazon received enormous public outcry after it was confirmed that they were considering working with U.S. Immigration and Customs Enforcement (ICE) to implement this technology for border security.⁴ Meanwhile, companies like Amazon, Apple, and Facebook are able to use their vast networks to trawl for endless amounts of data that can tie users' habits and personal information to facial biometrics, opening a new slew of data privacy concerns.⁵ Especially as companies are found to be increasingly untrustworthy with user data, as recently exemplified by the five billion dollar fine levied against Facebook by the Federal Trade Commission, the idea of these companies gathering another facet of personal user data is frightening.⁶ Another distressing factor about the use of facial recognition by companies and law enforcement is many algorithms' troubling history with systemic bias.

While computer algorithms are thought to be inherently unbiased and objective, factors like skewed training data sets can cause algorithms to be equally as biased as humans assigned the same task. If algorithms are trained with biased data sets, the data's misrepresentations or false correlations can cause the algorithm to adopt a similar skew.⁷ Research by *ProPublica* has

1 See generally Julian L. Center, *Practical Application of Facial Recognition: Automated Facial Recognition Access Control System*, in FACE RECOGNITION 402–411 (Harry Wechsler et al. eds., 1998); Tom Simonite, *Facial Recognition Is Suddenly Everywhere. Should You Worry?*, WIRED (Aug. 6 2019, 2:16 PM), <https://www.wired.com/story/facial-recognition-everywhere-should-you-worry/>.

2 See generally Genia Kostka, *China's Social Credit Systems and Public Opinion: Explaining High Levels of Approval*, 21 NEW MEDIA & SOC'Y 1565 (2019).

3 *Id.*; see also Charlie Campbell, *How China is Using "Social Credit Scores" to Reward and Punish Its Citizens*, TIME (Jan. 16, 2019), <https://time.com/collection/davos-2019/5502592/china-social-credit-score/>; MARTIN CHORZEMPA ET AL., PETERSON INST. FOR INT'L ECON., POLICY BRIEF NO. 18-14, CHINA'S SOCIAL CREDIT SYSTEM: A MARK OF PROGRESS OR A THREAT TO PRIVACY? (2018).

4 See, e.g., Drew Harwell, *Amazon Met with ICE Officials over Facial-recognition System that Could Identify Immigrants*, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/technology/2018/10/23/amazon-met-with-ice-officials-over-facial-recognition-system-that-could-identify-immigrants/?utm_term=.7f3e99bb11c1.

5 See, e.g., Asunción Esteve, *The Business of Personal Data: Google, Facebook, and Privacy Issues in the EU and the USA*, 7 INT'L DATA PRIVACY L. 36 (2017).

6 Cecilia Kang, *F.T.C. Approves Facebook Fine of About \$5 Billion*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html>.

7 See Bartosz Krawczyk, *Learning from Imbalanced Data: Open Challenges*

revealed a dark underbelly of racial bias in multiple applied algorithms, including systems for determining criminal recidivism risk and car insurance rates — and the data show that this pattern holds for facial recognition as well.⁸ MIT researcher Joy Buolamwini and Microsoft Researcher Timnit Gebru examined the proprietary facial recognition algorithms of IBM and Microsoft. They found that these companies had significantly higher error rates when attempting to identify certain kinds of races; women of color were misidentified up to 34 percent of the time, while white males were incorrectly identified only 0.8 percent of the time.⁹ Another study by Buolamwini and a different collaborator found that Amazon had even more severely biased results.¹⁰ After media outlets and watchdog groups raised questions about the algorithm's reliability, Amazon admitted that "the Rekognition results can be significantly skewed by using a facial database that is not appropriately representative," although it still criticized reports by MIT and the ACLU for not accurately representing its Rekognition algorithm.¹¹ The specific issue of non-representative training datasets has plagued many of these companies, but this is not the full story. Claims of flawed data sets could also be a deflection technique to disguise deeper seated issues with these algorithms, such as inherent bias in the algorithms, which are often hidden from direct research by claims of proprietary secrets.¹² In either case, the implications of this inaccuracy are clear: biased systems being deployed by governments and law enforcement agencies without a full understanding of their limitations and biases will enable the perpetuation of sexist and racist systems in the societal arenas where target groups remain the most vulnerable, both in law enforcement and other areas.

Relying on current government regulation and the ability of companies to ethically self-regulate are not sufficient measures to properly address the potential issues facial recognition can

and *Future Directions*, 5 PROGRESS ARTIFICIAL INTELLIGENCE 221 (2016).

8 Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see also Julia Angwin, Jeff Larson, Lauren Kirchner & Surya Mattu, *Minority Neighborhoods Pay Higher Car Insurance Premiums Than White Areas With the Same Risk*, PROPUBLICA (Apr. 5, 2017), <https://www.propublica.org/article/minority-neighborhoods-higher-car-insurance-premiums-white-areas-same-risk>. These reports clearly demonstrate bias in algorithms based off of skewed training data sets.

9 Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACHINE LEARNING RES. 77 (2018).

10 INIOLUWA DEBORAH RAJI & JOY BUOLAMWINI, CONF. ON ARTIFICIAL INTELLIGENCE, ETHICS, & SOC'Y, ACTIONABLE AUDITING: INVESTIGATING THE IMPACT OF PUBLICLY NAMING BIASED PERFORMANCE RESULTS OF COMMERCIAL AI PRODUCTS (2019), https://dam-prod.media.mit.edu/x/2019/01/24/AIES-19_paper_223.pdf.

11 MEREDITH WHITTAKER ET AL., AI NOW INST., AI NOW REPORT 2018, at 16 (2018), https://ainowinstitute.org/AI_Now_2018_Report.pdf (citing article which, in turn, quotes a blog post by Amazon's general manager, Matt Wood).

12 *Id.* at 7-9.

cause. For example, the internal ethics standards set by Amazon about the recommended certainty threshold used in law enforcement cases were routinely unclear and ignored, although the company denies wrongdoing, citing their creation of these standards.¹³

Some governments are taking steps to manage the potentially harmful impacts of facial recognition software. The EU's new set of privacy laws specifically addresses biometrics like facial recognition, setting this data aside into a more protected category that cannot be shared with third parties.¹⁴ In Washington state, a law currently being discussed by the House of Representatives would put significant restrictions on facial recognition. Alongside larger data privacy measures, the bill would require companies to actively and conspicuously gather user consent before using these systems, make facial recognition implementations public so that they can be tested for bias, and prevent government agencies from using facial recognition for surveillance and enforcement.¹⁵ Similarly, a federal bill that would require companies to get explicit consent to collect facial data and would regulate how companies handle that data has been proposed.¹⁶

While these measures are first steps that represent an important precedent, they do not adequately provide the limitations necessary to curb the dangers of facial recognition on a broad scale. Meanwhile, companies are flocking to form ethics boards and release press statements calling for more ethical implementations or even government regulation.¹⁷ While this is a step in the right direction to protect the public, experts and academics in the field have cautioned against allowing companies to self-regulate, with the 2018 AI report warning that "this 'trust us' form of corporate self-governance also has the potential to displace or forestall more comprehensive and binding forms of governmental regulation."¹⁸ Considering how reticent companies have been to confront their internal scandals without out-

13 See Cade Metz & Natasha Singer, *A.I. Experts Question Amazon's Facial-Recognition Technology*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/technology/amazon-facial-recognition-technology.html>.

14 See Council Regulation 2016/679, 2016 O.J. (L 119) 1 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>; see also, e.g., *Facebook switches off facial recognition for EU users*, 2012 BIOMETRIC TECH. TODAY 1. This law sets in place a special set of regulations for the way companies handle biometric data, which includes fingerprints, facial recognition scans, and DNA data. The law makes this data specifically protected from "processing," essentially preventing it from being spread to third parties, requiring more explicit consent to be gathered, and putting into place guidelines for how companies provide announcements about data breaches.

15 Washington Privacy Act, S.B. 5376, 66th Legis. (Wash. 2019)

16 Commercial Facial Recognition Privacy Act of 2019, S. 847, 116th Cong. (2019)

17 Scott Thurm, *Microsoft Calls For Federal Regulation of Facial Recognition*, WIRED (July 13, 2018, 11:00 AM), <https://www.wired.com/story/microsoft-calls-for-federal-regulation-of-facial-recognition/>.

18 WHITTAKER ET AL., *supra* note 11, at 32.

side pressure, it is especially important to create frameworks for regulation that are impartial and compulsory.¹⁹ However, the question still remains: what form should this regulation take?

II. Regulatory Options

A. Option 1 — Regulate How Facial Recognition Can Be Used

One popular and often discussed form of regulation in the United States would restrict how national, state, and local governments could utilize facial recognition. This would mean that federal, state, and local governments would prevent their own law enforcement agencies from using facial recognition. A number of organizations have pushed this as a form of acceptable and useful regulation. Microsoft has called for oversight on the use of facial recognition technologies by law enforcement, joined later by Amazon.²⁰ In a stronger statement, the ACLU called for a complete federal moratorium on the use of facial recognition by the government.²¹ Both of these statements reflect a similar goal, but with different levels of severities and approaches. Few politicians have actually commented on their thoughts on facial recognition restriction. Some members of Congress did demand more accountability for facial recognition after the ACLU revealed that Amazon's Rekognition algorithm matched some of them, especially people of color, with people convicted of crimes.²² This approach's general popularity, as well as Washington state's decision to pursue this regulatory path, suggests that this may present the most likely route forward for effective and immediate regulation. This approach would also be easier to implement than some others as it would require the government to self-regulate, not extend their reach to the complicated technology industry. However, this approach fails to address key issues surrounding facial recognition, like the collection of personal biometric data or unethical uses of the technology by non-government organizations. Furthermore, it is unclear how exactly this regulation would work, including what level of government it would operate at, which agency or department would oversee this self-regulation, or how comprehensively it would cover government agencies.

19 For examples of how these companies are often reticent to confront internal scandals, see, for example, Jake Laperruque, *About-Face: Examining Amazon's Shifting Story on Facial Recognition Accuracy*, POGO (Apr. 10, 2019), <https://www.pogo.org/analysis/2019/04/about-face-examining-amazon-shifting-story-on-facial-recognition-accuracy/>. Amazon was consistently unclear about how its technology should be used, publishing varying standards and lying about their internal processes.

20 Brad Smith, *Facial Recognition: The Need for Public Regulation and Corporate Responsibility*, MICROSOFT (July 13, 2018), <https://blogs.microsoft.com/on-the-issues/2018/07/13/facial-recognition-technology-the-need-for-public-regulation-and-corporate-responsibility/>; see also Thurm, *supra* note 17.

21 *Face Recognition Technology*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/face-recognition-technology> (last visited July 26, 2019).

22 Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, AM. C.L. UNION (July 26, 2018, 8:00 AM), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>.

B. Option 2 — Regulate How Companies Handle and Store Facial Recognition Data

Another form of potential facial recognition regulation could involve policies that control how companies store and handle user data. Regulation around private sector data usage already exists, with the EU and Washington state's new proposed legislation both including stricter guidelines on the handling of facial biometric data.²³ Implementing similar policies on a federal level would mean that companies would be unable to sell facial biometric data, would have to store it in particularly secure ways, or could not use this data for certain purposes, such as surveillance recognition or advertising. A study conducted by the Pew Research Center suggests that U.S. citizens have shockingly little faith in the ability of organizations to properly store their data, after breaches by companies like Uber, Yahoo, and Equifax have leaked enormous amounts of user data and left the public unconvinced about the security of their information.²⁴ Facebook is another common culprit of data mishandling, including its famous sale of user data to Cambridge Analytica and a recent scandal where user passwords were being stored in a plain text document.²⁵ Alongside similar data handling scandals from Marriott, Google Plus, and Equifax, the ability of companies to safely and privately store data is increasingly under question.²⁶ And with companies' massive and constant collection of data, including this new, more valuable, and dangerous form of biometric data, the flimsy network of already existing government protections are not enough to properly regulate these companies moving forward.²⁷ With this combination of public mistrust, a history of poor security, and insufficient current regulation, government regulation of the private sector seems like an obvious solution. However, data privacy regulation poses its own issues. It would require regulating companies outside the government, and the exact technical details of such a law are tricky to properly define, especially with the federal government's historically poor understanding of computer technology.²⁸ It also is unclear whether this is suf-

23 See *supra* notes 14-15 and accompanying text.

24 Aaron Smith, *Americans and Cybersecurity*, PEW RESEARCH CTR. (Jan. 26, 2017), <https://www.pewinternet.org/2017/01/26/americans-and-cybersecurity/>; see also Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL FOREIGN RELATIONS (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection>.

25 Tony Romm, *Facebook Says It Left 'Hundreds of Millions' of Users' Passwords Stored in Plain Text*, WASH. POST (Mar. 21, 2019), https://www.washingtonpost.com/technology/2019/03/21/facebook-says-it-left-hundreds-millions-users-passwords-stored-plain-text/?utm_term=.6f9c1c0dd647.

26 See, e.g., Glenn Fleishman, *Equifax Data Breach, One Year Later: Obvious Errors and No Real Changes, New Report Says*, FORTUNE (Sept. 7, 2018), <https://fortune.com/2018/09/07/equifax-data-breach-one-year-anniversary/>; Lily Hay Newman *A New Google+ Blunder Exposed Data From 52.5 Million Users*, WIRED (Dec. 10, 2018, 2:19 PM), <https://www.wired.com/story/google-plus-bug-52-million-users-data-exposed/>; Kate O'Flaherty, *Marriott CEO Reveals New Details About Mega Breach*, FORBES (Mar. 11, 2019, 5:45 AM), <https://www.forbes.com/sites/kateoflahertyuk/2019/03/11/marriott-ceo-reveals-new-details-about-mega-breach/#764f05c5155c>.

27 See O'Connor, *supra* note 24.

28 *Id.*

ficient: after all, it would not necessarily stop the harvesting of biometric data and would do nothing to restrict the actual use of facial recognition.

C. Option 3 — Regulate the Development of Facial Recognition Technologies

Perhaps the most extreme form of proposed facial recognition would regulate whether companies could use or develop facial recognition technologies at all. Although this would represent an extreme option, it would also be the only one that would fully regulate the use of facial recognition and collection of user biometric data. It could also represent a temporary break in a fast-moving industry while the government decides a more permanent form of regulation. However, enforcing this severe type of law would be almost impossible and would represent a ludicrous level of misunderstanding and control over technological advancement. Facial recognition technology exists, and trying to turn back the clock is a hopelessly futile endeavor. Instead, a focus on increased understanding of facial recognition and the possibilities for regulation reflects a much more realistic avenue for enforcement.

III. Conclusion

Facial recognition technology represents not only a valuable technological breakthrough, but also a microcosm of the complex relationship between the government and big tech. For too long, tech regulation has been suggested and threatened, with hearings for large executives and promises of retribution. But at the same time, very little has come to fruition. Tech regulation must start somewhere, and even if that somewhere is the United States government restricting its own use of the technology, it is a step forward. Ending the use of facial recognition by law enforcement, creating better user privacy laws, and investigating the bias and use of facial recognition by the industry all represent important steps forward in a healthy system of technological progress. This progress can no longer be ignored: federal and state governments need to act now to make sure that facial recognition is used safely and correctly. The option of regulating when facial recognition can be used is by far the most realistic option, and should certainly be pursued, but it also seems lacking in some areas. For instance, keeping companies accountable about their data is increasingly important and is an area where action has already been taken, such as with the FTC's recent severe fine against Facebook.²⁹ Actions are also being taken by various local and state governments, with San Francisco implementing new legislation and California moving towards regulation with police body cameras.³⁰ But while

these regulations are taking place, the scandals continue, most recently with the revelation that ICE widely scanned state databases of driver's licenses to try to identify illegal immigrants.³¹ While this piecemeal progress provides some guidelines and represents progress, it will take far more widespread regulation before the issue of facial recognition is adequately addressed.

²⁹ Kang, *supra* note 6.

³⁰ Sam Dean, *California Considers Ban on Facial Recognition's New Frontier: Police Body Cameras*, L.A. TIMES (June 7, 2019), <https://www.latimes.com/business/technology/la-fi-tn-face-recognition-ban-california-police-body-camera-20190607-story.html>; Kate Conger, Richard Fausset & Serge F. Kovalski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html>.

³¹ Catie Edmonson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html>.

Democratization, Islamization, and the Changing Face of Freedom: An Interview with Shadi Hamid

Lauren Rodriguez (PO '22)
Interview Editor

Shadi Hamid is a senior fellow at the Brookings Institution's Center for Middle East Policy who focuses on U.S. relations with the Middle East. He is also a contributing editor at The Atlantic and the author of Islamic Exceptionalism: How the Struggle Over Islam is Reshaping the World. Recently, Hamid participated in a Pomona Student Union-hosted debate that was centered around identity politics. While at Pomona College, he agreed to sit down for an interview with the Claremont Journal of Law and Public Policy.

This interview has been lightly edited for length and clarity.

CJLPP: *You've been vocal in your opposition to the Trump administration's plan to designate the Muslim Brotherhood as a terrorist organization. Could you explain for our readers the legal basis on which you're speaking out against this designation?*

SH: Yeah, so, to designate something a terrorist organization, that's not a decision the president can just make on a whim. There is a legal criterion that's generally used and there's an interdepartmental process — the Department of the Treasury, the Department of Defense, and the State Department are involved — and they have to present the legal basis, so there has to be some kind of factual aspect to it. My criticism is that there isn't a factual basis to it, and it's something that Trump seems to want to do out of deference to his allies — his close allies in the Middle East, so Saudi Arabia, the UAE, Egypt. And the question is, why now?

And the meeting with [the President of Egypt, Abdel Fattah el-Sisi,] that happened [in April] in D.C., that seems to be one of Sisi's main demands . . . : “can we get [the United States] on board with designating the Brotherhood as a terrorist organization?” Obviously Egypt . . . is as anti-Muslim Brotherhood as you can get, so it seems that Trump is kind of responding to a particular request, and you know how it is sometimes with Trump, that if he's in a meeting face-to-face and someone asks him something, then sometimes he'll just say, “Yeah, sure, why not? Let's do it!”

But we know that Trump himself has thought about this before. So this came up as a big issue of debate in January and February of 2017. Because there was opposition internally in the bureaucracy, and that was when Tillerson was Secretary of

State, Secretary Mattis at Defense, National Security Advisor McMaster — and these are the so-called adults in the room at that time, so there was a lot of internal pushback. . . . But if we actually look at the facts, it's not as if Trump is saying, “Well, we found new information about the Muslim Brotherhood that requires us to move in this direction.” That is not the argument being made. No one is actually presenting a new factual basis saying, “Well, the Brotherhood is implicated in XYZ terrorist attacks.” So in that sense it's hard to have a debate about it, because it wasn't as if the Trump Administration was actually presenting any evidence for the rest of us to say, “Oh, okay, let's engage with that and have a discussion.”

CJLPP: *Right. And do you think that, in America, the implications of this are related to identity politics? Do you think there's an aspect of the administration's decision that's trying to pit Judeo-Christians and Muslims against each other?*

SH: I think there's definitely a civilizational aspect to it and we know that the Trump Administration has a distinctive sense of “the West against the rest,” or “the West against Islam.” And during the campaign, when Trump was a candidate . . . he said [something like], “I think Islam hates us.”¹ That was one of his big quotes, about an entire religion. And you don't even know what he really means because Islam is not a person; Islam cannot hate us. That doesn't really make a whole lot of sense. But obviously it's a strong anti-Muslim, anti-Islam statement he made, and that's been a running theme throughout his candidacy and then his presidency. So we know Trump is oriented in this direction of seeing this Judeo-Christian civilization as something that is apart from Islam, or Islam is something that is othered, and something that is foreign, and obviously the proposed Muslim bans are a part of this discourse of seeing people, just by virtue of being Muslim, as a potential threat. So I think that's part of what's going on here.

CJLPP: *What do you think are some of the potential social ramifications of this decision?*

SH: I think one big concern is that it could be used as a smoke-

¹ Although Hamid expressed some uncertainty about the direct quote, it is in fact what Candidate Trump said. See, e.g., Theodore Schleifer, *Donald Trump: I Think Islam Hates Us*, CNN (Mar. 10, 2016), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html>.

screen to undermine American-Muslim organizations. So that's another kind of identity politics tie-in — that if you're talking about a particular community (the American-Muslim community), right-wing organizations have said for a long time that pretty much all major American-Muslim organizations have links or ties to the Muslim Brotherhood. And it's very easy to kind of play the guilt-by-association-game. You can say, "Well, this person knows that person, this person knew that person, therefore there is this indirect link with the Brotherhood," and I think that if you look at people like John Bolton — the current National Security Advisor — he has been involved in some of these really Islamophobic circles, and he has that kind of background. It wouldn't be completely out of nowhere for the Trump administration to try to attack, or to use that designation to cast doubt on American-Muslim organizations. The ones in question — CAIR [the Council on American-Islamic Relations] is a controversial one — and essentially if you criminalize any organization with the Brotherhood, that can be used in various ways.

You can challenge the designation in court, and even if something happened to American-Muslim organizations, they can challenge that through the legal process, but you're still effectively casting doubt on these organizations in the court of public opinion.

CJLPP: *On a similar thread, but more in the realm of foreign policy, Islamic exceptionalism is one of your particular areas of expertise. Could you elaborate on how exactly Islam is exceptional, especially in the areas of governance and law?*

SH: Yeah, I wrote a book with that title² and the argument that I make in it is that Islam is exceptional . . . in how it relates to law, politics, and governance. So what that means in practice is that Islam has proven to be more resistant to secularization than other religions, particularly Christianity. And I don't necessarily see that as a bad thing. One thing I always try to make really clear is that when I talk about exceptionalism, it's a value-neutral proposition. Exceptionalism can be good and it can be bad; difference is not something to be criminalized. It's okay for religions to be different, right? Otherwise, what's the point of having a wide variety of religions, right?

I think if we look historically, it is very clear that Islam has a different relationship with law, specifically. That has to do with the founding moments of different religions. So if we look at Christianity, Jesus Christ was a dissident against a reigning state. The New Testament doesn't have much to say about governance because Jesus and then, later on, the early Christians were not in a position to govern. So that context really matters in terms of how you see a religion evolving. And if you look at Islam, the Prophet Muhammad wasn't just

a cleric, a theologian, a prophet, and a man of religion — he was also a man of politics. He was a politician, and he was a state-builder as well: he was the head of a proto-state in Medina in the founding moment of Islam. So that has implications for how Islam evolves: the Qur'an has to have something to say about public law and governance because the Qur'an was addressing Muslims in a particular context, where they had to deal with questions of governance. So in that sense, part of the argument I make is that we have to look at the critical early period in which religions become what they are.

And one thing I want to do is challenge this idea that religion playing a role in public life is necessarily a bad thing. I think that for those of us who grew up in a secular context in the U.S., and especially in college campuses or major urban centers, there is a very strong secularizing dynamic. And sometimes you look and if people are being very open about their faith, that's almost like a weird thing. We see that as something that has to be dealt with or addressed or minimized: that people should keep their religion or their religious commitments private. But if we live in a pluralistic society here in the U.S., we should be willing to look at different approaches to religion and politics and say, "Hey, maybe we don't agree with that, but that's a legitimate way of approaching it. And this community, or that country, or that electorate, should be able to have more integration of Islam in politics if that's what they want and if they pursue that peacefully and through the democratic process." So I . . . challenge American and Western audiences to think a little bit more critically: not everything has to be this very secular approach, and not every culture, society, or religion is going to follow the same trajectory that Christianity followed.

And it's also about being realistic. You can't force people to be secular — and that can be quite repressive if you're like, "Oh, here are people who are holding onto their religion. That's bad." Then that leads to a desire to repress, and that can be dangerous. And we've seen how that can be dangerous in the Middle East, where if people express certain kinds of religious commitments in the public sphere, that's seen as something that can be threatening to the state, and then the state represses that.

CJLPP: *Are there any specific changes that you might propose making to our policy process in order to include these Islamic voices that have historically been excluded?*

SH: Yeah. I mean, I think that the fundamental question in the Middle East — and it actually goes beyond the Middle East — is, well, from the standpoint of the policy process, if we're talking about how U.S. policymakers or just we as Americans more generally should look at this, the key question is: can we do more to support democracy in the Middle East? And that, to me, has always been one of the major issues when we look

² SHADI HAMID, *ISLAMIC EXCEPTIONALISM: HOW THE STRUGGLE OVER ISLAM IS RESHAPING THE WORLD* (2016).

at how the U.S. approaches the Middle East . . . [W]e don't support democracy abroad; we support authoritarian regimes. I think that if the fundamental divide in some of these societies has to do with the role of Islam, then the way that I see it is that the democratic process, or having more democracy in the Middle East, is a way to accommodate those different views around the role of religion in public life. And the U.S. should do more to pressure authoritarian regimes to open up their societies so people can actually express different religious sentiments. The goal in the end should be, how can the democratic process accommodate a role for Islam in public life? So we see two options, one is the repressive option and one is the more accommodationist approach. I'm someone who prefers the latter, and I think that's the only long term way to have more peaceful, pluralistic societies in the Middle East. And I think the U.S. has played a very problematic role in terms of not allowing societies to accommodate these different streams and currents of Islamic thought and ideas.

CJLPP: *You once commented that democratization and Islamization often go hand in hand.³ Could you expand on what that means, and why those two developments seem to accompany each other?*

SH: Yeah, so if we're talking about religiously conservative societies, [and] if you're a government or a political party in a democratic context, you have to be at least somewhat responsive to public sentiment. And if public sentiment is more religiously conservative, then you have to meet that halfway. . . . We see that in a number of countries, say, Indonesia, Malaysia, and Pakistan, where you have some democratization — to different degrees, at least — but what's really interesting is that you can even have ostensibly secular parties that adopt more Islamically conservative positions because they want to win over more religiously conservative voters. For example, in Indonesia, let's say that 80 percent of Indonesians say Islam is very important to them in their daily lives and they want to see Islam playing a role in politics; they might disagree over what that role is, but these are people who are not secular in the sense of wanting to privatize Islam or separate it completely from public life. So if you're a politician and you're campaigning in especially a more religiously conservative area in Indonesia, you yourself might be a little more secular and be representing a secular party, but democratization means that you have to meet the median voter halfway — and public sentiment matters. . . . That kind of responsiveness and accountability is part of what democracy is about.

We can kind of make similar comparisons in Western democracies where, if majorities are uncomfortable with immigration — and this is especially the case in some European democra-

³ Shadi Hamid, *What's Different about Islam in Malaysia and Indonesia?*, BROOKINGS INST. (July 7, 2016), <https://www.brookings.edu/blog/markaz/2016/07/07/whats-different-about-islam-in-malaysia-and-indonesia/>.

cies — then you have to listen to voters. And sometimes that can lead to problematic situations where voters have bad or problematic ideas, then politicians are reflecting those bad or problematic ideas. But whatever the case is, if you're in power and if you want to keep on winning, and voters are saying, "We want Islam to matter more, and we want a more conservative interpretation of Islam," then politicians are going to have to reflect that. And that's what we see precisely in Indonesia, Malaysia, Pakistan, other countries that have had a longer period of democratization; Turkey is another case where with democratization we see Islamist parties doing better in elections. In Tunisia, we see the same thing with democratization. The major Islamist party, early on in the democratic transition, led a coalition government, and now they're a junior partner in a coalition government, but either way they do have a role in government because that is a product of democratization.

CJLPP: *So shifting gears back to America, I'd like to talk a little bit about how the landscape of policy debate is changing under the Trump Administration. You've written before that President Trump has unwittingly made the arena for policy debate broader by introducing ideas previously thought to be radical into the political mainstream. Could you talk more about this, and whether it is a good or a bad development in American democracy?*

SH: Yeah. So, I'm someone who believes that the bipartisan consensus of the 1990s and 2000s (the post-Cold War illusion that we all agreed on the basic foundations and that everything was moving in this liberal, technocratic direction, and it was just about improving policy outcomes and tinkering around the margins, [because] there was a sense that we had reached the end of ideology, and even Barack Obama, fairly recently, presented himself in some ways as a post-ideological president) . . . I think that was ultimately very naive, and I think a positive byproduct of the Trump era is that we're broadening the kinds of conversations that we have as Americans. And that's good, if you think that we need to broaden the kinds of conversations that we have as Americans.

There are some deep structural problems that Obama and others who were part of this centrist, center-left, or center-right elite, were not willing to address in a serious way. Because people weren't really willing to question the basic aspects of our economic structures and this kind of hyper-capitalism that just got totally out of control. So, what Trump's essentially allowed in American public debate is, his ideas are kind of either crazy, or out of the mainstream, or he says whatever the heck he wants at any given time. . . . What that does is it gives room for people on the Left to also say things that might have previously been considered crazy or radical, but because crazy and radical is now acceptable — because everyone is saying crazy and radical things because Trump has set the precedent that you can kind of push beyond the norms of acceptable discourse — that gives more room for socialist ideas, or ideas that are considered

more critical of the capitalist status quo.

And those are the kinds of conversations that I think are good to have in a democracy. . . . You have to have new voices, more voices, and we have a long history in our country of voices that . . . in the beginning . . . seem radical, then over time, those ideas become part of the normal political debate. So at some point in the beginning, an idea is going to seem crazy or radical, and the only way to know if it's good or it's effective is to actually put those ideas into the public debate So a seventy percent marginal tax rate, when you first hear that, you're like, "Whoa, that sounds a little bit radical," but maybe that's precisely what we need and the only way to actually know is to introduce the idea, as [Rep. Alexandria Ocasio-Cortez] did. . . . But we shouldn't close ourselves off to ideas just because they seem unrealistic or not pragmatic or socialist or whatever. All these labels are fine, but ultimately maybe what we need now at this particular moment in time as a country is a seventy percent marginal tax rate. Why don't we discuss that? I think if Hillary [Clinton] had won, we wouldn't have had those kinds of conversations, but because Donald Trump won, he made it safe for people to bring these new ideas into the public debate.

And this is not just in the U.S., but throughout Western democracies. Again, this can be for better or for worse. We see the rise of right-wing populist parties throughout Europe and they have some pretty anti-Muslim ideas; on the other hand, if you have left-wing populist parties — and I would say Bernie [Sanders] represents a left-wing populist approach — then those can be more positive. But in the end what you have is a more free-wheeling marketplace of ideas, and that's what we need now. Because I think there was a real dissatisfaction with where things were going — that technocratic centrist politics was not enough. People want something more. They don't want just a bunch of experts and elites telling them, "This is the way it is"; they want to feel passionate about their politics. And we have to find ways to channel that passion in a more productive direction — but also to respect that some people are, say, uncomfortable with large scale immigration in Europe. That doesn't mean we call them racist and just dismiss them. I think politicians actually have to listen to what their voters are saying and then try to channel those sentiments in a more productive way, but we can't ignore those sentiments and say, "They're just deplorable and they're racist." There has to be an engagement with those ideas.

CJLPP: There's been a lot of talk recently, and a lot of alarmist headlines, about how democracy is "dying" in America. What is your take on this, and do you believe . . . that liberal democracy is at risk in America?

SH: There's a lot of rhetoric around democracy dying, and there's been some pretty prominent books that have been published since Trump was elected about that. I take issue with

some of the starting premises of these arguments, and there is a risk of exaggerating the dangers of America becoming an authoritarian regime. . . . Even the idea of the "Resistance," . . . this self-proclaimed opposition: that suggests that you're fighting something illegitimate. When we think about the Resistance, we think about World War II and opposing Nazis and fascism. So to use a kind of similar term that suggests this sort of existential struggle, I think that can be problematic, because then we start to see Trump — as bad as he may be — and his administration as fundamentally illegitimate.

And you do hear a lot of that type of rhetoric from certain quarters on the Left, and once we start questioning the legitimacy of our elected government, I see that as as great of a risk, or even more of a risk, than the risk of Trump turning America into a dictatorship. Because if we start questioning the legitimacy of every presidential election, then we have no way to survive as a country. I mean, that's really the foundation of the democratic process: that every four years, or however many years, you respect the outcome of the election. But if every time one party wins the other party is going to say, "We don't accept that," or, "That president is illegitimate," and we have to deal with that for every election for the rest of our lives going forward, then, in my view, we're going into very dangerous territory.

I would've liked to see much more focus on the part of the Democrats saying, "We need to beat Trump in 2020, and that's the only way we want to get rid of him." But this focus on impeachment, even if there are some things that fall under impeachable offenses — I think that it would be very hard for us to recover from an actual, successful impeachment because Trump supporters, and Republicans more generally, would never forget it. It would become this sort of original sin, or this wound in the public body, and then you can imagine how Republicans would treat future Democratic presidents. And where does that end? So at some point you have to kind of take a step back and say, "Well, he was elected." No one after all is questioning the actual vote tally. You can say Russia interfered and all of that, but no one is saying that individual Americans were forced to vote against their will. No. The final vote tally is the final vote tally. And we have a system, the Electoral College. It's not ideal. But it's what Americans agreed on; those were the rules of the game. So I would, instead of Democrats scapegoating Russia this, Mueller report this: focus on just beating Trump. Because if our side can't beat Trump, do we deserve to even win? I mean, it should be an easy thing to do if we have a strong message — if we're able to connect with the American people.

CJLPP: Do you think that the Democrats can beat him?

SH: I think the Democrats *should* beat him. If Democrats can't beat him, then Trump deserves to be president. Because that

means Democrats are so ineffective, so un compelling, so uncharismatic, so uninteresting, that they can't even beat someone as lousy of a president as Donald Trump — it's absurd! I mean, Democrats should've won last time, too, right?

CJLPP: *Right, and isn't it because the party is splintered, too? Do you think that the different factions of the Democratic Party prevent them from unifying against President Trump?*

SH: Look, I mean, Trump won without having a completely unified Republican Party, so you're always going to have internal divisions. I think the big issue is that Democrats struggle to offer a strong, compelling message that really inspires people. I think the mistake Hillary made, and this goes back to what I was saying about centrist technocratic politics, is that if you just have a bunch of detailed policy proposals that are smart and effective, that's not enough. You have to connect with people and you have to inspire them, and you have to have a broader narrative — and I think that Democrats have really struggled with developing that broader narrative and connecting with people's gut.

I also think that Democrats have to be careful with not playing too much into identity politics, in the sense that if it's just about appealing to different constituencies of marginalized groups in the Democratic Party, but you don't have a strong message that goes beyond that, and, [you] also dismiss white voters generally as, "We're never going to get them anyway, they're all racist, whatever," that kind of approach (which I think does exist in certain parts of the Democratic Party) — that's dangerous! Because I think that there are white voters who are interested in an economically populist message. They want to feel that someone is speaking to them. Or, in the kind of cliché of the white working-class voters, they don't want just another centrist politician; they want someone who is able to speak to the very deep problems in certain parts of the country . . . that have been forgotten by politicians who just don't really care. And I think there are Democratic candidates who are trying to appeal to those kinds of constituencies, so it's definitely doable from my perspective, yeah.

CJLPP: *Who do you think are the candidates most able to galvanize people in those voting blocs?*

SH: I think that Bernie Sanders is up there in terms of having a strong economic message that can appeal both to minorities but also to more rural, white, working-class voters, so it doesn't have to be an either/or thing. I think [Pete] Buttigieg is interesting in that regard as well, in terms of having broad appeal beyond the normal constituencies. But I think there are a lot of compelling candidates, and probably too many in some sense, right? But I would say those are the two that have caught my eye the most.

CJLPP: *How did you get into academia and what are some of the*

changes that you hope to see in the fields of law, governance, and public policy through your work?

SH: So I ended up doing what I do, it's a long story but I guess the story starts with 9/11. September 11 was the formative moment for my generation, and it happened when I was a freshman, like you. That really changes how you view things, and it can politicize you, and it forces you to rethink your assumptions and rethink what you want to do with your life. Seeing how 9/11 affected the entire way we looked at the Middle East [and] the relationship between the U.S. and the Middle East. And shortly after, the Iraq War started . . . I wanted, as someone who was both American and Muslim, to really do what I could to improve U.S. policy. I felt like something had really gone wrong here in this relationship between the U.S. and this entire part of the world, and I wanted to get more involved in that.

One of the questions I had was, well, one reason why the Middle East has become so dysfunctional is going back to the issue of dictatorships. Why is it that the U.S. continues to support the authoritarian regimes when in Latin America, Asia, and elsewhere, starting in the 1980s and going into the 1990s, the U.S. got a lot better and started to actually support democratic transitions in these areas, but not in the Middle East? The Middle East remained the one exception. So I wanted to understand: why is it that the Middle East has remained this exception? And one of the reasons is that we as Americans — we want to support democracy in theory, but we're afraid of democratic outcomes in practice. So I said, why are we afraid of democratic outcomes in the Middle East? Because, the answer was, we're afraid of who might come to power. And who are these people who might come to power? Islamist movements! And that's how I got into the study of Islamist movements like the Muslim Brotherhood — because I wanted to understand, who are these groups who could theoretically come to power in the Middle East? Should we be afraid of them? To what extent is that justified? So I decided to basically immerse myself in the study of these groups and I spent a year in Jordan 2004-2005 on a Fulbright Fellowship studying the Jordanian Brotherhood, then I started focusing after that on the Egyptian Brotherhood, and I just became fascinated by this question of Islam's role in politics and what is the solution to this problem, because so many of the issues in the Middle East get to this very contested question of the role of religion. I found it fascinating, but I found it to be the key issue facing the region, and I wanted to see, are there different ways of looking at this fundamental issue?

CJLPP: *Thank you very much for your time and expertise, Mr. Hamid.*

Ramos v. Louisiana: Does the Fourteenth Amendment Fully Incorporate the Sixth Amendment Guarantee of a Unanimous Jury Verdict?

Brian J. Dolan (J.D., St. John's University School of Law '19)
Guest Contributor

Trinece Fedison's lifeless body was found stuffed into a trash can by a New Orleans police officer in November 2014.¹ One day earlier, Ms. Fedison's nephew, Jerome, saw her chatting with someone he described as a Spanish man.² Jerome then watched as Ms. Fedison went into a house with this so-called Spanish man.³ Upon learning of his aunt's death, Jerome returned to the street where he had seen his aunt with the Spanish man, and approached Evangelisto Ramos as he walked out of his house.⁴ "I know what you did," Jerome told Mr. Ramos, "You gonna feel me, partner, for real."⁵

Jerome's threats were not taken lightly. Mr. Ramos, terrified, hid out in a trailer near the dock where he worked.⁶ He told his boss that he had sex with someone who was later found dead and that his life had been threatened by a family member of the deceased victim.⁷ Mr. Ramos's boss urged him to contact the police; Mr. Ramos did so and agreed to sit down with police for an interview.⁸

Mr. Ramos was forthcoming and cooperative with the investigating detective. He told him that he had consensual sex with Ms. Fedison the night before she was found dead, and that they had had sex several times previously.⁹ Mr. Ramos also told the investigating detective that the night before she was found dead, she "had left his house and climbed into a black car with two men who had flagged her down."¹⁰ Finally, wanting to assist in the investigation, Mr. Ramos voluntarily agreed to provide a DNA sample.¹¹ The results showed that Mr. Ramos was one of three sources of DNA found on the trash can in which Ms. Fedison's body was found.¹² When the investigating detec-

tive asked Mr. Ramos about these results, he replied "that he had placed a bag of garbage in the church garbage can after Ms. Fedison left his house, while on his way to the corner store."¹³

A grand jury charged Mr. Ramos with one count of second-degree murder on May 21, 2015.¹⁴ Mr. Ramos continued to maintain his innocence, entered a plea of not guilty, and exercised his Sixth Amendment right to a jury trial;¹⁵ his trial began on June 22, 2016.¹⁶

At trial, the government offered virtually no direct evidence implicating Mr. Ramos in Ms. Fedison's death. The government offered no eyewitness testimony, and despite a comprehensive search of Mr. Ramos's home, the government found no murder weapon, no blood from Ms. Fedison, and no trace of any other physical evidence linking Mr. Ramos to her death.¹⁷ The government's case rested primarily on two pieces of highly circumstantial evidence: first, that Mr. Ramos was seen with the victim the day before her body was found, a fact he did not dispute and had explained to the investigators; second, that he had admitted to touching the garbage can in which her body was found, a garbage can that was situated near his house and which he probably touched on a regular basis.¹⁸ In addition, the government relied on unduly prejudicial and speculative testimony from the lead detective,¹⁹ and the prosecution told the jury that Ms. Fedison "must have been 'sexually assault[ed]' or 'raped[.]'" even though Mr. Ramos was not charged with any sexual offenses.²⁰

13 *Id.* at 11.

14 *Id.*; State v. Ramos, No. 2016-KA-1199, 2017 WL 4988658, at *1 (La. Ct. App., 4th Cir., Nov. 2, 2017).

15 Brief for Petitioner at 11, Ramos v. Louisiana, No. 18-5924 (U.S. June 11, 2019); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]").

16 Petition for Writ of Certiorari at 5, Ramos v. Louisiana, No. 18-5924 (U.S. Sept. 7, 2018).

17 Brief for Petitioner at 11, Ramos v. Louisiana, No. 18-5924 (U.S. June 11, 2019).

18 *Id.*

19 *Id.* ("The lead detective testified that Jerome Fedison and other local residents had told him the stabbing must have been committed by a 'Mexican or Hispanic' individual, because 'they like to use knives.'")

20 *Id.*

1 Brief for Petitioner at 9-10, Ramos v. Louisiana, No. 18-5924 (U.S. June 11, 2019).

2 *Id.* at 10.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

Unfortunately, Mr. Ramos’s lawyer at trial “did not conduct any independent investigation or put on a single witness[,]” despite Mr. Ramos’s continued insistence that he was completely innocent and despite the possibility “that Ms. Fedison might have been killed by [the] two men who picked her up [outside Mr. Ramos’s house] the evening she was killed.”²¹

The jury deliberated for a mere two hours. Two jurors thought the government had not proven Mr. Ramos’s guilt beyond a reasonable doubt; ten jurors thought the government had proven his guilt beyond a reasonable doubt. At the time, a non-unanimous jury verdict was sufficient to convict under Louisiana law,²² so the jury ceased deliberations and delivered a verdict of guilty.²³ Mr. Ramos was then sentenced to life in prison without the possibility of parole.²⁴

I. Procedural History of *Ramos v. Louisiana*

During the October 2019 Term, the Supreme Court of the United States will hear arguments in *Ramos v. Louisiana*. The question presented is “[w]hether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict.”²⁵ The Bill of Rights was originally understood to apply only against the federal government,²⁶ but most of its protections now apply to the states through the Fourteenth Amendment’s Due Process Clause — a doctrine known as “incorporation.”²⁷ Thus, the Supreme Court will decide in *Ramos v. Louisiana* whether juries in state criminal trials must reach a unanimous verdict, as is required in federal criminal trials.²⁸ This paper explores the history of jury verdicts, both unanimous and non-unanimous, and argues that the Supreme Court should incorporate the Sixth Amendment guarantee of a unanimous jury verdict against the states through the Due Process Clause of the Fourteenth Amendment.

21 *Id.*

22 As discussed in Section II, *infra*, Louisiana has amended its state constitution to require unanimous verdicts in all felony trials for felonies committed after January 1, 2019. However, because this change in the law is not retroactive, it will not affect the verdict in Mr. Ramos’s trial.

23 *Id.*

24 Petition for Writ of Certiorari, *supra* note 16, at 5.

25 Brief for Petitioner, *supra* note 17, at i.

26 *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (“When ratified in 1791, the Bill of Rights applied only to the Federal Government.”) (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

27 *Id.* (“With only a handful of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.”) (emphasis added).

28 *Id.* (“Incorporated Bill of Rights guarantees are enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.”) (internal quotations and citations omitted).

Mr. Ramos went through several layers of appellate review before his case reached the Supreme Court. After Mr. Ramos was convicted at trial and sentenced to life in prison, he appealed to the Louisiana Fourth Circuit Court of Appeal, arguing that the case against him was based on circumstantial evidence, that the government failed to establish proof of his guilt beyond a reasonable doubt, and that the evidence was insufficient to support the conviction.²⁹ Further, he argued that his conviction by a non-unanimous jury verdict, of ten guilty votes to two not-guilty votes, violated his federal constitutional rights.³⁰

The Louisiana Fourth Circuit Court of Appeal rejected Mr. Ramos’s argument and held that non-unanimous twelve-person jury verdicts are constitutional.³¹ In reaching its decision, the Louisiana Fourth Circuit Court of Appeal cited the case of *Apodaca v. Oregon*, in which the Supreme Court of the United States held that the Sixth Amendment guarantee of a unanimous jury verdict did not apply in state criminal trials, reasoning that there is “no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.”³²

The Louisiana Fourth Circuit Court of Appeal also relied on the cases of *State v. Bertrand*³³ and *State v. Hickman*³⁴ to support its ruling that non-unanimous jury verdicts do not violate the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution in light of the U.S. Supreme Court’s controlling decision in *Apodaca*.³⁵ In *Bertrand*, the Supreme Court of Louisiana affirmed the constitutionality of a Louisiana statute that required only ten out of twelve jurors to agree on a verdict in criminal cases “in which punishment is necessarily confinement at hard labor.”³⁶ *Hickman* also involved a constitutional challenge to the same statute at issue in *Bertrand*, but the defendant-petitioner offered the new argument that developments in the Supreme Court’s jurisprudence made the issue of non-unanimous jury verdicts “ripe for reconsideration.”³⁷ In *Hickman*, the court found the defendant-petitioner’s arguments unpersuasive, and concluded that the “[d]efendant’s constitutional rights were not violated by her 10-2 jury verdict.”³⁸

29 Petition for Writ of Certiorari, *supra* note 16, at 5.

30 *Id.*

31 *Id.*

32 *State v. Ramos*, No. 2016-KA-1199, 2017 WL 4988658, at *15-16 (La. Ct. App., 4th Cir., Nov. 2, 2017) (citing *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972)).

33 6 So. 3d 738 (La. 2009).

34 194 So. 3d 1160, 1168-69 (La. Ct. App., 4th Cir., May 16, 2016).

35 *Ramos*, 2017 WL 4988658, at *16.

36 6 So. 3d at 741.

37 194 So. 3d at 1169.

38 The Louisiana court stated in conclusion,

We find no reason, therefore, to depart from well-established precedent holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials based on the *McDonald* decision.

Under both state and federal jurisprudence, a criminal conviction by less than a unanimous jury does not violate Defendant’s right to

Next, Ramos appealed to the Louisiana Supreme Court, which summarily denied review without providing any reasons for its decision.³⁹ Then, on September 7, 2018, after receiving no relief in Louisiana's state court system, Mr. Ramos filed a petition for a writ of certiorari⁴⁰ with the Supreme Court of the United States, seeking review of his conviction and an answer to the question of whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict.⁴¹ On March 18, 2019, the Supreme Court of the United States granted Mr. Ramos's petition for a writ of certiorari.⁴² The case will be argued on October 7, 2019.

II. A (Very) Brief History of Non-Unanimous Jury Verdicts in Louisiana and Oregon

At the time of Mr. Ramos's conviction in Louisiana state court, Louisiana and Oregon stood as the only two states to accept verdicts by non-unanimous juries in criminal trials.⁴³ In November 2018, Louisiana voters passed an amendment to the state constitution requiring unanimous jury verdicts in all felony trials; however, the amendment will only apply to trials for felonies committed on or after January 1, 2019.⁴⁴ In other words, the amendment will not affect any felony convictions obtained by non-unanimous jury verdict for crimes committed before January 1, 2019. Thus, Mr. Ramos will not be entitled to a retrial or any other relief under Louisiana's new constitutional amendment, even though unanimous juries will be required going forward. Oregon, on the other hand, continues to allow non-unanimous jury verdicts if at least ten jurors agree.

In the other forty-eight states, as well as the federal judicial system, including federal courts in Louisiana and Oregon, a unanimous verdict is required to convict or acquit in all felony cases.⁴⁵ This raises the question of how these two states came to

permit verdicts by non-unanimous juries. This section discusses the origins of the non-unanimous jury systems in Louisiana and Oregon and the racial and ethnic prejudice that led to their creation.⁴⁶

At the time of the Louisiana Purchase in 1803, and until 1898, Louisiana juries were required to reach a unanimous verdict.⁴⁷ After the Civil War and subsequent Reconstruction period, white Louisianans sought ways to reassert racial dominance.⁴⁸ One way the white population tried to reassert its control over nonwhites was through the practice of "convict leasing," which permitted the rental of "prisoners to people or companies who needed labor," effectively using convicts as a form of slave labor, even though slavery itself was outlawed by the Thirteenth Amendment.⁴⁹ Further, the use of non-unanimous jury verdicts "ensured that African American jurors could not use their voting power to block convictions of other African Americans."⁵⁰ In 1898, Louisiana held a constitutional convention with the goal of assuring white supremacy and "eliminat[ing] 'the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise.'"⁵¹ It was at this convention that Louisiana abandoned the unanimity requirement; the new constitution permitted criminal convictions on the agreement of just nine out of twelve jurors.⁵² This new, non-unanimous, system made it easier for the state to secure convictions, thereby increasing the number of prisoners who could be exploited for their labor, and similarly limited the ability of African American jurors to "use their voting power on the jury to block convictions of other African Americans."⁵³ At that time, Louisianans were hostile toward the idea of permitting African-Americans to serve on juries, in large part because it was believed that African American jurors were less likely to convict, especially when the defendant was African American.⁵⁴ In

trial by jury as specified by the Louisiana Constitution, or the Sixth Amendment as made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

Id.

39 *State v. Ramos*, NO. 2017-KO-2133, 2018 La. LEXIS 1586, at *1 (La. June 15, 2018).

40 A "petition for writ of certiorari" is the means by which a losing party seeks discretionary review in the Supreme Court of the United States. *See* SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.").

41 *Ramos v. Louisiana*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/ramos-v-louisiana/> (last visited July 29, 2019).

42 *Id.*

43 Petition for Writ of Certiorari, *supra* note 16, at 10 ("Louisiana and Oregon are now the only states that allow for non-unanimous jury verdicts.").

44 John Simmerman & Gordon Russell, *Louisiana Voters Scrap Jim Crow-era Split Jury Law; Unanimous Verdicts to be Required*, ADVOCATE (Nov. 6, 2018, 9:45 PM), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html.

45 *See* Angela A. Allen-Bell, *These Jury Systems Are Vestiges of White Supremacy*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/opinions/these-jury-systems-are-vestiges-of-white-supremacy/2017/09/22/d7f1897a-9f13-11e7-9c8d-cf053ff30921_story.html?utm_term=.de4c3b-

342c8b.

46 *Id.*

47 Jessica Rosgaard & Wallis Watkins, *The History of Louisiana's Non-Unanimous Jury Rule*, WWNO (Oct. 22, 2018), <https://www.wwno.org/post/history-louisianas-non-unanimous-jury-rule>.

48 *See id.* (quoting Thomas Aiello, an Associate Professor of History and African-American Studies at Valdosta State University, who said that "the white population [in Louisiana] tried to reimpose some kind of version of white control over the system which they felt they had lost ever since the loss of the Civil War").

49 *Id.*; *see also* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.") (emphasis added).

50 Allen-Bell, *supra* note 45.

51 Brief for Petitioner, *supra* note 17, at 4; Rosgaard & Watkins, *supra* note 47.

52 To provide a deeper sense of the racial animus underlying the constitutional convention, consider that the resulting constitution also included poll taxes, a literacy test, and a property ownership qualification for voting, as well as one of the infamous Grandfather Clauses, which exempted white residents from these requirements. *See* Allen-Bell, *supra* note 45.

53 Brief for American Bar Association as Amicus Curiae in Support of Petitioner at 24, *Ramos v. Louisiana*, No. 18-5924 (U.S. June 18, 2019).

54 Brief Amici Curiae of the American Civil Liberties Union and the

essence, white Louisianans believed that the mere presence of one African American juror would inevitably result in a hung jury where a black defendant was on trial.⁵⁵ At the convention, delegates determined from records of eligible voters (from which eligibility to sit on juries is usually determined) that it would be very unlikely for any jury to have more than three African American members.⁵⁶ Based on this determination, the convention adopted the rule allowing conviction by nine jurors' votes, ensuring that three jurors' votes could be ignored.⁵⁷ In other words, the delegates ensured that, even in the rare situation where a jury included three African American members, those three jurors' votes could be silenced or nullified. (Again, it was assumed that African Americans would generally vote to acquit, so this amendment was meant to facilitate convictions, particularly of black defendants.⁵⁸)

Until 1934, Louisiana was the only state to allow non-unanimous jury verdicts in felony cases.⁵⁹ In 1934, Oregon passed a constitutional amendment allowing for non-unanimous jury verdicts in all felony cases (except first-degree murder) as long as ten out of twelve jurors agreed. This amendment was proposed and adopted primarily in response to a 1933 case in which "a jury failed to convict a Jewish man in the murder of Protestant man, instead handing down a verdict of manslaughter."⁶⁰ By the 1930s, the Ku Klux Klan had "found widespread acceptance in [Oregon]" and one local newspaper blamed the verdict in that case on "the vast immigration into America from southern and eastern Europe, of people untrained in the jury system," and "accused immigrants of making 'the jury of twelve increasingly unwieldy and unsatisfactory.'"⁶¹ Within a year of this verdict, the state constitution was amended to allow for non-unanimous jury verdicts in virtually all felony cases in Oregon.⁶²

Despite the racist and discriminatory origins of the non-unanimous jury system in Louisiana and Oregon, the Supreme Court of the United States upheld the practice of allowing non-unanimous jury verdicts in Louisiana in *Johnson v. Louisiana*⁶³ and in Oregon in *Apodaca v. Oregon*.⁶⁴ In *Johnson*, the petitioner argued that unanimous jury verdicts were required in all criminal cases in order to give effect to the requirement that the government prove a defendant's guilt beyond a reason-

able doubt.⁶⁵ The Supreme Court rejected this argument and held that the mere fact that less than twelve jurors agree about the defendant's guilt does not mean that the government failed to meet its burden of establishing guilt beyond a reasonable doubt.⁶⁶ The Supreme Court also rejected a challenge under the Equal Protection Clause to provisions of the same Louisiana statute requiring a unanimous twelve-person verdict in capital and five-person jury trials but permitting non-unanimous verdicts in non-capital felony trials.⁶⁷

In *Apodaca v. Oregon*, decided the same year as *Johnson*, the Supreme Court addressed the petitioners' argument that a conviction by a non-unanimous jury violates the Sixth Amendment right to a jury trial, made applicable against the states by the Fourteenth Amendment's Due Process Clause.⁶⁸ The Supreme Court held that requirement of a unanimous verdict, guaranteed in federal criminal cases, is not required in state criminal cases and that states may constitutionally authorize non-unanimous jury verdicts in criminal cases.⁶⁹ The holding was the result of an odd split of the Court's nine justices: eight justices agreed that the Sixth Amendment right to a jury trial should provide the same protections in both federal and state trials, but four thought unanimity was required and four thought it was not required.⁷⁰ Justice Powell, in a concurring opinion, provided the fifth vote for both groups of four, by positing that unanimity was required in federal trials but not in state trials.⁷¹ A plurality of the Supreme Court recognized that "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit."⁷² Apparently feeling this was of no consequence, the Court went on to say that the purposes of a jury trial are equally well served whether the jury must reach a unanimous verdict or not.⁷³

III. The Fourteenth Amendment Fully Incorporates the Sixth Amendment Guarantee of a Unanimous Jury Verdict

The reasoning underpinning the U.S. Supreme Court's decisions in *Apodaca v. Oregon* and *Johnson v. Louisiana* has been seriously called into question by more recent precedent and developments in the Supreme Court's Fourteenth Amendment jurisprudence.⁷⁴ In *Apodaca*, the crucial fifth vote to uphold *Apodaca*'s conviction by a non-unanimous jury came from Justice Powell who wrote a concurring opinion, in which he con-

ACLU Foundation of Louisiana in Support of Petitioner at 25, *Ramos v. Louisiana*, No. 18-5924 (U.S. June 18, 2019).

55 *Id.* at 25-27.

56 *Id.* at 27-28.

57 *Id.* at 28.

58 *Id.*

59 Brief for Petitioner, *supra* note 17, at 5.

60 *Id.* (noting that "the voter pamphlet explicitly cited the Silverman trial as support for the amendment"); Allen-Bell, *supra* note 45.

61 Allen-Bell, *supra* note 45.

62 *Id.*

63 406 U.S. 356 (1972).

64 406 U.S. 404 (1972).

65 *Johnson*, 406 U.S. at 359.

66 *Id.* at 359-63.

67 *Id.* at 363.

68 *Apodaca*, 406 U.S. at 406.

69 *Id.*

70 Brief for State of New York et al. as Amici Curiae in Support of Petitioner at 10, *Ramos v. Louisiana*, No. 18-5924 (June 18, 2019).

71 *Id.*

72 *Apodaca*, 406 U.S. at 411.

73 *Id.*

74 Aliza B. Kaplan & Amy Saack, *Overturing Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 20-21 (2016).

cluded that “unanimity is one of the indispensable features of a *federal* trial,” while also reasoning that not “all of the elements of a jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.”⁷⁵ However, this view is completely inconsistent with the modern Supreme Court’s view of incorporation, as expressed in *McDonald v. City of Chicago*.⁷⁶ In that case, decided in 2010, the U.S. Supreme Court rejected the idea of partial incorporation espoused by Justice Powell in *Apodaca* and held that “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”⁷⁷ In the jury-unanimity context, this means that because the Sixth Amendment right to a jury trial in federal criminal cases has been incorporated against the states,⁷⁸ all the features of a typical federal criminal jury trial, including a unanimous verdict, should be required in state criminal prosecutions. Oddly, the Supreme Court has repeatedly acknowledged that *Apodaca* runs afoul of this general principle of incorporation but has declined to overrule *Apodaca*, opting instead to characterize it as an exception to the general rule.⁷⁹

Under the U.S. Supreme Court’s incorporation doctrine, a Bill of Rights protection is deemed incorporated against the states through the Fourteenth Amendment’s Due Process Clause if the right is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition”⁸⁰ The requirement of a unanimous verdict is both fundamental and deeply rooted in our history, and should therefore be deemed incorporated against the states.

First, jury unanimity is supported by historical precedent. It

75 *Johnson v. Louisiana*, 406 U.S. 356, 369 (Powell, J., concurring in *Johnson v. Louisiana* and concurring in the judgment in *Apodaca v. Oregon*); Kaplan & Saack, *supra* note 74.

76 Specifically, the *McDonald* majority noted that “the Court abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,” and observed “that it would be incongruous to apply different standards depending on whether the claim was asserted in a state or federal court.” *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (internal quotations and citations omitted).

77 Kaplan & Saack, *supra* note 74, at 23.

78 *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) (“Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”).

79 Kaplan & Saack, *supra* note 74, at 24; *see also, e.g.*, *Timbs v. Indiana*, 139 S.Ct. 682, 687 n.1 (2019) (“The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. As we have explained, that ‘exception to the general rule . . . was the result of an unusual division among the Justices,’ and it ‘does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.’”) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010)).

80 *See, e.g.*, *Timbs*, 139 S.Ct. at 688.

dates to at least 1367 and “by the late fourteenth century, there was a widespread preference for unanimous verdicts,” with unanimity becoming “an accepted feature of the common-law jury by the 18th century.”⁸¹ Sir William Blackstone, whose *Commentaries on the Laws of England* greatly influenced the development of the American legal system, once wrote:

[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.... [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages.⁸²

And while the text of the Constitution itself does not explicitly require unanimous juries in criminal trials, both John Adams and James Madison acknowledged the importance of unanimity prior to ratification of the Constitution.⁸³ Moreover, the Supreme Court itself has recognized that “[i]n [federal] criminal cases this requirement of unanimity extends to all issues . . . which are left to the jury.”⁸⁴ It is also telling that the courts of nearly every state in the country, as well as the federal courts, require juries in felony criminal trials to reach a unanimous verdict.⁸⁵ Louisiana and Oregon are the only two states to stray from the unanimity requirement, and they do so for historically odious reasons having nothing to do with any legitimate function of the criminal legal system. Because of the long-established importance of the unanimity requirement, the Supreme Court should hold that the right to a unanimous jury verdict is a fundamental right and incorporate the guarantee of a unanimous jury verdict against the states through the Fourteenth Amendment.

In addition to the jurisprudential reasons discussed above, practical concerns of accuracy and fairness counsel in favor of fully incorporating the Sixth Amendment guarantee of a unanimous jury verdict. In a comprehensive study comparing the accuracy of unanimous verdicts against non-unanimous verdicts, William S. Neilson and Harold Winter found that “if retrials occur

81 Kaplan & Saack, *supra* note 74, at 25.

82 Eugene Volokh, *Does the Constitution Require Unanimous Jury Verdicts in Criminal Cases?*, REASON (Mar. 18, 2019), <https://reason.com/volokh/2019/03/18/does-the-constitution-require-unanimous> (quoting 2 BLACKSTONE, COMMENTARIES *378-79.).

83 Kaplan & Saack, *supra* note 74, at 25 (observing that John Adams wrote “it is the unanimity of the jury that preserves the rights of mankind[.]” and that James Madison proposed a draft of the Sixth Amendment that included “the requisite of unanimity for conviction”).

84 *Andres v. United States*, 333 U.S. 740, 748 (1948).

85 Brief for State of New York et al., *supra* note 70, at 3 (“Following the American Revolution, States incorporated the unanimity requirement into their constitutions either expressly or by reference to the common law right, and new States continued to do so as they joined the Union.”); *id.* at 9 (“Amici States have required unanimous jury verdicts for felony convictions for hundreds of years.”).

until a verdict is reached, a unanimous verdict rule is generally more accurate than a nonunanimous rule”⁸⁶ Moreover, one examination of fifty-six cases prosecuted in Louisiana state courts that resulted in exonerations found that thirty of those were cases in which the jury convicted by a non-unanimous vote.⁸⁷ In other words, approximately fifty-four percent of those known exonerations stemmed from cases that were decided by non-unanimous juries.⁸⁸ Of those thirty, thirteen were completely innocent, and ten of those thirteen were black.⁸⁹ A substantial body of empirical research suggests that requiring unanimity promotes more robust, careful, and thorough deliberations and results in more reliable decision-making.⁹⁰

One reason that unanimous verdicts are generally more accurate than non-unanimous verdicts is that “nonunanimous juries need not debate as fully as unanimous ones” because “[o]nce the requisite number of jurors agree upon guilt, discussion can come swiftly to an end.”⁹¹ On the other hand, unanimous juries are more likely to carefully consider each juror’s opinion because all twelve jurors must ultimately reach an agreement. Unanimous juries allow for the possibility of a minority fully converting the majority or for a minority convincing the majority that the defendant is only guilty of a lesser included offense rather than the top count.⁹² Finally, in a non-unanimous jury state, “[i]f the nine [or ten] convicting jurors need not fully consider the view of their fellow panel members, the chances for a verdict born of prejudice or bigotry increase, as the jury may split along race or class lines.”⁹³ Indeed, this is exactly the outcome that the delegates to the Louisiana constitutional convention intended when they included the non-unanimous rule allowing agreement from only nine of twelve jurors to determine a verdict. The theory at the time was that even

if three African-American jurors ended up on the same jury, it would not matter because the nine white jurors could effectively veto the African-American jurors’ votes.⁹⁴ Whereas “[b]oth the defendant and society can place special confidence in a unanimous verdict[,]” the same clearly cannot be said of non-unanimous verdicts.⁹⁵ Both the general public and jurors themselves express greater confidence in and satisfaction with verdicts reached unanimously as compared to non-unanimous decisions.⁹⁶

Further, requiring unanimous jury verdicts in felony trials is compelled by American ideals of justice. The United States legal system has long maintained a commitment to proof beyond a reasonable doubt in cases where an individual’s freedom is at stake,⁹⁷ to the principle that it is worse to convict an innocent person than to acquit a guilty person,⁹⁸ and to ensuring the continued “legitimacy and moral force of the criminal law.”⁹⁹

Non-unanimous juries undermine all three of these principles. They undermine our commitment to proof beyond a reasonable doubt because “[a] non-unanimous verdict demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors and shows that the government has failed to meet its burden of proof.”¹⁰⁰ Non-unanimous jury verdicts undermine our commitment to ensuring innocent people are not convicted because such ver-

86 William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT’L REV. L. & ECON. 1, 1 (2005).

87 Brief of Innocence Project New Orleans and the Innocence Project, Amici Curiae in Support of Petitioner at 5, *Ramos v. Louisiana*, No. 18-5924 (U.S. June 18, 2019).

88 Because jury deliberations are confidential, it is difficult to find complete numbers regarding how many criminal convictions are obtained through non-unanimous verdicts. However, the New Orleans Advocate “reviewed about 3,000 trials over six years, turning up 993 convictions rendered by 12-member Louisiana juries in which the newspaper was able to document the jury votes. . . . The newspaper’s analysis found that 40 percent of trial convictions . . . came over the objections of one or two holdouts.” Jeff Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, NEW ORLEANS ADVOCATE (Apr. 1, 2018), https://www.nola.com/news/courts/article_8e284de1-9c5c-5d77-bcc5-6e22a3053aa0.html.

89 Brief of Innocence Project New Orleans and the Innocence Project, Amici Curiae in Support of Petitioner at 10, *Ramos v. Louisiana*, No. 18-5924 (U.S. June 18, 2019).

90 Brief for American Bar Association, *supra* note 53, at 18-19 (citing the findings of various studies indicating that 12-person unanimous juries deliberate for longer and more thoroughly and conscientiously than non-unanimous juries).

91 *Nonunanimous Jury Verdicts*, 86 HARV. L. REV. 148, 153 (1972).

92 *Id.*

93 *Id.*

94 Brief of American Civil Liberties Union, *supra* note 54, at 28.

95 *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). *See also* Brief for American Bar Association, *supra* note 53, at 20 (citing a study which observed that there are six major ways unanimous rule juries differ from non-unanimous juries: unanimous juries deliberate longer; unanimous juries encourage greater participation by members of small, dissenting factions; large factions attract members more quickly under non-unanimous rules; jurors are more likely to remain holdouts under unanimous rules; unanimous juries take longer to deliberate before they vote; unanimous juries are more likely to adopt an evidence-driven deliberation style rather than a verdict-driven style); Brief for State of New York et al., *supra* note 70, at 9 (“Amici’s experience, confirmed by the overwhelming weight of social science research, demonstrates that the unanimity requirement improves the quality of jury deliberations and ensures that jury verdicts reflect the collected wisdom, experience, and perspective of every juror. Juries subject to a unanimity requirement deliberate longer, evaluate evidence more thoroughly, and grapple with the viewpoints of every member of the jury. This improved deliberative process contributes to more fair and reliable verdicts, which in turn reinforce public confidence in the legitimacy of the criminal justice system.”).

96 Brief for American Bar Association, *supra* note 53, at 20-21 (“Research also indicates that individual jurors are themselves less satisfied with the decisions they reach under non-unanimity rules. . . . And perhaps most crucially, the same is true of the public at large. Citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer.”).

97 *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

98 *Id.* (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

99 *Nonunanimous Jury Verdicts*, *supra* note 91, at 155.

100 Kaplan & Saack, *supra* note 74, at 29; *see also id.* at 36-43.

dicts increase the likelihood that an innocent person will be convicted; indeed, the Oregon Supreme Court has acknowledged that the purpose of the state's non-unanimous jury law is to make it easier to secure convictions.¹⁰¹ Finally, non-unanimous jury verdicts undermine the "legitimacy and moral force of the criminal law"¹⁰² by allowing the government to secure convictions more easily in certain places than others and raising questions about the accuracy of verdicts obtained where less than all of the jurors agreed about the defendant's guilt or innocence.

In deciding whether the unanimity requirement should be incorporated against the states, the Supreme Court must acknowledge the fundamentally racist history of non-unanimous jury verdicts in the only two states that permitted such verdicts at the time of Mr. Ramos's conviction.¹⁰³ As previously discussed, "the original purposes of Oregon's non-unanimous rule was in fact to silence the views of minorities and make it easier to convict defendants."¹⁰⁴ The same can obviously be said of Louisiana's non-unanimous rule. The only difference between the two is what kinds of voices were meant to be silenced. In Louisiana, it was African Americans. In Oregon, it was certain kinds of immigrants, particularly Jewish immigrants. Whichever voices they are intended to silence, non-unanimous jury systems appear to serve the purpose of silencing minority views. Empirical evidence indicates that black defendants are more likely to be convicted by non-unanimous juries than white defendants,¹⁰⁵ which is not surprising given that non-unanimous jury systems were largely born out of racial and ethnic animus. There should be no place in the American legal system for a method of reaching a verdict that enables jurors to "simply ignore the views of their fellow panel members of a different race or class."¹⁰⁶ Eliminating non-unanimous juries in felony trials would restore a modicum of fairness for criminal defendants tried in states with such systems.

* * *

When Mr. Ramos's case comes before the Supreme Court during the October 2019 Term, the Court must carefully consider developments in the Court's jurisprudence since *Apodaca* and *Johnson*, the long-established importance of the unanimity requirements, the dangers associated with non-unanimous juries, and the racist origins of the non-unanimous jury systems in Louisiana and Oregon. Based on all of these factors, the Supreme Court should conclude that Sixth Amendment guarantee of a unanimous jury verdict is incorporated against the states through the Fourteenth Amendment's Due Process

Clause. To hold otherwise would undermine the "legitimacy and moral force of the criminal law[,]"¹⁰⁷ and would leave the door open for other states to change to non-unanimous rules in felony criminal trials. It is high time the Supreme Court recognized that non-unanimous jury verdicts are anathema to the fundamental principles on which the United States' criminal legal system was built.

101 *Id.* at 28, 31.

102 *Nonunanimous Jury Verdicts*, *supra* note 91, at 155.

103 See generally Kaplan & Saack, *supra* note 74, at 43-51.

104 *Id.* at 43.

105 Brief for Petitioner, *supra* note 17, at 9.

106 *Id.* (citing *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting)).

107 *Nonunanimous Jury Verdicts*, *supra* note 91, at 155; Brief for State of New York et al., *supra* note 70, at 9 (observing that the deliberative process fostered by unanimous rules "contributes to more fair and reliable verdicts, which in turn reinforce public confidence in the legitimacy of the criminal justice system").

Forced Institutionalization: An Unjust Practice

Talia Bromberg (SCR '20)

Print Edition Editor

Forced institutionalization refers to the placement of an individual into the care of a specialized institution without the individual's consent. At its inception in the mid nineteenth century, forced institutionalization was an extension of the state's traditional power of *parens patriae*,¹ intended to provide humane help to those with disabilities by giving them care and housing.² However, by the early twentieth century, that had changed. As Social Darwinism gained popularity, the public's perception of those with disabilities changed and forced institutionalization became a way to offer some level of care, while "segregating" those with disabilities from "normal" society.³ Then, in the 1960s, the growing public consciousness about the mistreatment of the forcibly institutionalized led to mass deinstitutionalization. The perceived purpose of forced institutionalization shifted from care for those with disabilities to protection of the public. With this shift in purpose came a shift in power: the government justified its more limited use of institutionalization as an extension of the state's police power. This made clear that forced institutionalization was for the benefit of the public, not of the institutionalized individual.

Today, advocates for forced institutionalization cite both public safety and a moral imperative to care for people with disabilities. In this article, I examine both historical and contemporary arguments for and against forced institutionalization, and I conclude that it is not only ineffective but also a violation of personal autonomy.

I. The Bigoted History of Forced Institutionalization

One of the most compelling arguments for forced institutionalization is that taking away personal autonomy, specifically of those with psychiatric disabilities, benefits society as a whole. This justification was made clear in a Texas statute from 1915, which stated through the use of forcible institutionalization, "society [may be] relieved from the heavy economic and moral losses arising from the existence at large of [persons with

mental disabilities]."⁴ Drawing on the same principles of Social Darwinism that were used to justify forced sterilization⁵ and anti-Semitic immigration laws,⁶ women and minorities were often forcibly institutionalized as a way of silencing political and social outcasts without due process. Indigenous people in the United States were specifically targeted by these policies: starting in 1903, the Hiawatha Asylum for Insane Indians, in Canton, South Dakota, was a facility specifically made by the federal government to hold Native Americans.⁷ Over thirty years, the asylum detained nearly four hundred indigenous people,⁸ nearly half of whom would die.⁹ Stereotypes of "drunken Indians, sexually promiscuous Indian women, wild Indians, crazy Indians[]" were turned into diagnosable behavior through psychological assessments, which were then used by medical and political officials to justify the confinement of native people who did not fit American social norms.¹⁰ The stated purpose of the asylum was to care for disabled and mentally-ill native people, but in reality, medical and political offi-

4 An Act to provide for the establishment and maintenance of a State Farm Colony for the feeble minded, to make appropriations therefor, and to declare an emergency, 34th Leg., R.S., ch. 90, § 2, 1915 Tex. Gen. Laws 143, https://lrl.texas.gov/scanned/sessionLaws/34-0/HB_73_CH_90.pdf.

5 As Justice Oliver Wendell Holmes wrote for the Supreme Court in a decision upholding the use of forced sterilization against a Fourteenth Amendment challenge,

We have seen more than once that the public welfare may call upon the best citizens for their lives for the use of the State. It would be strange, if it could not call upon those who have already sapped the strength of the State, for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world if, instead of waiting to execute degenerative offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of the fallopian tubes. Three generations of imbeciles are enough.

Buck v. Bell, 274 U.S. 200, 207 (1927).

6 David Bianculli & Adam Cohen, *The Supreme Court Ruling That Led To 70,000 Forced Sterilization*, NPR (March 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> (discussing a 1924 immigration law that was "inspired by eugenicists" and that created "very unfavorable national quotas" that barred many Jewish would-be immigrants).

7 Vinod S. Bhatara et al., *The Hiawatha Asylum for Insane Indians: The First Federal Mental Hospital for an Ethnic Group*, 156 AM. J. PSYCH. 767, 767 (1999).

8 Susan Burch, "Dislocated Histories": *The Canton Asylum for Insane Indians*, 2 WOMEN, GENDER & FAMILIES OF COLOR 141, 141 (2014).

9 *Id.* at 148 (estimating mortality rate of forty-five percent).

10 *Id.* at 146.

1 *Parens patriae* refers to "[t]he power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals." *Parens patriae*, CORNELL LAW SCH. LEGAL INFO. INST.: WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/parens_patriae (last visited Aug. 21, 2019).

2 Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment — The American Experience*, 43 ISR. J. PSYCH. & RELATED SCI. 209, 210 (2006).

3 Claudia Center et al., *The Garrett History Brief*, 12 J. DISABILITY POL'Y STUD. 70 (2001)

cialists used psychological assessment tools to diagnose unwanted behavior — excessive drinking, sexual openness, failure to learn English — as mental illness.¹¹ The effects of involuntary confinement were devastating, not just for the individual, but for the community. Mothers were taken from their children, children were born in asylums,¹² and communities were unable to fulfill cultural expectations of caring for one another.¹³ The practice of institutionalizing indigenous people had nothing to do with care or public safety; instead, it “reflected the federal government’s goal to subjugate American Indian communities and to submerge their distinct identities.”¹⁴

Essentially, assigning the label of “disability” was a way to criminalize difference, giving the government the power to forcibly correct unwanted behaviors or to separate those who are different from mainstream society. Professor Tobin Siebers, an award-winning scholar of Disabilities Studies who passed away in 2015, argued that forced institutionalization has always been and continues to be a means of suppression:

The right to vote was withheld from women because of their supposed lack of higher reasoning. People of color had no chance to acquire civil rights as long as they were considered feeble-minded or diseased. The criminalization of refugees, asylum seekers, and immigrants continues today to rely on representing them as less than human, imagining them as diseased, disabled, or dishonest but primarily as the first two. The presence of disability further feminizes the female other, further racializes the racial other, and further alienates the alien other. In each case, the association of disability with a particular group justifies exclusion from the community of rights-bearing people.¹⁵

The “exclusion from the community of rights-bearing people” is what makes the forced institutionalization of people with disabilities justifiable. Once the government is able to justify taking away the rights of one group, history shows that the same rationale can be used to strip the rights of other, often marginalized, groups as well. When considering forced institutionalization, it is crucial to remember its white supremacist, patriarchal roots.

II. Modern Advocates for Forced Institutionalization

In the United States, societal views of mental illness and psychiatric disability have drastically changed since the early twentieth century. According to a survey published in May by the American Psychological Association, eighty-seven percent of American adults agreed that people should not be ashamed of having a mental health disorder.¹⁶ Despite these positive

changes, there is still a perception by many that mental illness increases the likelihood of violent behavior; in 2018, a poll conducted by the *Washington Post* and ABC found that fifty-seven percent of people believed shootings were a reflection of failures to identify and treat people with mental health problems.¹⁷ Although this does not inherently mean that those fifty-seven percent of people support expanding forced institutionalization, it does suggest that the majority of the general public still believes that there is a link between psychiatric disability and acts of violence, and that a solution to gun violence involves major changes to the ways in which we identify and treat those with mental illness. Forced institutionalization is a solution that has been gaining public interest due to recent statements by President Trump. In response to the mass shooting in El Paso, Texas, President Trump said that those with mental illness should be involuntarily confined to prevent mass shootings and that “mental illness and hatred pulls the trigger, not the gun.”¹⁸

Although President Trump’s statement can be seen as an attempt to scapegoat those with mental illness in order to defend his partisan, pro-gun agenda, arguments justifying forced institutionalization as a means to curb violence (especially gun violence) are made by bipartisan advocacy groups as well. Groups such as the Treatment Advocacy Center¹⁹ and the National Alliance on Mental Health²⁰ work with legislators on both sides of the aisle to promote legislation that would allow a court or a family member to compel a person to be institutionalized. These groups support legislation such as Kendra’s Law in New York²¹ and Laura’s Law in California,²² which come in response to a specific instance in which a person with an untreated psychiatric disability kills another individual. Such reports, however, are often misleading. According to Columbia psychiatry professor Paul Appelbaum and Duke medical sociologist Jeffrey Swanson, “only 3%–5% of violent acts are attributable to serious mental illness.”²³ Additionally, 120,000 gun-related kill-

PSYCHOL. ASS’N (May 1, 2019), <https://www.apa.org/news/press/releases/2019/05/mental-health-survey>.

17 *Washington Post-ABC News Poll Feb. 15-18, 2018*, WASH. POST, <http://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll-feb-15-18-2018/2280/> (last visited Aug. 21, 2019).

18 Grace Panetta, *Trump Said People with Mental Illness Should Be ‘Involuntarily Confined’ If Necessary to Prevent Mass Shootings, Despite Research Showing a Lack of Connection Between Mental Illness and Gun Violence*, BUS. INSIDER (Aug. 5, 2019, 12:41 PM), <https://www.businessinsider.com/trump-says-mentally-ill-people-should-beinvoluntarily-confined-2019-8?fbclid=IwAR0lx6nOHERTgZwFi-Ugo5KZkODlxC-GDPGLi4FoiNBwvrt-w8YPff8qk2cSU>.

19 *SMI & Violence*, TREATMENT ADVOCACY CTR., <https://www.treatmentadvocacycenter.org/key-issues/violence> (last visited Aug. 17, 2019).

20 *Setting the Record Straight*, NAT’L ALLIANCE ON MENTAL ILLNESS (Aug. 7, 2014) <https://www.nami.org/Blogs/From-the-CEO/August-2014/Setting-the-Record-Straight>.

21 N.Y. MENTAL HYG. LAW § 9.60.

22 CALIF. WELF. & INST. § 5354.

23 Paul S. Appelbaum & Jeffrey W. Swanson, *Gun Laws and Mental Illness: How Sensible Are the Current Restrictions*, 61 PSYCH. SERV. 652, 653 (2010).

11 *Id.*

12 *Id.* at 144.

13 *Id.* at 147.

14 *Id.* at 146.

15 TOBIN SIEBERS, *DISABILITY THEORY* 180 (2008).

16 *Survey: Americans Becoming More Open About Mental Health*, AM.

ings took place in the United States between 2001 and 2010, but fewer than five percent of those killings were committed by persons with a diagnosed mental illness.²⁴ Even within that statistic, about half of U.S. gun-related fatalities are suicides — the one type of violence that is strongly associated with mental illness.²⁵ Further, people with psychiatric disabilities often also have traits that are risk factors for violent behavior, such as substance abuse, unemployment, poverty, trauma, and violent victimization. When these factors are controlled for, “annual rates of violent behavior among [people with serious mental illness are] in line with the general population without mental illness — about 2 percent.”²⁶ By putting mental illness at the forefront of debates around public safety and violence, politicians and advocacy groups are drawing a false equivalence between psychiatric disability and violence.

Despite the statistics, advocates for increased forced institutionalization may argue that even one death that could have been prevented by the institutionalization of a person with a psychiatric disability is too many. However, this argument implies that the choice to forcibly institutionalize a person is a one-to-one trade: one person’s freedom for another person’s life. According to a 2011 meta-analysis published in the *Harvard Review of Psychiatry*, in order to prevent one stranger homicide, 35,000 people with schizophrenia judged to be at-risk of violence would have to be involuntarily committed.²⁷ Further, the same study found that “[a] large proportion of patients classified as being at high risk will not, in fact, cause or suffer any harm.”²⁸ Instead, these largely inaccurate risk assessment tools can often have “unintended consequences” such as “unwarranted detention for some patients, failure to treat others, misallocation of scarce health resources, and the stigma arising from patients’ being labeled as dangerous.”²⁹ The loss of one life is tragic, especially when that life could have been saved, but taking away the freedom of 35,000 people because they potentially could commit a violent crime is not an effective way to protect public safety.

III. The Adversarial Court System

The continuation of emergency forced institutionalization is determined in an adversarial court system, in which the burden of proof to forcibly institutionalize people with psychiatric disabilities is lower than in criminal hearings. Pursuant to the

24 Jonathan M. Metzler & Kenneth T. Macleish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241 (2015).

25 Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANN. EPIDEMIOLOGY 366, 366 (2015).

26 *Id.*

27 Matthew Large et al., *The Prediction Value of Risk Categorization in Schizophrenia*, 19 HARV. REV. PSYCH. 25, 28 (2011).

28 *Id.* at 25.

29 *Id.*

U.S. Supreme Court decision in *Addington v. Texas*,³⁰ evidence in a civil commitment case must only be “clear and convincing,” which is a lower standard than the “beyond a reasonable doubt” standard of evidence used in a criminal case.³¹ Additionally, standard rules of evidence such as the admissibility of hearsay and adherence to psychotherapist-patient confidentiality are generally disregarded in these hearings.³² Consequently, patients may be less likely to speak honestly or seek help from friends, family, or doctors since their privacy is not protected in the court. The admittance of hearsay opens up the possibility of manipulation of court proceedings by parties who are biased for or against the patient. Ultimately, the bar for forcibly institutionalizing a person who is suspected of having increased potential to commit a crime is lower than it is to convict a person who is suspected of having actually committed a crime. This is not to say that the bar should be lowered for either case. Rather, in both cases, the highest possible burden of proof should be met before a person’s liberty can be taken away for any reason.

As Donald H. Stone, a professor of law and the director of the Mental Health Law Clinic at the University of Baltimore, puts it, “confinement against one’s will is more akin to the criminal consequences of punishment than to pure treatment”³³ In other words, forcing a person to undergo treatment or remain in an institution without consent is essentially a punitive measure, even if the goal of that measure is rehabilitation or protection of the public. If this punitive measure is not in response to an actual crime — having the potential to become violent against oneself or others is not in itself a crime — then that punitive measure cannot possibly be just, because it is punishment for a crime that was not committed.³⁴ If a person with a psychiatric disability is in fact suspected of having already committed an actual crime, then they should be tried within the justice system with the same legal standards — proof beyond a reasonable doubt, with the inadmissibility of hearsay evidence, and protections for doctor-patient confidentiality — as any other accused party. Creating a separate system to preemptively try people with psychiatric disabilities for crimes which they have not yet committed is inherently ableist because it positions the rights of people without disabilities above the rights of people who are psychiatrically disabled.

IV. A Return to *Parens Patriae*

Along with arguments focusing on the safety of the public, advocates also point to the safety of the individual as justification

30 441 U.S. 418 (1979).

31 *Id.* at 425-33.

32 Donald H. Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner’s Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 790, 809 (2016).

33 *Id.*

34 It is important to note that there are also many issues with forced institutionalization as a consciously punitive measure, especially as the United States justice system currently stands; however that is outside of the scope of this paper.

for forced institutionalization. These arguments, based in the individual good, have historical roots. In the early nineteenth century, state-supported asylums were built in the United States as a way to keep those with perceived mental illness out of jails and almshouses. In order to place individuals in these asylums, laws surrounding forced institutionalization were conceived.³⁵

The “for their own good” argument is still used today and has in fact regained popularity in recent years. Just as the mass deinstitutionalization movement of the 1960s was sparked by a moral outrage at the mistreatment of people with psychiatric disabilities, the movement for increased institutionalization is fought today by those who feel that “society has a moral obligation to help people receive treatment.”³⁶ One of these people is Candy Dewitt, mother of Daniel Dewitt.

As a high school senior in 2007, Dewitt was diagnosed with schizophrenia and because he was a legal adult, his parents were not able to force him to take medication or to seek other forms of help. Without medication or other forms of support, Dewitt suffered severe schizophrenic episodes, and as he would deteriorate to the point that he qualified for emergency forced hospitalization. Dewitt was hospitalized about nine times over the course of four years, and against doctor recommendation, he was released each time after only a short time in the hospital because he could not be held once he was not considered to be an imminent danger to himself or others. In December 2011, Daniel was once again released from the hospital against the doctor’s advice. After his release, he declined into a floridly psychotic condition, murdering a man in February of 2012.³⁷

Advocates like Ms. Dewitt argue that “ignoring higher correlations between violence and the tiny fraction of Americans — less than 2% — who don’t receive treatment for a serious psychiatric disorder does more to stigmatize mental illness than addressing it head-on.”³⁸ In Ms. Dewitt’s view, if she had been able to force her adult son to stay in an inpatient program or otherwise receive treatment, then both his life and the life of his victim may have been saved. Although this idea seems to be altruistic, at least when advocated for by a grieving mother such as Ms. Dewitt, its outcomes may not be as pure as the intention because of the ambiguity of what it means to provide “help” and “treatment” to those with disabilities. Providing help can be interpreted as making the resources for treatment available to those with severe psychiatric disabilities; however, in the case of advocates for increased institutionalization, the word “providing” connotes forcing or coercing a person into commitment for the purpose of treatment.

35 Anfang & Appelbaum, *supra* note 2, at 210.

36 Haley Sweetland Edwards, *Dangerous Cases*, 184 TIME 54, 56 (2014), <https://time.com/3596978/crime-and-treatment/>.

37 See generally *id.*

38 *Id.* at 57.

V. To Treat or Not to Treat?

Forced institutionalization does not always ensure treatment. Once someone is forcibly institutionalized, they retain the right to reject treatment.³⁹ Consequently, the question of whether forced treatment should be allowed under forced institutionalization arises. At the inception of forced institutionalization in the nineteenth century, its purpose was to offer a “humane alternative” to poverty or jail by offering treatment along with housing. However, in reality, “hospitalization was involuntary and treatment was coerced, since it was presumed that all mentally ill patients had compromised reason to the extent that they were unable to request (or refuse) care on their own behalf.”⁴⁰ Today, advocates such as Ms. Dewitt have returned to the idea that if one can be forcibly institutionalized, then one should also be forcibly treated. Currently, the law is on the side of those in favor of forced treatment under forced institutionalization.

Although it may seem paradoxical, the movement towards deinstitutionalization in the 1960s actually led to broader acceptance of forced treatment during institutionalization. The “Draft Act Governing Hospitalization of the Mentally Ill,”⁴¹ published by the National Institute for Mental Health, limited the scope of the government’s *parens patriae* power to forcibly institutionalize “those genuinely unable to make decisions for themselves.”⁴² The Draft Act was a model statute, without any enforceable value, but “a number of states adopted it nearly intact, and others were influenced by many of its provisions.”⁴³ Although this limited the ability of the government to institutionalize people with psychiatric disabilities, it also assumed that those who did qualify for institutionalization were incapable of decision-making and therefore, following the same logic as the regulations of the early nineteenth century, were incapable of deciding whether or not they wanted or needed treatment. This standard was reinforced in the 1980s, when the American Psychiatric Association (APA) guidelines officially allowed for forcible treatment during forced institutionalization, since it was assumed that if a patient was involuntarily committed, the purpose of this commitment would be treatment.⁴⁴ Similarly to the impact of the Draft Act, these APA guidelines served as a template for state legislation.⁴⁵

39 Anfang & Appelbaum, *supra* note 2, at 213.

40 *Id.* at 210.

41 NAT’L INST. OF MENTAL HEALTH, FED. SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (Public Health Service Pub. No. 51, 1951), <https://babel.hathitrust.org/cgi/pt?id=uc1.b4258443&view=1up&seq=8>.

42 Anfang & Appelbaum, *supra* note 2, at 211.

43 Paul S. Appelbaum, *The Draft Act Governing Hospitalization of the Mentally Ill: Its Genesis and Its Legacy*, 51 PSYCH. SERV. 190, 191 (2000).

44 Anfang & Appelbaum, *supra* note 2, at 212.

45 *Id.* (“Many state legislatures have included some aspects of the APA guidelines when writing their statutes . . .”).

It may seem logical that forced treatment is necessary under forced institutionalization — otherwise there would be little difference between institutionalization and jail — but it is important to take into account the possible negative effects of these psychiatric treatments. Through involuntary inpatient or outpatient treatment, patients can be forced to take medications against their will. These medications can include sedatives or other drugs that change how a person is able to think and feel. In essence, people are given drugs that take away or severely alter a part of themselves because society has labeled that part as an illness. Their perceptions of themselves are disregarded, as is their bodily autonomy.

* * *

Forced treatments do not work, preemptive segregation of those who may commit violent crimes is a violation of due process, and institutionalizing someone based on the actions that they might do to themselves is a violation of mental and bodily autonomy. Policies of forced institutionalization have their origins in bigotry. When considering passing laws that would make it easier for someone to be forcibly institutionalized, it is important to consider this history. It is also important to consider the current state of a country passing laws to make forced institutionalization easier — a country whose systems of incarceration inordinately affect people of color,⁴⁶ immigrants,⁴⁷ and the disabled.⁴⁸ Whether or not the motivation for forced institutionalization is well-meaning, evidence shows that its results are dangerous. Forced institutionalization is neither practical nor moral; it is just bad policy.

⁴⁶ *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Aug. 17, 2019).

⁴⁷ Madeleine Joungh, *What is Happening at Migrant Detention Centers: Here's What to Know*, TIME (July 12, 2019, 2:01 PM) <https://time.com/5623148/migrant-detention-centers-conditions/>.

⁴⁸ Lorna Collier, *Incarceration Nation*, 45 MONITOR PSYCHOL. 56 (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration>.

Venezuela: The Petrostate and the Target of U.S. Intervention

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Venezuela boasts the largest oil reserves in the world.¹ Unfortunately, decades of corrupt governance, deep economic reliance on the export of oil and natural gas, and concentration of political power in an elite minority have driven the nation to economic and political peril. The once-prosperous Latin American country is now in the grips of hyperinflation, debt, and a growing autocracy. Venezuela's current president, Nicolás Maduro, is challenged most prominently by Juan Guaidó, leader of the Popular Will party and president of the National Assembly of Venezuela. The United States has taken a clear stance between these feuding political factions by supporting Guaidó and levying economic sanctions against Venezuela's state-owned oil company, Petroleos de Venezuela, S.A. (PdVSA). Unfortunately, these measures may not bring about the peace and economic restoration that both the United States and Venezuela seek.

In this paper, I argue that the United States should end sanctions against Venezuela's state-owned oil company, PdVSA, enacted in January 2019. The United States should continue to recognize Guaidó as the interim leader, but only under the condition that it outright condemns any form of military intervention. Instead, the United States should increase its contributions to the United Nations Development Programme's operations in Venezuela, pursue the prosecution of corrupt Venezuelan officials residing in America, and direct its resources to supporting diplomacy between feuding political factions with the aim of negotiating President Nicolás Maduro's resignation.

I. Context to the Venezuelan Crisis

Venezuela has been plagued with episodes of political unrest for centuries. Following the country's declaration of independence from Spain in 1810, implementing fair and prosperous post-colonial rule proved to be difficult.² Between the years 1958 and 1998, Venezuela experienced a tumultuous series of rulers. Accompanying these rulers was a series of economic bursts and downfalls.³ In 1998, Hugo Chávez was elected president and launched the Bolivarian Revolution, which brought

in a new constitution.⁴ Chávez was elected on the basis of his anti-corruption and pro-employment rhetoric, which resonated with the poor.⁵ As president, Chávez increased spending on education, food coupons, and social services, and he initiated new infrastructure programs to create employment opportunities.⁶ These new socialist and populist policies were attractive to Venezuela's lower and middle classes but relied heavily on Venezuela's oil wealth for their success.⁷ While the policies excelled during the prosperous oil boom, they were not sustainable during periods of economic recession.⁸ Chávez also nationalized the oil sector, which severely inhibited industrial competition and worsened the economic state when the oil sector experienced any sort of downfall.⁹

In July 2006, two months after the United States placed an arms embargo on Venezuela, President Chávez signed a weapons deals with Russia in which Venezuela agreed to purchase twenty-four Russian-made fighter jets and fifty-three military helicopters as well as to build a Russian rifle factory in Venezuela.¹⁰ U.S. State Department officials urged Russia to reconsider the sale, as Venezuela had exceeded its defensive needs and the sale was not aiding regional stability.¹¹ In response, Chávez claimed that the military purchases were vital for Venezuela's self-defense.¹²

After Chávez passed away from cancer in April 2013, his chosen successor, Nicolás Maduro, was elected president by a slim margin.¹³ Between the years of 2014 and 2015, following Mad-

⁴ *Venezuela Profile – Timeline*, BBC (Feb. 25, 2019), <https://www.bbc.com/news/world-latin-america-19652436>.

⁵ Heather D. Heckel & Edwin Lieuwen, *The Hugo Chávez Presidency*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Venezuela/The-Hugo-Chavez-presidency> (last visited Aug. 25, 2019).

⁶ *Id.*

⁷ *Id.*

⁸ Heckel & Lieuwen, *supra* note 5.

⁹ See generally Divya Rajagopal, *The Legacy of Hugo Chavez and a Failing Venezuela*, WHARTON PUB. POL'Y INITIATIVE (Feb. 9, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/1696-the-legacy-of-hugo-chavez-and-a-failing-venezuela>.

¹⁰ Jeremy Wolland, *Venezuela, Russia Signs Weapons Deal*, ARMS CONTROL ASS'N (Sept. 2006), https://www.armscontrol.org/act/2006_09/VenRussia.

¹¹ *Id.*

¹² *Id.*

¹³ Virginia Lopez & Jonathan Watts, *Nicolás Maduro Narrowly Wins Venezuelan Presidential Election*, GUARDIAN (Apr. 15, 2013), <https://www.theguardian.com/world/2013/apr/15/nicolas-maduro-wins-venezuelan-elec->

¹ Rocio Cara Labrado, *Venezuela: The Rise and Fall of a Petrostate*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2019), <https://www.cfr.org/background-er/Venezuela-crisis>.

² See generally Jennifer L. McCoy & Edwin Lieuwen, *The Independence Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Venezuela/The-independence-movement> (last visited Apr. 24, 2019).

³ *Id.*

uro's election, several top officials were charged with coup or murder attempts against the president. Most notably, in February 2015, an ex-air force general and ten soldiers were implicated in a plot to overthrow President Maduro by attacking the presidential palace.¹⁴ Beginning in January and continuing through May, thousands of Venezuelans have answered opposition leader Juan Guaidó's calls to take to the streets to protest Maduro's rule.¹⁵ Although these are mostly peaceful protests, Maduro's security forces have been responding with violence, using tear gas and rubber bullets.¹⁶

Maduro's presidency has been fraught with allegations of corruption. The National Electoral Council, which oversees all elections and referenda in Venezuela, is run by Maduro loyalists.¹⁷ Before the 2018 elections began, the opposition's most popular leaders were barred from running.¹⁸ The Electoral Council reported that Maduro had won almost seventy percent of the vote, which put him ahead of his nearest opponent, Henri Flacón of the Progressive Advance Party, by almost forty points.¹⁹ Opponents of Maduro in Venezuela, as well as the U.S. government, have claimed that these figures are inflated, as fewer than half of registered voters went to the polls.²⁰ Canada, Brazil, and several countries in the EU have also contested the election results.²¹ Anti-government protesters in Venezuela have urged Maduro to step down while accusing his administration of eroding democracy.²² In response, Maduro has placed the Venezuelan armed forces onto the streets to establish order.²³ Maduro maintains his confrontational stance against protesters and members of the opposition, calling them "vandals and terrorists."²⁴ These instances of corruption and injustice have prompted international outcry.²⁵

tion (noting Maduro won by 1.6 percent of the popular vote).

14 *Venezuela Accuses 11 of Plotting Anti-Maduro Coup*, BBC (Feb. 13, 2015), <https://www.bbc.com/news/world-latin-america-31464248>.

15 Phillip Reeves, *Venezuelans Show up in the Thousands to Protest Maduro*, NPR (May 2, 2019), <https://www.npr.org/2019/05/02/719386884/venezuelans-show-up-in-the-thousands-to-protest-against-maduro>.

16 *Id.*

17 Scott Neuman, *Venezuela's Maduro Wins Boycotted Elections Amid Charges of Fraud*, NPR (May 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/21/612918548/venezuelas-maduro-wins-boycotted-elections-amid-charges-of-fraud>.

18 *Id.*

19 *Id.*

20 Andreina Aponte & Luc Cohen, *Venezuela's Maduro Re-elected Amid Outcry Over Vote*, REUTERS (May 19, 2018), <https://www.reuters.com/article/us-venezuela-election/venezuelas-maduro-re-elected-amid-outcry-over-vote-idUSKCN1IL05U>.

21 *See generally* Andres R. Martinez, *Venezuela Crisis Splits the World's Allegiances: Map*, BLOOMBERG (Jan. 30, 2019), <https://www.bloomberg.com/news/articles/2019-01-30/venezuela-crisis-splits-the-world-s-allegiances-map>.

22 Rafael Romo & Marilia Brocchetto, *Venezuela Protests: What You Need to Know*, CNN (Apr. 20, 2017), <https://www-m.cnn.com/2017/04/18/americas/venezuela-protest-explainer/index.html?r=https%3A%2F%2Fwww.google.com%2F>.

23 *Id.*

24 *Id.*

25 *See, e.g., Venezuela: Violent Response to Demonstrators*, HUM. RTS. WATCH,

Due to low oil prices and massive political unrest, the Venezuelan government has been rendered too weak to fulfill its commitment to large-scale redistributive social policies. As a result, there are significant shortages of healthcare and food. Venezuelans have suffered months without basic supplies such as soap, toilet paper, flour, and eggs.²⁶ The country is also experiencing many economic repercussions due to the deteriorating social conditions, low oil prices, and unsustainable economic policies. In 2018, Venezuela's GDP decreased by double digits for the third year in a row.²⁷ Additionally, annual inflation has soared to more than 80,000 percent.²⁸ Venezuela's deteriorating social and economic conditions have led to a massive exodus of Venezuelans, which has become the largest migration crisis in recent Latin American history.²⁹

Several opposition groups challenged Maduro in Venezuela's 2018 presidential election. The most notable is Juan Guaidó, the thirty-five-year-old leader of Venezuela's opposition-controlled national assembly. Guaidó initially indicated interest in challenging Maduro when the elections preceding Maduro's second term of office in 2018 were deemed fraudulent.³⁰ In January 2019, shortly after Maduro's inauguration, Guaidó brazenly took to the international stage to declare himself interim President of Venezuela, provided he had the support of the military, until free and fair elections took place.³¹ This declaration was met with support from American leaders.³² Guaidó supports a market economy and granting fiscal autonomy to regional governments — policies aligned with the opposition party's values.³³ President Trump continues to officially support Guaidó. In fact, senior Trump officials frequently voice support for Guaidó's "Operation Liberty."³⁴

II. The U.S. Government Response

On January 28, 2019, the Trump Administration announced sanctions on Venezuela's state-owned oil company, PdVSA.³⁵

<https://www.hrw.org/news/2019/05/03/venezuela-violent-response-demonstrators> (last visited Sept. 1, 2019).

26 *Id.*

27 Rocio Cara Labrador, *Venezuela: The Rise and Fall of a Petrostate*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2019), <https://www.cfr.org/backgrounder/venezuela-crisis>.

28 *Id.*

29 *Venezuela: Events of 2018*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/venezuela> (last visited Apr. 25, 2019).

30 Joe Parkin Daniels, *Venezuela: Who Is Juan Guaidó, the Man Who Declared Himself President?*, GUARDIAN (Jan. 23, 2019), <https://www.theguardian.com/world/2019/jan/15/juan-guaido-venezuelan-opposition-leader-challenging-maduros-rule>.

31 *Id.*

32 Kevin Breuninger, *Trump-backed Opposition Leader Calls for Military Uprising in Venezuela*, CNBC (Apr. 30, 2019), <https://www.cnb.com/2019/04/30/clashes-in-venezuela-after-trump-backed-guaido-calls-for-maduro-ouster.html>.

33 Daniels, *supra* note 30.

34 *Id.*

35 CLAIRE RIBANDO SEELKE, CONG. RESEARCH SERV., IF10715, VENEZUELA: OVERVIEW OF U.S. SANCTIONS 1 (Aug. 22, 2019), <https://fas.org/sgp/>

Prior to the imposition of the PdVSA sanctions, the United States recognized Guaidó as the country's interim president and ceased to recognize Maduro as the President of Venezuela.³⁶ As a result of the sanctions, all PdVSA property and interests subject to U.S. jurisdiction are blocked from use by the United States government, and all of PdVSA's assets in the United States are frozen.³⁷ Additionally, these sanctions prohibit U.S. firms and citizens from conducting business with PdVSA.³⁸ Although Venezuelan oil exports to the United States had already been declining, the sanctions require U.S. refineries that process Venezuelan crude oil to find alternative sources.³⁹

The United States and Venezuela have been strongly interconnected for centuries due to their economic relations. The United States is Venezuela's largest trading partner.⁴⁰ Additionally, the countries belong to several of the same international organizations such as the UN, OPEC, World Bank, and the World Health Organization.⁴¹ Several American presidents have used economic power to influence Venezuelan politics.⁴² In 2002, the United States gave its implicit approval for a coup attempt against Hugo Chávez.⁴³ Unfortunately, since the political and economic situations in Venezuela have worsened with passing time, American administrations are finding it easier to justify interference in Venezuelan domestic affairs by identifying them as global security threats. This has eroded trust between the U.S. and Venezuelan governments. Although American sanctions may seem to be helping the Venezuelan people by placing pressure on the Maduro government, they are actually doing more harm than good. The more the United States continues to press this economic strain, the harder it will be for Venezuela to recover. For political and economic recovery to take place, the country will need to diversify its economy by reducing its reliance on oil exports. Successful, broad-reaching redistributive social policy relies on a sustainable government income to work. Without economic recovery, the instability and political polarization will only worsen. Ultimately, economic and po-

litical recovery must happen together for the country to repair the damage that has been inflicted by so many failed administrations.

President Trump has pursued an aggressive stance against Venezuela since imposing sanctions against Nicolás Maduro's government only one month into his presidency. In January 2019, President Trump officially recognized Guaidó as the legitimate interim president of Venezuela and vowed to "hold the illegitimate Maduro regime directly responsible for any threats it may pose to the safety of the Venezuelan people."⁴⁴ Additionally, on April 30, 2019, President Trump tweeted: "I am monitoring the situation in Venezuela very closely. The United States stands with the People of Venezuela and their Freedom!"⁴⁵ The Trump Administration urged the Venezuelan military to take action against Maduro.⁴⁶ Secretary of State Mike Pompeo and National Security Advisor John Bolton both urged the Venezuelan military to stand loyal to the Venezuelan people and their constitution.⁴⁷

Many top U.S. officials have praised President Trump for taking immediate action in Venezuela. Mark Feierstein, who served as President Barack Obama's top national security advisor on Latin America, called these sanctions "an overdue step to ratchet up pressure on the Venezuelan regime and signal that top officials will suffer consequences if they continue to engage in massive corruption, abuse human rights and [dismantle] democracy."⁴⁸ Although the Trump Administration's immediate and hardline response to the Venezuelan crisis has attracted bipartisan political support, there may be consequences to reacting so quickly and with such an emphasis on military intervention. A more effective measure would be to offer incentives for using diplomacy to facilitate a peaceful transition of governments.

III. Recommendations

The United States should end sanctions against Venezuela's state-owned oil company, PdVSA, enacted in January 2019. Analysts from leading think tanks and the United Nations are concerned that stronger sanctions on PdVSA will further exacerbate Venezuela's humanitarian crisis.⁴⁹ Former UN special

crs/row/IF10715.pdf.

36 Scott R. Anderson, *What Does it Mean for the United States to Recognize Juan Guaidó as Venezuela's President?*, LAWFARE (Feb. 1, 2019), <https://www.lawfareblog.com/what-does-it-mean-united-states-recognize-juan-guaid%C3%B3-venezuelas-president>.

37 *Id.*

38 Madeline Roache, *Sanctions, Venezuela, and US Intentions*, AL JAZEERA (Feb. 28, 2019) <https://www.aljazeera.com/news/2019/02/sanctions-venezuela-intentions-190226124044497.html>.

39 *Id.*

40 *Venezuela Exports, Imports and Trade Balance by Country*, WORLD BANK, <https://wits.worldbank.org/CountryProfile/en/Country/VEN/Year/LTST/TradeFlow/EXPIMP/Partner/by-country> (last visited Aug. 25, 2019)

41 *U.S. Relations with Venezuela*, U.S. DEP'T OF STATE, <https://www.state.gov/u-s-relations-with-venezuela/> (last visited Aug. 24, 2019).

42 *See generally* Wayne Madsen, *Trump's Threats Against Venezuela Mirrors Those of Bush and Obama*, STRATEGIC CULTURE FOUND. (Aug. 21, 2017), <https://www.strategic-culture.org/news/2017/08/21/trump-threat-against-venezuela-mirrors-those-bush-and-obama/>.

43 Ciara Nugent, *Venezuela*, TIME (Jan. 25, 2019), <https://time.com/5512005/venezuela-us-intervention-history-latin-america/>.

44 Breuninger, *supra* note 32.

45 *Id.*

46 *Id.*

47 *Id.*

48 *US Accuses Venezuelan Vice-President of Role in Global Drug Trafficking*, GUARDIAN (Feb. 13, 2019), <https://www.theguardian.com/us-news/2017/feb/14/us-accuses-venezuelan-vice-president-of-role-in-global-drug-trafficking> (alteration in original fixed for parallelism).

49 *See, e.g.*, DANY BAHAR ET AL., BROOKINGS INST., *IMPACT OF THE 2017 SANCTIONS ON VENEZUELA: REVISITING THE EVIDENCE* (May 2019), https://www.brookings.edu/wp-content/uploads/2019/05/impact-of-the-2017-sanctions-on-venezuela_final.pdf (think tank scholars); Michael Selby-Green, *Venezuela Crisis*, INDEPENDENT (Jan. 26, 2019), <https://www.independent.co.uk/news/world/americas/venezuela-us-sanc>

rapporteur Alfred de Zayas has criticized the United States' sanctions, labelling them as "crimes against humanity" because of their effects on Venezuelan civilians.⁵⁰ Economic trends in Venezuela demonstrate that the deterioration of living standards began before the United States began imposing economic sanctions,⁵¹ however, U.S. sanctions against PdVSA further compounded the day to-day economic struggle for the people of Venezuela by reducing Venezuela's foreign currency reserves, which the country depends upon to import medications and food.⁵² President Trump claims that the executive order mandating sanctions would prevent Venezuela's government from conducting "fire sales" of its assets, as the money "belongs to the Venezuelan people."⁵³ Unfortunately, the United States cannot cut off the government's access to oil without interfering in the lives of Venezuelan civilians. When ninety-five percent of export revenues come from oil sold from the state-owned oil company, cutting off the government's access to dollars will leave the economy without the currency needed to pay for imports of food and medicine, "turning the country's current humanitarian crisis into a full-blown catastrophe."⁵⁴

The United States should continue to support Juan Guaidó but publicly withdraw from the possibility of engaging in military intervention. Polls suggest fifty-seven percent of Venezuelan voters support Guaidó, while support for Maduro lies at ten percent.⁵⁵ The United States is justified, therefore, in continuing to recognize Guaidó as the interim leader and transferring all U.S. diplomatic and economic access to Guaidó. The Trump Administration must be careful, however, not to inadvertently validate Maduro's criticisms of Guaidó. When a new government obtains the authority to consent on behalf of a state, this government can authorize foreign states a range of activities within its own territory. Brookings Institution fellow Scott R. Anderson states that in this situation, American transfer of diplomatic and economic access to Guaidó "reflects the rhetoric advanced by Maduro's supporters, who paint Guaidó's movement as a U.S.-backed coup attempt."⁵⁶ The Trump Administration is not refuting this rhetoric as it has refused to rule out military intervention and implied that such intervention could take place. Consider National Security Advisor John

tions-united-nations-oil-pdvs-a8748201.html (citing former UN special rapporteur).

50 Selby-Green, *supra* note 49.

51 BAHAR ET AL, *supra* note 49.

52 *Id.*

53 Scott Neuman, *President Trump Approves New Sanctions on Venezuela*, NPR (May 22, 2018), <https://www.npr.org/sections/theway/2018/05/22/613250814/president-trump-approves-new-sanctions-on-venezuela>.

54 Francisco Rodriguez, *Why More Sanctions Won't Help Venezuela*, FOREIGN POL'Y (Jan. 12, 2018), <https://foreignpolicy.com/2018/01/12/why-more-sanctions-wont-help-venezuela/>.

55 Tom Phillips & Joe Parkin Daniels, *Six Months on, Juan Guaidó Supporters Hang on to Fading Hope in Venezuela*, GUARDIAN (July 22, 2019), <https://www.theguardian.com/world/2019/jul/22/six-months-on-juan-guaido-supporters-hang-on-to-fading-hope-in-venezuela>.

56 Anderson, *supra* note 36.

Bolton's tweet: "We denounce the illegitimate former Venezuelan Attorney General's threats against President Juan Guaidó. Let me reiterate — there will be serious consequences for those who attempt to subvert democracy and harm Guaidó."⁵⁷ Were he to provide consent, Guaidó could authorize U.S. military intervention as a matter of international law.⁵⁸ To facilitate a peaceful regime change, the United States must distinctly refuse to support or take part in any military intervention. This will prove that the United States is committed to a strategy of peaceful non-interference in South American affairs while prioritizing and promoting the wellbeing of the Venezuelan people.

U.S. military intervention in Venezuela would only be appropriate in cases of mass genocide, ethnic cleansing, or war crimes. Such intervention would be justified under the United Nations' Responsibility to Protect Doctrine, which "embodies a political commitment to end the worst forms of violence and persecution."⁵⁹ This doctrine identifies that all UN Member States must extend their obligations under international humanitarian and human rights law to assist populations at risk of genocide, war crimes, ethnic cleansing, and crimes against humanity.⁶⁰ Even if the United States removes its military backing of Guaidó, he alone will hold economic and diplomatic access to the resources America has to offer. These resources will be vital in reconstructing Venezuela's economy. Additionally, because the United States is an international leader, its support for Guaidó has influenced Canada, Australia, the United Kingdom, France, and more countries to formally recognize Guaidó and thus put more pressure on Maduro to step down. The United States' enormous influence may help Guaidó take sole control of the Venezuelan government even without international military intervention.

The United States should also prosecute corrupt Venezuelans living in the United States. There are around eleven thousand Venezuelan immigrants living in the Houston area alone.⁶¹ The majority of these immigrants are not involved in their home country's corruption, but there are Venezuelan oligarchs residing among them.⁶² While placing sanctions against the Maduro regime continues to harm innocent civilians in Venezuela, indicting more corrupt Venezuelans in the United States would do no such harm and would dissuade oligarchs from settling

57 John Bolton (@AmbJohnBolton), Twitter (Jan. 29, 2019, 10:59 AM), <https://twitter.com/AmbJohnBolton/status/1090323542812569602>.

58 *Id.*

59 *Responsibility to Protect*, UNITED NATIONS OFF. ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> (last visited Aug. 24, 2019).

60 *Id.*

61 *How can the U.S. Help Venezuelans? Prosecute Corrupt Oligarchs Hiding in Texas*, HOUSTON CHRON. (May 26, 2018), <https://www.houstonchronicle.com/opinion/editorials/article/How-can-the-U-S-help-Venezuelans-Prosecute-12945314.php>.

62 *Id.*

there. This would send a clear message to officials of the Maduro regime that the United States will not serve as a haven for corruption.

In addition, the United States can show support for Venezuelan civilians by extending temporary protected status to Venezuelan immigrants to the United States.⁶³ Temporary protected status (TPS) is a designation by the Department of Homeland Security (DHS) that may be granted if the conditions in a country temporarily prevent the country's nationals from returning safely, or if the country is unable to adequately handle the return of its citizens.⁶⁴ Usually, DHS will designate a country for TPS due to temporary conditions such as ongoing armed conflict, environmental disasters, epidemics, or other extraordinary and temporary conditions.⁶⁵ From a humanitarian perspective, extending TPS for Venezuelan citizens would give Venezuelan refugees the opportunity to access safety, food, and medicine in the United States. In addition, TPS would be politically advantageous in that it would show the international community that the United States is on the side of the Venezuelan people.

The United States should also encourage more support for the UN Development Programme, which has been able to provide aid to the country. Because the UN is a multilateral organization, it would not be speaking solely for one country's interest. This would demonstrate that the United States is prioritizing the people's needs over its own political agenda.

Lastly, the United States should support and encourage negotiations aimed at creating institutions that foster the coexistence of Venezuela's feuding political factions. In fact, diplomacy aimed at negotiating Maduro's resignation has more public support than military intervention to overthrow him.⁶⁶ This would also reduce the chances of needing military intervention to facilitate the transitions of presidencies. The United States has done this in the past by mediating the Camp David Accords between Israel and Egypt. The Camp David Accords were signed by the Egyptian President and Israeli Prime Minister in September 1978 following twelve days of secret negotiations at Camp David.⁶⁷ Due to this agreement, the two leaders received the shared 1978 Nobel Peace Prize.⁶⁸ If the United States takes on a mediating role between the two feuding Venezuelan political leaders, it is possible that this would help encourage a diplomatic rather than military solution.

IV. Conclusion

Although Guaidó has been recognized by the United States and fifty-three other countries as interim President of Venezuela

since January 2019, he has been unable to oust Maduro and secure free and fair elections.⁶⁹ Under Guaidó's leadership, the National Assembly is starting to create a framework to facilitate the transition of governments, has drafted a plan to offer amnesty for officials who support the transition, and is designing an approach for receiving humanitarian aid.⁷⁰ Since recognizing the Guaidó government, the United States has worked with the interim president and implied that it would consider military intervention to remove Maduro from office. The Trump Administration has also imposed further targeted sanctions such as visa bans and financial sanctions on Maduro officers and blocked the Maduro regime's access to revenue from the PdVSA.⁷¹

By directly targeting officials from Maduro's regime, the United States is sending a message that Maduro's policies are unacceptable. However, the United States should refrain from imposing sanctions on the current government because this may still affect the Venezuelan people and the ongoing humanitarian crisis. Instead, the United States needs to increase humanitarian aid to countries sheltering Venezuelans, encourage other countries and the UN to contribute to humanitarian aid, and condemn any and all use of military force. The only circumstances of military force that would be acceptable would be in any case of mass danger or harm to the Venezuelan people. The Trump Administration must be cautious to prioritize the safety and wellbeing of Venezuelan people above U.S. interests. They can do so by encouraging diplomacy and a peaceful transition of governments. This can only happen if the United States does not intervene militarily.

In 2015, President Obama issued Executive Order 13692, authorizing targeted sanctions against individuals who detract from democratic processes, commit human rights abuses, or engage in corruption.⁷² With this Order, the United States made a solid commitment to uphold international values of liberty, equality, and democracy. The Trump Administration must uphold this legacy and prove to the international community that the United States will not stand for injustice and corruption.

66 David Smilde, *Global Politics*, PUB. RADIO INT'L (Jan. 10, 2019), <https://www.pri.org/stories/2019-01-08/venezuelans-want-president-maduro-out-most-would-oppose-foreign-military>.

67 *Camp David Accords*, HISTORY (Mar. 15, 2018), <https://www.history.com/topics/middle-east/camp-david-accords>.

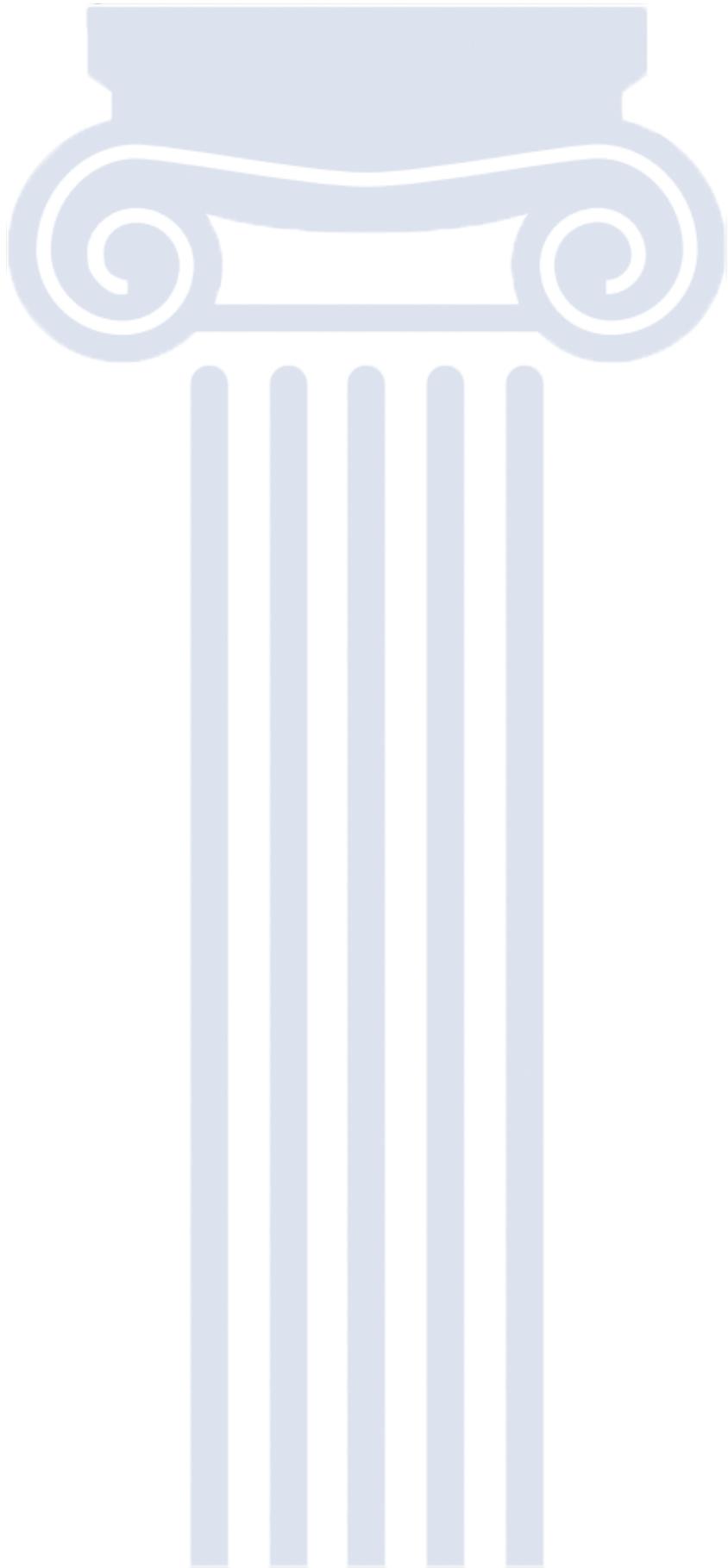
68 *Id.*

69 RIBANDO SEELKE, *supra* note 35.

70 *Id.*

71 *Id.*

72 *Id.*



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