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2015-2016

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The *Brandeis University Law Journal* is now accepting submissions for its next issue. The *Journal* welcomes pieces, preferably formatted according to the *Bluebook: A Uniform System of Citation*, that are written by the undergraduates, graduates, faculty, staff, and alumni of Brandeis University; contact brandeisuniversitylawjournal@gmail.com for submissions, subscription information, and to notify the Editor-in-Chief of any typographical or other oversights in this print.

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PREFACE

Dear Readers,

We are proudly to present to you the seventh volume of the Brandeis University Law Journal. This edition covers, by far, the most diversified content in the history of this publication. Besides articles discussing the current legal affairs in the United States such as environment and privacy laws, you will also find pieces about the legal issues concerning Muslims in postcolonial India, discussion on the international criminal tribunals and the 2016 U.S. presidential election. Continuing the efforts of our predecessors, we are committed to making the content of our journal more accessible for our readers, while keeping its longstanding academic rigor. We hope reading this volume is not only an experience that is academically informative and rewarding, but also enjoyable and fun.

This year is particularly important to the Brandeis community, it is the centennial anniversary of the university's namesake, Louis D. Brandeis, on his appointment to the Supreme Court of the United States. The Journal is honored to participate in this very special occasion by contributing a special edition to the "Louis D. Brandeis: An Inspiring Life" digital exhibition, an effort of the Brandeis Archives & Special Collections for the celebration of the anniversary. We especially would like to thank Zoe Waldman, who kindly invited us to contribute, for her trust and extremely hard work that made the special edition happen.

We would also like to thank everyone who served on the editorial as well as administrative board this year. Their diligence and passion for the law are the foundation of this publication. We would also like to congratulate our new Co-Editors-in-Chief, Dustin Fire and Noah Lourie. We wish them best luck in their effort to provide the Brandeis Community with a forum for rigorous academic discourse, facilitating the appreciation of intellectual clarity, and the pursuit of truth.

Finally, we want to dedicate this Journal to the memory of its founder, Judah Marans. Judah was a scholar, leader, and friend. His pioneering work to create the Brandeis University Law Journal touched the lives of many students, and still continues to impact campus life today. His efforts to provide a forum for legal discussion have grown for seven years since the journal's inception and is more vibrant than ever. We extend our deepest sympathies to his family and friends throughout the Brandeis community. May his memory be a blessing.

Sincerely,
James R. Hayward and Zixuan Xiao
Co-Editors-in-Chief

Analysing the Birth of "The Right to Privacy" and the Process Behind its Legal Justification[1]

*G. Amogha Rao**

In the year 1890, Samuel D. Warren and Louis D. Brandeis, both Boston-based lawyers, co-authored an article titled "The Right to Privacy."[2] This was, perhaps, the first time in the history of the common law that such a right was being formalised with an accompanied legal rationalisation. While notable legal scholars of the 20th century, the likes of Roscoe Pound, have credited the authors for "adding a chapter to [the] law"[3], the greater contribution is not, perhaps, "addition" but the successful derivation of a 'modern' right from existing principles of the archaic common law. The purpose of this analysis is *not* to discuss the impact of the conceptualisation of the Right but to decipher and trace the thought-process associated with the derivation of the said right, an explication of the said legal thought-process. The objective is to follow as to *how* the authors firstly, justify the inherent association of the said right with the common law and secondly, as to *why* the Right to Privacy, if it is in fact intrinsically and inherently associated with the common law, requires an explicit description and the special title of a 'Right'. These questions acquire a higher degree of importance in a 21st century setting because of the hyper-social nature of contemporary society, which values both privacy as well as the lack of it in certain domains, many of which are intangible realms like cyberspace. In such an environment, it is most relevant to recall how Brandeis and his co-author derived a modern right for a changing society from the elasticity of the common law − the repetition of which might just be the need of the hour.

The authors begin by emphasising the elastic nature of the common law, being flexible enough to meet the demands of a changing society. The evidence for this flexibility begins with how, from its very inception, the common law has protected the individual and his claim to property. However, the origin of this protection was in the form of providing a remedy for any *physical* harm to one's body or any *physical* violation to the dominion of one's land. These remedies were formalised to give birth to the ideas of "right to life" and "trespass" that on extrapolation, gives way to the "right to property." Likewise, the guarantee of "liberty" was the direct product of legal protection against *physical* restraint. The authors argue that these 'physical' forms of protection against bodily and tangible harm were expanded to accommodate less visible and more intellectual conceptions of the law such as the "right to *enjoy* life" beyond the archaic logic of a simple physical existence. The reasoning is furthered by the inclusion of intangibles within the sense of the term 'property'. Through the allusive discussion of patent rights that provide protection for the "products and processes of the mind"[4], the authors note that the term 'property' finds a more relevant meaning beyond physicality. The authors provide this background to exemplify how the law has transitioned from assuring physical wellbeing to also

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[1] This article is part of the Brandeis University Law Journal 2016 Special Volume, which is included in the "Louis D. Brandeis: An Inspiring Life" digital exhibition, an effort of the Brandeis Archives & Special Collections for the 100th anniversary celebration of Justice Brandeis's appointment to the Supreme Court.

[2] Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 193–220. Web.

[3] Letter from Roscoe Pound to William Chilton (1916), quoted in A. Mason, *Brandeis: A Free Man's Life*, p.70 (1956)

[4] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 194

protecting, the less tangible, emotional wellbeing of an individual by merely recognising that "pain, pleasure and profit" are neither ruled by nor constrained to the physical realm.[5]

The authors further extend their reasoning by stating that the law grants recognition to other forms of human emotion and sensation by prohibiting even "attempts to do [...] injury."[6] Meaning to say, the law made it illegal to even subject an individual to the sensation of 'fear' associated with injuries such as battery or trespass. A threat unto itself is a deplorable action and sometimes, as deplorable as the injury that gives the threat credibility. The legal recognition of human sensation is further qualified by the conceptualisation of the laws of nuisance and other laws such as the ones against offensive noise and odour. Brandeis and his co-author use this transition as evidence to portray how the law is trending towards securing the emotional wellbeing of the individual above and beyond the physical protection it already guarantees. The authors mention the development of the laws on defamation, libel and slander as illustrations for how the law recognises the importance of an individual's dignity and standing in society. Brandeis and Warren further mention the "right to be let alone"[7], as defined by Judge Thomas Cooley, in reference to capturing pictures of private individuals without their express permission. The 'right to be let alone' is morphed into what the authors define as the 'right to privacy', which at the time, according to them, desperately required the shelter of the common law. The authors trace the origins of the abovementioned rights and laws as a form of evidence to demonstrate that the right to privacy is, in fact, the logical extension of an already established and accepted trend that is unique to the common law, growing to meet the needs of an ever-changing society.

The question still arises, what was so distinct about the period that it prompted Brandeis and Warren to formulate an explicit 'right to privacy', as an extrapolation from the 'right to be let alone'? *Prima facie*, the justification that the authors provide alludes to the development of novel "inventions and [modern] business methods."[8] The authors mention the use of unauthorised "instantaneous photographs" by newspaper houses as a potent threat, posing to destroy the sanctity of private life by stealing the veil of the domestic setting. Attributable to the press, the authors mention the prevailing fear as, "what is whispered in the closet shall be proclaimed from the house-tops."[9] There were other empirical concerns that were emerging from the judicial system. In a case that the authors mention but do not reference in detail, a Broadway actor complains against a photographer for taking a picture of her wearing tights during a theatre performance. She petitioned the Supreme Court of New York to grant her relief by way of an *ex parte* injunction, disallowing the photographer(s) from making use of the photograph. The Court granted the relief requested.[10] The judiciary did show willingness to accord the enshrinement of such a right as the right to privacy but the requisite academic effort to actually synthesise the idea came from Brandeis and Warren who saw the Right as a necessity for civilised existence.

In their article, the authors frequently identify the menacing nature of the press and the damage it can cause to private citizens in the continuance of their domesticity. Brandeis and Warren observe the print media's tendency to profit off gossip, compromising − what they believe everyone has a claim to − the right to privacy. The authors note that, "[t]o occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion

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[5] *Ibid.* 195
[6] *Ibid.* 193
[7] Cooley, Thomas McIntyre. *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*. 2nd ed. Littleton, CO: F.B. Rothman p.29, 1993. Print.
[8] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 195
[9] *Ibid.*
[10] *Ibid.*, Times, N.Y. "Manola Gets an Injunction." *N.Y. Times* [New York] 18 June 1890: 2. Web...

upon the domestic circle."[11] A brief analysis of the extract reveals the origins of, perhaps, the first rudimentary definition of privacy and a basic description of its subsequent violation. The authors define privacy as, that which is meant for the domestic circle; any published information that could only be acquired by having unauthorised access to the domestic circle is seen to be a violation of that right to privacy. Brandeis and Warren condemn the press' scornful lust for gossip concerning sexual relations and other private information that, according to them, should never have reached the public's gaze in the very first place. The authors thoroughly criticise the press for its admonishable behaviour that seems to have overstepped the boundaries of decency and propriety.[12] However, the press is in itself an element and product of society, providing a service that has popular demand. Their scornful lust for the acquisition and delivery of gossip is balanced by the reader's thirst for consumption. Although brief, Brandeis and Warren do account for the consumption of gossip on part of the private citizen. As a sad reflection on human nature, the reason why the press indulges in the distribution and sale of gossip is the same reason why the Arabs distribute and sell oil. There is a large societal demand for seemingly scandalous and private information. "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality."[13] The bitter truth is that a large portion of society, at Brandeis' time, and presumably, even now, would prefer to derive entertainment at the cost of another's privacy while cherishing and guarding one's own right to it. Recognising this "weak side of human nature,"[14] Brandeis and Warren promulgate the right to privacy as not only a means to protect the individual's domestic sanctity but to also further the law's role as a civilising force. The right to privacy and its enshrinement into the common law must not just be observed as a micro phenomenon benefiting the individual and his/her domesticity but should also be seen as a corrective macro phenomenon improving the general standards of morality of a given society.

The authors' primary source of stimulus for the derivation of such a right appears to be the loss of face and dishonour that the publicity of private information causes. However, they realise that the laws of libel and slander do cover such injuries and provide appropriate and approximate remedies in the forms of civil and criminal penalties. As a means of distinguishing these existing laws from the right to privacy, the authors indulge in an examination of the laws associated with defamation and the rationale behind their enshrinement. Brandeis and Warren find that the laws concerning libel and slander, defamation in general, protect the individual's standing in relations and dealings with the exterior world. The honour and respect commanded by the individual aid him/her in the accumulation of wealth and prosperity. Any unjust and unwarranted harm done to an individual's societal standing that allows for prosperity and success is seen to be unlawful because it unfairly inhibits a person from a chance at a quality life. Therefore, Brandeis and Warren essentially reason that the existent laws of the time protected the material aspect of human life, paying little to no attention to the emotional and spiritual suffering that the loss of dignity entails. The authors first establish the legal trend of extending material protection to cover spiritual elements of life and then argue that the spiritual equivalent of the material law of defamation is, in fact, the right to privacy. Therefore, logically, it is within the ambit of the common law to grant legitimacy to the natural outcome of an established trend − the recognition of the right to privacy.

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[11] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 196
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*

The authors reason by yet another common law analogy that involves the common-law right over intellectual and artistic property and how that right, in essence, confirms the legitimacy of the right to privacy, if analysed in the spirit of the common law. Brandeis and Warren observe that the common law provides proprietary protection to artistic and intellectual creation. This protection is independent of the quality or nature of the protected material. It is immaterial if the work is a word or an essay, if it is mere ink on paper or a painting, all that matters is the right of the creator over the status of that which has been created. The common law gives to the creator the right to decide the extent to which he/she would like to expose his/her work to the outside world. As a form of corroborative evidence, the authors quote the dissenting opinion of Sir Joseph Yates from an English Judgement, *Millar vs. Taylor* (1769). The relevance of the dissent is that Sir Yates declared that the common law gives to each individual the right to decide the forum for the expression of his/her thoughts, words and actions.[15] Therefore by extension, it is the right of the creator to decide the level of privacy and publicity associated with the exposure of his/her creation. This proprietary protection is further qualified by the authors through another common-law practice wherein a person is protected from expressing his feelings under duress, by way of force or through compulsion, with the exception of being on the stand in a court of law.[16] In other words, the individual has the power to decide where, when and before who he/she wants to express his/her thoughts and sentiments, providing evidence of a rudimentary application of the right to privacy.

The authors also analyse the rationale behind as to why this *apparent* spirit of the right to privacy (without using those words) is granted in cases of artistic and intellectual work, even when the judges of the time considered the nature of the work to be irrelevant in the determination of those rights. Brandeis and Warren realise that proprietary over such works is akin to the ownership of property. The common-law provides such protection because creation has value and not because the creator has a sentimental attachment to his/her work. There is yet again the fundamental question of having a corporeal rationale behind a law and the lack of prescribing a remedy for a sentimental injury. The authors note that the law of property protects against unjust enrichment by prohibiting unauthorised use of artistic and intellectual work. However, if the individual places worth over a creation, the worth of the creation is only as strong as its legal recognition. In other words, the material evaluation of privacy is indefinable and by extension, the value of the peace of mind derived from the maintenance of one's privacy is imperceptible. Consequently, privacy and private information might not find protection from public gaze under the narrow definition of the term 'property.' Meaning to say, there is no method of transferring a sentimental injury to the objectivity of a material remedy and therefore, there is no means of measuring the injury itself, at least through the narrow definition of the term 'property.' However, in another English case, *Prince Albert vs. Strange* (1849), the authors cite a distinction that the High Court of Chancery draws between property and "that which is exclusiv[e]."[17] As the judge in *Prince Albert*, Lord Cottenham observed that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his."[18] Although similar to the understanding of the term 'property', "that which is exclusive" is broader and contains even those elements that are seemingly ordinary, elements that have limited material value in the eyes of the law but sentimental value in the eyes of the proprietor. The authors also

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[15] Yates, Sir Joseph. (Dissenting Opinion) *Millar vs. Taylor*. Court of the King's Bench, England. 1769. Web.
[16] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 201
[17] Lord Cottenham. *Prince Albert vs. Strange*. High Court of the Chancery, England. 1849. Web.
[18] *Ibid.*

quote Lord Cottenham as having said, "privacy is the right invaded"[19] in relation to the actions of the defendants. However, Lord Cottenham's views were limited to the context in which he spoke and the case in question involved royalty, the consort of Queen Victoria herself. In matters involving the crown and royalty, discretion is assumed to be a duty more than an attribute associated to the crown's claim to privacy. Nevertheless, Lord Cottenham accorded privacy the status of a right and that unto itself is a significant contribution to the authors' cause.

The authors do, however, highlight an inconsistency between the law's treatment of artistic-intellectual material and its treatment of private-domestic material. The claim that ordinary domestic information and material do not have value in comparison to artistic-intellectual works, and therefore, not akin to the status of property, is, perhaps, true at a superficial qualitative level. However, at the level of reality, even that which is ordinary and domestic acquires a value when it is published by profiteers of gossip. In one sense, if exclusivity is a protected attribute for seemingly ordinary information and if that information is accessed without consent for the purpose of enrichment, then is it not true that the act of enrichment without consent is unjust and that which has been used to derive such enrichment, akin to property? The question is, what will fill the legal void between seemingly unjust enrichment and the desire for its prohibition by those who are *sentimentally* injured (as opposed to a material injury)? The unequivocal answer that the authors provide is the right to privacy. The authors recognise that both the profiteers of gossip as well as the ones being injured by its publicity give value to private-domestic information but the law fails to recognise that worth, blinded by the ordinary face value. It is also important to recognise that the injury is sentimental and spiritual but not indefinable. However, the material measurement of the injury is only realisable after it has been committed. While private information is definitely distinct from intellectual property, there is enough practical similarity to accord privacy the same-level of protection as that accorded to property. Therefore, the authors note, "[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[20]

The authors promulgate the right to privacy as an existent notion within the common law and prove its existence through analogy. The first pillar that the authors establish is the accommodating elastic nature of the common law, which appears to show a trend in the direction of preserving the spirituality of its subjects. That trend is extended to include privacy, the deprivation of which causes spiritual-sentimental distress and therefore, requiring the shelter and recognition of the common law. The authors further show that the laws of libel, slander and defamation in general, provide remedies for the injuries associated with the invasion of privacy. They draw parallels between the ownership of property and the exclusivity of private information, while testing their practical similarities and proving their legal disparities. The law's role as a civilising force, assuring the social advancement of mankind is also underscored. While the authors do successfully piece together the various elements of the common law that give the right to privacy the legitimacy and force of the law, they also realise that all these elements would have to operate in unison for a just outcome. This realisation provided the authors the impetus to distinguish the right to privacy from those principles that share its spirit, at least in part. It is in the privacy of our homes and walls that we find the courage to express and be our true selves, the comfort to nurse our sorrows and the freedom to explore and exercise our unique

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[19] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 205
[20] *Ibid.*

spirituality. The deprivation of those joys may occur but it will be because of Brandeis and Warren that such injustices will not stand the scrutiny of the law.

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Hog Pollution in North Carolina: Policy and Legal Analysis

*Emma Wheeler**

North Carolina is renowned for its pulled pork. Residents are quick to debate the merits of Eastern-style versus Lexington-style barbecue, a sweeter and redder version of the vinegar-based Eastern variety. The state's affinity for the pig is no surprise given that North Carolina is the second biggest pork-producing state in the country, producing $2.9 billion in hog sales in 2012.[1] With that revenue though, comes vast amounts of pollution in the form of hog waste, which pollutes the streams, rivers, and air. In this paper, I will establish that hog pollution in North Carolina is an environmental and public health threat, representative of the broader challenge of regulating Concentrated Animal Farming Operations (CAFOs). The state of North Carolina and the nation at large must take a hard look at ways of effectively regulating this industry within existing state and federal legal frameworks and through innovative policy solutions, as current permitting systems have proven to be ineffective.

I will begin by looking at the current state of affairs of hog farms in North Carolina to show that the hog industry has grown to the point that its pollution is no longer adequately regulated. I will then give an in-depth picture of the water and air pollution at stake, as well as the health risks implicit with this pollution. I will examine the role of the federal and state governments under the relevant federal environmental statutes, and will show that these statutes are ineffective as currently applied in North Carolina and the nation at large. Next, I will explore the extent to which hog pollution disproportionally affects minority groups and populations living in poverty. Finally, I'll look at the challenges of addressing CAFOs in general and make policy recommendations for better regulating this environmentally harmful method of raising animals. This is an urgent issue that has yet to be effectively addressed by the state or federal government, despite having been in the public eye for almost two decades, since the Raleigh *News and Observer* writers, Joby Warrick and Pat Stith, wrote a Pulitzer Prize-winning investigative series entitled, "Hog Boss" in 1995.[2] While the hog industry is vital to North Carolina's economy and culture, its natural resources are just as essential. Though I focus on the hog pollution problem in North Carolina, these concerns are not specific to the state – the conversation on using existing and new legal frameworks to effectively regulate CAFOs is one that is long overdue.

Background Information

Hog pollution in NC has become a wide-scale problem since the industrialization of the hog industry in the 1980s. Previously, farmers had few enough hogs that the waste could be used as fertilizer without overloading the fields or having a need to store the waste.[3] Today, large-scale hog farming in NC consists of over 2,100 industrial facilities raising nearly 10 million hogs[4], producing an excess of waste to be dealt with as hogs produce an estimated two to five times the amount of waste as a human.[5] A congressional report by the U.S. Government

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[1] USDA NASS, 2012 Census of Agriculture.
[2] Warrick, Joby and Pat Stith, "New studies show that lagoons are leaking", Raleigh *N&O*.
[3] Peach, Sara, "What to Do About Pig Poop?" National Geographic.
[4] Dove, Rick, "Hog Pollution and Our Rivers" Waterkeeper Alliance and RiverLaw.
[5] Kuo, Lily, "The world eats cheap bacon at the expense of the NC's rural poor" Quartz.

Accountability Office found that in 2002, hogs in five adjacent counties housing over 7.5 million hogs could have collectively produced 15.5 million tons of manure that year.[6] By comparison, the entire state of North Carolina's human population numbers 9.94 million and generates approximately 7 million tons of human waste a year[7], which is carefully treated and controlled.

Municipal human waste is sent to wastewater treatment plants where it is collected, treated, and disposed of in such a way to "prevent, as far as reasonably possible, any contamination of the land, groundwater, and surface waters".[8] In contrast to the treatment of human waste, hog waste is minimally treated and undergoes no standard or regulated treatment process. A typical hog facility in NC houses as many as 4,000 hogs, which are confined in close quarters, sometimes with little room for even basic mobility.[9] When the contained hogs defecate in their stalls, the waste falls through slats in the floor and is then flushed into open-air lagoons. In the lagoons, exposure to naturally occurring bacteria causes the waste to turn an unsightly pink color, the only treatment the manure will receive. Once in the pond, thicker sludge sinks to the bottom, theoretically creating a barrier that will prevent leakage. The liquid at the top is siphoned off and sprayed onto nearby fields as fertilizer.[10] The use of the waste as manure prevents the lagoons from regularly overflowing; however, the process brings its own myriad of consequences. Many residents live just feet away from the fields where the hog waste is sprayed. These neighbors complain of the offensive odor – a stench that fills their houses and makes their eyes burn. Additionally, the spraying process releases harmful air pollutants, and facilitates the contamination of waterways by runoff. The lagoon systems are prone to seepage into groundwater sources and have been known to overflow, especially during storms.[11] The hog industry has shown significant growth in recent decades, outgrowing regulations and wreaking havoc on the environment and nearby communities. The growth of the industry, coupled with the documented pollution effects and health risks associated with the waste necessitates a deeper look at the policy and law used to regulate the industry.

Pollution

An abundance of research has been produced since the 1990s clarifying the link between industrial hog farms and environmental degradation. Among the institutions researching this subject are the University of North Carolina at Chapel Hill, North Carolina State University and Duke University. Three major concerns are relevant in the conversation around industrial hog pollution: water pollution, air pollution, and health effects. Water pollution is perhaps the most documented of these effects. Studies have shown that sewage seeps from the lagoons into the ground water, allowing toxins to leak into potential water sources and deteriorate water quality. Not only does hog pollution affect ground water, it also affects the states' streams and rivers.[12] *Figure 2* in Appendix A shows the relative locations of swine CAFOs relative to the river basins they affect.[13] The figure shows just how widespread the hog pollution is, and the large-scale

[6] GAO Report, "CAFO – EPA Needs More Information…" p.5.
[7] Calculated based on proportions of human waste in the GAO report, p.5.
[8] NC General Statutes, Article 11, Chapter 130A, Section 33.
[9] Lo, Mariana, "Hogwash from the Pork Industry" Earthjustice.
[10] Kuo, Lily, "The world eats cheap bacon at the expense of the NC's rural poor" Quartz.
[11] Peach, Sara, "What to Do About Pig Poop?" National Geographic.
[12] Warrick, Joby and Pat Stith, "New studies show that lagoons are leaking", Raleigh *N&O*.
[13] Harden, Stephen L. "*Surface-Water Quality in Agricultural Watersheds"*, USGS Report.

effects water pollution could have for major river basins in the eastern part of the state. High levels of nutrients and fecal matter in waterways are linked to low levels of oxygen in water, which can in turn cause fish kills.[14] These results indicate that current waste disposal practices are insufficient in their prevention of seepage into groundwater sources, run-off into streams and watersheds, and leakage into surface water. Eastern North Carolina's landscape, which features high groundwater tables and floodplains, makes the lagoons especially susceptible to leakage and flooding, enabling the waste to contaminate nearby waterways. Additionally, excess spray runs off the land and into nearby creeks, streams, and rivers.[15] The negative environmental effects associated with hog pollution are concerning if not potentially disastrous, and must be taken seriously by North Carolina's law and policy makers.

Health Risks

Equally concerning are the health risks associated with proximity to industrial swine operations with open-air lagoon and spray field waste management systems. Health effects are closely linked to air pollution and emissions from the hog facilities. The decomposition process of the waste can release as many as 400 volatile organic compounds into the air, including hydrogen sulfide, ammonia, dust, endotoxins, carbon dioxide, and methane.[16] Many of these compounds are known to cause health concerns and to pollute the environment. Given the vast number of chemical emissions given off by the lagoon and spray field waste method and their documented health effects, it is no surprise that North Carolina residents neighboring hog operations often report eye irritation, nausea, coughing fits, breathing difficulties, asthma, wheezing, and elevated blood pressure.[17] Studies have documented positive relationships between industrial agriculture output and infant mortality rates[18], childhood asthma[19], and blood pressure levels[20]. Additionally, studies show that antibiotics used to keep the pigs healthy in close quarters may contribute to antibiotic resistance in human populations, which poses a major public health threat. The antibiotics are fed to pigs in large quantities, which often pass through the pigs and into the lagoons, where they may be sprayed onto fields or may seep into the groundwater, carrying the antibiotics, as well as resistant bacteria back into waterways and soil.[21] Antibiotics are used to fight infectious diseases, but are ineffective when bacteria become resistant to them. In individuals with compromised immune systems, exposure to antibiotic-resistant bacteria can be deadly; in healthy adults, it makes treatment a longer, costlier ordeal. Given the severity of health and pollution consequences associated with the hog operations, it is astounding that they have been permitted to operate these hazardous waste management systems for so long.

Legal Frameworks: The Clean Water Act and Permitting

Several existing state and federal legal frameworks regulate industrial hog facilities, but have proven ineffective in controlling the North Carolina hog industry thus far. Hog operations

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[14] "What Is Nutrient Pollution?" *National Oceanic and Atmospheric Administration*.
[15] Kuo, Lily, "The world eats cheap bacon at the expense of NC's rural poor" Quartz.
[16] Marks, Robbin, "Cesspools of Shame", NRDC p.17.
[17] Peach, Sara, "What to Do About Pig Poop?" National Geographic.
[18] Sneeringer, Stacy, "Does Animal Feeding Operation Pollution Hurt Public Health?" p.124.
[19] Pavilonis, Brian T. et al., "Relative Exposure to Swine Animal Feeding Operations".
[20] Wing, Steve et al., "Air Pollution from Industrial Swine Operations" EHP.
[21] Marks, Robbin, "Cesspools of Shame", NRDC p.24.

can come into regulation under the Clean Water Act (CWA), the Clean Air Act (CAA), and even the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The EPA is the federal agency that oversees environmental regulations and the implementation of these federal acts; it is their responsibility to ensure that environmental pollutants are acknowledged and controlled. The extent to which industrial hog operations pollute nearby streams, surface water, groundwater, and watersheds makes the Clean Water Act an obvious avenue through which to regulate hog farming. The Clean Water Act is a comprehensive federal law controlling pollution of the rivers, lakes and wetlands of the United States.[22] Under the Clean Water Act, a National Pollution Discharge Elimination System (NPDES) was established to limit the amount and type of pollutants from discrete facilities and point sources, which expressly include CAFOs. NPDES permits may be issued by either by states or the federal EPA, but are subject to enforcement by regulatory agencies.[23]

Regulation at the State Level

North Carolina developed its own General Permitting System to regulate CAFOs, establishing several conditions that holders of Certificates of Coverage must meet each year. Among these conditions: facilities must be designed to "prevent the discharge of pollutants to surface waters or wetlands"; must be "designed, operated and maintained to contain all waste plus the runoff from a 25-year, 24-hour rainfall event"; must design a Certified Animal Waste Management Plan (CAWMP) with the help of a Certified Technical Specialist; waste must not be applied to fields at a rate faster than the nutrients can effectively be absorbed by crops.[24] The current General Permit is effective from October 1, 2014 until September 30, 2019. The North Carolina General Permit covers nearly all operation animal feeding operations, which are defined as feedlots involving more than 250 swine and a liquid waste management system.[25] While these provisions sound good in theory, in practice they have had almost no effect in regulating the industry for several reasons.

In 1997, the state placed a moratorium on the issuance of General Permits for construction of new hog Concentrated Animal Feeding Operations (CAFOs), and issued a prohibition on the expansion of existing hog CAFO operations. In 2007, the moratorium was made permanent under the Swine Farm Environmental Performance Standards act, banning new lagoons and requiring that new or expanded CAFO sites develop environmentally superior technology (ESTs). In order to remain permitted, sites undergoing expansions were required to reduce emissions substantially and prevent waste discharge into surface or ground water. Although the state offered a sizable cost-share program, which would allow site operators to upgrade their lagoons and implement ESTs, only 8 had participated, as of 2013. The law, though promising in theory, grandfathered in the vast majority of existing operations, thereby allowing them to bypass regulation. A later act in 2011 allowed CAFOs to make updates to their buildings without needing to upgrade to ESTs or address their waste management practices. This effectively allowed all hog farms to increase their building and herd sizes without addressing their lagoons, counteracting any good a permit might have done.[26] In September of 2014, the

[22] "Animal Agriculture and the Clean Water Act", The Pew Environmental Group.
[23] "Animal Agriculture and the Clean Water Act", The Pew Environmental Group.
[24] Swine Waste Management General Permit, NCDEQ.
[25] "Animal Feeding Operations Program" NCDEQ.
[26] Nicole, Wendee, "CAFOs and Environmental Justice: The Case of North Carolina", EHP.

North Carolina Department of Environment and Natural Resources (NCDENR) approved an extension of the General Permitting system, making minimal changes to the process despite abundant information about the failures of the system. These permits will be in effect until September 30th, 2019.[27] Through ineffective policies, North Carolina has allowed its hog industry to grow at an accelerated rate while failing to regulate its rudimentary hog waste disposal systems, in spite of more than two decades of public-awareness surrounding the issue. This failure on the part of the NCDENR and the state necessitates a closer look at the policies that have prevented the state from taking firm steps toward addressing the problem of hog CAFO pollution.

The current General Permitting process lacks an oversight mechanism, which has partially contributed to its vast ineffectiveness. With no way to ensure that farms are operating as they should and a limited budget for enforcement and inspection, the permit system has been rendered ineffective at preventing pollution. Additionally, the permitting process does not currently include a requirement for facilities to monitor their waste or the groundwater near their lagoons. Required monitoring by the farms would facilitate the DENR's efforts to prevent groundwater contamination because farms would be more aware of their contamination, and the information would be more easily accessible. Public disclosure of this information might make the owners of CAFOs less willing to ignore leakage and pollution problems, knowing that there would be enhanced levels of public scrutiny. Though regulation at the state level has failed to effectively address hog pollution thus far, there are several actions the legislature and NCDENR could take to better protect the state's natural resources and the health of its citizens.

Regulation at the National Level

The failure to effectively regulate CAFOs extends much further than North Carolina's borders. Under the Clean Water Act only about 40% of the nation's 200,000 large livestock facilities are regulated, according to Jon Devine, senior attorney at the Natural Defense Council.[28] Given the scale of CAFOs and the environmental degradation that accompanies these massive operations, this lack of regulation is astounding. In fact, the Government Accountability Office report finds that the EPA does not have a "systematic and coordinated process for collecting and maintaining accurate and complete information on the number, size, and location of permitted CAFOs" and therefore "does not have the information it needs to effectively regulate these operations".[29] Without necessary information or even required reporting from CAFOs, the EPA has had a difficult time appropriately regulating the industry. Aside from the challenges already discussed, the EPA has also struggled with issues of jurisdiction and authority in regulating certain aspects of CAFOs, such as the waste disposal systems of livestock and poultry farms. This has been based on disputes over the wording of the Clean Water Act, which lists "agricultural storm water" as a non-point source, allowing some farms to skirt regulation.[30] These ambiguities only add to the difficulties inherent in revising the existing legal framework to better regulate the nation's CAFOs. The EPA is likely to continue to face lawsuits and obstacles from the industry as they make efforts to reduce the scope of the CAFO problem.

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[27] Lado, Marianne Engelman, "Complaint Under Title VI of the Civil Rights Act", p.5.
[28] Peach, Sara, "What to Do About Pig Poop?" National Geographic.
[29] GAO Report, "CAFO – EPA Needs More Information…" p.17.
[30] *Rose Acre Farms* v. *NCDENR* (2015), American Farm Bureau Federation.

Environmental Justice

The rural poor of North Carolina are disproportionately affected by the location of the hog facilities, which are almost always located near rural, low-income minority communities. Residents whose homes neighbor industrial hog facilities face the following consequences: they are exposed to numerous health risks, must put up with the smells and fumes, often experience nausea and breathing problems associated with the spraying process, cannot leave laundry to dry outside, cannot use well water, cannot allow their children to play outside, often feel uncomfortable inviting guests to their homes, may not be able to get the smell of the hog waste out of their clothes, are at risk of exposure to raw waste during leaks and hurricanes, and may not be able to move because of property devaluation.[31] The hog farms prevent neighbors from enjoying their property, destroy their quality of life, and cause undue stress.

Figure 1 in Appendix A shows a map of North Carolina featuring dots to represent the location of hog facilities, and colored blocks to represent the percentage of minorities living in a given area. There is a strong correlation between areas with large minority presences and the location of the odorous, polluting hog facilities. The graphic comes from a UNC-CH study conducted by Steve Wing and Jill Johnston, from the Department of Epidemiology, which concluded that industrial hog operations in the state of North Carolina disproportionately affect Black, Hispanic, and Native American populations at a statistically significant rate, and seem to affect low-income minority communities significantly more than low-income white communities. They establish that the spatial pattern observed here is known as environmental racism.[32] Environmental racism does not necessarily suggest that hog farms were intentionally placed neighboring rural minority communities. Often these locations are the paths of least resistance because the communities do not have the political or financial capital to prevent industrial hog operations in their communities.[33] Nevertheless, these populations are particularly vulnerable to environmental hazards and have reduced ability to relocate because of the industry's effects on property values. They disproportionately bear the brunt of the pollution and harm caused by the industrial hog farming operations, and the plight of these communities cannot be ignored in the discussion of hog CAFOs.

Some advocacy groups are fighting to address these concerns and to bring about positive change for the communities affected. Most notably, Earthjustice – a non-profit environmental law firm – brought forth a petition to the EPA alleging that the North Carolina Department of the Environment and Natural Resources (NCDENR) had failed to adhere to the 1964 Civil Rights Act in its hog pollution regulation. As mentioned above, the NCDENR is the state agency charged with protecting North Carolina's environmental and public health, and has the authority to issue permits consistent with this mission. This includes the authority to "regulate animal waste management systems at swine facilities".[34] The complaint alleged that the NCDENR's General Permit issuance to industrial swine facilities in the state had allowed the hog facilities to operate with "inadequate and outdated systems of controlling animal waste" and with minimal oversight, which proved to be detrimental to neighboring African American, Latino, and Native

[31] NC Hog Farm Factory Litigation Website.
[32] Wing, Steve, and Jill Johnston, "Industrial Hog Operations in North Carolina. Disproportionately Impact African-Americans, Hispanics, and American Indians" UNC-CH.
[33] Nicole, Wendee, "CAFOs and Environmental Justice: The Case of North Carolina", EHP.
[34] Lado, Marianne Engelman, "Complaint Under Title VI of the Civil Rights Act", p.5.

American communities.[35] The complaint claims that because the NCDENR accepts funding from the EPA, the department is subject to the Civil Rights Act, Title VI regulation, which prohibits discrimination, and to the EPA's Title VI implementing regulations which state that "[n]o person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color [or] national origin". Earthjustice and the complainants allege that the NCDENR violated Title VI by allowing the hazardous lagoon and spray field systems to continue without restriction, citing evidence that the NCDENR ignored pleas from the affected communities to require more diligent waste disposal practices, and claiming NCDENR has been aware of the hazards of the currently accepted waste disposal systems since the mid-1990s. They claim that the NCDENR "finalized the permit without analyzing the potential for disproportionate health or environmental impacts on African Americans, Latinos, and Native Americans".[36] The complaint concludes by suggesting several less discriminatory alternatives for the DENR: that the department exercise their authority to require hog facilities to install monitoring and public reporting technology, waste management systems that minimize odors and pollution, and/or controls on confinement houses to filter air before it is emitted. Finally, they ask that the EPA "suspend or terminate EPA funding to DENR" should the DENR not come into compliance with the 1964 Civil Rights Act.[37]

In February of 2015, the EPA announced that it would accept the complaint and would launch an investigation of the state agency. Though an investigation does not guarantee that any of the complainants' demands will be met, it is a step forward towards holding the NCDENR responsible for fulfilling its regulatory role. Depending on the outcome of the EPA's investigation, the DENR may be forced to revisit its permitting process and eventually work towards reducing pollution connected to hog farms. Regardless, this complaint has served to bring the North Carolina industrial hog farming back into the public eye, and has brought much needed attention to the underlying discrimination in the North Carolina hog industry. While the EPA investigation may not solve anything by itself, it may prompt the DENR to make adjustments to its permitting process, and to consider ways of more effectively and fairly regulating hog operations. It is a shame that current state legislation fails to adequately safeguard the interests of the low-income communities who most need protection or to effectively regulate the industrial hog industry in a way that requires compliance with basic environmental standards. Earthjustice's approach of invoking the 1964 Civil Rights Act in order to bring about environmental justice to the communities affected by hog pollution is an innovative legal solution. It is this type of legal solution that may be necessary on a large scale to address CAFO pollution if legislators at the state and national level fail to provide policy solutions.

Recommendations and Conclusion

Up to this point, the North Carolina legislature has made futile attempts at regulating an industry that has shown blatant disregard for North Carolina's communities, air, rivers, and groundwater. The failure of legislation to regulate the existing industry is inexcusable. Even without broad federal legislation regulating CAFOs, it is the state's prerogative to bring hog pollution under control. One effective strategy for doing this would be to replace the moratorium on new hog facilities with technology-based compliance standards, effective immediately for

[35] Ibid. p.3.
[36] Ibid. p.11.
[37] Ibid. p.45.

new and modified hog facilities. New regulations should remove exemptions for old hog farm facilities, and should instead give older facilities a set number of years to come into compliance. Non-compliance should be a fineable offense, and to minimize the extent to which administrative and inspection positions become necessary, the new regulations should feature citizen-policing measures. Such measures would allow citizens to receive a percentage of a non-compliance fine for bringing suit against a facility suspected of non-compliance. Fines should be set-aside in a fund to help moderate environmental damage already caused by the hog farms, and to cover relocation costs for families wishing to move away from the polluted areas. The current permitting system instituted by the NCDENR fails to implement proper control and oversight of the hog operations, and should be revised to prioritize the health of communities situated near industrial hog operations, and to minimize emission, leakage, seepage or overflow of harmful environmental pollutants. An improved approach would not grandfather in existing facilities, but would also encourage efforts to reduce the damaged and pollution caused by current and future farms.

As a nation, there are several viable avenues through which to begin to better address the problem. The EPA and state agencies can continue to work under the same CWA permitting system as they currently are, making incremental improvements to the process and battling industry leaders in the courts as they struggle to retain authority. This leaves the fate of the vulnerable communities disproportionately affected by CAFOs at the mercy of the EPA and state agencies that do not have a track record of protecting the needs of the rural minority populations. Alternatively, Congress could pass new legislation regulating CAFOs. If Congress were to do so, the policy should ensure that existing facilities are expected to come into regulation within a reasonable number of years. The policy would also do well to include provisions for heavy fines for non-compliance, mandatory-monitoring systems with monthly public disclosure requirements, and incentives to continually improve existing technology standards. Comprehensive federal regulations would be preferable for many reasons. It would prevent a race to the bottom among states at the expense of their rural poor populations, and would remedy the inconsistent regulation of CAFOs that currently exist throughout the nation. Additionally, other avenues for regulation of CAFOs remain relatively unexplored. The Clean Air Act was once considered as a means to regulate emissions for livestock facilities, but the lack of available data on emissions made writing feasible regulations for CAFOs under the CAA difficult. The EPA agreed that operators who monitored their own air quality were exempt from regulation during and prior to monitoring.[38] Depending on the success of Earthjustice's complaint using the 1964 Civil Rights act, future suits and complaints on the basis of environmental discrimination could be a viable short-term solution.

We should be deeply concerned about the growth of industrial agriculture, and its impacts on our environment and natural resources. Though this paper focused on hog CAFOs in North Carolina, CAFOs are a national problem, with over 200,000 operating across the nation. The same failings in regulation of CAFOs at the North Carolina level are present nationally as well. Meat and products produced in CAFOs are artificially inexpensive, with hidden costs including the damage they cause to water, air, and public health. The food we eat, and the organizations we support through food choices, have real and palpable effects on the environment. Public scrutiny is necessary to bring about positive change, as are conscious choices by the public to support

[38] Sneeringer, Stacy, "Does Animal Feeding Operation Pollution Hurt Public Health?" p.124.

farms and organizations that do not recklessly poison our waterways and fields. The state and federal governments have failed to regulate industrial agriculture operations in a way that prioritizes human health and the environment. This failure is indicative of the challenges in adequately regulating these powerful companies. It is essential that we continue to modify existing legal frameworks and explore innovative policy solutions in order to most effectively regulate NC hog pollution at the state level and to address the nationwide problems of CAFOs.

Appendix A: Charts and Figures

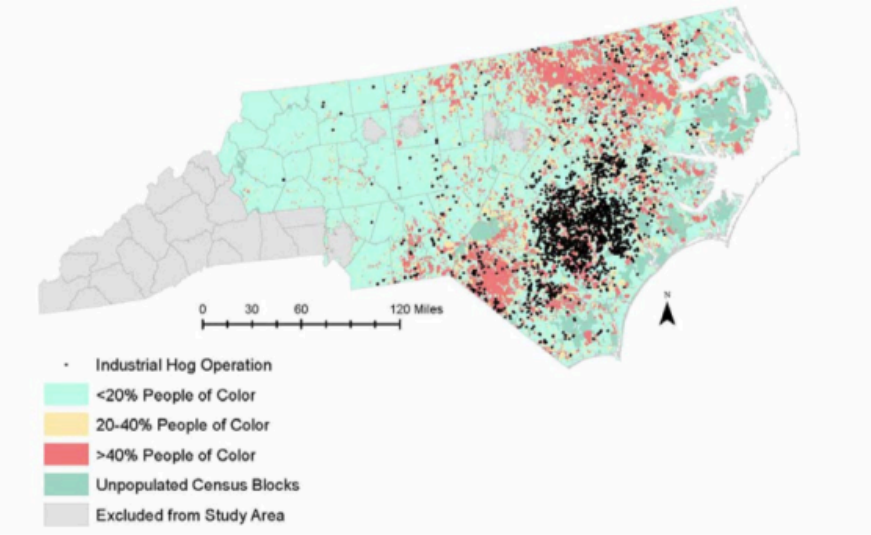
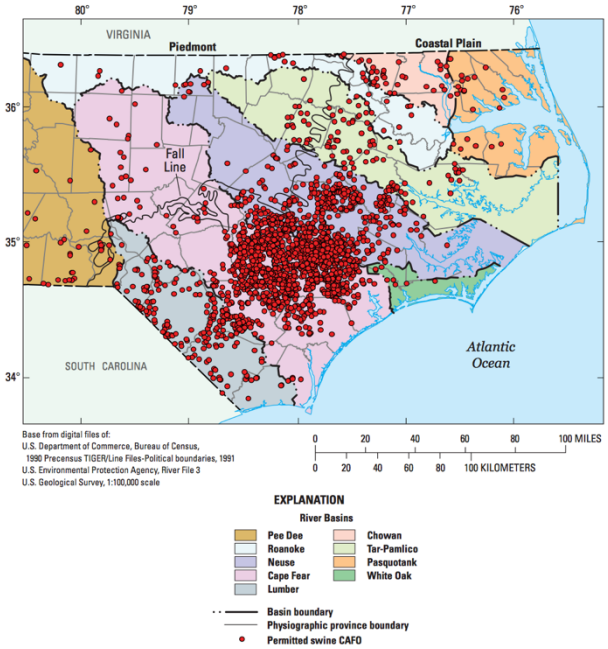


Figure 1: This graph shows the location of industrial hog operations in the state of North



Carolina relative to areas that are more heavily populated by minorities.[39]

Figure 2: This chart shows the locations of permitted swine CAFO operations in NC relative to the river basins they affect. [40]

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[39] Wing, Steve, and Jill Johnston, "Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics, and American Indians" UNC-CH.
[40] Harden, Stephen L. "*Surface-Water Quality in Agricultural Watersheds"* USGS Report.

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The Brandeis Déjà vu: Looking at the Then and Now of Media Privacy[1]

Eric Paik*

INTRODUCTION

The accelerated development of cyber technology stands in distinction in a world that has, in the past few decades, witnessed strong dynamicity all throughout. It is easy to put the developmental rapidity of cyber technology into perspective, if one were to take the example of current U.S privacy laws and recognize them as being made antique by growing cyber-technology; a monumental reaction of the American legal system concerning the federal collection of personal information in computer databases was the Privacy Act of 1974, a framework that has been preserved to this day on how the U.S government "gathers, shares, and protects Americans' personal information.[2]

Needless to say, forty years of technological development has long rendered the Privacy Act insufficient, resulting in a problematic amount of concerns and a concerning amount of problems related to data privacy and the American Government.[3] Expectedly, Government collection and utilization of digital data has received an abundance of media attention in the past few years, but we must appropriately remind ourselves that the urgent matter of privacy protection is one that encompasses much more, for example, the vast market of electronic commerce; new technology is everywhere to be found, and so are privacy concerns that come with it. After all, we live in a world where five exabytes (the equivalent amount of information, if hypothetically digitalized, accumulated throughout human history of texts and images until 2003) of information is produced in a matter of minutes.[4] There is enough information on everyone's plates. Simply put, there is an abundance of highly portable information, technological ways to access the said information, entities that are interested in utilizing the information, and a shortage of ways to stop the daunting consequence of the whole situation: privacy invasion.

If, by any chance, the given situation (which is seemingly unique to our modern digital age) triggers a déjà vu, that is because we have dealt with this issue before, more than a hundred years ago. Former Supreme Court Justice Louis D. Brandeis and Samuel D. Warren in their landmark article, *The Right to Privacy*, dealt with the legal conceptualization of privacy and the possible solutions of privacy intrusion in a time that witnessed the increasing usage of photographic technology by the media.[5] With *The Rights to Privacy* being a foundational article of legal philosophy in American privacy law, it is an appropriate piece of literature that we could refer back to for the acquisition of guidance in thinking about privacy and its legal guardian

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[1] This article is part of the Brandeis University Law Journal 2016 Special Volume, which is included in the "Louis D. Brandeis: An Inspiring Life" digital exhibition, an effort of the Brandeis Archives & Special Collections for the 100th anniversary celebration of Justice Brandeis's appointment to the Supreme Court.

[2] State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 1

[3] The Teaching Company/The Great Courses. "Privacy for the Cyber Age." *Kanopy* video, 33:00. 2013. https://brandeis.kanopystreaming.com/video/privacy-cyber-age

[4] State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 3

[5] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review*. (1890): 195

today. So, therefore, it is in the following sections of this essay where we observe *The Rights to Privacy* in its legal philosophy and then attempt at determining its applicability in today's cyber-dominated world. In doing so, we specifically explore the birth of the privacy tort through the publication of *The Right to Privacy*, and then look towards the changing definition of privacy tort factors in today's social media that necessitates a re-evaluation of Brandeis and Warren's legal genius.

THE RIGHT TO PRIVACY (1980)—BIRTH OF THE PRIVACY TORT

> From the perspective of tort law at the time, Warren and Brandeis's argument that tort law should remedy psychological and emotional harm was fairly radical. Their arguments about its evolutionary potential notwithstanding, the common law had traditionally rejected claims of emotional injury and had required plaintiffs to prove physical or property injuries to recover damages.[6]

The Right to Privacy still maintains its identity as a monumental article on the subject of legal protection of privacy. Written by Louis D. Brandeis and Samuel D. Warren, and Published in the *Harvard Law Review* in 1890, *The Right to Privacy* famously referred to Justice Thomas M. Cooley's definition of privacy as the "right to be let alone," and detailed the emergent concern of the violation of privacy due to technological inventions, specifically the technology utilized by the press.[7] The increasing focus of print media on private affairs, aided by the newly implemented use of photography, had essentially created a market of information entailing rumors and personal details, one that was "pursued with industry as well as effrontery."[8] This situation had given rise to two concerns for the co-authors of *The Right to Privacy*, one of which was the fallen integrity and standards of print media, and another which carried more weight of legal significance was the lack of protection that privacy received.[9] Privacy in the interactions among private parties, though a growing concern, was not sufficiently protected by congressional statutes, and neither was it protected sufficiently through common law. In fact, the legal concept of privacy in the wake of growing technology was one without concrete identity. The initiating section of the article *The Right to Privacy*, therefore, spoke of the chronological appropriateness of a new legal recognition of rights:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights.[10]

Brandeis and Warren explained that the "right to be let alone," a product of the evolving interpretation of our basic right to life, faced a new chapter of threatening business trend in yellow journalism; even seemingly benign gossip could be utilized with evil intent, if the gossip accompanied large public presence, to jeopardize the emotional well-being of an individual.[11] However, at the time of the article's publication, emotional injury was not recognized by courts

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[6] Neil M. Richards, "Puzzle of Brandeis, Privacy, and Speech." *Vanderbilt Law Review* 63.5 (2010): 1303
[7] Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 195
[8] Ibid., 196
[9] Ibid., 196
[10] Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 193
[11] Ibid., 196

as a legal injury. Therefore, a part of Brandeis and Warren's argument was that emotional injury was deserving of a legal recognition and remedy. Their philosophical basis in pushing this unconventional idea could be found towards the beginning of the article, which reads: "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things."[12] Brandeis and Warren respected the intangible value in honoring the "inviolate personality" of people, and so felt the need for the legal recognition of emotional harm as a legitimate injury.[13]

Following the development of their logic, what Brandeis and Warren ultimately advocated was tort remedy for the emotional damage caused by privacy invasion. However, even in the case of the legal recognition of emotional harm as a legal injury, the existing tort law would not have protected privacy as described by Brandeis and Warren. What was laid out in *The Right to Privacy*, therefore, was the push for the creation of a new category of tort law that specifically protected privacy. In communicating this, Brandeis and Warren showcased their excellence in portraying the standalone uniqueness of the subject of privacy, one that demonstrated the lack of protection privacy received from already existing parts of the common law; privacy was embedded with characteristic details which separated it from the seemingly related legal concepts of property as well as defamation, and so privacy could not sufficiently be accommodated for through the principles of either. In clarifying this uniqueness of privacy in its qualities as a subject of tort, the co-authors first compared the nature of defamation (slander and libel) to that of privacy, highlighting the value of emotional and spiritual well-being that is unique to privacy and absent in defamation:

> Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel...The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen, -- the effect of the publication upon his estimate of himself and upon his own feelings nor forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual.[14]

Furthermore, the co-authors stated that though the category of property in tort law secured "to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others,"[15] it did so in a problematic fashion that only concerned published material. Property law did not, in its narrowness, deal with instances in which the issue at stake had nothing to do with obtaining profit through publication but rather the

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[12] Ibid., 195
[13] Ibid., 205
[14] Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 197
[15] Ibid., 198

"relief afforded by the ability to prevent any publication at all."[16] In other words, property law came fairly close to protecting the essence of privacy, but its legal boundaries only included either published information or information which the rightful owner had the intention of publishing. What Brandeis and Warren stated was that the fundamental value of protecting the extent to which an individual shares her/his information should not be about the value of the intellectual information as a publishable or published material:[17]

> A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.[18]

In both examples of the extension of tort law the emotional suffering of an individual in the public disclosure of unpublished private facts, which was the emergent concern, was unprotected. Therefore, Brandeis and Warren propounded it necessary that the common law made fitting adjustments for the demanding and urgent situation, by first viewing emotional harm as a legal injury and then formulating a new tort recognition of privacy as a unique subject.[19]

Even to this day *The Right to Privacy* is very deserving of its fame; it recognized the philosophical essence of the American common law dealing with one's right "to be let alone" which was more or less lost in legal translation and only protected in a limited sense. In other words, Louis D. Brandeis and Samuel D. Warren had addressed the serious issue of emotional damage in the case of unauthorized and undesired circulation of unpublished information, one that slipped past the protection of property and against defamation, and together philosophized the legal category of privacy tort in reaction. While recognizing the significant value of what Brandeis and Warren advocated a century ago, the following section highlights a few factors that have changed and require further attention in how we view privacy tort today.

IMPORTANT FACTORS IN MODERN APPLICATION

> A more modern and specific interpretation of privacy tort was constructed by William Lloyd Prosser some seventy years after the article "The Right to Privacy" was published.[20] Prosser's take on privacy tort in itself has merit as well as compatibility issues in its application to today's world, with complex legal examples being notably stated by scholars such as Professor Danielle Keats Citron.[21] However, this essay solely observes the broad original ideas of Louis D.

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[16] Warren and Brandeis, "The Right to Privacy," Harvard Law Review 4.5 (1890): 200
[17] Ibid.
[18] Ibid., 201
[19] Ibid.
[20] Danielle Keats Citron. "Mainstreaming Privacy Torts." *California Law Review* 98.6 (2010): 1805
[21] Ibid.

Brandeis and Samuel D. Warren in their application to today's world without considering William Lloyd Prosser's more specific interpretation of privacy tort.

The simplified essence of *The Right to Privacy* would be best described as a discussion about the much needed tort remedy for emotional injury arising from the undesired disclosure of unpublished private facts. In an attempt to translate that philosophy into today's world, we must consider that modern societal complexity has changed the types and depth of the injury at risk as well as the perception of terms such as "unpublished" and "private facts." Though the essence of the article *The Right to Privacy* remains more important than ever, privacy tort should, and already does, deal with a much more complex reality. This section of the essay, therefore, attempts to observe two of many factors relating to the modern application of the philosophy of *The Right to Privacy* by specifically considering the example of social media. In sub-section one, the discussion focuses on the difficulty in maintaining the definition of privacy as exactly articulated in *The Right to Privacy* due to the changing definition and relevancy of consent and private space. In sub-section two, the increasing emotional harm as well as the emergence of new types of harm in social media are highlighted.

SECTION 1: GRAY AREAS OF PRIVATE SPACE AND CONSENT-WHOSE DATE IS IT ANYWAY?

Given the current usage of social media, it is easy to argue that society generally has a lower expectation of privacy when it comes to sharing personal information online. That is, until their privacy is intruded upon.[22]

There are a few fundamental questions that require consideration when it comes to discussing the ideas of "The Right to Privacy" in its applicability to today's cyberspace. To initiate the discussion, we start with the nature of social media in being representative of both private and public elements.

The expectation of privacy in the arena of social media, if derived from the essence of *The Right to Privacy*, is confusing due to the following statement: "the right to privacy ceases if an individual, or someone by consent of the individual makes public the information themselves."[23] Sharing information on social media is conventionally understood as a voluntary act which, if we were to refer to the statement above, could eliminate legal expectations of privacy. This is not a surprising development of logic because the common understanding of the intended function of social media is that "people post because they want others to read the information."[24] However, the added complexity of social media originates from the existence of adjustable privacy settings. Taking the social media giant Facebook as an example, it is apparent that, first of all, there are three modes of privacy settings at large: sharing information with your

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[22] Renee Prunty and Amanda Swartzendruber, "Social Media and the Fourth Amendment Privacy Protections." In *Privacy in the Digital Age: 21st -century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 402-403

[23] Katherine Leigh, "Developments on the Fourth Amendment and Privacy to the 21st Century." In *Privacy in the Digital Age*: *21st-century Challenges to the Fourth Amendment,* ed. Nancy S. Lind and Erik Ranking (Santa Barbara, California: Praeger, 2015), 14

[24] Meghan E. Leonard, "The Changing Expectations of Privacy in the Digital Age." In *Privacy in the Digital Age: 21st -century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 317

approved "friends", sharing information with the public that uses Facebook services, and sharing information with the specific list of users selected. Due to the existence of different privacy settings and some 1.23 billion active monthly users,[25] it cannot be stated that every individual participates in social media with the same expectation of privacy; some people have Facebook accounts with the expectation of sharing information with a limited group of people and they have the privacy setting details to help reinforce that will. What is implied through all of this is that social media participation does not necessarily constitute information being made public in the black and white sense. Instead, selective publicity seems to better describe the general expectation of user experience when it comes to Facebook. Put another way, limited privacy is what the typical user might want or expect from using Facebook.[26] This gray area of situationally defining and expecting privacy is a source of trouble for privacy tort.

Considering the fact that different privacy settings generate varying user experiences with different execution of privacy protection, it is then crucial to understand that privacy settings are often complicated: "Knowing exactly which settings to choose and how to best protect your privacy on Facebook is difficult for even the most adept of users… In addition, the privacy setting options change frequently, as does the Facebook interface."[27] Social media users, in this case Facebook account holders, may by mistake make information "more public" than what they had intended. A hypothetical college student under the legal drinking age might share a photograph depicting the consumption of alcohol with the intention of privately sharing his/her enjoyment of youthful energy with friends (not in reference to the Facebook idea of "friends") and unexpectedly face consequences of public viewership due to a mistake of a click or corporate-induced changes in privacy settings. The student in this given scenario faces privacy concerns, concerns that could very possibly bring with them emotional suffering, that the student did not anticipate or want at the time of sharing the information. However, in logical terms, this hypothetical student has indeed given her/his consent to Facebook regarding privacy details as proven by the preferences selected online. Here, we notice the difference between the issue of privacy back in the time of intruding print media and now: back in the day of yellow journalism it was easy to see that in the case of unauthorized and unwanted picture publication that very clearly there was no consent or the desire for disclosure, whereas in the case of Facebook it is difficult to assume the same. After all, "Facebook and other social-networking sites remind users of the privacy risks when creating an account."[28] The responsibility could be argued to belong solely with any user that mistakenly induces more publicity into the shared information.

In analyzing the above situation, it might be helpful to turn to a relic of another side of the American legal system dealing with privacy, the fourth amendment case of *Katz v. United States*.[29] The portion of our concern is the court recognition of privacy rights in instances where intentionally private acts take place in public settings, and the contrary denial of privacy protection in situations where public disclosure of information is made in an expectedly private space.[30] So going back to Facebook, are we to understand the general utilization of social media

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[25] Lisa M. Austin, "Enough About Me: Why Privacy Is About Power, Not Consent (or Harm)," in *A World Without Privacy: What Law Can and Should Do?*, ed. Austin Sarat (New York: Cambridge University Press, 2015), 147
[26] Austin, "Why Privacy is About Power, not Consent (or Harm)," 149-150
[27] Leonard, "The Changing Expectations of Privacy in the Digital Age", 316
[28] Ibid.
[29] Katz v. United States, 389 U.S. 347 (1967)
[30] Prunty and Swartzendruber, "Social Media and the Fourth Amendment Privacy Protections." 402-403

as an act with private intent in a public area, or are we to understand it as public disclosure of information in an area that could be private? On one side we may be justified in expecting privacy, and on the flip side we may not, or it really may be situational.

The discussion about consent and the varied expectation of privacy and user experience was initiated above, and is continued here. The factor of consent in the example of Facebook is made even more confusing because of what is recognized by Professor Lisa M. Austin, in the chapter "Why Privacy is About Power, not Consent (or harm)" which is published in the book *A World Without Privacy,* as "implied consent."[31] The legal acceptance of implied consent means that privacy recognition could happen at a broad level of general user expectation without considering the privacy affinity of each individual user:

> General expectation of users, formed through the active architectural choices of Facebook, can even undercut individual consent entirely. For example, CIPPC complained that Facebook does not provide users with the ability to opt-out of profile memorialization. Although the Assistant Commissioner originally found this to contravene the consent requirements, she changed her view due to "reasonable expectations" with respect to content…Because of this, the Assistant Commissioner found that Facebook could rely upon implied consent. However, this implied consent is based on what "typical" users would want, and indeed what "users generally" would want in relation to another individual… Reasonable expectations of the "Facebook experience" trump individual consent."[32]

Facebook's often changing privacy settings and policies, in other words, just have to conform to what would be legally recognized as acceptable general user standards and expectations. The fact that Facebook "has no obligation to change its infrastructure so as to better enable individual choice"[33] raises the possibility that accommodation for the varying privacy needs of social media users is unlikely to materialize. However, the emotional damage (the amplified nature of which is discussed in the next section) is very plausible to arise from genuine mistakes or unexpected changes in privacy settings, and could be then viewed as unintended sharing of private information. The application of the philosophy of *The Right to Privacy* is challenging when considering such an aspect of today's privacy.

This section is concluded with the peculiar example of a Facebook function called "tagging." Facebook account holders often reveal information about others in photographs and texts through "tagging," or name labeling, other people. "Tagging" could involve other Facebook users but could also involve those that have no participatory will when it comes to Facebook. Not only would it be a problem for individuals that are "tagged" to be unaware of their information being shared online, but there are only two offered solutions for a concerned and aware individual in that situation, and both of them are revealing of private information.[34] The first solution is to make a Facebook account and "untag" herself/himself, and the other solution is a method that still involves Facebook obtaining the non-user's email information.[35] Though

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[31] Austin, "Why Privacy is About Power, not Consent (or Harm)," 151
[32] Ibid., 147
[33] Austin, "Why Privacy is About Power, not Consent (or Harm)," 152
[34] Ibid.
[35] Ibid., 153

the legal responsibility in the given scenario might lie primarily with the user of Facebook that shared the information without consent, Facebook still gains profitable private information from the "tagged" individual in the process of problem-shooting, so the issue of legal responsibility is made confusing.[36]

SECTION 2: AMPLIFIED INJURIES MEAN PRIVACY TORT IS INCREASINGLY IMPORTANT

Renee Prunty and Amanda Swartzendruber, in their co-authored section of the book *Privacy in the Digital Age* titled *Social Media and the Fourth Amendment Privacy Protections*, identified the broad range of potential harm related to social media: "There are many possible negative consequences attached to the use of social media sites. These new forums create a place for gossip, rumors, unwanted contact, stalking, the use of data by third parties, hacking, and even identity theft."[37] Though Prunty and Swartzendruber's work analyzes the aspect of government surveillance and its constitutionality, many of the harms that they have listed are injuries that remind us of what Brandeis and Warren wanted to establish a tort remedy for; malicious gossip and rumors were specifically stated by Brandeis and Warren to cause emotional harm that was toxic to the human pursuit of happiness in life. However, what cannot go unnoticed in observing the list of harms above is that in it are things such as stalking and unwanted contact, actions that could consequently entail direct physical harm or robbery. Another thing to keep in mind is the permanent nature of data and its availability which amplifies the emotional and reputational harm that was similarly discussed a century ago by Brandeis and Warren.[38] This sub-section observes the expanded width and depth of injuries related to privacy that seek tort remedy, which allows us to see the increased value in privacy tort. Again, the specific example we will observe is social media.

As stated above, private information in the modern world is stored digitally. Unlike a century ago when the private information of concern was circulated by print media and most likely withered away with time, private information on the web is permanent and searchable.[39] The horror of digital data permanency for those suffering emotional harm from unwanted disclosure of information is perfectly described by Professor Danielle Keats Citron as "evoking a Nietzschean image of persistent memory."[40] Combine the permanent nature of digital data with the fact that data is now easily searchable and globally accessible, and we have at our hands the groundwork for the timeless preservation and return of emotional suffering for some individuals.[41] Besides, anybody with the intent to do so could publish private information of others with more ease and potential for publicity than any press we could have imagined a century back. Private information on the web is at a constant risk of being shared by anyone, with the potential to spread globally like wildfire and to be preserved in its most accessible state for the time to come. If that was not enough to induce fear, the increased damage of privacy invasion is discussed next.

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[36] Ibid.
[37] Prunty and Swartzendruber, "Social Media and the Fourth Amendment Privacy Protections." 408
[38] Citron, "Mainstreaming Privacy Torts." 1808
[39] Ibid.
[40] Citron, "Mainstreaming Privacy Torts." 1813
[41] Ibid.

"In the past, physical injuries associated with privacy invasions typically involved a person's physical manifestations of emotional distress. For instance, individuals often suffered sleeplessness in the face of privacy invasions."[42] In today's world of social media, the abundance of easily accessible personal data is allowing the occurrence of life threatening situations. Participants of social media that have access to personal information of others could easily initiate unwanted disclosure of private facts anonymously, or even by pretending to be the very subject of the disclosed information. Take for example the case referred to by Professor Dianne Cintron: "in 2009, a Long Island, New York, mother allegedly posted an advertisement on Craigslist seeking sex and directing men to the mother of her nine-year-old daughter's rival."[43] With malicious intent and enough personal information, imitating identity online to initiate danger for another individual could be achieved by anyone. To really reveal the alarming danger that is privacy invasion on social media, we end the section with another disturbing example referred to by Professor Dianne Citron, one that serves as a powerful reminder of why the idea of privacy protection as suggested by Brandeis and Warren are more important than ever:

> In an early case of online impersonation, a security guard pretended to be a woman in a chat room, claiming that the woman wanted to be assaulted. The chat room posting asserted: "I want you to break down my door and rape me." It also provided the woman's name, address, and instructions about how to get past her building's security system. Over the next few weeks, nine men showed up at her door, often in the middle of the night.[44]

CONCLUSION

Louis D. Brandeis and Samuel D. Warren understood a very important aspect of our legal system: the law evolves, and justifiably so due to the betterment of our recognition of values and needs over time:

> Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect.[45]

Therefore, in the history of the evolution of American law, *The Right to Privacy* has its own special place for its awareness of a need for change. However, as important as it is that we take the principles of Brandeis and Warren to heart, it is now time for the Brandeis or Warren of our generation to step up to the plate. The cyber world that we inhabit is one that Brandeis and Warren could not have imagined more than a century ago, and quite frankly had no responsibility to do so. This new era of cyber development and its byproduct could only be interpreted by those that are responsible for it, namely us. The process of defining our newly adjusted "right to privacy" is to be anticipated in the days to come.

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[42] Ibid., 1817
[43] Ibid., 1818
[44] Citron, "Mainstreaming Privacy Torts." 1818
[45] Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 193

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ELCTION 2016: Is Ted Cruz Eligible to Run for President of the United States?

Noah Lourie *

Abstract: *The office of President of the United States is one of the most important positions in the country. The Commander in Chief is in charge of the most powerful military complex, the most affluent nation and must make decisions that will drastically affect the domestic and global community. The power bestowed upon the President and the trust they must earn from the American people, demonstrates the importance that each candidate fulfills the requirements outlined in the Constitution. While most of the conditions necessary for one's presidential candidature defined in the Constitution are clear, the specific phrase, "natural born citizen," contains much ambiguity and has continued to be a source of conflict during presidential elections. This ambiguity extends to the current presidential candidate Ted Cruz, who was born in Alberta, Canada in 1970.*

I. INTRODUCTION

The Constitution of the United States does not delineate many conditions for the office of President. Article II Section I of the Constitution outlines that elections for President will be held every four years, that candidates must be at least thirty-five years old, and have lived in the United States for at least fourteen years.[1] Most importantly however, it states that, "No person except a natural born Citizen… at the time of the adoption of this Constitution, shall be eligible to the Office of President."[2] This particular language is deliberately ambiguous, as the Founders wanted to allow for almost anyone to be able to run for public office without significantly limiting the potential of citizens to participate in the public sphere. While the Constitution never truly defines the term natural born, and the Founders wanted it to be enigmatic, the office of the President still denotes the highest importance. Ensuring that candidates are natural born citizens guarantees a level playing field for the most important political office in the country; but more importantly, guarantees that there is no conflict of interest between the candidate and their true country of origin. Just as the Constitution does not define the term natural born, neither has the United States Supreme Court. In the cases, *Inglis* v. *Trustees of Sailor's Snug Harbor*, *Minor* v. *Happersett*, and *United States* v. *Wong Kim Ark*, the Supreme Court was asked to elucidate the meaning of citizen, and while these cases provide an important historical precedent, the ambiguity still remains. Ultimately the question can be reduced to the potential definition the Founders had, past Supreme Court cases, the difference between constitutionally and congressionally conferred citizenship, and most importantly, the distinction between becoming a citizen at the moment of birth and having to achieve it later through the process of naturalization. The fact that Senator Ted Cruz was born in a region that was and remains out of the United States' jurisdiction means he fails to satisfy the natural born requirement and therefore disqualifies him for president.

II. FOUNDERS' DEFINITION OF "NATURAL BORN CITIZEN"

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[1] National Constitution Center, "The Constitution of the United States."

[2] Ibid.

When the Constitution was ratified in 1789, there were many different interpretations of the meaning of citizen, as well as natural born, that influenced the Founders' rationale behind the specific terminology. One influential source for the Founders was Great Britain, as the colonies had only recently declared and won their independence, and many people were still coming to terms with being American citizens rather than British subjects. Thus, the English jurist, Sir William Blackstone, who wrote extensively on the meaning of natural born subjects as early as 1760, impacted the Founders definition of natural born citizen. In 1765 Blackstone authored, *Commentaries on the Laws of England*, and wrote that, "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it."[3] The idea of allegiance was paramount for the Founders, who, at the time of drafting the Constitution, were establishing a new government in which the citizens' obedience was crucial. This sentiment was echoed by James Madison, who is widely considered to be the father of the Constitution, when he said during a House of Representatives meeting in May of 1789, "it is an established maxim, that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States…The sovereign cannot make a citizen by any act of his own; he can confer denizenship; but this does not make a man either a citizen or subject. In order to make a citizen or subject, it is established, that allegiance shall first be due to the whole nation."[4] Madison's conception of natural born citizen then is based on allegiance, as he suggests that the only way to achieve this is by making natural born citizens solely those who are born in the United States. Further, he notes that that while a state can designate someone a denizen by statute or legislation, this does not make them equal to someone who is an actual citizen by virtue of birth. While Blackstone undoubtedly influenced the authors of the Constitution, English statutory law is not congruent with American common law, and further, there is an important distinction between "subject" and "citizen." In England during the 18th century, not every natural born subject could become the King, but only a small category of subjects called the royalty.[5] While the Founders were concerned primarily with allegiance, they would disapprove of such a small number of citizens able to become President.

Another highly influential source for the Founders was the French philosopher, Emer de Vattel, who published the, *Law of Nations*, in 1758 on the law of sovereigns and free and independent states. In book I chapter XIX, Vattel discusses the meaning of native citizen, writing that, "the citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner,

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[3] Blackstone, William. Commentaries on the Laws of England: A Facsimile of the First Edition of 1765--1769. (Chicago: University of Chicago Press, 1979). (Accessed March 22, 2016),

* Undergraduate at Brandeis University, Class of 2019

[4] The Founders' Constitution, "Volume 2, Article 1, Section 5, Clauses 1--4, Document 13." (The University of Chicago Press: 2000), (Accessed March 22, 2016).

[5] Lawrence B. Solum, "Originalism and the Natural Born Citizen Clause." Illinois Public Law. April 18, 2010. (Accessed March 28, 2016).

it will be only the place of his birth, and not his country."[6] The influence of Vattel's reasoning is clearly represented in the Naturalization Act of 1790, Congress' first substantive immigration law. In the act, Congress asserted that, "any alien, being a free white person, who shall have resided in the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof… and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered natural born citizens."[7] The Naturalization Act of 1790, building upon Article II Section I of the Constitution, established that children of American citizens born abroad should be considered as natural born citizens. Many argue that this suggests that the Founders, while undoubtedly influenced by Sir Blackstone, relied more heavily upon the philosophy of Monsieur Vattel, and thought that children born abroad to American citizens should be natural born citizens as well.

III. THE FOURTEENTH AMENDMENT

While the Naturalization Act of 1790 offered the first meaningful definition of natural born citizen, the term was further defined by the passage of the Fourteenth Amendment in 1868. Before the passage of the Fourteenth Amendment, it was widely believed that one was a citizen of the United States by being a citizen of any state. Ratified shortly after the culmination of the Civil War, the Fourteenth Amendment states in Section I that, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[8] This amendment was one of three passed in the wake of the Civil War; the Thirteenth Amendment abolished slavery, and the Fifteenth Amendment allowed men to vote regardless of race.[9] The Fourteenth Amendment allowed newly freed slaves to be citizens of the United States, but also established several important implications for the meaning of natural born citizenship. Firstly, by virtue of being in the Constitution, the Fourteenth Amendment made national and state citizenship subject to federal law.[10] More importantly, the Citizenship Clause further defined the Founders original intentions behind the meaning of natural born citizen, by drawing a distinction between two kinds of citizenship; birthright citizens and naturalized citizens.[11]

The first part of the Fourteenth Amendment, or, the Citizenship Clause, automatically designates citizenship to all those, "subject to the jurisdiction of the United States."[12] This is

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[6] Emer de Vattel, "The Law of Nations: Principles of the Law and Nature Applied to the Conduct and Affairs of Nations and Sovereigns." Library of Congress. T. & J. W. Johnson, Law Booksellers, (Philadelphia: 1844), 101. (Accessed March 23, 2016).
[7] Library of Congress, "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875." (Accessed March 23, 2016).
[8] National Constitution Center.
[9] Linda R. Monk, "Equality and The Fourteenth Amendment: A New Constitution." PBS. (Accessed March 23, 2016).
[10] Robert Clinton, "Ted Cruz Isn't a 'Natural Born' Citizen." US News. January 27, 2016. (Accessed March 24, 2016).
[11] Clinton.
[12] Linda R. Monk, "Citizenship and Privileges Clauses." PBS. (Accessed March 25, 2016).

known as birthright citizenship, and means anyone born in the United States is consequently a citizen.[13] The Fourteenth Amendment was written in response to the Supreme Court's ruling in *Dred Scott* v. *Sandford*, in which Chief Justice Taney ruled that African Americans were not citizens because of their race. Thus, the Citizenship Clause unequivocally confers citizenship to anyone born in the United States, regardless of their race or skin color; and to children who are born in the United States to illegal aliens. People born in America are constitutionally citizens, while those who are born out of the country must have their citizenship designated by federal law, under Article I Section 8 Clause IV of the Constitution, which asserts that it is the power of Congress, "to establish an uniform Rule of Naturalization… throughout the United States."[14] Thus, birthright citizenship describes someone who at the time of their birth did not have to go through a naturalization proceeding or process at some later time, and it is this kind of person that is Constitutionally eligible to run for President.[15]

IIII. THE SUPREME COURT AND NATURAL BORN CITIZENSHIP

Nowhere in the Constitution is the term natural born citizen delineated, and the Supreme Court likewise has yet to explicitly define the Citizenship Clause and who can be eligible for president, however the court has ruled on several important citizenship cases, such as, *Inglis* v. *Trustees of Sailor's Snug Harbor*, *Minor* v. *Happersett*, and *United States* v. *Wong Kim Ark*. In, *Inglis* v. *Trustees of Sailor's Snug Harbor* (Inglis), the court had to solve the complications of citizenship during the Revolutionary War. The main complication was due to the fact that the court wanted to ensure that proper allegiance would be owed to the United States, since many citizens were former British subjects. In Inglis, the court said that, "nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto are subjects by birth." This established the precedent that if someone is born in this country, even to parents who are citizens of another, their children are automatically American citizens. This principle, of *jus soli*, or the right of anyone born in a territory to citizenship is consistent with the Fourteenth Amendment and American jurisprudence.

Another paramount case that built upon the precedent set in Inglis is the 1874 case of *Minor* v. *Happersett* (Minor). Virginia Minor filed a lawsuit against the state of Missouri after she was disallowed from registering to vote because she was a woman. Minor argued that preventing her to vote was a violation of the Fourteenth Amendment; and as the case came before the Supreme Court, Chief Justice Morrison Waite, in his majority opinion, first discussed whether Minor was a citizen of the United States in terms of the Fourteenth Amendment and common law. On behalf of a unanimous court, Chief Justice Waite wrote the following in regards to the common law definition of natural born citizen,

> The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of

[13] Monk, "Citizenship and Privileges Clauses."
[14] The Constitution Center.
[15] Neal Katyal and Paul Clement, "On the Meaning of "Natural Born Citizen." Harvard Law Review. March 11, 2015. (Accessed March 25, 2016).

> which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens.[16]

This establishes several key distinctions between the different kinds of citizenship present within the United States. Firstly, as the court expressly reaffirms, natural born citizens are those that are born in country to parents who are citizens. This is distinct from the second class defined by Chief Justice Waite, those who have no claim to citizenship because they are foreigners. The final class of citizenship defined in Minor is the category of those who are born within the jurisdiction of the United States, but not to parents who are themselves citizens. Chief Justice Waite had reservations about designating this class as natural born citizens, but was adamant that children born in America to citizen parents are themselves natural born citizens.

Finally, in 1897 the Supreme Court was presented with *United States* v. *Wong Kim Ark*, which signified the last meaningful citizenship case the court has adjudicated. Wong Kim Ark was born in 1873 during the height of the anti-Chinese sentiment and the exclusion era. Both his parents were Chinese and had been living in northern California for some time, but because of the difficulty for Chinese businesses in particular, the family moved back to China when Ark was nine years old.[17] When Ark tried to return to San Francisco in 1895, despite being an American-born citizen, he was barred entry under the Chinese Exclusion Act. Signed into law in 1882, the Chinese Exclusion Act prevented the Chinese from immigrating to the United States and becoming citizens primarily because of economic concerns.[18] Ark was able to acquire a writ of Habeas Corpus, by claiming he was a citizen under the Fourteenth Amendment of the Constitution; however when the case reached the Supreme Court, the nine Justices were burdened with first answering the question of whether Ark was a natural born citizen and could stay in America.

Justice Gray wrote in the majority opinion that the law, "irresistibly lead us to these conclusions: the Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[19] Thus, the

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[16] Minor v. Happersett. 88 U.S. 162, (1874).
[17] Fred Barbash, "Donald Trump meet Wong Kim Ark, the Chinese American cook who is the father of 'birthright citizenship.'" *The Washington Post.* August 31, 2015. (Accessed March 30, 2016).
[18] Harvard University, "Chinese Exclusion Act (1882)." Open Collections Program: Immigration to the US. (Accessed April 2, 2016).
[19] United States v. Wong Kim Ark, 169 U.S. 649, (1898).

court upheld that the Fourteenth Amendment's citizenship guarantee applies to children born to foreigners on American soil, despite the fact that the parents might not be American citizens and further unable to attain American citizenship in their own right.[20] In the dissent, Justice Fuller enumerated several important points, challenging the premise that Wong Kim Ark was in fact "subject to the jurisdiction of the United States." He wrote, "the true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage… the place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."[21] He continued on to say, "the framers of the Constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and there is nothing to show that, in the matter of nationality, they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing." [22] The dissent emphatically proposes that citizenship cannot be qualified merely by birth place, but rather is contingent on lineage, as the parents' citizenship is the true determinant of a child's loyalties.

V. EVOLUTION OF NATURAL BORN CITIZEN

The meaning of natural born citizen has evolved significantly since the Founders first included it as a necessary condition to become President of the United States. The authors of the Constitution indicated that the meaning of the clause was to preclude and deter foreign manipulation of the new American government and prevent a foreign actor from becoming its leader. In July of 1787, John Jay wrote a letter to George Washington, in which he said, "Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in chief of the American army shall not be given to, nor devolved on, any but a natural born Citizen."[23] The Founders were apprehensive about foreign manipulation in their their newly established government; and while they wanted to allow for most anyone to be able to achieve the highest office in the land, they wanted to ensure that the allegiance of the candidate would not be questioned.

Although immigration and citizenship policy has changed since the ratification of the Constitution, allegiance has always remained a constant part of the definition of natural born citizen and present in the opinions of Supreme Court rulings. James Madison noted the importance of allegiance during his address to the House of Representatives, and specifically how place rather than lineage was the best determinant of loyalty. Allegiance was also a theme throughout the Supreme Court rulings, as the court consistently upheld that a child born, "within the jurisdiction of the United States," even if it is to parents who are not citizens, are themselves natural born. Although the Naturalization Act of 1790 indicated that natural born citizenship extends to children who are born to American

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[20] Garrett Epps, "The Citizenship Clause: A "Legislative History." American University Law Review, 2010. (Accessed April 5, 2016), 332.
[21] United States v. Wong Kim Ark.
[22] Ibid.
[23] "To George Washington from John Jay, 25 July 1787." Founders Online, National Archives. (Accessed April 6, 2016).

citizens abroad, this accordance of citizenship to foreigners has since been repudiated. The term natural born citizen used to describe children abroad in the 1790 Naturalization Act was left out of the an updated version of the same piece of legislation five years after the passage of the original.[24] After the Naturalization Acts of the late eighteenth century, the Fourteenth Amendment was the next significant legislation to define citizenship. The Fourteenth Amendment, as reaffirmed by several Supreme Court cases, established that anyone born in the United States is a natural born citizen, regardless of the citizenship status of either of their parents. The evolution of the natural born citizen definition demonstrates that Ted Cruz is ineligible to be a candidate for President of the United States.

VI. THE INELIGABILITY OF TED CRUZ

Ted Cruz was born in Alberta, Canada in 1970, where he lived until he was four years old, when the family relocated to Texas.[25] While his mother was born in Delaware, his father was a Cuban citizen; and evidence suggests that along with Cruz' mother, was seeking permanent residency in Canada at the time of their sons' birth.[26] Based on original intent, a method for interpreting the meaning of the Constitution by emphasizing what the authors initially envisioned, it is clear that the natural born citizen requirement was primarily to ensure that candidates for president would be loyal only to the United States. Even if birthplace were to be discounted in terms of determining allegiance, Cruz still lived in Canada for the first four years of his life. Original intent clearly suggests that the Founders consciously drew a distinction between natural born citizen and any other kind of citizenship; and further, that they created the distinction to ensure commonality among all presidential candidates and ensure that only loyal Americans could attain the office of president.

Proponents of Ted Cruz' eligibility for president argue that a natural born citizen is someone who is a citizen from birth and does not have to go through the process of naturalization.[27] In the Harvard Law Review, two former Solicitor Generals, Neal Katyal and Paul Clement, wrote, "Congress has made equally clear from the time of the framing of the Constitution to the current day that, subject to certain residency requirements of the parents, someone born to a U.S. citizen parent generally becomes a U.S. citizen without regard to whether the birth takes place in Canada, the Canal Zone, or the continental United States."[28] Ted Cruz did not have to go through a process of naturalization because his mother was an American citizen, and therefore her citizenship automatically passed to him when he was born. Based on an immigration bill ratified by Congress in 1952, Cruz can claim to be a natural born citizen because his mother is a U.S. citizen; and yet there is a difference between natural born and citizen, and while Congress does have the power to confer citizenship, it does not have the power to convert someone to natural born status

[24] Indiana University, "Naturalization Laws: 1790-1795." (Accessed April 7, 2016).
[25] Mathew Piper, "Utahn's federal suit challenges presidential eligibility of Cruz." *The Salt Lake Tribune*. January 26, 2016. (Accessed April 9, 2016).
[26] Piper.
[27] Katyal and Clement.
[28] Ibid.

without amending the Constitution.[29] To naturalize a foreigner is to confer citizenship, but it does not make them born in American, and similarly, to bestow citizen statutorily to someone born abroad to an American parent cannot ostensibly make them a natural born citizen.[30]

Further, Katyal and Clement significantly rely on British statutory law and Blackstone's reasoning, instead of American common law as their definition for why Cruz is a natural born citizen. Although the Founders were influenced by British law, there are clear differences between Blackstone's definition of subjects and the Founders description of citizens. It is also understood that it is the common law that is relevant to defining natural born citizen, rather than British statutory law. Additionally, Katyal and Clement heavily depend on the Naturalization Act of 1790, as a demonstration for the Founders' true intentions. While the legislation in 1790 did designate foreign children born to American citizens as natural born, that specific language was left out by the Third Congress.[31] This denotes both the importance and distinction of natural born citizenship, as the Founders themselves deliberated about the terms' true meaning.

While Ted Cruz is currently having his presidential eligibility debated, other presidential candidates, such as John McCain and Barack Obama in 2008, likewise had their candidacy questioned on the basis of natural born citizenship. McCain was born in 1936 on a military base in the Panama Canal Zone to citizen parents. Although McCain, like Cruz, was not born in the continental United States, there is a difference between the former and current presidential candidate. The Panama Canal Zone where McCain was born, was sovereign U.S. territory at the time of the Senator's birth; as the Supreme Court explained in *O'Connor* v. *United States*, "from 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone."[32] The Fourteenth Amendment expressly states that anyone is a citizen if they are born in the United States or a place, "subject to the jurisdiction thereof." Thus, although McCain was not born in one the states, the Panama Canal Zone still constituted United States territory at the time of his birth, meaning that he was a natural born citizen and eligible for the Presidency.

The current President of the United States, Barack Obama, also had his citizenship debated during the presidential election of 2008. It was challenged that President Obama was not born in this country, but rather in Kenya, and therefore his status as a natural born citizen was questioned.[33] The President provided birth certificate records that indicated he was born in Honolulu, Hawaii in 1961, automatically making him a natural born citizen. The difference between President Obama and Ted Cruz is that Obama was born in the United States, while Cruz was born outside of it. Consistent with both the original intent of the Founders to ensure that the President would be a loyal American unburdened by the

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[29] Mary B. McManamon, "Ted Cruz is not Eligible to be President." *The Washington Post*. January 12, 2016. (Accessed April 9, 2016).
[30] Eric Posner, "Ted Cruz Is Not Eligible to Be President." *Slate.* February 8, 2016. (Accessed April 10, 2016).
[31] Library of Congress, "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875, Naturalization Act of 1795, Third Congress." January 29, 1795. (Accessed April 10, 2016).
[32] O'Connor v. United States, 479 US 27, (1984).
[33] Gary Tuchman, "CNN Investigation: Obama born in US." *CNN*. April 25, 2011. (Accessed April 10, 2016).

inclinations of other countries, and common law, a presidential candidate can only be born on American soil or within its jurisdiction.

VII. CONCLUSION

The requirement of natural born citizen in order to become a candidate for president is one of the most important limitations in the Constitution. Throughout human history, civilizations and communities have been built and destroyed by the movement of people. The United States has long represented the possibility that anyone can come to America and not only succeed but also flourish. America is built upon what has historically been an open immigration policy, conferring citizenship both constitutionally through birth, and statutorily through Congress. The Founders of this nation however saw a difference between someone earning citizenship through a naturalization process, and through birth. The primary reason for the distinction between natural born and citizen, is the belief that allegiance is represented best by those who acquire citizenship through birth. Throughout history, relationships between people and countries have not become simpler but rather more convoluted, politicians' positions more entrenched, consensus harder to achieve, and loyalties easily strained. The United States has emerged as a powerful nation that other countries try and emulate. While there are hundreds of congressman and women, and nine members of the high court, there can be only one president. The importance of the president then denotes that there should be a difference between a citizen and one that is naturally born. No one has been elected President of the United States after having been born outside the country.[34] Not only was Ted Cruz born outside the jurisdiction of the United States, but he continued to reside in Canada for four years, and did not renounce his citizenship until 2014.[35] While the length of time it takes to develop loyalty to a sovereign is seemingly arbitrary, four years is not inconsequential; and if birth does not necessarily determine loyalty, but rather lineage, Cruz's parents were possibly seeking Canadian citizenship at the time of their sons' birth.[36] This ambiguity is precisely why the Founders created the distinction between natural born and citizen, and added the former as a requirement to be president. Ted Cruz' presidential run does a disservice to the other candidates seeking the same office who are themselves qualified, and most importantly, the American people that have put their faith in the fairness of the system and faith in the Founders to create the most representative government. In order to uphold the continuity of the American electoral system, and ensure that the eventual president will be loyal to the United States, Ted Cruz should be disqualified as a candidate for president on account of his Canadian birth.

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[34] David G. Savage, "Is Ted Cruz, born in Canada, eligible for the presidency? Legal experts say yes." *Latimes*. January 8, 2016. (Accessed April 10, 2016).
[35] Saeed Ahmed, "It's official: Ted Cruz a citizen of the U.S. - and the U.S. only." *CNN*. January 9, 2016. (Accessed April 10, 2016).
[36] Piper.

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INTERNATIONAL LAW: The Legacy of International Criminal Tribunals and the Role of Communication

*Holly Rutledge**

As the field of international criminal law expands, the subject of legacy has become a key consideration for international courts and tribunals. While each international criminal institution faces different circumstances that affect its legacy, general themes and components of legacy may be observed based on their histories. As institutions such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone (SCSL) come to a close or approach the end of their mandates, the academic community and their staff members reflect on the history of these institutions and the legacy that they will leave behind. Examining legacy raises questions about what the ideal role of an international court is and what effects it can have politically, for victims, and on the peace and wellbeing of a nation. As legendary jurist Antonio Cassese wrote, "tribunals must leave something useful behind."[1]

Generally, these institutions are seen as steps towards an end to impunity and establishment of rule of law despite many obstacles. Critical evaluation, however, is important for the development and improvement of future institutions. Along with judicial proceedings, legacy projects and outreach programs protect the history of a court while supporting and strengthening a community. Ms. Sara Darehshori, a Senior Counsel with the International Justice Program and Human Rights Watch, stated that "outreach initiatives must be considered from the outset of a court's operation," and noted that the early ICTR was too internally focused on its legal objectives and did not devote as much time or resources to making the trial accessible to the public. "It did not occur to the Office of the Prosecutor to publicize its work," Ms. Darehshori states, "given that most lawyers came from national systems and legal cultures in which the legitimacy of the court system is taken for granted and courts are generally accessible to the population."[2] This quotation reflects one of the largest aspects of legacy that is often overlooked in the rush for a court to complete its formal mandate: outreach and the impact on the people of the affected region. Due to misunderstanding of international laws and miscommunication between the affected region and international community, courts also often face expectations beyond their mandate, leading to frustration and confusion. Therefore, a level of cooperation with civil society and outside actors is crucial to achieve justice for victims, to work towards healing beyond punitive justice, and to ensure that the efforts of the international community are as fruitful as possible.

Understanding and Defining Legacy

Legacy is defined as encompassing the broad, theoretical accomplishments of the courts as well as their material effects. The material legacy of a court refers to what it might physically

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[1]Antonio Cassese. Report on the Special Court for Sierra Leone. Rep. Residual Special Court for Sierra Leone, 12 Dec. 2006. 61.

[2]Symposium on the Legacy of International Criminal Courts and Tribunals in Africa Rep. the International Criminal Tribunal for Rwanda, The International Center for Ethics, Justice, and Public Life, Brandeis University, Feb. 2010. 37.

leave behind. This can include its archives, facilities, and specific legacy projects implemented at the ground level. As defined by the ICTY, legacy is what " the Tribunal will hand down to successors and others."[3] At an international discussion on the legacy of the SCSL hosted by the International Center for Transitional Justice (ICTJ), legacy was defined as what would live on after the completion of its judicial work: "its decisions, archives, prison, and courtroom."[4] Some of the broader aspects of legacy include a court's contributions to international jurisprudence, such as protecting "victims' rights to justice, strengthening the rule of law, and fighting impunity."[5] As international criminal law is a young and constantly evolving field of law, one of the important aspects of legacy is that each new tribunal will set a precedent for future international courts and international criminal justice.[6] A court's impact on broad social trends is referred to as its normative legacy. This normative legacy includes allowing victims of atrocities to establish a narrative, establishing greater accountability for crimes that have historically gone unpunished, and instituting rules that may be enforced in the future fight against impunity.[7] The SCSL website describes that legacy means something different to each of the affected parties, from the people of Sierra Leone to future tribunals, or more broadly to the system of international justice.[8] Although additional services are necessary to advance the healing and welfare of victims, this process in itself can have an intrinsic affect by providing a sense justice. Given these different interpretations, it is clear that a court's final legacy can encompass a myriad of different elements and components of a tribunals work.

The International Criminal Tribunal for the Former Yugoslavia

As the first international criminal tribunal since the Nuremberg trials, the ICTY set many precedents for international law. Founded in 1993 in response to a war involving multiple parties, the court was faced with determining who was at fault for which crimes, and informally was expected to put an end to the violent attacks against civilians. While it was successful in some respects, infamous attacks such as the massacre at Srebrenica occurred after the founding of the court. The ICTY's neutrality was aided by the fact that it prosecuted members of all groups involved, however this decision sometimes led to bitterness for the parties of the former Yugoslavia. Doctor Rachel Kerr, a Senior lecturer at King's College London in the Department of War Studies, examines the role of the ICTY in establishing peace in the region. Kerr asserts that the tribunal's judicial legacy includes "substantial inroads into substantive law issues, in particular with regard to the definition of genocide, the application of 'grave breaches' provisions, the elucidation and expansion of the laws applicable to non-international armed conflict, the definition of crimes against humanity and the nature of command responsibility" as well as setting a precedent for international law.[9] As one of the first international tribunals,

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[3]"Assessing the Legacy of the ICTY." ICTY. 24 Feb. 2010.
[4]"International Experts Gather in Freetown to Discuss Legacy of the Special Court for Sierra Leone."
[5]"Ibid.
[6]UN-ICTR. External Relations and Communication Outreach Unit. *ICTR's 20th Anniversary Commemoration and Website Launch in The Hague*. *United Nations International Criminal Tribunal for Rwanda*. N.p., 5 Dec. 2014.
[7]Magdalena Spalińska, Helena Eggleston, and Rada Pejić-Sremac, eds. "20 Years of the ICTY: Anniversary Events and Legacy Conference Proceedings." United Nations International Criminal Tribunal for the Former Yugoslavia. ICTY Outreach Program, 2014. 7, 22.
[8]"Legacy Projects." The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone.
[9]Rachel Kerr, "Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia." Journal of Southeast European & Black Sea Studies 7.3 (2007): 373-385. Academic Search Premier. Web. 378.

however, the ICTY initially put less emphasis on victim integration and outreach, which may have hindered its legacy for the affected people.

One of the main functions of an international court is to pursue justice on behalf of affected groups, but this is also often the most contentious aspect of the tribunals. The ICTY made substantial contributions to the jurisprudence of international law, but a critique of the ICTY is that it failed to provide true justice for victims and did not adequately impact national reconciliation in the former Yugoslavia.[10] Peter van der Auweraert, a member of the International Organization for Migration, stated that the legacy of the ICTY is also the "legacy of the international community which has invested all its resources in punitive justice."[11] Clearly this is a natural function of the tribunal's structure, but it also indicates that perhaps there should be greater attention paid to supplementary programs that are restorative rather than punitive in nature. Nataša Kandić, founder of the Humanitarian Law Center, does note that the tribunal's work was important for the people in the regions of the former Yugoslavia as a way to establish a factual narrative of events. Without these facts, the people would have been deprived of the opportunity to come to "autonomous conclusions" and would have instead been left to rely on secondary sources.[12] The proceedings of the tribunal and the transparent access to its findings were pivotal to its ability to prevent future crimes, end impunity, and establish justice.

Transitional justice is "an approach to achieving justice in times of transition from conflict and/or state repression"[13] using judicial and non-judicial measures. While an international tribunal has an immense opportunity to promote transitional justice, it cannot do so without additional mechanisms and efforts. Kerr states that the proceedings of the ICTY have been "central" to the transition to peace, but there has been criticism of inefficiency of the tribunal's process and the lack of tangible impact on peace and reconciliation.[14] On the other hand, this could also be an unavoidable consequence of a court that follows a war, in which each party will see their treatment as unjust compared to their former opponent. It is unclear how far the court can go to promote reconciliation while also providing justice in a way that is as neutral and as apolitical as possible. Kerr asserts that "the nexus between peace and justice is to be found in the contribution that justice can make to the process of establishing sustainable peace."[15] The role of criminal trials in this process is important for establishing individual responsibility, deterring future events, providing a sense of justice for victims, establishing rule of law, removing perpetrators from the peace process, and providing an impartial record. Other factors strongly impact this process, for example one observer stated that "'[w]hether societies come to value tribunals as an equitable and effective way to confront their violent paths may ultimately depend more on the approval of a nation's leaders than in anything an outreach programme can do'"[16] While it is important for a tribunal to reach the people in an affected region, unrealistic expectations that transcend the mandate of the tribunal excessively may distract from the main obligations of the court and its ultimate legacy.

As an international tribunal, it is necessary to consider the unique history of the region. Changes and policies that are seen as impositions or that are not integrated into the community

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[10]Spalińska, Eggleston, and Pejić-Sremac, eds, "20 Years of the ICTY: Anniversary Events and Legacy Conference Proceedings," 26.
[11]Ibid. 84.
[12]Ibid. 44.
[13]"What is Transitional Justice?" International Center for Transitional Justice.
[14]Kerr, "Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia," 374.
[15]Ibid. 379.
[16]Ibid.

will likely be less effective and not meet the needs of the community. Dan Saxon, a former prosecutor for the ICTY, explores the legacy of the ICTY in the region of the former Yugoslavia and the broader role of the court in his essay "Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia." He critiques the practicality of some of the goals of the tribunal and what was hoped would be its legacy. For example, it is often assumed that the creation of an ad hoc tribunal will help to restore or foster the rule of law; Saxon argues that since "the former Yugoslavia has no history or tradition of a strong independent judiciary" such an establishment was perceived as a Western imposition rather than an organic process based in the lived experience of many residents.[17] For an international tribunal to have a lasting, positive impact on the domestic rule of law and judiciary, it must take steps to encourage local initiatives, policies, and adaptations.

The International Criminal Tribunal for Rwanda

The ICTR was established shortly after the ICTY in response to the devastating Rwandan genocide in 1994. The tribunal was based in Tanzania in an effort to bring the proceedings of the trial closer to the affected region than the ICTY had been. However, as with the ICTY, outreach was not an initial prerogative of the tribunal, which alienated the tribunal from the reality of Rwanda. Another factor that disadvantaged the tribunal was that it did not prosecute certain groups, which diminished its perceived legitimacy. Both the ICTY and the ICTR were criticized for the length of their proceedings and the cost of the trials, a particularly pressing concern when almost half of Rwanda lives in poverty and limited resources must be allocated with care. Part of the positive legacy of the ICTR is its effect on the region, in particular the victims, the academic community, and the judicial system. Not only did the ICTR establish specific regional programs, such as legal journals or moot court exercises, it also helped to raise the profile of international law.[18] Some of the difficulties it faced centered on the task of integrating the court and international criminal law into the African education system and the domestic courts. Major difficulties in this respect include a lack of communication or clear practice on how to address conflicts between international and domestic law as well as a metaphorical "'wall'…separating international and domestic law."[19] Professor Yitiha Simbeye of the Open University of Tanzania and Consultant Legal Officer of the International Refugee Rights Initiative in Kampala stressed the importance of the archives of the tribunal; in her opinion, access to the archives was crucial to the jurisprudence of the tribunal trickling down to the national courts.[20] She additionally noted that there was a need for more education programs on the subject of international criminal law in order to strengthen international legal prospects in the region's future. New institutions that contribute to this goal and could be used as resources include the African Court of Human and Peoples' Rights and the Open University of Tanzania's new International Criminal Law Center.[21] The transfer of the jurisprudence of the ICTR to the local judicial systems is an essential part of the ICTR's legacy and its long term effect on the region. As Sir Dennis Byron,

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[17] Dan Saxon, "Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia." Journal of Human Rights 4 (2005): 559-72. Print. 562.
[18] Symposium on the Legacy of International Criminal Courts and Tribunals in Africa 8
[19] Ibid. 11.
[20] Ibid. 42.
[21] Ibid.

the Honorable ICTR President stated, “it is only through such developments that the Tribunal’s legacy will be safeguarded.”[22]

The proceedings of the ICTR make it clear that while outreach and legacy programs are not always seen as part of the primary function of a court, they are necessary for the court to reach its full potential and mandate. Mr. Roland Ammoussouga, a Senior Legal Officer, ICTR Spokesperson and Chief of External Relations and Strategic Planning Section at the ICTR, spoke on the efforts of the tribunals outreach program in relation to legacy. He stressed the importance of outreach in fulfilling the tribunal’s mandate and expressed that “in order for the Tribunal to contribute to the restoration and maintenance of peace in Rwanda and the Great Lakes Region, as mandated by the UN Security Council, it is 'essential that the Rwandan population and the peoples of the African continent have a clear understanding of the work of the Tribunal.'”[23] One of the main struggles for the Rwandan outreach initiatives was the introduction of international law to a population that was not familiar with the concepts and institutions of international law. This gap in knowledge and background necessitated new and nontraditional forms of communication to reach the population.[24] Mr. Ammoussouga specifically “called for prioritizing an outreach program that seeks to preserve and ensure the survival of the legacy of the ICTR in Rwanda, in the Great Lakes Region, and throughout the African continent, in order to ‘help to increase and sustain the awareness of current and future generations about the achievements and challenges of international criminal justice and its quest for the eradication of the culture of impunity.’”[25] This experience attests to the difficulties in communication that may arise for an international court and the necessity of versatile outreach programs. Programs that work with the community are a necessary component to ensure that the trials are effective and that the court achieves its long-term goals.

The Special Court for Sierra Leone

As a hybrid tribunal funded by voluntary contributions, the trajectory of the SCSL differed from the previous two tribunals. From the beginning, the SCSL put an emphasis on outreach and adapting to fit the needs of the people. Outreach projects and integration with the local population were aided by the hybrid nature of the court and its location in Freetown, Sierra Leone. This resulted in better education on both the tribunal and international criminal law itself, which in turn improved public opinion of the court. Thierry Cruvellier, a journalist and writer who studied the SCSL, notes that “while attention to its long-term legacy was not an explicit part of the Special Court’s mandate, its in-country presence and commitments reiterated by senior court officials led international policy makers and Sierra Leoneans to expect that it would have a significant impact on rule of law at the domestic level.”[26] As a hybrid court, the Special Court was anticipated to have a “demonstration effect,” in which it would act as a catalyst for improvements to the domestic legal system.”[27] The SCSL instituted programs that facilitated one-on-one integration of its international employees and local employees, which assisted in strengthening the domestic judiciary. The hybrid court model was pioneered in an effort to avoid

[22] Ibid. 49
[23] Ibid 34.
[24] Ibid.
[25] Ibid. 35.
[26] Thierry Cruvellier, "From The Taylor Trial to a Lasting Legacy: Putting The Special Court Model to the Test." (2009): n. pag. International Center for Transitional Justice and Sierra Leone Court Monitoring Programme. Web. 3.
[27] Cruvellier, "From The Taylor Trial to a Lasting Legacy: Putting The Special Court Model to the Test," 28.

some of the pitfalls of the previous tribunals, but it is clear that this was not entirely successful. In particular, excessive spending and length of the trials continued to be a challenge.[28] Cruvellier states that for the Special Court "the cost-per-defendant ratio is not a significant improvement on the record of the ad hoc tribunals," though the narrow mandate of the court did limit overall costs of the Special Court.[29] Therefore, while improvements are still necessary to improve efficiency of international tribunals, the SCSL sets a helpful precedent in terms of outreach, communication, and education within the community.

Binta Mansaray, Registrar at the SCSL, stated that she felt the ICTR had "created 'unrealistic expectations' regarding its capacity for effecting social change in the East African region."[30] In her view, the ICTR was meant mainly to complement and support the domestic judiciary and many of the lower level cases should have been pursued in that venue. In terms of her own experience at the SCSL, she stated that "the SCSL also has a broad mandate to contribute to the consolidation of peace and to foster the rule of law." Mansaray stressed the significance of context specific grassroots programs that were able to better reach the community and foster understanding of the rule of law. It was considered important from the outset of the SCSL to establish an Outreach Program in order to fulfill its broader mandate through "a robust public information and public education scheme.'"[31] Mansaray additionally made the point that rule of law cannot effectively stem only from the courtroom, but rather it must be a part of a larger campaign that provides information to the public and considers different ways of engaging target groups. In contrast to some of the critiques made of the ICTR, the SCSL has been relatively praised for its outreach; "its approach has been to engage the local population in the SCSL's judicial work by holding town and village meetings and by continually disseminating information through video, radio, workshops, and written materials."[32] The use of outreach and media is an important factor in the legitimacy of the court and the transparency of proceedings, both of which affect the legacy of the court in the affected region and for the international community. In instances where there was not an active outreach program, the work of the court was often misinterpreted and used for political purposes; for example, the ICTY was at times used by different groups for "propaganda purposes," which ultimately damaged efforts to foster reconciliation in the areas of the former Yugoslavia and impeded the prosecutor.[33] Therefore, by facilitating educational outreach and collaborative initiatives with local legal structures a court can present the facts of the situation in a way that will reach a broader audience.

Conclusions

While each court has a unique context and legacy, it is a general recommendation that international tribunals must actively prioritize outreach and a methodology that will involve people at the domestic level throughout the duration of the trials. Even the collaborative effort to create an international court can be an important step towards peace and the establishment of rule of law; Martin Ngoga, the Prosecutor General of Rwanda, emphasized that by acknowledging the Rwandan genocide and the experiences of the victims, the mere creation of the ICTR was a

[28]Ibid 22.
[29]Ibid 44.
[30]Symposium on the Legacy of International Criminal Courts and Tribunals in Africa 25.
[31]Ibid. 39
[32]Ibid. 37
[33]Ibid. 37

political act of immense importance.[34] Such political effects are inevitable and must be taken into consideration, for example in the case of the ICTY prosecuting high ranking officials sent a political message and changed the political landscape. On the other hand, an international tribunal cannot be responsible for every aspect of establishing political peace and reconciliation in a region. Encouraging specific programs that work in tandem with international tribunals allow the tribunals to most efficiently and effectively achieve their mandate, while working with local resources. Use of outreach in the community helps to integrate the international resources into the affected country and to implement a comprehensive approach to protect and build the legacy of the court. One of the frequently expressed regrets in regards to legacy is that it was considered as an afterthought and was not prioritized in terms of time or budget allocation. Additionally, major problems to be addressed by future tribunals are the establishment of legitimacy, finding the support of states and civil society, and reducing the length and cost of the trials. Transparent trials that prosecute higher level offenders and members of different groups without prejudice help to establish legitimacy and benefit the international judicial legacy. In the future, it is essential that international tribunals ensure that their work is accessible, that they take measures to integrate the academic and judicial community of the nation, and that they are constantly evaluating and adapting to their context. Legacy is the reflection of all of a tribunal's years of investments by dedicated personnel and the international community, therefore it is important to consider legacy as early as possible and to take steps towards achieving valuable and lasting results.

[34]Ibid. 46

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COMPARATIVE LAW: In Search of a Muslim Identity Between the Two Extremes of Secularism and Religious Law

Gali Amogha Rao*

Abstract*: This paper analyses the development of the Indian Muslim identity with respect to the coexistence of Shariat and sovereign laws. The period of analysis is post-colonial India. The paper analyses the different conflicts of legal philosophy and practice that exist between the judiciary of India and that of the parallel Islamic system. The conflict is such that private citizens suffer from wrongful interpretation of religious law and there is an infringement of the fundamental right to justice as guaranteed by the sovereign laws to every Indian citizen. The analysis begins with a brief discussion of a case that involved a conflict of laws and, vicariously, a conflict of legal ideology between the two systems. The paper mentions other similar cases in corroboration of the primary claim—conflict of legal philosophy. The views of the Indian State are considered with special reference to the idea of secularism in the Indian context. The Constitution of India is analysed to establish as to what the word 'secular' means under the Supreme Law of the Indian State. The analyses reveal that the parallel system, although impractical serves the cause of meeting the Indian idea of secularism. The paper concludes that the secular ethos of Indian democracy allow for infringement of certain Common Law values to make space for certain religious laws, even though they are more conflictive than complimentary.*

On the night of June 6th, 2005, Imrana, a woman in her 20s and a mother of five children, was raped by her father-in-law in a village in the Indian state of Uttar Pradesh.[1] Imrana, and the family that she married into, was Muslim. Imrana's case was not reported and was not directly absorbed by the appropriate Criminal-Justice System as prescribed by Indian statute. Instead, the case was subjected to an informal parallel system of resolving Muslim communal disputes. On first instance, the local leaders of the village's Muslim community decided, relying on their interpretation of Islamic Law, as defined by the Quoran and the Hadith[2], that Imrana's marriage to her husband was void and that she must be married to her father-in-law. On a second instance of judicio-religious intervention, the editor of a local newspaper posed a question to a Muslim scholar, a *Darul Uloom*[3], of the Deobandi[4] school of thought asking for an opinion on the matter. The *Darul Uloom* concurred with the pronunciation of the Muslim village leaders.[5] In the whole judicio-religious process, none of the adjudicators were recognised by law or statute and none of the enquirers like the journalist were closely related to the case. The village leaders and the Muslim scholars, like the *Darul Uloom*, derive legitimacy for their

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[1] Vishwa Lochan Madan Versus Union of India & Others. Supreme Court of India. 07 July 2014. Print.

[2] The body of traditions relating to Muhammad, which now form a supplement to the Qur'an, called the Sunna. "Hadith, n." OED Online. Oxford University Press, March 2015. Web. 20 April 2015.

[3] A Muslim Scholar who has knowledge and training in Judicial matters pertaining to Islam. Essentially, a judge for Islamic Law.

[4] Considered to be a radical school of thought by authors like Salman Rushdie. Rushdie compares the Deobandis to the Taliban in Afghanistan.

[5] Vishwa Lochan Madan Case

pronouncements or *fatwas*[6] through the reverence that is bestowed upon them by the members of the Muslim community for their theocratic knowledge and study. Vishwa Lochan Madan, in his capacity as a citizen of India, filed a Civil Writ Petition in the Supreme Court of India asking for the abolishment and admonishment of the above illustrated judicio-religious system. The petitioner believed that such individuals and courts undermine the constitutional authority of the judiciary and that they use extralegal means to decide cases on the basis of unrecognised law. While eventually the sovereign law took its course and the father-in-law was found guilty of rape by virtue of a criminal case that was filed against him, the parallel system demonstrated no evidence of changing its position on the civil status of the marriage. The judge in the criminal case did not attempt to analyse the status of the marriage (a Civil Law subject) because of the criminal nature of the case.

The Imrana case illustrates an incompatibility between the coexistence of Shariat and statutory law. The conflict is such that the sovereign jurisprudence criminalises an individual for the rape of his daughter-in-law, while at the same time, the applied Islamic law declares the victim's marriage void and advises for the establishment of marriage between the rapist and the victim. Although the judicial system of India espouses to reflect the values of the prevailing societal culture, the legal tolerance for Shariat Law is more conflictory than complimentary to India's secular judicial structure. The sovereign judicial system allows for coexistence on the presumption of superiority over the parallel system. However, in practice, the two systems have equal and comparable powers. The matter is further complicated by the prioritisation order. While the judicial system prioritises the criminal aspect, paying little heed to the civil status of the marriage, the parallel system analyses the case from the standpoint of the civil ramifications. This illustrates a difference in legal philosophy and therefore a difference in the *modus operandi* of the two systems, demonstrating a fundamental conflict.

In 1947, after achieving independence from the British crown, India was geographically partitioned to create two dominions − India and Pakistan. Pakistan occupied two areas of the subcontinent, the north-western and eastern[7]. In basic terms, Pakistan was created from those areas of the Indian subcontinent where the Muslims were in majority with the exception of Kashmir. The ensuing population transfer due to the partition resulted in widespread violence and bloodshed between the Hindus (and Sikhs) coming from and the Muslims going to Pakistan. Currently, India is the largest democracy in the world with a secular system of governance. Pakistan is an Islamic Republic with a similar system of governance as India and has a judicial system that accommodates Islamic Law and jurisprudence to the extent that the requirement of a parallel system is null and void. India and Pakistan have comparable number of Muslims but India's secular nature and majority Hindu population complicate the practical realities of governance and judicial exercise with respect to Shariat Law and hence the parallel system.

While Indian Law has some accommodation for Islamic principles and practices, it is not an Islamic Republic with dedicated infrastructure to deliver justice in a purely Islamic fashion. This paper analyses the Indian Muslim's identity with respect to the prevailing judicial system and the system's capacity to absorb the values, traditions and customs of the Muslims of India. Although the paper does not directly compare the judicial systems of India and Pakistan, it attempts to decipher whether India's secular judicial machinery has the ability to protect and preserve Islamic principles and tenets as much as it perceives an Islamic Republic to.

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[6] A religious decree issued by a competent Muslim scholar or authority.

[7] After the 1971-72 India-Pakistan War, East Pakistan declared itself independent of Pakistan and renamed itself as the People's Republic of Bangladesh.

Although Partition created a dichotomy in the Indian Muslim's identity post-1947, the partition itself did not affect most Muslims of the subcontinent. The Indian Muslim, who was not affected by partition, did not feel the pressure of choosing a side and continued to enjoy the comforts of secularism while maintaining India*ness* and Muslim*ness,* simultaneously. Burjor Avari, in his book, *Islamic Civilisation in South Asia* corroborates this claim by stating, "in most parts of India, partition made little difference to Muslim leading their lives."[8] The purpose of this observation is to note that Indian secularism is neither a newly constructed socio-legal phenomenon nor is it an idea created for the protection of Muslims in post-colonial India. Secularism in India exists independent of the interests of any one community and gives a sense of security to the Muslims. Again, not that it was created for the Muslims but that the Muslims derive legal security from it. Avari mentions this aspect in his book while discussing the creation of the Supreme Law of the land, the Constitution of India. "[A] factor in the Muslims' sense of security was the promulgation of the new constitution in 1950, under the direction of Dr. Bhimrao Ambedkar (1891−1956), the leader of the Dalit community, the most deprived section of people within the Hindu world."[9] Dr. Ambedkar was born a Hindu but subsequently converted to Buddhism due to the ills of the Caste System[10]. He is celebrated as the father of the Indian Constitution. "Ambedkar's strong sense of justice, fairness and egalitarianism is manifest throughout the constitution; and every group and community in India can seek redress [from the judicial system] for injustice or inequality [as enshrined in] this secular constitution."[11] In the Indian context, not only does Islamic Law have legitimacy, it also has the right to thrive, as promised by the secular ethos of the Constitution.

> In the Western world the term 'secular' normally implies a non-religious or an anti-religious outlook. In India, it has a different connotation. The Indian constitution is not non-religious or anti-religious; it aims to maintain a neutral position in an arena of diverse religions. The Indian state actually often provides help and encouragement to its citizens in the maintenance of their respective faiths.[12]

The spirit of this paper does not allow for judgement or assessment of the morality of communal customs but merely permits analysis from an academic perspective. The analysis focuses on the ramifications of such customs on the development of identity in a secular and diverse judicial environment. Pursuant to its secular structure, the judiciary allows for the recognition of religious law and even enforces it in cases adjudicated by its sovereign courts. Moreover, it does not object to the creation and operation of a *de facto* parallel judicial systems that aim to propagate and promote religious law. The only caveat, as stated in the Vishwa Lochan Case in an advisory form, is the requirement for the "consent of the affected parties".[13] The court reasons that such 'parallel' systems are akin to Alternate Dispute Resolution Mechanisms (or ADRMs), which are widely recognised in most, if not all, jurisdictions and therefore, allowable.

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[8] Avari, Burjor. *Islamic Civilization in South Asia: A History of Muslim Power and Presence in the Indian Subcontinent*. London: Routledge, 2013. Print., 228.
[9] Ibid.
[10] A hierarchical social system that existed in erstwhile Hindu society, remnants of which are still visible in contemporary Hindu society.
[11] *Islamic Civilization in South Asia*, 228.
[12] Ibid., 228-29.
[13] Vishwa Lochan Madan Case

Consent is a particularly important legal concept while discussing civil cases. The court in the Vishwa Lochan case noted that Imrana's case was being discussed without her consent or her direct involvement. The *Darul Uloom* ordered an injunction for an infinite period disallowing Imrana and her husband from continuing their marital life even though none of them approached the *Darul Uloom*. The question is whether the act of seeking a judicio-religious opinion in the absence of the affected party permitted? The sovereign judicial system advises against it and the parallel system functions regardless. This illustrates another fundamental difference in legal philosophy and creates a conflict of an elementary nature.

Moreover, religious 'ADRMs' are not really conventional ADRMs. Non-conformance of a conventional ADRM decision does not result in communal ostracisation and social death, while non-conformance with judicio-religious decisions do lead to such severe consequences. Further, the unique phenomenon of honour killings[14] also raises the possibility of murder by family members in the event of non-compliance with judicio-religious decisions. In such circumstances, a decision of a judicio-religious authority reaches the value of a sovereign court's order. The psychological pressure from the judicio-religious authority and the law enforcement's power become comparable. While sovereign judicial power possessed by courts is accountable, the judicio-religious power held by religious clerics is unaccountable. This dichotomy of power allows individuals like Imrana to face the possibility of being married to her rapist, exemplifying another clear mismatch between the two systems. The mismatch is such that the same case can be decided differently with diversely different results depending on what law is applied, giving birth to mismatching concepts of justice.

Although the Indian constitution refrains from granting special privileges to Muslims, it allows for Muslims to approach Shariat Courts and forums for adjudicating matters with respect to marriage, divorce, inheritance, death etc. The All India Muslim Personal Law Board (AIMPLB) is a non-governmental organisation that was formed in the 1970s by virtue of a Convention of Muslim scholars and jurists who rose in opposition of a parliamentary bill that wanted to establish a Uniform Civil Code at the time. The establishment of such a code would have circumvented the applicability of Muslim Personal Law (Shariat Law) in civil cases that applied to Muslims. AIMPLB, *inter alia*, aims to limit government intervention in Shariat matters, protect the retention and implementation of the Shariat Act, initiate studies on the different schools of Islamic jurisprudence. AIMPLB is one of the principal actors in the active effort to establish a parallel informal judicial system for matters relating to the applicability of Shariat Law. AIMPLB functions like an ADRM but because of its social status and intellectual reverence, it serves the purpose of strong and independent judicial system for Muslim Personal Law matters. Further, the AIMPLB, while deciding cases, relies on its interpretation of Islamic Law, which may or may not be in alignment with statutory enactments. However, there are certain parliamentary enactments that recognise and enforce specific fundamental tenants of Shariat Law. Dissolution of the Muslim Marriages Act, 1939 and the Muslim Personal Law (Shariat) Application Act, 1937 are examples of codified law that are judicially enforceable through sovereign judicial courts. Even with such laws in place, independent actors such as the AIMPLB felt the requirement of expanding the applicability of Shariat, which is achieved through the parallel system. The very existence of the parallel system provides evidence of failure of coexistence. The secular system did not plan for the parallel system and assumed the smooth resolution of affaires through State judicial machinery, which is more ideological than

[14]" The killing of a relative, especially a girl or woman, who is perceived to have brought dishonour on the family." *OxfordDictionaries.com.* Oxford Dictionaries, 2015. Web. 24 April 2015

practical. Hence, although they are conflictory, the parallel system attempts to fill the void left by the judicial system.

Most scholars agree and I concede that the parallel structure has helped more than it has harmed. Further, the existence of such judicio-religious systems is a symbol of religious tolerance and secular ethos − positive characteristics of a robust democracy. However, there are ample cases that illustrate the ills of an unaccountable and conflictory adjudicatory body. In another similar case, Asoobi, a young girl, was raped by her father-in-law and a *fatwa* declared that the father-in-law could only be found guilty of rape if there was a witness to testify or if her husband endorsed her allegation. Further, the *fatwa* disallowed her from filing a Police complaint against her rapist.[15] In yet another similar case, Jatsonara, by virtue of a *fatwa*, was asked to recognise her rapist father-in-law as her legitimate husband and divorce her existing husband.[16] Both cases were cited by the petitioner in the Vishwa Lochan case as examples of a prevalent network of laws and proceedings that lack legal-backing but have psychological force equivalent to that of an enforceable judicial order.

A brief analysis of the Asoobi case reveals a larger systemic conflict. The *fatwa* debarred Asoobi from filing a Police complaint, which is her right as a citizen of India and more importantly, a matter of state judicial procedure. The situation is such that the parallel system forbids her from pursuing her right for justice, which is a fundamental right that the Indian State strives to guarantee. Further, the two systems have dissimilar and conflicting procedures for fact-finding and evidence submission. Asoobi was required to either produce a witness or convince her husband of the occurrence of rape in order to prove the father-in-law's guilt. Such evidencing procedures are neither recognised nor recommended by the sovereign judicial system. The Asoobi case reflects a direct conflict between the judicio-religious system and that of the Indian judiciary in terms of relevant fact-finding procedures. India follows an Adversarial System of Judicial proceeding enshrined with the principles of the Common Law, one of which was put into words by the English Jurist William Blackstone. "It is better that ten guilty persons escape than that one innocent suffer."[17] What Blackstone said and wrote in 1769 holds as a fundamental principle in most Common Law jurisprudences. While the Imrana, Asoobi and Jatsonara cases reflect scenarios where the victim is victimised for the purpose of enforcing 'divine' law, the legal philosophy of India's sovereign judicial system does not permit even a slight deviation that causes an innocent to suffer. This, yet again, demonstrates a mismatch and incompatibility between the legal philosophy of India and that of the parallel Islamic system.

Islamic legal philosophy allows for interpretation and the use of human judgement in order to adjudicate cases in conformance with prevailing customs, traditions and requirements of a given geographic region. Avari, in his book, mentions this aspect while discussing the Quoran and the practices of the Prophet to describe the origins of Shariat. "Wise and learned human beings can interpret the law in line with customs and conventions of a prevailing age or a particular part of the world, but they must do so without infringing the limits set by the divine law."[18] Although the Indian judiciary allows for the existence of parallel systems practicing different schools of Islamic legal thought, there is no definition for what is permitted and what is prohibited. The lack of definition is justified and rationalised by a self-constructed façade of religious freedom and tolerance. This allows for absurd ideas of justice and governance, which

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[15] Vishwa Lochan Madan Case
[16] Ibid.
[17] Blackstone, William. *Commentaries On The Laws Of England*. Oxford: Clarendon, 1769. Print.
[18] *Islamic Civilization in South Asia*, Pg. 5

create villains out of victims and absolve criminals of crime. The purpose of this observation is to highlight the lack of definition that could, perhaps, cause a few mislead 'scholars' to stretch 'divine' law to meet outdated societal expectations.

The *Deobandi* school of thought from the Imrana case has a reputation of harbouring and nurturing outmoded and irrelevant ideas of justice that many Indian Muslims do not prescribe or adhere to. To qualify this observation, in the Imrana case, the *Darul Uloom* equated adultery to rape and therefore, did not consider the criminal aspect of the case and only focused on the civil ramifications to the existing marriage. The procedure to prove rape was so outdated that there was no admissible evidence in the eyes of the *Darul Uloom*. The sovereign judicial system refrains from extreme measures of outlawing such practices and procedure in the fear of being termed as an anti-minority system. This exemplifies an untreated and unmitigated conflict of procedure and practice between the two systems, demonstrating incompatibility.

The Indian state does not take responsibility for the enforcement of the adjudications of the parallel system but only recognises the right of such courts and institutions to exist.[19] Scholars who argue in favour of compatibility between sovereign judicial system and the parallel system often cite the origins of the modern-day Islamic movement as evidence for compatibility. Mian Abdur Rashid, a Pakistani author, in his book, *Islam in the Indo-Pakistan Subcontinent*, mentions the origins of two reactionary movements stemming from the time of the British colonial period.[20] One of these reactionary movements is the *Deobandi* movement, as referenced in the Imrana case. The movement commenced as an anti-British movement to rid Islam of Western influence and gain autonomy for Islamic thought, including Islamic legal thought. Rashid mentions that the *Deobandis* joined forces with the Indian nationalists, who were predominantly Hindu, to achieve their larger goal for Islam in an independent India.[21] Although the *Deobandis* viewed Indian nationalism as a product of narrow-minded non-Islamic Western-influenced thought, they worked side by side with the Indian nationalists in the hope of creating a State wherein they could achieve their goals. The idea was to compromise in the present for a brighter and better future. The *Deobandi* school of thought established itself to purify Orthodox Islam to make it comparable to what it was during the glory years of the Prophet. However, such reformation fails to account for changing times, practices and wishes of the newer generation of Muslims, which Islamic Law actually allows for. Owing to such myopic vision and operation, the *Deobandis* have been losing followers. Their practice of Shariat is often deplored for its misinterpreted strictness.

The Muslim identity with respect to the judiciary in modern-day India is moulded by two simultaneous yet opposing forces. In maintenance of a secular ideology, the State recognises and encourages a parallel system that opposes the sovereign judiciary's practical (not legal) legitimacy. The parallel system would prefer that all Muslims be subjected to their legal philosophy but the State emphasises the requirement of "consent". The State also attempts to remedy the multiple failings of the parallel system, as seen in the Imrana, Asoobi and Jatsonara cases. In the whole process of locating identity, the Indian Muslim is offered a hybrid judicial system that is a product of a conflict of legal philosophy. The coexistence of these two systems is neither efficient nor sustainable but it serves the dual purposes of maintaining secular status and assuring the Muslims of the protection of their legal philosophy.

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[19] Vishwa Lochan Madan Case, Judgement, Pg 13. Print.

[20] Rashid, Mian Abdur. *Islam in the Indo-Pakistan Subcontinent: An Analytical Study of the Islamic Movements*. Lahore: National Book Foundation, 1977. Print., Pg. 59

[21] Ibid. Pg. 60-61

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Supreme Court Roundup

Jesse Chen*

GLOSSIP V. GROSS

Docket Number	14-7955
Date Argued	April 29, 2015
Date Decided	June 29, 2015
Vote	5-4, for Gross
Issues	Eighth Amendment; cruel and unusual punishment

In this case, the Court ruled upon whether or not Oklahoma's three-drug protocol for lethal injection violated the Eighth Amendment. This protocol involved the use of sodium thiopental to induce unconsciousness, a paralytic agent to inhibit involuntary movements, and potassium chloride to induce cardiac arrest[1]. Due to circumstances resulting in an inability to obtain sodium thiopental, Oklahoma decided to substitute 500 milligrams of the sedative midazolam as the first drug in their three-drug protocol. Charles Warner and 20 other Death row inmates in filed a 42 U. S. C. §1983 action against the state on grounds of cruel and unusual punishment, stating that the dosage of midazolam would be insufficient in preventing the pain experienced after the administration of the second and third drugs[2]. Furthermore, four inmates also filed for a preliminary injunction to prevent Oklahoma from carrying out any executions. A federal district court denied the motion, citing that the prisoners were unable to establish a likelihood that the use of midazolam would result in unusual pain, as well as not being able to offer an alternative drug that would substantially cause less pain[3]. This decision was affirmed by the Tenth Circuit U.S. Court of Appeals.

The Court ruled 5-4 in favor of Gross. The opinion was delivered by Justice Samuel A. Alito, Jr., in which the court held that there was insufficient evidence that the use of midazolam in Oklahoma's three-drug protocol presented a great enough risk of severe pain to violate the Eighth Amendment. The Court concurred with the District Court that the prisoners failed to identify an acceptable alternative method of execution which would yield less pain than the use of midazolam. Furthermore, executions have always been viewed as a constitutional punishment in the United States, and the risk of pain is inherent in the nature of an execution. Thus, the Eighth Amendment's protection against cruel and unusual punishment does not extend to protect against any and all pain that may occur during capital punishment. Because of the plaintiff's failure to provide factual evidence that midazolam has a higher than acceptable risk of pain, nor identified other available alternative execution methods, the Court chose to affirm the decision made by the Tenth Circuit Court of Appeals[4] This is in line with the standards established by the Court in *Baze v. Rees, 553 U.S. 25* (2008).

Justice Scalia, joined by Justice Clarence Thomas, wrote a concurring opinion, in which

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[1]Glossip v. Gross, 576 U.S. ___ (2015) 1

[2]*Id.* at 1

[3]*Id.* at 1

[4]*Id.* at 14

he stated that the death penalty cannot be held as unconstitutional by its very nature, as it is a punishment that the Constitution itself contemplates. He states that the argument presented against the death penalty, that it is arbitrary and open to mistake, is more so a criticism of the jury system. Scalia states that "[But] when a punishment is authorized by law—if you kill you are subject to death— the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned[5]". Here he argues that the moral question of whether or not the death penalty is cruel and unusual rests in the hands of the jury's conviction, and that the State carrying out its function of administering justice has no need of moral consideration[6].

A dissenting opinion was written by Justice Stephen G. Breyer and joined by Justice Ruth Bader Ginsburg, who argued that the death penalty should be ruled unconstitutional. He states that the social and legal standards have changed since the implementation of the death penalty, and that its constitutionality has long since been brought into question[7]. Breyer writes that "Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use[8]."

A second dissenting opinion was written by Justice Sonia Sotomayor, who wrote that scientific evidence has shown that midazolam does not adequately sedate prior the reaching its drug ceiling, and often fails to keep the subject fully unconscious the "face of [more] noxious stimuli[9]". She also argued that the Court's interpretation of *Baze v. Rees* as a precedent was incorrect, and that there is no requirement for petitioners for relief under the Eighth Amendment to provide an acceptable and available alternative. Sotomayor also points out that just because an alternative cannot be found does not automatically result in an execution method becoming constitutional[10]. She was joined by Justice Stephen G. Breyer, Justice Ruth Bader Ginsburg, and Justice Elena Kagan.

OBERGEFELL V. HODGES

Docket Number	14-556
Date Argued	April 28, 2015
Date Decided	June 26, 2015
Vote	5-4, for Obergefell
Issues	Fourteenth Amendment; Equal Protection Clause

The Supreme Court ruled in this case whether or not the Fourteenth Amendment of the U.S. Constitution guaranteed the right for same sex couples to obtain a marriage license and have

[5] *Id.* at 4 (Scalia, J., concurring)
[6] *Id.* at 3-4
[7] *Id.* at 2 (Breyer, J., dissenting)
[8] *Id.* at 2
[9] Id. at 6 (Sotomayor, J., dissenting)
[10] *Id.* at 24-25

their marriage recognized by the State. The petitioners of the original case were 14 same-sex couples and two other homosexual men who filed suits in the Federal District Courts in Michigan, Kentucky, Ohio, and Tennessee. [11] These suits attacked the definition of marriage used by said states, a union between a man and a woman, as well as their subsequent failure to recognize or perform marriages for same-sex couples as a violation of the Fourteenth Amendment's Equal Protection Clause. The trial courts ruled in favor of the plaintiffs. The decision was appealed and later reached the U.S. Sixth Circuit Court of Appeals, who reversed the decision and held that the states refusal to recognize same-sex marriages did not violate the Fourteenth Amendment.

The Supreme Court ruled in favor of Obergefell in a 5-4 decision, with the opinion delivered by Justice Kennedy, who was joined by Justice Ginsberg, Justice Sotomayor, and Justice Kagan. The Court's opinion stated that "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family...It would misunderstand these men and women to say that they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.[12]" The Court also went on to list four reasons for their decision: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" [13] and that such autonomy is a liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. (2) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." [14] (3) the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education[15]." And (4) "marriage is the keystone of the Nation's social order[16]". The consequence of denying same-sex couples from marriage would thus deny them these benefits, reduce social order, and unfairly diminish the legitimacy of their relationships. The Court also cited precedent rulings, such as *Turner v. Safley,* in which they held that prisoners could not be denied the right to marriage because it was a fundamental right[17]. Thus, the Court overturned the Sixth Circuit Court's decision and held that the four State's ban on same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment.

Dissenting opinions were written by all four of the dissenting Justices. Justice Roberts argued that using Due Process to cover the legalization of same-sex marriage is not inherent in the interpretation of the Fourteenth Amendment, but rather an expansion of its coverage. To bolster this argument, Roberts cited that no court decision had ever before challenged the definition of marriage as "between a man and a woman". Justice Roberts states that the Court's decision is based upon using a moral argument to override the spirit of the law in his statement: "[But]this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.[18]"

Justice Scalia viewed the decision as a "threat to American democracy", in that it was

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[11] Obergefell Et Al. v. Hodges, Director, Ohio Department of Health, Et Al., 576 U.S. ___ (2015) 1
[12] *Id.* at 28
[13] *Id.* at 3
[14] *Id.* at 13
[15] *Id.* at 14
[16] *Id.* at 4
[17] *Id.* at 14, citing Turner v. Safley, 482 U.S. 78 (1987)
[18] *Id.* at 2 (Roberts, J., Dissenting)

used to “create 'liberties' that the Constitution and its Amendments neglect to mention[19]”. In his opinion, the Court mandating that all States must accept same-sex marriages was an unfair imposition of will upon the American populous that removed democratic debate from the table. Scalia also addressed the claim that the Fourteenth Amendment had been violated by the four states in question with his standard originalist interpretation, stating that a ban on same-sex marriage was not considered unconstitutional when the amendment was ratified in 1868, and thus there is “no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text[20]”.

Justice Thomas rejected the idea that same-sex marriage could be guaranteed by the Constitution, stating that “liberty has been understood as freedom from government action, not entitlement to government benefits[21]”. Nowhere in the Constitution does it declare that individuals have an expectation to receive a government service, such as a marriage license. Furthermore, Thomas also criticized the Court for interpreting the Constitution “guided only by their personal views as to the 'fundamental rights' protected by that document”. [22]

Justice Alito took a similar stance as the former two Justices on this issue, stating that “'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted' in this Nation's history and tradition'”. [23] Same-sex marriage cannot be considered “deeply rooted” in history or tradition, and thus should not be protected under Due Process. Alito also feared the decision would contribute to a “tyranny of the majority”, and that those who hold views against it would risk being labeled as bigots and be discriminated against by society. [24]

WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS

Docket Number	14-144
Date Argued	March 23, 2015
Date Decided	June 18, 2015
Vote	5-4, for Walker
Issues	First Amendment, Freedom of Speech

This case covered the Supreme Court's ruling on a controversial use of the Confederate Flag on government-issued property. The Texas Division of the Sons of Confederate Veterans and its officers (the SCV) applied for the issuing of a specialty license place to be issued by the Texas Department of Motor Vehicles (the TDMV). This specialty plate would feature a confederate flag both in the organization's logo and one faintly printed on the background[25]. The TDMV refused to create the license plate after multiple complaints from the public, which prompted the SCV to sue on the grounds of a violation of their First Amendment rights. The district court ruled in favor of Walker, stating that license plates were government property and

[19] *Id.* at 1 (Scalia, J., Dissenting)
[20] *Id.* at 4 (Scalia, J., Dissenting)
[21] *Id.* at 1 (Thomas, J., Dissenting)
[22] *Id.* at 2 (Thomas J., Dissenting)
[23] *Id.* at 2 (Alito J., Dissenting)
[24] *Id.* at 7 (Alito J., Dissenting)
[25] Walker v. Texas Division, Sons of Confederate Veterans, 576 US ___ (2015) 3-4

could be reasonably regulated as they were not considered a public forum. The United States Court of Appeals for the Fifth Circuit reversed this decision, arguing that the denial was a form of discrimination against the symbology of the Confederate Flag.

The Court ruled 5-4 in favor of Walker, with the opinion written by Justice Breyer stating that "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.[26]" The Court based their decision upon the precedents set in *Pleasant Grove City v. Summum,* in which the Court upheld the city's refusal to allow the Summum church to erect a monument of the Seven Aphorisms on grounds that it would be a government establishment of religion. In that case, the Court found that the "display of a permanent monument in a public park" would be perceived by an ordinary and reasonable observer to reflect the values of the government[27]. This was in direct contrast to protests and demonstrations, which were finite in time. Like a monument, the Court considered a license plate to be similar as a permanent fixture. The Court also found that license plates are reasonably associated with the government, stating that "drivers displaying license plates 'use their private property as a 'mobile billboard' for the State's ideological message.'[28]" Thus, the TDMV did not violate the First Amendment in refusing to produce the SCV's license plates, as government property is held to a lower standard of free speech, as they are required to uphold viewpoint neutrality.

A dissenting opinion was written by Justice Alito, with Chief Justice Roberts, Justice Scalia, and Justice Kennedy joining. Alito argued against the Court's decision to find license plates government property. Alito cited that over 350 varieties of specialty Texas license plates were available, and that many plates honor private institutions and corporations as well[29] (some examples given were high schools, the Masons, soft drinks, and NASCAR drivers). Many plates also feature tongue-in-cheek slogans such as "Rather Be Golfing". Alito states that, by the logic used behind the Court's decision, all of the previous license plates can be seen as examples of government speech (which he considers ludicrous). Instead, Alito asserts that "while all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages.[30]" Thus these plates should be considered an expression of personal speech, and its limitation would indeed be a violation of the First Amendment.

ELONIS V. UNITED STATES

Docket Number	13-983
Date Argued	December 1, 2014
Date Decided	June 1, 2015
Vote	8-1, for Elonis
Issues	First Amendment, 18 U. S. C. §875(c)

[26] *Id.* at 5
[27] Pleasant Grove City v. Summum, 555 U.S. 460 (2009)
[28] Walker v. Texas Division, Sons of Confederate Veterans, 576 US ___ (2015) 17
[29] *Id.* at 2 (Alito, J. Dissenting)
[30] *Id.* at 3

With the increasing assimilation of social media in society, the definitions of "protected speech" must also be examined. In this case, the Supreme Court ruled on whether or not Anthony Douglas Elonis' posting of violent rap lyrics to Facebook constituted as "threatening language". Elonis posted his rap lyrics to Facebook after a recent divorce under the pseudonym "Tone Dougie". The lyrics contained several instances of graphically violent language and imagery pertaining to his former wife, select co-workers, a kindergarten class, and state and federal law enforcement. They were interspersed with disclaimers that stated the lyrics to be "fictitious" and not depicting real persons[31]. Despite this, he was indicted by a grand jury on five counts of threats relayed through interstate communication, a violation of Federal Law 18 U. S. C. §875(c). He appealed to a district court stating that the government must prove that he intended to communicate a "true threat", but was dismissed on the grounds that a "reasonable person would foresee that his statements would be interpreted as a threat[32]. Elonis was convicted on four of the five counts and served 44 months in prison. He appealed to the United States Court of Appeals for the Third Circuit, who affirmed the district court's decision.

With no luck on those fronts, Elonis appealed to the Supreme Court, who ruled 8-1 that Elonis' actions did not meet the requirements of a "reasonable person's" expectation of threatening speech. The Court's opinion was written by Chief Justice Roberts, and joined by seven other Justices. Roberts offered in his opinion that the "reasonable person" standard that Elonis was convicted on is acceptable for tort law, it is inconsistent with conventional requirements for establishing criminal conduct: *mens rea, or* an awareness that one's actions are wrong[33]. While ignorance of the law is not usually considered a defense for breaking it, sufficient *mens rea* is required to prove the comission of a crime under Federal Law §875(c)[34]. Roberts argued that, at best, Elonis was negligent and reckless in his posting of speech that could potentially be seen as threatening. However, because Elonis obviously did not post the lyrics with the intent to threaten, as evidenced by his disclaimers and taking up of a persona, the Court found insufficient reason for Elonis' indictment.

Justice Alito wrote a concurring opinion in which he agreed that *mens rea* was required to convict under §875(c), but also argued that the Court's ruling left the definition of the terms necessary to prove a crime needlessly vague (how do you know if someone is purposeful or simply negligent or reckless?). Alito stated that "this will have regrettable consequences. While the Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard[35]." Alito also addressed the First Amendment issue brought up by Elonis, stating that song lyrics are generally performed in public or sold in recorded form, whereas statements made on social media "pointedly directed at their victims" and thus are much easier to be taken seriously[36]. To allow this would be to allow anyone to post threats on social media under the guise of "lyrics" or other similar artistic expressions.

Justice Thomas, as the sole dissenter, argued that the Court's ruling "casts aside the approach used in nine Circuits and leaves nothing in its place[37]", in essence removing a general standard used by the justice system without replacing it. Thomas also cites precedent, such as

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[31]Elonis v. United States, 575 US ___ (2015) 1
[32]*Id.* at 1
[33]*Id.* at 13
[34]*Id.* at 2-3
[35]*Id.* at 1-2 (Alito, J. Concurring)
[36]*Id.* at 6
[37]*Id.* at 1 (Thomas, J. Dissenting)

Rosen v. United States, in which the Court ruled against the petitioner even though he did not show purposeful intent[38].

Dedication to Justice Scalia:

We at the Brandeis Law Journal would like to dedicate this year's Supreme Court Roundup in memoriam of Justice Antonin Gregory Scalia, who passed away on February 13, 2016, after nearly thirty years of service on the Supreme Court. A strong supporter of the originalist and textualist Constitutional interpretations, Scalia proved himself numerous times to hold strong conviction in his beliefs, even when they proved controversial with the American populous. Regardless of our personal views on his political beliefs, we greatly respect him for his service to this country.

[38] *Id.* at 4