



PENN UNDERGRADUATE LAW JOURNAL

CONTENTS

A HISTORICAL INSTITUTIONALIST
PERSPECTIVE ON ISRAEL'S BASIC LAW: NATION
STATE OF THE JEWISH PEOPLE

Neil Schwartz

AUTONOMOUS VEHICLES AND TORTS: A
BEHAVIORAL ECONOMIC ANALYSIS

Ruru Hoong

RESPONSIBILITY FOR ATROCITY: HANNAH
ARENDT AND THE ASSUMPTIONS OF
RESPONSIBILITY

Lawrence Huang

ONE MAN, NO VOTE: ANALYZING THE EFFECTS OF
DISENFRANCHISEMENT ON RECIDIVISM

Alexandra Tolhurst

THE ORIGINS OF PATIENTS' RIGHTS IN CROSS-
BORDER HEALTHCARE: BALANCING THE
INDIVIDUAL AND COLLECTIVE RIGHT TO HEALTH

Malwina Anna Wojcik

Volume 7
Number 1
Fall 2019

Penn Undergraduate Law Journal

Vol XII.

Fall 2019

No. [1/2]

TABLE OF CONTENTS

Letter from the Editor-in-Chief

Lorenza Colagrossi, University of Pennsylvania.....1

A Historical Institutional Perspective on Israel's Basic Law: Nation State of the Jewish People

Neil Schwartz, University of Michigan.....4

Autonomous Vehicles and Torts: A Behavioral Economic Analysis

Ruru Hoong, Stanford University.....32

Responsibility for Atrocity: Hannah Arendt and the Assumptions of Responsibility

Lawrence Huang, Georgetown University.....50

One Man, No Vote: Analyzing the Effects of Disenfranchisement on Recidivism

Alexandra Tolhurst, University of Pennsylvania.....69

The Origins of Patients' Rights in Cross-Border Healthcare: Balancing the Individual and Collective Right to Health

Malwina Anna Wojcik, Queen Mary University of London.....102

MASTHEAD

Editor-in-Chief

LORENZA COLAGROSSI

Managing Editor

HELEN CATHERINE DARBY

Executive Editors

ISABELLE BREIER
JUSTIN LINETSKI

LEAH DUNBAR

LEO GEARIN
ESTHER YEUNG

Director of Programming and Communications

JOEY RAVENNA

Business Manager

PAULINA PEDAS

Blog Manager

ANNA SCHWARTZ

Social Media Coordinators

CHIH-NING KUO

MAI NGUYEN

Associate Editors

MARGARET BADDING
SANTANA BROWNING
ALEXIS CALIN
CHARLENE CANNING
JUSTIN CHAN
KENNEDY CROWDER
SYDNEY GWYNN
NATHANIEL HYLTON

CELIA KRETH
NIKHIL LAKHANI
SPENCER LANDIS
SHARON LEE
ALANA MATTEI
LILY MONROE
SIMONE NOORALI
EMILIA ONUONGA
SAM ORLOFF

LAWRENCE PHILLIPS
JOEY RAVENNA
ADALYN RICHARDS
EMMA RONZETTI
MARY SADALLAH
BRADLEY SAUNDERS
STACY SHIMANUKI
LORRY WU

FACULTY ADVISORY BOARD

The Penn Undergraduate Law Journal is honored to have the following professors supporting this publication. Their contributions are much appreciated.

Professor Phillip Ackerman-Lieberman

Assistant Professor of Law and Jewish Studies;
Affiliated Professor of Islamic Studies and History
~ Vanderbilt University ~

Professor Alexander Guerrero

Assistant Professor of Philosophy
and of Medical Ethics and Health Policy
~ University of Pennsylvania ~

Professor Nancy Bentley

English Department Chair;
Professor of English
~ University of Pennsylvania ~

Professor Cristina Bicchieri

Professor of Philosophy and Professor of
Legal Studies, The Wharton School
~ University of Pennsylvania ~

Professor Sarah Barringer Gordon

Arlin M. Adams Professor of Constitutional
Law and Professor of History
~ University of Pennsylvania ~

Professor Philip M. Nichols

Associate Professor of Legal Studies and
Business Ethics, The Wharton School
~ University of Pennsylvania ~

Professor Brendan O'Leary

Lauder Professor of Political Science;
Director, Penn Program in Ethnic Conflict
~ University of Pennsylvania ~

Professor Rogers Smith

Christopher H. Browne Distinguished
Professor of Political Science
~ University of Pennsylvania ~

INSTITUTIONAL SPONSORSHIP

The Penn Undergraduate Law Journal is honored to have the following academic institutes and departments supporting this publication. Their contributions are much appreciated.

Department of Legal Studies & Business Ethics
University of Pennsylvania – The Wharton School

Christopher H. Browne Center for International Politics
University of Pennsylvania – College of Arts & Sciences

The Penn Program on Democracy, Citizenship, and Constitutionalism
University of Pennsylvania – College of Arts & Sciences



OUR MISSION

A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

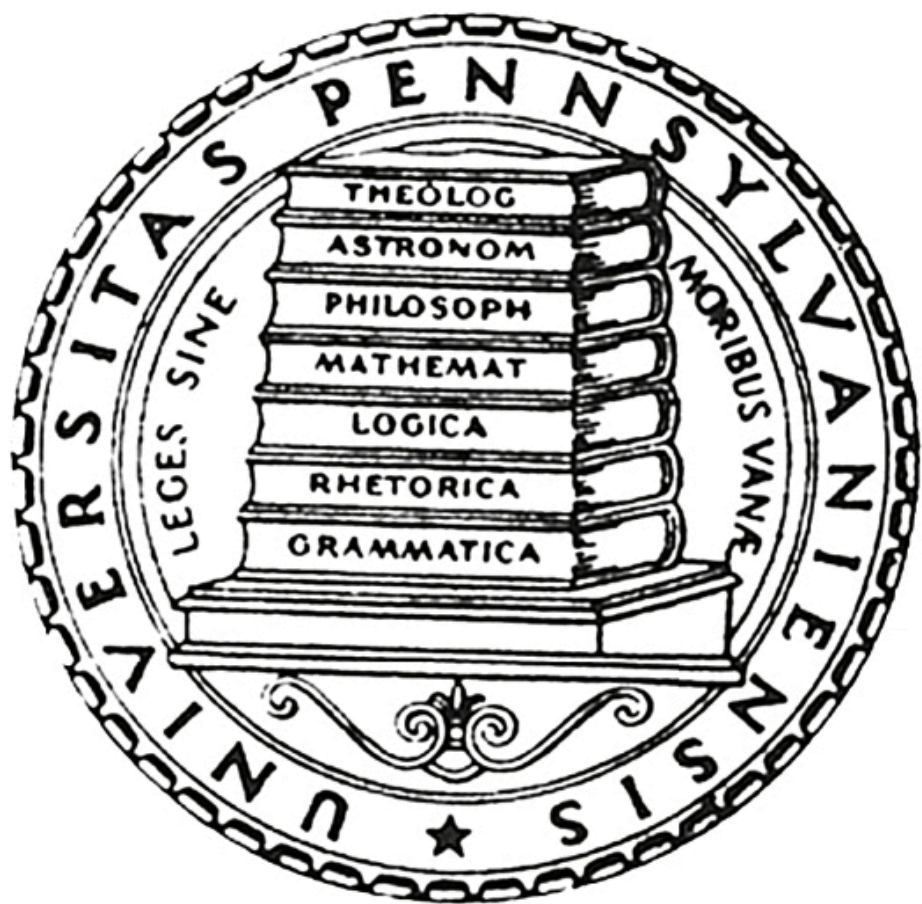
The views expressed by the contributors are not necessarily those of the Editorial or Faculty Advisory Board of the Penn Undergraduate Law Journal. While every effort has been made to ensure the accuracy and completeness of information contained in this journal, the Editors cannot accept responsibility for any errors, inaccuracies, omissions, or inconsistencies contained herein.

No part of this journal may be reproduced or transmitted in any form or by any means, including photocopying, recording, or by any information storage and retrieval system, without permission in writing. The authors who submitted their work to the Penn Undergraduate Law Journal retain all rights to their work.

© Copyright 2019. Penn Undergraduate Law Journal. All rights reserved.

Volume no. 7, Issue no. 1, 2019.

www.pulj.org



LETTER FROM THE EDITOR-IN-CHIEF

Lorenza Colagrossi, University of Pennsylvania

Dear Reader,

On behalf of the entire Penn Undergraduate Law Journal staff, I am very pleased to present you with the thirteenth installment of our publication. This edition brings together five outstanding articles which analyze diverse topics ranging from autonomous vehicles and torts to the origins of patients' rights in cross-border healthcare. These articles explore subjects that are incredibly relevant to the legal system of the United States as well as the international community as a whole. Our entire team is deeply humbled and excited to share our authors' exceptional work with you.

Our first piece, "A Historical Institutional Perspective on Israel's Basic Law: Nation State of the Jewish People," is by Neil Schwartz of the University of Michigan. The author begins by providing historical context on the "Nation State Bill." He then provides an in depth literature review about the "characterization of Israel in the context of its Jewish and democratic identities." Schwartz highlights the tension between Jewish and democratic values as well as between Israel and its diaspora. He argues that "Israel's complex geopolitical history, national security concerns, and preoccupation with maintaining a Jewish demographic majority have led to debates over whether Jewish or democratic values should be favored in the public sphere."

Our second article, "Autonomous Vehicles and Torts: A Behavioral Economic Analysis," comes to us from Ruru Hoong of Stanford University. The author begins by establishing that the rise of autonomous vehicles will call for a newly revised legal system to address the question of torts and liability. She predicts that going forward, there will be two main kinds of auto accidents. The first kind, which she coins as "pure" accidents, are those consisting of only automated vehicles. The second, which she coins as "mixed accidents," are those consisting of both autonomous and conventional vehicles. Hoong argues that "a legal regime that ascribes strict liability to manufacturers in the event of 'pure' accidents and that specifies strict liability to drivers of conventional vehicles with a defense of contributory negligence in 'mixed' accidents would be most likely to yield an

efficient outcome.”

Our third article, by Lawrence Huang of Georgetown University, is titled “Responsibility for Atrocity: Hannah Arendt and the Assumptions of Responsibility.” The author begins by asserting the premise that “the ability to hold perpetrators of mass atrocities accountable is essential to the international order.” He proceeds to review political scientist Hannah Arendt’s perspective on the role of the international community in bringing perpetrators of mass atrocities to justice. He examines these concepts through the lens of *The Confessions of an Argentinian Dirty Warrior*. Huang argues “that lower-ranking soldiers, like Argentinian Adolfo Scilingo, as well as high-ranking officials, like Eichmann, can be unthinking perpetrators of atrocity.” He concludes that “one ought to accept the inability to morally justify modern practices of holding perpetrators responsible as an inevitable consequence, but one must hold perpetrators responsible nonetheless.”

Our fourth piece, “One Man, No Vote: Analyzing the Effects of Disenfranchisement on Recidivism,” comes to us from Alexandra Tolhurst of our very own University of Pennsylvania. Tolhurst hypothesizes that recidivism will decrease as access to voting rights for felons increases. The author analyzes disenfranchisement laws in the United States through the lens of three states: Georgia, South Carolina, and Florida. Tolhurst conducts in depth research that helps compare her three target states against control states. She concludes that “the restoration of voting rights, at least in Florida, did not have the intended effect of reducing recidivism. Rather, relative to other states that didn’t change their laws, recidivism actually increased.”

Our final piece, “The Origins of Patients’ Rights in Cross-Border Healthcare: Balancing the Individual and Collective Right to Health,” is by Malwina Anna Wojcik of Queen Mary University of London. To help find a balance between individual and collective rights, the author analyzes different rationales for patient mobility. Wojcik investigates both Regulation 883/04 and the European Court of Justice’s (CJEU) interpretation of Art. 56 TFEU to contrast the orthodox pillars of healthcare. Finally, she examines the new Directive on Patients’ Rights and comes to the conclusion that “the Directive shifts the balance towards collective rights and reinstates national control over the healthcare systems.”

Thank you so much for our sponsors, our readers, and all the writers who submitted their work to our journal. I would especially like to thank our authors whose outstanding work allows us to keep publishing our journal each semester. But most of all, I would like to thank the Penn Undergraduate Law Journal team.

Your tireless effort allows every branch of PULJ to run. I am proud to work with each and every one of you. It is always a joy to find others who share a similar passion for the law. Thank you for sharing in this endeavour with me.

Best,

Ana Lorenza R. Colagrossi

A handwritten signature in black ink, appearing to read 'L.C.' with a flourish underneath.

ARTICLE**A HISTORICAL INSTITUTIONALIST PERSPECTIVE ON
ISRAEL'S BASIC LAW: NATION STATE OF THE
JEWISH PEOPLE**

Neil Schwartz, University of Michigan

Abstract

Israel brands itself as a beacon of stability in a hostile and autocratic Middle East, with flourishing democratic values and equality for all as enumerated in its Proclamation of Independence. Why, then, despite its claim to be a liberal-Western democracy, did its parliament pass the Nation State Bill in July 2018? This thesis argues the passing of the Nation State Bill is the result of a historical tension over Israel's identity as both a Jewish and democratic state. Rather than seek answers based on contingent circumstances of the Arab-Israeli conflict, I argue attention must be paid to transformations within the judicial and legislative branches in the last 30 years. Over that time, the Supreme Court of Israel capitalized on its growing power to assume the responsibility of judicial review, and thus, the power to overturn Knesset legislation which ran afoul with democratic values. Concurrently, right-wing political parties co-opted fears of national security to enter mainstream Israeli politics. The conservative Knesset has used its growing influence to counter the Supreme Court's encroachment by seeking ways to institutionalize its policy goals. The Nation State Bill is an attempt by right-wing politicians to shift Israel's identity towards Jewish values and away from democratic values as retribution against challenges led by an activist court, especially in the sphere of immigration and citizenship policies. Through an analysis of the historical trajectories of these two institutions, this thesis demonstrates how a multi-disciplined approach is required when assessing and predicting the impacts of legislative actions in Israel.

A Historical Institutional Perspective on Israel's Basic Law: Nation State of the Jewish People

כָּל אֲהָבָה שֶׁהִיא תְלוּיָהּ בְּדָבָר, בְּטַל דָּבָר, בְּטֹלָה אֲהָבָה. וְשֶׁאֵינָהּ תְלוּיָהּ בְּדָבָר, אֵינָהּ בְּטֹלָה לְעוֹלָם.

Any love that is dependent on something, when that thing perishes, the love perishes. But a love that is not dependent on something, does not ever perish.

Pirkei Avot 5:19

Chapter 1: Introduction

Background

In the morning hours of July 19th, 2018, in a 62-55 decision,¹ the Israeli national parliament passed Basic Law: Israel as the Nation State of the Jewish People, known informally and herein referred to as the “Nation State Bill.” This highly controversial law proclaims Israel as the historic homeland of the Jewish people and grants Jews the unique right of national self-determination in the country. It establishes Jewish symbols as those of the state, affirms a united and complete Jerusalem as Israel’s capital, declares Israel’s responsibility to serve as an “ingathering of the exiles,” and seeks to strengthen its ties to the Jewish diaspora. By elevating the symbols, language, and religion of Jewish people, the Nation State Bill explicitly outlines a state-sponsored affinity for the Jewish ethno-religious group. The bill also solidifies certain nationalist policies valued by Israel’s right-wing politicians by introducing sweeping decisions on controversial topics such as the status of Jerusalem, which the Supreme Court has contested in recent history. Most importantly, by institutionalizing these values and ethnic preferences in the context of competing identities, the Nation State Bill represents a remarkably sudden shift away from Israel’s democratic character towards a nation with robust Jewish values.

Given Israel’s decades-long campaign to portray itself as a beacon of stability in a so-called virulent Middle East, as well as criticism of its occupation of Palestinian territories, the introduction of the Nation State Bill created reason for concern amongst both Israel’s supporters and critics. According to Israeli scholar Baruch Kimmerling, free elections and universal suffrage led to the establishment of Israel’s government in 1948. Israeli (primarily Jewish) citizens enjoy innumerable civil rights and liberties, resembling those of liberal democracies in the Western world.² Israel has continuously emphasized its democratic values by portraying itself as the only democracy in the Middle East. For example, the country’s relatively free press and freedom of expression has allowed Israel to cooperate with foreign media by conducting press conferences and sending out press releases³ about its technological innovations, considered symbols of free and creative thinking. But due to its competing identity as a Jewish state, as stipulated in its Proclamation of Independence, Israel has been uncertain in its application of rights to Israeli non-Jewish minorities. Supporters

1 Israel, Knesset Basic Law: Israel - The Nation State of the Jewish People Proclamation of Independence, <https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>

2 Baruch Kimmerling, *Religion, Nationalism and Democracy in Israel*, 6 Constellations: An International Journal of Critical and Democratic Theory 339 (1999), doi:10.1111/1467-8675.00150.

3Eli Avraham, *Marking and managing nation branding during prolonged crisis: The case of Israel*, 5(3) Place Branding and Public Diplomacy 202, 205 (2009), doi:10.1057/pb.2009.15

of the bill dispute the idea that Jewish values and democratic values cannot co-exist in Israel, pointing to a handful of democratic countries, including Hungary, Germany, and Romania, which have (or had) ethnically-selective immigration and citizenship policies.⁴ Negative reactions from the bill generally express dismay at the perceived erosion of Israel's democracy,⁵ although criticism has also veered towards the extreme and claimed that the law amounts to "apartheid."⁶

Why, then, despite claiming to be a Western democracy, did Israel pass the Nation State Bill in the summer of 2018? The bill's passage and resulting institutionalization of right-wing, nationalist ideals cannot be explained by mere contingent circumstance or by the intensification of the Israeli-Palestinian conflict. Although I demonstrate how security concerns have played a role in the Nation State Bill's development, these concerns do not fully explain the bill's passage at this particular moment in time. Given Israel's history of near-perpetual conflict with its neighbors, its security situation has remained volatile since its modern founding in 1948. 2018 was not characterized as a particularly intense year for the Arab-Israeli conflict. Nor was it in the midst of any periods of protracted violence, such as Israel's declared wars, or the First and Second Intifadas.

Rather, I explain the passage of the Nation State Bill as the culmination of deep-seated, historical tension concerning Israel's identity as both a Jewish and democratic state. More specifically, I argue that careful attention must be paid to transformations within the judicial and legislative branches in the last 30 years, marked by both the rise of judicial activism in the Israeli Supreme Court and the rise of mainstream right-wing politics in the Knesset, Israel's national parliament. The Nation State Bill is an attempt by right-wing politicians to pull the needle towards Jewish values and away from democratic values as retribution for an activist court's democratic challenges, particularly concerning immigration and citizenship.

I will first review three areas of relevant literature as they relate to the argument set forth by this thesis. I will then review the methodology for obtaining the evidence I use to support my argument. Finally, I will provide a

roadmap by summarizing the succeeding chapters.

Literature Review

Characterizing Israel as Democratic versus Jewish

Among scholars who discuss the characterization of Israel in the context of its Jewish and democratic identities, there is a general consensus on the existence of a dichotomy between these two sets of values. According to some scholars, this tension manifests as unequal treatment regarding the rights of non-Jews in Israel and the rights bestowed *de facto* on Jews. Sammy Smootha uses Israel to exemplify a diminished type of democracy according to his model, best referred to as an “ethnic democracy.” Countries in this category consider ethnic nationalism, rather than the citizenry, as the cornerstone of the state, meaning that rights are not extended equally to all citizens.⁷ For scholars like Smootha, Israel has a strong ethnic bias that forces a deviation from Western democratic values. Smootha’s conclusion is grounded firmly in his belief of a fundamental contradiction between Israel’s egalitarian universalistic-democratic character and its inegalitarian Jewish-Zionist character.⁸

The tension between these two characters extends particularly to Israel’s immigration and citizenship policies. Scholars point to specific laws as evidence of state-sanctioned separation of Arab families: The Law of Return guarantees the right of every Jew to immigrate to Israel, while the 2003 citizenship law singles out Arab groups. Proponents of the Law of Return argue that its framers aimed to correct the historical wrong of worldwide Jewish persecution, and the Supreme Court of Israel asserts that the citizenship amendment stripping Palestinians of the opportunity to live in Israel was passed due to national security concerns.⁹ Opponents of these laws, however, see them as drawing discriminatory distinctions between Jews and Arabs, an unacceptable quality for a country that claims to be a liberal democracy.¹⁰

Not all scholars who discuss the characterization of Israel’s institutions agree with the ethnic versus civic state distinction. Christian Joppke explicitly argues against this analysis, calling it “misleading,” because all nations have both an ethnic element defined by descent and origin and a civic element defined by associations of strangers that transcend immediate kinship.¹¹ Even if this distinction exists, according to Joppke, countries that would otherwise be classified as “ethnic” and “civic” have policies transcending their

7 Sammy Smootha, *The model of ethnic democracy: Israel as a Jewish democratic state*, 8(4) Nations and Nationalism 475, 478 (2002).

8 Smootha, *supra*, at 496

9 See Daphne Barak-Erez, Israel: Citizenship and immigration law in the vise of security, nationality, and human rights, 6(1) Int’l J. Const. L. 184, (2007), doi:10.1093/icon/mom036

10 Smootha, *supra*, at 490-491

11 Christian Joppke, *Selecting by origin: Ethnic migration in the liberal state* 17 (2005)

characterization. Those states generally considered “civic,” like the United States and the United Kingdom, heavily implemented policies at odds with pure liberalism throughout their respective histories, such as the 1921 national origin quota system in the US and the Aliens Act of 1905 in Britain.¹² Moreover, countries considered “ethnic,” such as Germany, have phased out open door policies aimed at encouraging co-ethnic immigration. Specifically, the “return” of ethnic Germans to Germany was a constitutional right enshrined in Article 116 of the Basic Law until a 1993 law limited the status of ethnic Germans to persons born before 1993.¹³ To Joppke, the religiously closed, non-territorial self-definition of the titular nation and the deep division of society demonstrates how Israel is a limited case of a liberal state.¹⁴ Joppke’s argument is distinct from Smooha’s, which fundamentally believes Israel’s Jewish and democratic characteristics cannot co-exist.

Kimmerling straddles both Smooha’s and Joppke’s assessments by arguing that Judaism is built into Israeli nationality. As a result of what Kimmerling calls the “Zionist hegemony,” Israel is not defined as state as belonging to its citizens, but to the entire Jewish people. His point is vital to the relationship between the right-wing and the Jewish diaspora, where the rise of an ultra-Orthodox, nationalist strand of politicians has facilitated the prominence of right-wing politics and reconfigured Israel’s relationship to the Jewish diaspora. He also suggests, however, that Western values contained in Israel’s universal and secular codes do not necessarily stand in contradiction to the state’s Jewish identity.¹⁵ Rather, any tension between the two sets of values are absorbed by Zionist hegemony, the unchallengeable social order that exists because there exist neither terms nor concepts with which to characterize and question it. From this phenomenon, Kimmerling concludes that the character of Israeli democracy is accepted by most measurements, but only within the parameters fixed by the Zionist hegemony, a regime continuously fluctuating between democracy and nationalist-theocracy.¹⁶

The classification of Israel’s identity has been subject to scrutiny by scholars across various disciplines and using a variety of lenses, which obscure the comprehensive analysis needed to create more informed assessments of

12 Alyssa Girvan, *The History of British Immigration Policy (1905-2016) Timeline Resource*, June 2018, University of East Anglia website, (Feb. 17, 2019), <https://static1.squarespace.com/static/5748678dcf80a1ffc26975/t/5b27e23d8a922dfca10ddeb1/1529340490557/Immigration+Timeline.pdf>

13 Christian Joppke & Zeev Rosenhek, Contesting ethnic immigration: Germany and Israel compared, 43(3) *European Journal of Sociology* 301, 303, 327 (2002), doi:10.1017/s0003975602001121.

14 Joppke, *supra* at 30.

15 Kimmerling, *supra* at 340

16 Kimmerling *supra*, at 340-341

Israel's actions. Joppke classifies Israel as part of the "diaspora constellation," characterized by nations with the belief that their co-ethnics are stranded and oppressed outside of the home state,¹⁷ as opposed to the "settler state constellation" or "postcolonial constellation." Kimmerling, on the other hand, considers Israel to be one of the "settler states," formed by a society of settler-immigrants and still an active settlement builder to this day.¹⁸ Despite the distinct reasoning the two scholars offer, they arrive at a similar conclusion about Israel's limited identity as a liberal democracy. Kimmerling, however, offers a more nuanced and complex view in his consideration of the way Israel's democracy is viewed by different groups. He suggests that Israel's democracy is seen differently by various people due to the Zionist hegemony and differing manners of consciousness, which represents the line of thinking I seek to capture.

The Court System and its Relationship to the Legislature in Israel

The Nation State Bill, which passed as a Basic Law meaning that it is constitutionally superior to statute laws, was perceived as a move to rebuke the court's growing role and so-called "judicial activism" in reversing the Knesset's legislation. Studies use the court's role in legislation as an experiment on the relationship between judicial and legislative branches, especially in a country that enshrines both religious and democratic values within its institutions. Scholars debate the possibility of these two values co-existing, and their scholarship about tensions between the court and the Knesset often describe when religious and democratic values come into conflict. The core of the conflict between the Supreme Court of Israel and the Knesset are the values each branch purports to represent. Part of the divide between the legislature and judiciary stems from varying accounts about where the Supreme Court derives the power it holds today. During the "Constitutional Revolution" in the early to mid-1990s, the Supreme Court began to scrutinize specific legislation from the Knesset, which putatively violates the constitutional-like Basic Laws, striking down laws deemed incompatible with them which essentially activated judicial review.

Scholars have shown how the Supreme Court of Israel expresses its concern for upholding democratic values, demonstrating that the "Constitutional Revolution" was a watershed moment for the Israeli legal system and constitutional politics. There exists disagreement, however, about the conditions influencing the court's decision to take a more active role in the legal system. David Kretzmer argues, in the absence of a formal bill of rights, that the Supreme Court filled a void in the protection of human rights,¹⁹ which is a responsibility

17 Joppke *supra*, at 29-30

18 Kimmerling *supra*, at 340

19 David Kretzmer, *The New Basic Law on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 14(2) *Netherlands Quarterly of Human Rights* 173 (1996).

that a democratic nation should undertake. According to Martin Edelman, the Court is seen as a guardian of fundamental values embedded in an objective legal order.²⁰ Yoram Rabin and Arnon Gutfel contend that the Court, as an independent body with no constitutional text to rely upon, based its protection of human rights on references to principles derived from the democratic nature of the State, from its “national spirit” and from the “social consensus,” all reflected in the State’s Declaration of Independence and in the history of Israel and the Jewish people.²¹ In this sense, the Supreme Court of Israel differs from Supreme Courts in other Western democracies due to its derivation of the power of judicial review. Nonetheless, it remains a representation of democratic values to these scholars.

Hirschl, however, proposes a different view. He argues that Israel’s “constitutionalization” was the planned strategy of a ruling political elite made up of a relatively coherent social class of secular neoliberals of European origin with disproportionate access to the legal arena.²² He uses evidence from the Basic Laws, which include entrenchment clauses to protect them from being overturned, as mechanisms for these elites to insulate their policy preferences from popular political pressure²³ and maintain their authority against the growing power of “peripheral” groups.²⁴

Like Kimmerling, Hirschl evokes the “Zionist hegemony” when speaking about the respective tensions between democracy and Judaism, as well as between legislature and judiciary. The political power that a relatively small group of Ashkenazi Jews purportedly had in the 1980s and 1990s suggests that an expansion of the Supreme Court that was not as independent as Kretzmer claims, raising questions over the judicial branch’s independence in the context of a nation which claims itself to be a full-fledged democracy with compatible Jewish values. Rather, the desire of Ashkenazi groups to defend their position against the growing power of fringe groups such as ultra-Orthodox and Russian immigrants reflects the fragmentation of Israeli politics seen during the election of 1996, which empowered the aforementioned formerly marginalized groups to make large gains in their political representation.

Through his interdisciplinary analysis, Diskin demonstrates an awareness of the complex mechanisms influencing the dynamic Israeli electoral system. He emphasizes the 1996 election in his historical survey of Israel’s institutional development, reaching across multiple dimensions of identity and politics to

explain the underlying processes by which the electoral system changed. He attributes the election of 1996 to the fragmentation of the Israeli political system, which increased the number of parties with Knesset representation to a peak of 15.²⁵ He highlights the national, ethnic, and religious cleavages between Jewish and Arab voters as well as those within the Jewish population,²⁶ distinguishing between Sephardic Jews and Ashkenazi Jews. Diskin draws on changing social, ethnic, and economic characteristics of Israeli society to demonstrate their effects on voter partisan affiliations. The multi-party system in the 1996 election derived from one of the court's first moves of judicial activism, when it elevated Basic Law: The Government to constitutional status following dissatisfaction with the conventional parliamentary system.

The Role of the Court and Right-Wing Politics in Immigration and Citizenship Policy-Making

Scholars have studied the roles that high courts and right-wing political groups have played in developing legislation, especially regarding citizenship and immigration. Studies contend that the real effects of radical right-wing politics occur largely due to the interaction between the radical right and established actors regardless of the radical right's assumption of power in the parliamentary body. For example, Minkenberg characterizes the right-wing in terms of its use of political "camouflage," which allows it to make ideological and strategic adjustments to new cleavage and opportunity structures in the absence of an open hostility to liberal democracies and the softening of racist and authoritarian messages in terms of "ethnopluralist" and "ethnocratic" concepts of politics and society.²⁷ Thus, in "stable democracies," the right-wing acts as a bridge between moderate conservatives and explicit anti-democratic, violent right-wing extremists.²⁸ Minkenberg largely speaks in terms of European powers and focuses on cultural policies. His analysis, however, can be extended to any countries with conditions that allow for interactions between political actors, and the realm of immigration and citizenship policies.

For the radical right-wing in this context, a rise into mainstream politics enables an appropriation of the dominant concept of nation and nationhood. Myra Waterbury explores the role of right-wing politics in the legislation of a bill which reinforces the relationship between a nation and its diaspora in her analysis of the legislation of the "Status Law" in Hungary in 2006. The Status Law conferred special privileges unto ethnic Hungarians living outside the physical borders of the nation. Waterbury argues right-wing elites in Hungary used and

26 Diskin, *supra* at 504.

27 Michael Minkenberg, *The Radical Right in Public Office: Agenda-Setting and Policy Effects*, 24(4) *West European Politics* 1 (2001).

28 Minkenberg, *supra* at 3.

co-opted transnational ties with the Hungarian diaspora to facilitate its rise into mainstream politics and to further their own political goals, which enabled the passage of the bill.²⁹ Dissatisfied with past silence from the Communist Party over the worsening situation of Hungarian ethnics in neighboring states, the right-wing FIDESZ party tapped into deeply held concerns about overcoming past injustices suffered by Hungary in an effort to re-construct its political ideology.³⁰ Thus, according to Minkenberg's idea of "political camouflage," one would expect the FIDESZ party to use the diaspora issue as a means of shaping conservative policies, given the support for liberal democracy after the collapse of communism and a platform for racist messages.³¹

In these cases of right-wing governments passing illiberal immigration and citizenship policies, are courts willing to override the legislative body on the grounds that those policies violate the constitution? Scholarly works discussing supreme court interventions in legislation outline how the oft-contentious relationship between the judiciary and other political actors is central to courts' decisions. There are two schools of thought about this relationship. The first, to which Joppke subscribes in his 2001 analysis of European Court of Justice (ECJ) and German courts, emphasizes how justices make decisions relying exclusively on their individual ideological preferences and are unmoved by their fellow justices or other political actors.³² Joppke outlines how the German Supreme Court had aggressively expanded the rights of non-citizen labor migrants and their families in the midst of government indecision about terminating guest worker programs in the country.³³ The court worked actively against the government's desire to draft anti-immigrant policies, and broadly interpreted a "freedom of personality" clause in the German Basic Law as giving aliens access to rights reserved for German citizens.

The other school of thought contends that justices are strategic when formulating their actions and consider the potential reactions of their policy competitors (i.e. the other branches of government). Bergara et al. employs an established econometric model to analyze data on the impact of institutional constraints on the U.S. Supreme Court's decision making to conclude that the U.S. Supreme Court justices do indeed adjust their decisions to presidential and congressional preferences. This inhibits justices from passing down a decision

29 Myra A. Waterbury, *Internal Exclusion, External Inclusion: Diaspora Politics and Party-Building Strategies in Post-Communist Hungary*, 20(3) *East European Politics and Societies* 483 (2006).

30 Waterbury, *supra* at 493.

31 Minkenberg, *supra* at 3.

32 Mario Bergara, et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28(2) *Legislative Studies Quarterly* 247 (2011).

33 Christian Joppke, *The Legal-Domestic Sources of Immigrant Rights*, 34(4) *Comparative Political Studies* 339(2001).

that would be overturned by an act of Congress if Congress replaced the decision with a policy that, in the view of a majority of the court, led to an inferior outcome.³⁴ This perspective fails to address the dynamics that exist between judiciaries and legislatures in other countries, but the general relationship is still useful in exploring the nuances of the conflict between the Israeli Supreme Court and the Knesset.

Scholars have also discussed the role that public opinion plays as a factor in the decisions of the Supreme Court of Israel. David Barnum's study of the relationship between the policy preferences of the U.S. Supreme Court and those of public preference yielded the conclusion that the court's decisions in overturning legislation were often supported by trends in nationwide public opinion.³⁵ When such support was lacking, the court seemed reluctant to act. His analysis offers deeper insights into the characterization of the U.S. Supreme Court, post-New Deal, as a "counter-majoritive activist" in which unelected judges use the power of judicial review to nullify the actions of elected executives or legislators, acting contrary to "majority will."

There are two ways, according to Barnum, to resolve this tension between judicial review and majoritarian principles. One is to assert majoritarian principles that do not exhaust the controlling tenants of democracy, which allows for some policy decisions to be made by an institution relatively insulated from political pressure. In his analysis of the EU, Joppke argues the ECJ used its "hermeneutic monopoly" on interpreting EU treaties to expand the concept of a worker and a worker's rights in sufficiently broad terms.³⁶ Although Joppke concedes there is legal space for the ECJ to apply the doctrine of implied powers to citizenship and nationality policies, he argues that the court contradicted the interests of EU member states by turning demand-induced migration into supply-induced migration.³⁷ Thus, although there might be legal space for an independent institution to legislate, the ECJ demonstrated how courts can also act against the interests of constituents.

The second way to resolve the tension surrounding majoritarian principles and judicial review is to establish that the supreme court does not often render counter-majoritarian policy decisions.³⁸ Dahl finds instead that policy outputs of the court were likely to conform to the policy preferences of the dominant coalition in national politics in the long run.³⁹ The research I put forth

34 Bergara, et al., *supra* at 249.

35 David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47(2) *The Journal of Politics* 652(1985).

36 Joppke, *supra* at 354.

37 Joppke, *supra*, at 355.

38 Barnum, *supra*, at 653.

39 Robert A. Dahl, *Decision-Making in a Democracy*, 1 *Role of the Supreme Court Symposium* 279-95 (1957).

confirms that the Supreme Court of Israel infrequently rules on counter-majoritarian principles, but the significance of those decisions, which did run contrary to the dominant right-wing coalition, have contributed to the combative relationship we observe today between the court and the Knesset. The lack of attention paid to the significance of these legal departures in the literature signals a need to analyze the dynamics of such events when discussing the role of the court and right-wing political groups in legislating policies.

Limitations of the Literature and My Contributions

The scholarship in these fields offer narrow and deep explanations of how Israel's key issues and institutions impact its national identity. No body of work, however, attempts to map and integrate their historical trajectories to explain the passage of legislation. Explaining the passage of a law, especially one as consequential as the Nation State Bill, can identify underlying mechanisms that shape a nation's identity. Due to the myriad political, legal, and social forces at work in democratic legislatures, accounting for these forces is vital when evaluating the Nation State Bill. The comprehensive analysis offered by this paper highlights the nuances of the Nation State Bill and the impact it has on a deeply divided Israeli society with an ambiguous Jewish identity.

Moreover, although scholars attest to the independence of the Supreme Court of Israel's actions during the "Constitutional Revolution," none have extended their analysis beyond the political implications of the revolution. Due to this lapse in the literature, there remains an opportunity for empirical analysis of the ramifications of the court's judicial review power. Despite the "soft legal principles" Kretzmer discusses, which he argued had minimal influence on the Knesset's actions, the Supreme Court has engaged in a form of judicial activism that has intervened in several cases involving Knesset laws. These laws have dealt with controversial topics, including citizenship rights for Palestinians and the treatment of African asylum seekers in internment camps. The result has widened the divisions between the judicial branch and the legislative branch as they clash over who has the authority to decide the identity of Israel as a Jewish and democratic state. This paper seeks to break down, analyze, and shed light on the role of these tensions in the passage of the Nation State Bill.

Methodology

I relied upon political science, legal, and sociological scholarship from secondary sources to conduct a historical analysis of the key issues and institutions that shaped the development of the Nation State Bill. Given the recent passage of the bill, I use diverse news sources from publications across the political spectrum to situate scholarly evidence on legal and political systems in the Israeli context. Scholarship highlights how public opinion plays an especially vital role in shaping legislation and the decisions of the Supreme Court of Israel,

so I use newspaper articles from domestic Israeli sources as well as international publications to supplement my analysis with public perspectives. I chose articles which presented supportive, dissenting, and ambiguous opinions on the Nation State Bill by using keyword Google searches including “Nation State Bill racist” and “Nation State Bill support.” The diverse array of news sources reflects the nuances I seek to capture, including highlighting the tensions that exist between Israel’s democratic and Jewish identities. I therefore use multiple news outlets at various points. Moreover, I will examine the results of surveys developed to gauge public opinion about African asylum seekers and relations with Palestinians, as these issues are closely connected to the conflict between the Supreme Court and right-wing government.

Chapter Organization

The following chapters lay out the key issues and tensions contained in the Nation State Bill, and analyze the trajectories of two institutions centered around these debates. Chapter 2 will situate my argument within the historical tension between Jewish and democratic values as well as the tension in the relationship between Israel and the Jewish diaspora. These debates are important because of the division between the Supreme Court of Israel and the right-wing political establishment, as they subscribe to opposing views with respect to citizenship and immigration. The chapter will discuss how these issues have appeared before the court, analyze the impacts of the decisions reached, and demonstrate how the direction each institution leaned served to deepen the intensification of the conflict between the legislature and the judiciary.

Chapter 3 will present the significance of the Supreme Court’s influence on these main issues and tensions by surveying the trajectory of its development throughout Israeli history. I argue that the Supreme Court could not have played such a large role in the conflict with the legislature and the development of the Nation State Bill without the impetus of several critical events that occurred in the 1990s. These events allowed the court to assume the power of judicial review. The court intervened in several significant cases involving democratic values, such as the treatment of African asylum-seekers, a decision which diverged from conservative politicians’ nationalistic views. Thus, the debate between the court and the Knesset has brought up a question about the balance of powers between the two branches in the context of legislating and ruling on substantial issues.

Chapter 4 analyzes the trajectory of right-wing politics in Israel from their first ascent to the premiership in 1977 through the present day. I argue that the actions of right-wing politicians, particularly the passing of the Nation State Bill, have been responses to the growing influence of the Supreme Court of Israel. Conservative politicians have sought to institutionalize their policies to safeguard them from an intruding court. I will provide evidence that a series of events leading to the court’s inclusion in mainstream Israeli politics made this

type of intervention possible. Given the high-profile nature of the tensions and issues placed before the court and its decisions, the question of which branch has the power to control legislation has emerged. This question carries significant implications for Israel's identity as a Jewish or democratic state.

The final chapter reiterates the argument that the Nation State Bill was a form of retribution executed by the Israeli right-wing political establishment to inhibit the Supreme Court's democratic challenge. The trajectories of both of these institutions allowed each to procure the power to shape key issues, and the Nation State Bill constituted the critical juncture at which these developmental paths collided. The chapter then highlights reactions to the passage of the bill and discusses the Nation State Bill's future effects by focusing on a movement by contemporary conservatives to overturn the court's rulings on several key decisions. I conclude with a discussion of the importance of considering issues surrounding Israel with a more nuanced perspective.

Chapter 2: Setting Up the Issues

Introduction

The culmination of nearly two decades of political debate over Israel's Jewish and democratic identities, the Nation State Bill received substantial criticism upon its passage from various political, religious, and ethnic groups both in Israel and throughout the world.⁴⁰ Some of the most divisive aspects of the bill include sweeping affirmations of Israel as the national home of Jewish people and of the exclusive Jewish right to national self-determination in Israel. Furthermore, the bill reiterates Israel's mission to ensure the safety of all Jews worldwide; to strengthen its relationship with the diaspora; and to preserve the cultural, historical, and religious heritage among Jews in the diaspora.⁴¹

What were the underlying tensions in Israel that drove the passage of the Nation State Bill? How did these tensions manifest in court, and what were the implications of the court's decisions for the conflict between the judiciary and legislature? This chapter places my argument within the context of the historical tension between Jewish and democratic values, as well as the tension over the

40 For examples of criticism, see: Liebermann, O. (2018, July 19). Israel passes controversial 'nation-state' bill into law. Retrieved March 1, 2019, from <https://www.cnn.com/2018/07/19/middleeast/israel-nation-state-legislation-intl/index.html>, Green, E. (2018, July 21). Israel's New Law Inflames the Core Tension in Its Identity. Retrieved March 1, 2019, from <https://www.theatlantic.com/international/archive/2018/07/israel-nation-state-law/565712/>, and Lis, J., & Landau, N. (2018, July 19). Israel passes controversial Jewish nation-state bill after stormy debate. Retrieved March 1, 2019, from <https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048>

41 Israel, Knesset. (2018). Basic Law: Israel- The Nation State of the Jewish People. Jerusalem.

proper relationship between Israel and the Jewish diaspora. I argue that the manifestations of these tensions are evident in the divisions between the Supreme Court and right-wing politicians, who take opposing stances on whether to use Jewish or democratic values when ruling on legislation regarding immigration and citizenship. Debates on the proper extent of Israel's relations with the Jewish diaspora have resurrected the question of who comprises the Jewish population, an issue that right-wing conservatives have sought to safeguard from the activist court through the Nation State Bill.

The first section of the chapter will discuss the tension that exists between Jewish and democratic values in Israel. It recounts steps that the Israeli government has taken to promote Jewish ideas over democratic ones and analyzes a supreme court case regarding non-citizen rights that highlights the differing views between the judicial and legislative branches. The chapter then shifts to discuss tension over Israel's treatment of the Jewish diaspora and preferential immigration policies contingent on Jewish identity. I conclude this chapter by examining two cases that demonstrate the contested Jewish identity and the starkly different outcomes that can occur depending on a variety of circumstances including political climate, economic needs, and race.

The Tensions Between Jewish and Democratic Values

Background

Following the end of the Six Day War in June 1967, the Israeli government sought ways to capitalize on support from the Jewish diaspora and inspire them to make aliyah in the vise of its unique security situation and perceived need for a demographic boost. After the upheaval of the center-left government in 1977 by a right-wing coalition, over 250 Jewish settlements were constructed until it became clear that there were insufficient numbers of Jews to adequately populate all of these settlements.⁴² The lack of Jews in these settlements stemmed from fears for Israel's security, as the 1980s were a time of increased Arab terror acts against Israel.⁴³ The sentiment among the Jewish diaspora was that there was no way to overcome the Arab masses on the "other side"—in Judea and Samaria (which together constitute the West Bank) and the Gaza Strip.⁴⁴ Thus, the government pursued ways to reconcile its immigration policies with the security fears plaguing its efforts to achieve steady Jewish settlement in Israel.

Israel's complicated geopolitical history, doubts about its sovereignty,

42 Arnon Soffer, *Demography and the shaping of Israel's borders*, 10 *Contemporary Jewry* 91-105 (1989).

43 Israel Ministry of Foreign Affairs, *1967-1993: Major Terror Attacks*, 2013, <https://www.mfa.gov.il/mfa/aboutisrael/maps/pages/1967-1993-%20major%20terror%20attacks.aspx>.

44 Soffer, *supra*, at 96.

and its tenuous security situation have increased the salience of its illiberal immigration policies. These policies separate the nation from other Western democracies. Fitzgerald explains that the United States and Argentina discriminated against Eastern Europeans and restricted their entry due to fears of anarchists, Communists, and other radicals throughout the early 20th century.⁴⁵ However, as nation-states developed, these security concerns faded. That is, until the two world wars brought about the exclusion of enemy aliens. Since Israel has consistently worried about its security given its volatile history, these concerns are still present and corroborate its motives of using immigration and emigration as policy tools. Policies including the Law of Return, which stipulates the right of any Jew to immigrate to Israel and gain citizenship, have been amended several times by the Supreme Court of Israel. These amendments challenge the aims of the right-wing political establishment.

Israel's ethnically-selective laws have undergone adjustments based on its changing security and ethnographic needs. The Law of Return was revised several times to reflect the growing need for Jewish immigration, but is unique among ethnically-selective policies in other countries in its requirement for the physical movement of co-ethnics to the kin state. Although the Law of Return recognizes the ethno-cultural membership of Jews who do not possess formal citizenship status, it does not grant symbolic recognition nor give the same set of quasi-benefits to co-ethnics.⁴⁶ Such benefits have been conferred unto co-ethnics in Central and Eastern European countries regardless of citizenship status. Rather, the requirement of formal movement of the Jewish diaspora to Israel is a vehicle to serve state goals, namely consolidating a Jewish majority within its boundaries.

Scholars use these policies to characterize Israel as an ethnic or illiberal democracy, emphasizing the extent to which the state uses national security to implement policies that encourage immigration among the Jewish diaspora. Although the Israeli government does not recognize them as illiberal, a common justification for these policies stems from the fear that the immigration of non-Jews will lead to a demographic crisis, namely the loss of the Jewish majority in Israel. This phenomenon, pertinent to Israel's conflict between religious and democratic values, demonstrates the inextricable link between Jewish immigration and ethnic nationhood—the crux of the Nation State Bill. Like the pioneering sentiment felt by Jews following Israel's victory in the Six Day War, the full significance of Jewish immigration derives from a geopolitical

45 David Scott FitzGerald & David Cook-Martín, *Culling the masses: The democratic origins of racist immigration policy in the Americas* §

46 Yossi Harpaz, *Compensatory citizenship: A comparative study of dual nationality in Serbia, Mexico and Israel*, 2016.

environment in which demography is destiny.⁴⁷

Tzaim v. Prime Minister (2018)

The case of *Tzaim v. Prime Minister* demonstrates how tensions between Israel's democratic and Jewish values have unfolded within the sphere of illiberal citizenship and immigration policies. The Supreme Court's decision ultimately rejected the right-wing government's stance. In the case, five Palestinian women living with cancer in the Gaza Strip were denied entry into Israel, where they sought medical treatment. The state denied the women on grounds that they were first degree relatives of Hamas members. This was part of a government policy preventing family members of Hamas members older than 16 years in age from entering Israel for any reason.⁴⁸ The law was instituted as part of Israel's attempt to pressure Hamas into returning the bodies of two Israeli soldiers from Operation Defensive Shield in 2014, as well as two Israelis who entered the Gaza Strip after the operation.⁴⁹

The appeals from the Palestinian women reflect the boundary between democratic and Jewish values. The five women, along with several Israeli, Arab, and Palestinian human rights groups, petitioned the Supreme Court to overturn the government's decision on the grounds that it was arbitrary, unreasonable, disproportionate, and a deviation from international humanitarian norms. The state argued that Israel is not legally responsible for Gaza residents and maintains the right to refuse entry except in exceptional humanitarian circumstances, following former Prime Minister Ariel Sharon's unilateral retreat from Jewish settlements in the Gaza Strip in 2005 at the insistence of Gazans and the international community. More broadly, the state argued that Israel has discretion over who enters the territory it governs and that no foreigner has the right to enter the country or pass through even for medical treatment.⁵⁰ Since Hamas threatens the security of Israel⁵¹ and Jewish values, Israel's ban on its neighbors from entering the country exemplifies the state's focus on protecting and preserving Jewish values.

The Supreme Court's decision demanding that the state grant the women permission to pass through Israel reflects a stronger commitment to democratic values than the right-wing government establishment, whose commitment more

48 Tamar Hostovsky Brandes & Idit Shafran Gittleman, *The Israeli Supreme Court's Decision in Tziam v. the Prime Minister*, LAWFARE, Sep. 24, 2018, at 3, <https://www.lawfareblog.com/israeli-supreme-courts-decision-tziam-v-prime-minister>.

49 Times of Israel Staff, *Court rules state must allow Hamas relatives into Israel for cancer treatment*, TIMES OF ISRAEL, Aug. 27, 2018, at 3, <https://www.timesofisrael.com/court-rules-state-must-allow-hamas-relatives-into-israel-for-cancer-treatment/>.

50 Brandes & Gittleman, *supra*.

51 The Charter of Hamas art. 28, para. 2.

closely followed Israel's Jewish values. According to the court, Israel is bound by criteria for accepting and rejecting requests based on legitimate considerations in line with the state's basic constitutional ethics. The recognition and preservation of life, even that of an enemy alien, are significant to Israel's values as a democratic and Jewish state. Further, the policy was incompatible with the value of individual responsibility, which prohibits punishing individuals for the actions of others, such as immediate family members, and the ban did not allow for what the court believed to be a system of case-by-case examination. Although the Supreme Court did not strike down the entire policy of restricted access for Gaza residents, its decision based on the state's respect for all life drew upon its democratic values. The roots of the court's interpretation of Israel's 'basic values' come from the "Constitutional Revolution" in the early and mid-1990s, a topic discussed at length in Chapter 3 which gave the court broad new powers to interpret Israel's constitutional laws.

The reaction from right-wing Knesset members highlights the disparity between the state's and Supreme Court's priorities for Israel's identity. Knesset member Betzalel Smotrich from the conservative Jewish Home Party tweeted soon after the court's decision that the ruling demonstrated a "lack of responsibility shown by judges for the state's security." He also drew on the commonly-held right-wing notion that the court was participating in "activism on steroids with no legal basis,"⁵² alluding to previous criticism for overturning legislation passed by the Knesset on the basis of democratic values versus Jewish ones. Despite the court's order to consider each request for medical treatment on a case-by-case basis, the state continued to systematically uphold the ban on Gaza residents. According to Haaretz, Israel has denied requests from potential Palestinian patients because they had relatives who moved to areas of the West Bank controlled by the Palestinian Authority (PA) without Israeli permission.⁵³ Although the government has stated that it reserves the right to decide whether Gazans can move to the West Bank, this judgment violates the Oslo Accords-- which recognize Gaza and the West Bank as one territory. As Chapter 4 explores, Prime Minister Netanyahu rose to prominence on criticism of the Oslo Accords as too soft on Palestinians. This tension between the court and the legislature serves as the basis for the creation of the Nation State Bill, and manifests in other cases and tensions as well.

The Tension Between Israel and Its Diaspora

Background

Within the Jewish community, comprising Israeli Jews and the Jewish diaspora, lies a deep-seated tension between Israel's national identity and its obligations as a liberal democracy. This relationship is enshrined in Israel's Proclamation of Independence, where the country's founders wrote an appeal "to the Jewish people throughout the Diaspora to rally round the Jews of *Eretz-Israel* in the tasks of immigration and up-building and to stand by them in the great struggle for the realization of the age-old dream - the redemption of Israel."⁵⁴

The relationship between Israel and the Jewish diaspora, however, is not predetermined. The Proclamation of Independence affirms the existence of this relationship, but does not further explain the specific contours of the interactions between the state and its co-ethnics. Israel's stated purpose is to serve as the homeland for a specific ethnic group, where diaspora members of that ethnic nation are preferred to non-members.⁵⁵ The disparity in treatment of ethnic Jews and non-Jews is widely apparent in Israel⁵⁶ and has historical roots. The difference in treatment has resulted in starkly depleted social outcomes and economic opportunities for non Jewish-groups, such as in housing and in the labor market.⁵⁷ Most recent in the line of institutionalized preferences is the Nation State Bill, which reaffirms sole Jewish rights to national self-determination in Israel and promotes the establishment of Jewish settlements. The bill devotes an entire section to Israel's connection with the Jewish people, specifying that the state shall act within the diaspora to strengthen the affinity between the state and members of the Jewish people.⁵⁸

Although ambiguity exists regarding the precise relationship between Israel and the Jewish diaspora, it is not the only case in which the relationship between the kin state and its diaspora have been institutionalized and contested. Joppke and Rosenhek compare the Jewish affinity for Israel as its homeland with the affinity that ethnic Germans have for Germany, as ethnic Germans are also believed to be identical with the state-bearing nation.⁵⁹ The right of return for ethnic Germans was a constitutional right, designed as a temporary remedy for

54 Israel, Knesset. (1948). Proclamation of Independence. Tel Aviv.

55 Smooha, *supra*, at 477.

56 Ames Hampshire. (2009). *Selecting by Origin: Ethnic Migration in the Liberal State*. By Christian Joppke. Cambridge, Mass.: Harvard University Press, 2005. Pp. xi+330. \$49.95. *American Journal of Sociology*, 114(6), 1885–1887. <https://doi.org/10.1086/600323>

57 Barbara S Okun & Dov Friedlander (2005). Educational stratification among Arabs and Jews in Israel: Historical disadvantage, discrimination, and opportunity. *Population Studies*, 59(2), 163-180. doi:10.1080/00324720500099405

58 Israel, Knesset. (2018). Basic Law: Israel- The Nation State of the Jewish People. Jerusalem

59 Joppke & Rosenhek, *supra*, at 303.

ethnic Germans in the Soviet Union who were deemed by the government to have been persecuted for their German ethnicity after World War II. Despite the law, a struggle in Germany occurred over whether an ethnic or civic definition of German nationhood should take precedence. The civic definition strengthened over time⁶⁰ and resulted in the demise of the German Law of Return in 1993. In contrast to Israel's migration-focused approach, Waterbury discusses Hungary's passage of the far-reaching "Status Law," which grants special benefits and subsidies to millions of ethnic Hungarians living in neighboring countries.⁶¹ Similar to Israel, Hungary's relationship with its diaspora has been an important feature of both domestic politics and foreign policy, but has been contested throughout the changing priorities of each Hungarian administration.⁶² Diaspora relations play a significant role in the trajectory of the kin state's policies, which impact both members and non-members of the ethnic state.

Jewish Membership Case Studies

The contestation concerning Jewish identity, a topic addressed by the Nation State Bil, has also manifested in previous cases throughout Israeli history. Concurrent with the collapse of the Soviet Union in the late 1980s and early 1990s, large influxes of Russian immigrants made their way to Israel under the Law of Return despite their un-*halachic* recognition as Jews. This period also witnessed the emergence of a group of Ethiopian Jews who were left behind by an Israeli airlift operation. Their status as Jews was dubiously recognized by the government, which created conflict over the state's responsibility to them. These two cases encapsulate the tension over Jewish identity, further complicating Israel's relationship with the diaspora and the Nation State Bill.

Soviet 'Jewish' Immigration

The mass immigration of Jews from the former Soviet Union represented one of the first times in Israel's history in which religious and right-wing political groups were willing to overlook the *halachic* definition of a Jew, determined by *Halacha* (Jewish law). The origins of Israel's acceptance of these Russian immigrants arose from its geopolitical struggle during the First Intifada.⁶³ Increased violence during the Palestinian uprising resulted in a heightened demands for foreign workers. At the same time, the government was seeking to decrease its reliance on Palestinian labor. Since the 1960s, Palestinian labor had been more frequently used for low-skilled jobs in Israel in sectors such as

60 Joppke & Rosenhek, *supra*, at 306.

61 Waterbury, *supra*, at 484.

62 Waterbury, *supra*, at 485.

63 Ian S. Lustick (1999). Israel as a Non-Arab State: The Political Implications of Mass Immigration of Non-Jews. *Middle East Journal*, 53(3), 417-433. Retrieved February 7, 2019.

construction, agriculture, and services.⁶⁴ Then-Prime Minister Yitzhak Rabin believed that the “separation” of Israeli and Palestinian people would foster peace, meaning the importation of foreign labor became a temporary measure to help the country reconstruct the economy and free itself from dependence on cheap labor from the Palestinian territories.⁶⁵ The government’s desire, along with the timely collapse of the Soviet Union and succeeding outflow of Russians from the country, laid the groundwork for an increasingly blurred definition of Jewish identity, and exposed underlying motivations for Israel’s “illiberal” immigration policies.

Russian immigrants’ status as Jews demonstrated Israel’s willingness to rebuke the status quo of Jewish identity to build and maintain a Jewish majority against the perceived rising Arab influence in the country. Looking at Western Europe’s history of importing foreign labor and the tendency of these “temporary” workers to settle permanently in the host country, government ministers wanted to avoid a similar situation in Israel. They believed adding large numbers of non-Jews would make the country suffer in terms of its ethnic dimension.⁶⁶ Especially during a time of high levels of Jewish emigration, low levels of Jewish immigration, and diminishing Jewish rates of natural increase relative to Arab rates, an Arab majority within the administrative and political jurisdiction of Israel appeared imminent⁶⁷ to government actors.

The Law of Return allowed for preferential immigration of Russians to Israel due to the broader criteria established by the amendment. Primarily, traditional criteria stipulates that one is a Jew only if his/her mother is Jewish.⁶⁸ According to the updated Law of Return, however, the right to immigrate is extended to include the children and grandchildren of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew. The purpose was to ensure the unity of families where intermarriage had occurred,⁶⁹ which is against the Orthodox interpretation of Jewish identity. According to the law then, it became possible for dozens of people who have never considered themselves Jewish and who would not be considered Jewish upon arrival in Israel to qualify for Israeli residence and citizenship.⁷⁰

The allowance of these Russian immigrants accomplished both Israel’s short- and long-term goal of bolstering the domestic Jewish population despite its departure from a strict Orthodox interpretation of Jewish identity. According to Dumbrava, ethno-nationally sensitive migration and citizenship policies (such as

64 David V. Bartram. (1998). Foreign Workers in Israel: History and Theory. *International Migration Review*, 32(2), 303-325. doi:10.1177/019791839803200201

65 Bartram, *supra*, at 314.

66 Bartram, *supra*, at 304.

67 Lustick, *supra*, at 425.

68 Jerusalem Report, 6 July 1998, p. 6.

69 Lustick, *supra*, at 422.

70 Lustick, *supra*, at 422.

the Law of Return) can reduce the need to rely on non-ethnic immigrants to fill labor shortages, and also contribute to the re-adjustment of the ethnic structure of the population.⁷¹ This case of Russian immigration illustrates both of Dumbrava's points, ultimately contributing to the formal reproduction of the preferred ethnic group's population, on the basis that these immigrants could still contribute to the demographic consolidation of the Jewish state.⁷² In the short term, the Israeli government sought to create employment for the new Russian immigrants, due to fear that they might leave for the United States rather than seek employment in Israel. This would be seen as a failure of Zionism. Thus, the government made the replacement of Palestinian workers with highly educated Russian Jews a national mission⁷³ This case also illustrates an implicit long-term goal of the Law of Return, which is to construct and maintain a Jewish majority against non-ethnically Jewish influences. The law was not designed to ward off unwanted immigrants, but to encourage desired immigrants.⁷⁴ Israel demonstrated its commitment to serving as the Jewish homeland, even if it had to adjust the definition of a Jew's identity to do so.

The Falash Mura

The case of the Falash Mura demonstrates the salience of a contested Jewish identity that transcends race and emphasizes preference for certain traits over others within the ethnic group. These Ethiopian nationals constitute groups left behind following the 1991 airlift of over 14,000 *Falash* (Ethiopian) Jews to Israel because they were designated by the Israeli government as descendants of converts⁷⁵ and therefore not authentic Jews. The Falash Mura have long claimed to be part of the Beta Israel community of Ethiopian Jews. Their ancestors converted to Christianity, but today many of them claim their right to "return to Judaism" in the context of a mass migration to Israel. Despite the comparable non-Jewish background of the Falash Mura, the Israeli state considered the case different from that of Russian immigrants. Whether the Law of Return should apply to a group of dark-skinned Ethiopians believed to have Jewish ancestry, yet descended from Christian converts, has provoked enduring dispute about the definition of a Jew, particularly because the Falash Mura allegedly had ample reasons to want to leave a war-torn Ethiopia rather than seeking to "return to

71 Costica Dumbrava. (2016). Reproducing the nation: Reproduction, citizenship and ethno-demographic survival in post-communist Romania. *Journal of Ethnic and Migration Studies*, 43(9), 1490-1507. doi:10.1080/1369183x.2016.1221335

72 Jaeun Kim. (2019). Ethnic capital, migration, and citizenship: A Bourdieusian perspective. *Ethnic and Racial Studies*, 42(3), 357-385. doi:10.1080/01419870.2019.1535131

73 Bartram, *supra*, at 310.

74 Joppke, *supra*, at 192-193.

75 Don Seeman, *Agency, Bureaucracy, and Religious Conversion: Ethiopian 'Felashmura' Immigrants to Israel*. In *The Anthropology of Religious Conversion*, (2003).

Judaism.”⁷⁶

The dynamics of the Falash Mura case, categorized by a combination of bureaucratic, religious, ethnographic, and historical accounts of agency,⁷⁷ have resulted in a system of conflicting criteria for Jewishness by which these immigrants are judged. Seeman documents the rituals of domination that immigrating Falash Mura have been subject to during the conversion process. Such rituals include a symbolic circumcision in public to the shaming gaze of outsiders, as well as formal and informal scrutiny to verify the authenticity of their religious practice at the immigrant center. Comparing the Falash Mura’s plight to the relative ease of white immigrants from Russia helps highlight the latent racial preference circulating in notions of Jewish belonging.

Thus, we observe the value Israel places on certain traits, such as race, within the Jewish community when encouraging ethnic immigration. Although both Russian and Falash Mura immigrants are required to undergo state-regulated religious conversions before enjoying equal rights and civil recognition as “untainted” Jewish immigrants,⁷⁸ Russians were rarely questioned about the sincerity of their motive to leave their home country and commit to Judaism. The Falash Mura, on the contrary, had to show that their motivation for immigrating to Israel did not predicate on their desire to leave Ethiopia.⁷⁹ Further, they had to demonstrate their sincerity to “return” to the religion of their ancestors under profound distrust of their commitment to Judaism. Through these rituals, Falash Mura immigrants learned that their submission was never “enough”⁸⁰ in the eyes of political elites or parts of the general Israeli public.

Key Findings

In the context of Israel’s immigration policies that are skewed in favor of Jews, there exists tension among the Jewish diaspora and the state about the definition of a Jew. These policies create more co-ethnics rather than consolidating the pre-existing ethnic community. There also exists tension over which Jewish traits the state values. The case of the Russian immigrants illustrates an instance in which religious and right-wing parties were willing to forgo their strict definition of a Jew in an effort to continue favored Jewish immigration.

Certain political, economic, and racial factors are also at play when it comes to determining the ease with which diaspora Jews can immigrate to Israel. Originally left out of the Ethiopian-Jewish migration in 1991, the Falash Mura have been subject to extreme scrutiny and suspicion from Israelis over their

76 Kim, *supra*, at 369-370.

77 Seeman, *supra*, at 30.

78 Kim, *supra*, at 369.

79 Seeman, *supra*, at 30.

80 Seeman, *supra*, at 37.

commitment to Judaism, even subjecting themselves to harsh conditions once arriving to prove their “worthiness.” Such immigration policies highlight and perpetuate ideas reflected in the Nation State Bill--a bill that embodies Israel’s efforts to construct its national identity as a Jewish state at the expense of the diaspora it was created to serve.

Conclusion

A host of issues within Israel’s boundaries perpetuated a series of tensions that have sown conflict between the judicial branch and legislative branch. Israel’s complex geopolitical history, national security concerns, and preoccupation with maintaining a Jewish demographic majority have led to debates over whether Jewish or democratic values should be favored in the public sphere. The court, a bulwark for democratic values, has frequently clashed over a series of illiberal immigration and citizenship policies imposed by the nationalist, right-wing legislature. The case of the Palestinian women unable to acquire proper medical treatment as a result of the ban highlights the ramifications of policies aimed at protecting the Jewish identity of Israel. Overall, the blanket ban on Gaza residents undermines democratic values. Although the idea of a strong bond between Israel and the Jewish diaspora lays within its Declaration of Independence, conflict between the Supreme Court of Israel and Knesset has implicated the question of Jewish identity itself. The analysis of two cases of recent Jewish immigration to Israel demonstrates the various dimensions along which Israel has adjusted the legal definition of a Jew to fit its present circumstances. The dynamic between the Supreme Court and the Knesset has been complicated by the right-wing government’s attempts to institutionalize its own nationalist and Jewish-centered policies against intervention from the court. Tension between Jewish and democratic values, as well as tension over Israel’s relationship with the Jewish diaspora, have become public issues over which the legislature and judiciary attempt to use their increasing power to mold Israel’s identity.

Chapter 3: The Supreme Court of Israel and Judicial Activism

Background

The increasing power of the Supreme Court over the past 20 years led to an intense power struggle between the judiciary and legislature, a divide that would later play an instrumental role in the development of the Nation State Bill. Until 1992, the court operated without a working constitution⁸¹ until abruptly bestowing upon itself the power of judicial review. In addition to fueling the

81 Gideon Sapir, *Constitutional revolutions: Israel as a case-study*, 5(4) International Journal of Law in Context 355 (2009).

debate about the balance between Israel's Jewish and democratic values, this move to judicial review unearthed the tension over the separation of powers between the legislative and judicial branches. Progressives have viewed the court as an essential institution that defends human rights and serves to check the power of the executive. Conservatives, however, have called the court and then-Chief Justice Aharon Barak (who declared this the "Constitutional Revolution") an "activist" in a pejorative sense. This resentment stems from his alleged usurpation of political power and violations of the separation of powers.⁸²

From where exactly did the Supreme Court derive its power of judicial review? What are the substantive issues which have exacerbated the divide between the judiciary and legislature? This chapter examines how the court's repeated interpretations of Israel's Basic Laws at the expense of Knesset laws have motivated the conservative legislature to institutionalize their nationalist policies as a safeguard against the court's encroachment. I argue that the Supreme Court obtained its power through a series of critical events and have since wielded this power via judicial activism to oppose the Knesset in several decisive court cases. I will first survey and analyze the historical trajectory of the Supreme Court to understand the origins of its power and later use of judicial review and activism. I will then examine two court cases which demonstrate the tensions between the court and the Knesset over the separation of powers and Israel's identity.

History of the Israeli Supreme Court and Lack of a Constitution, 1948 – 1992

On the eve of Israel's modern founding, the first government was founded not from the provisions of an official constitution, but rather was based solely on the principles explicitly outlined in the Declaration of Independence. The lack of a constitution, however, precipitated debate among members of Knesset who disagreed about the form, content, and even need for a constitution. Shortly after, in 1950, the First Knesset issued what became known as the "Harari Decision." Named after its champion MK Yitzhak Harari, the Harari Decision called for the creation of a specific Knesset committee tasked with forming the constitution in "steps", chapter by chapter, until it was deemed "complete." Each chapter would be represented by a Basic Law and would together comprise a constitution. The lack of a constitution also distinguished the Supreme Court of Israel from its foreign counterparts in constitutional democracies, whose roles usually involve interpreting their respective constitutions. The first Basic Laws passed were structural in content, originally excluding any ideological articles generally associated with a constitution. Between 1958 and 1991, the Knesset

82 Nimer Sultany, *Activism and Legitimation in Israel's Jurisprudence of Occupation*, 23(3) Social and Legal Studies 315 (2014).

passed nine Basic Laws, which outlined the specific allocation of powers between the Knesset, Presidency, and Judiciary; granted the Bank of Israel the authority to mint currency; and assigned the Ministry of Defense the responsibility of upholding the operation of the military.⁸³ Within the same period, the Knesset also passed several laws of “constitutional character”; but without roots in the judicial system, these laws were passed as ordinary governmental legislation. Among these laws passed by the Knesset were the Equal Rights for Women Law and the Law of Return.⁸⁴ The Law of Return guarantees the right of every Jew to immigrate and gain Israeli citizenship and has been a point of controversy since its inception. Since these two laws address such fundamental issues, one might wonder why the Knesset would not enshrine equal rights for women or the Law of Return as Basic Laws. The fact that the Knesset passed constitutionally appropriate laws as ordinary legislation rather than Basic Laws has undermined its commitment to creating a constitution chapter by chapter. Notably absent among the flurry of legislation passed within this forty-four-year time period was legislation protecting human rights, an integral part of a constitutional democracy.

The Supreme Court’s proactive actions to protect human rights, even prior to the creation of an explicit bill of rights, provided the impetus for the court’s future call for a “constitutional revolution.” Many attempts over the years were made by governing coalitions to anchor a bill of rights as a Basic Law, but all came without success. Even as a political minority in the Knesset for most of Israel’s history, Orthodox Jewish groups long opposed a bill of rights because of their concern that it would enable the court to exercise judicial review, a democratic mechanism, over religious doctrines and apply secular proceedings to religious issues such as marriage and Sabbath observance.⁸⁵ To circumvent Knesset opposition to a tangible bill of rights, the court used a line of cases to integrate civil rights into the legal system through declarations. In one of the earliest of such cases, the court declared in their decision on *Kol Ha’am v. Minister of Interior* (1953):

The high value of the principle of ensuring free discussion and the investigation of truth constitutes a function of politico-social progress in every state which calls itself a democracy...the system of laws under which the political institutions in Israel have been established and function are witness to the first that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence...mean that Israel is a freedom-loving State.⁸⁶

83 The Knesset of Israel, *Basic Laws*, 2019, <https://main.knesset.gov.il/en/activity/pages/basiclaws.aspx>

84 Sapir, *supra*, at 360.

85 Kretzmer, *supra*, at 380.

86 H CJ 73/53, *Kol Ha’am Co., Ltd. v. Minister of the Interior* (October 16, 1953).

Thus, Gideon Sapir marks 1992 the year in which Israel gained a Bill of Rights due to the court's elevation of human rights to constitutional status.

The "soft legal principles," which included the protection of the freedom of speech and the discovery of truth, became quasi-legal statutes that enjoyed freedom from restriction by government authorities. But the purpose of emphasizing basic rights in the Israeli legal system did not require a bill of rights since the court sought generally to define protected rights drawn from Israel's perceived status as a democracy. In addition to defining these rights through case verdicts, the court also developed an extensive system of jurisprudence that mimicked some of the U.S. Supreme Court's constitutional "tests," which are performed to ensure the balancing of basic rights such as freedom of speech and movement with other rights and interests such as national security.⁸⁷

Although the Israeli Supreme Court built a system of jurisprudence through court declarations and tests to balance rights and other interests, its only basis for judicial review until the 1990s involved intervention for failures to respect an "entrenched" clause of any Basic Law.⁸⁸ As exemplified in section 44 of Basic Law: The Knesset (and later Basic Law: Freedom of Occupation), an "entrenchment" clause states that the relevant law cannot be varied, suspended, or made subject to emergency regulations and shall not be altered except by a majority of eighty members of the Knesset.⁸⁹ As a result of this stipulation, the court stated that "when there is an explicit legal instruction of the Knesset that leaves no room for doubt, it must be followed, even if it is incompatible with the principles of the Declaration of Independence."⁹⁰ The court later clarified that it would not even repeal primary legislation injurious to human rights.⁹¹ Thus, while the court had a vehicle for judicial review set in place for some time despite the lack of a bill of rights or constitution, it was substantially limited in its ability to assess and modify legislation even within the purview of the Basic Laws.

ARTICLE

AUTONOMOUS VEHICLES AND TORTS: A BEHAVIORAL ECONOMIC ANALYSIS

Ruru Hoong, Stanford University

With the probable onset of fully autonomous vehicles, the need has arisen for a newly revised scheme of liability governing auto accidents that promotes not only driver safety and manufacturer care, but also incentivizes optimal behavior on the part of all involved parties. Many scholars have proposed adopting some form of strict liability on manufacturers in order to address purely autonomous accidents, though there is not a consensus on the matter. Advocates of strict liability emphasize that the majority of auto-related accidents going forward will be manufacturer-based,¹ whereas proponents of negligence-based rules generally call for substantial reconceptualization of fault standards for both human drivers and autonomous vehicles.²

However, there has been startlingly little discussion on a key factor influencing the relative appeal of different liability systems: consumer choice. Though existing work on the topic notes that there will be a long transition period as we move towards a world in which autonomous vehicles dominate the roads, it takes for granted that “highly autonomous vehicles will largely supplant conventional vehicles, and pure highly autonomous vehicle accidents will come to dominate,”³ without seriously taking into consideration the fact that highly autonomous vehicles and more conventional cars may act as imperfect substitutes. Given that consumers may substitute between the two goods, the systems of liability that govern accidents involving each type of vehicle, or both, can distort relative incentives and therefore have implications on the uptake of self-driving cars, resulting in impacts on societal welfare.

The potential substitution between conventional and autonomous vehicles also hints at another complication – there will be different types of auto-accidents going forward: (i) “pure” accidents that only involve fully automated vehicles, and (ii) “mixed” accidents that may involve a mix of conventional cars (likely equipped with autonomous capabilities, but still requiring a human driver)

and fully autonomous vehicles.⁴ Any approach to designing a new legal regime of liability should ascribe an appropriate level of accident responsibility to the manufacturers of fully autonomous vehicles, but should also induce drivers of conventional vehicles to take appropriate levels of care. A legal system that prescribes the same scheme of liability in both “pure” and “mixed” accidents will inevitably distort incentives and lead to suboptimal outcomes. As such, I propose an approach that adopts strict liability to manufacturers for “pure” accidents, but that follows more traditional negligence-based rules in governing accidents involving different types of vehicles.

To my knowledge, most existing work has limited their discussions to standard models in law and economics that assume rationality; in my essay, I also draw from studies in behavioral economics and cognitive psychology to shed light on how the cognitive biases of different parties can affect the way they respond to differing liability regimes. Even in the nascent stages of the development of the economic analysis of law, Guido Calabresi and Jon Hirschoff note that their assumptions include, “inter alia, [...] the absence of psychological or other impediments to acting on the basis of available information, [...] and the extent to which parties actually bear the costs which the particular tests impose upon them.”⁵ It is therefore important to consider the effects of psychological biases as we consider the reform of accident liability for autonomous vehicles: indeed, behavioral analysis has already influenced scholarly discussion of tort law.⁶ Using insights from behavioral economics, I supplement the argument for a system of strict liability in the case of “pure” accidents.

Background

A. Automation

In order to facilitate a discussion of autonomous vehicles, it would be instructive to first provide a brief backdrop of the autonomous vehicle landscape. The Society of Automotive Engineers (SAE) International prescribes a five-tiered classification of automation,⁷ which has also been adopted by the National Highway Traffic Safety Administration (NHTSA):

1. **Level 1:** automation system can in some situations assist the driver on some parts of the driving task (e.g. parallel parking assistance).
2. **Level 2:** automation system can conduct parts of the driving task and

4 Abraham and Rabin (2018) make this distinction between “pure” and “mixed” accidents and propose making “Manufacturer Enterprise Responsibility” (a variant of a strict liability system to manufacturers) an exclusive remedy for both “pure” and “mixed” accidents.

5 Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 THE YALE LAW JOURNAL 1055 (1972).

6 Restatement (Third) of Torts, AMERICAN LAW INSTITUTE 2010, §3.

7 SAE International Recommended Practice J3016, *Taxonomy of Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*, revised June 2018.

can take limited action in an emergency situation (e.g., stopping for an obstruction).

3. **Level 3:** automation system can conduct the entire driving task while engaged, but drivers are required to take control when the system prompts them to do so (e.g., cars that know how to change lanes and respond to incidents) – the driver is always considered backup and bears responsibility.

4. **Level 4:** in certain environments and road conditions, the automation system conducts entire driving task and the human need not take control.

5. **Level 5:** automation system can perform all driving tasks under all conditions that a human could plausibly carry out.

Though the use of terminology is not always consistent, “fully” or “highly” autonomous cars often refers to Level 4-5 vehicles. Currently, there are no commercially-available highly automated vehicles: indeed, the 2019 Audi A8 is the first publicly available car with *Level 3* driving capabilities. Given that Level 1-3 cars require supervision, the responsibility for taking care largely lies with the driver, though there is certainly some nuance involved. For example, when a vehicle monitored by a human driver is involved with accident when operating in autonomous mode, which parties should bear liability?⁸ These unresolved questions will be even more important going forward, because it is highly likely that even conventional, driver-manned vehicles will be autonomous to some degree. This can be evidenced by the numerous semi-autonomous technological innovations that have already begun filtrating the current car market: for example, automatic braking systems, interlock systems that prevent inebriated drivers from manning a vehicle, tracking systems that monitor driver speed and that can potentially automatically slow down speeding vehicles, and so on. In some ways it is inevitable, from an economic standpoint⁹—and desirable, in the view of safety—that these technologies be instituted in driver-manned vehicles, which will certainly change our assessment of auto accidents.

B. Current Scheme of Liability

Liability for the majority of auto accidents currently lies with the driver

8 Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, THE NEW YORK TIMES (2018), <https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html> (last visited May 25, 2019).

9 E.g., in a data-heavy world, insurance companies may charge prohibitively high premiums to consumers that refuse to use advanced in-car telemetry to track their speed, acceleration, and usage. Persistently high-speed drivers self-select into non-tracking insurance packages with higher premiums, continuously driving up the price of such insurance. Under a traditional adverse selection model, we would see the market for non-tracking insurance unravel – and therefore we would see a gradual push towards a world in which all devices will be tracked.

under a traditional negligence standard,¹⁰ and reasonably so, given that “human choice or error” is estimated to be responsible for up to 94% of car crashes.¹¹ Most drivers are typically protected by third-party liability insurance, which reduces risk and potentially improves welfare for risk-averse entities, but also distorts the incentives of the insured party that no longer has to pay for damages out-of-pocket if found liable.¹² If insurance coverage is complete and does not depend on care levels, then there is a propensity for moral hazard. However, since a driver’s accident history typically affects the determination of premiums, drivers do face incentives to take some level of care. Thus, the main economic impact of driver liability lies with the cost of insurance premiums. Separately, there are also products-liability considerations: manufacturers are incentivized to build products to certain safety standards in order to reduce the possibility of product liability torts lawsuits.

Additionally, the NHTSA sets extensive regulatory safety standards for vehicle safety, though they have often been criticized for not being prompt in updating safety standards. As former Administrator of the NHTSA Mark Rosekind highlighted in a talk at Stanford University,¹³ everything signed in regulation takes about 8-10 years to go through the pipeline. Given the rapidly changing technology in the autonomous vehicle world, these regulatory standards are likely to be rendered obsolete even before they come into force: in our consideration of liability regimes, it is important to keep these limitations in mind.

What Constitutes the Efficient Outcome?

To answer the question of what scheme of liability is most appropriate, it is necessary to first define what constitutes the efficient outcome. In the traditional law and economics analysis of cases involving stochastic externalities, the ideal outcome is three-fold: firstly, the *level of care* exercised by all parties

10 A handful of states (e.g., Massachusetts, New York) currently have no-fault laws in effect; under those laws, drivers are required to insure themselves against potential injuries and damages caused by accidents. Insurance companies are therefore the first and legally preferred source of recovery, regardless of who was at fault in the accident. This is arguably a sub-optimal system as drivers are not as incentivized to take an appropriately high level of care since their insurance covers accidents regardless of fault. That being said, insurance premiums tend to rise upon the incurrence of claims, which could have a deterrent effect (though this effect on safety precautions would be highly attenuated, and the incentives to take care are even lesser than insurance paired with the traditional negligence standard).

11 National Highway Traffic Safety Administration, “2015 Motor Vehicle Crashes: Overview,” <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812318>.

12 For a traditional law and economics view of liability and insurance, see Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004), pg. 257-79.

13 “The Future of Urban Transportation and Mobility,” hosted by Stanford Tau Beta Pi on May 23, 2019.

(e.g. companies like Uber, drivers, users, etc.) must be optimal – that is, care must be taken where benefits exceeds cost; secondly, the *activity level*, which can refer to the mileage of a specific car, as well as the total number of cars on the road, must be such that the marginal benefit equals that of its marginal cost; and lastly, *risk allocation* must ensure that risk averse parties do not bear risk. In short, it is desirable to provide parties with incentives to act in a manner that is as aligned with aggregate social welfare as possible: namely, to minimize the social costs of accidents. To achieve or even to fully appraise the efficient outcome in reality is a quixotic project (owing to problems like imperfect information, the difficulties of assessing probabilities, etc.), although policy-makers and designers of systems of liability typically aim to shape incentives to achieve as efficient an outcome as possible.

In this essay, I also consider another important dimension on which to assess welfare efficiency: the relative usage of fully autonomous vehicles over driver-operated cars. There are three main reasons to believe that having a high percentage of autonomous vehicles on the road, as opposed to human-controlled vehicles, would be beneficial towards societal welfare: (i) safety, (ii) mobility, and (iii) sustainability.¹⁴ Road safety is an important problem: there are over 6 million police-reported motor vehicle traffic crashes every year, and over 35,000 people are killed in the US yearly.¹⁵ Auto accident externalities are estimated to be substantial: using panel data on state-average insurance premiums and loss costs, Edlin and Mandic¹⁶ find that the increase in traffic density from a typical additional driver increases statewide insurance costs of other drivers by \$1725-\$3239 per year. Given that most accidents (and by extension, insurance) costs are caused by human error, the increased prevalence of autonomous vehicles is bound to improve road safety. Furthermore, connected and automated vehicles are expected to yield significant improvements on other dimensions: time utilization (e.g., connecting users in more remote areas, reducing wait time for a car, eliminating the need for parking) and energy efficiency.¹⁷

14 These three reasons were outlined by Mark Rosekind (15th Administrator of the NHTSA and current Chief Safety Innovations Officer at ZOOX) during a talk at Stanford on May 23, 2019.

15 *Ibid*, pg. 2.

16 Aaron Edlin and Pinar Karaca-Mandic, *The Accident Externality from Driving?* 114 JOURNAL OF POLITICAL ECONOMY, (2006)

17 However, Taiebat, Stolper, and Xu (2019) develop a microeconomic model in which their results indicate that aggregate energy use actually *increases* as a result of the adoption of autonomous vehicles. They attribute this to increased demand for autonomous vehicles as a mode of transport that results from the decreased cost of travel (as previously compared to, for example, biking or walking). This in turn could have implications on traffic congestion and global air pollution, incurring further negative externalities, but the discussion of these effects is outside the scope of this essay. See Morteza Taiebat, Samuel Stolper, Ming Xu, “Forecasting the Impact of Connected and Automated Vehicles on Energy Use: A Microeconomic Study of Induced Travel and Energy Rebound,” *Applied Energy*, Volume 247, 2019, Pages 297-308,

If autonomous vehicles are so desirable relative to conventional cars, would it not be efficient to have a world of solely autonomous cars? It is not immediately obvious that this would be desirable, not only because autonomous vehicles might face their own types of safety problems (e.g. cyber-attacks), but also because there is reason to believe that – at least for some people – there is inherent welfare derived from driving a car. It would be hard to imagine a world in which discerning car enthusiasts are an extinct breed. There are certainly some hedonic qualities associated with vehicle ownership,¹⁸ though there is substantial heterogeneity in the population as to the strength of those preferences. The right mix of autonomous and self-operated vehicles that yields optimal social welfare would depend on the strength of these preferences: one could imagine that since autonomous vehicles are generally much safer than conventional cars, it would be socially optimal for *most* people to use autonomous vehicles, and for a small subset of drivers to own cars because they would derive high levels of benefit from doing so.

Pure Accidents

In the case of accidents solely involving fully autonomous vehicles, driver-liability, at least in the sense that we understand it today, would be irrelevant as there will be no human driver, and passengers have no control or influence over the vehicle. Passengers might not even have ownership of the cars they ride in – ride-sharing companies similar to the likes of Uber and Lyft would manage networks of autonomous vehicles, picking up and dropping off customers along the most efficient routes. Given that there is little that passengers can do to mitigate accident harm, expected harm is assumed to be largely determined by the care of vehicle manufacturers, as well as the care of the ride-sharing companies in maintaining and replacing their fleet of autonomous vehicles – that is, if they end up pursuing a business model in which they own their fleet of autonomous cars. It is possible to envisage a business model in which ride-sharing companies rent cars from auto manufacturers, who are then responsible for the upkeep of the vehicles.¹⁹

ISSN 0306-2619, <https://doi.org/10.1016/j.apenergy.2019.03.174>.

18 Even companies that are known for their advances in self-autonomous cars have emphasized that there is some inherent value to being able to operate a car. In a 2018 Audi commercial, an executive is shown to use autonomous cars throughout the day but decides to wind down at the end of the day by driving through a picturesque landscape in a 2018 Audi R8 Spyder. See Audi's Latest Commercial Mocks Self-Driving Cars, *THE NEWS WHEEL* (2018), <https://thenewswheel.com/audis-latest-commercial-mocks-self-driving-cars/> (last visited May 25, 2019).

19 In the former model, incentives for ride-sharing companies to maintain and replace their fleets would also depend on the competitive landscape, and there is reason to believe that they will do so in the presence of competition (e.g. Zipcar currently replaces their vehicles every 1-2 years even in the absence of mandatory regulatory standards to do so, presumably from the threat of customers switching to another ride-sharing company or other form of transportation if they perceive the

Under a traditional view, strict liability and negligence standards set at an efficient standard of care should be outcome-equivalent in a unilateral accident model. However, for reasons I will touch upon later, this does not seem to be the case in reality: in particular, it is especially difficult for policy-makers and judges that do not have perfect information nor the necessary expertise to determine optimal *ex-ante* negligence standards of care. Thus, for cases of “pure” accidents, I propose a system of strict liability to vehicle manufacturers. A number of scholars have also proposed some variant of this scheme: Omri Ben-Shahar suggested that carmakers should have to compensate victims of driverless accidents regardless of blame,²⁰ David Vladeck propounded that there should be strict joint and several liability for all highly autonomous vehicle injuries for both auto makers and vehicle component part manufacturers,²¹ and Abraham and Rabin devised the “Manufacturer Enterprise Responsibility” (MER) scheme, a compensation system that ascribes strict responsibility to manufacturers, administered by a Fund created through assessments levied on manufacturers of fully autonomous vehicles. By bringing in related insights from the behavioral sciences, I provide further argument for why a system of strict liability is preferable to familiar standards of negligence.

A. Biases of Involved Parties

Since tort situations necessarily involve some measure of probability assessment (e.g. the probability of getting into an accident, or the probability of being held liable for an accident), law and economics scholars have applied insights from *prospect theory* to tort liability. Amongst other things, prospect theory suggests that individuals tend to overweight low probabilities and underestimate high probabilities.²² Jochen Bigus applies this to the context of unilateral tort liability, suggesting that this probability distortion decreases the tortfeasor’s marginal benefits of taking care, thus resulting in under deterrence.²³ He further propounds that this under-deterrence effect is inevitable under a system of strict liability, but has a more ambiguous influence in the case of a negligence rule, because a negligence rule provides certainty.²⁴

vehicles to be unsafe). In the latter model, a system ascribing strict liability to manufacturers would induce them to adopt an appropriate level of care.

20 Omri Ben-Shahar, *Should Carmakers Be Liable When A Self-Driving Car Crashes?* FORBES (2016), <https://www.forbes.com/sites/omribensshahar/2016/09/22/should-carmakers-be-liable-when-a-self-driving-car-crashes/> (last visited May 26, 2019).

21 David C. Vladeck, *Machines without Principals: Liability Rules and Artificial Intelligence*, 89 WASHINGTON LAW REVIEW. 117, (2014).

22 Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Making Under Risk*, 47 ECONOMETRICA (1977), pg. 63–92.

23 Jochen Bigus, *Tort Liability and Probability Weighting Function according to Prospect Theory*, ALEA ANNUAL MEETINGS Working Paper (2006).

24 Even with a vague standard of due care, this theory of probability weighting actually tends to

In view of this cognitive bias, it would appear on a superficial level that negligence-based rules might be preferable to a system of strict liability. However, in the case of fully autonomous vehicles, I argue that the predominant cause of accidents, besides uncontrollable aspects like weather and environmental conditions, are manufacturer-based. Whereas it is plausible in our current setting that injurers – often individual drivers – are highly susceptible to the type of probability weighting explained by prospect theory, this would not be as apparent in the case of “pure” accidents in the world of autonomous cars. Vehicle manufacturers routinely engage in comprehensive stochastic crash and cost-benefit analyses, and therefore would naturally be less susceptible to the heuristics involved in prospect theory. Instead, I suggest that it is more plausible that *individual consumers* be subject to this probability weighting distortion. These heuristics can affect their perceptions of the relative safety of fully autonomous vehicles over conventional cars: passengers are likely to *overweight* the low probability of getting into an accident in a fully autonomous vehicle and *underweight* the relatively high probability of getting into an accident when operating a conventional car. As a result, prospect theory implies decelerated autonomous vehicle take-up, leading to sub-optimal utilization of highly autonomous vehicles.

The *salience* of the probability of an accident – that is, the prominence of safety concerns regarding each mode of transport to consumers – is also likely to affect the relative proportion of fully autonomous cars to conventional vehicles on the road. Individuals are more likely to focus on information that is more prominent:²⁵ given the novelty of autonomous cars, it is inevitable that accidents involving fully autonomous cars will receive more media attention, despite the fact that the majority of accidents are human-caused. It is therefore possible that safety risks regarding autonomous vehicles will be more salient to consumers, also contributing to the underutilization of autonomous vehicles relative to conventional ones.

Illusory superiority bias can also add to the problem of sub-optimal autonomous vehicle take-up. Many behavioral studies in psychology have shown that most people think that they are better than the average person along many dimensions. For example, Horswill and authors find that drivers tend to have inflated opinions of their own hazard-and-perception skills and rate themselves superior to both their peers and the average driver.²⁶ Though the prevalence and

increase deterrence and might induce more efficient care (or even excessive care).

25 See Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, Science (1974); Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, *Salience Theory of Choice Under Risk*, THE QUARTERLY JOURNAL OF ECONOMICS (2012)

26 Horswill, Mark S., Andrea E. Waylen, and Matthew I. Tofield. “Drivers’ Ratings of Different Components of Their Own Driving Skill: A Greater Illusion of Superiority for Skills That Relate to Accident Involvement 1.” *Journal of Applied Social Psychology* 34.1 (2004): 177-195.

persistence of these effects may vary across cultures or other demographic characteristics (e.g., men are more prone to illusory bias than women), the fact that people overestimate their safety can have undesirable effects on individual choice of transport, prompting individuals to choose to operate conventional vehicles even though it would be more socially optimal for them to utilize fully autonomous cars. Furthermore, this bias can also have pernicious effects on driver behavior, inducing drivers to take less care than they otherwise would.

For illustration, consider an individual A whose preferences over autonomous and conventional vehicles depend largely on three main factors: (i) the pleasure they derive from driving (as opposed to being a passenger in the vehicle), (ii) the convenience from being a passenger in a vehicle (freeing up time for doing work, watching TV), and (iii) their perceived safety level or probability of getting into an accident. A simple numerical example is displayed below:

Figure 1: Welfare Utility and the Choice Between Fully Autonomous and Conventional Cars

	Total Utility	Total Accident Costs	Accident Probability
Fully Autonomous Vehicle	12	10	0.1
Conventional Vehicle	15	10	0.5

Without the cognitive biases previously mentioned, a risk-neutral individual A²⁷ would choose to ride a fully autonomous vehicle (expected payoff of 11) as opposed to a conventional vehicle (expected payoff of 10). However, if their perception of their own driving skill suffers from illusory superiority bias, it is possible that they would underestimate the probability of getting into an accident in a conventional vehicle (e.g., a perceived accident probability of 0.3 yields an expected payoff of 12), leading them to the sub-optimal choice of driving a conventional car. The heuristics involved in prospect theory and the effects of salience can also affect individuals' probability assessment in similar

27 The argument still holds if the individual is risk-averse.

ways.

Viewed in light of these cognitive biases, the standard of liability in “pure” accidents should be that of strict liability. Under strict liability, passengers bear no financial responsibility for accidents and do not have to estimate the probabilities of getting into an accident as they will not have to bear its costs, therefore reducing the effects of the three previously mentioned biases. Though negligence rules are lauded for providing more certainty to vehicle manufacturers, they create *less* certainty for passengers that have to take on the residual accident risk for accidents that occur when vehicle manufacturers take due care. As individuals do not know whether they will have to bear liability, they are much more susceptible to the aforementioned cognitive biases associated with probability assessment. Thus, consumers are more likely to choose to drive conventional cars, resulting in a sub-optimal proportion of highly autonomous vehicles on the road.

B. Biases of the Court

The stochastic nature of accidents also gives rise to the cognitive biases and heuristics employed by another subset of individuals: legislators and courts.²⁸ Even the judiciary is not immune to systematic errors in judgment.²⁹ Negligence-based rules are particularly prone to these errors: the current negligence-based tort system requires courts to decide whether the *ex-ante* marginal cost of precautions was lower than the marginal expected harm of accidents those precautions could have averted. This is succinctly put in the Learned Hand formula, which specifies that: “failure to take a precaution is negligent only if the cost of the precaution [...] is less than the probability of the accident that the precaution would have prevented multiplied by the loss that the accident if it occurred would cause.”³⁰ Probability assessments are unavoidable here, and a range of cognitive decision-making biases can affect judgments.

Since courts typically assess events after they have occurred, they are particularly susceptible to *hindsight bias*.³¹ Hindsight bias is the tendency for people to overestimate the predictability of past events because learning the outcome post-hoc causes people to update their beliefs about the world.³²

28 Yoed Halbersberg & Ehud Guttel, *Behavioral Economics and Tort Law*, THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (2014).

29 Chris P. Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, SSRN ELECTRONIC JOURNAL (2001).

30 *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947).

31 See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 UNIVERSITY OF CHICAGO LAW REVIEW 571, (1998).

32 See Stephen J. Hoch & George F. Loewenstein, *Outcome feedback: Hindsight and information*, 15 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, and COGNITION 605–619 (1989); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased judgments of past events after the outcomes are known*, 107 PSYCHOLOGICAL BULLETIN 311–327 (1990).

Studies have demonstrated that judgments of legal liability are subject to hindsight bias: for example, Kim Kamin and Jeffrey Rachlinski compared *ex-ante* decisions regarding whether or not to take a precaution against flooding with comparable *ex-post* evaluations of whether the failure to take the precaution was negligent, finding that the majority of participants concluded in foresight that a flood was too unlikely to justify further precautions – a decision that most participants in the hindsight condition found to be negligent.³³ The hindsight bias is closely related to *outcome bias*, which is the tendency to perceive conduct as more careless than the same conduct in cases where bad outcome did not occur.

As Halbersberg and Guttel also detail, the aforementioned biases have a direct bearing on the choice between different liability systems. Under the negligence doctrine, judges only determine liability for an accident *after* it has already taken place, and hence are vulnerable to outcome bias. Furthermore, the Learned Hand formula specifies that courts have to make *ex-post* assessments of the *ex-ante* probability of the accident occurring, which is exactly what the hindsight bias affects. In contrast, schemes of strict liability avoid the need for probability assessments and may therefore lead to less biased results.³⁴

Even in the absence of these cognitive biases, judicial assessments of engineering safety performance standards would be difficult and costly. In the case of new technology like autonomous vehicles, it is hard to determine the *scope* of precautions that can be included in an assessment of negligence: for example, does a manufacturer bear liability for an accident that could have been prevented if they had invested in R&D that would have resulted in a superior product? Though it is reasonable to believe that better tracking technology and availability of premarket testing data will make it easier for judges to access information on manufacturer precautions, difficult questions like this one remain. To this end, some existing literature has proposed adjusting the standards of defect assessment but retaining liability for product defects. Mark Geistfeld proposes a performance standard for autonomous vehicles that “halves the rate of crashes relative to a conventional vehicle,” which he asserts will “necessarily have a reasonable safe or non-defective operating system for tort purposes.”³⁵ It appears strangely arbitrary to specify that fully autonomous vehicles should be more than twice as safe as conventional vehicles, and it is almost certain that they will be so. Attributing any other level of relative safety as a standard under which

defectiveness is assessed will be equally as arbitrary and yield suboptimal liability; moreover, it is likely that conventional vehicles will also see improvements in safety by adopting semi-autonomous features, as described earlier in the essay, and it seems needlessly illogical to penalize manufacturers of fully autonomous vehicles for safety advances in conventional car technologies. Given the difficulties and cognitive biases judiciaries encounter in determining negligence, as well as the complexity legislators face in designing negligence-based rules, the standard of liability governing “pure” accidents should be that of strict liability.

Mixed Accidents

“Mixed” accidents can be varied: they can involve fully autonomous vehicles and non-autonomous conventional cars, fully autonomous vehicles and semi-autonomous cars (i.e., Level 3 or below), fully autonomous vehicles and third parties, or combinations of all of the above. In this section, I focus specifically on “mixed” accidents involving both fully autonomous cars and conventional vehicles, whether semi-autonomous or not, because the situation offers the most nuance for discussion. There has not been much discussion in the literature of the distinction between “pure” and “mixed” accidents, with the exception of Abraham and Rabin, who lay out a comprehensive analysis of several possible approaches to handling injuries resulting from mixed accidents. They advocate an approach that moves towards an exclusive “Manufacturer Enterprise Responsibility” (MER) system, favoring the complete elimination of negligence liability.³⁶

There are several objections to this approach, most notably that drivers of conventional vehicles would have no incentive at all to take care. Manufacturers of fully autonomous vehicles are wholly responsible for paying into the MER fund, and the drivers of conventional cars would bear none of the financial consequences of an accident, even if it was caused by their negligence. Abraham and Rabin address this concern by pointing out that the technology of fully autonomous vehicles could be developed to avoid accidents with conventional vehicles that are negligently driven. Yet, it appears unfair to put the burden on manufacturers of fully autonomous vehicles to develop technologies that can predict the behavior of conventional drivers; moreover, it is implausible that they could do so perfectly.

Even if it were possible to develop this technology, it does not change the nature of incentives for conventional drivers: they would still take a suboptimal level of care. Furthermore, the safety of the roads would also be highly dependent

³⁶ However, they note that if this complete abolition is infeasible, then conventional vehicle defendants can still be liable in negligence to autonomous passengers for sums that are not compensated by their MER.

on having a high proportion of fully autonomous vehicles on the road. Most analyses take for granted that we will gradually transition to a society where there will only be fully autonomous vehicles on the road. Yet, the adoption of a blanket MER or other strict liability system would likely distort incentives such that there would be a *higher* percentage of conventional vehicles on the road than there otherwise would be under other liability schemes. According to the American Automobile Association (AAA), the average cost to own and operate a new vehicle in 2018 is \$8,849 per annum, with auto insurance constituting 13-14% of those costs.³⁷ Absolving conventional drivers from liability makes it relatively more attractive for consumers to purchase conventional cars as it relieves them of these costs; moreover, they would no longer have to bear other costs of liability resulting from their negligence not already covered by insurance. As such, adopting a system of strict liability to manufacturers in accidents involving conventional cars would not only lead to suboptimal levels of care on the part of drivers, but also an inefficient level of autonomous vehicles on the road.

The need to incentivize driver care is still of utmost importance, even in a world where conventional vehicles are equipped with autonomous technologies. This is evidenced by the situation we currently see today: an Axios study of vehicle incident reports show that humans are responsible for the vast majority of autonomous-vehicle related accidents that occurred between 2014 and 2018.³⁸ The most advanced commercially-available autonomous vehicle on the road is classified as SAE Level 3, and therefore not fully autonomous by our definition, and it is clear that having semi-autonomous features in a car is fundamentally different from having a fully autonomous, Level 4 or 5 vehicle. In the former type of vehicle, negligence of the human driver can take the form of not taking over at appropriate moments. In March of 2018, a self-driving Uber killed a pedestrian in Tempe, Arizona, even though there was a safety driver present in the car. It was clear from interior car videos that the driver was distracted and did not have his hands hovering above the steering wheel as instructed.³⁹ It is therefore of paramount importance that systems of liability be crafted such that conventional drivers have the incentive to take care, and passengers of fully autonomous cars should have the right to recover compensation for injuries caused by the negligence of conventional drivers.

Of course, retaining a system of negligence for “mixed” accidents would introduce many of the problems with negligence-based rules that caused us to

37 AAA. “Your Driving Costs,” (2018), <https://publicaffairsresources.aaa.biz/download/11896/>.

38 Kia Kokalitcheva. “People cause most California autonomous vehicle accidents.” AXIOS (2018), <https://www.axios.com/california-people-cause-most-autonomous-vehicle-accidents-dc962265-c9bb-4b00-ae97-50427f6bc936.html>

39 Troy Griggs & Daisuke Wakabayashi, “How a Self-Driving Uber Killed a Pedestrian in Arizona,” THE NEW YORK TIMES (2018), <https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html> (last visited May 27, 2019).

eschew the negligence standard for “pure” accidents in the first place. Thus, for “mixed” accidents involving both fully autonomous and conventional cars, I propose adopting a standard of strict liability *to the drivers of conventional vehicles*, with the exception of cases where the accident may have been caused by the fault of defective autonomous vehicles (e.g., mechanical failure or software errors, etc.). This would give drivers of autonomous vehicles the incentive to take appropriate levels of care, whilst maintaining safety incentives for manufacturers of fully autonomous cars. Though there is still the problem of determining whether an accident was caused by the fully autonomous vehicle, there is reason to believe that with the rise of monitoring and tracking technology, as well as the repletion of internal and external (e.g., LIDAR) autonomous car cameras, it will become progressively more straightforward to identify the causes of accidents.

Conclusion

Cognitive biases in human psychology inevitably affect assessments of accident probabilities and individuals’ ability to minimize accident costs. This has adverse consequences on the balance of fully autonomous and conventional vehicles, resulting in sub-optimal social welfare. In view of these departures from rationality, I have argued that a legal regime that ascribes strict liability to manufacturers in the event of “pure” accidents and that specifies strict liability to drivers of conventional vehicles with a defense of contributory negligence in “mixed” accidents would be most likely to yield an efficient outcome.

It is important to note that there may exist issues of external validity in the application of studies in the behavioral sciences to law. Especially since studies are often carried out in experimental conditions with participants that may not fully represent the population (e.g., college students), some of the results may not carry over to real-life situations. Moreover, experimental subjects tend to deal with small sums of money, whereas parties in an auto accident potentially face the loss of life, so incentives vary greatly between the two situations. I am not incredibly concerned by these threats of external validity: many of the biases I have cited in this paper have been well documented across many contexts. We should be wary of inferring and extrapolating *magnitudes* of the biases observed in experiments to our particular situation, but I am fairly confident that the biases I have mentioned are likely to systematically affect the cognitive processes of most, if not all, humans in the context of vehicle accidents.

Some researchers have expressed the concern that the threat of strict liability on manufacturers would impede autonomous vehicle R&D, distorting the balance between autonomous and conventional vehicles.⁴⁰ I find this unlikely: the potential benefits of the technology far outweigh the potential costs of,

40 E.g., Jessica Brodsky, *Autonomous Vehicle Regulation: How an Uncertain Legal Landscape May Hit the Brakes on Self-Driving Cars*, 31 BERKELEY TECH (2016), pg. 861-65.

bearing liability especially if accident costs are substantially reduced due to the adoption of autonomous vehicle technologies. In fact, companies like Volvo, Google, and Daimler AG's Mercedes-Benz have already pledged to accept full liability if their vehicles cause an accident.⁴¹

Additionally, though the adoption of a strict liability system dramatically reduces the court's role in deciding appropriate standards of care, it does not fully absolve judges from making potentially subjective decisions that may be subject to cognitive biases, especially in the determination of damages.⁴² However, given there is no strong inherent reason why determinations of damages would vary across liability systems and affect my analysis of the relative appeal of different schemes,⁴³ I refrain from addressing this in my essay.

Lastly, even though a strict liability system would incentivize due care on the part of manufacturers, there should still be federal and state regulations governing automated road vehicles. There should be regulations governing data transmission and connectivity to other vehicles, which will introduce a host of privacy concerns, mandatory security features, and fail-safe protocols. There is a need for regulatory bodies like the NHTSA to set up *ex-ante* performance standards – for example, the UK has an ongoing consultation project which focuses on autonomous vehicle safety, criminal and civil liability, and how road rules can be adapted for artificial intelligence and automated vehicles.⁴⁴ Implementing such forward-looking and data-driven regulations, whilst also adopting a tort system that maintains incentives like the one specified above, will do well to prepare us for a brave new world of autonomous vehicles.

41 Wayne Cohen and Nicole Schneider, *Potential liability ramifications of self-driving cars*, 36 WESTLAW JOURNAL 3 (2016).

42 See John Bronsteen, Christopher Buccafusco and Jonathan Masur, *Happiness and Punishment*, 76 UNIVERSITY OF CHICAGO LAW REVIEW 3 (2009), pg. 1037-82; Cass R. Sunstein, *Illusory Losses*, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS WORKING PAPER No. 340 (2007).

43 This isn't strictly true: different liability systems "endow" certain parties with liability and can therefore be subject to different cognitive biases (e.g., anchoring or the endowment effect). However, this necessitates further discussion and argument that lies outside the scope of this essay.

44 Law Commission and Scottish Law Commission. *Automated Vehicles: A joint preliminary consultation paper* (2018), <https://www.lawcom.gov.uk/project/automated-vehicles/>

BIBLIOGRAPHY

AAA. "Your Driving Costs," (2018), <https://publicaffairsresources.aaa.biz/download/11896/>.

Abraham, Kenneth S., and Robert L. Rabin. *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, SSRN ELECTRONIC JOURNAL (2018), at 51.

Ben-Shahar, Omri. *Should Carmakers Be Liable When A Self-Driving Car Crashes?* Forbes (2016), <https://www.forbes.com/sites/omribenshahar/2016/09/22/should-carmakers-be-liable-when-a-self-driving-car-crashes/> (last visited May 26, 2019).

Bigus, Jochen. *Tort Liability and Probability Weighting Function according to Prospect Theory*, ALEA ANNUAL MEETINGS Working Paper (2006).

Brodsky, Jessica. *Autonomous Vehicle Regulation: How an Uncertain Legal Landscape May Hit the Brakes on Self-Driving Cars*, 31 BERKELEY TECH (2016), pg. 861-65.

Bronsteen, John, Christopher Buccafusco and Jonathan Masur, *Happiness and Punishment*, 76 UNIVERSITY OF CHICAGO LAW REVIEW 3 (2009), pg. 1037-82; Cass R. Sunstein, *Illusory Losses*, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS WORKING PAPER No. 340 (2007).

Calabresi, Guido, Jon T. Hirschoff. *Toward a Test for Strict Liability in Torts*, 81 THE YALE LAW JOURNAL 1055 (1972).

Cohen, Wayne, Nicole Schneider. *Potential liability ramifications of self-driving cars*, 36 WESTLAW JOURNAL 3 (2016).

Geistfeld, Mark A. *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Litigation*, CALIFORNIA LAW REVIEW (2017).

Griggs, Troy, Daisuke Wakabayashi. "How a Self-Driving Uber Killed a Pedestrian in Arizona," THE NEW YORK TIMES (2018), <https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html> (last visited May 27, 2019).

Guthrie, Chris P., Jeffrey J. Rachlinski & Andrew J. Wistrich. *Inside the Judicial Mind*, SSRN ELECTRONIC JOURNAL (2001).

Halbersberg, Yoed, Ehud Guttel. *Behavioral Economics and Tort Law*, THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (2014).

Hawkins, Scott A. & Reid Hastie, *Hindsight: Biased judgments of past events after the outcomes are known*, 107 PSYCHOLOGICAL BULLETIN 311–327 (1990).

Hoch, Stephen J., and George F. Loewenstein. *Outcome feedback: Hindsight and information*, 15 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 605–619 (1989).

Horswill, Mark S., Andrea E. Waylen, and Matthew I. Tofield. “Drivers’ Ratings of Different Components of Their Own Driving Skill: A Greater Illusion of Superiority for Skills That Relate to Accident Involvement 1.” *Journal of Applied Social Psychology* 34.1 (2004): 177-195.

Kahneman, Daniel, Amos Tversky. *Prospect Theory: An Analysis of Decision Making Under Risk*, 47 ECONOMETRICA (1977), pg. 63–92.

Kamin, Kim A., Jeffrey J. Rachlinski. *Attitudes Toward Flood Damage Liability Questionnaire*, PSYCHTESTS DATASET (1995).

Kokalitcheva, Kia. “People cause most California autonomous vehicle accidents.” AXIOS (2018), <https://www.axios.com/california-people-cause-most-autonomous-vehicle-accidents-dc962265-c9bb-4b00-ae97-50427f6bc936.html>

Law Commission and Scottish Law Commission. *Automated Vehicles: A joint preliminary consultation paper* (2018), <https://www.lawcom.gov.uk/project/automated-vehicles/>

National Highway Traffic Safety Administration, “2015 Motor Vehicle Crashes: Overview,” <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812318>.

Rachlinski, Jeffrey J. *A Positive Psychological Theory of Judging in Hindsight*, 65 UNIVERSITY OF CHICAGO LAW REVIEW 571, (1998).

Restatement (Third) of Torts, AMERICAN LAW INSTITUTE 2010, §3.

SAE International Recommended Practice J3016, *Taxonomy of Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*, revised June 2018.

Talley Eric. *Automatorts: How Should Accident Law Adapt to Autonomous Vehicles? Lessons from Law and Economics*, (2019).

“The Future of Urban Transportation and Mobility,” hosted by Stanford Tau Beta Pi on May 23, 2019.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir.1947).

Vladeck, David C. *Machines without Principals: Liability Rules and Artificial Intelligence*, 89 WASHINGTON LAW REVIEW. 117, (2014).

Wakabayashi, Daisuke. *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, THE NEW YORK TIMES (2018), <https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html> (last visited May 25, 2019).

ARTICLE

**RESPONSIBILITY FOR ATROCITY:
HANNAH ARENDT AND THE ASSUMPTIONS
OF RESPONSIBILITY**

Lawrence Huang, Georgetown University

“Foremost among the larger issues at stake in the Eichmann trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime” (*Eichmann in Jerusalem: A Report on the Banality of Evil*, 277).

“This new type of criminal, who is in actual fact *hostis generis humani*, commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong” (*Eichmann in Jerusalem: A Report on the Banality of Evil*, 276).

Abstract

The ability to hold perpetrators of mass atrocities accountable is essential to the international order. Although international criminal law continues to hold perpetrators of mass atrocity responsible, it does so in violation of moral and ethical principles. These principles of international law and the human rights regime, in particular, rest on the assumption that it is possible to hold criminals responsible for their crimes based on their intent. Hannah Arendt problematizes this assumption in *Eichmann in Jerusalem: A Report on the Banality of Evil*; she argues that one should not always think of perpetrators of mass atrocity as people of purely bad moral intentions. Perpetrators can demonstrate a lack of thought instead of deliberate intent in their support of violations of international law. This paper seeks to explore some of the applications of Arendt's critique on the reliance of intention in finding perpetrators responsible for mass atrocity.

This paper begins with a literature review of Arendt's thought on responsibility in international judgment of perpetrators of mass atrocity. It will then outline Arendt's objection to conceptions of responsibility for mass atrocity, for responsibility assumes that the perpetrator of evil acts had evil intent—an assumption that Arendt is not ready to grant. Next, it will expand the scope of that objection through the case study of the Argentinian death flights as told in *The Confessions of an Argentinian Dirty Warrior*. This paper will argue that lower-ranking soldiers, like Argentinian Adolfo Scilingo, as well as high-ranking officials, like Eichmann, can be unthinking perpetrators of atrocity. It will then consider two attempts—Mark Drumbl and Mark Osiel—to respond to Arendt's criticism, finding both insufficient. Mark Drumbl rejects the current conception of responsibility in international criminal law, but his attempts to reform the sources of criminal law may not appear to be practical and do not solve the problem of intention. Mark Osiel undertakes a parallel project by considering Arendt's objection to finding responsibility based on intention as applied to another Argentinian soldier in the dirty war, Alfredo Astiz. Osiel's solution of re-conceptualizing criminal trials as a venue for public discourse and restoration is not a direct response to Arendt's objection. This paper ultimately argues that, given the inability to respond to Arendt's objection, one ought to accept the inability to morally justify modern practices of holding perpetrators responsible as an inevitable consequence, but one must hold perpetrators responsible nonetheless.

Background

Hannah Arendt was a prolific 20th century Jewish political theorist, and a profound skeptic of the international human rights regime. Most famous for being the first to typologize the totalitarian regime as categorically different from previous regimes, her related work on rights and responsibilities is perhaps even more relevant today in response to contemporary weakening of human rights protections.

Until recently, Arendt was seen as a theorist of politics, not legal principles. Interpreters took her failure to use specific terminology of international law (criminal, human rights, or other) when discussing criminal trials like the trial of Adolf Eichmann as legal naiveté. Her lack of a single publication explicitly tying together her work on legal principles was viewed as “anti-systematic.”¹ However, as interest in Arendt’s theory has surged after her death and in the contemporary political environment, efforts have been made to reinterpret her account of international human rights.

Newer theorists have begun to resuscitate Arendt’s work on legal theory, especially her undeveloped work on international legal theory. David Luban argues that “no theorist has thought more perceptively than Arendt about international criminal liability in mass atrocity.”² He expands this argument in a forthcoming book manuscript in which he argues that the Eichmann trial was a moment of ‘observation’ that, while not a sophisticated legal theory at the time, prompted Arendt to spend the rest of her life interested in questions of both legal and moral judgment.³ Nonetheless, the field of interpreting Arendt as a legal theorist is new and contested. Peg Birmingham responds to Luban’s contention of a change towards sophisticated legal theory after the Eichmann trial by finding an Arendtian “philosophy of law” in her earlier work on totalitarianism.⁴ Luban himself maintains limits on Arendt’s standing as a legal theorist, arguing that Arendt—like all other legal theorists at the time of the Eichmann trial—was unable to justify why genocide should be the ‘crime of crimes.’⁵ Skeptics are correct that Arendt’s key insights are political and moral more than legal, but efforts to separate these spheres are exactly what give her objection to international criminal law so much purchase.

1 Margaret Canovan, *Hannah Arendt: A Reiteration of Her Political Thought* 5 (1992).

2 David Luban, Hannah Arendt as a Theorist of International Criminal Law, 11 INT. CR. L. R., 2-11, 5 (2011).

3 David Luban, Arendt on the Crime of Crimes, 28 Ratio Juris, 307-325, 3 (2015).

Given as a draft at the New York University Colloquium in Legal, Political, and Social Philosophy. Titled Arendt at Jerusalem, publically available but chapters are available here: http://www.law.nyu.edu/sites/default/files/upload_documents/NYU_%20David%20Luban.pdf

4 Peg Birmingham, Hannah Arendt’s Philosophy of Law Approach to International Criminal Law, 14 Int. Cr. L. R., 695-716 (2015).

5 David Luban, Arendt on the Crime of Crimes, 28 Ratio Juris, 307-325, 29 (2015).

It is important to note that the scope of this paper will not contest Arendt's account of the history of the Holocaust. Bettina Stangneth argues that through historical analysis of his years in exile, Eichmann had the knowledge and intention to commit genocide; however, major Arendt scholars have disputed this historical account.⁶ This paper remains agnostic on the account of Eichmann's actual intentions, accepting the description given by Arendt since the account is sufficient to ground her objection regardless of the historical accuracy. Similarly, this paper takes Arendt's objection in *Eichmann* with only passing reference to her larger corpus, just as it does to Mark Osiel and Mark Drumbl's works. Thus, the questions asked are immense, and the scope and the answers given are limited.

Arendt's Objection: The Problem of Non-Intentional Atrocity

Arendt has a generally ambivalent relationship with international institutions and the human rights regime, but in *Eichmann*, she takes a particular interest in critiquing the assumptions of international responses to mass atrocity. This section will summarize the facts of the case and highlight three key elements of Arendt's objection: the lack of intention, the rejection of the bureaucratic excuses, and the role of society. I emphasize Arendt's strongest case: that the international regime is ill equipped to judge perpetrators of mass atrocity.⁷

Adolf Eichmann (1906-1962) was a German official in World War II and a significant leader in the Holocaust.⁸ Eichmann had an ordinary childhood and he was a decidedly unremarkable student and worker. Eventually, he joined the National Socialist German Workers Party (Nazi Party) at the behest of his friend. He again had an unremarkable beginning to his military career, initially losing his job due to budget cuts, before he successfully applied for a transfer to the Jewish department. Here, he began his swift rise up the Nazi ranks, considered uniquely capable of pushing Jewish organizations to resettle in Israel. Eichmann viewed himself as an expert on the Jewish question, as he had friendly working relationships with Jewish Zionist groups over their shared goal of Jewish resettlement in Israel, and he was initially very effective at organizing Jewish

6 Seyla Benhabib, *Who's on Trial, Eichmann or Arendt?*, New York Times (2014).

7 Hannah Arendt, *Eichmann in Jerusalem: A Report On the Banality of Evil* (1963).

It is important to note that international criminal law has adapted to Arendt's critique, for it is still possible to punish a perpetrator on a conception of mens rea that does not rely on proving 'intent.' As such, one should read this paper as a reminder that this move is insufficiently grounded in moral principles, and more must be done to make the practice of law complement moral principles and their related legal principles.

8 *Id.*

The description of Eichmann's life and role in the Holocaust is drawn from Arendt's account in *Eichmann*, primarily chapter four with reference to chapter two and the later chapters.

‘voluntary’ migration out of Germany and Europe.

As World War II escalated, Eichmann’s superiors rejected his use of voluntary resettlement programs in favor of forced resettlement, the use of concentration camps, and the infliction of mass killings. Eichmann’s first major resettlement regime in Vienna was successful and became a point of personal pride, but as other countries began to close off or limit the number of Jews allowed to immigrate, the Nazis turned to lethal solutions. Eichmann’s considerations of establishing a Jewish homeland in Africa or continuing the resettlements were done in vain, as his superiors turned to mass murder. Eichmann’s superiors transformed his role from organizing resettlements to organizing forced deportations, at first to Poland and eventually across German-occupied territories. Eichmann himself did not decide to escalate from resettlement to concentration camps and, according to Arendt’s historical account, he seemed upset when he first visited a concentration camp, as he did not initially know the fate of the Jews on the trains he organized. Nonetheless, he felt honored to be brought in on the ‘secret solution’, and after sitting in a meeting with the upper echelons of the Nazi party officials, he set aside his conscience and wholeheartedly supported the camps. Eichmann then supported and facilitated the concentration camp and mass killing system by organizing the trains that deported Jews to determined locations in the Third Reich.

After the war, with many of his superiors either committing suicide or facing justice at the Nuremberg trials, Eichmann fled to Argentina. With false papers, he stayed in Argentina for a dozen years - protected by Argentinian sovereignty. Once his identity became public, the state of Israel kidnapped him and brought him to trial in Israel. He was indicted for 15 crimes, including crimes against humanity, war crimes, and crimes against the Jewish people. It is important to note that Eichmann was not indicted under international criminal law as reflected today. He was indicted under the Israeli Nazi and Nazi Collaborators (Punishment) Law, which was developed for retroactive application and applied outside Israeli territory.⁹ This was not unprecedented and followed laws from other states seeking to retroactively punish Nazis. As discussed, international law has accounted for the inability to hold perpetrators responsible based on intent, but this paper goes deeper into the legal principles and morality of such a system. Furthermore, Arendt’s criticisms are not of a particular formulation or representation of international criminal law, and it is fair to say that her critique is not dependent on a particular legal body. Her critique of

9 Hans Baade, *The Eichmann Trial: Some Legal Aspects*, DUKE L. J. 9 (2014).

It is important to note that Eichmann was tried under domestic Israeli law, not international law. This is of extreme relevance to the legitimacy of the tribunal and no relevance to my argument. Arendt may have been more amenable to trial under international law because it would provide more weight to the argument that Eichmann had committed a crime against all of humanity, but her claims about his lack of intention are applicable to both domestic and international law.

international law, while not the most specific or in a traditional format of legal theory, delves into the fundamental assumptions of how one holds a perpetrator responsible.

Arendt's objection is that convictions of mass atrocity under the international system of justice require finding intent, yet that intent is not always present. I call this problem 'non-intentional atrocity' instead of 'unintentional atrocity,' because Arendt's criticisms are not regarding an accidental consequence (like unintentionally knocking a coffee off a table), but rather of the inability to make thought-out decision, or the inability to intend. For people such as Arendt who are committed to being able to convict perpetrators of mass atrocity such as Adolf Eichmann, this objection poses a foundational problem. On what grounds can someone be found responsible for mass atrocity if they do not show intent to commit mass atrocity? While this paper has presented the objection in general terms, Arendt is clear that she is drawing out a lesson from an individual case, not outlining a theory applicable to all cases of international convictions. This objection is irrelevant to most cases that currently rise to the level of prosecution under international criminal law, for not all criminals have the same 'thoughtlessness'¹⁰ as Eichmann. Nonetheless, convictions work in a broader sense of the assumption that sound-minded¹¹ defendants can be convicted based on their intention. Arendt seeks to problematize and reject this assumption.

Arendt grounds her objection in the example of Eichmann, who despite committing atrocious crimes, did not appear to have the intention of a perpetrator of mass atrocity. More broadly, Arendt argues that Eichmann is thoughtless: "the longer one listened to [Eichmann], the more obvious it became that his inability to speak was closely connected with an inability to *think*, namely, to think from the standpoint of somebody else."¹² For example, Arendt finds that he speaks in "stock phrases and self-invented clichés," so he is unable to access the independent vocabulary to articulate independent thoughts on a basal level.¹³ He is able to paraphrase Kant's categorical imperative and has read the *Critique of Practical Reason* (notoriously one of the most difficult philosophical works), but

10 Hannah Arendt, *Eichmann in Jerusalem: A Report On the Banality of Evil* (1963).

Arendt's conception of thoughtlessness is in the context of a larger theory of totalitarianism and theory of action. In short, Arendt argues that a totalitarian regime, like the Nazi regime, is so fundamentally oppressive that human beings lose the capacity to think for themselves. There is no realm for public discourse or action in a totalitarian regime, so people become 'unthinking.' They lose the capacity for truly independent thought and action.

11 *Id.*

Eichmann was of sound mind, as I demonstrate with the examples I want to consider in this paper. Adolfo Scilingo, after his interviews with Horacio Verbitsky, argued that he was incompetent to be tried in Spain, but medical professionals and a Spanish court ultimately rejected that argument. The scope of this criticism is limited to people of sound mind.

12 *Id.* at 49.

13 *Id.*

he is entirely oblivious to the fact that he is twisting Kant beyond recognition.¹⁴ Eichmann is simply incapable of independent thought, so he has neither “perverted nor sadistic” intention, and he is not, as one would expect, uniquely evil enough to commit the crimes that fall into mass atrocity.¹⁵ Although his relationship with the Jewish people is paternalistic and arguably falls under anti-Semitism, it is *not* anti-Semitism in its extreme form that manifests as a desire to destroy all Jews. In its most polemical form, the argument is that elements of the contemporary Western left and right display more hostile and anti-Semitic intent than Eichmann did, so what grounds do we have to make him responsible if intent is an element of retribution in the international human rights regime? Eichmann committed a grave crime, but he is not unique in hostile intent. He is unique because of his superior ability to “organize and negotiate,” so it is important now to consider Eichmann in the context of his role in the bureaucracy.¹⁶

Eichmann’s thoughtlessness is distinct from being merely a cog in a machine, for Arendt is unwilling to conflate lack of intent with the superior orders doctrine. Theorists have argued that Eichmann’s lack of hostile *mens rea* could mean that he was innocent despite his actions, for he was simply following orders.¹⁷ Efforts to make Eichmann innocent because of his role in the bureaucracy, however, fundamentally misinterpret Arendt’s conception of Eichmann’s responsibility. Appeals to the bureaucracy are for Arendt excuses, for they attempt to locate responsibility in the potentiality of others. In one conception of responsibility, Eichmann was merely following orders as anyone would have in his position, and so it is unfair to hold him responsible. This would be a profound misreading of Arendt. She is unclear if the role of bureaucracy should be an attenuating factor in punishing Eichmann, but Arendt is *explicit* that Eichmann is still responsible for the mass atrocity, even if he was following orders.

Arendt is unwilling to conflate lack of intention with the excuse of the bureaucracy, just as she is unwilling to allow the total inversion of morals in civil society to absolve Eichmann of responsibility. This component is vital to Arendt’s argument and to understanding why it is so hard to hold some perpetrators of mass atrocity responsible. Mass atrocity was accepted in some shape or form throughout Germany, so some suggest that Eichmann ought not be responsible for following the norms of society. This argument gains some leverage through the changing linguistic frameworks during the Holocaust. For example, killing.

14 *Id.* at 135.

15 *Id.*

16 *Id.*

17 Benjamin A. Schupmann, *Thoughtlessness and Resentment: Determinism and Moral Responsibility in the Case of Adolf Eichmann*, *Philosophy and Social Criticism*, 2014, at 136.

and murder were conceived of as “a medical matter,” which distanced Eichmann from the consequences of his actions.¹⁸ It is important to remember that the Holocaust also involved eugenic experimentation and violations of the rights of disabled people. The transformation of killing into a medical matter received some pushback from within the German public when the T4 program of involuntary euthanasia of mentally and physically disabled people became public, but the linguistic turn towards conflating the murder and killing as medicine, according to Arendt, took an irrevocable toll on German values. Furthermore, Arendt decries the inconsistent pushback from civil society when the targets of gassing switched from mentally handicapped people to Jews. She specifically calls out inconsistent pushback from churches.¹⁹ She also targets the Jewish Councils that worked with Eichmann to choose and organize which Jews would be deported and killed.²⁰ While some Jewish Councils actively resisted the Nazis, she criticizes the lack of unified resistance from civil society.

It is important to delineate the scope and aim of Arendt’s objection to international criminal law. Arendt does not aim to reject international criminal law in its entirety or argue that one ought to have no international criminal law. But she would remain skeptical of international law, even in its contemporary reflection, for it does not address the phenomenon of non-intentional perpetration of mass atrocity. There was also (and to a lesser degree remains) a tendency to extrapolate from Arendt’s critique an attempt to defend Eichmann as innocent. These readings of Arendt, aside from ignoring her response in the second edition of the book²¹ and selectively reading her report, are telling insofar as they reveal a tendency to defend international criminal law by ignoring the problem. Nonetheless, Arendt’s more limited objection stands. Attempts to hold perpetrators responsible, while possible under contemporary international criminal law, rely on faulty assumptions about individual intent, or attempt to ignore the lack of intent and its impact on perpetrator agency and responsibility. It is difficult to accept Arendt’s premise that a perpetrator of mass atrocity might not display the *mens rea* for the crime. Thus, this paper will now endeavor to demonstrate the enduring relevance of this criticism by exploring the example

18 Hannah Arendt, *Eichmann in Jerusalem: A Report On the Banality of Evil*, 69 (1963).

19 *Id* at 109.

20 While the concept of collective responsibility and attenuated responsibility are extremely relevant in considering the role of the Jewish Councils, they are not necessary to make an argument about responsibility in international criminal law. Suffice it to say that critics of Arendt tend to read her as making more generalizable claims than she is, for she is aware that many Jewish Councils participated in resisting the Nazis and wants to make the facilitating Jewish Councils responsible not criminally but politically and perhaps morally.

21 In the epilogue of the second edition of her book, Arendt explicitly and repeatedly writes that Eichmann is evil and deserved to be hanged. There is no doubt in my mind, and I should be clear that I agree with her, that Arendt was profoundly comfortable with Eichmann being killed. Her objection is not to the outcome but to the proceedings.

of Adolfo Scilingo in *Confessions of an Argentinian Dirty Warrior*.

Adolfo Scilingo: Expanding the Scope of the Objection

This purpose of this section is twofold. First, this paper aims to reinforce Arendt's example of Eichmann with similar example through the Argentinian "Dirty War." Second, it will argue that Adolfo Scilingo during the war demonstrates that Arendt's argument is more generalizable than she intends, for the question of intention in international criminal law should not be restricted to high-level perpetrators of mass atrocity. Adolfo Scilingo was a Lieutenant Commander during the Argentinian "Dirty War" that participated in the death flights. In those flights, he drugged political prisoners and threw them alive out of planes to drown in the sea. He is most famous for confessing his crimes to journalist Horacio Verbitsky in *Confessions of an Argentine Dirty Warrior*, and it is this confession that I consider below. Given that Arendt uses historical analysis and evidence brought about in a trial, I do not want to argue that these are entirely comparable case studies. Also, Eichmann maintains his innocence while Scilingo accepts some form of personal responsibility. The dissimilarity of these cases is ultimately instructive because it demonstrates just how far Arendt's observations prove true. Arendt makes room to extend the example of Eichmann, adding that "the trouble with Eichmann was precisely that so many were like him."²² Thus, this paper will attempt to fill in the gaps more comprehensively to build Arendt's theory from the example of Eichmann; it will argue that there are more Eichmanns than are known.

Arendt makes room in her report to extend the example of Eichmann, for officials like Scilingo display many of the same aspects that pose similar problems to holding criminals responsible. Scilingo displays a lack of bad intention throughout much of his confession, even when pressed by Verbitsky. When Verbitsky presses him on the gang-like contraventions of law and morality, Scilingo responds, "shooting someone is immoral too," implying that Scilingo does not believe he committed something truly evil.²³ Although, unlike Eichmann, Scilingo is explicit that he struggles with internal suffering and regret, he does not entirely embrace his guilt or responsibility. For instance, Scilingo emphasizes that he was not responsible for torturing, flying, or drugging the prisoners, minimizing his role in the death flights.²⁴ Verbitsky writes of Scilingo, "every time an idea surprises him, he remains silent. He resists accepting a different perspective, but he isn't categorical either."²⁵ It appears that Scilingo is

22 Hannah Arendt, *Eichmann in Jerusalem: A Report On the Banality of Evil*, 276 (1963).

23 Horacio Verbitsky, *Confessions of an Argentinian Dirty Warrior: A Firsthand Account of Atrocity* 52 (1995).

24 *Id.*

25 *Id.*

incapable of empathy and unable to take the perspective of another person. It seems that this is a weaker form of thoughtlessness than Eichmann's, for Scilingo does not assert his categorical innocence. This difference could be the result of the different forum (confession versus trial statements), but unlike Arendt, one cannot view Scilingo in person to determine whether he was truly a thoughtless and non-intentional perpetrator. Nonetheless, there is good evidence to believe that Scilingo and Eichmann *are* similar, especially considering their similar structural circumstances.

Furthermore, the Argentinian bureaucracy and civil society play similar roles in complicating Scilingo's responsibility. Most directly, Scilingo makes the same 'superior order' and military culture argument as Eichmann, arguing that his military position required him to follow orders. Furthermore, those orders were deliberately vague, making it harder to delineate Scilingo's intention from his understanding of nebulous orders.²⁶ Unclear orders play an important role in sustaining bureaucratized violence, and although Arendt does not explore this phenomenon explicitly, the lack of clarity is yet another element that makes it harder to base convictions on a clear intention. Unclear orders are an example of using words that are bureaucratized and become part of social values, similar to the conflation between murder and 'medical matters.' Similarly, Scilingo accepted the terminology of 'the flight' without reflection: "it was normal, although now it seems like an aberration."²⁷ Scilingo's crimes were not 'death flights;' they were murder, and such linguistic shifts give cause to question whether he had evil intentions. When unclear orders compound with an intense military education, Scilingo's ability to independently think and have agency over his actions and responsibility for consequences becomes questionable. Independent thought is exactly what is necessary in these pivotal situations, but when there are structural barriers to that thought, the assumption of thought-out evil intentions becomes questionable grounds for convictions.

Moreover, elements of civil society supported mass atrocity and allowed Scilingo to commit these crimes without the evil intention assumed to be behind them. Most significantly, parts of the Catholic Church played an immensely important facilitator role. Catholic chaplains helped the Navy officials who participated in the murders to come to terms with their actions on Christian

26 For more, see Alex Gibney, *Taxi to the Dark Side* (2007) and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Ernesto Mendez, UN Doc. A/71/298, 5 August 2016. Both works emphasize how unclear orders, trainings, and protocols do more than open the door to cruel and inhumane treatment, as well as torture. Unclear orders imply a blank slate and prompts lower-level officials like Scilingo towards unjust and illegal action.

27 Horacio Verbitsky, *Confessions of an Argentinian Dirty Warrior: A Firsthand Account of Atrocity* 52 (1995).

grounds, reframing their murders as Christian actions.²⁸ While the Catholic Church, like other actors such as journalists and judges, had diverse roles in the Dirty War, these actors in civil society allowed Scilingo and others to commit mass atrocity. Catholic confessions pose a particularly acute problem to the idea of intention versus thoughtlessness. On the one hand, the need to confess indicates a feeling of guilt and therefore bad intention, while on the other hand, the use of the confessions indicate that the soldiers were not substantially free-thinking in their actions, for they were profoundly shaped by the input of these Catholic chaplains. Their ability to continue to murder on the death flights was not a truly independent thought but rather one profoundly influenced by the chaplains. Ultimately, civil society and bureaucracy, to a significant degree, facilitated the mindless and thoughtless perpetration of mass atrocity.

Before drawing the comparison between Scilingo and Eichmann, it is useful to consider the defense of due obedience in the Argentinian case at large. Due obedience is entirely relevant to how to judge Scilingo, for Scilingo was lower to middle level officer while Eichmann was undoubtedly a high level official (just underneath the Nazi equivalent of a cabinet). Yet they were both following orders, and as I have demonstrated, they both share qualities of non-intention. As such, it is instructive to consider how the Argentinian government approached due obedience, or rather, to examine the political contestation over due obedience. While due obedience was generally a defense of people who committed crimes under orders, Alfonsín expanded the definition marginally to include those who “had a great deal of discretion about how to comply with them, or those who committed some of the extraordinary brutal abuses of human rights which call for exemplary punishment.”²⁹ Before that definition could come into force, the legislature expanded it considerably. But that new definition dramatically expanded the scope of prosecutable officers, which in turn led to military protest against the trials. With the Supreme Court unwilling to clarify the scope of due obedience, Alfonsín was forced to reduce the levels of officers subject to prosecution. Ultimately, none of it mattered because Alfonsín lost his re-election, and his successor liberally pardoned perpetrators of mass murder. The Argentinian case is instructive first and foremost because it demonstrates that a lack of clarity over the scope of officials subject to prosecution leads to significant and dangerous contestation over that scope. Nino provides a useful corrective to Arendt’s theoretical and Verbitsky’s biographical account, for a lack of conceptual clarity risks further violence and instability when that obscurity manifests in judicial trials. By highlighting the lack of coordinated negotiations and common discourse after the Argentinian “Dirty War” trials, Nino reveals

that there remains no clarity over who in the military hierarchy is subject to prosecution.³⁰

To even further complicate the messy politics of judicial trials, the strong similarities between Scilingo and Eichmann demonstrate that Arendt's objection to international criminal law is of a particularly wide scope. These examples demonstrate that Arendt's objection applies to officials relatively low and high in the chain of command, and it applies to officials regardless of their post-atrocity status. I assume that officials who are higher than Eichmann are intentionally evil. Nonetheless, Arendt describes how Eichmann's superiors are "greatly satisfied" at deciding to implement the Final Solution, which indicates at least that it is possible they had evil intentions.³¹ At the very least, this paper asserts that Hitler and those directly under him had independently evil personalities, and as such, they are appropriate targets for international criminal law under its current assumptions.

On the other hand, it is less clear that Arendt's critique can be expanded to military members on the lower side of the hierarchy, and Scilingo demonstrates that indeed the critique stands when international prosecution targets lower-ranking officials. Scilingo is actually involved in the flights (as opposed to Eichmann's mere organizing of the flights), so he represents a different and lower category of military officials. Yet Scilingo and soldiers of his status are easier targets for international criminal law, as lower-ranked officials are easier to prosecute. As such, Arendt's objection to the assumption of evil intention for mass atrocity seems to be quite expansive. It would not apply to all soldiers who fall between Scilingo and Eichmann in the military hierarchy, as there are undoubtedly soldiers across the hierarchy who truly intend to commit mass atrocity, but international criminal law in its current form is not correctly prepared to prosecute this vast swath of soldiers.

Arendt's objection does not just apply to a vast swathe of the military hierarchy, but it also applies whether the criminal confesses or not. I have already argued that neither perpetrator reveals truly atrocious intention, although they committed horrible acts, but only Scilingo has confessed. While in terms of the mechanisms of a trial, the confession is paramount, the confession is irrelevant as to whether the perpetrator is actually responsible and ought to be held responsible. Hitler is responsible whether or not he confesses. At the time of the crime, neither actor had clear evil intention, and although Scilingo has since somewhat recognized the evil consequences of his action, it is unclear if he can be held responsible if responsibility is based on evil intention. Naturally, perpetrators who confess can typically be judged legally responsible more quickly, but the concern in this theoretical objection is whether one can be found responsible regardless of confession. Scilingo's confession gives the reader great

30 *Id.*

analytical insight, but Arendt's objection to intention-based international criminal convictions applies to perpetrators who confess and those who do not.

Looking Forward: Drumbl, Osiel, and Arendt

The final section of this paper explores responses to Arendt's objection to international criminal law. It will explore two legal theorists who give Arendtian criticisms of international criminal law, either implicitly or explicitly, and find that their prescriptions are insufficient to Arendt's objection. Mark Drumbl proposes that international criminal law be somewhat more deferential to lower levels of institutional authority and be more open to drawing on sources in other legal and extralegal categories, yet this limits the role of criminal law more than rethinking its assumptions.³² In his more explicitly Arendtian analysis, Mark Osiel goes further to argue that trials of perpetrators of mass atrocity can help communities recover from the trauma of the atrocity. However, Osiel shifts the goals of international criminal law instead of rethinking its assumptions. Because of this, Arendt's theory remains a powerful critique of international criminal law, yet there remains the imperative to hold these perpetrators responsible.

Drumbl's reconstruction of international criminal law involves limiting the role and broadening the sources of international criminal law, but the former proposal is irrelevant and the latter is insufficient. Drumbl persuasively argues that international criminal law is an insufficient means to achieve its purported ends of retribution, deterrence, and expressivism. To make this argument, he draws on legal analysis as well as social science, and he makes reference to Western political thinkers, including Arendt. Drawing a distinction between 'ordinary' and 'extraordinary' crimes, Drumbl correctly aligns Arendt's critique with the latter category, and he makes the Arendtian argument that assumptions that work in ordinary criminal law (such as intentions role in responsibility) cannot be directly transferred to extraordinary crimes.³³ Drumbl moves from this Arendtian critique to argue first that international criminal must pay "qualified deference" to national and local legal institutions, which are often more legitimate sources of law that can achieve retribution, deterrence, and expressivism.³⁴ It is not necessary to contest this argument,³⁵ for even if international criminal tribunals were to move for complementarity to qualified deference, there is no reason to believe that the local and national sources of law

32 Mark Drumbl, *Atrocity, Punishment, and International Law* (2007).

33 *Id.* at 3, 12.

34 *Id.*

35 Although with time, space, and advice from the professor, I do want to contest this argument about qualified deference. It is unclear to me that local and national institutions would be adequate, or that the 'great evil' requirement is sufficiently clear. This is nonetheless a less important argument that what follows.

would do a better job of dealing with the unique case of evil perpetrators without evidence of evil intention. Without evidence that currently subordinate reflections of law would be able to hold non-intentional perpetrators of mass atrocity responsible, Drumbl cannot respond to Arendt with this argument.

Drumbl's other prescription for international criminal law, and the one that is a more direct response to Arendt's objection, is that international criminal law ought to draw on other categories of law. Specifically, he describes the lessons that could be learned from other sources of law. He does this because international criminal law draws on domestic criminal law, which hopes to identify individual fault and therefore individual intention. Given the Arendtian objection, it is useful to appeal to the types of law that allow for collective justice, responsibility, and retribution. Tort, contract, and restitution law, according to Drumbl, are able to hold collective responsible, which would indeed skirt Arendt's objection to attempt to find non-intentional perpetrators individually responsible, directing the aim at larger political, military, and social institutions.³⁶ Yet Drumbl is unwilling to find those institutions as a collective responsible, arguing instead for a "careful" definition of the collective that pays attention to the role of individual agency in collective perpetration of atrocity.³⁷ Drumbl wishes to analyze the ways in which people individually perpetrate atrocity as part of an atrocity, which would allow prosecutors to hold the collective responsible without needing to find fault in any individual person. This necessitates further evaluation.

First, it is not clear that the 'careful' definition of the collective is entirely feasible. Especially in complicated structures like the Nazi regime, which Arendt explicitly describes as "absurdly complicated," I believe Arendt would respond, and I would agree, that it becomes too difficult to adequately trace all the causal mechanisms to properly define the collective.³⁸ The 'careful' definition is a necessary component of Drumbl's argument, and while it is important, it is not clear that it is practicable. More significantly, this proposal will not necessarily and directly address Arendt's criticism. Drumbl's reading of Arendt can charitably be described as sporadic, and as such, it is not clear that Arendt's objection is a priority in his proposal, but his multiple references to Arendt's banality of evil imply that his solution must be able to address Arendt's objection. Drumbl could argue that by collectivizing responsibility, the question of individual intention becomes irrelevant, but that we mean to take a 'crude' instead of 'careful' definition of the collective. If Drumbl were to take the more explicitly and unapologetically structuralist approach, he would sidestep Arendt's criticism. I believe Arendt would find such an approach insufficient, for Arendt's

36 Mark Drumbl, *Atrocity, Punishment, and International Law* 198 (2007).

37 *Id.*

38 Hannah Arendt, *Eichmann in Jerusalem: A Report On the Banality of Evil* 71 (1963).

larger corpus focuses on the public realm as the freedom of individual action and is skeptical of collective responsibility this crudely defined. I am more amenable to this more general approach to the collective, but for the purposes of this paper, it suffices to say that Drumbl's own prescription to international criminal law pulling on sources of collective responsibility relies too much on individual responsibility. If Drumbl wants to punish collective perpetrators because of their individual agency in the atrocity, then he needs to provide a better account of how individual agency is unrelated to individual intention to better account for Arendt's argument.

Mark Osiel, on the other hand, is much more explicitly Arendtian, and so he is perhaps on better grounds to respond to her objection. Osiel takes up Arendt's objection and applies it to the case of Alfredo Astiz, who was an Argentine navy officer, an effective infiltrator of rebel groups, and a leader of a death squad. Astiz represents a middle ground in the military hierarchy Scilingo and Eichmann, and so while it was useful to consider the extreme cases to make the argument about the scope of Arendt's objection, it is not necessary to consider whether Astiz could mirror Arendt's Eichmann.³⁹ Nonetheless, Osiel writes that "Arendt's argument still poses so great a challenge to Western law that its implications have apparently remained too painful and horrifying for courts and legal scholars seriously to contemplate."⁴⁰ He actually takes Arendt's objection further than I have, arguing that it represents an attack on international criminal law's "manifest illegality," for he takes the Arendtian objection to mean that the entire project of international criminal law is, in fact, illegal.⁴¹ As such, he attempts to radically reconstruct international criminal law.

Osiel's proposal is to effectively shift the goals of international criminal trials from responsibility to social restoration. He argues the criminal trials are a sort of public spectacle which allow for social discourse that can "advance social solidarity by ventilating and addressing disagreement, rather than concealing it—by acknowledging and confronting interpretive controversy, not suppressing it."⁴² Embedded in his larger focus on reforms to military and police structures that facilitate perpetration of mass atrocity, Osiel wants to change the ends of criminal trials. He does not want to do away with retribution, but something like social reparation is, Osiel argues, the appropriate goal of criminal trials. His argument

39 Astiz is a more appropriate case study for the type of sociological research into military organization Osiel conducts, but he may actually be a harder case to use as it relates to Arendt's objection. Astiz demonstrates more zeal and passion that veers on intention than Scilingo. Osiel can make this argument through extensive in-person research, and because Arendt's objection is in fact rather broad, but suffice it to say that Scilingo remains the appropriate case study for this paper.

40 Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* 10 (2001).

41 *Id.* at 150.

42 Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 283 (1997).

boils down to the criminal trials' role as a space for democratic contestation and social discourse, for trials provide a unique opportunity for reparative discourse to build 'social solidarity.' This solidarity, manifested concretely through political and military reforms, are hopefully preventative mechanisms against reoccurrence. This argument is significant, as is his other proposal to restructure military training with deep understanding of military values and tradition, but they are both ultimately irrelevant. Osiel is unable to maintain criminal law's responsibility-attributing role, so he shifts the ends away from responsibility towards social solidarity. While Arendt does not express explicit disapproval of social solidarity as the end of criminal trials, her goal is primarily for international criminal law to catch up to mass atrocity in the 20th century, and so it seems unfair to give up on that project, to shift the goalposts, and to subordinate responsibility for atrocity. Unfortunately, I do not have a better solution. In what follows, I make a schematically similar but substantively different move to Osiel. I admit that we are not able to find Eichmann and Scilingo responsible on the current conception of international criminal law. I then shift the goalposts, but instead of reducing the role of responsibility in criminal justice, I take Arendt's objection as a limitation and argue that its consequences might not be as tragic as she argues.

Hannah Arendt has given what seems like an insurmountable mountain to climb in her objection to the assumptions of holding perpetrators responsible. I would like to suggest that instead of trying to climb Everest, one admit that one cannot climb Everest and make sure one climbs regular hills as best as one can. Legal theorists have not found an appropriate way to ground responsibility in something other than intention, but courts need to continue prosecuting mass atrocities. In fact, they do. The simple fact that criminal trials have continued to this day by using a broader concept of mens rea that does not focus on traditional conceptions of intent, despite the popularization of Arendt's banality of evil thesis, is evidence that the current system works. The system merely works imperfectly, and attempts to prosecute 20th century mass atrocity did not "explode the limits of the law."⁴³ Perhaps the tools to find individuals responsible for mass atrocity exist, and I would suggest they exist in morality instead of law, but until those tools are found, current tools must be sharpened. Arendt's objection to international criminal law comes in the context of a larger critique of totalitarian regimes and bureaucratized violence, and her priority in those larger critiques is maintaining the free sphere of political action. Ultimately the best solution, and arguably the only effective one, would be to address the larger political situation that provokes mass atrocity without intention. Nonetheless, current practice is to prosecute the Eichmanns and the Scilingas. Arendt writes the judges convict Eichmann not by finding responsibility grounded in intent but

43 Hannah Arendt, Letter from Hannah Arendt to Karl Jaspers 54 (1946).

by a “barbaric” justification that “a great crime offends nature, so that the very earth cries out for vengeance.”⁴⁴ The current and likely defendants in the International Criminal Court have committed such great crimes that until a sophisticated legal analysis grounds responsibility in something other than intent and in a way amenable also to moral principles, we will still find these defendants responsible because of the greatness of their crime.

Conclusion

This paper has explored the implications of Hannah Arendt’s criticism of the very foundations of international criminal law. If perpetrators must have evil intent to do an evil atrocity in order to be found responsible, then assumptions of moral and legal responsibility are useless in the face of mass atrocity in totalitarian regimes and mass atrocity perpetrated by thoughtless bureaucrats. In fact, I have expanded this criticism with the example of Alberto Scilingo, who demonstrates that even soldiers relatively low in the hierarchy could display a lack of hostile intent similar to Eichmann’s. It concluded by exploring two proposed responses to Arendt’s objections. Drumbl’s proposal of drawing from other sources of law is interesting, but he has not proved why other sources of law would do a better job of addressing intent. And Osiel’s proposal of reconsidering the ends of criminal prosecution has potential, but answers a different objection. Ultimately, we have no choice but to accept Arendt’s objection as a limitation on international criminal law.

This largely theoretical paper raises more questions than answers, and there remains a pressing need for legal and political theorists to approach the question of the roots of responsibility for non-intentional perpetration of atrocity. Until such a time comes, however, the practical approach is to recognize that, despite theoretical concerns, one *must* find people who commit evil actions responsible. Although this paper rejects Drumbl and Osiel as responses to Arendt, their proposals deserve to be further explored by practitioners. Drumbl needs a more rigorous account of what other sources of law bring to criminal law, and Osiel needs to demonstrate how his attention to military organization in other work affects the role of criminal trials. I am largely amenable to Osiel’s more sociological approach and Drumbl’s more collective approach, although neither of these approaches would respond to Arendt’s fundamental objection to responsibility in its modern conception. Let us, then, continue to search for answers to the Arendtian objection while considering approaches by theorists and practitioners like Drumbl and Osiel. Altogether, though there is not yet sufficient philosophically justified grounds to do so, we *must* find individuals like Eichmann responsible and punish them to the fullest extent of the law.

BIBLIOGRAPHY

Baade, Hans, "The Eichmann Trial: Some Legal Aspects," *Duke Law Journal*, Volume 1961:421. pp. 400-420.

Benhabib, Seyla, "Who's on Trial, Eichmann or Arendt?," *New York Times: The Stone*, September 21, 2014. Found at <https://opinionator.blogs.nytimes.com/2014/09/21/whos-on-trial-eichmann-or-anrendt/>

Birmingham, Peg, "Hannah Arendt's Philosophy of Law Approach to International Criminal Law," *International Criminal Law Review*, Volume 14, Issue 4-5, pp. 695-716, 2015.

Drumbl, Mark, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007).

Hannah Arendt, "Letter from Hannah Arendt to Karl Jaspers" (August 18, 1946) in Hannah Arendt & Karl Jaspers, *Hannah Arendt, Karl Jaspers: Correspondence, 1926-1969* (Kohler 7 Saner eds., 1992).

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (Penguin: New York, 1963).

Luban, David, "Arendt on the Crime of Crimes," *Ratio Juris*, Vol. 28, Issue 3, pp. 307-325, 2015.

Luban, David, "Hannah Arendt as a Theorist of International Criminal Law," *International Criminal Law Review*, Volume 11, Issue 3, pp. 621-641, 2-11.

Nino, Carlos, "Past Abuses of Human Rights in Context," *The Yale Law Journal*, Vol. 100, No. 9, pp. 2619-2640, 1991.

Osiel, Mark, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War*, (Yale University Press: New Haven, 2001).

Osiel, Mark, *Mass Atrocity, Collective Memory, and the Law*, (Transaction Publishers: New Jersey, 1997).

Stangneth, Bettina, *Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer*, Vintage Publisher, trans. Ruth Martin, 2011.

Verbitsky, Horacio, *Confessions of an Argentine Dirty Warrior: A Firsthand Account of Atrocity*, (New York: The New Press, 1996).

ARTICLE

ONE MAN, NO VOTE: ANALYZING THE EFFECTS OF DISENFRANCHISEMENT ON RECIDIVISM

Alexandra Tolhurst, University of Pennsylvania

Abstract

In November 2018, Florida voters approved an amendment restoring voting rights to an estimated 1.4 million citizens with felony records. The amendment was based in part on a study showing that the previous restoration of voting rights led to near inexistent recidivism among those who had their rights restored. If this is the case, it has great implications for the estimated 6.1 million American citizens that are currently prohibited from voting due to laws that disenfranchise those who are convicted of felony offenses. But is this the case? Prior studies have shown a correlation between one's ability to vote upon release from prison and reduced recidivism rates. This study uses a difference-in-differences technique to determine the causal effect of one's access to voting rights on recidivism. Using data from the National Corrections Reporting Program, this study examines recidivism rates from 2000-2016 in three states—South Carolina and Georgia as control states which didn't change their disenfranchisement policies throughout the time in question; and Florida, known as the disenfranchisement capital of the United States, as the treatment state. Findings show that the restoration of voting rights does not lead to a decrease in recidivism, except for certain subgroups of felons. These findings suggest that current momentum to change disenfranchisement laws may not necessarily be misguided, but that resources may be best allocated elsewhere to policies that will effectively reintegrate felons and reduce recidivism.

Introduction

In November 2018, Florida voters approved Amendment 4, the Voting Rights Restoration for Felons Initiative, restoring voting rights to approximately 1.4 million citizens with felony records who have completed their term.¹ The largest expansion of voting rights since the 26th Amendment, which was passed nearly 50 years ago, Amendment 4 was partially based on research showing that the restoration of voting rights decreased recidivism.² Citing a report on the impact of Florida's restoration of voting rights which showed that the average recidivism rate for those who had their rights restored was only 0.4% compared to the state average of 30%, proponents of the amendment argued that felons who have their voting rights restored have the ability to become full members of society and the economy, which leads to lower recidivism rates.³

This debate is not contained within Florida. Despite the main characteristic of a democratic system of governance being its citizens ability to have a say in the policies that affect them by voting, over 6.1 million United States citizens are denied this right due to felony disenfranchisement policies that strip them of their voting rights after being convicted of a felony.⁴ In other words, over 2.5% of the United States voting age population, or 1 in 40 adults, is denied the right to vote ranging in time from the length of their prison sentence to their entire life. Additionally, 77% of disenfranchised voters are either on probation or parole or have finished their sentence, therefore, are living in a democracy in which they do not get to participate in, effectively relegating them to the status of "second-class citizens."

The ability to partake in informal social control measures and societal institutions, such as voting, has been proven to help felons re-integrate into society and prevent recidivism.⁵ Additionally, previous research has documented that the reversal of disenfranchisement policies, allowing felons renewed access

1 Arian Campo-Flores, Jon Kamp, Floridians Grant People With Felony Records the Right to Vote, *Wall Street Journal* (Nov. 6, 2018), <https://www.wsj.com/articles/floridians-grant-people-with-felony-records-the-right-to-vote-1541560193>

2 The Washington Economics Group, Inc., Economic Impacts of Restoring the Eligibility to Vote for Floridians with Felony Convictions as a Result of Passage of Amendment 4, The Washington Economics Group, Inc. (May 8, 2018), <https://drive.google.com/file/d/1sP2BiK-CEmkJJOiKjAgUBAwl75H5UP08/view>

3 Mary Ellen Klas, Price Tag for Restricting Felons' Rights After Prison Put at More Than \$365 Million a Year, *The Miami Herald* (May 21, 2018), <https://www.miamiherald.com/news/politics-government/election/article211408754.html>

4 Christopher Uggen, Ryan Larson, and Sarah Shannon, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, The Sentencing Project (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

5 Robert J. Sampson and John H. Laub, Crime and Deviance over the Life Course: The Salience of Adult Social Bonds, 609-627 *American Sociological Review* (1990).

to voting rights, increases pro-social and pro-democratic attitudes.⁶ Though these have both been proven to be predictors of reduced crime and recidivism, no empirical studies yet exist to show that access to voting rights has a causal effect on recidivism. This study seeks to fill that gap in the literature.

After reviewing the previous literature surrounding the topic and giving readers an understanding of disenfranchisement laws in America, I present the data that I will use to analyze the effect of disenfranchisement on recidivism. The next section details my research design before presenting the results. The last section recognizes the limitations of my research while also addressing the policy implications of this study and ideas for further research.

Prior Literature

Insights from Criminological and Democratic Theory

A great deal of focus in criminological research has been given to the determinants of recidivism and possible treatments to reduce recidivism. Many of these studies, often descriptive, cohort studies, have found empirical evidence that methods of informal social control contribute to reduced levels of recidivism.⁷ Classic and oft-cited research from Sampson and Laub (1990) found that criminal offenders who re-enter society after incarceration with a stable marriage and stable work history have consistently lower rates of recidivism than those offenders who don't. The main contribution of these studies is the claim that institutions such as marriage, education, and the workforce act as informal social control measures that engage the former offender in society and make them feel like they have a stake in society. This makes the costs of committing further criminal acts outweigh the benefits, causing them to be a productive member of society rather than recidivate.

Claims about the value of institutions in shaping individuals into model citizens are heavily related to democratic norms and values that date back to writings by Alexis de Tocqueville (1838) and John Stuart Mill (1861) in the 19th century. These classic pieces claim that the value in democratic institutions is in the opportunities for political participation they create. Yet, as a society, we bar felons from voting and other forms of civic engagement after their sentence has been served. Currently, over 6 million felons, approximately 2.5% of the United States voting age population, are disenfranchised, disallowing them from participating in our democratic institutions.⁸

Much research has documented that political participation in a democratic system produces an aware citizenry who believe they have a stake in the political system and therefore continues a cycle of political participation.⁹ In other words, "persons who feel efficacious participate at a higher level in the political system than those who lack such feelings."¹⁰

7 John H. Laub, Daniel S. Nagin and Robert J. Sampson, Restoring Rights, Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process, 225-238 *American Sociological Review* (2018).

8 Christopher Uggen, Ryan Larson, and Sarah Shannon, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, The Sentencing Project (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

9 Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: Voting Rights, 41 FLA. L. REV. 443 (1989).

10 Lester W. Milbrath & Madan L. Goel, Political participation: how and why do people get involved in politics? (2d ed. 1977).

Civic Engagement and Recidivism

Generally, voting and civic engagement are not considered informal social control measures as described by Sampson and Laub (1995). Nevertheless, since the idea that Sampson and Laub put forth was that being a member of a family or a workforce gives a person the feeling of being a part of something larger and therefore makes them less likely to recidivate, it is easy to see how the same argument can be made for voting. Since voting is seen as granting “status” and signals formal membership within a political community, voting and civic engagement can also be seen as informal social control measures.¹¹ This very argument was put forth by Uggen, Manza, and Behrens (2004), who conducted a research study that used interviews with felons about the value of civic participation, concluding that participation in democratic institutions, including voting, affirms an individual’s membership in the larger community. Building off Sampson and Laub’s work, Uggen et al. (2004; 2006) argued that civic reintegration is just as important to reintegration as the workplace and family space after offending, and that successful reintegration, in the form of re-enfranchisement, would contribute to reduced recidivism rates.

Though no studies have focused on the causal relationship between voting—an act of civic participation—and recidivism, a growing body of research has documented a correlation between civic participation, mostly in the form of volunteering, and the reduction of recidivism.¹² The main findings of these descriptive studies are that civic engagement offers offenders an increased sense of community engagement,¹³ a strengthened commitment to civic engagement upon release, and a stronger sense of civic responsibility¹⁴—all of which are predictors of reduced crime and recidivism.¹⁵

11 Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* 173 (2003).

12 Shelly S. Hinck, et al., *Service-Learning in Prison Facilities: Interaction as a Source of Transformation*, in *Working for Justice: A Handbook of Prison Education and Activism* (2013).

13 Jennifer Tilton, *Rethinking youth voice and institutional power: Reflections from inside a service learning partnership in a California juvenile hall*, 35 *CHILDREN AND YOUTH SERVICES REV.* 1189, 1195 (2013).

14 Deborah S. Arthur & Jamie Valentine, *In Service Together: University Students and Incarcerated Youth Collaborate for Change*, 98 *THE PRISON JOURNAL* 427, 442 (2018).

15 Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government*, SSRN (2018).

The Consequences of Disenfranchisement

Despite the large body of research documenting the importance of civic engagement in becoming a productive citizen, the number of studies on disenfranchisement laws has been few. A growing body of research is focusing on what is termed the “collateral consequences” of incarceration, which are consequences that are not visible but have equal or greater consequences on the felon.¹⁶ These consequences include revocation of drivers licenses, the inability to receive federal welfare benefits, the inability to get a job, and disenfranchisement, which prevents formerly incarcerated offenders from voting.¹⁷

Despite this lack of attention, in recent years, disenfranchisement has been a widely covered topic throughout mass media. For example, before the 2018 midterm elections, one popular late-night talk show host devoted a portion of his program to speaking about disenfranchisement and its consequences due to the impending vote on Amendment 4 in Florida that would re-enfranchise 1.4 million felons.¹⁸ The media has dubbed Florida the “disenfranchisement capital” of America, reporting on changes in the laws and notable effects since the 2000 election.

Despite much coverage in the media, little research has been done on the political effects of disenfranchisement policies. Nonetheless, multiple studies have looked at the effect that a mass amount of lost votes could and possibly has had on American elections. Due to multiple factors, particularly the large proportion of racial minorities and lower-income individuals that are incarcerated who would be “likely” Democratic voters, scholars have modeled that disenfranchisement laws have played a decisive role in multiple United States Senate elections and the 2000 Presidential election between Bush and Gore by deeming ineligible thousands of would-be Democratic voters.¹⁹ Despite this, scholars have not agreed on the actual effect on elections because one of the primary features of these modeling studies is making predictions, which is

16 Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 16 (2002).

17 Marc Mauer & Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2002).

18 Ryan Reed, John Oliver on How Florida Became America’s ‘Disenfranchisement Capital’, (Rolling Stone, September 10, 2014), online at <https://www.rollingstone.com/tv/tv-news/john-oliver-florida-disenfranchisement-capital-721875/>.

19 Christopher Uggen & Jeff Manza, *Democratic contraction? Political consequences of felon disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002).; Anthony J. Phillips & Natalie D. Deckard, *Felon disenfranchisement laws and the feedback loop of political exclusion: The case of Florida*, 20 J. AFR. AM. STUD. 1 (2016).; Traci Burch, *Did Disenfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida’s Ex-Felons*, 34 POL. BEHAV. 1 (2010).

at the scholar's discretion. While scholars agree that felons differ from non-felons in ways that are likely to affect political behavior, they disagree to what extent. For this reason, Burch's (2012) study, which replicated Uggen & Manza's (2002) using different estimates, finds that Uggen & Manza overestimated the effect of disenfranchisement on the 2000 election.

The other body of existing research on disenfranchisement laws involves field experiments that attempt to reverse the political effects of disenfranchisement laws with reintegration efforts. Rather than focus on the future criminal behavior of offenders due to the laws, these studies focus on the political participation of offenders. Among the range of disenfranchisement laws, some states require that officials notify offenders of their right to register to vote after release if they are eligible (Table 3). These studies attempt to discern if such notification laws are effective at increasing voter turnout in felon populations, of which most find a positive response rate.²⁰ Meredith and Morse (2015) use a regression discontinuity design to show that in Iowa, both automatic restoration of voting rights and notification of one's rights increases the likelihood of voter turnout for felon populations.

Still, the body of literature investigating the effects of disenfranchisement laws on felons has a wide gap. One study that made strides in the field is Shineman's (2018), in which she conducts two field experiments in Ohio and Virginia that established a causal relationship between the reversing of disenfranchisement policies and an increase in pro-democratic attitudes and behaviors in felons. Though only being able to theorize about the link to recidivism, this is the first study to provide a causal link between disenfranchisement and attitudes that have proven links to recidivism—that is, pro-democratic behaviors and attitudes are predictors of reduced crime and recidivism—which suggests that a link between disenfranchisement and recidivism may exist.

Only two studies have investigated this link, making them the studies that are closest to my work. Both studies attempted to discern the effect of voting on recidivism, though both established a correlational relationship rather than a causal one.²¹ Uggen and Manza (2004) use data from the Youth Development

20 Alan S. Gerber et al., *Can Incarcerated Felons Be (Re)integrated into the Political System? Results from a Field Experiment*, 59 *AM. J. POL. SCI.* 1 (2014).; Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 *ANNALS AM. ACAD. POL. & SOC. SCI.* 220 (2014).; Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 *Q.J. POL. & SOC. SCI.* 41 (2015).

21 Christopher Uggen et al., *After Crime and Punishment: Pathways to Offender Reintegration, Less Than the Average Citizen: Stigma, Role Transition and the Civic Reintegration of Convicted Felons* 261, Shadd Maruna & Russ Immarigeon, Willan Publishing (2004).; Guy P. Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *BERKELEY LA RAZA L.J.* 407 (2012).

and voting behavior, to run a logistic regression analysis. Though benefiting from longitudinal data, the study is not attempting to provide a causal relationship, so there could easily be third variables explaining the relationships seen. Additionally, the study lacks external validity—Minnesota is a rare state in that it has historically high voter turnout rates, low incarceration rates, and 90% of the state demographically is white, making it a bad test case for most of the country.

Hamilton-Smith and Vogel's (2012) build on Uggen and Manza's work by instead using multi-state data. They use the Department of Justice's Study of Recidivism of Prisoners released in 1994, which includes data on 302,209 felons released from prison in fifteen states in 1994. Using a logistic regression analysis to estimate treatment effects while also accounting for unobserved differences across states, Hamilton-Smith and Vogel find that disenfranchisement laws have a significant effect on recidivism. Individuals released in states that permanently disenfranchise felons are 10% more likely to recidivate than those released in states that restore voting rights upon release. Though making advances in the field, the study is just comparing states without providing a counterfactual, therefore there is no way of knowing if these differences existed before laws were put in place or if a third variable is causing the observed difference. Additionally, the data used is over 20 years old, so, while still being useful, one must use caution in applying what is learned from this study to today because the data is from 1994. Building on this work, I use updated data on recidivism and a difference-in-differences research design to exploit recent changes in disenfranchisement laws to discern the causal effect of disenfranchisement laws on recidivism.

Lastly, of course, there is the report that led to the creation of Amendment 4 in Florida. This study used annual reports on the status of individuals whose rights were restored from 2011 to 2015 to determine the impact of voting rights on recidivism.²² The study showed that of the 1,390 felons whose voting rights were restored, only six re-offended, making the average recidivism rate among this population 0.4% compared to the state-wide 30% recidivism rate. Despite this, similar to Hamilton-Smith and Vogel's (2012) study, there is no control group, so the author admits that "there is not enough data to conclude that there is a direct correlation between restoring civil rights and decreased recidivism."²³

22 Erika L. Wood, *Florida: An Outlier in Denying Voting Rights*, Brennan Center for Justice (2016).

23 Erika L. Wood, *Florida: An Outlier in Denying Voting Rights*, Brennan Center for Justice (2016).

Disenfranchisement Laws in the United States

When the United States was founded, the idea of “civil death” was carried over from Europe. “Civil death,” based on the persuasive idea at the time that those who committed crimes had broken their social contract with the community and no longer deserved a say in governance, was originally imposed on citizens who committed crimes of morality, such as drunkenness or prostitution, or election crimes, such as voter fraud.²⁴ By 1868, 80% of states had included in their constitutions that felons would be disenfranchised for life.

Many disenfranchisement laws were originally passed to target black citizens who had recently gained the right to vote under the Voting Rights Act in order to keep them from voting. For example, South Carolina disenfranchised those convicted of “thievery” and rape, but not of murder, because they deemed the former to be “black” crimes. Previous research has documented the racialized motivations of disenfranchisement policies throughout history and the disproportionate effects of these policies on minority citizens, which still exist today. Currently, black Americans are more than four times as likely to be disenfranchised as non-black Americans.²⁵ In some states, black adults make up over 20% of the disenfranchised population.

Disenfranchisement policies are noted for being incredibly complex, often misunderstood by policymakers and those they affect. The policies range in practice from no restriction of voting rights to lifetime disenfranchisement (see Appendix Appendix A for a list of each state’s policy.) As of 2019, two states never disenfranchise felons, ten states disenfranchise some felons for life, and two states disenfranchise all felons for life.²⁶

One category of disenfranchisement laws bars felons from voting until after their sentence is served. In practice, these laws look very different depending on the state one is in. For example, some states, such as Alaska and Minnesota, restrict voting rights until one has completed their full sentence, including prison, parole, and probation. Other states, such as Michigan and Utah, restore rights upon release from prison, regardless of one’s being on parole or probation. In some states, this is expanded further to include the requirement to pay all fees, fines, or restitution owed before restoration of voting rights.

24 John Locke, *Two Treatises of Government*, Awnsham Churchill (1689).; George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 *FORDHAM URB. L.J.* 101 (2005).

25 Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, The Sentencing Project (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

26 *Criminal Disenfranchisement Laws Across the United States*, (Brennan Center for Justice, December 7, 2018), online at <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

Currently, 33 states follow one of these policies.²⁷

Another category of disenfranchisement laws encompasses those which restore rights after a set number of years (Appendix A). In some states, such as Nebraska or Delaware, this period is two or five years post-sentence, respectively. In other states, such as Oklahoma, voting rights are not restored until after a period of time equal to the length of the sentence that was served, which could effectively still amount to lifetime disenfranchisement.

Additionally, some states disenfranchise only some felons. For example, Nevada, having one of the most complex policies in the nation, separates felonies into different categories based on severity. Those whose convictions are in “category A,” having multiple felonies, are permanently disenfranchised, while certain convictions in “category B” result in automatic restoration two years post-sentence.²⁸ Another example is Alabama, which has a “law of moral turpitude” that lists 47 crimes ranging from murder to theft which disqualify one from voting rights restoration.²⁹

Finally, there are those states that permanently disenfranchise felons who do not apply for a certificate of restoration or are granted clemency. For example, Tennessee requires that all people convicted of a felony, except those with electoral or violent offenses who are ineligible, apply for a certificate of restoration that must be granted by the Board of Probation and Parole as well as the election commission office.³⁰ Eight states’ disenfranchisement policies are of this type.³¹

As evidenced above, most states have moved away from the antiquated policy of lifetime disenfranchisement. Since 2000, 21 states have expanded felony voter provisions.³² This is partially due to the United States’ current political landscape – eight in ten United States residents support voting rights for felons who have completed their sentences and two-thirds support voting rights for those on probation or parole.³³ Nonetheless, changes in disenfranchisement

27 Jean Chung, *Felony Disenfranchisement: A Primer* (2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

28 *Criminal Disenfranchisement Laws Across the United States*, (Brennan Center for Justice, December 7, 2018), online at <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

29 ALA. CRIM. CODE § 17-3-30.1 (2017).

30 Tennessee Secretary of State, *Eligibility to Vote after a Felony Conviction* (2017), https://sos-tn-gov-files.tnsosfiles.com/forms/Eligibility%20to%20Vote%20after%20Felony%20Conviction.pdf?VqqFjxmz7DwdD7_jLHbDHXYtLmn2SiPZ.

31 *Criminal Disenfranchisement Laws Across the United States*, (Brennan Center for Justice, December 7, 2018), online at <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

32 Jean Chung, *Felony Disenfranchisement: A Primer* (2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

33 Jeff Manza, Clem Brooks & Christopher Uggen, Public attitudes towards felon disenfranchisement in the United States. (68 ed. 2004), *Public Opinion Quarterly*.

policy are subject to political vacillation and are often decided on party lines. For example, Iowa expanded felony voter provisions in 2005 under a Democratic governor, then reversed those expansions in 2011 under a Republican governor.³⁴

Research Setting

Georgia

Georgia is one of just a few states with a “law of moral turpitude.” Georgia’s constitution reads, “No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.”³⁵ Unlike other states that provide a list of felonies that involve moral turpitude, no such list exists in Georgia.³⁶ In practice, this means that every person convicted of a felony is ineligible to vote until they complete their sentence, including parole, probation, and the payment of any fines.

Georgia has the 10th highest per capita rate of disenfranchisement in the country.³⁷ In 2010, seven out of every 50 Georgians had a felony conviction, and in 2018, approximately 250,000 Georgians were ineligible to vote as they were serving felony sentences at the time.³⁸ This disenfranchisement disproportionately affects African Americans by a large margin. In 2016, 52% of those disenfranchised were African American, almost twice the percentage of African Americans in the state population.³⁹ At the same time, whites accounted for only 36% of the disenfranchised population, nearly half their percentage of the population.

One study found that the majority of Georgians with a felony conviction are registered to vote, with 60% of felons reporting they had registered.⁴⁰ Further, 95% of felons said it is important to vote, possibly lending to the argument that the inability to vote contributes to felons’ feelings of exclusion from local communities after being released from prison.

South Carolina

South Carolina is one of 33 states which allows former felons to restore their voting rights after completing their entire sentence, including parole or probation (see Appendix A). The disenfranchised population includes an estimated 48,000 citizens, of whom 51% are currently in prison, 43% are on

probation, and 6% are on parole.⁴¹

As in most states, disenfranchisement disproportionately affects minorities in South Carolina. South Carolina was one of five southern states that, between 1890 and 1910, passed laws barring convicts from voting if they were convicted of crimes considered ‘black.’⁴² These laws disenfranchised people convicted of “thievery, arson, wife beating, housebreaking, and attempted rape,” but didn’t include murder. Though the law has since been changed, today one out of every 27 African American voters are disenfranchised, compared to only one out of every 65 South Carolina voters.⁴³ Even though African Americans make up only 27% of South Carolina’s population, 64% of South Carolina’s disenfranchised population is African American.

Florida

In 1968, Florida revised its constitution, removing the “law of moral turpitude” but leaving intact a provision stating that “no person convicted of a felony... shall be qualified to vote... until restoration of civil rights...,” amounting to blanket felony disenfranchisement for all felons.⁴⁴ This was the law until 2007 when then-Governor Crist issued an executive order for new clemency rules, eliminating the requirement of a formal clemency application process for most felons. The rules allowed for the restoration of voting rights once a felon had completed all conditions of his sentence, paid all fees, and had no pending criminal charges. In short, the rules stated that eligible felons “shall have his or her civil rights immediately restored by automatic approval of the Clemency Board.” According to the Auditor General, under these rules 80% of felons became eligible for rights restoration.

These rules instituted by Governor Crist remained in effect until 2011, when the incoming governor, Rick Scott, issued his own rules of executive clemency. These new clemency rules not only rolled back reforms implemented under Governor Crist, reinstating lifetime disenfranchisement, but imposed a five-year waiting period before convicts could apply for clemency. If an application were granted review, approval was required of the governor, and two members of his cabinet for clemency to be granted. While over 200,000 felons

regained their voting rights during the four years Governor Crist's clemency rules were in effect, only approximately 2,000 regained their voting rights under Governor Scott's rules.⁴⁵

In November 2018, Florida voters approved a constitutional amendment, the Voting Rights Restoration for Felons Initiative, that restored the right to vote automatically for felons upon completion of their sentences, probation, and parole, except for those convicted of murder or felony sexual offenses.⁴⁶ The amendment went into effect in January of 2019 and restored the right to vote to approximately 1.4 million citizens. Before the Voting Rights Restoration for Felons Initiative went into effect, Florida's disenfranchisement rate was higher than that of any other state. The disenfranchised population had accounted for 25% of United States citizens, 1.6 million people, that had lost their right to vote due to felony convictions.

46 Criminal Disenfranchisement Laws Across the United States, (Brennan Center for Justice, December 7, 2018), online at <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

Data

The previously reviewed literature suggests that there may exist a causal link between one's ability to vote and recidivism, but this has yet to be proven. Previous attempts have established a correlation between voting and recidivism using both qualitative, longitudinal, self-reported data, and aggregated state-level administrative data.⁴⁷ These data, however, are not ideal to establish causation due to the lack of a counter-factual or control group.

The present study uses data from the National Corrections Reporting Program (NCRP) collected between 1991 and 2016 by the Bureau of Justice Statistics.⁴⁸ The NCRP compiles data on all people admitted to state prison, released from state prison, or in state prison at year end, including from 1991 to 2016 in the United States. The data include information for each individual prison term, including offender characteristics—such as race, age of admittance, age of release, and sex—as well as offense characteristics—such as offense type, year of admittance, and type of admittance. These data are advantageous because they provide offender-level administrative information, rather than aggregated, state-level data or self-reported data. Additionally, because the data contain one record for each term spent in prison and is connected to a unique “inmate ID” that remains constant for each individual, this allows for examination of each individual's whereabouts throughout a particular period.

Generally, a necessary assumption is that given data is both accurate and of good quality. Nevertheless, due to state-level differences in the collection of data, here it is assumed that differences would be found in the quality of NCRP data depending on the state considered. An analysis of the NCRP data finds that only eight states' data in the dataset meet tests for reliability and availability.⁴⁹ In some cases, states have not reported data since the conception of NCRP, and in other cases, the reliability and availability of data vary by year. This not only constricts which states are able to be used for this study, but allows for the possibility of biased results. Additionally, definitions for certain variables vary by state, such as for “race,” which could allow for results to be under- or over-stated depending on reporting.

Due to the limitation of reliable data, three states' – South Carolina, Georgia, and Florida - were chosen for this study based on their being determined as reliable by the NBER (2014) analysis and the availability of the data from the

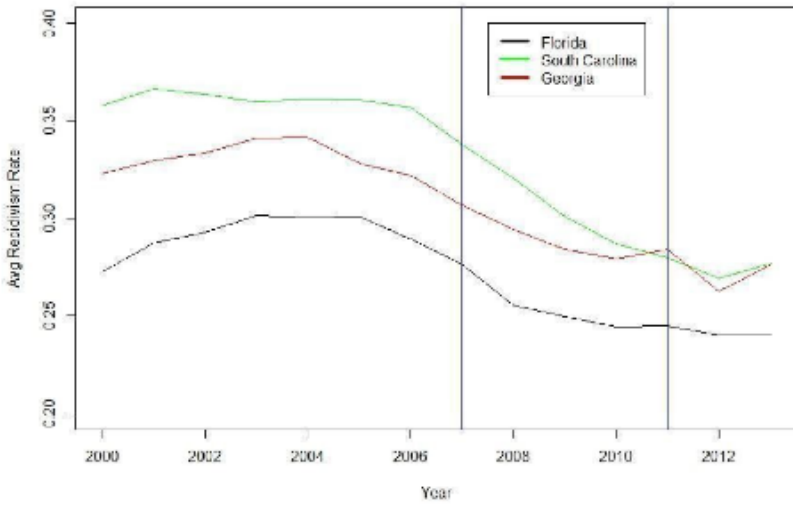
year 2000 to 2016. The full dataset includes 12,342,783 term records from 2000 to 2016. After defining recidivism as re-admittance within three years of release, removing observations for which the offense was murder or a sexual felony (these offenses are ineligible for re-enfranchisement), removing observations with missing variables in the dataset, and limiting the data to only include term records from Florida, South Carolina, and Georgia, the full analysis was completed on 88,537 individuals.

The outcome of interest for this study is recidivism, which is analyzed using individual re-admittances to prison between 2000 and 2013. For the purposes of this study, recidivism is defined as re-admittance within three years of release. Important to note is that the NCRP data limits analysis of recidivism to only re-admittances, not re-arrests as recidivism is traditionally defined. Thus, the analysis was conducted on individuals whose term was due to a new conviction or parole revocation. This could bias the results downward due to a significant set of individuals being missing who were possibly re-arrested, but not re-admitted to prison.

Figure 1 shows the basic recidivism rate for Florida, South Carolina, and Georgia from 2000 to 2013. The critical time period in question is 2007 to 2011, the years that Florida's rules instituted by Governor Crist were in effect, allowing for the automatic restoration of voting rights upon completion of sentence. If the restoration of voting rights causes decreased recidivism, one would expect to see Florida's recidivism rate decrease at a more rapid rate than South Carolina and Georgia between 2007 and 2011, then equalization of the rates after 2011.

Table 1 shows the breakdown of recidivism in each of the periods, both during the period of 2007 to 2011 and not. The average recidivism for felons who would be eligible for rights restoration based on the rules implemented by Governor Crist actually increased between 2007 and 2011 in South Carolina, Georgia, and Florida. In South Carolina and Georgia, this increase amounted to a modest 0.77%, while in Florida the increase was more than double that at slightly over 2%.

Figure 1. Recidivism Rate by State 2000-2013



Note: Vertical lines denote treatment period between 2007 and 2011.
 Source: (Bureau of Justice Statistics, 2018)

Table 1. Mean Re-Admit Rate for Felons Meeting Voter Eligibility Requirements

	Years FL felons are ineligible to vote	Years FL felons are eligible to vote (2007-2011)
South Carolina & Georgia	6.36%	7.13%
Florida	7.89%	9.90%

Source: (Bureau of Justice Statistics, 2018)

Given that disenfranchisement disproportionately affects African Americans, it is useful to look at the different recidivism rates for blacks and whites during the period in question as well. Table 2 shows the mean recidivism rate in each of the periods by race. Whereas recidivism is higher for blacks compared to whites in all three states during the years that Florida felons are ineligible to vote, it is lower for blacks than whites during the years felons are eligible to vote in Florida. Additionally, recidivism increased for both races in all states from 2007 to 2011, it increased by 3.46% for whites and only 0.89% for blacks in Florida. In South Carolina and Georgia, recidivism increased 1.73% for whites and 0.49% for blacks during the same time. This could possibly suggest that the restoration of voting rights has a differential effect on recidivism dependent on race.

Table 2. Mean Re-Admit Rate for Felons Meeting Voter Eligibility Requirements by Race

	Years FL felons are ineligible to vote		Years FL felons are eligible to vote	
	White	Black	White	Black
South Carolina & Georgia	5.68%	6.87%	7.41%	7.36%
Florida	6.81%	8.53%	10.27%	9.42%

Source: (Bureau of Justice Statistics, 2018)

Hypothesis

H1: *Recidivism will decrease as access to voting rights for felons increases.* Having access to voting rights makes people no longer feel like “second-class citizens,” easing reintegration and making them engage in pro-democratic and socially acceptable behaviors; this, in turn, minimizes the chances they will recidivate.

H2: *Restoration of voting rights will cause recidivism to decrease more for female felons than male felons.* Male felons, for both violent and non-violent offenses, are more likely to recidivate than female felons. Additionally, fewer men register to vote than women. Restoration of voting rights will disproportionately affect female felons, causing a larger decrease in recidivism in female felons than male felons.

H3: *Restoration of voting rights will cause recidivism to decrease more for black felons than white felons.* Disenfranchisement disproportionately affects African Americans. A sweeping restoration of voting rights will cause black felons to be disproportionately affected, creating a larger decrease in recidivism in the black population than the white population.

Research Design

To determine the causal effects of disenfranchisement on recidivism, a difference-in-differences analysis was conducted. Treatment and control states were determined by the NBER (2014) analysis of the quality and availability of the NCRP data and by internal law changes regarding disenfranchisement since 2000. Table 3 shows all the changes in disenfranchisement policies in the United States since 2000. Florida was selected as the treatment state for two reasons: first, it is notorious for being the disenfranchisement capital of the US; additionally, it is one of only two states during the period to go from lifetime disenfranchisement to a more lenient policy and back to lifetime disenfranchisement. Every state on the diagonal (from left to right) had no change in policy since 2000, making it eligible to be a control state. Of the six states with reliable and available data in this category, South Carolina and Georgia were chosen due to their proximity to Florida (eliminating regional effects) and their similar recidivism rates to Florida (Figure 1). The treatment period was the period from 2007 to 2011, the years during which Florida allowed for automatic restoration of voting rights upon completion of one’s sentence.

For each analysis, data was limited to those citizens who would meet voter eligibility requirements during the treatment period – those who were not in prison, were 18 or older, and who had never been convicted of murder or a sexual felony – so that rates could be accurately determined. All data was analyzed using R. Each question was analyzed using the Quasi-Poisson general linear model.

Table 3. Changes in State Felon Disenfranchisement Laws Since 2000: Law in Pre- v. Post- Period

	No restriction of voting rights	Requires notification of voting rights and/or help in restoration process	Automatic restoration after release from prison	Allows restoration after completion of full sentence	Allows restoration of voting rights two-to-five years post-sentence, with application	Lifetime disenfranchisement for some or a felony
No restriction of voting rights	-Maine -Vermont		-Massachusetts (2000)			
Requires notification of voting rights and/or help in restoration process						
Automatic restoration after release from prison		-South Dakota (2010)	-Ca, Florida -Colorado -Hawaii -Illinois -Indiana -Kansas -Michigan-Montana -New Hampshire -North Dakota -Ohio -Oregon -Pennsylvania -Utah	-South Dakota (2012)		
Allows restoration after completion of full sentence		-New Mexico (2003) -New Jersey (2010) -North Carolina (2007) -New York (2010) -Louisiana (2008)	-Maryland (2016) -New York (2018) -Rhode Island (2006)	-Alaska -Arkansas -Georgia -Idaho -Minnesota -Missouri -South Carolina -Texas -West Virginia -Wisconsin -Arizona		-Kentucky (2015) -Iowa (2011) -Florida (2011)
Allows restoration of voting rights two-to-five years post-sentence, with application				-Virginia (2015)	-Oklahoma	
Lifetime Disenfranchisement		-Florida (2007)		-Iowa (2005) -New Mexico (2001) -Delaware (2015) -Florida (2007) -Florida (2018) -Maryland (2007)	-Delaware (2000) -Nebraska (2005)	-Mississippi -Virginia -Wyoming

Three statistical analyses were completed:

Analysis 1: A difference-in-differences analysis was conducted to determine whether Florida experienced a change in recidivism during the treatment period relative to South Carolina and Georgia. The relative change in recidivism was estimated using the following model:

$$Y_{it} \sim \text{Poisson}(\lambda_{it}) \quad (1)$$

$$\log(\lambda_{it}) = \beta_0 + \beta_1 FL_i + \beta_2 post_t + \beta_3 FL_i \times post_t \quad (2)$$

In the model, FL_i is a 0/1 indicator as to whether felon i is within Florida, and $post_t$ is a 0/1 indicator as to whether year t falls within the treatment period of 2007 to 2011. The “treatment effect,” that is, the effect of disenfranchisement on recidivism, is the difference-in-differences estimator, $exp\beta_3$, modeled as:

$$\exp(\beta_3) = \frac{\frac{\lambda_{FL,post}}{\lambda_{FL,pre}}}{\frac{\lambda_{non-FL,post}}{\lambda_{non-FL,pre}}} \quad (3)$$

This estimator compares the relative change in recidivism in Florida during the treatment period to the relative change in South Carolina and Georgia.

Analysis 2: A triple-differences analysis was performed to determine if the treatment effect observed in the first analyses differs with gender. The relative changes in recidivism was estimated using the following model:

$$Y_{ite} \sim \text{Poisson}(\lambda_{ite}) \quad (4)$$

$$\log(\lambda_{ite}) = \beta_0 + \beta_1 FL_i + \beta_2 post_t + \beta_3 male_e + \beta_4 FL_i \times post_t + \beta_5 male_e \times post_t + \beta_6 FL_i \quad (5)$$

Changes in this model include is the addition of $male_e$, a 0/1 indicator as to whether felon e is male or female. The difference-in-differences-in-differences estimator (DDD estimate), $exp\beta_7$, compares the relative change in recidivism for males versus females. The DDD estimate starts with the change in averages for males in Florida then nets out the change in averages for males in South Carolina and Georgia and the change in averages for females in Florida. This, again, provides robustness by accounting for potentially misleading trends in the changes in recidivism across states and changes in recidivism of both genders in Florida due to other state-specific changes.

Analysis 3: A triple-differences analysis (similar to Analysis 2) was conducted to determine if the treatment effect observed in the first analyses is differential based on race. The relative change in recidivism was estimated using the following model:

$$Y_{ite} \sim \text{Poisson}(\lambda_{ite}) \quad (6)$$

$$\log(\lambda_{ite}) = \beta_0 + \beta_1 FL_i + \beta_2 post_t + \beta_3 black_e + \beta_4 FL_i \times post_t + \beta_5 black_e \times post_t + \beta_6 FL_i \quad (7)$$

Different in this model is the addition of *black_e*, a 0/1 indicator as to whether felon *e* is black or white. The difference-in-differences-in-differences estimator (DDD estimate), *expB7*, compares the relative change in recidivism for blacks versus whites. The DDD estimate starts with the change in averages for blacks in Florida then nets out the change in averages for blacks in South Carolina and Georgia and the change in averages for whites in Florida. This provides robustness by controlling for potentially confounding trends – changes in recidivism among blacks across states and changes in recidivism for all races in Florida due to other state-specific changes.

Results

The first analysis estimated whether disenfranchisement causes recidivism by comparing the relative change in recidivism in Florida to the relative change in recidivism in South Carolina and Georgia from 2007 to 2011, when felons were automatically re-enfranchised upon completion of their sentence in Florida. Results showed that recidivism increased when felons gained access to voting rights. Relative to recidivism rates in South Carolina and Georgia during the treatment period, Florida's recidivism rate increased by 12% (95% conf. interval: 10.9, 13.2). These results were statistically significant with a p-value of 0.

The second analysis estimated whether the treatment effect seen in the first analyses differed based on gender. The results showed that there was no difference in recidivism based on gender. Though the analysis showed a modest increase for males at 0.4%, the p-value was very high at 0.803, indicating that this difference was likely due to chance.

Lastly, the third analysis estimated whether the treatment effect seen in the first analyses differed based on race. The triple-differences estimate of the impact of disenfranchisement on recidivism for blacks estimates the effect to be a 10.8% less likely chance (95% conf. interval: -9.0, -12.7) of recidivism for blacks. These results were statistically significant with a p-value of 0.

Discussion

These results suggest that the restoration of voting rights, at least in Florida, did not have the intended effect of reducing recidivism. Rather, relative to other states that didn't change their laws, recidivism actually increased. This is quite surprising given that re-enfranchisement is assumed to lead to decreased recidivism due to one feeling like a valued member of civil society. Additionally, these results contradict multiple previous studies that have found the opposite - that disenfranchisement does indeed lead to increased recidivism.

One possible explanation for the discrepancy between these results and Hamilton-Smith's (2012) findings is the study design. Hamilton finds that states without lifetime disenfranchisement have lower recidivism rates, but he doesn't compare actual trends. In other words, there are most likely other differences between states, and without comparing trends in both states before and after disenfranchisement laws take effect, it is difficult to determine if differences existed before the treatment and, by extension, to determine if the laws caused states without lifetime disenfranchisement to stop mirroring trends in states that do have lifetime disenfranchisement.

A similar explanation emerges when considering why these results differ from Uggen and Manza's (2004), who found that voting, rather than having voting rights, is correlated with reduced recidivism. Because the study did not attempt to establish causation, confounding variables, such as education level, criminal history, or state-level factors, may have easily skewed the results. Additionally, compared to Florida, South Carolina, Georgia, and most other states in the United States, Minnesota provides a highly homogenous sample. With a small population, high voter turnout rates, low incarceration rates, and nearly 90% of the state identifying as white, it makes sense that these results would not hold for other areas of the United States.

The most plausible explanation as to why these results contradict findings also based on Florida data is selection bias. This study considered all felons except for those convicted of murder or sexual felonies. The previous study on Florida, which found that recidivism was 0.4% for those whose voting rights were restored between 2011 and 2015, considered 1,390 felons who were specifically chosen and approved to have their voting rights restored. Therefore, it is most likely the case that these felons were already the types of convicts who were less likely to recidivate anyways, which allowed for them to be part of the small cohort who were approved for restoration of voting rights. This study, on the other hand, considers all felons, since the law automatically restored voting rights for all felons, not just the "model felons" specifically chosen for re-enfranchisement.

Additional possibilities exist for why an increase in recidivism was found rather than the expected decrease. First, while ideally any changes in recidivism

in Florida would be attributed to the change in disenfranchisement policy, it is also possible that other changes within Florida were driving the recidivism rate. For example, if unemployment was increasing in Florida at the time (or not decreasing as rapidly as in other states) after the Great Recession, it might be expected that recidivism would increase because released felons would have fewer opportunities to successfully reintegrate into society. Additionally, it is possible that there were internal changes in the criminal justice system, such as a heightened focus on re-entry programs. Given the transition to a Republican governor, it is possible that Florida saw a crack-down on crime and less liberal policies focusing on re-entry after 2011, both of which might cause recidivism rates to increase.

The assumption that felons care about and are aware of their voting rights could also explain why the restoration of such rights didn't decrease recidivism. The underlying premise as to why disenfranchisement increases recidivism is that people feel like a second-class citizen who is unable to participate in civil society. Nonetheless, if one does have the right to vote but is unaware of that right, their odds of recidivating would not change with the restoration of their voting rights because they'd still feel like a second-class citizen. We perhaps see evidence of this because recidivism suddenly dropped in Florida in 2007 when rights were restored to mass amounts of felons then began to level off in 2008. This trend could be attributed to the publicity given to the rules instituted by Governor Crist when they became Florida's disenfranchisement policy in 2007, so most felons suddenly became aware of their right to vote. But, after 2007, the average number of felons aware of their rights could have decreased due to less attention being given to the policy. This calls for further research on the effect of disenfranchisement policies that require state criminal justice agencies to notify felons of their right to vote post-sentence or assist in the registration process, such as in Louisiana and New Jersey.

Alternatively, perhaps the best explanation for seeing increased recidivism rates is because the population of felons is non-homogenous. Therefore, overall rates provide a limited perspective on recidivism rates among specific sub-groups of the population. The results of Analysis 2 and 3 show some evidence of this. Though there was no differential effect on recidivism for males and females as hypothesized, explanations exist as to why this may be. It was hypothesized that recidivism would decrease more for females than for males because more females register to vote and actually carry out the act of voting. This once again assumes that felons are aware of their right to vote and care about it, which is not necessarily the case. It is also possible that the population of women voters that are recognized as more active voters than men does not traditionally include felons. This could explain why no significant difference was found based on gender.

The results of Analysis 3 indeed show that Florida's change in

disenfranchisement policy had a differential effect based on race. This is very encouraging given the fact that a significant portion of the disenfranchised population is African American. Given the historical lack of inclusion and impact of disenfranchisement on minorities, it is plausible that the restoration of voting rights has a disparate meaning for blacks versus whites. For a group that has historically been relegated to second-class in many aspects, it is not hard to believe that regaining the ability to take part in civil society is more meaningful to African Americans than whites, who have a better chance of reintegration into society regardless of their voting rights.

The question then becomes: what should be done? If re-enfranchisement only decreases recidivism for some groups and has the possibility of increasing it for others, is it a worthy pursuit? The results imply that it is. African Americans are disproportionately represented in both the disenfranchised population and the prison population. Results suggest that the restoration of voting rights for this group could significantly decrease their odds of recidivism, a goal that researchers, legislatures, and courts often occupy themselves with.

The data suggests that efforts should not only be focused on disenfranchisement. Diverting resources from re-entry programs or other recidivism-reducing efforts would not be wise, as only some groups benefit from the restoration of voting rights. Rather, legislatures should work towards loosening their disenfranchisement policies while also continuing to fund re-entry programs and research towards finding other programs and policies that decrease recidivism rates. Even if the restoration of voting rights does not cause reduced recidivism, especially for certain subgroups of the felon population, it is possible that the two are correlated, making it important that governments pursue looser disenfranchisement policies. As Uggen and Manza write, “while the single behavioral act of casting a ballot is unlikely to be the sole factor that turns felons’ lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.”⁵⁰ The same is true for having one’s rights restored – while it is not likely to be the sole factor that reduces recidivism, there is a real possibility that it contributes to their long-term integration into society.

Though the results of this study have great implications for disenfranchisement policies moving forward, as with any study, there are limitations. First, because this study only considers re-admittances to prison rather than re-arrests, the effects are likely understated. Though beyond the scope of this study, possible further research should replicate the study using full arrest records or RAP sheets. This would allow for a better understanding of the effect of disenfranchisement on the whole population of offenders.

Additionally, multiple errors in the data create implications when

50 Christopher Uggen and Jeff Manza, Voting and subsequent crime and arrest: Evidence from a community sample, 36 COLUM. HUM. RTS. L. REV. (2004)

considering the robustness of this study. For example, because the precise age of each offender was unknown, it was calculated using my best estimate. This most likely led to the exclusion of many offenders who in fact should have been included, therefore biasing the results. The biggest limitation is that other traditional determinants of recidivism were not included in the dataset and therefore couldn't be evaluated. For example, we know that those with more prior prison commitments have a higher likelihood of recidivating, that married felons have a lower likelihood of recidivating, and that felons with a higher education level have a lower likelihood of recidivating.⁵¹ Due to the exclusion of these variables from the dataset, this study was unable to both control for these and determine if the restoration of voting rights had a differential effect on these sub-groups.

In conclusion, while not impactful for all felons, the restoration of voter rights does have an impact on recidivism for certain sub-groups. Further research should expand the various subgroups that are studied to determine who is most likely to benefit from loosened disenfranchisement policies. Second, the passage of Amendment 4 in Florida provides a unique and unprecedented opportunity to study the effect of disenfranchisement policies on recidivism. As the single largest policy granting voting rights since the 26th Amendment, it is crucial that research be done on this policy when recidivism data becomes available in 2022. Lastly, as mentioned previously, it is critical that felons know and understand their rights. Therefore, further research should be conducted on the effect of policies that require state criminal justice agencies to either notify felons of their voting rights or assist in the restoration process. This study only considered the effect of a law change that entailed automatic restoration of rights but did not require notification of this restoration. To effectively guide policy discussions, it will be important to understand whether notification laws are more effective at reducing recidivism or whether laws like the one considered in this study are enough.

51 Mark S. Inch, Florida Prison Recidivism Report: Releases from 2010 to 2017, dc.state.fl.us, June 2019, <http://www.dc.state.fl.us/pub/recidivism/RecidivismReport2019.pdf>

BIBLIOGRAPHY

ACLU, Felony Disenfranchisement in South Carolina, www.ACLU.org, https://www.aclu.org/sites/default/files/pdfs/votingrights/sc_factsheet.pdf (last visited Nov. 17, 2019)

Ala. Crim. Code § 17-3-30.1 (2017).

Alan S. Gerber et al., Can Incarcerated Felons Be (Re)integrated into the Political System? Results from a Field Experiment, 59 *Am. J. Pol. Sci.* 1 (2014).

Anthony J. Phillips & Natalie D. Deckard, Felon disenfranchisement laws and the feedback loop of political exclusion: The case of Florida, 20 *J. Afr. Am. Stud.* 1 (2016).

Arian Campo-Flores, Jon Kamp, Floridians Grant People With Felony Records the Right to Vote, *Wall Street Journal* (Nov. 6, 2018), <https://www.wsj.com/articles/floridians-grant-people-with-felony-records-the-right-to-vote-1541560193>

Bureau of Justice Statistics, National Corrections Reporting Program, 1991-2016: Selected Variables (ICPSR 37021), Ann Arbor, MI: Inter-university Consortium for Political and Social Research, (Aug. 30, 2018) Christopher Uggen & Jeff Manza, Democratic contraction? Political consequences of felon disenfranchisement in the United States, 67 *Am. Soc. Rev.* 777 (2002).

Christopher Uggen and Jeff Manza, Voting and subsequent crime and arrest: Evidence from a community sample, 36 *Colum. Hum. Rts. L. Rev.* (2004)

Christopher Uggen and Sarah Shannon, State-Level Estimates of Felon Disenfranchisement in the United States, 2010 (2012), The Sentencing Project.

Christopher Uggen, Ryan Larson, and Sarah Shannon, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, The Sentencing Project (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

Christopher Uggen et al., *After Crime and Punishment: Pathways to Offender Reintegration, Less Than the Average Citizen: Stigma, Role Transition and the Civic Reintegration of Convicted Felons* 261, Shadd Maruna & Russ Immarigeon, Willan Publishing (2004).

Criminal Disenfranchisement Laws Across the United States, (Brennan Center for Justice, December 7, 2018), online at <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

Deborah S. Arthur & Jamie Valentine, In Service Together: University Students and Incarcerated Youth Collaborate for Change, 98 *The Prison Journal* 427, 442 (2018).

Erika L. Wood, Florida: An Outlier in Denying Voting Rights, Brennan Center for Justice (2016).

Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: Voting Rights, 41 *Fla. L. Rev.* 443 (1989).

Ga. Const. art. II, §1.

George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 *Fordham Urb. L.J.* 101 (2005).

Georgia Justice Project's 2014 Felony Disenfranchisement Study Report (2014), <https://www.gjp.org/news/gjps-2014-felonly-disenfranchisement-study-report/>.

Guy P. Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *Berkeley La Raza L.J.* 407 (2012).

Janel Ross, *The race-infused history of why felons aren't allowed to vote in a dozen states*, www.WashingtonPost.com, May 24, 2016, 1:33 PM, <https://www.washingtonpost.com/news/the-fix/wp/2016/05/24/the-race-infused-history-of-why-felons-arent-allowed-to-vote-in-a-dozen-states/?noredirect=on>

Jean Chung, *Felony Disenfranchisement: A Primer* (2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

Jeff Manza, Clem Brooks & Christopher Uggen, *Public attitudes towards felon disenfranchisement in the United States*. (68 ed. 2004), *Public Opinion Quarterly*.

Jennifer Tilton, *Rethinking youth voice and institutional power: Reflections from inside a service learning partnership in a California juvenile hall*, 35 *Children and Youth Services Rev.* 1189, 1195 (2013).

Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 16 (2002).

John H. Laub, Daniel S. Nagin and Robert J. Sampson, *Restoring Rights, Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 225-238 *American Sociological Review* (2018).

John Locke, *Two Treatises of Government*, Awnsham Churchill (1689).

Johnny Kauffman, *Georgia Leads Nation In Purging Felons From Voter Rolls, Most Removed Are Black* (2018), <https://www.wabe.org/georgia-leads-nation-in-purging-felons-from-voter-rolls-most-removed-are-black/>.

Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* 173 (2003).

Lester W. Milbrath & Madan L. Goel, *Political participation: how and why do people get involved in politics?* (2d ed. 1977).

Marc Mauer & Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2002).

Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 *Annals Am. Acad. Pol. & Soc. Sci.* 220 (2014).

Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 *Q.J. Pol. & Soc. Sci.* 41 (2015).

Mark S. Inch, Florida Prison Recidivism Report: Releases from 2010 to 2017, [dc.state.fl.us](http://www.dc.state.fl.us), June 2019, <http://www.dc.state.fl.us/pub/recidivism/RecidivismReport2019.pdf>

Mary Ellen Klas, Price Tag for Restricting Felons' Rights After Prison Put at More Than \$365 Million a Year, *The Miami Herald* (May 21, 2018), <https://www.miamiherald.com/news/politics-government/election/article211408754.html>

NBER, Appendix A National Corrections Reporting Program, [www.NBER.org](http://www.nber.org), June 27, 2014, http://www.nber.org/data-appendix/w20283/Appendices_6-27-2014.pdf

Robert J. Sampson and John H. Laub, Crime and Deviance over the Life Course: The Salience of Adult Social Bonds, 609-627 *American Sociological Review* (1990).

Ryan Reed, John Oliver on How Florida Became America's 'Disenfranchisement Capital', (*Rolling Stone*, September 10, 2014), online at <https://www.rollingstone.com/tv/tv-news/john-oliver-florida-disenfranchisement-capital-721875/>.

Shelly S. Hinck, et al., Service-Learning in Prison Facilities: Interaction as a Source of Transformation, in *Working for Justice: A Handbook of Prison Education and Activism* (2013).

Tennessee Secretary of State, Eligibility to Vote after a Felony Conviction (2017), https://sos-tn-gov-files.tnsosfiles.com/forms/Eligibility%20to%20Vote%20after%20Felony%20Conviction.pdf?VqqFjxmz7DwdD7_jLHbDHXYtLmn2SiPZ.

The Washington Economics Group, Inc., Economic Impacts of Restoring the Eligibility to Vote for Floridians with Felony Convictions as a Result of Passage of Amendment 4, *The Washington Economics Group, Inc.* (May 8, 2018), <https://drive.google.com/file/d/1sP2BiK-CEmkqJOiKjAgUBAw175H5UP08/view>

Traci Burch, Did Disenfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons, 34 *Pol. Behav.* 1 (2010).

Victoria Shineman, Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government, *SSRN* (2018).

Appendix

Appendix A. Current Disenfranchisement Policy by State

Alabama: Permanent disenfranchisement unless granted a certificate of eligibility to register to vote after completion of sentence, which applies to most felons. Permanent disenfranchisement for felons convicted of crimes included in the “law of moral turpitude.”

Alaska: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Arizona: Permanent disenfranchisement for some people with felony convictions, unless government approves individual rights restoration.

Arkansas: Voting rights restored upon completion of sentence, including prison, parole, and probation.

California: Voting rights restored automatically after release from prison and discharge from parole; people on probation may vote.

Colorado: Voting rights restored automatically after release from prison and discharge from parole; people on probation may vote.

Connecticut: Voting rights restored automatically after release from prison and discharge from parole; people on probation may vote.

Delaware: Voting rights automatically restored upon completion of sentence, including prison, parole, and probation, for most offenses. Some offenses require a five-year waiting period post-sentence before restoration.

Florida: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Georgia: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Hawaii: Voting rights restored automatically after release from prison.

Idaho: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Illinois: Voting rights restored automatically after release from prison.

Indiana: Voting rights restored automatically after release from prison.

Iowa: Permanent disenfranchisement for all persons with felony convictions. Governor currently in process of ending permanent disenfranchisement.

Kansas: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Kentucky: Permanent disenfranchisement for all persons with felony convictions.

Louisiana: Voting rights restored upon completion of sentence, including prison, parole, and probation. Department of Public Safety and Corrections required to provide notification of rights restoration process.

Maine: No disenfranchisement for people with criminal convictions.

Maryland: Voting rights restored automatically after release from prison.

Massachusetts: Voting rights restored automatically after release from prison.

- Michigan: Voting rights restored automatically after release from prison.
- Minnesota: Voting rights restored upon completion of sentence, including prison, parole, and probation.
- Mississippi: Felons convicted of 22 qualifying offenses are permanently disenfranchised. Voting rights restored upon completion of sentence, including prison, parole, and probation, for all other offenses.
- Missouri: Voting rights restored upon completion of sentence, including prison, parole, and probation.
- Montana: Voting rights restored automatically after release from prison.
- Nebraska: Voting rights restored automatically two years post-sentence.
- Nevada: Voting rights restored automatically upon completion of sentence, including prison, parole, and probation, for most first-time felony convictions. Certain persons with certain convictions classified as “category B” will have rights automatically restored two years post-sentence. Permanent disenfranchisement for people with: (1) “category A” felonies; (2) “category B” felonies that resulted in “substantial bodily harm” to the victim; or (3) multiple felony convictions of any category.
- New Hampshire: Voting rights restored automatically after release from prison.
- New Jersey: Voting rights restored upon completion of sentence, including prison, parole, and probation. State criminal justice agencies required to notify persons of their voting rights upon release.
- New Mexico: Voting rights restored upon completion of sentence, including prison, parole, and probation. Department of Corrections required to provide notification of completion of sentence to the Secretary of State.
- New York: Voting rights restored automatically after release from prison. State criminal justice agencies required to assist in the restoration process.
- North Carolina: Voting rights restored upon completion of sentence, including prison, parole, and probation. State criminal justice agencies required to provide notification of rights.
- North Dakota: Voting rights restored automatically after release from prison.
- Ohio: Voting rights restored automatically after release from prison.
- Oklahoma: Voting rights are automatically restored upon completion of all supervised release after a period of time equal to the length of sentence served.
- Oregon: Voting rights restored automatically after release from prison.
- Pennsylvania: Voting rights restored automatically after release from prison.
- Rhode Island: Voting rights restored automatically after release from prison.
- South Carolina: Voting rights restored upon completion of sentence, including prison, parole, and probation.
- South Dakota: Voting rights restored upon completion of sentence, including prison, parole, and probation. The state required to provide training and voter education curriculum to felons.

Tennessee: Permanent disenfranchisement for some people with felony convictions. Most felons are eligible to have their rights restored upon completion of full sentence by applying for a “certificate of restoration” from the Board of Probation and Parole and county election offices.

Texas: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Utah: Voting rights restored automatically after release from prison.

Vermont: No disenfranchisement for people with criminal convictions.

Virginia: Permanent disenfranchisement for all persons with felony convictions.

Washington: Voting rights restored upon completion of sentence, including prison, parole, and probation.

West Virginia: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Wisconsin: Voting rights restored upon completion of sentence, including prison, parole, and probation.

Wyoming: Permanent disenfranchisement for all persons with felony convictions.

THE ORIGINS OF PATIENTS' RIGHTS IN CROSS-BORDER HEALTHCARE: BALANCING THE INDIVIDUAL AND COLLECTIVE RIGHT TO HEALTH

Malwina Anna Wojcik, Queen Mary University of London

I. INTRODUCTION

Patient mobility in the EU encompasses a broad spectrum of patient movements. A preliminary distinction can be made between an unplanned treatment, provided during a temporary stay abroad, and a planned treatment, which involves the patient travelling to another Member State with the purpose of receiving healthcare. While the first phenomenon is governed almost exclusively by Regulation 883/04,¹ the second is subject to a complex legal framework involving interactions between the Regulation 883/04,² Art. 56 Treaty on the Functioning of the European Union (TFEU), and the new Directive 2011/24/EU on Patients' Rights in Cross-border Healthcare.³

This investigation focuses on the provision of planned healthcare in another Member State, particularly focusing on the conflict between individual and collective patients' rights that underlies the cross-border treatment. This article defines individual rights as personal entitlements to healthcare, enforceable by particular patients. Collective rights will be considered as universal access to high-quality healthcare under an effectively-functioning healthcare system. The rise of patient mobility disrupts the territoriality principle, which gives Member States exclusive competence to design and manage their social security frameworks. The exercise of individual rights to treatment abroad can endanger the financial stability of the healthcare systems, which are based on the allocation of scarce resources. This risk is particularly evident in case of Beveridge-style systems, which require careful management of public funds.

In order to determine how the balance between individual and collective rights should be achieved, this investigation will examine different rationales for patient mobility. The second chapter will present and contrast the two orthodox

pillars of cross-border healthcare: social security coordination, stemming from Regulation 883/04, and freedom to provide services, originating from the European Court of Justice's (CJEU) interpretation of Art. 56 TFEU. It will be argued that the former favours collective rights by protecting the stability of healthcare systems, while the latter gives priority to individual, market-based rights. The third chapter will explore how these two routes to cross-border healthcare interact in the CJEU's jurisprudence, arguing that the Court accords preference to individual rights and pays little attention to solidarity and equitable access to healthcare for domestic patients.

The fourth chapter will examine an unorthodox rationale for patient mobility by purporting to answer whether mobile patients' rights can be regarded as human rights. It will draw from the international human rights instruments and legal traditions of the Member States to discover whether the right to treatment and other health rights can be considered as individually enforceable. It will also examine the development of human rights discourse in the EU, particularly Article 35 of the Charter of Fundamental Rights, which is dedicated to healthcare. It will be argued that a human rights justification could have a significant impact on patient mobility. At the same time, this rationale would introduce uncertainty into the complex cross-border healthcare framework because it is theoretically capable of strengthening both individual and collective rights.

The fifth chapter will focus on how the new Directive on Patients' Rights construes the balance between individual and collective rights. The Directive will be analysed within the context of the orthodox and unorthodox rationales of patient mobility. The conclusion will be that the Directive shifts the balance towards collective rights and reinstates national control over the healthcare systems.

II. THE ORTHODOX RATIONALES FOR PATIENT MOBILITY: SOCIAL SECURITY COORDINATION AND FREE MOVEMENT

This chapter traces the origins of patient mobility, which was established on two pillars: the social security coordination and free movement of goods and services. The former encompasses minimal protection of persons insured under a social security scheme in the EU, while mainly focusing on protecting the Member State's right to manage their national healthcare systems. The latter enshrines individual, Treaty-based rights to treatment abroad, while providing only certain exceptions aimed at protecting the capacity of national systems.

1. Patient as a worker: the social security coordination

The origins of patient mobility lie in the mobility of labour. Soon after

the creation of the European Economic Community, it became obvious that enabling the free movement of workers would require a level of coordination of social security systems to offer protection to those who decide to work in another Member State. This, of course, included the right to preventive healthcare and treatment. With the lack of a centralized framework, the plurality of national healthcare systems would inevitably lead to ineffective protection of workers' rights, in turn hindering the free movement. Art. 48 TFEU requires the European Parliament and the Council to adopt such social security measures necessary to protect the freedom of movement of workers. Just a year after the Treaty of Rome came into force, the Council introduced Regulation Number Three⁴ concerning social security for migrant workers. This was the precursor of Regulation 1408/71,⁵ which became the basis for the patient mobility jurisprudence (currently replaced by Regulation 883/04). Although it has its origin in workers' rights, Regulation 883/04 currently extends to anyone who is insured within the EU health system. This encompasses EU nationals (employed or self-employed, civil servants, students and pensioners) and their families and survivors, as well as non-EU nationals who are resident in the EU (including stateless persons and refugees), their families and survivors.⁶

Coordination of social security does not sit easily with the principle of territoriality, according to which national governments have exclusive control over relevant aspects of social policy. They are entitled to determine both the extent to which the benefits are provided abroad and the extent to which they are provided to foreign citizens. Healthcare has traditionally been subject to the principle of territoriality. As enshrined in Art. 168 TFEU, Member States maintain primary competence over their domestic healthcare systems, while the role of the EU in promotion of health is indirect and limited mainly to policy considerations. Hence, the Union's influence on health law is often described as "patchwork,"⁷ based primarily on incentives to cooperate. The principle of territoriality in healthcare protects solidarity and equity, values which serve as pillars of all the European healthcare systems. Unlike contractual healthcare arrangements, the contributions to the national healthcare systems are not determined based on age or medical condition. On the contrary, solidarity entails equitable transfer of resources between the citizens, which in turn leads to equal

4 Regulation 3/1958 of 25 September 1958 Concerning Social Security for Migrant Workers 1958 O.J. (L 30) 561 (EEC).

5 Regulation 1408/71 of the Council of 14 June 1971 on the Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community 1971 O.J. (L 149) 2-50 (EEC).

6 Regulation 883/2004, *supra* note 2, art. 2.

7 Elias Mossialos et al., Health systems governance in Europe: the role of European Union law and policy, in Health systems governance in Europe: the role of European Union law and policy (Elias Mossialos et al. eds., 2010).

access to healthcare. As legal scholar Tamara Hervey points out, these principles operate on the assumption of a closed national healthcare system.⁸ Therefore, patient mobility is predominantly seen as detrimental to solidarity and equal access.⁹ Some skeptical academic voices talk about the “decomposition”¹⁰ or “killing”¹¹ of national healthcare systems, suggesting that a side effect of patient mobility is death of “social citizenship.”¹²

Others offer a more balanced approach. For example, territoriality expert A.J. Obermaier notes that the territoriality principle is not absolute because hardly any social system is completely “closed.”¹³ Protecting the free movement of workers requires a mere coordination, as opposed to a harmonization of the national security systems. In this view, patient mobility is perceived as an exception to the territoriality principle, as opposed to a destructive force. The rights of patients are construed as workers’ rights. This approach offers limited individual protection to mobile patients without disrupting the stability of national healthcare systems. The emphasis is put on the collective rights, while the individual patients’ rights operate only to remedy the discriminatory effect the principle of territoriality has on migrant workers. Social security coordination constitutes a floor, not a ceiling, for the benefits, as Member States are not barred from introducing a more favourable framework if their steering capacity allows it.¹⁴ In other words, the coordination functions as a “safety net”¹⁵ for citizens exercising their free movement rights.

The prevalence of collective rights and protection of national health systems is clearly expressed in the requirement of prior authorisation of any planned medical treatment abroad, which is enshrined in Article 20(1) of Regulation 883/04 (former Art. 22(1)(c) of Regulation 1408/71). Authorisation acts like a gatekeeping mechanism, which permits the Member States to maintain the steering capacity of their national social security systems. If the authorisation

8 Tamara Hervey, Patient mobility, Solidarity, and Equal access, in *Cross-Border Health Care and European Law 21* (André den Exter ed., 2017).

9 *Id.* at 26.

10 Tomislav Sokol, *Entitlement to Socially Covered Healthcare Versus Priority Setting: ECJ's Decomposition of the NHS?*, 13 *European J. Social Security* 317 (2011).

11 Vassilis G. Hatzopoulos, *Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgements of the ECJ in Vanbraekel and Peerbooms*, 39 *Common Market L. Rev.* 683 (2002).

12 Christopher Newdick, *The European Court of Justice, Transnational Health Care, and Social Citizenship -- Accidental Death of a Concept?*, 26 *Wisconsin Int'l L.J.* 845 (2009).

13 Andreas J. Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German, and French Social Policy* 35 (1st ed. 2009).

14 Willy Palm & Irene A. Glinos, *Enabling patient mobility in the EU: between free movement and coordination*, in *Health systems governance in Europe: the role of European Union law and policy* (Elias Mossialos et al. eds., 2010).

15 *A Community Framework on the Application of Patients' Rights in Cross-Border Healthcare*, COM(2008) 415 final (February 7, 2008).

is granted, the patient is treated as if insured in the Member State of treatment. The medical expenses are settled directly between the insurers of the Member State of treatment and the Member State of affiliation. Hence, under the coordination route, mobile patients have access only to healthcare providers accredited by the national system. Benefits of this framework include its predictability and certainty, both for a patient, who is ensured that the treatment abroad will be covered, and the Member State of affiliation, which knows in advance the scope of expenses that it agrees to incur.

The prior authorisation requirement, however, does not leave the Member States with unconstrained freedom to reject the request for treatment abroad based solely on the limited capacity of their national health systems. Article 20(2) of Regulation 883/04 puts an important constraint on the right to refuse treatment: authorisation must be granted if the treatment is within the domestic basket of health benefits and cannot be provided at home within medically justifiable time limit, taking into regard the patient's current state of health and the probable course of illness. Notably, the predecessor of the current provision, Article 22(2) of Regulation 1408/71 provided that authorisation "may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides." This original wording was vague and permitted a dangerously broad interpretation. Patients could potentially demand authorisation for treatment unavailable in the domestic insurance package. The CJEU's decision in *Pierik (No 1)*.¹⁶ suggested that such an outcome would be possible. In this case, physiotherapeutic treatment available in Germany, which was considered more effective than other treatments available in the Netherlands, fell under the duty to grant authorisation. To avoid a dangerous slippery slope, whereby Member States would be forced to authorise treatment absent from the domestic healthcare basket, including medically or legally uncertified procedures, the EU legislature subsequently amended Article 22(2) by introducing the requirements currently present in Article 20(2) of Regulation 883/04. Nevertheless, when the health basket of the Member State of affiliation contains a general, undetailed list of benefits, the patient is entitled to the most effective treatment for his or her disease available in any Member State.¹⁷

In summation, the coordination route attempts to reconcile the rights of patients, which are necessary for maintaining the free movement of workers, with national regulatory autonomy, which protects the stability of the national health systems. Individuals seeking treatment abroad can benefit from the certainty and economic incentives offered by the system - no upfront payment is required since

16 Case 117/77, *Bestuur van het Algemeen Burgerlijk Ziekenfonds, Drenthe-Platteland v. G. Pierik*, 1978 E.C.R. 825.

17 Case C-173/09, *Elchinov v. Natsionalna Zdravnoosiguritelna Kasa*, 2010 E.C.R. I-8889.

the expenses are settled between the insurers. However, patients cannot use Regulation 883/04 to claim a right to treatment not provided under the domestic insurance or to avoid waiting lists. Prior authorisation remains a significant barrier to cross-border healthcare, protecting the capacity of national health systems, and enshrining the principle of solidarity. Thus, the result of the balancing exercise accords priority to the communitarian, as opposed to individual rights.

2. Patient as a consumer: the freedom to provide services

While the patient mobility phenomenon stems from the free movement of workers, its legal framework, as developed by the CJEU, was built around the freedom of movement of goods¹⁸ and services.¹⁹ In spite of its special nature of general interest, healthcare is still regarded as a service under EU law,²⁰ allowing cross-border patients to rely on the directly effective Treaty provision of freedom to receive services.²¹ Yet, before the ground-breaking judgments in *Decker*²² and *Kohll*, which started a long thread of patient mobility jurisprudence, the prevailing view was that the freedom of movement of goods and services does not affect the organisation of national social security systems.²³

Kohll involved a Luxembourg citizen who was refused authorisation for his daughter's orthodontic treatment in Germany. The argument of the competent national authority was that the treatment was not urgent and could have been performed in Luxembourg in a medically appropriate time.²⁴ In *Decker*, the plaintiff was denied reimbursement for a pair of glasses he bought in Belgium using a prescription from a Luxembourg doctor. His application for a refund failed because he did not request prior authorisation.

In *Kohll*, the CJEU reiterated that, although Community law should not hinder the powers of the Member States to organise their own social security systems, the Member States "must nevertheless comply with Community law when exercising those powers."²⁵ This, of course, included compliance with Article 56 TFEU (Article 49 EC, as it then was), which prohibits restrictions on the freedom to provide services. As Hervey notes, the CJEU has traditionally been very generous in construing a "restriction" on free movement, which includes any

18 Treaty on the Functioning of the European Union, art. 28, October 26, 2012, O.J. C 326.

19 TFEU art. 56.

20 Joined Cases 286/82 and 26/83, Graziana Luisi and Guiseppe Carbone v. Ministero del Tesoro, 1984 E.C.R. 377.

21 Case C-26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, 1963 ECLI:EU:C:1962:42.

23 Obermaier, *supra* note 13.

24 Case C-158/96, Raymond Kohll v. Union des caisses de maladie, 1998 E.C.R. I-01931.

25 *Id.*

measures that make it more difficult to receive a service abroad.²⁶ Hence, unsurprisingly, the CJEU in *Kohll* was adamant that the requirement of prior authorisation constitutes a *prima facie* bar to the freedom to provide services.²⁷ From the perspective of EU law, the judgement marked a mere evolution. European social law professor Yves Jorens regards it as a logical development of a dynamic Community law,²⁸ while EU law scholar Panos Koutrakos believes that “it hardly breaks new ground,”²⁹ because the same reasoning is embedded in the CJEU’s jurisprudence in other areas, such as criminal legislation³⁰ or vessel’s registration.³¹ From the perspective of healthcare authorities, however, the judgement was indeed revolutionary. It constituted an open challenge to the principle of solidarity and stability of national health systems, which the authorisation requirement under Regulation 1408/71 (as it then was) sought to protect. It is therefore hardly surprising that as many as 13 Member States decided to submit their written observations in the proceedings, purporting to entrench the territoriality principle.³² Two lines of argument were adopted: France and Germany contented that an uncoordinated opening of the healthcare market would endanger the structure of national health systems, while the UK argued that NHS, being a system funded by taxes, should be excluded from the scope of principles established in the rulings.

The CJEU partly addressed these concerns by recognising three justifications for authorisation: controlling health expenditure,³³ maintaining a high quality of national hospital service³⁴ and protecting public health by maintaining treatment capacity.³⁵ Nevertheless, analysing the facts of *Decker/Kohll*, the Court found that none of the above justifications was applicable, as neither the cross-border orthodontic treatment nor the pair of glasses purchased abroad put a true financial detriment on the Luxembourg healthcare system. This was because Luxembourg operates a healthcare system based on reimbursement, whereby patients are expected to pay out of pocket and then request a full or

26 Tamara Hervy & Jean V. McHale, *European Union Health Law: Themes and Implications* 194 (2015).

27 Case C-158/96, *Kohll v. Union des caisses de maladie*, 1998 E.C.R. I-01931.

28 Yves Jorens, *Impact de la jurisprudence la plus récente de la Cour européenne de justice sur l’influence des règles relatives au marché intérieur sur les systèmes nationaux de santé, plus spécialement les arrêts prononcés après décembre 2001: Les cas Muller-Faure Van Riet, Inizan et Leichte*, 46 *Revue belge de sécurité sociale* 379 (2004).

29 Panos Koutrakos, *Healthcare as an Economic Service Under EC Law*, in *Social Welfare and EU Law* 108 (Michael Dougan & Eleanor Spaventa eds., 2005).

30 Case 299/86, *Italy v. Rainer Drexl*, 1988 E.C.R. 1213.

31 Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*, 1991 E.C.R. I-03905.

32 Obermaier, *supra* note 13.

33 *Supra* note 24.

34 *Id.* at 50.

35 *Id.* at 51.

partial refund. Hence, it appeared reasonable that if the level of reimbursement was similar, it did not matter that the treatment was obtained abroad. The Court in *Decker/Kohll* gave a pragmatic judgement strongly based on the particular facts of the cases. At the same time, the CJEU introduced a major change to the legal framework for cross-border treatment without answering broader questions or formulating precise principles. Hence, as expressed in the UK's observations mentioned above, considerable doubts existed whether the rulings applied equally to benefit-in-kind systems, especially those of the Beveridge type, which are funded by general revenues. The problem was that the money consideration, required for healthcare to be regarded as a service according to Article 57 TFEU, was not easy to discern in publicly-ran systems. Only the judgements in *Muller Faure*³⁶ and *Watts*³⁷ clarified the provision of healthcare is subject to ordinary Treaty provisions on the free movement of goods and services, regardless of the organisation of the national health system. This sparked a fear of disruption of the territoriality principle and equal access to treatment, particularly in publicly-funded systems where access to healthcare is primarily based on solidarity.

The later patient mobility case law refined the basic principles established by *Decker/Kohll*, both by narrowing and extending them. The evolution of CJEU's jurisprudence on the free movement of services and its relationship with the social coordination route will be examined in detail in the next chapter. For the purpose of this section, it suffices to reiterate some key differences between them. Firstly, because the treatment is accorded a market character, mobile patients can access all lawfully operating providers, both public and private (not accredited).³⁸ Secondly, since prior authorisation, unless justified, is regarded as an obstacle to the free movement of services, patients are required to pay upfront and request a reimbursement. Thirdly, it is the rules and tariffs of a Member State of affiliation that apply, diminishing the financial burden on national healthcare systems.³⁹ However, just like under Regulation 883/04, only services included in the health basket of Member State of affiliation are covered.

The CJEU effectively created a new route to access cross-border treatment based on the freedom to provide services. Although some protective measures were introduced to maintain stability of the national systems, his rationale for patient mobility remains strongly focused on individual economic rights, as opposed to a collective right to healthcare. The burden to prove that

36 Case C-385/88, *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, 2003 E.C.R. I-04509.

37 Case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, 2006 E.C.R. I-04325.

38 Case C-444/05, *Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)*, 2007 E.C.R. I-3185.

39 *Supra* note 24.

prior authorisation is justified rests on the Member State of affiliation. As healthcare becomes a commodity to be purchased, the right to treatment abroad is a right that a patient possesses as a consumer. Arguably, this approach entails a double blow to the equal access to treatment. First, uncontrolled patient mobility constitutes a threat to the planning capacity of national systems, considerably disadvantaging domestic patients. It is a problem in both the Member State of affiliation, which might struggle to control expenses connected to outflow of patients, and the Member State of treatment, which might be tempted to adopt a “regulatory race to the bottom”⁴⁰ to discourage uncontrolled inflow of patients. Second, the consumerist approach undermines equal access to treatment by discriminating against the poorer and less affluent, who are barred from receiving treatment abroad due to their inability to pay out of pocket. Scholars Willy Palm and Irene Glinos rightly claim that the free movement of patients “is likely to benefit the least ill, the most literate and the wealthiest.”⁴¹ These are the people that “shout the loudest,”⁴² are the most articulate, and are conscious of their expectations. The merit of this argument is well demonstrated by a case study of patient mobility in Greece.⁴³ In the 1990s, Greek government embarked on an experiment of facilitating cross-border treatments as a remedy for the domestic healthcare deficit. Given the mixed structure of the Greek social security system, however, the result was contrary to what had been expected: inequalities in access to healthcare increased. The rate of mobility was significantly higher among the wealthier patients who benefited from a better coverage of their sickness fund. The conclusion seems to be that, while the free movement of services provisions offer a gateway to increase individual rights to healthcare, the access to it is highly unequal. Among two patients with identical medical needs, the wealthy one sees the gate wide open, while the poorer one still finds it locked.

III. THE INTERPLAY BETWEEN SOCIAL SECURITY COORDINATION AND FREE MOVEMENT OF SERVICES: THE PATIENT MOBILITY JURISPRUDENCE

The previous chapter outlined two parallel routes to cross-border healthcare: social security coordination under Regulation 883/04 and free movement of services under Art. 56 TFEU. As we have seen, these routes have profoundly different rationales which appear to be contradictory: the Regulation makes prior authorisation of unplanned treatment a requirement, whereas the

CJEU's jurisprudence based on the free movement of services presents it as a *prima facie* unlawful restriction. Accordingly, the Regulation seems to favour collective rights to healthcare, while Art. 56 gives priority to individual rights. Despite their apparent contradiction, the CJEU considers these routes to be interconnected and asserts that the Treaty provisions do not invalidate the Regulation. Instead, according to the Court, the latter must be interpreted consistently with the former.⁴⁴ This section will explore how the CJEU purports to construe the relationship between the two routes and in turn, how it intends to balance the individual and collective rights to health.

1. *Vanbraekel, Geraets-Smits/Peerbooms, Müller-Fauré /van Riet, and Inizan: setting the cornerstones of patient mobility*

The judgements in *Decker* and *Kohll* sparked uncertainty among the Member States and were received with reservation. All of the Member States defended a compulsory prior authorisation. Moreover, only Austria, Belgium, and France agreed with the finding that healthcare services have an economic nature.⁴⁵ This was only the beginning of a controversial patient mobility saga. In the subsequent cases the CJEU took an increasingly individualistic approach, prioritising economic freedoms over solidarity and equal access.

Prior authorization was challenged again in *Vanbraekel*.⁴⁶ The case involved a Belgian citizen who was refused authorization for orthopaedic surgery at a French hospital. Nevertheless, the patient underwent the treatment abroad. Unsurprisingly, the Belgian insurer denied reimbursement. However, in the judicial review of the decision it was found that the authorisation should have been granted in the first place. Hence, the claimant was entitled to reimbursement under Art. 22(1)(c) of Regulation 1408/71. The crux of the case was that the cost of the treatment was bigger according to Belgian tariffs. Therefore, the claimant paid less in France than she would have paid home. If she were reimbursed under the Regulation, she would receive only as much as she actually paid for the treatment abroad. However, following *Decker/Kohll* she would have been entitled to reimbursement up to the level available in Belgium. The CJEU followed the second option, reiterating that the freedom to provide services applies equally to social security rules. Because of this, the claimant was entitled to additional reimbursement.⁴⁷ The justification provided was that a lower level of coverage in a Member State of treatment may constitute a barrier to freedom to provide services, deterring a patient from going abroad.⁴⁸ The Court also made clear that

44 Case C-208/07 von Chamier-Glisczinski, 2009 E.C.R. I-06095, 66.

45 Obermaier, *supra* note 13.

46 Case C-368/98, *Vanbraekel*, 2001 E.C.R. I-5363.

47 *Id.* at 53.

48 *Id.* at 45.

Art. 49 EC (as it then was) precludes national legislation prohibiting the reimbursement of costs after it is found that the authorisation was wrongly refused.⁴⁹

In *Geraets Smits/Peerbooms*⁵⁰ the CJEU considered the cases of two Dutch patients who sought treatment for Parkinson's disease in Germany and an urgent intensive care in Austria. The cross-border treatment was not authorised by the competent Dutch authority because it was regarded as experimental and therefore not "normal within the professional circles concerned," as the Dutch rules for reimbursement prescribed.⁵¹ One of the matters before the CJEU was the interpretation of "normal treatment." The Court construed it broadly, with reference to "the state of international medical science and medical standards generally accepted at international level."⁵² Hence, the CJEU seemed to limit the ability of national authorities to freely determine their healthcare baskets, by introducing an implied requirement of compliance with the international "state of the art."⁵³ The Court effectively adopted a position of a final arbiter in the exercise of Member States' powers to regulate their health funds, a controversial role from the territoriality perspective.⁵⁴ Moreover, the judgment clearly stated that in-patient (hospital) treatment falls within Article 49 EC.⁵⁵ Therefore, while determining the scope of hospital services, the Member States have to comply with the EU law.

On the other hand, the Court addressed some of the national stability concerns by recognising that prior authorisation for in-patient care does not violate EU law *per se*. On the contrary, it was 'necessary and reasonable' because of the effort that goes into the planning of the well balanced and accessible hospital services.⁵⁶ This was a much welcomed development from the point of view of collective rights. Koutrakos calls this approach "flexible and pragmatic"⁵⁷ since the Court was ready to recognise exceptions to the general principle of free movement of services. While prior authorisation for hospital services established an important restriction to free movement of patients, it alone did not offer satisfactory protection to the stability of healthcare systems. The Court did not recognise that some non-hospital treatments can also be associated with considerable expenditure. If a health basket could not be construed solely

49 *Id.* at 56.

50 Case C-157/99, *Geraets Smits and Peerbooms*, 2001 E.C.R I-69.

51 *Id.* at 31-39.

52 *Id.* at 92.

53 Aart Hendriks, *High-quality of Care throughout Europe — But Do We Speak the Same Language?*, 23 *European Journal of Health Law*, 14 (2016).

54 *Supra* note 29.

55 *Supra* note 50.

56 *Id.* at 80-81.

57 *Supra* note 29.

according to the national standards, and authorisation could not be refused if an equally effective treatment was unavailable without ‘undue delay’,⁵⁸ Member States could be forced to pay for advanced and expensive treatments abroad.

Another Dutch case, *Muller-Faure/van Riet*⁵⁹ offered some important clarifications. The case involved Ms. Muller-Faure, who was refused reimbursement for a dental treatment she underwent in Germany, and Ms. van Riet who went to Belgium for an arthroscopy procedure pending authorisation.

Firstly, the CJEU finally addressed the inapplicability argument put forth by Member States, clarifying that healthcare is an economic service regardless of if “it is paid for by a national health service or by systems providing benefits in kind.”⁶⁰

Secondly, the CJEU differentiated between in-patient and out-patient (non-hospital) treatment. With regards to the former, it reiterated the position in *Peerbooms*, recognising that prior authorisation is justifiable, but it added that the existence of waiting lists alone is not enough to refuse it.⁶¹ As for the latter, the CJEU contended that the prior authorisation requirement is not justifiable. The stability argument was rejected and rendered an exaggeration. The Court asserted that patient mobility is a limited phenomenon which will not endanger the viability of the health funds. It reiterated that patients generally prefer to be treated by local providers because of “the linguistic barriers, geographic distance, the cost of staying abroad and lack of information.”⁶² This finding seems to grossly disregard social realities. As Advocate General Colomer rightly noticed, free movement of healthcare professionals makes it easy for a patient to find a foreign doctor who speaks his language.⁶³ Travelling around Europe becomes cheaper, quicker and an increasing number of EU citizens decide to purchase a holiday home abroad.⁶⁴ Sixteen years after the verdict, in the era of Internet and inexpensive air travel, when patients are increasingly well-informed and self-conscious, the CJEU’s observations seem to be particularly outdated.

Last but not least, the judgment clarified the concept of “undue delay.” When deciding what factors amount to an undue delay, the national authorities must consider all the circumstances of the case. These include not only the patient’s medical condition and history, but also the degree of pain and disability “which might, for example, make it impossible or extremely difficult for him to carry out a professional activity.”⁶⁵ It is clear that the CJEU favoured a broad

58 *Supra* note 50.

59 Case C-385/99, *Muller-Faure/van Riet*, 2003 E.C.R. I-4509.

60 *Id.* at 103.

61 *Id.* at 71.

62 *Id.* at 95.

63 Opinion of AG Colomer in *Müller-Fauré /van Reit*, 2003 E.C.R. I-04509, 51.

64 *Id.*

65 *Id.*

assessment, strongly focused on individual entitlements. The subtle mention of the economic rights stemming from the right to healthcare does not go unnoticed. It is another indicator of the Court's strictly economic approach to health services.

The issues of undue delay and prior authorisation were revisited in *Inizan*,⁶⁶ a case concerning a French citizen who was refused reimbursement for a treatment in Germany because it could be provided in France within an acceptable time. In assessing the compatibility of French provisions with the EU law, the CJEU reiterated that prior authorisation when it comes to hospital care is "necessary, reasonable and justified" but only when based on objective, non-discriminatory criteria known in advance, and when the procedural system is easily accessible and capable of ensuring that the request will be dealt with objectively, impartially and promptly.⁶⁷ If undue delay occurs, the treatment must be authorised.

2. *Leichtle, Keller, Acereda Herrera, and Stamatelaki*: clarifying the principles of patient mobility

After it laid the foundations of patient mobility, the CJEU considered a number of cases which tested the newly established doctrines. These cases resulted in an even wider recognition of individual patient rights.

First, the CJEU broadened the scope of patient mobility to cover health SPAs and private hospitals. In *Leichtle*,⁶⁸ a German citizen sought to obtain a cure in Italy, but their authorization was refused. The CJEU held that freedom to provide services was infringed by national rules which provided that authorisation for a health SPA can only be given when it is shown that health cure in another Member State would be more effective.⁶⁹ In *Stamatelaki*⁷⁰ it was held that domestic arrangements permitting reimbursement for both private and public hospitals, but forbidding reimbursement for a private hospital in another Member State, are incompatible with the EU law.⁷¹

Moreover, in exceptional circumstances, Member States could be obligated to reimburse a treatment outside of the EU. *Keller*⁷² involved a German national residing in Spain who received authorization to travel to Germany to treat a malignant tumour. Physicians in Germany referred her to a private clinic in Zurich – the only institution competent to treat her condition. Spanish

66 Case C-56/01, *Inizan*, 2003 E.C.R. I-12403.

67 *Id.* at 56.

68 Case C-8/02, *Leichtle*, 2004 E.C.R. I-02641.

69 *Id.* at 51.

70 Case C-444/05, *Stamatelaki*, 2007 E.C.R. I-03185.

71 *Id.* at 38.

72 Case C-145/03, *Keller*, 2005 E.C.R. I-02529.

authorities refused to reimburse the treatment, alleging that further authorisation from Spanish authority and assessment by Spanish doctors was required for a treatment outside of the EU. The CJEU found that Spain was bound by the findings made during the authorised treatment in Germany and therefore had to reimburse the costs of treatment.⁷³

On the other hand, the CJEU was more considerate of national autonomy in cases concerning reimbursement for costs auxiliary to treatment. *Acereda Herrera*⁷⁴ involved a Spanish citizen travelling to France for an authorized treatment. She claimed reimbursement of travel and accommodation expenses but was refused. The CJEU denied such an entitlement, except for the costs that are recoverable.⁷⁵

3. *Watts, Elchinov, and Petru*: the impact of patient mobility on publicly funded healthcare systems

From the moment the *Decker/Kohll* judgements sparked the debate on patient mobility, Member States operating nationally funded, Beveridge-style healthcare systems sought to differentiate themselves from Bismarck-style benefits-in-kind systems, claiming that the lack of compulsory authorisation drastically disrupts their planning capacity by hindering solidarity and equal access. This attitude was particularly well represented by the UK who strongly and firmly denied any transferability of CJEU's patient mobility jurisprudence to the NHS.⁷⁶ Indeed, the overriding principle of territoriality, restrictive interpretation of Regulation 1408/71 and complete absence of out-of-pocket payments constituted convincing arguments against the patient mobility case law developed by the CJEU.⁷⁷ Although in 2002 the territorial restriction present in Article 5(2)(b) of the NHS Act 1977 was repealed,⁷⁸ the decision to fund a treatment abroad remained discretionary and limited to rare cases.

This approach was challenged by Ms. Watts, a British citizen who applied for a hip replacement in France. She was on a waiting list of her competent healthcare trust and hence, she was refused authorisation. On review of the decision, the Bedford Primary Care Trust reduced the waiting time from 4

to 3 months, but still refused authorisation for a cross-border treatment. In spite of that, Ms. Watts went to France to have her hip replaced. Unsurprisingly, she was denied reimbursement. In the judicial reviews of this decision the High Court ruled that the case must fail on the facts because the reduced waiting time did not constitute an undue delay.⁷⁹ Nevertheless, quite unexpectedly, Munby J accepted the full merit of the claimant's legal argument based on freedom to provide services.⁸⁰ His analysis of the CJEU's jurisprudence, especially *Müller-Fauré /van Riet*, led him to the conclusion that the services provided by NHS were falling into the ambit of Article 49 EC (as it then was). The judge recognised the profound effect of the case by declaring that Ms. Watts 'won a mighty battle with the Secretary of State on a matter of great public importance' and that 'her exertions will endure for the benefit of those who come after her.'⁸¹ Predictably, this offered little comfort to the claimant who appealed the decision. So did the Secretary of State who once again reiterated the orthodox argument that Article 49 EC did not apply to NHS patients, who were only allowed to rely on Regulation 1408/71. The Court of Appeal agreed with the Secretary of State, supporting the view that NHS should be distinguished because of its publicly funded nature.⁸² This view seemed to be supported by the CJEU's earlier jurisprudence suggesting that welfare is considered to be a service when the payer and provider are separate and independent.⁸³ Following this reasoning, systems involving a monopoly state provider of free healthcare lack the market element of free choice. Nevertheless, the Court referred the question of applicability of Article 49 to the CJEU.

The CJEU had no issue with extending the scope of Treaty provisions regarding free movement of services to the publicly funded healthcare systems, such as NHS.⁸⁴ If the patient received the hospital treatment abroad for a money consideration and subsequently asked for reimbursement from her Member State of affiliation, it mattered not whether the competent state operated a system based on social insurance or a publicly funded one.⁸⁵ Hence, the requirement to obtain prior authorisation was found to constitute an obstacle for the free movement of services.⁸⁶ Nevertheless, authorisation for a hospital treatment could still be justified due to planning objectives, but only when there was no undue delay.⁸⁷ The Court reiterated that the mere presence of a waiting list does

not justify refusal of authorisation.⁸⁸ Again, the CJEU strongly embraced individual rights, putting little emphasis on the stability of healthcare systems. It decisively rejected special treatment of publicly funded healthcare and reiterated that close attention must be paid to the patient's individual circumstances while assessing undue delay.⁸⁹

This creates a problem, particularly in the newer Member States, which often struggle to effectively manage their public health funds. Unfortunately, at the same time, these systems tend to provide a lower quality of care characterised by outdated methods of delivery and longer waiting lists.⁹⁰ So far the relatively insignificant number of mobile patients allowed the CJEU to downplay the destabilisation argument. Nevertheless, some commentators point out that the 'second wave'⁹¹ of patient mobility cases, involving citizens from poorer and underdeveloped healthcare systems, might bring more cross-border claims, which would have destructive consequences for the capacity of the competent national systems.⁹² This problem is well illustrated by the cases of *Elchinov*⁹³ and *Petru*.⁹⁴

Mr Elchinov was a Bulgarian citizen, insured under the national healthcare service (NZOK), who sought to obtain urgent radiation treatment for his malignant eye cancer in Germany. No similarly advanced treatment was available in Bulgaria, removal of the eyeball being the only alternative. Mr Elchinov applied for authorisation but went to Germany before receiving it. NZOK refused authorisation and reimbursement for the treatment, because it was not in the domestic healthcare basket. The CJEU held that the fact that the treatment was not materially available in Bulgaria was not enough to exclude it from the scope of authorisation.⁹⁵ In other words, absence or presence of a particular treatment could not constitute a legal definition of the scope of services basket in the said Member State. The Court reiterated that when the list of available treatments includes general categories, the national authorities must interpret them broadly, 'on the basis of objective and non-discriminatory criteria, taking into consideration all the relevant medical factors and the available scientific data.'⁹⁶ It follows that if national authorities would like to protect the stability of the health fund by excluding a treatment from the scope of

authorisation, they would have no other choice but to produce a comprehensive list of every medical procedure available. This puts a considerable administrative burden on the healthcare funds and hinders developments in medical practice, resulting in a detriment to the patients themselves.⁹⁷

A further extension of individual entitlements at the cost of stability of national systems is evidenced by the case of Ms. Petru who suffered from a serious cardiovascular disease, which required her to have an open-heart surgery. In her opinion, the Romanian health infrastructure was inadequate for the operation, so she decided to undergo the surgery in Germany. Before going abroad, Petru was refused authorization. The main question for the CJEU was whether the lack of necessary hospital infrastructure and medication could have been taken into account when assessing what constitutes an undue delay. The Court answered in the affirmative, reiterating that the Regulation 1408/71 “does not distinguish between the different reasons for which a particular treatment cannot be provided in good time.”⁹⁸ Hence, the lack of adequate facilities, supplies or expertise was capable of precluding equally effective treatment from being delivered without undue delay. Provided there was no domestic hospital which could offer timely and adequate treatment, authorisation could not be refused.⁹⁹ This finding is problematic because it seems to equate poor quality treatment with lack of treatment, creating an incentive for patients to travel abroad to enjoy better quality healthcare. This might put undue pressure on the national healthcare systems, especially in light of austerity in the enlarging EU, demonstrated by long waiting lists, increased out-of-pocket payments, and growing differences between healthcare services in different countries.¹⁰⁰ National health funds which already struggle to manage their budgets might be susceptible to unexpected disruptions caused by patient mobility. The Court did not follow the Opinion of Advocate General Cruz Villalón, who put forward an argument for restriction of the patient mobility abroad in situations where undue delay is caused by poor quality treatment. He sought to distinguish between temporary and prolonged structural deficiencies.¹⁰¹ Only the former would require the national authority to authorise a treatment abroad. In case of the latter authorisation would have to be granted only if it would not put at risk the capacity of national welfare systems. In his case commentary, Hatzopoulos expresses a regret that that the Opinion was disregarded, pointing out that ‘for every “elite patient” such as Ms. Petru who is allowed to move abroad and

97 Murphy, *supra* note 90.

98 Case C-268/13, Elena Petru v. Casa Județeană de Asigurări de Sănătate Sibiu and Casa Națională de Asigurări de Sănătate, 2014 ECLI:EU:C 2014:33.

99 *Id.* at 34.

100 Frischhut, Patient Mobility in Times of Austerity: A Legal and Policy Analysis of the Petru Case, 28 *European J. Health Law* 36 (2016).

101 Opinion of AG Cruz Villalón in Petru, ECLI:EU:C 2014:2271.

deplete finite financial resources, there is an indefinite number of “default patients” back home, whose suffering is further increased.¹⁰² He also rightly notices that judging the quality of output of the healthcare system indirectly judges its inputs.¹⁰³ Such a practice encroaches on territoriality, since in principle, the allocation of scarce financial and human resources is not amenable to judicial review either by the CJEU or any other court.

4. An unbalanced relationship?

Examination of the patient mobility jurisprudence leads to a conclusion that the CJEU puts undue emphasis on individual economic rights, while jeopardizing the stability of health funds in Member States, especially those poorer ones. This is evident in the restrictions imposed on the two main safeguards of national healthcare systems enshrined in Regulation 883/04: prior authorisation and basket of care.

The CJEU recognised that while hospital treatment warrants prior authorisation, the same is not true for non-hospital care, unless it threatens the financial viability of social security systems (*Geraets Smits/Peerbooms*). This differentiation, based on a rather unconvincing argument that patients are generally unwilling to travel abroad, is regrettable, because it hinders control of national healthcare expenditure. European patients are increasingly independent and well-informed and therefore, their treatment expectations become proportionally higher. The lack of compulsory prior authorisation permits them to travel abroad to avoid waiting lists and receive better quality care. The patient mobility jurisprudence fosters this phenomenon by recognising that low quality treatment may amount to undue delay (*Petru*) and that the presence of waiting lists is not enough to refuse authorisation (*Watts*). Even though under Art. 56 the reimbursement amount is set on the level of Member State of affiliation, uncontrolled outflows of patients are likely to cause disruptions in allocation of scarce resources.

Even where prior authorisation is considered justified, it must be granted when undue delay is present (*Inizan*). Again, favourably for patients, this concept is interpreted very broadly, with reference to all medical and non-medical circumstances of a particular case (*Muller-Faure/van Riet*). When authorisation is wrongly refused, the patient is entitled to complementary reimbursement under the more favourable domestic tariff (*Vanbraekel*).

While in principle the Member States are free to determine their baskets of healthcare, in practice this requirement appears constrained by the finding that

102 Hatzopoulos, “Some thoughts on the fate of poorer Member States’ healthcare systems after the ruling in *Elena Petru*.”

103 *Id.* at 427.

unless a particular procedure is explicitly excluded from reimbursement, the national medical practice has to be interpreted with reference to international state of the arts (*Elchinov*).

The relationship between Regulation 883/04 and Art. 56 TFEU appears dominated by individual economic rights, fostering the model of a patient-consumer. This approach remains detrimental to collective rights to healthcare, based on solidarity and equal access. Once recognised as an economic service, healthcare cannot be removed from a free market narrative. However, da Costa Leite Borges rightly argues that the CJEU should not neglect the communitarian aspect of health and proposes adopting criteria different than remuneration to capture the economic nature of healthcare services.¹⁰⁴ Paying more attention to the objectives of healthcare provision, would have prompted the Court to conclude that perhaps some of the healthcare services should be excluded from the application of free movement provisions, just like they are excluded from the scope of competition rules.¹⁰⁵

IV. HUMAN RIGHTS AS A RATIONALE FOR PATIENT MOBILITY

The social security regulation and the freedom to provide services remain the basic pillars of patient mobility. Nevertheless, the human rights discourse, increasingly present both in medical law and the EU legal order, becomes relevant as an alternative rationale for cross-border healthcare. This chapter will offer a closer look at the human rights rhetoric in patient mobility. Firstly, it will outline the sources of health rights relevant for cross-border healthcare and their place in the hierarchy of human rights. Secondly, it will shortly examine the place of human rights, including health rights, in the EU legal order. Lastly, it will examine what, if any, change would a human rights approach make in patient mobility.

1. Health rights as human rights

In modern societies health rights are increasingly perceived as fundamental human rights. Their importance is reiterated in international instruments and constitutional orders of numerous EU Member States. Nevertheless, the content of health rights is not clearly defined. It is often analysed in the context of dichotomy between civil and political rights and socio-

104 Danielle da Costa Leite Borges, Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views, 7 *International Journal of Law in Context* 335, 352 (2011).

105 Case C-57/12 *Femarbel* ECLI:EU:C:2013:517 interpreting Article 2(2)(f) and (j) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ (L 376) 36.

economic rights. While the former entail a negative obligation of non-interference and are usually cost-free, the latter carry a positive obligation and often require 'substantial investment of resources, establishment of an effective infrastructure and progressive taxation.'¹⁰⁶ The differences between these two were reiterated by the UN General Assembly's decision to divide the Universal Declaration of Human Rights into two separate covenants: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). The Council of Europe followed suit by establishing two separate treaties for civil/political and socio-economic rights: European Convention of Human Rights 1950 (ECHR) and European Social Charter 1961 (ESC). The division present in these crucial international and regional instruments mirrors the hierarchy of fundamental rights, with civil and political rights being supreme and widely enforced in liberal democracies. Socio-economic rights, on the other hand, are often contested because they are not directly enforceable and justiciable. Therefore they are more akin to policies than rights *per se*. What is the place of health rights in this framework? As Tamara Hervey claims, they are best understood as 'the cluster of rights, falling in both categories'.¹⁰⁷ The access to healthcare and treatment is broadly classified as a positive, socio-economic right. However, rights such as privacy, bodily-integrity or dignity, commonly conceived as patients' rights, are significant examples of negative, civil rights. The right to life, which strongly features in health law, is both positive and negative, requiring non-interference but also implementation of positive measures to protect life.

a) The communitarian element of health rights: the right to healthcare and the right to treatment

The right to health, or more precisely access to healthcare, is the broadest of the health rights. Arguably, it is also the most crucial one in the context of patients who seek to access healthcare in another Member State. The right to health was first explicitly recognised in 1946 in the Preamble of the WHO Constitution, which stated that: 'The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'. It was reiterated both in the ICESCR¹⁰⁸ and ESC.¹⁰⁹ The former arguably provides the fullest definition of the

right,¹¹⁰ mentioning not only the access to healthcare,¹¹¹ but also background conditions that should be satisfied for the right to be protected, such as prevention of infant mortality,¹¹² improvement of environmental and industrial hygiene,¹¹³ prevention of epidemic, endemic, and occupational diseases,¹¹⁴ and creation of conditions ensuring proper care in the event of sickness.¹¹⁵ Undoubtedly, the right to health, as construed in these instruments, requires considerate planning and expenditure. It entails a claim for a state's protection and assistance, rather than non-interference. Hence, it is not perceived as enforceable by individuals because its execution largely depends on the available resources. It can be argued that non-justiciability limits the right's practical significance. Some commentators contend that socio-economic rights, such as the right to health, can hardly be labelled 'rights' because 'the very essence of the right is that it is accorded immediate protection by the courts'.¹¹⁶ An opposing view is that a positive right to health is still valuable as a complement to the negative healthcare rights. These two are correlative and should not be perceived in isolation.¹¹⁷ Individually enforceable rights would be rendered meaningless if a universal access to healthcare did not exist. Similarly, ensuring access to healthcare would be pointless if the negative rights of patients were disregarded.

Another important feature of the right to health is its communitarian nature. Universal and equal access to healthcare is only achievable through the equitable distribution of resources. This is explicitly reiterated by Art. 3 of the European Convention on Human Rights and Biomedicine (ECHR), which talks about 'equitable access to healthcare of appropriate quality', provided with regard to 'health needs and available resources.' The right to health under international law is predominantly seen as an expression of collective entitlement. Hence, it could hardly be used to support individual claims of mobile patients. Furthermore, it could hardly be used to support the very phenomenon of patient mobility itself, as the international instruments put emphasis on the duties that states have within their own jurisdictions.

What about the right to treatment in the domestic law? This derivative of the broader right to healthcare, again strongly dependent on planning and

110 Danielle da Costa Leite Borges, Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views, 7 *International Journal of Law in Context* 337(2011).

111 CESCR, Art 12(1).

112 *Id.* at Art. 12(2)(a).

113 *Id.* at Art. 12(2)(b).

114 *Id.* at Art. 12(2)(c).

115 *Id.* at Art. 12(2)(d).

116 Armin von Bogdandy, The European Union as a human rights organization? 1307, 1316 (37 ed. 2000).

117 Andre den Exter, *Health care law-making in central and eastern Europe. Review of a legal-theoretical model.* (Antwerp: Intersentia 2002), 58-60.

resources, is highly significant in the context of patient mobility. If it is accepted that such individual right exists and is infringed in the patient's home country, it will arguably give rise to a strong claim to cross-border healthcare based on human rights. The existence of the right to treatment was addressed in the judgement of the High Court in *Watts*,¹¹⁸ where Munby J reiterated a well-established view that no such entitlement exists under the English law.¹¹⁹ In support of the conclusion, he cited extensively from two judgments: *R v Cambridge Health Authority, ex p B*¹²⁰ and *R v North West Lancashire Health Authority, ex p A*.¹²¹ The first case concerned a refusal to fund expensive treatment of a 0-year-old girl suffering from leukaemia. The total cost of the therapy in the US, which entailed a 10-20% likelihood of success, was £75,000. In his landmark first instance judgment,¹²² Laws J quashed the decision of the health authority, contending that insufficient weight was given to human rights. He suggested that the discretion in resource allocation enjoyed by authorities is narrower when an important right, such as the right to life, is jeopardized. His decision was however reversed by the Court of Appeal which reinstated the traditional approach: the court would not strike down a decision of health authority unless it is *Wednesbury* unreasonable, that is unreasonable to the extent of being absurd. Sir Thomas Bingham MR explained:

I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world.¹²³

In the Court's opinion, the finite nature of resources necessitated difficult decisions about their allocation. This view was confirmed in *Ex p A*, a case concerning the refusal of funding a gender-reassignment procedure. Here, Auld LJ claimed that it is 'an unhappy but unavoidable feature of state funded health care that regional health authorities have to establish certain priorities in funding different treatments from their finite resources.'¹²⁴ In the light of this, a decision to prioritize life-saving treatments over gender reassignment was reasonable,

118 *R (on the application of Watts) v Bedford Primary Care Trust and Another* [2003] EWHC 2228 (Admin).

119 *Id.* at 38.

120 *R v Cambridge Health Authority, ex p B*, 1995, 2 All E.R. 129.

121 *R v North West Lancashire Health Authority, ex p A*, 2000, 1 W.L.R. 977.

122 *R v Cambridge Health Authority, ex p B*, 1995, 25 BMLR 5.

123 *Ex p B*, 137.

124 *Ex p A*, 991D.

provided that all the relevant circumstances of the particular case were considered, fulfilling the procedural requirements established in *Coughlan*.¹²⁵

Following the decision in *Burke*,¹²⁶ it is not entirely clear whether a right to life-sustaining treatment exists in English law. In this case, the applicant who suffered from a congenital degenerative brain condition sought to obtain reassurance that artificial nutrition and hydration would not be withdrawn when his condition deteriorated. The Court of Appeal refrained from approaching the problem from a broader perspective, limiting itself to analysis concerning withdrawal of ANH. It was held not to be 'a decision that can lawfully be taken in the case of a competent patient who expresses the will to stay alive.'¹²⁷ Elizabeth Wicks claims that this amounts to an implicit recognition of a limited right to treatment, albeit a life-sustaining one.¹²⁸ Nevertheless, the Court reiterated that the doctor's obligation to provide treatment lies in his duty to act in the best interests of the patient and not in the fact that the patient demands particular treatment.¹²⁹ These words are in sharp opposition to the consumerist approach to patients' rights. They do not sit easily with the idea of healthcare as service, which underpins the CJEU's jurisprudence on patient mobility.

The conclusion is that no individual, enforceable right to treatment exists under English law. Hence, it cannot provide human rights rationale to support patient mobility. On the contrary, as evidenced by *Watts*, EU law on cross-border healthcare granted English patients rights, which they would not be able to enjoy under domestic law. In *Blood*,¹³⁰ a case concerning artificial insemination using the sperm of the applicant's deceased husband, the Court of Appeal suggested that the freedom to provide and receive services under EU law permitted Mrs Blood to take the sperm abroad to undergo the treatment which would have been illegal in the UK because of the lack of the husband's written consent. Johnathan Montgomery suggests that if the parents of the child in *Ex p B* sought treatment in the EU, the application of patient mobility jurisprudence could have resulted in NHS being obliged to refund it.¹³¹ The conclusion appears to be that, in the context of cross-border healthcare, economic freedoms accord more entitlements to individuals than human rights, which favour a collective entitlement.

b) The individual element of health rights: the right to life and other patients' rights

125 *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

126 *R (on the application of Burke) v General Medical Council* [2005] QB 424.

127 *Id.* at 53.

128 Wicks, *Human Rights and Healthcare* (Hart 2007), 34.

129 *Burke*, *supra* note 126, 31.

130 *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All E.R. 687.

131 Jonathan Montgomery, *Impact of European Union Law on English Healthcare Law* 155 (27 ed. 2005).

The most crucial individually enforceable right in the healthcare context is perhaps the right to life, as enshrined in Art. 2 of ECHR and Art. 6 of ICCPR. Many argue that it should not be used too broadly in the context of healthcare because, as explained in the preceding sections, health-related rights are mostly covered by the socio-economic instruments.¹³² Nevertheless, the significance of the right to life in the medical context cannot be denied. As we have seen earlier, a negative version of the right is engaged in case of withdrawal of life-sustaining treatment against a patient's will. However, a positive right to life can also be capable of individual enforcement, as emphasised by the European Court of Human Rights in *Osman v United Kingdom*.¹³³ where if there is a real and immediate risk to life the state must 'take appropriate steps to safeguard it.'¹³⁴ Wicks claims that the principle in *Osman* is applicable also to the provision of life-saving medical treatment, but only to the extent permitted by resources.¹³⁵

Health rights also encompass specific patients' rights, which are predominantly civil rights capable of individual enforcement. These, unlike the general right to health and the right to life, are mostly relevant and topical in developed states, where patient autonomy gains increasing importance. These are the rights that Kennedy and Grubb have in mind when they describe medical law as 'a subset of human rights law.'¹³⁶

Naturally, the scope of patients' rights enshrined in domestic legislation varies between different EU Member States. However, there appears to be a broad consensus regarding the protection of three basic rights: privacy and confidentiality, dignity, especially consent to treatment, and the right to information.¹³⁷ Apart from being protected by national laws, these rights are also enshrined in ECHR,¹³⁸ which is often considered a 'patients' rights treaty.'¹³⁹ It has been signed and ratified by 15 EU Member States. Being sufficiently precise and unconditional, the patients' rights provisions of ECHR are capable of direct applicability in countries with a monist system.¹⁴⁰

Other patients' rights can be derived directly from ECHR, for example Art. 3 (prohibition of inhuman and degrading treatment) and Art. 8 (right to

132 Alasdair Maclean, *The Individual's Right to Treatment under the Human Rights Act 1998 in Healthcare Law: The Impact of the Human Rights Act 1998*, at 87 (A Garwood-Gowers et al eds., 2001).

133 *Osman v. United Kingdom*, 29 E.H.R.R. 245 (2000).

134 *Id.* at 115.

135 Wicks, *supra* note 128.

136 Kennedy and A Grubb, *Medical Law*. 3. (3d ed. Butterworths 2000).

137 Hervey, *supra* note 26.

138 Particularly: Art. 5, Art. 8 and Art. (consent to treatment), Art. Article 10 §1 (privacy) and Art. Article 10 §2 (right to information).

139 Herman Nys and Tom Goffin, *Mapping national practices and strategies relating to patients' rights in Cross-border health care in the European Union*, 174 (M Wismar et al eds., 2011).

140 *Id.* at 178.

private and family life). These two were invoked by Ms *Watts* in the context of cross-border treatment. The High Court in *Watts* rejected the applicant's argument. Munby J held that neither Art. 8 nor Art. 3 were breached by the refusal to fund a treatment. The decision did not carry a serious infringement of private and family life and did not involve actual physical harm or mental suffering.¹⁴¹ Although the claim based on Art. 3 did not succeed in *Watts*, it is arguable that it could have more force in different patient mobility cases, for example a *Petru* scenario. While the existence of reasonable waiting lists does not amount to inhuman or degrading treatment, inadequate medical equipment and facilities, which put the patient's life at risk, might be enough to breach Art. 3.

It might seem that individual patients' rights have little significance in the patient mobility framework, where the right to treatment remains a central issue. This, however, is an oversimplification. It is hardly conceivable that individual patients' rights can be disregarded in cross-border healthcare. On the contrary, their effective protection is one of the challenges that patient mobility raises. Member States are expected to work together to ensure that the mobile patients' rights to privacy, dignity and information are respected wherever they receive their treatment. A step towards establishing a framework for such cooperation is visible in the Patient Rights Directive, which sets out obligations of Member State of Treatment and Member State of Affiliation in protection of the basic patients' rights. This will be further explored in the next chapter. However, it is worth underlining that the individual patients' rights cannot be invoked in support of the right to treatment and distributive justice, as reiterated in *Watts*.

2. Human rights in the EU

The traditional view is that the European Community started with a project of economic integration and was not intended to be a human rights body. Kenner claims that the decision to exclude fundamental rights protection from the EEC Treaty stemmed from a belief that market integration will be more effective without interference with 'well established and jealously guarded national systems of social protections, labour law and industrial relations.'¹⁴² While the substantial task of protecting human rights was delegated to the Council of Europe, the EU would indirectly contribute to increasing social standards by fostering economic growth.¹⁴³ However, focusing predominantly on the common market did not mean that the Community rejected the fundamental human rights. On the contrary, De Burca suggests that one of the early considerations

141 *Watts* (HC), *supra* note 79.

142 Kenner, *supra* note 106.

143 *Id.* at 6.

underlying the European integration, as expressed in the draft European Political Community Treaty 1952, was a creation of a strong human rights framework, protecting the Community from backsliding into totalitarianism and fascism.¹⁴⁴ She argues that the EU has never intended to completely exclude the protection of human rights from its competence. The decision to do so in the EEC Treaty was motivated by a belief that the European integration should be gradual rather than immediate.¹⁴⁵

In the mature EU legal framework, human rights, including health rights, play an increasingly important role. Art. 2 of the Treaty on European Union (TEU) states that the Union is founded upon respect for dignity and human rights. The CJEU has long accepted that human rights form general principles of the Community law.¹⁴⁶ Their main source, as enshrined in Art. 6(3) TEU, is the ECHR. Commitment to the Convention is further evidenced by the Union's plans to access it in the near future.¹⁴⁷ While the CJEU also recognises human rights stemming from constitutional traditions of the Member States¹⁴⁸ and other international instruments, the scope of this recognition is often uncertain. This means that protection of some rights, particularly those which do not stem directly from ECHR, can be easily contested. Therefore, the application of health rights, which, as we have seen, are mostly found in instruments other than the Convention, can cause considerable difficulty. For example, ECHR, containing rights particularly important for health law, was relied upon in the Opinion of Advocate General Jacobs in the *Biotechnology Directive*¹⁴⁹ but the CJEU in *De Fruytier*¹⁵⁰ expressed a more cautious approach, underlining that ECHR was not ratified by many Member States and the EU itself.

In spite of the CJEU's recognition of human rights as fundamental principles, their place in the EU legal order, as well as its relationship with other human rights regimes, has long remained uncertain. The promulgation of the EU's Charter of Fundamental Rights and Freedoms (EU CFR), the Union's first own human rights instrument, offered some clarification. Following the Treaty of Lisbon, the Charter has the same legal value as the founding Treaties.¹⁵¹ Although Art. 51(1) reads that the Member States are only bound by the EU CFR 'when they are implementing Union law', the CJEU has asserted that the Charter is

144 Gráinne De Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 *American Journal of International Law* 649, 692 (2011).

145 *Id.* at 669.

146 *Internationale Handelsgesellschaft Case*, 1970 E.C.R. 1125.

147 TEU Art. 6(2).

148 C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, 2004 ECLI:EU:C:2004:614.

149 C-377/98, *Netherlands v Parliament and Council*, 2001 ECLI:EU:C:2001:329.

150 C-237/09, *Belgian State v Nathalie De Fruytier*, 2010 ECLI:EU:C:2010:316.

151 TEU Art. 6(1).

applicable ‘in all situations governed by EU law.’¹⁵² Hence, it can potentially be invoked in patient mobility cases.

The Charter encompasses a broad selection of positive and negative rights, drawing inspiration from various regional and international human rights orders, constitutional traditions of the Member States, the CJEU’s jurisprudence, and EU legislation. The Preamble reflects a well-established division between political and civil and socio-economic rights, distinguishing between rights and freedoms, which are potentially individually enforceable, and principles, which are judicially cognisable only as an interpretative tool of EU law. Importantly however, the provisions of the Charter are not explicitly classified as falling into one of these categories. This implies that a single article can encompass both rights, freedoms and principles. Such a structure appears particularly suitable to accommodate health rights, which, as was discussed before, encompass both positive and negative elements.

Indeed, the EU CFR contains several provisions relevant to health law, which, following the integration of the Charter, form part of the EU constitution: Art. 1, protecting the dignity of a person, Art. 3, referring to the integrity of the person, and Art. 8, protecting personal data. These all carry negative obligations important in the healthcare context. Art. 3(2), draws inspiration from the ECHR by making specific reference to the ‘fields of medicine and biology’, enshrining, among others, ‘free and informed consent.’¹⁵³

In the context of access to cross-border healthcare, two provisions of the Charter are particularly important: Art. 2 (right to life) and Art. 35 (right to health). The former could be used to challenge a denial of a life-saving treatment. The latter is crucial because of its potential to create an enforceable right to access cross-border treatment. Art. 35 states:

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

The Article is twofold.¹⁵⁴ the first part expresses an individual entitlement to healthcare, while the second mirrors the policy obligation already reflected in Art. 168(1) TFEU. There is little doubt that the latter is a mere principle. However, whether the ‘right to healthcare’ can be considered individually enforceable, or is in fact a right in name only, is a highly contested matter. As we have seen, the right to healthcare and the right to treatment, as enshrined in domestic law and other international instruments which Art. 35 echoes, is construed as a positive,

152 C-617/10, Åklagaren v Hans Åkerberg Fransson, 2013 ECLI:EU:C:2013:280.

153 EU CFR art. 3, §2a.

154 Hervey and Kenner, *supra* note 106.

socio-economic right, not capable of being relied upon by individual patients. Are there any reasons to think that the right to health under EUCFR should be treated differently? The wording of the Article does not suggest so: although ‘everybody’ has the right to healthcare, it exists subject to ‘the conditions established by national laws and practices’. This points us in the direction of a communitarian, rather than individual interpretation. In addition, if taken at face value, the provision seems to preclude the right to cross-border treatment, underlining the primary competence of Member States in provision of healthcare. Nevertheless, an opposing view is that Art. 35 confers an enforceable right to healthcare, ‘although one hedged with exceptions and caveats,’ that could theoretically be invoked by mobile patients.¹⁵⁵

3. Human rights approach to patient mobility

As we have seen in the preceding section, the rhetoric of human rights seems to slowly pave its way into the EU health law. Hence, the crucial question for the present investigation is what, if any, difference would a human rights approach make to the patient mobility. Tamara Hervey argued that while it could add to the judicial discourse, it is unlikely that it would change the substantial outcome of the cases.¹⁵⁶ However, in her more recent work, she takes a slightly different position, contending that ‘Articulating a claim within the human rights frame may have implications for both legal reasoning and for legal outcomes.’¹⁵⁷ She points out that bringing human rights arguments into the jurisprudence on patient mobility can potentially affect its outcome by changing the standard of proof required to derogate from free movement.¹⁵⁸ This argument is based on a well-established principle that protection of human rights constitutes an objective justification for restriction of free movement.¹⁵⁹ The principle is further extended by a suggestion that human rights can not only restrict but also strengthen economic freedoms. The practical outcomes of Hervey’s argument will now be considered with reference to health related rights in the Charter of Fundamental Rights: Art. 2 (right to life) and Art. 35 (right to health).

Wicks argues that the burden of proof on the Member State which opposes authorisation of a life-saving treatment might be higher if Art. 2 CFR is engaged.¹⁶⁰ Perhaps Mr Peerbooms, who received a cross-border treatment

whilst in a life threatening coma, could have relied on this argument to strengthen his submission. On the other hand, Wicks notes that it is possible that Art. 2 could hinder free movement of patients in procedures such as abortion or euthanasia.¹⁶¹ Up to date the CJEU has been reluctant to address human rights considerations in these difficult areas, limiting its analysis to free movement provisions.¹⁶² According to Wicks, Member States could potentially use the right to life to justify the refusal of authorisation.¹⁶³ However, this argument does not seem to be compatible with one of the well-established rules of patient mobility. Both the case law and the Patients' Rights Directive reiterate that the Member States of Affiliation are not obliged to reimburse treatment which does not fall into their domestic basket of benefits. Hence, a Member State where abortion or euthanasia are illegal is entitled to refuse authorisation on this basis. It is hardly conceivable that a Member State where such procedures are legal could contest a patient's entitlement to undergo them abroad by claiming an infringement of the right to life. Therefore, while Art. 2 appears to be capable of strengthening the individual right to health, it is highly unlikely that it would ever act to trump it.

The possible effects of articulating Art. 35 in a patient mobility scenario seem to be more uncertain. That is because, as explained before, the right to health under EUCFR appears to be a double edged sword. It can be treated as either an expression of communitarian or individual entitlement to healthcare. If the former was true, the Member States could rely on it to refuse authorisation of an expensive cross-border treatment, claiming that the right to healthcare of other citizens will be compromised. In the latter scenario mobile patients could use Art. 35 to shift the standard of proof in their favour. This interpretation seemed to be favoured by Advocate General Colomer, who in his opinion in *Stamatelaki* recognised that the mobile patients' rights stem not only from the fundamental freedoms but also from 'the right of citizens to healthcare, proclaimed in Art. 35 of the EUCFR.'¹⁶⁴ He continued:

being a fundamental asset health cannot be considered solely in terms of social expenditure and latent economic difficulties. This right is perceived as a personal entitlement unconnected to a person's relationship with social security and the Court of Justice cannot overlook that aspect.¹⁶⁵

161 *Id.* at 2.03.

162 C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, 1991 ECLI:EU:C:1991:378.

163 Wicks, *supra* note 135.

164 C-444/05, *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmaton*, 2007 ECLI:EU:C:2007:24.

165 *Id.* at 160.

This interpretation is broad and inclusive. It states that the right to health should not be dependent solely on resource allocation, implying that it cannot be conceived as a collective, socio-economic right only. The Opinion contends that Art. 35 is capable of giving rise to an individual entitlement to health care in a cross-border scenario, based solely on the concept of European citizenship. In *Peterson* Advocate General Colomer underlined its growing recognition by the Court, which ‘has transformed the paradigm of *homo economicus* into that of *homo civitatis*’,¹⁶⁶ extending the Treaty protections to groups of people who were traditionally excluded such as students¹⁶⁷ and benefit recipients.¹⁶⁸ Hence, European citizenship could be regarded as a basis for both economic freedoms and fundamental rights protected by the Charter. The implication of this approach is that patients would be allowed to claim breach of Art. 35 when reimbursement for a cross-border treatment is denied.

However, it is crucial to note that the Court in *Stamatelaki* did not consider the human rights argument raised by the Advocate General. A possible reason for the reluctance to invoke the right to health under CFR is the unpredictable impact it could have on the relatively coherent patient mobility jurisprudence. Unlike Art. 2, whose use would be limited to the most exceptional cases, Art. 35 could be applied in nearly every cross-border scenario. Hence, its scope and application would require a strict clarification. Otherwise, there exists a considerable risk that while it would constitute a new, rights-oriented approach to patient mobility, it would fail to provide concrete solutions, unnecessarily complicating the framework, which the Patients’ Rights Directive purports to clarify.

McHale notes that one of the problems with human rights based analysis is that it almost inevitably requires resolving a conflict between the rights of the individual and the ‘rights and freedoms of others,’ which according to Art. 52(1) CFR, constitute a possible limitation on the exercise of rights and freedoms protected by the Charter.¹⁶⁹ This argument reiterates the uncertainties connected with the dual nature of the human rights discourse. Because of the finite nature of resources, respecting the individual right to cross-border healthcare often means compromising the stability of the national systems and hence, the collective right to health. However, what McHale sees as a disadvantage of the human-rights analysis, could constitute a positive change, leading to greater recognition of the communitarian rights. Approaching the patient mobility cases from a conflict of

166 C-228/07, Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich, 2008 ECLI:EU:C:2008:494.

167 C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, 2005 ECLI:EU:C:2005:169.

168 C-184/99, Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve, 2001 ECLI:EU:C:2001:458.

169 McHale, *supra* note 156.

rights perspective would make a proportionality exercise inherent in decision making, allowing for an appropriate balance between individual and communitarian rights to be reached. Introducing an explicit human rights discourse would no longer permit the CJEU to neglect the stability of the national health systems by focusing predominantly on individual economic freedoms. On the contrary, the court would be directly engaged in safeguarding both individual and collective right to health.

However, it is highly uncertain how this model would work in practice. Its operation depends on two crucial questions. The first one is of course whether Art. 35 is capable of being invoked by individuals. If the Court answers this question in affirmative, patients in cross-border disputes would be able to rely both on a freedom of movement and the right to access healthcare under CFR. This would give them advantage in cross-border claims. If the answer is no, and the right to health is to be interpreted as collective, the balance would shift in favour of Member States which could invoke Art. 35 to protect the stability of the national healthcare systems. The second question is how to construe the relationship between economic freedoms and human rights? If the latter are to be perceived as objective justifications for limiting or strengthening the former, as Hervey proposes, human rights would still be accorded a peripheral function in cross-border healthcare while economic freedoms would remain the main source of entitlements. An alternative option is to elevate Art. 35 to the main rationale of patient mobility. This, however, would be a risky and impractical solution since ‘Human rights may provide analytical tools but much more rarely will provide clear cut solutions.’¹⁷⁰

V. THE PATIENTS’ RIGHTS DIRECTIVE

The tension between the individual and collective rights in patient mobility culminated in the enactment of The Patients’ Rights Directive, which intended to clarify the balance. This attempt is visible in the Directive’s double rationale: Art. 114 TFEU on the internal market and Art. 168 TFEU on division of competence between the EU and Member States in the area of health. The Directive is often described as suffering from an ‘identity disorder.’¹⁷¹ While its main aim is to facilitate cross border healthcare, it also provides a strong mechanism protecting the stability of national social security systems. This chapter will start by exploring the political origins of the Directive and contrasting approaches which shaped its final text. Next, it will analyse the Directive through different rationales of patient mobility: the orthodox, based on

170 Hervey, *supra* note 107.

171 Karl Harald Søvig, Convergence and divergence in patients’ rights, in *Cross-Border Health Care and European Law 21* (André den Exter ed., 2017).

internal market and social security, and the unorthodox, based on human rights.

1. The Directive behind the scenes: political debate

The Directive came into existence as a result of a difficult compromise between different legal and political actors. As was already mentioned, the rise of patient mobility sparked considerable unrest amongst the Member States which started considering a political action to reassert control over their national healthcare systems. This desire was evidenced by unsuccessful calls for a Treaty amendment exempting healthcare from the scope of the internal market.¹⁷²

The Commission adopted an opposing approach, seeking to entrench the status of healthcare as an economic service. The General Directorate for the Internal Market and Services (DG MARKET) fostered a codification of the patient mobility jurisprudence in the Bolkestein Directive.¹⁷³ However, it was met with a strong opposition from the Member States and the European Parliament, which rejected the proposal, asking for healthcare to be excluded from the scope of the Services Directive. Hence, the Commission was left with the challenge of producing a proposal specifically targeting cross-border healthcare. This task was entrusted to the General Directorate for Health and Food Safety (DG SANCO). After a long and cumbersome consultation process, involving submissions from as many as 266 stakeholders, SANCO was finally ready to present its proposal on 2 July 2008.¹⁷⁴

The proposal, whose legal basis was solely Art. 114 TFEU, has a strong economic tilt. It went beyond codification of the CJEU's case law, introducing provisions which put considerable hurdles on the Member States' ability to refuse authorisation. Art. 7 provided that out-patient healthcare is not subject to prior authorisation. Art. 8 clarified that prior authorisation is justifiable for in-patient hospital care and specifically listed highly-specialised and cost-intensive treatments. Moreover, it gave the Commission authority to determine what constituted highly-specialised and cost-intensive care. Prior authorisation could be justified if Member States proved that cross-border treatment is likely to seriously undermine the planning, rationalization, or financial balance of the national healthcare system.

The proposal was the subject of a fierce debate in the European Parliament and the Council. In the former, a compromise between three largest political groups: European People's Party (EPP), Alliance of Liberals and

Democrats (ALDE) and Socialists and Democrats (SD) had to be reached. EPP and ALDE were generally supportive of the proposal. ALDE argued for even less national control of patient mobility, proposing the establishment of a European patient ombudsman. SD, on the other hand, concerned about violation of subsidiarity, proposed adding Art. 168 TFEU as a legal basis for the Directive and introducing more national control over prior authorisation. While SD's proposals were implemented into the final text of the Directive, more patient-friendly ideas of the Parliament, such as lack of prior authorisation for patients with rare diseases or a voucher system, were rejected.¹⁷⁵

During the discussion in the Council the biggest controversy was associated with the Commission's power to define what constitutes a highly-specialised and cost-intensive treatment. Spain expressed particular concerns about the capacity of its healthcare system, given a considerable number of pensioners from Northern countries residing in Spain, who travel to their country of origin to receive treatment.¹⁷⁶ Austria opposed the Directive, fearing an uncontrolled inflow of patients.¹⁷⁷ Poland was against the access to unaffiliated foreign providers, claiming that it would discriminate against home patients who can only access contracted providers.¹⁷⁸ The Council pushed for more national control over the process, including freedom to impose prior authorisation. Initially, the Commission opposed it as incompatible with the CJEU's jurisprudence. However, after a surprisingly lenient judgment in *Commission v France*,¹⁷⁹ where the Court held that out-patient care requiring major medical equipment warrants prior authorisation, the Commission's argument lost its force.

Hence, the final compromise between the European Parliament, the Council and Commission visibly modified the preliminary proposal to reinstate the national control over social security systems. The long political debate culminated with the triumph of Member States seeking to restrict patient mobility. The final text of the Directive left the definitions of 'highly specialised' and 'cost-intensive' care to national authorities and broadened the scope of the prior authorisation.

2. The orthodox and unorthodox rationales for patient mobility in the Patients' Rights Directive

This section will explore how the Directive interacts with the orthodox and unorthodox rationales for patient mobility. Although it purported to clarify the legal framework on patient mobility, the Directive arguably added to its

175 *Supra* note 172.

176 *Id.* at 12.

177 *Id.* at 13.

178 *Id.*

179 Case C-512/08 *Commission v France*, 2010 ECR I-8833.

complexity. It is unclear whether it intends to replace the route based directly on Art. 56. Pointing out subtle differences between the CJEU's case law and the Directive, Sokolov contends that the latter establishes a third route to cross-border treatment.¹⁸⁰ The Directive itself offers contradictory suggestions. Recital 29 mentions that individuals should be able to benefit from the principles of free movement of patients, services, and goods 'in accordance with the TFEU and with this Directive'. However, Recital 30 reads: 'For patients, therefore, the two systems should be coherent; *either* this Directive applies *or* the Union regulations on the coordination of social security systems apply.'

a) Freedom to provide services and social security coordination

The Directive purported to codify the complex case law based on Art. 56 TFEU. Hence, many provisions reflect the rules established in the CJEU's jurisprudence. Others, however, seem to alter them. The Directive applies to provision of healthcare 'regardless of how it is organised, delivered and financed.'¹⁸¹ The Member States are free to design their benefit baskets and only treatments available therein are subject to reimbursement.¹⁸² In the absence of an explicit provision to the contrary, it seems that the *Elchinov* rule applies and the health baskets have to be interpreted against international standards. Echoing the issues raised by *Petru*, the Directive makes numerous references to high-quality healthcare and calls for cooperation between Member States in achieving it.¹⁸³ Nevertheless, it does not explicitly recognise poor quality treatment as a factor in assessing undue delay.

Under the Directive patients can access both affiliated and unaffiliated foreign providers.¹⁸⁴ They are required to pay out-of-pocket and request reimbursement, up to the level available under the domestic tariff. The Member States may decide to reimburse the full cost of treatment (when it exceeds the domestic tariffs), as well as associated costs.¹⁸⁵ However, following *Acereda Herrera*, this is not an obligation. The Directive makes clear that patients should not profit from the provision of healthcare abroad,¹⁸⁶ so the reimbursement cannot exceed the actual cost of treatment. This provision does not appear compatible with the *Vanbraekel* complementary reimbursement for planned hospital care.

The Directive features several references to Regulation 883/04, purporting to clarify the relationship between the two instruments.¹⁸⁷ The Directive provides that when sharing information about cross-border healthcare, the Member State of affiliation should make a clear distinction between the rights enjoyed under the Regulation and under the Directive.¹⁸⁸ Art. 8(3) provides that applications for prior authorisation shall be judged primarily under the rules laid down in Regulation 883/04, unless the patient requests otherwise. This ensures that the patient will not have to pay out-of-pocket for an authorised treatment. The rule applies also when it is found that authorisation was wrongly refused. The patient can then benefit from reimbursement calculated under the Regulation rules, that is according to the tariffs of Member State of treatment.¹⁸⁹ In similar vein, Recital 31 states that patients should be able to enjoy the more beneficial framework guaranteed by the Regulation. The Directive applies where the conditions under the Regulation are not fulfilled or when the patient expressly prefers to rely on the Directive, for example when he does not want to wait for authorisation.

Protection of the stability of national healthcare systems is greatly emphasised by the Directive, which is packed with references to the national competence in planning and managing healthcare.¹⁹⁰ Recital 4 states that the application of the Directive ‘should not result in patients being encouraged to receive treatment outside their Member State of affiliation’, while Recital 39 provides that ‘patient flows between Member States are limited and expected to remain so’. These assertions do not sit comfortably with the very purpose of the Directive, which is to ‘facilitate the access to safe and high-quality cross-border healthcare’. On the contrary, they can be read as a reassertion of the territoriality principle.

The Directive addresses concerns of both Member State of treatment and Member State of affiliation. Recital 21 clarifies that Member States of treatment are not obliged to ‘accept for planned treatment patients from other Member States or to prioritise them to the detriment of other patients.’ Moreover, Art. 4(3) allows Member State of treatment to control the patients’ inflow by derogating from non-discrimination principle when it is justified by planning requirements, ensuring high quality care for domestic patients, controlling costs or avoiding waste of financial, technical or human resources. The Member States of affiliation benefit from a corresponding provision allowing them to limit the application of reimbursement rules.¹⁹¹

187 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Art. 1(1).

188 *Id.* at Art. 5(b).

189 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Recital 46.

190 See for example: Recital 4, Recital 5, Recital 7, Recital 10, Recital 19, Recital 33, Art. 1.

191 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the

Most importantly, the Directive broadens the scope of prior authorisation. Art. 8(2)(a) provides that it can apply to healthcare which is subject to planning requirements and involves at least one night stay in a hospital or use of highly specialised, cost-effective medical infrastructure or equipment. Hence, prior authorisation is no longer limited to hospital treatment but encompasses medical procedures which Member States deem particularly advanced and expensive.

Additionally, prior authorisation is possible when the treatment presents a risk for the patient or the population (Art. 8(2)(b)) or when there are doubts regarding quality and safety standards of the foreign provider (Art. 8(2)(c)). The Directive contains corresponding provisions on when authorisation can be refused, based on patient's safety,¹⁹² the population's safety¹⁹³ and the provider's low quality and safety standards.¹⁹⁴ These grounds are not derived from the patient mobility case law but from the protection of public health, which constitutes an overriding reason justifying restrictions on free movement.¹⁹⁵ According to de la Rosa, these additions 'reflect a desire to increase the flexibility of States through provisions drafted in a vague way.'¹⁹⁶ For example, patient safety risk could be used to deny an experimental treatment, while low quality standards could be an argument for limiting access to providers unaffiliated with the national system.

However, the Member States still have to grant authorisation if healthcare cannot be provided within a medically justifiable time limit, based on an objective medical assessment of the patient's condition, the history and probable course of illness, the degree of the pain, and/or the nature of disability.¹⁹⁷ This formulation reflects the CJEU's definition of undue delay, with an exclusion of the 'ability to work' factor cited in *Müller-Fauré*. Again, this can be interpreted as favourable to Member States since the category of illnesses impeding the ability to work is broad.

To sum up, the Directive appears to provide a greatly-appreciated counterweight to the CJEU's jurisprudence. It shifts the control back to Member States by introducing measures 'fencing off'¹⁹⁸ the national healthcare systems. Implementation of the Directive in Poland is a good example of this restrictive

Application of Patients' Rights in Cross-Border Healthcare Art. 7(9).

192 *Id.* at Art. 8(6)(a).

193 *Id.* at Art. 8(6)(b).

194 *Id.* at Art. 8(6)(c).

195 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare Recital 11.

196 S de la Rosa, 'Directive on Cross-border Healthcare or the Art of Codifying Complex Case Law,' (2012) 49 CML Rev. 15, 41.

197 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare Art. 8(5).

198 Leigh Hancker and Wolf Sauter, *EU Competition and Internal Market Law in the Healthcare Sector* (OUP 2012), 208.

approach. Art. 8(2)(a) was relied upon to impose prior authorisation on the majority of healthcare services, including procedures such as hyperbaric therapy, computer tomography, or genetic examination, which are all considered cost-intensive and requiring specialised equipment.¹⁹⁹ Moreover, annual reimbursement limit on cross-border healthcare was introduced,²⁰⁰ constituting another safeguard for financial stability.

b) Human rights

Codification of the CJEU's case law in the Directive constituted an opportunity to introduce human rights language into patient mobility. But are 'patients' rights in cross-border healthcare' really construed as human rights? The lack of reference to Art. 35 EUCFR suggests a negative answer. Perhaps considerable doubts regarding application of the provision led to the decision to avoid explicit human rights discourse. The drafters of the Directive seemed unwilling to acknowledge that health rights can stem directly from the concept of European citizenship.²⁰¹ On the other hand, it is possible that Art. 35 was not mentioned because it was read primarily as a 'super-mainstreaming' expression²⁰² of EU competence in health law and policy. Therefore, it could have been perceived as a mere reiteration of Art. 168(1) TFEU.

It is clear that the Directive does not intend to create an unconstrained individual right to treatment on the EU level. No exception is made for life-saving treatment or rare diseases. Although the latter are mentioned in Art. 13, it merely provides for cooperation between Member States regarding diagnosis and treatment.

On the other hand, the Directive seems to underline the collective aspect of the right to healthcare. Recital 5 refers to the Council Conclusions on Common values and principles in European Union Health Systems, which are 'necessary to ensure trust in cross-border healthcare' and 'high level of health protection.' Recital 21 and Art. 4(1) mention 'universality, access to good quality care, equity, and solidarity.' Importantly, these are described as 'values and principles', which makes them more akin to positive, socio-economic rights than negative, civil

rights. They represent a common standard that the Member States should strive to achieve. The Directive provides that the common values should be respected equally with regard to home patients and patients from other Member States.²⁰³ This constitutes the basis of the non-discrimination provision in Art. 4(3), which is construed as a mere ‘principle’ that can be deviated from to protect the stability of the national social security systems.

The Directive features several provisions expressing individual patient’s rights. The right to information is discerned in obligations imposed on the Member State of affiliation and the Member State of treatment. The former should make available information about rights and entitlement to cross-border healthcare and reimbursement, as well as enforcement and redress mechanisms.²⁰⁴ The latter must create national contact points providing information on available treatments, tariffs, quality and safety standards²⁰⁵ to facilitate informed consent to cross-border treatment.²⁰⁶ Another important individual right recognised by the Directive is confidentiality. Patients enjoy a right to access their medical records, both in the Member State of affiliation²⁰⁷ and Member State of treatment.²⁰⁸ Art. 4(2)(e) states that processing personal data is subject to ‘fundamental right to privacy.’ This wording, as well as inclusion of concrete legal instruments protecting privacy (Art. 8 EUCFR²⁰⁹ and Directives 95/46 EC and 2002/58/EC²¹⁰), strongly emphasise the justiciability of the right. Finally, the Directive addresses procedural fairness and the right to redress.²¹¹

The conclusion seems to be that the individual rights featured in the Directive are mainly procedural, aimed at achieving the highest attainable standard of quality and safety in cross-border healthcare. When

203 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Recital 21.

204 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Art. 5(b).

205 *Id.* at Art. 4(2)(a), Art. 6(3).

206 *Id.* at Art. 4(2)(b).

207 *Id.* at Art. 5(d).

208 *Id.* at Art. 4(2)(f).

209 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Recital 25.

210 Directive 2011/24 of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-Border Healthcare Art. 4(2)(e).

211 *Id.* at Art. 7(6), Art. 9.

it comes to the right to healthcare itself, its collective variation is given priority. The Directive is hesitant to engage in an explicit human rights discourse. Sadly, it does not address important inequalities in access to cross-border healthcare, which remains reserved to the more affluent.

VI. CONCLUSION

Herman Nys wrote that ‘A European citizen who is not allowed to become a Europatient is no European citizen at all.’²¹² This bold statement is a strong assertion of the individual right to cross-border healthcare. It is not difficult to sympathise with this view. After all, when our health is endangered, we all strive to achieve the highest quality of care that we can afford. However, what we rarely think about is how our personal choices affect the entitlements of others. The European healthcare systems, based on solidarity and equal access, work thanks to equitable distribution of scarce resources. Traditionally, the principle of territoriality protected their operation by emphasising the Member States’ sole competence in designing and managing their social security systems. The rise of patient mobility disrupted this model.

The judgments in *Decker/Kohll* marked a beginning of ‘juridification’²¹³ of areas traditionally reserved to political and administrative decision-making. The construction of healthcare as an economic service enforced a model of a patient-consumer who can rely on the internal market rules to access a treatment of his choice. This granted patients rights which they had not enjoyed before under the domestic or international human rights law. The CJEU adopted the role of a hero ‘protecting the innocent individuals from the evil of protectionist-minded Member States.’²¹⁴ However, in doing so, it dangerously shifted the balance away from collective rights. The situations when a Member State could rely on prior authorisation and basket of care to refuse a cost-intensive treatment were limited. This development was dangerous, especially for the stability of the newer Member States, which were particularly susceptible to patient migrations.

The Patients’ Rights Directive offered a positive change, reinstating the national control over healthcare systems. Although the legislation was conceived as a patients’ rights guarantee, introducing an even more consumerist approach, its final text reflects a difficult compromise between the Commission and Member States seeking to protect their health funds. A compromise which, arguably, is not satisfactory for either side. While the proponents of patient

212 Herman Nys, Comparative health law and the harmonization of patients’ rights in Europe, *European Journal of Health Law* 317, 321 (2002).

213 Kenneth Veitch, Juridification, Medicalisation, and the Impact of EU Law: Patient Mobility and the Allocation of Scarce NHS Resources, *Med Law Rev* 362 (2012).

214 Nicholas Bernard, “A ‘New Governance’ Approach to Economic, Social and Cultural Rights in the EU” in Hervey and Kenner, *supra* note 107.

mobility might criticise the Directive for constraining patients' rights, its opponents contend that even publication of a comprehensive list of cost-intensive treatments may endanger financial stability by prompting patients to challenge the domestic resource allocation.²¹⁵ The truth lies somewhere in the middle. It has to be reiterated that enforcement of individual rights can have a positive effect on communitarian right to healthcare. In health law individual challenges often prompt a long-overdue reform. For example, the *Kohll* jurisprudence acted as a catalyst for a legal reform of the NHS, which the Labour government undertook in 2001.²¹⁶ Moreover, patient mobility can be a chance to attract funding for domestic healthcare by promoting a Member State as a medical tourism destination.

Although the Directive succeeds in striking a satisfactory balance between individual and communitarian rights, it does not take a chance to introduce a human rights discourse to the patient mobility. The Directive addresses neither the life-saving treatment nor inequality concerns in access to cross-border healthcare, which continues to benefit the more affluent at the expense of the poorer and less articulate. As long as this will remain the case, Nys' ambitious statement will not become reality.

BIBLIOGRAPHY

Bernard, N. "A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU" in Hervey, T. and Kenner, J. (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights. A Legal Perspective* (Hart 2003).

da Costa Leite Borges, D. 'Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views' (2011) *Int. J. Law Context* 7(3) 335.

De Burca, G. 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105(4) *American Journal of International Law* 649.

de la Rosa, S. 'Directive on Cross-border Healthcare or the Art of Codifying Complex Case Law' (2012) 49 *CML Rev.* 15.

den Exter, A. *Health care law-making in central and eastern Europe. Review of a legal-theoretical model.* (Antwerp: Intersentia 2002).

Di Federico, G. 'Access to Healthcare in the Post-Lisbon Era and the Genuine Enjoyment of EU Citizens' Rights' in Rossi and Casolari (eds), *The EU After Lisbon: Amending or Coping with the Existing Treaties* (Springer 2014).

Frischhut, M., Fahy, N. 'Patient Mobility in Times of Austerity: A Legal and Policy Analysis of the Petru Case' (2016) 23 *European Journal of Health Law* 36.

Frischhut, M. 'Standards on quality and safety in cross-border healthcare' in den Exter, A. (ed), *Cross-border health care and European Union law* (Erasmus University Press 2017).

Gore, R. 'Reignited concerns over resource allocation and the transposition of the Patients' Rights Directive' (2013) 18(1) *Cov. L.J.* 99.

Hancher, L., Sauter, W. *EU Competition and Internal Market Law in the Healthcare Sector* (OUP 2012).

Hatzopoulos, V. 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgements of the ECJ in Vanbraekel and Peerbooms' (2002) 39 *Common Market Law Review* 683.

Hatzopoulos, V. 'Some thoughts on the fate of poorer Member States' healthcare systems after the ruling in Elena Petru' (2016) 41(3) E.L. Rev. 424.

Hendriks, A. 'High-quality of Care throughout Europe — But Do We Speak the Same Language?' (2016) 23(1) European Journal of Health Law 14.

Hervey, T., McHale, J. 'Article 35' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

Hervey, T., McHale, J. *Health Law and the European Union* (CUP 2004).

Hervey, T. 'Patient Mobility, Solidarity and Equal Access' in den Exter, A. (ed), *Cross-border health care and European Union law* (Erasmus University Press 2017).

Hervey, T. 'Rights: health rights as human rights' in Hervey, T. and McHale, J.V. *European Union Health Law: Themes and Implications* (CUP 2015).

Hervey, T. 'Rights: mobile patients' rights as human rights' in Hervey, T. and McHale, J.V. *European Union Health Law: Themes and Implications* (CUP 2015).

Hervey, T. 'The Right to Health in European Union Law' in Hervey, T. and Kenner, J. (eds.), *Economic and Social Rights Under the EU Charter of Fundamental Rights. A Legal Perspective* (Hart 2003).

Hervey, T., Vanhercke, B. 'Health Systems Governance in Europe The Role of European Union Law and Policy' in Mossialos, E. et al (eds.), *Health Systems Governance in Europe. The Role of European Union Law and Policy* (CUP 2010).

Hervey, T. 'We Don't See a Connection: The 'Right to Health' in the EU Charter and European Social Charter' in de Búrca, G. et al (eds) *Social Rights in Europe* (OUP 2005).

Jorens, Y. 'Impact de la jurisprudence la plus récente de la Cour européenne de justice sur l'influence des règles relatives au marché intérieur sur les systèmes nationaux de santé, plus spécialement les arrêts prononcés après décembre 2001: Les cas Muller-Faure Van Riet, Inizan et Leichtle' (2004) 46(2) Revue belge de sécurité sociale 379.

Kaczorowska, A. 'A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes' (2006) 12 E.L.J. 345.

Kennedy, I., Grubb, A. *Medical Law*, 3rd ed. (Butterworths 2000).

Kenner, J. 'Economic and Social Rights in the EU Legal Order: the Mirage of Indivisibility' in Hervey, T. and Kenner, J. (eds.), *Economic and Social Rights Under the EU Charter of Fundamental Rights. A Legal Perspective* (Hart 2003).

Koutrakos, P. 'Healthcare as an Economic Service under EC Law' in Dougan, M. and Spaventa, E. *Social Welfare and EU Law* (Hart 2005).

Kyriopoulos, J.E. et al, 'Cross-border Flow of Health Care: the Greek Experience - Facts and Figures' in Glinos, I.A. and Baeten, R. *A Literature Review of Cross Border Patient Mobility in the EU* (OSE, 2006).

Sokol, T. 'Entitlement to Socially Covered Healthcare versus Priority Setting: ECJ's Decomposition of the NHS?' (2011) 13 *European Journal of Social Security* 317.

Maclean, A. 'The Individual's Right to Treatment under the Human Rights Act 1998' in Garwood-Gowers, A. et al (eds.), *Healthcare Law: The Impact of the Human Rights Act 1998* (London: Cavendish Publishing 2001).

McHale, J. 'Fundamental rights and health care' in E Mossialos et al (eds.) *Health Systems Governance in Europe. The Role of European Union Law and Policy* (CUP 2010).

Montgomery, J. 'Impact of European Union Law on English Healthcare Law' in Dougan, M. and Spaventa, E. *Social Welfare and EU Law* (Hart 2005).

Murphy, C. 'An effective right to cross-border healthcare? On patients, primacy and procedural autonomy: comment on Elchinov' (2011) 36(4) E.L. Rev. 542.

Newdick, C. 'The European Court of Justice, Transnational Health Care, and Social Citizenship - Accidental Death of a Concept?' (2009) 26 *Wisconsin International Law Journal* 845.

Nedwick C. *Who Should We Treat? Rights, Rationing and Resources in the NHS* (OUP 2005).

- Nys, H. 'Comparative Health Law and the Harmonisation of Patients' Rights in Europe' (2002) *European Journal of Health Law* 317.
- Nys, H., Goffin, T. 'Mapping national practices and strategies relating to patients' rights' in Wismar, M. et al (eds.) *Cross-border Health Care in the European Union* (World Health Organization 2011, report on behalf of the European Observatory on Health Systems and Policies).
- Obermaier, A.J. *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy* (Ashgate 2009).
- Palm, W. and Glinos, I.A. 'Enabling patient mobility in the EU: between free movement and coordination' in Mossialos, E. et al (eds), *Health Systems Governance in Europe. The Role of European Union Law and Policy* (CUP 2010).
- Sindbjerg Martinsen, D. 'The Politics of the Cross Border Care Directive' in den Exter, A. (ed), *Cross-border health care and European Union law* (Erasmus University Press 2017).
- Sokolov, T. 'Reimbursement and authorisation issues' in den Exter, A. (ed), *Cross-border health care and European Union law* (Erasmus University Press 2017).
- Søvig, K.H. 'Convergence and divergence in patients' rights' in den Exter, A. (ed), *Cross-border health care and European Union law* (Erasmus University Press 2017).
- Veitch, K. 'Juridification, Medicalisation, and the Impact of EU Law: Patient Mobility and the Allocation of Scarce NHS Resources' (2012) 20(3) *Med Law Rev* 362.
- von Bogdandy, A. 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' 37 *Common Market Law Review* (2000) 1307.
- Wicks, E. 'Article 2' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).
- Wicks, E. *Human Rights and Healthcare* (Hart 2007).







PENN UNDERGRADUATE LAW JOURNAL

Volume 7, Number 1, Fall 2019