

# PENN UNDERGRADUATE LAW JOURNAL

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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.

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The Penn Undergraduate Law Journal uses the latest version of *The Maroonbook: The University of Chicago Manual of Legal Citation*.

*This journal is dedicated to the memory of Eduardo María Gear.*

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The inaugural issue of the Penn Undergraduate Law Journal marks the culmination of a year of work and the convergence of a number of competing ideas, all of which arose from a desire to provide a unique forum for exceptional undergraduate writers representing a range of academic disciplines. Welcoming submissions from public and private universities alike and publishing biannually, we founded this journal with a view toward broadening and enriching undergraduate discourse on topics relating to law or legal systems.

To distinguish our publication, we chose to label ourselves interdisciplinary. Reflecting Penn's emphasis on cross-disciplinary approaches, this defining feature allows our editors to evaluate works holistically, not just with an eye toward legal elements. It is, moreover, our firm belief that articles with strong grounding in a specific discipline give readers fresh perspectives, with varying contexts and underpinnings to frame arguments. As a result, our journal looks for Economics and History research papers, Political Science and Philosophy theses, not simply articles whose sole and central focus is the law.

Recent years have seen concerns about saturation in the realm of academic publishing. We pressed on in the belief our journal would be filling an untapped niche for undergraduates across the nation. Seeking foremost to publish longer pieces, such as senior theses or independent studies, our journal aims to showcase original undergraduate research pertaining to legal issues, both contemporary and historical. Our second objective is to feature shorter articles, written in the same spirit, that take original angles on previously explored subjects.

The Penn Undergraduate Law Journal would not have become a reality without the warm reception and overwhelming support of Penn faculty. Untold hours of consultation helped us devise an editing system, delineate our objectives, and obviate difficulties. Additionally, funds from a number of academic departments, especially the Legal Studies and Business Ethics Department of The Wharton School, have proven indispensable to the realization of our plans. True to its promise of promoting undergraduate initiatives, the university and its faculty have provided much needed support, guidance, and encouragement.

Considerable appreciation also goes to our editors, who worked tirelessly with their chosen pieces, our sales associates, who helped raise funds, and our layout editors, who designed the journal. We would also like to thank Professor Philip M. Nichols of The Wharton School for his unerring guidance and help in securing funding, Professor Alexander Guerrero of the Philosophy Department for his advice and help in formulating an editing system, and Professor Phillip Ackerman-Lieberman of Vanderbilt Law School for writing the introduction. Our families also deserve high praise for supporting us at every milestone.

It is our distinct honor to present you with the first issue of the Penn Undergraduate Law Journal. We hope this marks the start of a longstanding publication at the University of Pennsylvania.

Thank you,



Tomas E. Piedrahita



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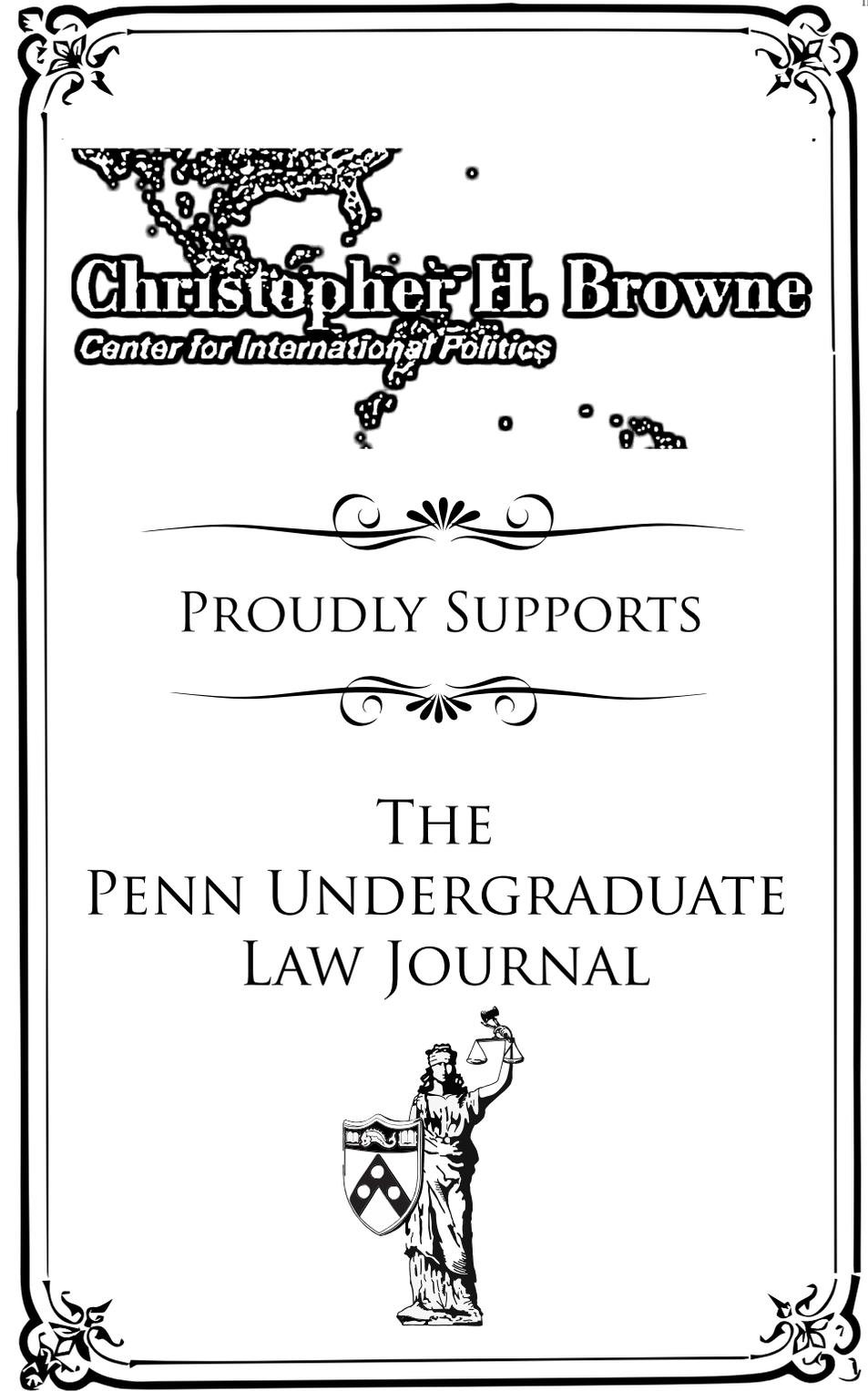
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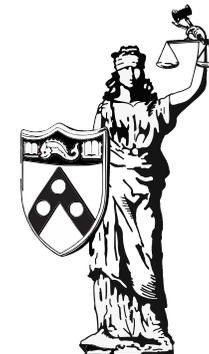
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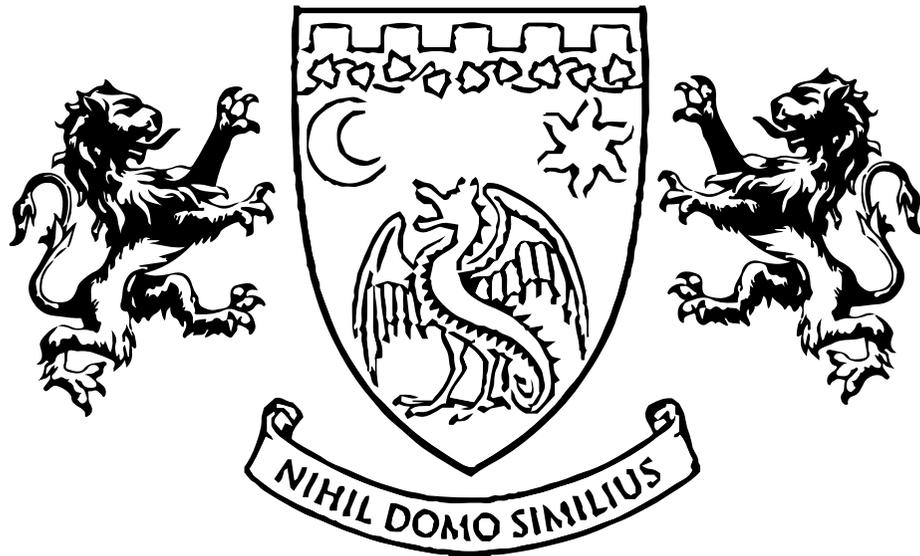
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ON THIS CROWNING ACHIEVEMENT

## INTRODUCTION

### STRAYING JUST FAR ENOUGH: THE JEWISH COURTS OF MEDIEVAL EGYPT

Phillip I. Ackerman-Lieberman<sup>†</sup>

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Having spent a number of years dividing my teaching time between Arts & Science and a law school, I have come to appreciate the unique perspective of students seeking professional training. Wondering how my law students might put to use the information that they draw from readings and classroom discussion has inspired me to think carefully about the practice of law. As a medieval Jewish and Islamic historian, my law school teaching has subtly shifted the direction of my research to focus on actual court practice. At the same time, the time I have spent with students who have not yet entered that professional track (that is, generally undergraduates interested in social, legal, and economic history) has encouraged me to think not only about black-letter law as I did reading classical Jewish and Islamic legal sources as a graduate student, but to think broadly about the social meaning of what goes on in the court, and about how materials produced by medieval courts may be used fruitfully to tell us something about the relationship between Jews and Muslims as a whole. The *Penn Undergraduate Law Journal* gives the second type of students—those who are not yet asking the question of “How will I use this in my law practice?”—the opportunity to think about legal materials and legal questions in a broad historical and sociological way, and so I praise the editors and contributors whose work is featured here for their efforts in encouraging us to think expansively about the law and how we might use it. What I offer here is the fruit of continued discussion with my students and engagement with my sources, attempting to look at the legal records of the Jewish community of medieval Egypt in this expansive way, at the nexus of black-letter law and daily life—a close reading of court practice designed to place the Jewish court in its social and legal context.

As I have written elsewhere, Rabbanite Jewish courts in medieval Egypt produced documents, some of which in their details ran afoul of Jewish law. I have described the roots of this phenomenon to be Jewish judges’ reliance on mediation as a strategy for the formation and management of commercial agreements that would have garnered the support of all of the contracting parties. The courts’ usage of mediation would therefore have reduced the likelihood that merchants initiating, managing, or terminating their contracts through the courts would seek

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to overturn any agreement made therein, particularly through an appeal to Muslim courts. The specific mediation technique that I have identified as having been used by the Rabbanite court may be described as “norm-educating.” In my understanding, norm-educating mediation means that the Jewish elders sitting as the Rabbanite court who would eventually come to ratify agreements would have educated Jewish merchants as to the content of Jewish law concerning the matter which brought those merchants to the court—such as the details describing the structures of commercial partnership permitted by Jewish law—even though those elders would be willing in the end to ratify agreements which did not necessarily fit the details of the structures found in the classical compendia of Jewish law. Norm-educating mediation contrasts with norm-advocating mediation, a strategy whereby mediators require petitioners to structure their agreements within the norms of the legal system they ostensibly represent. Had the Rabbanite courts been norm-advocating, the agreements that came out of the Rabbanite courts would have been wedded to the details of Jewish law as the elders of those courts understood them. Since litigants often appealed to rabbinic jurists for legal opinions (*responsa*) that they would then bring to the court itself to shore up their position in the litigation, the elders of the Rabbanite court would have been familiar with the classical sources of Jewish law. That is to say, even if the “elders” of the Jewish court were not themselves experts in Jewish law, the *responsa* of these rabbinic jurists would have educated them as to the “baseline framework for discussion of disputed issues.”<sup>1</sup> In the norm-advocating framework, this baseline defines the range of options which the courts might have permitted; however, in the norm-educating framework, it simply becomes the opening volley in a process which may indeed take the litigants far afield as they move towards a mutually acceptable agreement.

In this paper, I wish to look at the specific ways in which the commercial agreements notarized by the Rabbanite court diverge from the classical sources of Jewish law, and to see what we might be able to learn from these divergences about both commercial practice in medieval Egypt as a whole and the legal environment in which the Rabbanite court was situated. In particular, I am interested in exploring the legal and economic pressures that might have motivated Jewish merchants to diverge from the baseline of Jewish law in their agreements and Jewish elders to give their stamp of approval to these agreements. These pressures may have pushed the agreements emerging from the Jewish court in one or another identifiable direction, and so by looking at the details of these agreements we may be able to point to the influence of one or another set of circumstances. For instance, if the Jewish agreements are found to have substantially accommodated Islamic commercial law, we may ascribe this to the opportunities for legal forum-shopping on the part of Jewish merchants who had access to Islamic courts. Yet determining the nature of that influence is a tricky business: as I have written elsewhere, if Jewish agreements are found to have rejected the structures of Islamic law, we may

<sup>1</sup> Waldman, 730.

nonetheless argue that Jewish merchants’ choices were shaped by the opportunities for forum-shopping, if only to reject practices which Jewish merchants identified as “Islamic.” Therefore, a detailed discussion comparing commercial agreements from the Geniza to the relevant materials from Jewish law and outlining the divergences between these agreements and the sources of Jewish law must precede any conjecture as to what legal or economic pressures might have motivated those divergences.

From the outset, it is important to point out that to the extent that legal documents concerning mercantile cooperation from the Geniza provide enough detail to compare the structures they describe with the classical compendia of Jewish law, the detail in agreements from the Geniza often corresponds with the structures of Jewish law. What we might call “ordinary partnership,” a relationship to which all partners provide both capital and work, is described in both Geniza documents and in Jewish legal sources. In the case of the ordinary partnership, Jewish law understands both profits and losses to be shared by the partners. The ordinary partnership differs from the Jewish investment partnership (Hebrew, *’eseq*), for which one or more of the individuals providing financial capital serves as a “silent” partner and does not work; the corresponding Islamic *commenda* is a special case of investment partnership for which the silent partner bears all losses. This simplified taxonomy of partnership—including ordinary partnerships, investment partnerships, and *commendas*—will suffice for much of my analysis. Many of the ordinary partnerships found in the legal agreements from the Geniza include all the salient features understood by Jewish law—particularly, shared investment of capital and work and fixed divisions of profits and losses. The Geniza does reveal exceptions to this general tendency—most notably perhaps, a number of partnership agreements for which one or more of the partners invested no capital.

Yet Geniza records also reveal a number of partnerships for which one partner’s investment is minor relative to that of his fellow, but is nonetheless not zero.<sup>2</sup> These agreements show a junior partner to have invested less than five percent of the overall partnership capital. However, such partnership agreements would still have been fit within the bounds of Jewish law as described by Maimonides and others. As Goitein explains, work partnerships afforded junior colleagues who lacked investment capital the opportunity to take advantage of economic opportunities. We might be led to think, then, that the primary driving force behind the appearance of the work partnership was economic. Yet the existence of agreements for which one of the partners brought a very small portion (one might say, perhaps, a “token” proportion) of partnership capital suggests that potential partners could pay lip service (at least) to the constructs of Jewish law without weakening the role that this sort of partnership might play as an economic substitute for an employment agreement. This encourages us to look beyond microeconomics to explain why the Geniza *does* contain work partnerships that do indeed run afoul of

<sup>2</sup> Cf. ENA NS 17.35, TS 10 J 27.3 C, TS 13 J 3.19.

Jewish law. In this case, the fact that Ḥanafī law permits work partnerships may be a relevant datum.<sup>3</sup> If, as Udovitch points out, Ḥanafī law incorporated customary practice in the medieval Islamic marketplace, the use of the work partnership model in a few agreements from the Geniza concerning Jewish merchants<sup>4</sup> could point to the adoption by Jewish merchants of a more broad-based commercial practice. It could also point to an awareness on the part of Jewish merchants or Jewish legal authorities that the work partnership was permitted by Ḥanafī law, and that such an agreement might therefore have withstood challenge in an Islamic court. The robustness which this would bring to agreements from the Jewish court would have eliminated the opportunity for calculating merchants to exploit differences in law to their advantage.

At times, Jewish merchants seem to have devised their own commercial structures or institutions to accommodate Islamic law and/or the practices of the broader marketplace, and the Jewish courts seem to have given their stamp of approval to these institutions. One such institution is the *mu'āmalā*, a commercial structure which I have identified elsewhere as equivalent to the ordinary partnership but lacking the formal *qinyan* which marked ordinary partnerships initiated under the auspices of Jewish law.<sup>5</sup> In contradistinction to Jewish law, most schools of Islamic law do not require the placement of partnership funds in a common purse (that is, in Jewish law, the *qinyan*) as an act of initiation.<sup>6</sup> The *mu'āmalā* is not discussed in the narrative works of Jewish law,<sup>7</sup> but this structure would have certainly helped meet the economic needs of Jewish merchants—specifically, the difficulty of initiating a partnership through the *qinyan* when the parties are physically distant from one another. However, it is difficult to say precisely which factors led to the development of the *mu'āmalā* among Jewish merchants—the permissiveness of Islamic law, the demands of economic competition in the marketplace, or Jewish acculturation and awareness of practices common among their non-Jewish fellows. But the *mu'āmalā* is nonetheless accommodated by documents emerging from the Jewish court: one such document considers the difference between a *mu'āmalā* and a so-called *qinyan*;<sup>8</sup> and a number of release documents juxtapose the ordinary partnership (Judeo-Arabic, *shirka*) and the *mu'āmalā*, releasing partners from relationships which took the form of both of these structures.<sup>9</sup> Here, the

3 Cf. Udovitch, pp.65-77.

4 Cf. ENA NS 21.1, INA D 55.8.

5 Cf. MT ShSh 4:1 for the requirement of the *qinyan* at the initiation of ordinary partnerships.

6 Shāfi'ī jurists and Ibn Ḥazm alone require this, cf. Ibn Rushd, II:391, and Ibn Ḥazm, VII:261.

7 This commercial structure may have been discussed in Samuel b. Ḥofni's *Book of Partnership* (cf. the table of contents in the Lewin printing), but the relevant portion of this work is not extant at present. However, Samuel may not have needed this structure in order to accommodate the position of Islamic law vis-a-vis the act of initiation at the start of an ordinary partnership since he did not strictly require the *qinyan* in any case. (cf. *Iṭṭur*, s.v. "shituf").

8 ULC OR 1080 J 290. See also Responsa Maimonides 72, which alludes to a *mu'āmalā*.

9 See, for example, ENA 2738.35, TS 13 J 3.15, and TS 16.195.

Jewish court is found acknowledging commercial structures that do not appear in Jewish law but would nonetheless have been recognized in Islamic law.

The work partnership and the *mu'āmalā* give us but two examples of legal accommodation by the Jewish court of structures recognized by Islamic commercial law. Jewish courts' willingness to notarize agreements following the Islamic *commenda* (an investment partnership for which the silent partner bears all liability for losses) instead of the talmudic *'isqa* (an investment partnership for which liability for losses is shared, though not necessarily equally, by both the silent partner and the "managing" or "active" partner) provides us with not only another such example, but one which seems to have been of sufficient prominence in the marketplace that it was accommodated not only by the Jewish courts, but was even noted (though not necessarily promoted) in contemporary rabbinic responsa.

Up until this point, I have identified cases in which the Rabbanite court seems to have accommodated practices recognizable in the classical sources of Islamic law, which might suggest that the range of outcomes the Rabbanite court was willing to recognize was influenced by litigants' ability to forum-shop. We might speculate, therefore, that the Jewish court was in fact norm-advocating instead of norm-educating, but the scope of those norms to which the norm-advocating Rabbanite court would have restricted itself was defined not only by Jewish law but also by Islamic law. The awareness that Jewish merchants could go elsewhere to satisfy their preference for certain types of commercial arrangements—in this case, the Islamic *commenda*—might have encouraged the Rabbanite court to accommodate such arrangements rather than have their constituents go elsewhere.

If Rabbanite courts saw themselves in direct competition with Muslim courts, and if this helped shape the range of outcomes the Rabbanite court might have permitted, what influence might transactions taking place outside of any court have had on the outcomes within the Rabbanite court? That is to say, did the Rabbanite court see itself in competition with Islamic courts alone, or did Jewish elders also feel compelled to tolerate agreements which might otherwise have been made outside the court system entirely? Libson identifies both Muslim practice and Islamic law as having had an influence on both local custom and geonic custom,<sup>10</sup> and the latter would have helped shape Jewish jurists' legal opinions and therefore have trickled down to the Rabbanite courts.

If Goitein is correct that interest-bearing loans were pushed out of the court system because neither Jewish nor Muslim courts would ordinarily have given their approval, with the exception he brings from 1239 proving the rule, then we may see the distinction between custom or broad-based practice in the market and law at any given point in time to become critically important. With this in mind, the possibility that broad-based market practices made their way into Jewish law only indirectly through the prism of Islamic law should be considered. Indeed, in his description of the flexibility of the geonic decree allowing debts to be collected

10 Libson, p.93ff.

from chattel as well as real property, Libson explains that “[t]he geonim, by adopting the practice of agency and basing it on what was essentially a kind of legal fiction, gave Jewish law a flexibility equal to that of Muslim legal practice.”<sup>11</sup> If the Rabbanite courts rejected mercantile practices common in the marketplace but nevertheless barred by Muslim courts, the Rabbanite courts might push their constituents out of the court system but at least Rabbanite elders could rest easy with the knowledge that those constituents would not be seeking recourse in an Islamic court. Yet if these Rabbanite elders rejected practices permitted by Muslim courts, they would be placing their own power and influence over the Jewish community at great risk as those constituents could simply carry their agreements over to the Muslim courts. Jewish elders may have been flexible in their rulings, but the evidence is not clear that they were more flexible than their Muslim colleagues, nor that they pre-empted those colleagues in taking on legal innovations based on the custom of the marketplace.

While Jewish jurists might have been free to reinterpret black-letter law and to introduce innovations to respond to economic realities and incorporate local custom, it is not clear that local Jewish courts were quite so bold. But the dynamics of forum-shopping would certainly have encouraged Rabbanite elders to absorb the range of options provided by their Muslim fellows in order to retain for themselves the allegiance of their Jewish constituents. The evidence I have provided here supports the conjecture that the Rabbanite court was indeed aware of these options and did allow them to be incorporated into documents which they subsequently notarized. This brings us back to the idea of the Jewish courts as norm-educating versus norm-advocating: while a norm-educating court might not strictly place constraints on the outcomes of the mediation process, the evidence I have adduced here does seem to fit within certain bounds—namely, the combination of outcomes recommended by the classical sources of Jewish law and those accepted by the rival Muslim courts. Yet since the latter included some outcomes that were themselves strictly outside the bounds of classical Islamic law (not to mention Jewish law), it is difficult to describe the Rabbanite court as having been norm-advocating. Rather, we may see the Rabbanite court as positioning itself somewhere between these two models, eager to encourage Jewish merchants to shape their commercial arrangements informed by Jewish law yet also attentive to the court’s place vis-à-vis its competitors in the legal sphere.

<sup>11</sup> Libson, p.39.

## ARTICLE

### **PUNISHING FOREIGNERS: IS THE EQUAL TREATMENT OF CITIZENS AND ALIENS ACCUSED OF CRIME CONSISTENT WITH SOCIAL CONTRACT THEORY AND THE CONSTITUTION?**

Skylar Albertson<sup>†</sup>

**ABSTRACT:** *The dominant approach to the punishment of foreigners relies upon actual consent in order to justify the denial of important protections to aliens accused of wrongdoing. This model consists of two parts. Preexisting membership stipulates that if an individual was not considered a party to the social contract before facing punishment, the state is not required to treat that individual as it would a citizen. Balancing encourages the state to determine its treatment of foreigners on a case-to-case basis. When the punishment of foreigners has come before the Supreme Court, justices have frequently adopted the exclusionary logic of actual consent. In this paper, I propose an alternate theory called implied membership. According to implied membership, hypothetical consent requires the state to punish both aliens and citizens in the same manner.*

<sup>†</sup> Skylar graduated magna cum laude with honors from Brown University in 2013, receiving a B.A. in Political Science. His paper on the punishment of foreigners was awarded both the Samuel C. Lamport Prize in International Understanding and the Political Science Department Award for Best Thesis in Political Theory. Skylar would like to thank Professors Calabresi, Brettschneider, and Schiller for their feedback and support.

## I. INTRODUCTION

In 2001, members of an Afghan military coalition fighting against the Taliban captured 21-year-old Yaser Esam Hamdi. It is unclear precisely how or when the Afghan fighters apprehended Hamdi. However, the attacks on the United States of September 11th, 2001, and the subsequent involvement of the United States military in Afghanistan, somehow led to Hamdi's transfer into American custody. In 2002, the United States brought Hamdi to the naval base at Guantanamo Bay.<sup>1</sup> Jack Goldsmith, an attorney from the General Counsel's Office of the Pentagon, remembers watching Hamdi at Guantanamo and thinking, "It seemed unnecessarily extreme to hold a twenty-two year old foot soldier in a remote wing of a run-down prison in a tiny cell, isolated from almost all human contact and with no access to a lawyer."<sup>2</sup> Hamdi's father insisted that his son was in Afghanistan carrying out humanitarian relief work. However, Michael Mobbs, a Special Advisor to the Under Secretary of Defense for Policy, issued a statement accusing Hamdi of fighting alongside the Taliban. Justice Sandra Day O'Connor revealed that the so-called Mobbs Declaration was "the sole evidentiary support that the Government... provided to the courts for Hamdi's detention."<sup>3</sup>

The acting commander of the Guantanamo naval base, Colonel Donald Woolfolk, reasoned, "the detention program was aimed at holding the suspects not for punishment or for trial, but rather for gathering intelligence."<sup>4</sup> Yet when the CIA dispatched an expert to assess the situation at Guantanamo that same year, he reported, "one-third of the prison camp's population of more than 600 captives... had no connection to terrorism whatsoever."<sup>5</sup> A member of the FBI's counterterrorism division put the number even lower, insisting that "there were no more than fifty detainees worth holding in Guantanamo."<sup>6</sup>

The United States admits that members of its military or law enforcement agencies interrogated Hamdi.<sup>7</sup> Although there is no public record of the details of the interrogation, and indeed Hamdi's treatment may have been humane, it is indisputable that other individuals in similar circumstances did not enjoy such a fate. Mohammed al-Qhatani was rumored to have been closely involved with the terrorist attacks of September 11th, 2001, possibly as the mystery 20th hijacker who never made it on to one of the planes.<sup>8</sup> Al-Qahtani was "allowed four hours of sleep

1 *Hamdi v. Rumsfeld*, 542 US 507, 587 (2004).

2 Jane Mayer, *The Dark Side: The Inside Story of how the War on Terror Turned into a War on American Ideals* 199 (Doubleday 2008).

3 *Hamdi*, 542 US at 588.

4 Mayer, *Dark Side* at 199 (cited in Note 2).

5 *Id.* at 183.

6 *Id.* at 187.

7 *Hamdi*, 542 US at 587.

8 Charlie Savage, William Glaberson, and Andrew W. Lehren, "Classified Files Offer New Insights into Detainees," (NY Times April 24, 2011), online at <http://www.nytimes.com/2011/04/25/world/>

a night" for 48 out of 54 days, "forced to strip naked, wear a leash, and perform dog tricks...[and] was deprived of the opportunity to use a toilet after having been force-fed liquids intravenously."<sup>9</sup> American investigators were ultimately able to prove that al-Qahtani was associated with Al Qaeda, but al-Qhatani was involved on such a low level that he possessed no useful information.<sup>11</sup> An American lawyer permitted to meet with al-Qahtani concluded that he had offered false confessions in order to avoid prolonged abuse.<sup>12</sup>

In some cases, the United States has outsourced the interrogations of terror suspects through a procedure called extraordinary rendition. Maher Arar, a Canadian engineer with a degree from McGill University, was taken from his family at JFK International Airport and flown to Syria. American officials then handed him over to their Syrian counterparts, who repeatedly beat and whipped Arar. After Arar's release in 2003, the Canadian government cleared him of any wrongdoing, despite the fact that he had signed several false confessions. In fact, the Canadian government decided to grant Arar \$10.5 million in damages.<sup>13</sup> Asked to describe his experience, Arar stated that, "Not even animals could withstand it."<sup>14</sup> In a similar episode, an Australian citizen named Mamdouh Habib was brought to Egypt, where interrogators beat and electrocuted him. Like Arar, Habib was eventually released without ever being charged with a crime.<sup>15</sup>

Hamdi, like many of the individuals detained at Guantanamo, grew up in an Arabic country. What is peculiar about Hamdi is that he was born in Louisiana and moved to Saudi Arabia as a child. This information mattered a great deal to officials of the United States government. Upon learning that Hamdi was in fact an American citizen, they transferred him from Guantanamo to naval briggs in Virginia and ultimately South Carolina.<sup>16</sup> This information also mattered a great deal to Justice Antonin Scalia. On June 28th, 2004, the Supreme Court handed down its decisions in both *Rasul v. Bush* (2004)<sup>17</sup> and *Hamdi v. Rumsfeld* (2004)<sup>18</sup>. The detainees in *Rasul*, like Hamdi, were allegedly "captured abroad during hostilities between the United States and the Taliban," before being brought to Guantanamo Bay.<sup>19</sup> Family members of the detainees insisted that "none of...[them had] ever

[guantanamo-files-lives-in-an-american-limbo.html?hp](http://www.guantanamo-files-lives-in-an-american-limbo.html?hp), 1 (visited December 2, 2011).

9 *Id.*

10 Mayer, *Dark Side* at 206-07 (cited in note 2).

11 *Id.* at 211-12.

12 Adam Zagorin, Exclusive: *20th Hijacker Claims That Torture Made Him Lie*, (Time March 3, 2006), online at <http://www.time.com/time/nation/article/0,8599,1169322,00.html> (visited December 2, 2012).

13 Mayer, *Dark Side* at 129-34 (cited in note 2).

14 Mayer, *Dark Side* at 131 (cited in note 2).

15 *Id.* at 125-27.

16 *Hamdi*, 542 US at 588.

17 *Rasul v. Bush*, 542 US 466 (2004).

18 *Hamdi v. Rumsfeld*, 542 US 507 (2004).

19 *Rasul v. Bush*, 542 US at 554.

been a combatant against the United States or... [had] ever engaged in any terrorist attacks.”<sup>20</sup> However, unlike *Hamdi*, *Rasul* dealt with the indefinite detention of foreigners. In *Rasul*, the Court was asked to consider whether it possessed proper jurisdiction to hear suits brought on behalf of “2 Australian citizens and 12 Kuwaiti citizens.”<sup>21</sup>

Scalia warned in his dissent for *Rasul* that granting the Supreme Court jurisdiction for writs of habeas corpus submitted by Guantanamo detainees “ought to be unthinkable,” on account of “a potentially harmful effect upon the Nation’s conduct of a war.”<sup>22</sup> In his dissent for *Hamdi*, Scalia declared, “Where the government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”<sup>23</sup> According to Scalia, American citizenship protected Hamdi from indefinite detention at Guantanamo Bay, despite the fact that Hamdi had grown up and spent most of his life outside the United States. Scalia argued that, “The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal.”<sup>24</sup> In support of this position, Scalia noted that, “No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution’s authorization of standing armies in peacetime.”<sup>25</sup> Scalia thus handed down opinions on the same day, arguing for the indefinite detention of foreigners in *Rasul* and against the indefinite detention of citizens in *Hamdi*.

Why should citizenship be the difference between a jury trial and indefinite detention? The Supreme Court ruled in both *Rasul* and *Hamdi* that it did have jurisdiction over applications for writs of habeas corpus submitted by Guantanamo detainees. However, the justices struggled mightily in their efforts to determine the constitutionality of indefinite detention at Guantanamo Bay. It was not until *Boumediene v. Bush* (2008) that the Court struck down the procedures established for Guantanamo detainees as an unconstitutional suspension of habeas corpus.<sup>26</sup> These cases are one chapter in a long history of Supreme Court decisions concerning the punishment of aliens. However, Guantanamo Bay and the War on Terror in general are unique because the American government has never exercised this much control over foreign nationals on such a large scale. Even after the Court’s decision in *Boumediene*, promises from President Barack Obama, and a report published by the Government Accountability Office supporting the end of indefinite detention, the United States continues to detain individuals at Guantanamo.<sup>27</sup> In a November

20 Id at 555.

21 Id at 554.

22 Id at 576 (Scalia dissenting).

23 *Hamdi*, 542 US at 615.

24 Id at 623.

25 Id.

26 *Boumediene v. Bush*, 553 US 723, 732, 800 (2008).

27 Associated Press, *Government Report Supports Closing Guantanamo*, The New York Times

2012 letter to the New York Times, former Rear Admiral Donald J. Guter, who attended the trial of Khalid Shaikh Mohammed at Guantanamo, wrote, “as the Navy judge advocate general at the Pentagon on 9/11, I want justice. But Guantanamo has not provided that justice and has not made us safer.”<sup>28</sup>

### A. *The Social Contract and the Constitution*

Social contract theory and the Constitution are closely intertwined. Many of the Framers thought of the Constitution as the American social contract.<sup>29</sup> The term “the People” is used throughout the Constitution and implies that the Framers, having just renounced their status as members of the British Empire, intended for some concept of citizenship or membership to play a role in the Constitution. The Constitution, like the social contract, is thought to derive its legitimacy from the consent of the people, as opposed to divine right. Conversely, American constitutional law can provide case studies for the actual outcomes of a particular social contract. Using constitutional disputes as examples of the issues and concerns involved with social contract theory helps illuminate whether such a theory is useful in practice.

Social contract theory is particularly relevant to the constitutional questions involving the punishment of foreigners. Social contract theorists typically grant few rights to individuals who are not parties to the social contract. Hobbes,<sup>30</sup> Locke,<sup>31</sup> and Rousseau<sup>32</sup> all suggest that if individuals bring legitimacy to the government through consent, they are justified in denying the benefits of that society to outsiders who have not offered their own consent to the government. If it can be shown that the extension of certain rights or protections to foreigners is compatible with social contract theory, it is likely that this practice can be reconciled with the Constitution. Social contract theory is not dispositive for constitutional interpretation. However, the centrality of citizenship to social contract theory makes it a suitable model for considering the relationship between the Constitution and aliens.

### B. *The Need for a General Theory That Addresses the Punishment of Foreigners*

There is a need in both social contract theory and constitutional theory

(NY Times November 28, 2012), online at [http://www.nytimes.com/2012/11/29/us/government-report-supports-closing-guantanamo-prison.html?\\_r=0](http://www.nytimes.com/2012/11/29/us/government-report-supports-closing-guantanamo-prison.html?_r=0) (visited December 2, 2012).

28 Donald J. Guter, *No Justice at Guantanamo*, NY Times IHT Global Opinion (NY Times Nov 29, 2012), online at <http://www.nytimes.com/2012/11/30/opinion/no-justice-at-guantanamo.html> (visited Dec 2, 2012).

29 Maynard Garrison, ed, *Collected Works of James Wilson* 253 (Liberty 2007).

30 Thomas Hobbes and Edwin M. Curley, *Leviathan: With Selected Variants from the Latin Edition of 1668* 112, 203 (Hackett 1994).

31 John Locke, *Two Treatises of Government* 274 (Cambridge 1988) (Peter Laslett, ed).

32 Jean-Jacques Rousseau, *Basic Political Writings*, 159-60 (Hackett 1987) (D. Cress, ed).

for a model that addresses all punishment inflicted by the state upon foreigners. Social contract theory risks becoming hopelessly obsolete without revisiting its treatment of aliens. The classic social contract theorists wrote in the context of a world that bears little resemblance to the present. Citizens of different nations now constantly come into contact with each other, crossing territorial and jurisdictional lines at a pace unfathomable to 17th and 18th century theorists. As Joseph Carens points out, applications of social contract theory in the present threaten to make, “Citizenship...the modern equivalent of feudal privilege — an inherited status,” that arbitrarily bears extraordinary significance in certain circumstances.<sup>33</sup> Scalia’s dissenting opinions in *Rasul* and *Hamdi* are evidence of the odd results that social contract theory can produce without thoughtful consideration of the relationship between aliens and the state.

The need for such a theory in American constitutional law is even more pronounced. The specific provisions of the Constitution guarding against arbitrary power suggest that practices such as extraordinary rendition and indefinite detention violate the Constitution. The same logic may apply for certain procedures involved with deportation and administrative punishment.<sup>34</sup> It may be true that the Framers gave little if any thought to the punishment of foreigners, or at the very least to the extraterritorial punishment of foreigners. However, it is abundantly clear that the Framers *did* worry about the arbitrary exercise of power by the government over individuals. This opposition to arbitrary power is embodied in several sections of the Constitution, such as the Suspension Clause, the prohibition against bills of attainder, and several of the amendments in the Bill of Rights.

Furthermore, there is evidence that at least some of the Framers did in fact give ample consideration to the constitutional issues raised by the punishment of non-citizens. While debating the Alien and Sedition Acts, James Madison asserted that, “it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that...they have no right to its protection.”<sup>35</sup> According to Madison, the fact that foreigners, unlike citizens, could reasonably expect to be deported as a result of wrongdoing meant that the government should be espe-

33 Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *The Review of Politics* 251, 252 (1987).

34 United States Immigration and Customs Enforcement officials detain immigrants against whom there have been no allegations of wrongdoing. (“Immigrants in Solitary,” *New York Times*, April 2, 2013) According to one account, the ICE holds approximately 300 immigrants in solitary confinement each day, even though the detainees are being held pursuant to civil matters. (Ian Urbina and Catherine Rentz, “Immigrants Held in Solitary Cells, Often for Weeks,” *New York Times*, March 23, 2013) In *Magical Urbanism*, Mike Davis cites the American Friends Service Committee in asserting that, “The US border zone...has become the new ‘DMZ’ where... ‘constitutional and property rights essentially cease to exist.’” Mike Davis, *Magical Urbanism* at 40 (Verso 2000).

35 James Madison, *Madison’s Report on the Virginia Resolutions*, (The Library of Congress 556) online at <http://memory.loc.gov/ammem/amlaw/lwed.html> (visited December 2, 2012).

cially cautious when punishing non-citizens.<sup>36</sup> James Wilson even suggested that, “when an alien is tried, one half of his jury should be aliens.”<sup>37</sup> Both Framers felt that certain provisions of the Constitution required equal treatment for citizens and foreigners accused of crimes. This does not establish that the Constitution grants rights to aliens, but it does prove that the topic is not completely novel in constitutional law.

The Supreme Court has consistently displayed an unwillingness to demand the same protections for aliens as it does for citizens. Whether the issue has been immigration, criminal investigations, or hostile conflict, the Court has interpreted the Constitution to exclude non-citizens from important benefits such as the right to a trial. In doing so, the Court has sanctioned the arbitrary and unchecked exercise of power. I will argue that, more often than not, justices have arrived at these decisions through deficient reasoning. With the advent of the so-called War on Terror, the Supreme Court’s jurisprudence surrounding the punishment of foreigners should be reexamined now more than ever.

### C. Overview

In Chapter 1, I will examine the leading approach to the punishment of foreigners. This model consists of two parts: preexisting membership and balancing. Preexisting membership stipulates that if an individual was not considered a party to the social contract before facing punishment, the state is not required to treat that individual as it would a citizen.<sup>38</sup> Balancing encourages the state to determine its treatment of foreigners on a case-by-case basis.<sup>39</sup> Under this approach, the state balances the interests of foreigners, the interests of the state, and relevant practical considerations. Balancing relies upon the concept of preexisting membership in order to justify the dissimilar treatment of aliens and citizens, but does not completely reject foreigners’ claims to rights.

In Chapter 2, I will propose an alternate model for understanding the punishment of foreigners, which I will refer to as implied membership.<sup>40</sup> At its most basic level, this approach is an articulation of the “Golden Rule,” do unto others as you would have others do unto you. However, implied membership takes this

36 *Id.* at 555.

37 Garrison, *Wilson* at 1196 (cited in note 27).

38 Gerald L. Neuman describes a similar approach, which he refers to as “membership models,” in *Strangers to the Constitution*. I have chosen to modify this framework because I hope to show that competing models also rely on notions of membership. Gerald L. Neuman, *Strangers to the Constitution* (Princeton 1996).

39 Gerald L. Neuman refers to a similar approach as “formalism” or “global due process.” I have chosen to use the term balancing test because I believe this approach relies on no guiding principle other than what a particular state decision maker believes the facts of a specific case demand. *Id.*

40 Gerald L. Neuman proposes a similar theory, which he calls “mutuality of obligation.” I have chosen the label implied membership because I seek to show that criminal defendants are members of the society that seeks to punish them. *Id.*

principle a step further by proposing that whenever the state seeks to punish an individual, that individual acquires citizenship for the duration of the interaction with the punishing state. In practice, this means that whenever the government seeks to punish an individual, it must treat that individual as if he or she is its own citizen. I will argue that when the government disregards this constraint, it acts without legitimacy. In each chapter, I will begin by discussing the version of social contract theory behind each model, and conclude by examining the history of each approach in American constitutional law.

## II. CHAPTER 1: PREEXISTING MEMBERSHIP & BALANCING

The two dominant conceptual frames for the punishment of foreigners in constitutional law and social contract theory have their roots in the writings of Hobbes and Locke. Under the preexisting membership model, the state faces no constraints when it seeks to punish foreigners. The balancing approach encourages the state to treat aliens the same as citizens, but allows practical concerns and competing interests to trump this goal. The concepts are two components of a particular view of the social contract, which stipulates that citizens are entitled to protection from the government in a manner that foreigners are not. In the context of criminal law, this approach means that the state can deny procedural rights to foreigners while citizens of the punishing state enjoy those same protections.

In practice, preexisting membership and balancing amount to successive steps in the exclusionary logic of actual consent. Both approaches express a strong preference for the rights of citizens. The key difference between the two is that preexisting membership focuses on whether a particular individual has consented to a scheme of government, while balancing focuses on whether it is convenient to deny rights to an alien in a specific situation. The balancing approach presupposes a reliance on preexisting membership in order to justify treating foreigners differently. This view of foreigners can be traced back to the theories of Hobbes and Locke, who ground the legitimacy of the social contract in actual consent, and propose that the state may deal as it pleases with individuals who have not consented to the social contract.

### A. Hobbes and Locke on Preexisting Membership

Locke's discussion of crime in both the state of nature and civil society highlights the extreme nature of his views on aliens. According to Locke, "in the State of Nature, every one has the Executive Power."<sup>41</sup> Individuals are empowered to carry out the law of nature themselves and punish offenders accordingly. When someone violates the law of nature, "[he] does thereby put himself into a State of

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41 Locke, *Treatises of Government* 275 (cited in note 29).

War with him [the victim]."<sup>42</sup> In Locke's view, individuals sever their connections with the rest of humanity when they violate the law of nature, and in doing so expose themselves to whatever punishment the victim feels is necessary to deter repeat offenses. As Locke puts it,

In transgressing the Law of Nature, the Offender declares himself to live by another Rule...and so he becomes dangerous to Mankind, the tie, which is to secure them from injury and violence broken by him...[and so] every man...may bring such evil upon any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him...from doing the like mischief.<sup>43</sup>

Locke similarly declares that murderers "may be destroyed as a Lyon or a Tyger, or one of those wild Savage Beasts, with whom Men can have no Society nor Security."<sup>44</sup>

The trouble with the state of nature is that individuals serve as imperfect judges and executioners of the law of nature. As Locke observes, "it is unreasonable for Men to be Judges in their own Cases...[because] Self-love will make Men partial to themselves and their friends."<sup>45</sup> Furthermore, "the Law of Nature would...be in vain, if there were no body that...had a Power to Execute that Law."<sup>46</sup> In Locke's theory, individuals enter the social contract by forfeiting their powers of judging and execution. They do this so that the enforcement of laws is both fair and certain. Locke thus declares that, "[among] the great and chief end[s]... of Mens uniting into Commonwealths...[are] an establish'd, settled, known Law, received and allowed by common consent...[and] a known and indifferent Judge with Authority to determine all differences according to the established Law... [and] to give it due Execution."<sup>47</sup>

The mechanism by which individuals come to such an agreement is consent. Locke places a great deal of emphasis on the role of consent in his theory, noting that, "the beginning of Politick Society depends on the consent of the Individuals."<sup>48</sup> Given Locke's view that in the state of nature the unprovoked exercise of power by one person against another initiates a state of war, it makes sense that Locke scrutinizes the process by which individuals forfeit much of the power they possess outside of civil society. According to Locke,

Men being...by Nature, all free, equal and independent, no one can be

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42 Id at 279.

43 Locke, *Treatises of Government* 275 (cited in note 29).

44 Id at 274.

45 Id at 275.

46 Id at 272.

47 Locke, *Treatises of Government* 272 (cited in note 29).

48 Id at 337.

put out of this Estate and subjected to the Political Power of another without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst each other.<sup>49</sup>

Locke accepts both explicit and implicit forms of consent as sufficient for membership in the social contract. He acknowledges that, “There is a common distinction of an express and a tacit consent,” and concludes that, “every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far obliged to Obedience to the Laws... during such Enjoyment, as any one under it.”<sup>50</sup> However, Locke restricts his understanding of consent to actual — as opposed to hypothetical — consent. This is implicit from Locke’s stipulation that, “a Child is born a Subject of no Country or Government... till he come to Age of Discretion; and then he is... at liberty [to choose] what Government he will put himself under.”<sup>51</sup> For Locke, individuals must be capable of reason, and either *actually* give their express consent or *actually* give their tacit consent by receiving certain benefits from the government in order to be considered parties to the social contract.

Once individuals enter into civil society, Locke allows for radically different treatment of citizens and aliens. When citizens of the government face accusations of crime, an impartial judge determines their guilt. If a party to the social contract is found to be guilty, then the “Magistrate, who by being the Magistrate, has the common right of punishing put into his hands,” is responsible for the execution of the law.<sup>52</sup> Non-citizens face a much different fate. According to Locke, “the Magistrates of any Community, can[not] punish an Alien of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another.”<sup>53</sup> Locke does not mean that governments cannot exercise coercive power over aliens. Rather, for Locke, punishment is a phenomenon that can only exist between the state and individuals who possess preexisting membership. In Locke’s view, foreigners cannot benefit from an impartial judge or executioner of the law because they have not consented to give up their own power of judging and executing natural law. When the state imposes force upon foreigners, it does so not as a legitimate governing authority enforcing the law, but as an entity in the state of nature executing the law of nature without the constraints of civil law.

49 Locke, *Treatises of Government* 331 (cited in note 29).

50 *Id.* at 347-8.

51 *Id.* at 347.

52 *Id.* at 274.

53 Locke, *Treatises of Government* 273 (cited in note 29).

Hobbes takes an even more dismissive approach to the rights of foreigners than Locke does. In contrast to Locke, Hobbes theorizes that individuals in the state of nature are constantly at risk of death or injury, and seek to establish civil society in order to survive. For Hobbes, there is no law of nature to bind individuals in conscience whether or not civil society exists. As a result, Hobbes insists that there is no such concept as crime in the state of nature. As Hobbes explains, “where the law ceaseth, sin ceaseth... [and] when the sovereign power ceaseth, crime also ceaseth.”<sup>54</sup> According to Hobbes, there is only “The Right of Nature... the liberty each man hath to use his own power... for the preservation of his own nature.”<sup>55</sup> Each person in the state of nature is justified in doing whatever he can to survive.

Hobbes’s belief that the state of nature is dangerous and anarchic leads him to obsess over the importance of consent for the formation of government. He insists that individuals must not only enter into an agreement, but also take steps to ensure its enforcement. Hobbes declares that, “the question is not of promises mutual where there is no security of performance on either side... for such promises are no covenants.”<sup>56</sup> Furthermore, Hobbes requires individuals to divest themselves of any and all claims to power when they enter the social contract. In Hobbes’s view,

The only way to erect such a common power as may be able to defend them from the invasion of foreigners and the injuries of one another... is to confer all their power and strength upon one man, or upon one assembly of men... and therein to submit their wills, every one to his will, and their judgments, to his judgment... as if every man should say to every man I authorize and give up my right of governing myself to this man, or to this assembly of men.<sup>57</sup>

Hobbes believes that individuals will voluntarily enter into this type of contract in order to escape the state of nature, where suffering and death are inevitable. He declares that individuals who do not agree to give up their autonomy in such a manner “must now consent... or else justly be destroyed by the rest.”<sup>58</sup> Aliens to the social contract remain in the state of nature and enjoy absolutely zero protection from the sovereign. As Hobbes describes it, “amongst masterless men, there is perpetual war... [and] no security.”<sup>59</sup>

According to Hobbes, once a community submits its power to a sovereign and leaves the state of nature, crime and punishment begin to exist. However,

54 Hobbes, *Leviathan* at 191 (cited in note 28).

55 *Id.* at 79.

56 *Id.* at 91.

57 Hobbes, *Leviathan* at 109 (cited in note 28).

58 *Id.* at 112.

59 *Id.* at 140.

he denies that aliens can be treated according to the law in the same manner as citizens. Hobbes defines punishment as, “an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law.”<sup>60</sup> Similar to Locke, Hobbes argues that because the law stems from a contract between the sovereign and the people, the law does not apply to interactions with aliens. As Hobbes explains, “harm inflicted upon one that is a declared enemy falls not under the name of punishment, because. . . they were never subject to the law, and therefore cannot transgress it.”<sup>61</sup> In Hobbes’s view, the existence of the state of nature demands that the sovereign should treat all individuals who are not subjects as enemies. Hobbes proclaims that, “punishment set down in the law are to subjects, not to enemies.”<sup>62</sup> When the sovereign inflicts harm upon aliens, its actions do not count as punishment.

Hobbes’s insistence that the social contract excludes foreigners from the law is most striking in his discussion regarding the punishment of innocent persons. Despite encouraging individuals to bestow virtually unlimited power upon the sovereign, Hobbes explicitly denounces the punishment of innocent citizens. He declares that, “All punishments of innocent subjects, be they great or little, are against the law of nature. For punishment is only for transgressions of the law. . . [and] seeing all sovereign power is originally given by the consent of every one of the subjects. . . they should, as long as they are obedient, be protected.”<sup>63</sup> Hobbes discourages the sovereign from punishing innocent citizens because by conforming to the law, those individuals are holding up their end of the social contract. Whether or not aliens have provoked the sovereign or its citizens, there is no contractual relationship between them and the sovereign, and thus no constraints on the sovereign’s exercise of its power over them. In a Hobbesian social contract, “the infliction of what evil soever on an innocent man that is not a subject. . . without violation of any former covenant, is no breach of the law of nature.”<sup>64</sup> Both Hobbes and Locke require individuals to enter the social contract through the submission of actual consent in order to receive the protections and benefits of the law. Both theorists maintain that the state faces no legal constraints when dealing with individuals who do not hold preexisting membership in the social contract.

### B. *Hobbes and Locke on the Balancing Approach*

In practice, some government actors — notably Supreme Court justices — have displayed an unwillingness to declare outright that foreigners possess no legal standing. They choose instead to focus on whether or not the facts and in-

<sup>60</sup> Id at 203.

<sup>61</sup> Hobbes, *Leviathan* at 205 (cited in note 28).

<sup>62</sup> Id at 206.

<sup>63</sup> Hobbes, *Leviathan* at 208 (cited in note 28).

<sup>64</sup> Id at 208.

terests involved in particular circumstances allow for the state to treat aliens the same as citizens. In other words, the question is whether it is convenient to extend legal protections to foreigners. This approach also draws from Hobbes and Locke. For Hobbes, the importance of avoiding a return to the state of nature justifies the balancing approach, which he endorses in all situations, including those when the target of government action is a member of the social contract. Locke divides the government into legislative and executive branches, and argues for giving the latter virtually unlimited discretionary power over foreign affairs.

As discussed above, Hobbes argues that consent is necessary for the creation of government, but insufficient for that purpose without a strong enforcement mechanism. According to Hobbes, “there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant.”<sup>65</sup> Hobbes uses the specter of the state of nature to justify an essentially limitless power for the sovereign. He proposes that the sovereign should possess the authority to inflict harm upon both foreigners and citizens, regardless of what a relevant law might demand. Hobbes defines punishment as “an evil inflicted by public authority. . . [in response to] a transgression of the law.”<sup>66</sup> However, he also mentions hostile acts, which he describes as, “evil inflicted by public authority without precedent public condemnation.”<sup>67</sup> Rather than condemn hostile acts as immoral or unjust, Hobbes briefly notes that, “the fact for which a man is punished ought first to be judged by public authority to be a transgression of the law.”<sup>68</sup> Elsewhere, Hobbes insists that, “nothing the sovereign representative can do to a subject, on what pretence whatsoever, can properly be called injustice,”<sup>69</sup> and that “to those laws which the sovereign himself, that is, which the commonwealth maketh, he is not subject.”<sup>70</sup>

In Hobbes’s theory, the sovereign may do whatever is necessary to maintain civil society. When the sovereign inflicts harm upon citizens, the sovereign’s actions are considered punishment if they are carried out pursuant to the law, or a hostile act if they are not. In contrast, when the sovereign harms aliens, its actions are always considered hostile acts. Hobbes’s understanding of punishment is a clear antecedent to the balancing approach. His discussion of innocent subjects reveals that consent and preexisting membership are important to his understanding of the differences between citizens and foreigners. However, Hobbes’s focus is primarily on which measures are necessary in practice for the sovereign to maintain power.

Locke also entrusts the government with an enormous amount of discre-

<sup>65</sup> Hobbes, *Leviathan* at 89 (cited in note 28).

<sup>66</sup> Id at 203.

<sup>67</sup> Id at 204.

<sup>68</sup> Id at 204.

<sup>69</sup> Hobbes, *Leviathan* at 89 (cited in note 28).

<sup>70</sup> Id at 213.

tionary power, but departs from Hobbes by more clearly distinguishing how the exercise of such power differs with respect to foreigners and citizens. Locke subdivides the executive power into the ordinary executive power, which consists of the execution of the law, the prerogative power, and the federative power. According to Locke, “because the Laws, that are at once, and in a short time made, have a constant and lasting force... ’tis necessary there should be a Power always in being, which should see to the Execution of the Laws... And thus the Legislative and Executive Power come often to be separated.”<sup>71</sup> The prerogative power mostly pertains to domestic issues, while the federative power exclusively concerns foreign affairs. In Locke’s words, “Prerogative can be nothing but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good; and their acquiescing in it when so done.”<sup>72</sup> The prerogative power thus amounts to an extraordinarily broad power for the executive to use as he sees fit. However, Locke expects the legislative branch of the government, which he describes as the “one Supream Power,” to curb the exercise of prerogative.<sup>73</sup> Even though Locke expressly concedes that the prerogative power may sometime contravene standing law, he refrains from vesting the executive with the supreme authority of the government.

In contrast, Locke places no constraints upon the exercise of similar power over aliens to the social contract. He defines the federative power as, “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.”<sup>74</sup> Locke acknowledges that this power may be abused, but expresses no concern for the potential impact on foreigners. As Locke explains,

although this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive, Laws, than the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. For the Laws that concern Subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to Foreigners... must be left in great part to the Prudence of those who have this Power committed to them.<sup>75</sup>

In Locke’s view, the difficulty involved in legislating for foreign affairs justifies

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71 Locke, *Treatises of Government* 365 (cited in note 29).

72 *Id.* at 377.

73 *Id.* at 366.

74 *Id.* at 365.

75 Locke, *Treatises of Government* 365-66 (cited in note 29).

extending fewer protections to foreigners. In some respects, this logic represents a surprising departure from Locke’s suspicion towards tyranny and arbitrary power. However, Locke is most concerned with consent. As a result, Locke stipulates that when the government comes into contact with aliens, it may act in whichever manner it feels is necessary, rather than in accordance with the law.

Hobbes and Locke demonstrate how the concepts of preexisting membership and balancing fit together and flow directly from the logic of the social contract. Both theorists reason that if consent legitimates government, then the authority created by the social contract pertains only to the relationship between citizens and the government. Hobbes’s warning, “promises are no covenants,” points to the central justification for excluding foreigners from the legal protections that citizens enjoy: if individuals who refuse or fail to enter the social contract receive the same protections that cooperating individuals enjoy, there is very little incentive to consent. The first concept involved with this view of aliens — preexisting membership — stems from the belief that the absence of consent excludes foreigners from the protection of the law. From there, Hobbes and Locke both suggest that because aliens are outsiders to the social contract, only practical concerns should guide the government when it interacts with foreigners. This second concept, balancing, encourages the government to deal with aliens on a case-by-case basis, free from the constraints inherent in the rule of law.

### C. Contemporary Theorists

A few theorists have examined the implications of social contract theory for foreigners in recent years. Joseph Carens and Ryan Pevnick focus on the relationship between immigration and the social contract, while Gerald Neuman directly addresses the punishment of foreigners in the context of constitutional law. The writings of all three represent a shift to a variant of the balancing approach that expresses a greater concern for the welfare of aliens than either Locke or Hobbes displays, but still allows contingencies to justify the exclusion of foreigners from the protection of the law.

In his discussion of the relationship between the Constitution and foreigners, Gerald Neuman argues against what he refers to as universalism. According to Neuman, universalism stipulates that, “constitutional provisions should be interpreted as applicable to every person and at every place.”<sup>76</sup> Neuman attacks universalism on the grounds that it is impracticable and misrepresents the requirements of the Constitution. As Neuman explains, “The individual-rights provisions of the Constitution do not purport to state moral duties that are owed by all persons and groups; rather they state more exacting requirements that American citizens considered necessary constraints on the government’s exercise of sovereignty.”<sup>77</sup> Neu-

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76 Neuman, *Strangers* at 6 (cited in note 36).

77 *Id.* at 110.

man is correct to attack universalism as he describes the theory. It does not make sense to treat “all human beings on earth...[as] subjects of the American social contract.”<sup>78</sup> It would be impossible to pass any legislation if its potential effects for each individual on the face of the earth needed to be considered. However, Pevnick, Carens, and Neuman all propose theories that are insufficiently universalist. Each theorist refuses to treat citizens and aliens the same for the purposes of punishment, and in doing so reverts to preexisting membership and balancing.

Ryan Pevnick concedes that actual consent is a somewhat arbitrary basis for the social contract, but nevertheless uses a form of actual implicit consent to justify the dissimilar treatment of aliens and citizens. According to Pevnick, “states are not fully consensual organizations...citizens are born into a particular state and do not consent to its authority...they simply find that the state insists that it has legitimate power over them, like it or not.”<sup>79</sup> Pevnick concludes that because states are not entirely voluntary, citizenship cannot justify an outright rejection of the rights of aliens. Pevnick denounces the view that, “considerations of justice are inapplicable beyond state borders.”<sup>80</sup>

Pevnick proposes an alternative understanding of the implications of social contract theory, which he refers to as associative ownership. Pevnick’s theory uses actual consent to justify the limited exclusion of foreigners from the benefits and protections of the social contract. As Pevnick explains,

the associative ownership view insists that the citizenry constitutes an association extending through time that comes to have a claim over state institutions as a result of the efforts — from physical labor and tax payments to obeying the law — that make such institutions possible. In this sense, the citizenry has a special ownership relationship with state institutions that distinguishes their position from that of foreigners. It is... this relationship that underlies or legitimizes claims of sovereignty.<sup>81</sup>

In Pevnick’s theory, the contributions of citizens justify the exclusion of foreigners. According to Pevnick, “members of the community are in a position to legitimately deny membership to some outsiders because this entitlement amounts to a *prima facie* privilege to do with it, within boundaries, what they wish.”<sup>82</sup> Associative ownership relies upon a concept of actual consent that is quite similar to the reasoning used by Locke. Pevnick insists that the actual participation of citizens in society justifies the exclusion of aliens from state institutions. Pevnick cautions that there are constraints upon the exercise of power over aliens, reasoning that,

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<sup>78</sup> Id at 109-110.

<sup>79</sup> Ryan Pevnick, *Immigration and the Constraints of Justice* 58 (Cambridge 2011).

<sup>80</sup> Id at 8.

<sup>81</sup> Pevnick, *Immigration and Constraints* at 11 (cited in note 77).

<sup>82</sup> Id at 53.

“seeing the state as in some sense a collective resource of the citizenry implies limits...including responsibilities towards non-owners.”<sup>83</sup> However, it is unclear how substantial these limits might be. Pevnick limits his discussion to arguing in favor of the legitimacy of closed borders.

Joseph Carens argues in favor of a more universalist view of aliens that demands open borders, but nevertheless bears resemblance to the balancing approach. Carens attacks the narrow understanding of consent that both Hobbes and Locke use to support their conclusions regarding the punishment of foreigners. According to Carens, “Birthplace and parentage are natural contingencies that are ‘arbitrary from a moral point of view.’”<sup>84</sup> In Carens’s view, Pevnick and Locke are incorrect to suggest that implicit consent provides a legitimate basis for discriminating between citizens and aliens. Carens even declares that, “Citizenship in Western liberal democracies is the modern equivalent of feudal privilege — an inherited status that greatly enhances one’s life chances...[and] is hard to justify when one thinks about it closely.”<sup>85</sup> He concludes that the arbitrary nature of citizenship generates a need for open borders.<sup>86</sup> Carens’s harsh criticism of actual consent directly challenges the position that the government may do as it pleases with aliens.

Despite his call for open borders, Carens concedes that the government should possess a great degree of flexibility when it interacts with foreigners. Carens insists that a policy of open borders does not require that “there is *no* room for distinctions between aliens and citizens.”<sup>87</sup> According to Carens, the state is justified in treating citizens and aliens differently because, “Those who choose to cooperate together in the state have special rights and obligations shared by non-citizens.”<sup>88</sup> In this way, Carens treats citizenship as neither completely arbitrary nor completely voluntary. He offers a few examples of practical circumstances that would justify a restrictive immigration policy. As Carens explains, “National security is a crucial form of public order. So, states are clearly entitled to prevent the entry of people...whose goal is the overthrow of just institutions.”<sup>89</sup> He adds that “the sheer size of the potential demand” could also necessitate the exclusion of foreigners.<sup>90</sup> Carens does not place specific limits on the power of the state when it deals with foreigners.

Carens and Pevnick both incorporate a greater sense of empathy for foreigners into their theories than Hobbes or Locke does, but it is unclear where they stand on the punishment of foreigners. Neither theory requires the state to offer

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<sup>83</sup> Id at 11-2.

<sup>84</sup> Carens, 49 *The Review of Politics* at 261 (cited in note 33).

<sup>85</sup> Id at 252.

<sup>86</sup> Id at 251.

<sup>87</sup> Carens, 49 *The Review of Politics* at 270 (cited at note 33).

<sup>88</sup> Id at 260.

<sup>89</sup> Id at 260.

<sup>90</sup> Id at 260.

any benefits or protections to aliens accused of crime. However, Pevnick and Carens both reject the idea that the social contract generates an unlimited power over aliens. Pevnick points out that, “the associative ownership view conflicts with the principle that all those affected by a decision ought to be enfranchised.”<sup>91</sup> Presumably, Pevnick feels that associative ownership is consistent with offering something less than enfranchisement to foreigners affected by the actions of the state. He does not say whether these lesser benefits would include protections for the accused, but his repeated warnings that associative ownership only justifies the exercise of power over aliens “within limits” suggests that he might support the extension of important legal protections to foreigners. At the same time, his insistence that citizens possess, “*prima facie* control or ownership over the benefits and resources” of the government might mean that he would argue against treating citizens and aliens the same for the purposes of punishment.<sup>92</sup> In similar fashion, Carens argues that his approach allows the state to discriminate between citizens and foreigners, but only to a certain extent. Both theorists clearly depart from Hobbes and Locke by imposing some boundaries on the power of the state over aliens. However, by constraining their arguments to the topic of immigration, Carens and Pevnick do not provide clear answers to the question of punishment.

Gerald Neuman takes the positions offered by Carens and Pevnick a step further by explicitly arguing that the Constitution requires the equal treatment of aliens for the purposes of punishment in most situations. However, Neuman fails to sufficiently distinguish his approach from the balancing model. Furthermore, Neuman asserts that providing legal protections to foreigners suspected of wrongdoing is inconsistent with social contract theory.<sup>93</sup> Ultimately, Neuman’s theory — like those of Carens and Pevnick — amounts to a version of the balancing approach that often tips the scales in favor of foreigners.

Neuman’s approach, which he refers to as mutuality of obligation, stipulates that when the government seeks to impose punishment upon an individual, it must acknowledge coordinate obligations upon itself. As Neuman explains, “the mutuality of obligation approach affords the express protections of fundamental law, to the extent that their terms permit, as a condition for subjecting a person to the nation’s law.”<sup>94</sup> However, just as Carens is quick to place conditions upon his support for open borders, Neuman cautions that his theory is contextually depen-

91 Pevnick, *Immigration and Constraints* at 47 (cited in note 77).

92 Pevnick, *Immigration and Constraints* at 47 (cited in note 77).

93 Neuman argues that his mutuality of obligation approach is consistent with the Constitution, but not social contract theory. In Neuman’s view, social contract necessarily leads to either preexisting membership or universalism. Neuman describes preexisting membership as the view that, “beneficiaries have rights based in the [social] contract...[and] nonbeneficiaries are relegated to whatever right they may have independent.” Neuman, *Strangers* at 6 (cited in note 36). He argues that universalism is a variant of preexisting membership that treats, “all human beings on earth... [as] subjects of the American social contract.” *Id.* at 109-10.

94 *Id.* at 109.

dent. According to Neuman, “The mutuality of obligation approach respects the written Constitution by making all the rights it contains presumptively applicable...but leaves room for textual references or other inputs to rebut the presumption.”<sup>95</sup> Neuman offers very little guidance as to when and how the government can overcome the mutuality presumption. His approach leaves the door open for the dissimilar treatment of foreigners in extraordinary circumstances.

Similar to Carens and Pevnick, Neuman rejects the view that aliens have little or no claims to legal rights and protections. Neuman criticizes the preexisting membership approach for endorsing the view that, “there are no constitutional limits to the content of the laws to which...[aliens] may be subjected.”<sup>96</sup> In similar fashion, he attacks the balancing model for its susceptibility for abuse.<sup>97</sup> Neuman describes his formulation of the balancing model, which he refers to as global due process, as “a brand of harmless universalism...[which treats] rights as potentially applicable worldwide, and then permit[s] them to be outweighed by countervailing government interests through a balancing process.”<sup>98</sup> Neuman insists that the mutuality of obligation approach is a marked improvement upon global due process. However, his explanation of the mutuality model makes it seem as if the shift is less substantive than he claims.

Neuman introduces the idea that the government can have obligations towards foreigners. However, both the balancing and mutuality approaches are conditioned by an understanding that they do not apply in certain circumstances. Implicit in Neuman’s discussion of the mutuality of obligation approach is that the government may not overcome the presumptive rights of citizens in the same manner that it might for aliens. Neuman, Carens, and Pevnick thus all display a high level of concern for the welfare of foreigners, but nevertheless insist that the government is not obligated to punish aliens in the same manner as citizens. All three theorists represent a significant departure from Hobbes and Locke. However, they seem unable to let go of the idea that individuals who consent to the authority of the government are entitled to protection from that authority to a greater extent than individuals who have not consented.

#### D. Criticism of Preexisting Membership and Balancing

At the root of the problems brought about by the preexisting membership and balancing approaches is a belief that actual consent is an acceptable basis for understanding the legitimacy of government. In theory, actual consent should provide a strong rationale for the authority of the government. However, actual consent is something of a myth in practice. Proponents of the view that political

95 Neuman, *Strangers* at 102 (cited in note 36).

96 *Id.* at 112.

97 *Id.* at 115.

98 *Id.* at 8.

legitimacy is grounded in actual consent mistakenly conflate theory and practice and end up ascribing authority to institutions that merely appear to be grounded in actual consent. As a result, arbitrary and extreme policies are accepted as legitimate, even though actual consent is absent. By claiming that the social contract as grounded in actual consent even when it cannot be, the government is able to use citizenship to justify policies that in practice cannot be justified by reference to actual consent. Theorists who support the actual consent view of the social contract, but oppose the unrestrained exercise of power over foreigners often turn to the balancing approach. However, the balancing model can barely be considered an improvement upon preexisting membership. The balancing approach collapses back into preexisting membership in difficult cases, and leads to the same results.

Randy Barnett successfully proves that actual consent is not a suitable model for understanding the legitimacy of the United States Constitution. Barnett's discussion is specific to the United States, but can easily be applied to other countries where actual consent is commonly thought to be the foundation of political legitimacy.<sup>99</sup> Barnett begins by declaring that, "A lawmaking system is legitimate... if it creates commands that citizens have a duty to obey."<sup>100</sup> He concedes that actual consent can potentially serve as the foundation for legitimacy, but insists that, "Anything less than unanimous consent simply cannot bind nonconsenting persons."<sup>101</sup> Barnett rejects claims that actual consent gives the Constitution its authority, and expresses doubt that it can serve as a workable source of legitimacy for any society. As Barnett explains, "genuine [unanimous] consent, were it to exist, could give rise duty of obedience... [but] the conditions necessary for 'We the People' actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist."<sup>102</sup>

Locke attempts to overcome the problem of unanimous consent by arguing that tacit consent suffices for membership in the social contract. Yet as Barnett demonstrates, both forms of actual consent — explicit and tacit — fail to serve as persuasive accounts of political legitimacy. Barnett first examines the argument that, "by using a vote to try and influence the outcome [of an election]... a person [has] chosen to participate in the process... [and] this choice necessarily entail[s]... consent to abide by the outcome."<sup>103</sup> It may be that the act of voting serves as the vehicle by which individuals consent to the social contract. Ryan Pevnick includes voting as an important part of associative ownership. However, voting does not in any way indicate that an individual consents to the terms of the social contract. As Barnett explains, "voters... could... be voting simply to minimize the threat to their

99 My discussion of Randy Barnett's critique of consent is borrowed in part from a paper I wrote for Professor Steve Calabresi's seminar, Constitutional Theory.

100 Randy Barnett, *Restoring the Lost Constitution* 12 (Princeton 2005).

101 *Id.* at 11.

102 Barnett, *Lost Constitution* 14 (cited in note 98).

103 *Id.* at 15.

interests posed by the lawmaking process... [and so] the simple act of voting does not tell us whether the voter consents."<sup>104</sup>

Barnett moves next to reject claims that residency or oaths of allegiance amount to actual consent. Barnett argues that, "If the reason for taking an oath is to give the lawmakers authority by our consent, then unless they first have authority, they cannot demand we take an oath... [and] the problem with inferring consent from refusal to leave the country is that it presupposes that those who demand you leave already have authority over you."<sup>105</sup> Many of the specific acts that are commonly thought of as indications of actual consent do not provide a solid foundation for the legitimacy of government. Locke and Hobbes envision individuals voluntarily sacrificing great amounts of power in exchange for membership in the social contract. This transfer of power is clear in theory, but it is not a realistic expectation in practice.

A potential counterargument to Barnett's rejection of actual consent is that individuals offer their consent whenever they accept benefits from the government. This approach, which I will refer to as fair play, is an outgrowth of Locke's tacit consent. Carens and Pevnick both rely upon fair play to a certain extent in order to explain why a special relationship between citizens and the government might justify the dissimilar treatment of foreigners. Fair play amounts to a variant of actual consent that allows a certain level of participation in society to substitute for an affirmative act of consent. By participating in society, individuals inevitably receive benefits from the government such as infrastructure. Similar to Locke's conception of consent, individuals are still required to *actually* do something prior to becoming the target of state action in order to receive the same protections as citizens. Fair play, like actual consent, is a poor descriptive model and does not justify the dissimilar administration of punishment.

Randy Barnett provides a compelling rebuttable to fair play. As Barnett explains, "one is [not] obligated to pay for all unsolicited benefits one receives from others... because the kinds of benefits supposedly received from a legal system — the benefit of social cooperation, for example — are benefits that one cannot refuse no matter how much one wants to."<sup>106</sup> Furthermore, if individuals were able to selectively decide which government benefits to receive and pay for, collective action would be impossible.<sup>107</sup> The very essence of the social contract is rooted in a demand for collective action. Barnett concedes that, "There may be some merit to this suggestion... [that] using an item that you know has been sent to you with the expectation of repayment may indicate a consent to pay."<sup>108</sup> However, the products of the social contract are more often than not the types of goods that

104 *Id.*

105 *Id.* at 18.

106 Barnett, *Lost Constitution* 26 (cited in note 98).

107 *Id.*

108 *Id.*

cannot be thought of in such a way. The exchange of power for protection makes sense in theory, but simply does not provide an accurate description of the real world. Finally, Barnett criticizes the receipt of benefits argument for too easily justifying extreme results. As Barnett explains, “a slaveholder [could] claim, and often accurately, that he was...providing his slaves with vital benefits.”<sup>109</sup> In this way, fair play can be shown to tolerate slavery even when actual consent is clearly absent.

Actual consent is also problematic because it can lead to the exclusion of outsiders in general, as opposed to only foreigners. Pamela Mason illustrates why actual consent is difficult to reconcile with pluralism. According to Mason, reliance on actual consent for legitimacy makes it easy to restrict the group for which the social contract restrains the power of the government. Quoting Michael Lessnoff, Mason refers to the view that, “legitimacy of the social contract...depend[s] on...how it was actually established” as the foundational social contract.<sup>110</sup> In this frame, “Knowing who is a party to the social contract and who is not... becomes tremendously important in establishing the nature and limits of government authority.”<sup>111</sup> The ambiguity surrounding precisely who is a member of the foundational contract allows government actors to selectively draw from history in order to justify the exclusion of particular groups or individuals. As Mason reveals,

social contract theory...[was] used to deny constitutional rights to... [a] category of persons...in *Dred Scott*...The *Dred Scott* majority... makes much of the voluntary character of membership... Neither *Dred Scott* nor any ‘one of that race had ever migrated to the United States *voluntarily*’; it was thereby clear that the Constitution was ‘not intended to confer on them or their posterity the blessings of liberty.’<sup>112</sup>

In countries such as the United States, where actual consent is historically inaccurate and pluralism is a historical fact, the government can point to actual consent in order to justify the exercise of unrestrained power over groups that are found to be outside the foundational social contract. As Mason explains, “if the absolute, uncontrolled, and unlimited sovereignty of ‘the people’ is fully embodied in the state...the foundational social contract may remove all limits to power of the government.”<sup>113</sup> It is not difficult to conclude that “the foundational social contract, with its exclusionary idea of membership...and ambiguous endorsement of unlimited government power, is a poor foundation for a pluralist society.”<sup>114</sup>

109 *Id.* at 28.

110 Pamela A. Mason, *Rhetorics of ‘the People’: The Supreme Court, the Social Contract, and the Constitution*, 61.2 *Review of Politics* 275, 298 (1999).

111 *Id.*

112 *Id.* at 286.

113 *Id.* at 298.

114 Mason, *Rhetorics* 299 (cited in note 208).

Fortunately, outright support for the preexisting membership approach in American constitutional law has receded. However, preexisting membership lives on under the guise of the balancing approach. As mentioned above, Neuman describes a model similar to balancing as, “a brand of harmless universalism... [which treats] rights as potentially applicable worldwide, and then permit[s] them to be outweighed by countervailing government interests through a balancing process.”<sup>115</sup> However, Neuman is wrong to compare balancing with universalism. The balancing approach is merely preexisting membership with the caveat that aliens may enjoy the benefits of the social contract when the government feels that it is convenient for them to do so. Advocates of the balancing approach still seek to treat citizens and aliens differently for the purposes of punishment. These theorists — either implicitly or explicitly — argue that when security is at stake, it becomes okay to fall back on the preexisting membership approach. The balancing approach is thus every bit as reliant on actual consent as the preexisting membership approach. Its flaws are every bit as serious; historically, the punishment of foreigners only becomes a concern when security is at stake.

#### E. *The Chinese Exclusion Act*

The Supreme Court first relied upon the preexisting membership and balancing approaches to support the dissimilar treatment of foreigners in cases regarding the exclusion and expulsion of Chinese citizens. In both *Chae Chan Ping v. United States* (1889)<sup>116</sup> and *Fong Yue Ting v. United States* (1893)<sup>117</sup>, the Supreme Court ruled that inherent sovereign power authorizes the government to expel and exclude aliens for any reason. The Court was careful to suggest that the Constitution still constrains the government in other sorts of interactions with aliens within the territorial boundaries of the United States. However, the cases sanction an unlimited power of expulsion, and imply that once foreigners are outside the territory of the United States, there are no restrictions on the power of the government.

In *Chae Chan Ping*, the Supreme Court made it abundantly clear that it had no qualms with an absolute power of expulsion. Mr. Ping traveled to the United States in 1875 in search of work. In 1882, Congress passed the infamous Chinese Exclusion Act, which imposed burdensome restrictions upon the immigration of Chinese citizens. Two years later, Congress amended the Chinese Exclusion Act to make it even more difficult for Chinese citizens to enter the country. In 1887, after working in the United States for over a decade, Chae Chan Ping decided to briefly return to China. Before leaving the country, Ping was careful to obtain a certificate

115 Neuman, *Strangers* at 8 (cited in note 36).

116 *Chae Chan Ping* is also referred to as the Chinese Exclusion Case. *Chae Chan Ping v. United States*, 130 US 581 (1889).

117 *Fong Yue Ting v. United States*, 149 US 698 (1893).

for return in accordance with the amended Chinese Exclusion Act. One month before Ping returned in the fall of 1888, Congress passed an act prohibiting the return of Chinese citizens who had spent time in the United States and subsequently left. When Ping arrived in San Francisco in October, 1888 he was denied entry to the country and arrested aboard his ship.<sup>118</sup>

Justice Field's majority opinion for *Chae Chan Ping* endorsed a view of sovereignty similar to those promoted by Hobbes and Locke. According to Field, "The power of exclusion of foreigners...[is] an incident of sovereignty belonging to the government of the United States...[to be used] any time when, in the judgment of the government, the interests of the country require it, [and which] cannot be granted away or restrained on behalf of anyone."<sup>119</sup> Rather than carrying out a detailed exegesis of the Constitution, Field argued that the power to expel is inherent in the sovereignty of all nations. In Field's mind, Chinese citizens such as Ping "remained strangers," and could therefore be expelled at any time despite the fact that one of the pieces of legislation amending the Chinese Exclusion Act indicated that they could obtain certificates authorizing their return.<sup>120</sup>

A few years later, Justice Gray introduced a territorial distinction to the inherent sovereign power invoked in *Chae Chan Ping*. Gray's decision in *Fong Yue Ting* creates an authority that resembles Locke's federative power. The case centers around three Chinese citizens who were arrested and subsequently expelled from the country for failing to possess certificates of residence. One of the three men had applied for a certificate, but his request was denied on the grounds that, "the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race, and not credible witnesses."<sup>121</sup> In denying the writs of habeas corpus submitted by the three men, Justice Gray relied upon the same inherent sovereign power rationale used in *Chae Chan Ping*. Gray declared in no uncertain terms that "The right to exclude or expel...any class of aliens, absolutely or upon certain conditions, in war or in peace...[is] an inherent and inalienable right of every sovereign and independent nation, [and is] essential to its safety."<sup>122</sup> Gray's characterization of the power to exclude or expel as absolute and necessary for the safety of the country is distinctly Hobbesian. However, he narrowed his opinion, explaining,

Chinese laborers...like all other aliens residing in the United States...are entitled so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws... But they continue to be aliens...and there-

118 *Chae Chan Ping*, 130 US at 581-83.

119 *Id* at 609.

120 *Id* at 595.

121 *Fong Yue Ting*, 149 US at 703.

122 *Fong Yue Ting*, 149 US at 711.

fore remain subject to the power of Congress to expel them or to order them to be removed or deported from the country whenever, in its judgment, their removal is necessary or expedient for the public interest.<sup>123</sup>

In Gray's view, the Constitution protects aliens whenever they are physically within the territorial boundaries of the United States. However, this protection is mostly an illusion since Congress can at any time expel aliens, at which point they cease to enjoy the benefits and protections of the Constitution.

Justice Gray's opinion in *Fong Yue Ting* incorporates both the preexisting membership and balancing approaches. Gray relies upon a notion of preexisting membership to justify the exclusion of aliens, but concedes that the Constitution protects foreigners until Congress deems that it is "necessary or expedient" to expel them. Although *Chae Chan Ping* and *Fong Yue Ting* focus on the constitutionality of exclusion and expulsion, they set the stage for later opinions concerning the punishment of foreigners in general.

#### F. *The Insular Cases*

The balancing approach makes its next appearance in American constitutional law amidst the aftermath of the Spanish-American War. Confronted with the peculiar question of whether and how the Constitution constrains the government when it acts in occupied or conquered territories, the Supreme Court ceded a startling amount of flexibility to the political branches. Through what are now known as *The Insular Cases*, the Supreme Court fashioned a doctrine that would serve as an important precedent for employing the balancing approach in cases concerning the punishment of foreigners. In the words of Gary Lawson and Guy Seidman, "The doctrine...that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history."<sup>124</sup>

*The Insular Cases* begin with the question of whether the constitutional requirement of uniform tariffs applies to territories acquired through war. In *Downes v. Bidwell* (1901), the Court was asked to determine whether the government could impose a 15% tariff on goods imported from Puerto Rico.<sup>125</sup> S.B. Downes & Co. sought to reclaim duties it paid under protest for oranges that it had imported from Puerto Rico to New York in November, 1900. Earlier in the year, Congress had passed the Foraker Act, which set up a temporary civil government for Puerto Rico.<sup>126</sup> As Lawson and Seidman explain, "if Puerto Rico is part of the United States for the purposes of this uniformity provision, then goods traveling between

123 *Id* at 724.

124 Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History*, (Yale 2004) at 197.

125 *Downes v. Bidwell*, 182 US 244 (1901).

126 *Id*.

Puerto Rico and any of the states... cannot be subject to duty.”<sup>127</sup> However, Justice Brown went to great lengths to avoid this conclusion. According to Brown, “The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude ‘within the United States, or in any place subject to their jurisdiction,’ is... significant as showing that there may be places under the jurisdiction of the United States that are not part of the Union.”<sup>128</sup> Brown argued that Puerto Rico was such a place. In Brown’s view, “the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.”<sup>129</sup> The Uniformity Clause did not apply to Puerto Rico because Congress had not expressly directed the clause to apply to Puerto Rico. In his holding, Brown offered the bizarre statement that, “while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense.”<sup>130</sup> Brown cited *Fong Yue Ting* in order to reassure critics of his opinion that it would not leave aliens, “subject to the merely arbitrary control of Congress.”<sup>131</sup> However, Brown declined to specify how his opinion left the residents of Puerto Rico with meaningful protection from the power of the government.

While *Downes v. Bidwell* only dealt with the constitutionality of tariffs, its implications for individual rights were soon realized in *Balzac v. Porto Rico* (1922).<sup>132</sup> Jesus Balzac was a Puerto Rican editor against whom two criminal prosecutions for libel were brought. The Code of Criminal Procedure in effect at the time for Puerto Rico allowed for jury trials in felony cases, but not for misdemeanors. Libel was classified as a misdemeanor, and so the government of Puerto Rico sought to prosecute Balzac without a jury trial.<sup>133</sup> However, Congress had recently passed the Jones Act, which extended United States citizenship to residents of Puerto Rico.<sup>134</sup> Balzac challenged the government’s prosecution on the grounds that, as an American citizen, he was entitled to a jury trial under the Sixth Amendment.<sup>135</sup> Chief Justice Taft decided in favor of the government, reasoning that, “It is locality that is determinative of the application of the Constitution.”<sup>136</sup> In Taft’s view, the Bill of Rights did not guarantee a right to trial by jury in criminal cases in Puerto Rico because Congress had not formally incorporated Puerto Rico as part of the United States.<sup>137</sup> Curiously, Taft noted that some provisions of the Bill of Rights

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127 Lawson and Seidman, *The Constitution of Empire* at 194 (cited in note 121).

128 *Downes*, 182 US at 251.

129 *Id* at 279.

130 *Id* at 341.

131 *Downes*, 182 US at 283.

132 *Balzac v. Porto Rico*, 258 US 298 (1922).

133 *Id* at 300.

134 *Id* at 308.

135 *Id* at 304.

136 *Balzac*, 258 US at 309.

137 *Id* at 306-9.

might still apply in Puerto Rico. According to Taft, rights that are “fundamental,” and which would not disturb, “the orderly administration of justice” always carry force in territories.<sup>138</sup> The right to a jury trial did not meet this description because “The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.”<sup>139</sup> In this way, Taft used the balancing approach to expand the territorial doctrine of *Downes* and apply it to the Sixth Amendment.

### G. World War II

The advent of World War II brought the punishment of aliens to the forefront of constitutional law. Drawing from the precedents set by *The Insular Cases* and the Chinese Exclusion Act, the Supreme Court consistently came out in favor of the government, at the expense of foreigners. The World War II cases dealing with the punishment of foreigners are clear examples of the preexisting membership and balancing approaches. The flexibility that the Court ceded to the government would ultimately lay the groundwork for the government’s use of Guantanamo Bay during the War on Terror.

In *Ex Parte Quirin* (1942), the Court was asked to rule on the constitutionality of military tribunals used to try German saboteurs captured on American soil.<sup>140</sup> The Germans had traveled from Europe to the United States by submarine and sought to detonate explosives at strategic American facilities. However, upon landing at two different sites along the East Coast, all three men were apprehended by the FBI. One of the saboteurs claimed that he possessed American citizenship, but the Court agreed with the government’s claim that by joining the German military, he had “renounced or abandoned his United States citizenship.”<sup>141</sup> The three Germans argued that, “the President...[was] without any...authority to order... [that they] be tried by military tribunal...[and that] in consequence, they...[were] entitled to [the protection of] the Fifth and Sixth Amendments.”<sup>142</sup> The language of these amendments refers to “person[s]” and “the accused,” as opposed to citizens. However, as Justice Jackson pointed out in his majority opinion, “By the Articles of War...Congress...explicitly provided...that military tribunals shall have jurisdiction to try offenders...against the law of war.”<sup>143</sup> The Articles of War created a distinction between, “Lawful combatants,” who are entitled to the protections of relevant laws of war and Constitutional provisions, and “unlawful combatants... [who] are subject to trial and punishment by military tribunals.”<sup>144</sup> Justice Jackson

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138 *Id* at 309.

139 *Id* at 310.

140 *Ex Parte Quirin*, 317 US 1 (1942).

141 *Id* at 20-2.

142 *Id* at 24.

143 *Id* at 28.

144 *Quirin*, 317 US at 31.

concluded that because the German saboteurs had “pass[ed] surreptitiously from enemy territory into our own...for the commission of hostile acts...[they had] the status of unlawful combatants.”<sup>145</sup>

Justice Jackson’s opinion for *Ex Parte Quirin* is considerably less controversial than later cases concerning the punishment of aliens. The German saboteurs were essentially caught in the act, and Congress had expressly provided for their treatment. However, the procedures to which they were subjected, and the Court’s approval of those procedures, would leave the door open for abuse. According to Justice Jackson’s interpretation of the Articles of War, military tribunals are appropriate for individuals merely accused of violating the laws of war. The majority opinion in *Quirin* empowers the government to accuse any foreigner of violating the laws of war in order to exclude the defendant from the protections of the Constitution.

Four years later, the issue of military tribunals again came before the Court. This time, the petitioner for habeas corpus was Tomoyuki Yamashita, a general in the Imperial Japanese Army. General Yamashita surrendered to the United States on September 3rd, 1945, and was charged with violating the laws of war three weeks later. Yamashita pled not guilty, but was subsequently convicted of violating the laws of war and sentenced to death.<sup>146</sup> According to the accusation levied against Yamashita, he had “failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies.”<sup>147</sup> Justice Stone distinguished the case from *Quirin* by pointing out that Yamashita’s military trial had occurred after the cessation of hostilities between Japan and the United States. However, Stone nevertheless ruled in favor of the government, reasoning that, “The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy...the evils which the military operations have produced.”<sup>148</sup> Stone’s opinion expanded *Quirin* to authorize military tribunals after the end of war.

Shortly after *In re Yamashita* (1946), the Court reexamined the territorial distinction and broad power of expulsion developed through *The Insular Cases*.<sup>149</sup> In his majority opinion for *Ahrens v. Clark* (1948), Justice Douglas gave his wholehearted support for both doctrines.<sup>150</sup> The case arose from writs of habeas corpus submitted on behalf of 120 German citizens who were detained at Ellis Island. The attorney general had issued orders to deport the Germans on the grounds that “each

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145 *Quirin*, 317 US at 35.

146 *In re Yamashita*, 327 US 1, 5 (1946).

147 *Id* at 13-14.

148 *In re Yamashita*, 327 US at 11.

149 *In re Yamashita*, 327 US 1 (1946).

150 *Ahrens v. Clark*, 335 US 189 (1948).

of them...[was] dangerous to the public peace and safety of the United States.” The only evidence marshaled in support of this claim that appears in Justice Douglas’s opinion is the petitioners’ German citizenship.<sup>151</sup> However, what makes the decision in *Ahrens* extraordinary is not the sweeping power of expulsion wielded by the attorney general, but rather the astonishing claim that the detained Germans could not even submit writs of habeas corpus.

According to the government, even though the German petitioners were being held pursuant to an order issued by the attorney general, they could not challenge their detention because Ellis Island is beyond the territorial limits of the jurisdiction of the federal district court to which they submitted their suits. Justice Douglas sided with the government, declaring that, “It is not sufficient...that the jailer or custodian alone be found in the jurisdiction.”<sup>152</sup> Douglas’s justification for his decision is a clear example of the balancing approach. According to Douglas, it was unreasonable “to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writs. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose.”<sup>153</sup> Douglas of course did not provide any actual evidence in support of his claims. Under the pressure of the war, Douglas limited the scope of habeas rights largely on the basis of conjecture.

Two years after *Ahrens*, the Court handed down its most influential World War II opinion concerning the punishment of foreigners. In *Johnson v. Eisentrager* (1950), the Court was asked to determine the fate of German soldiers accused of aiding Japanese troops after Germany had surrendered, but before Japan surrendered.<sup>154</sup> The German petitioners in *Eisentrager* were captured and convicted by a military tribunal in China before being transported to the American-controlled Landsberg Prison in Germany. The Germans claimed that they were working in German civilian offices, but officials of the American military alleged that the Germans had supplied military intelligence to members of the Japanese Imperial Army.<sup>155</sup> The Court of Appeals ruled that the Germans could in fact submit writs of habeas corpus on the grounds that, “any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal.”<sup>156</sup> Justice Jackson’s majority opinion used the concepts of preexisting membership and balancing to overturn the Court of Appeals.

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151 *Id* at 189.

152 *Id* at 190.

153 *Id* at 190.

154 *Johnson v. Eisentrager*, 339 US 763 (1950).

155 *Id* at 765-767.

156 *Id* at 767.

Justice Jackson's opinion for *Eisentrager* emphasized the importance of citizenship, as well as the contingencies of war. Jackson began by stating that, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens...with the citizen we are now little concerned except to set his case apart as untouched by this decision."<sup>157</sup> Jackson did not provide a constitutional argument in favor of this premise, opting instead for an inherent sovereignty rationale similar to those used in *The Insular Cases* and the Chinese Exclusion Act cases. According to Jackson, "It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes arms against us."<sup>158</sup> Jackson continued by arguing that foreign citizenship can justify the exclusion of aliens from constitutional protections during war because, "The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy."<sup>159</sup> As Jackson explained, the precise implications of foreign citizenship during war are severe: "The resident enemy alien is constitutionally subject to summary arrest, internment, and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy."<sup>160</sup> However, the petitioners in *Eisentrager* were not resident aliens. According to Jackson, "the nonresident enemy alien...does not have even this qualified access to our courts."<sup>161</sup> Echoing Justice Douglas's *Ahrens* opinion, Jackson supported this view of the rights of foreigners with practical concerns. Jackson worried that "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing...Such trials would hamper the war effort...bring aid and comfort to the enemy...[and] diminish the prestige of our commanders."<sup>162</sup>

Taken together, the landmark World War II cases dealing with the punishment of foreigners expose the full implications of the preexisting membership and balancing approaches. The opinions make much of the benefits and protections that aliens normally enjoy, but their holdings allowed the government to do as it pleased with foreigners. The legacy of *Quirin*, *Yamashita*, *Ahrens*, and *Eisentrager* is that by simply accusing aliens of violations of the laws of war, the government can subject them to military tribunals. The territorial doctrine developed through these cases denies aliens detained abroad the power to even challenge their detention through writs of habeas corpus.

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<sup>157</sup> *Id.* at 769.

<sup>158</sup> *Eisentrager*, 339 US at 771.

<sup>159</sup> *Id.* at 772.

<sup>160</sup> *Id.* at 775.

<sup>161</sup> *Id.* at 776.

<sup>162</sup> *Eisentrager*, 339 US at 779.

### H. *Verdugo-Urquidez*

Chief Justice Rehnquist penned the most extensive defense of the preexisting membership and balancing approaches in his majority opinion for *United States v. Verdugo-Urquidez* (1990).<sup>163</sup> Although it is not clear that the facts of the case called for it, Rehnquist provided a lengthy interpretation of the meaning and implications of the term, "The People," as it is used throughout the Constitution. His conclusion — that the Constitution applies differently for individuals who have established a "sufficient connection with...the country"<sup>164</sup> — illustrates the continued prominence of preexisting membership and balancing in the Supreme Court's jurisprudence.

Rene Martin Verdugo-Urquidez was a Mexican citizen whom the DEA suspected was not only a major drug trafficker, but also possibly involved in the recent torture and murder of a DEA agent. In August 1985, the DEA secured a warrant for Verdugo-Urquidez's arrest. Several months later, the DEA arranged for Mexican law enforcement officials to apprehend Verdugo-Urquidez in Mexico and turn him over into American custody at the border. While Verdugo-Urquidez waited in a California prison for his trial, a member of the DEA requested permission from Mexican authorities to search Verdugo-Urquidez's home in Mexico. A group of both Mexican and American law enforcement officials executed the search and recovered a tally sheet that the prosecutors for Verdugo-Urquidez's trial felt was key to proving his involvement in the illicit drug trade. Verdugo-Urquidez's lawyers sought to suppress the tally sheet on the grounds that the DEA had failed to obtain a search warrant, in violation of the Fourth Amendment. Both the District Court and the Court of Appeals sided with Verdugo-Urquidez, citing *Reid v. Covert*<sup>165</sup>, which substantially overturned the territorial distinction of *The Insular Cases* and *Ahrens* by extending the protection of the Fifth and Sixth Amendments to American citizens convicted by military tribunals outside the physical territory of the United States.<sup>166</sup> Furthermore, the Court of Appeals questioned why the government would respect constitutional constraints for all of its dealings with Verdugo-Urquidez, except for the search of his home. As the Court of Appeals opinion puts it, "[it] would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment...and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment."<sup>167</sup>

Chief Justice Rehnquist overturned the lower courts' rulings, arguing that

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<sup>163</sup> *United States v. Verdugo-Urquidez*, 494 US 259 (1990).

<sup>164</sup> *Id.* at 265.

<sup>165</sup> *Reid v. Covert*, 354 US 1 (1957).

<sup>166</sup> *Verdugo-Urquidez*, 494 US at 262-3.

<sup>167</sup> *Verdugo-Urquidez*, 494 US at 263.

the text of the Fourth Amendment constrains its application to interactions between the government and citizens. As Rehnquist explained, the Fourth Amendment refers to “The right of the people to be secure...against unreasonable searches... [which] contrasts with the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments.”<sup>168</sup> According to Rehnquist, the shift in language from the Fourth to the Fifth and Sixth Amendments signals that the former has a more limited scope. Rehnquist asserted that, “The available historical data show...that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government...[not] to restrain the action of the Federal Government against aliens outside of the United States territory.”<sup>169</sup>

So as not to overturn precedents granting constitutional protections to resident aliens within the territory of the United States, Rehnquist provided his own definition of “the People.” In Rehnquist’s words, “‘the people’...refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country.”<sup>170</sup> Rehnquist’s sufficient connection is the legal articulation of Pevnick’s associative ownership. In Rehnquist’s view, individuals must participate in society in order to earn benefits and protections. Defendants do not receive constitutional protections by virtue of the fact that the government seeks to impose force upon them, but rather because they have somehow come to deserve legal protections by affirmatively working to obtain membership in society. Rehnquist emphasized that although Verdugo-Urquidez was being held in an American prison, he had “no voluntary attachment to the United States.”<sup>171</sup>

Rehnquist’s preoccupation with whether or not Verdugo-Urquidez had voluntarily associated himself with the United States is indicative of his opinion’s reliance on actual consent. As Pamela Mason observes, “the principal version of social contract theory at play in *Verdugo* recalls...an ideology which supports a far more exclusionary standard of membership in the nation that has obtained for most of this century and which has important implications for the construction of political authority it is enlisted to support.”<sup>172</sup> Furthermore, Rehnquist cited both *The Insular Cases* and *Eisentrager* in order to assert that even the broad language of the Fifth and Sixth Amendments does not always apply to aliens who have failed to establish a sufficient connection to the United States.<sup>173</sup> Rehnquist’s opinion uses a form of actual consent to deny vital constitutional protections to foreigners. His endorsement of preexisting membership and balancing is significant for the precedent it set of selectively excluding foreigners from the Constitution.

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168 *Id* at 265-6.

169 *Id* at 266.

170 *Id* at 265.

171 *Verdugo-Urquidez*, 494 US at 274-5.

172 Mason, 61.2 *Review of Politics* at 276 (cited in note 109).

173 *Verdugo Urquidez*, 494 US at 268-9.

## I. Guantanamo Bay

The Supreme Court’s rulings in the cases surrounding indefinite detention at Guantanamo Bay are the most recent examples of the preexisting membership and balancing approaches in American constitutional law. The extreme nature of indefinite detention lays bare the full implications of actual consent. In *Boumediene v. Bush*, a majority of five justices ruled that six years of captivity without anything resembling a trial was simply too much. However, the Court persisted in its reliance on preexisting membership and balance. As a result, the Supreme Court again endorsed the unequal application of the Constitution to citizens and foreigners accused of wrongdoing.

As written above, the Supreme Court handed down both *Rasul* and *Hamdi* on June 28th, 2004. The petitioners in both cases were individuals allegedly captured during hostilities between the American military and the Taliban during the so-called War on Terror. However, Yaser Esam Hamdi was born in Louisiana and thus held American citizenship. Both were detained at Guantanamo Bay, but Hamdi was brought to a naval brig in South Carolina once the government realized that he was an American citizen. As a result, Justice Stevens framed the question at issue in *Rasul* as “whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty,”<sup>174</sup> while Justice O’Connor in *Hamdi* sought to determine, “the legality of the Government’s detention of a United States citizen on United States soil as an ‘enemy combatant’ and...the process that is constitutionally owed to one who seeks to challenge his classification as such.”<sup>175</sup> In both cases, the Court handed down cautious rulings in favor of the petitioners. In *Rasul*, Stevens held that federal courts could hear the detainees’ challenges to their detention, but stopped short of extending constitutional protections such as the right to a trial.<sup>176</sup> Justice O’Connor concluded in *Hamdi* that, “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”<sup>177</sup> Her opinion does not explain what would have happened if the military had never brought Hamdi from Guantanamo to the United States, nor does it say whether Hamdi was constitutionally entitled to anything more than the ambiguously-worded “neutral decisionmaker.”

Justice Scalia’s dissents in both cases reveal that the holdings in *Rasul* and *Hamdi* are products of the preexisting membership and balancing models. In *Rasul*, Scalia castigated Stevens’s opinion of the Court for bringing about “a po-

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174 *Rasul*, 542 US at 554.

175 *Hamdi*, 542 US at 586.

176 *Rasul*, 542 US at 563-63.

177 *Hamdi*, 542 US at 586.

tentially harmful effect upon the Nation's conduct of a war."<sup>178</sup> Meanwhile, Scalia expressed outrage over O'Connor's *Hamdi* decision on the grounds that, "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."<sup>179</sup> In Scalia's view, the Court should have extended full constitutional protections to Hamdi, and excluded the petitioners in *Rasul* from those same benefits. In this light, it becomes clear that the holdings in both cases represent cautious attempts by the Court to extend the Constitution to foreigners without substantially inconveniencing the government. Hamdi's preexisting membership as a citizen of the United States brought him the due process guarantee of the Fifth Amendment, but the *Quirin* precedent likely counseled O'Connor not to fully treat Hamdi as a citizen. In both cases, the practical concerns associated with the War on Terror kept the Court from extending full constitutional rights to the accused. Of course, Scalia's dissents suffer from a glaring contradiction: if the holding in *Rasul* inappropriately hindered the ability of the government to wage war, why could the same not be said for the decision in *Hamdi*?

Scalia's remark that the holding in *Rasul* would impair the military's ability to wage war draws from a key argument in favor of indefinite detention. As discussed earlier, some members of the United States government have sought to characterize the military's operations at Guantanamo as intelligence work rather than punishment. In this frame, the naval base at Guantanamo is not a prison, but rather an informational resource used by the military in its efforts against international terrorism. This view of Guantanamo is a clear example of the balancing approach because it judges the merits of indefinite detention solely on its claimed practical use. The facts of the Guantanamo cases reveal that this characterization of indefinite detention is false and misleading. By designating individuals as enemy combatants and holding them against their will, the government has sought to carry out punishment. As will become clear in the next chapter, indefinite detention is an illegitimate exercise of coercive power. Furthermore, there are indications that the military has not benefited from Guantanamo. As discussed earlier, members of the CIA, the FBI and the Navy have challenged the position that interrogations carried out at the Guantanamo Bay naval base have been of much use to the military.

Two years later, in *Hamdan v. Rumsfeld* (2006), the Court again offered only a timid holding in favor of the petitioners.<sup>180</sup> Justice Stevens's majority opinion examined the applicability of the Geneva Conventions and the Uniform Code of Military Justice (UCMJ) to the procedures established by Congress in the Detainee Treatment Act (DTA). Stevens held that the military commission used to convict Salim Ahmed Hamdan, whom the government accused of working as Osama bin

<sup>178</sup> *Rasul*, 542 US at 576.

<sup>179</sup> *Hamdi*, 542 US at 615.

<sup>180</sup> *Hamdan v. Rumsfeld*, 548 US 557 (2006).

Laden's driver, fell short of the standards required by the Geneva Convention and the UCMJ.<sup>181</sup> The underlying assumption in using the Geneva Conventions and the UCMJ as measures in the case was that the United States was in fact at war, causing a different set of rules other than criminal law to apply. Stevens objected to the government's actions because, "the military commission convened to try him [Hamdan]...had the power to convict based on evidence the accused would never see or hear."<sup>182</sup> Stevens again declined to address the potential constitutional issues at play. In fact, he explicitly declined to "address the Government's power to detain him [Hamdan] for the duration of active hostilities in order to prevent...harm."<sup>183</sup> The holding in *Hamdan* represents another gentle nudge from the Court to the executive branch. As we will see in *Boumediene*, the Court's general approach to Guantanamo was to step out of the way of the military until individuals were held without trial for over half a decade — and even at that point, the Court was at pains to avoid hindering the operations of the War on Terror.

In response to the Supreme Court's decisions in *Rasul*, *Hamdi*, and *Hamdan*, Congress passed the Military Commission Act of 2006 (MCA), which sought to establish procedures for the detainees held at Guantanamo that would substitute for habeas corpus.<sup>184</sup> Whereas in *Rasul* Justice Stevens could point to statutory habeas requirements for his decision, the MCA forced the Supreme Court to determine whether the Constitution extended rights to the detainees in Guantanamo. Furthermore, the facts of *Boumediene* were even more extreme than the previous cases concerning Guantanamo. As Justice Kennedy explained, the petitioners were "aliens designated as enemy combatants and detained at...Guantanamo...Some...apprehended on the battlefield in Afghanistan, others in places as far from there as Bosnia and Gambia...none...[was] a citizen of a nation...at war with the United States...[and] each denie[d that] he...[was] a member of the al Qaeda terrorist network...or of the Taliban regime."<sup>185</sup> The detainees' lawyers challenged the MCA on the grounds that it unconstitutionally excluded the judiciary from reviewing their cases, effectively suspending habeas corpus in the absence of the formal suspension required by the Suspension Clause.<sup>186</sup>

The government argued that, "non-citizens detained as enemy combatants and detained in territory located outside...[the] Nation's borders have no constitutional rights and no privilege of habeas corpus."<sup>187</sup> Central to the government's position was the claim that nothing less than "formal sovereignty," could cause the Suspension Clause to extend to Guantanamo.<sup>188</sup> In 1903, Cuba and the United

<sup>181</sup> *Id* at 622-25.

<sup>182</sup> *Id* at 571.

<sup>183</sup> *Hamdan*, 548 US at 635.

<sup>184</sup> *Boumediene*, 553 US at 732-33.

<sup>185</sup> *Id* at 734.

<sup>186</sup> *Id* at 732-37.

<sup>187</sup> *Id* at 740.

<sup>188</sup> *Boumediene*, 553 US at 750.

States signed a lease providing that, “Cuba retains ‘ultimate sovereignty’ over the territory while the United States exercises ‘complete jurisdiction and control.’” The lease contains no termination date, and “Under the terms of...[a] 1934 Treaty...Cuba effectively has no rights as a sovereign until the parties [both] agree to modification of the 1903 Lease...or the United States abandons the base.”<sup>189</sup> Kennedy recognized that, “The necessary implication of the [government’s] argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.”<sup>190</sup> Kennedy emphatically rejected the government’s claim, declaring that, “Our basic charter cannot be contracted away like this.”<sup>191</sup>

Despite finally asserting that at least some constitutional rights extend to Guantanamo, Kennedy’s opinion is quite similar to those in *Rasul*, *Hamdi*, and *Hamdan*. In fact, Kennedy explicitly stated that he arrived at his holding primarily by weighing the relevant practical concerns. According to Kennedy, the *Boumediene* decision is the continuation of, “a common thread uniting the *Insular Cases*, *Eisentrager*, and...[similar cases]: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>192</sup> Kennedy asserted that,

at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.<sup>193</sup>

In Kennedy’s view, the petitioners in *Boumediene* were only entitled to habeas corpus because each of these criteria pointed in their favor. In particular, Kennedy was alarmed that individuals at Guantanamo had been held for as many as six years without the ability to challenge their detention.<sup>194</sup> Kennedy omitted any discussion of whether additional constitutional rights might extend to Guantanamo. In this light, his assertion that the “opinion does not undermine the Executive’s powers as Commander in Chief” is clearly accurate.<sup>195</sup> At the conclusion of his *Boumediene* decision, Kennedy declared that, “Security depends upon a sophisticated

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189 *Boumediene*, 553 US at 755.

190 *Id* at 767.

191 *Id* at 767.

192 *Id* at 766.

193 *Boumediene*, 553 US at 768-9.

194 *Id* at 789.

195 *Id* at 800.

intelligence apparatus and the ability of our Armed Forces to act and to interdict... [and] security subsists, too, in fidelity to freedom’s first principles...chief among... [them] freedom from arbitrary and lawful restraint.”<sup>196</sup> The legacy of *Boumediene* and its precedents is that — as a matter of constitutional history — when aliens are the targets of government action, freedom from arbitrary power rarely wins out over practical concerns.

### III. CHAPTER 2: IMPLIED MEMBERSHIP

An alternative to preexisting membership and balancing is to conceive of every individual whom the state punishes as a member of the social contract. This theory of punishment, which I will refer to as implied membership, relies upon hypothetical consent for the legitimacy of the social contract. Normatively, implied membership is appealing because it requires the state to justify all instances of punishment. By doing so, implied membership avoids many of the arbitrary and extreme results of actual consent. The state is no longer in a position to exercise coercive force over aliens in a manner that it would otherwise understand to be illegitimate when applied to citizens. In this chapter, I will argue that implied membership is consistent with both social contract theory and the United States Constitution.

Implied membership conflicts with the traditional understanding of the implications of social contract theory for aliens. However, it is important not to discard the social contract frame due to the importance of consent for discussing legitimacy and punishment. As Corey Brettschneider explains, “A political theory of punishment is concerned not only with *how* and *when* to punish but also with the question of *who* is administering a punishment...not just the issue of desert but, more fundamentally, that of the political legitimacy of *state* punishment.”<sup>197</sup> In American constitutional law, the ideal of popular sovereignty ensures that consent will remain a major component in debates regarding the legitimate extent of government authority. Implied membership demonstrates why consent should be understood to constrain the power of the state when it punishes both citizens and foreigners.

Punishment is different from other interactions between the state and individuals because of its unique combination of coercion and legitimacy. When the state wages war, it often does not claim to act legitimately as it would when administering punishment. War brings about a fight for survival. It is for this reason that Hobbes carefully defines hostile acts and punishment separately. As discussed in the previous chapter, Hobbes and Locke do not require the state to justify its actions as legitimate when it executes hostile acts. Hobbes explicitly states that all coercion of aliens counts as hostile acts, while the exercise of force over citizens

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196 *Boumediene*, 553 US at 801.

197 Corey Brettschneider, *The Rights of the Guilty*, 35.2 *Political Theory* 175, 175 (2007).

pursuant to the law counts as punishment. Implied membership requires the state to extend the protections inherent in the act of punishment to all individuals. When the state coerces any individual — citizen or foreigner — without the support of hypothetical consent, the state must recognize that it acts without legitimacy. In constitutional law, the Suspension Clause and War Powers Clause establish when the United States government may properly exercise force that might conflict with other provisions of the Constitution. Implied membership may have consequences for the exercise of non-coercive power over aliens, such as the distribution of welfare benefits. However, because these types of government actions do not involve coercive force, the relevant implications of implied membership are less clear. Social contract theory is most concerned with the legitimacy of punishment, and so my focus will be the consequences of implied membership for punishment.

### A. Rousseau and Hypothetical Consent

Although it is somewhat unclear whether Rousseau would endorse punishing citizens and aliens in the same manner, his incorporation of hypothetical consent into social contract theory provides the foundation for implied membership. Similar to the theories that Locke and Hobbes construct, Rousseau's version of the social contract develops from his conception of the state of nature. In contrast to Hobbes and Locke, Rousseau denies that a state of war can exist prior to the formation of government. According to Rousseau,

Men are not naturally enemies, for the simple reason that men living in their original state of independence do not have sufficiently constant relationships among themselves to bring about either a state of peace or a state of war. It is the relationship between things and not that between men that brings about war... a private war between one man and another can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of laws.<sup>198</sup>

As a result, Rousseau rejects Hobbes's view that individuals enter into civil society simply in order to survive. Rousseau declares that, "Fights between private individuals, duels, encounters, are not acts which produce a state."<sup>199</sup> Consequently, Rousseau criticizes the Hobbesian sovereign as an unreasonable object of consent. As Rousseau explains,

To alienate is to give or sell. A man who makes himself the slave of someone else does not give himself; he sells himself, at least for his subsistence. But why does a people sell itself?...It will be said that the

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<sup>198</sup> Rousseau, *Political Writings* at 145 (cited in note 30).  
<sup>199</sup> *Id.*

despot assures his subjects of civil tranquility...But what do they gain... if the oppressive demands caused by his ministers occasion more grief for his subjects than their own dissensions would have done...if this very tranquility is one of their miseries? A tranquil life is also had in dungeons... The Greeks who were Locked up in the Cyclops' cave lived in tranquil existence as they awaited their turn to be devoured.<sup>200</sup>

Rousseau shares Locke's fear of unlimited power and accordingly declares that it is "a vain and contradictory convention to stipulate absolute authority on one side and limitless obedience on the other."<sup>201</sup> However, Rousseau departs from Locke by proposing that hypothetical consent should play a role in legitimating the social contract.

Rousseau's conception of the state of nature leads him to propose a new method for understanding how consent operates in the social contract. Rather than have each individual submit to a single sovereign, Rousseau stipulates that the members of the social contract reciprocally transfer power to each other. Rousseau describes this process as, "the total alienation of each associate, together with all of his rights, to the entire community...in giving himself to all, each person gives himself to no one."<sup>202</sup> In Rousseau's social contract, individuals give up their private claims to rights that they possess in the state of nature. However, rather than directly submit to the authority of a sovereign or legislature, individual members of the social contract consent amongst each other.

At times, Rousseau provides indications that, like Hobbes and Locke, he believes that actual consent is required for the social contract. According to Rousseau, the social contract begins with a convention at which point there must be unanimous consent. Rousseau reasons that, "The law of majority rule...presupposes unanimity on at least one occasion."<sup>203</sup> In Rousseau's opinion, "if there were no prior convention, then, unless the vote were unanimous...the minority's obligation to submit to the majority's choice," would not be justifiable.<sup>204</sup> Later on, Rousseau suggests that, "If...at the time of the social compact, there are opponents to it, their opposition does not invalidate the contract; it merely prevents them from being included in it. They are foreigners among citizens. Once the state is instituted, residency implies consent."<sup>205</sup> Here Rousseau seems to adopt the belief that actual consent is required for the creation of the social contract. Individuals explicitly offer their actual consent to the social contract, depart from the territory of the newly formed government, or implicitly offer their actual consent to the social

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<sup>200</sup> Rousseau, *Political Writings* at 144 (cited in note 30).

<sup>201</sup> *Id.* at 145.

<sup>202</sup> *Id.* at 148.

<sup>203</sup> Rousseau, *Political Writings* at 147 (cited in note 30).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 205.

contract by remaining within the territory of the newly formed government. At first glance, this understanding of the formation of the social contract is no different from Locke's.

Rousseau's account of the general will reveals that he grounds the legitimacy of the social contract in hypothetical consent. According to Rousseau, "The general will is always right and always tends toward the public utility. However, it does not follow that the deliberations of the people always have the same rectitude. We always want what is good for us, but we do not always see what it is."<sup>206</sup> Elsewhere, Rousseau declares, "Examine carefully what goes on in any deliberation and you will see that the general will is always for the common good; however, quite often there is a secret schism...which causes the natural disposition of the assembly to be lost sight of for the sake of private purposes."<sup>207</sup> The general will is an ideal with which the actual operations of the state will not always align. However, Rousseau uses the general will to justify majority rule despite the fact that the government may err in practice. Rousseau argues that, "The citizen consents to all the laws, even to those that pass in spite of his opposition, and even to those that punish him when he dares violate any of them. The constant will of all the members of the state is the general will; through it they are citizens and free."<sup>208</sup> When citizens refuse to offer their actual consent to a particular government action or policy, Rousseau argues that they nevertheless are bound by hypothetical consent to obey the government because the social contract provides structure for deliberations that tend toward the general will.

Corey Brettschneider illuminates the relationship between the general will and hypothetical consent in the context of punishment. As Brettschneider explains,

For Rousseau, it is necessary that criminals consent to punishment because all coercive acts of the state must be arrived at unanimously... However...Rousseau's notion of unanimous consent is not subject to the obvious objection that actual criminals do not consent to their own punishments. By consent, Rousseau is not referring to actual empirical consent. Rather, he espouses a hypothetical notion of consent, which seeks to reconcile the individual will of the condemned with what he calls the "general will."<sup>209</sup>

Rousseau measures the legitimacy of punishment according to whether individuals would hypothetically consent to the power of the government in recognition

206 Id at 155.

207 Rousseau, *Political Writings* at 115 (cited in note 30).

208 Id at 206.

209 Corey Brettschneider, *Rights within the Social Contract: Rousseau on Punishment*, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *Law as Punishment/Law as Regulation* 50, 54-55 (Stanford 2011).

that its actions follow the general will. Rather than seek to reconcile this view of consent with Rousseau's apparent insistence on unanimous actual consent for the initial formation of the social contract, Brettschneider argues that hypothetical consent is also sufficient for the creation of government. In Brettschneider's words, "unanimity on this 'one occasion' should not be understood to imply that legitimate polities must have the actual assent of all their citizens, even at the moment of founding. Such an understanding of unanimity would be unworkable given the likely scenario in which at least one individual would dissent from the content of the social contract."<sup>210</sup> Glossing over Rousseau's initial requirement of unanimous actual consent is consistent with the rest of Rousseau's theory. If hypothetical consent can bind dissenting citizens in all subsequent deliberations, there is little reason why it should not apply to the formation of the social contract.

The idea that actual consent is never required for the social contract may seem absurd. However, hypothetical consent differs from actual consent in that it is more concerned with constraining the government than empowering it. Theories of the social contract rooted in actual consent view citizens as exchanging their own private power in return for the benefits of cooperation. The power that individuals submit to the social contract is what constructs the government. This transfer of power generates an entitlement to the benefits of the social contract and the state that aliens do not possess. The social contract and all resulting government actions and policies are legitimate because people have actually consented to them. In this light, actual consent is a matter of moral desert. Citizens enjoy protections that aliens do not enjoy because citizens *deserve* the benefits of the social contract. As discussed in the previous chapter, this conception of the social contract is a poor foundation for legitimacy because actual consent is historically a false and misleading description of how societies operate, and can attach legitimacy to extreme results.

In contrast, hypothetical consent stipulates that the social contract is only legitimate insofar as it constrains the government from executing unreasonable actions and policies. Hypothetical consent is better thought of as a measure of legitimacy, rather than its source.<sup>211</sup> As Brettschneider explains,

Hypothetical unanimous consent is not an account of actual procedure, nor is it reliant on what persons actually say or do. Rather, it is a principled account of which guarantees are necessary to ensure that all citizens could consent to a particular set of constitutional principles. An ideal of

210 Id at 55.

211 John Rawls, *Political Liberalism: Expanded Edition* 1, 217 (Columbia 2005). Rawls' liberal principle of legitimacy states that, "[the] exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational." Implied membership requires the state to justify punishment to both citizens and aliens.

hypothetical consent asks us to place ourselves in a contractual situation where we must determine which laws are justifiable...Although such a contractual situation would never occur, it serves as the thought experiment by which the legitimacy of laws is measured.<sup>212</sup>

Hypothetical consent is an important analytic tool in practice, and is compatible with political processes that rely on actual consent. Brettschneider concedes that hypothetical consent, “cannot resolve every hard case,” but contends that, “it can point to several types of punishment that should be ruled out and some basic rights that even the worst criminals should retain.”<sup>213</sup> However, implicit in Brettschneider’s contractualist framework is an assumption that the state is punishing its own citizens. Implied membership stipulates that the political legitimacy of coercive power targeted at aliens must be measured in accordance with hypothetical consent in the same manner that the exercise of power over citizens would.

The use of hypothetical consent to determine the legitimacy of government actions does not discount the importance of actual consent in social contract theory. Rather, it rejects the notion that actual consent serves as the foundation for political legitimacy. As Rousseau argues, actual consent is important because deliberations and majority rule tend to generate favorable results. Hypothetical consent entails a recognition that democratic rule does not always produce reasonable outcomes. Hypothetical consent refuses to lend the claims of legitimacy to unreasonable policies that have the support of actual majority will. When the actual consent of the majority generates outcomes that are unreasonable or otherwise unjust, hypothetical consent requires the state to concede that it has acted illegitimately. This is a much better defense against arbitrary rule than actual consent and majority rule on their own. Could there be a polity devoid of actual consent with a government that exercises legitimate power? A benevolent monarch whose actions, when measured by hypothetical consent, are found to be legitimate? No, because the total absence of actual consent is an unreasonable structure of government to which individuals would not hypothetically consent. Hypothetical consent helps explain why the United States Constitution is legitimate despite numerous restrictions on actual consent, and the fact that “the conditions necessary for ‘We

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212 Corey Brettschneider, *Rights within the Social Contract: Rousseau on Punishment*, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *Law as Punishment/Law as Regulation* 50, 56-58 (Stanford 2011). Brettschneider adopts the phrase, “the justification of punishment,” on the grounds that Rawls’ liberal principle of legitimacy is a modern reformulation of Rousseau’s hypothetical consent.

213 Brettschneider, 35.2 Political Theory at 188 (cited in note 191). Brettschneider argues that the death penalty is an example of a type of punishment that hypothetical consent rules out. Corey Brettschneider, *Rights within the Social Contract: Rousseau on Punishment*, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *Law as Punishment/Law as Regulation* 50, 56-58 (Stanford 2011).

the People’ actually to [unanimously] consent to anything like the Constitution or amendments thereto have never existed and could never exist.”<sup>214</sup> The Constitution is legitimate because individuals would hypothetically accept its provisions as reasonable.

Implied membership expands the reach of hypothetical consent to all individuals whom the state seeks to punish. This understanding of the social contract conflicts even with Rousseau’s views on aliens. Similar to Carens, Pevnick, and Neuman, Rousseau is somewhat mindful of the welfare of foreigners, but concedes that the social contract allows for the dissimilar treatment of citizens and aliens. Rousseau declares,

since all the commitments of society are reciprocal in nature, it is impossible to put oneself outside the law without renouncing its advantages...the republic is on the verge of its ruin at the very moment someone can think it is a fine thing not to obey the laws... if the nobility or the military or some other order within the state were ever to adopt such a maxim, everything would be irretrievably lost.<sup>215</sup>

Here, Rousseau appears primed to reject the preexisting membership and balancing approaches. However, he maintains that the social contract and the general will do not take the interests of foreigners into account. As Rousseau explains,

[The] general will, which always tends toward the conservation and well-being of the whole and of each part, and which is the source of the laws, is for all the members of the state, in their relations both to one and another and to the state, the rule of what is just and what is unjust... [However,] it is important to observe that this rule of justice, on a firm footing with all citizens, can be defective with regard to foreigners...For the will of the state, however general it may be in relation to its members, is no longer so in relation to other states and to their members, but becomes for them a private and individual will.<sup>216</sup>

Implied membership stipulates that when the state punishes an alien, the social contract and the general will extend to that individual.

Despite Rousseau’s objection to including the interests of foreigners in the general will, there are some indications that his version of social contract theory is in fact compatible with implied consent. At one point, Rousseau suggests that the manner by which states treat outsiders is a good measure of legitimacy. According to Rousseau,

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214 Barnett, *Lost Constitution* 14 (cited in 98).

215 Rousseau, *Political Writings* at 177 (cited in note 30).

216 *Id.* at 114.

the great city of the world becomes the political body whose law of nature is always the general will, and whose states and diverse peoples are merely private individuals. From these same [rules of justice internal to the social contract]...applied to each political society and to its members, are derived the most universal and secure rules on whose basis one could judge a government to be good or bad.

Furthermore, Rousseau argues that once a war concludes, the state must treat prisoners fairly. Rousseau reasons,

War is not...a relationship between one man and another, but a relationship between one state and another. In war private individuals are enemies only incidentally: not as men or even as citizens, but as soldiers... each state can have as enemies only other states and not men, since there can be no real relationship between things of disparate natures... Since the purpose of war is the destruction of the enemy state, one has the right to kill the defenders of that state so long as they bear arms. But as soon as they lay down their arms and surrender, they cease to be enemies or instruments of the enemy. They return to being simply men; and one no longer has a right to their lives...war does not grant a right that is unnecessary to its purpose.<sup>217</sup>

Rousseau does not say whether punishment inflicted upon prisoners of war would need to meet the requirements of actual consent. His insistence that the general will does not include the interests of aliens points in one direction, but his suggestion that the treatment of foreigners signals whether a government is good or bad points in the other. Rousseau does say that prisoners of war should not become slaves because, “In taking the equivalent of his life, the victor has done him no favor. Instead of killing him unprofitably he kills him usefully.”<sup>218</sup> At the very least, Rousseau’s discussion of aliens paves the way for a theory of implied membership.

### B. *From Social Contract Theory to the Constitution*

Despite the Supreme Court’s reliance on preexisting membership and balancing in the many of the cases concerning the rights of aliens, there is substantial evidence that some of the Framers would have supported implied membership. Citing from the Framers does not establish that implied membership is a requirement of the Constitution, or even that implied membership is consistent with the Constitution. However, it does demonstrate at the very least that the concept of

<sup>217</sup> Id at 145-6.

<sup>218</sup> Id at 146.

implied membership is not entirely novel in American constitutional law. Furthermore, the remarks of the Framers reveal that it is possible for experts in constitutional law to endorse implied membership.

James Wilson wrote in defense of extending the protections of the Constitution to foreigners. In Wilson’s view, the Constitution represents an important departure from the historical treatment of aliens. Wilson proudly contrasted the generous benefits that he felt the Constitution guarantees to foreigners with the approach that prior governments — notably the British Empire — practiced.<sup>219</sup> As Wilson observed, “In ancient times, every alien was considered as an enemy.” According to Wilson, “The rule...should be reversed. None but an enemy should be considered an alien.”<sup>220</sup> Wilson explicitly invoked social contract theory in order to argue that the Constitution should protect foreigners, reasoning that, “The rights of citizenship are the rights of parties to the social compact. Even to these, aliens should be permitted to accede upon easy terms.”<sup>221</sup> Similar to Rousseau, Wilson argued that the dissimilar treatment of aliens stems from misconceptions about the allegiance of foreigners to their homelands. As Wilson explained, “Error, as well as truth, is sometimes connected by a regular chain. A man is deemed a dangerous enemy or a suspicious friend to that country in which he wishes to reside, because he is previously deemed an appurtenant or a slave to that country in which he chanced to be born.”<sup>222</sup> Wilson even drew parallels<sup>223</sup> between citizenship and feudalism.<sup>224</sup>

Wilson was particularly adamant about extending the right to a jury trial to aliens. Wilson’s declaration that, “None but an enemy should be considered an alien” might appear to suggest that he would oppose the application of constitutional provisions to foreigners accused or guilty of committing crimes. However, Wilson’s discussion of jury trials presents compelling evidence that he felt the Constitution requires the government to administer punishment equally to aliens and citizens. Wilson viewed the Sixth Amendment guarantee to public jury trials as one of the most important provisions in the Constitution. As Wilson explained, “In ancient times, a variety of methods by which crimes might be tried, was known to the common law...A fourth kind still remains and is our boast — the trial by jury.”<sup>225</sup> In fact, Wilson went even further than arguing that the Sixth Amendment should protect foreigners. According to Wilson, “When an alien is tried, one half

<sup>219</sup> Garrison, *Wilson* at 1050-51 (cited in note 27).

<sup>220</sup> Id at 1046.

<sup>221</sup> Id.

<sup>222</sup> Id 1049.

<sup>223</sup> Carens, 49 *The Review of Politics* at 252 (cited at note 33). Roughly two centuries later, Joseph Carens would write that, “Citizenship in Western liberal democracies is the modern equivalent of feudal privilege — an inherited status that greatly enhances one’s life chances...[and] is hard to justify when one think about it closely.”

<sup>224</sup> Garrison, *Wilson* at 1050-1 (cited in note 27).

<sup>225</sup> Garrison, *Wilson* at 1194 (cited in note 27).

of his jury should be aliens, if he require it.”<sup>226</sup> Wilson was so concerned with ensuring that the Constitution would produce fair trials that he sought to give aliens juries composed of their foreign peers so that prejudices would not deprive them of a proper trial.

The first constitutional crisis involving the punishment of foreigners did not ever come to trial. In 1798, Congress passed the Alien and Sedition Acts, the former of which gave the president virtually unlimited power to detain and deport foreigners. The debates over the Alien Act had every bit as much to do with an ongoing power struggle between the Federalists and the Jeffersonians as they did with the constitutional rights of aliens. As Gerald Neuman explains, “The statutes embodied the extreme Federalists’ reaction to the importation of dangerous revolutionary ideas from France, which they saw being spread by French agents, Irish immigrants, and Jeffersonian Republicans.”<sup>227</sup> Nevertheless, the Alien Act forced the punishment of foreigners to the forefront of public discourse because its content, “posed in stark form the question whether aliens had constitutional rights.”<sup>228</sup>

The Federalists’ arguments foreshadowed the Supreme Court’s jurisprudence regarding the punishment of aliens. Neuman recounts how, “The Federalists...gave a nativist twist to the social contract background of American constitutionalism. Citizens, as parties to the compact, could assert constitutional rights. But aliens were not parties and had to look elsewhere for their rights — for example, to the law of nations, which recognized the power of a nation to expel aliens at will.”<sup>229</sup> The Federalists framed their position in terms of loyalty and moral desert by suggesting that “foreign immigrants were insufficiently attached to the good of the country or to republican principles.”<sup>230</sup>

In contrast to the Supreme Court decisions discussed in the previous chapter, the preexisting membership approach lost in the debates over the Alien Act.<sup>231</sup> The Jeffersonians countered the Federalists’ arguments with theories of constitutionalism similar to implied membership. Gerald Neuman describes how,

John Taylor of Caroline...supported aliens’ entitlement to constitutional rights with three arguments...the generality of the text...a strong republication argument that...the Alien Act transgressed fundamental republican principles by creating a class of persons wholly dependent on

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226 *Id* at 1196.

227 Neuman, *Strangers* at 53 (cited in note 36).

228 *Id* at 53.

229 *Id* at 54.

230 Neuman, *Strangers* at 56 (cited in note 36).

231 Congress passed the Alien and Sedition Acts in 1798. The acts consisted of four separate pieces of legislation. In 1802, Congress repealed the Naturalization Act, which placed restrictions on United States citizenship. Congress allowed the other three acts to expire. (“Alien and Sedition Acts: Primary Documents of American History,” The Library of Congress, <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html>, accessed April 3, 2013)

the president...[and the position that] even under the law of nations aliens ‘were entitled and subjected to the sanctions of municipal law.’”<sup>232</sup>

Taylor singled out, “[the] deprivation of common law rights without due process, denial of trial by jury, and exercise of judicial power by the president,” as the key constitutional defects in the Alien Act.<sup>233</sup> Similar to Wilson, Taylor felt that specific constitutional provisions related to punishment should apply to foreigners in the same manner as they would for citizens.

James Madison also voiced opposition to the Alien Act. However, Madison was careful to distinguish between alien friends and alien enemies. In Madison’s Report on the Virginia Resolutions, he attacked the Alien Act for unconstitutionally violating the separation of powers doctrine and depriving alien friends of vital constitutional protections. In contrast to Wilson, Madison endorsed the dissimilar treatment of alien enemies. According to Madison, the Alien Act improperly conflated,

the two cases of aliens, members of a hostile nation; and...members of friendly nations...With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies...With respect to aliens who are not enemies...the power assumed by the act of Congress is denied to be constitutional.<sup>234</sup>

Madison’s position that a jury trial is not constitutionally necessary to determine whether a foreigner is an alien friend or enemy foreshadows the United States government’s use of the term enemy combatant in the War on Terror. However, Madison was highly critical of the idea that the executive branch — as opposed to the judiciary — could determine which individuals were alien enemies.<sup>235</sup> Furthermore, Madison attacked the Federalists’ claim that deportation is not punishment, but rather the revocation of a favor. In Madison’s words, “if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”<sup>236</sup> Madison added that, “it cannot be a true inference, that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right.”<sup>237</sup>

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232 Neuman, *Strangers* at 57 (cited in note 36).

233 *Id* at 57.

234 Madison, “Madison’s Report” 554 (cited in 33).

235 *Id* at 555.

236 *Id*.

237 *Id* at 556.

The crux of Madison's argument is that whatever legal differences there may be between citizens and aliens, the Constitution does not support the dissimilar treatment of foreigners for the purpose of punishment. Madison explicitly attacked the Federalists' version of the American social contract, reasoning that

it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, temporary obedience, they are entitled in return, to their protection and advantage. If aliens had no rights to the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial.<sup>238</sup>

Like Wilson, Madison even supported giving foreigners trials with at least one half of the jury composed of aliens.<sup>239</sup>

For at least some of the Framers, there was something about the constitutional protections afforded to criminal defendants that they felt was a fundamental requirement of legitimate punishment. Madison and Wilson opposed punishing foreigners without trials. The Sixth Amendment contains the Constitution's guarantee to a public jury trial. In addition, the Fourth, Fifth, and Fourteenth Amendments, along with the Suspension Clause establish specific legal protections for individuals accused of crime. At different points in American history, the Supreme Court has sanctioned the denial of these constitutional rights to aliens. Implied membership stipulates that in order for punishment to be legitimate, the constitutional protections afforded to the accused must extend to all individuals in the same manner.

### C. Habeas Corpus, Due Process, and Jury Trials

The legal protections enshrined in the Suspension Clause and the Fifth, Sixth, and Fourteenth Amendments flow directly from one to each other. The writ of habeas corpus gives individuals the right to challenge their detention. The Fifth, Sixth, and Fourteenth Amendments deal with how the government may constitutionally punish an individual once an individual has been apprehended and detained.<sup>240</sup> These constitutional provisions are closely intertwined and tend to arise

238 Madison, "Madison's Report" 556 (cited in 33).

239 Id.

240 The Eighth Amendment also concerns the treatment of individuals after capture. However, the Eighth Amendment rarely makes an appearance in cases concerning the rights of aliens. This is likely because arguments grounded in other constitutional provisions will be more likely to persuade justices of the Supreme Court. In *Fong Yue Ting*, Justice Brewer explicitly invokes the Eighth Amendment, but only in passing. *Fong Yue Ting v. United States*, 149 US 733. It may be

together in cases. Furthermore, these legal protections are vital to the legitimacy of punishment. Parties to the social contract would hypothetically demand these measures because they all represent common sense obstacles to the abuse of power. Implied membership requires the state to treat all targets of punishment as citizens, and thus extend these protections to all individuals accused of wrongdoing.

In *Yick Wo v. Hopkins* (1886), the Supreme Court ruled that the Constitution protects aliens from "arbitrary and unjust discrimination."<sup>241</sup> The case concerned a San Francisco city ordinance that effectively prevented individuals of Chinese descent from operating dry cleaning businesses.<sup>242</sup> In his majority opinion, Justice Mathews declared in no uncertain terms that, "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens... These provisions are universal in their application... without regard to any differences of race, of color, or of nationality."<sup>243</sup> In Mathews's view there is something different about the United States Constitution that counsels against the inherent power arguments that carried the day in *The Insular Cases*. As Mathews explained, "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but, in our system... sovereignty itself remains with the people... And the law is the definition and limitation of power."<sup>244</sup> Mathews recognized that the limitations on the power of the government established in the Constitution are necessary for political legitimacy, whether or not the target of government action possesses official citizenship.

Seven years later, the Supreme Court embraced preexisting membership and balancing in *Fong Yue Ting*. However, Justice Brewer's dissent presented a persuasive case for extending more than the Fourteenth Amendment to aliens. Citing Madison's Report on the Virginia Resolutions, Brewer asserted that the statute empowering the President to expel foreigners at will, "deprive[d] them of liberty, and impose[d] punishment without due process of law... in disregard of the 4th, 5th, 6th, and 8th articles of the amendments."<sup>245</sup> Whereas the facts in *Yick Wo* only required Mathews to determine the applicability of the Due Process Clause of the Fourteenth Amendment to aliens, Brewer explicitly argued that the government should punish citizens and aliens in the same manner. Similar to Mathews, Brewer sought to distinguish punishment in the United States from the practice other governments. In Brewer's words, "whatever the rights a resident alien might have in any other nation, here, he is within the express protection of the Constitution... The Governments of other nations have elastic powers. Ours are fixed and bounded by

that the dissimilar treatment of aliens exposes them to penalties that would be considered cruel and unusual if applied to citizens.

241 *Yick Wo v. Hopkins*, 118 US 356 (1886).

242 *Yick Wo*, 118 US at 356.

243 Id at 369.

244 Id at 370.

245 *Fong Yue Ting*, 149 US at 733.

a written Constitution.<sup>246</sup> Brewer's dissent hits at a core tenet of implied membership. In a given situation, preexisting membership and balancing may seem practically necessary. However, in order for punishment to be legitimate, reasonable protections must be provided to the accused. In the Constitution, the Suspension Clause and several of the amendments embody the reasonable protections necessary for punishment to be legitimate. Unfortunately, Brewer conditioned his dissent upon the territorial doctrine of *The Insular Cases*. Despite his adamant declaration that the Constitution protects resident aliens, Brewer maintained that, "The Constitution has no extraterritorial effect."<sup>247</sup> Brewer's dissent thus approaches a constitutional theory of implied membership, but ultimately falls short.

Justice Murphy attacked the territorial distinction in his dissent for *In re Yamashita*, laying the groundwork for a theory of implied membership. In *Yamashita*, *Quirin*, *Eisentrager*, and the cases dealing with indefinite detention at Guantanamo Bay, the government put forth two primary arguments. First, the government relied upon the territorial distinction of *The Insular Cases*. Second, the government claimed that even if the Fifth and Fourteenth Amendments guaranteed due process to foreigners, that military commissions — as opposed the public jury trials — could satisfy the requirements of due process. As Justice Murphy recognized, military commissions too often "disregard the procedural rights of an accused person...especially the due process clause of the Fifth Amendment."<sup>248</sup> According to Murphy, the constitutional protections afforded to the accused are "universal and indestructible."<sup>249</sup> Just as Lawson and Seidman describe *The Insular Cases* as a response to "felt needs," Justice Murphy attacked the military commission in *Yamashita* as the product of "popular passion or frenzy of the moment."<sup>250</sup> In Murphy's view, "No military necessity or other emergency demanded the suspension of the safeguards of due process."<sup>251</sup> Similar to Justices Mathews and Brewer, Murphy proposed that while the government action in dispute was "reminiscent of...[the policies of] less respected nations...such a procedure is unworthy of the tradition of our people...[and] the common ideals of mankind."<sup>252</sup>

Two years later, Justice Murphy joined Justice Rutledge's dissent for *Ahrens v. Clark*, which offered a stinging rebuke to the territorial distinction relied on by the government. According to Rutledge, "ruling...that the writ [of habeas corpus] can issue only when the place of confinement lies within the limits of the court's territorial jurisdiction...[allows a] purely geographic fact...[to strip the writ of] much of its historic efficacy."<sup>253</sup> Shortly thereafter, Justice Black provided a

246 Id at 737.

247 *Fong Yue Ting*, 149 US at 738.

248 *In re Yamashita*, 327 US at 26.

249 Id at 27.

250 Id at 26.

251 Id at 27.

252 *In re Yamashita*, 327 US at 28.

253 *Ahrens*, 335 US at 194-5.

full articulation of implied membership in his dissent for *Johnson v. Eisentrager*. According to Black, "United States citizenship...is a priceless treasure...[that] is enriched beyond price by our goal of equal justice under law — equal justice not for citizens alone, but for all persons coming within the ambit of our power."<sup>254</sup> Furthermore, Justice Black pointed out that in denying writs of habeas corpus to the petitioners in *Eisentrager*, the Court essentially convicted them of war crimes, despite not having sufficient evidence brought to trial. As Black explained,

Whether obedience to commands of their Japanese superiors would in itself constitute 'unlawful' belligerency in violation of the laws of war is not so simple a question as the Court assumes. The alleged circumstances, if proven, would place these Germans in much the same position as patriotic French, Dutch, or Norwegian soldiers who fought on with the British after their homelands officially surrendered to Nazi Germany.<sup>255</sup>

These dissents represent a realization that implied membership is necessary in order for punishment to be legitimate. Justice Black's declaration that the Constitution protects "all persons coming with the ambit of our power" captures this principle perfectly. The Supreme Court's endorsement of military commissions presents a serious problem because it gives illegitimate actions the appearance of political legitimacy.

Implied membership would have required the Court to issue quite different decisions in *Fong Yue Ting*, *Yamashita*, *Ahrens*, and *Eisentrager*. In *Quirin*, implied membership would not have substantially altered the outcome. Justice Mathews's majority opinion for *Yick Wo* is a perfect example of implied membership, and also helps to illuminate the deficiencies in the Court's approach to the other cases discussed in this section. As discussed earlier in the chapter, implied membership measures the political legitimacy of the state in accordance with the hypothetical consent of individuals against whom the government exercises coercive force. To adopt Rousseau's language, implied membership requires the general will of the social contract to take into account the wills of both citizens and aliens who become the targets of government force. Mathews's declaration that individual rights provisions such as the Fourteenth Amendment, "are universal in their application...without regard to difference of race, of color, or of nationality," is consistent with this principle.

A Court employing implied membership in its jurisprudence would adopt Mathews's approach from *Yick Wo* and apply it to *Fong Yue Ting*, *Yamashita*, *Ahrens*, *Quirin*, and *Eisentrager*. As recounted in the previous chapter, the Court opted instead for preexisting membership and balancing. This phenomenon is somewhat understandable for the Court's holdings in *Yamashita*, *Ahrens*, *Quirin*,

254 *Eisentrager*, 339 US at 791.

255 Id at 791.

and *Eisentrager*, given the pressures of World War II. In *Fong Yue Ting*, it is all too likely that the Court was influenced considerably by xenophobia and the precedents set in *The Insular Cases*. Even Justice Brewer, who authored the dissent for *Fong Yue Ting*, remarked, “this statute is directed only against the obnoxious Chinese, but... who shall say it will not be exercised tomorrow against other classes and other people?”<sup>256</sup> According to implied membership, the Court in *Fong Yue Ting* should have struck down the unlimited power of expulsion that the government claimed to possess. Furthermore, the Court should have gone beyond even Brewer’s dissent and discarded the idea that, “the Constitution has no extraterritorial effect.” Similarly, the Court should have followed Justice Rutledge’s dissent in *Ahrens*. Rutledge correctly recognized that the territorial distinction relied upon by the Court in *Ahrens* was arbitrary and unreasonable. As explained earlier, the Court’s refusal to apply the Constitution to aliens outside United States territory developed from the twisted logic of actual consent.

In *Yamashita*, *Quirin*, and *Eisentrager*, implied membership would have required the Court to extend the protections of the Suspension Clause and the Fifth and Sixth Amendments to the accused. As discussed in the previous chapter, the Supreme Court upheld the use of military commissions in all three cases, citing national security concerns in support of its conclusions. In *Quirin*, implied membership should not have produced a substantially different result since the German saboteurs were essentially caught in the act. However, the government would have had to prosecute the defendants in court, rather than by military commission. In contrast, Justice Murphy’s dissent in *Yamashita* and Justice Black’s dissent in *Eisentrager* suggest that the extension of constitutional protections to the accused may have allowed evidence to come to trial that would have changed the outcomes of the cases. Murphy worried that *Yamashita* was decided too quickly amidst the frenzy of the war, while Black insisted that the facts in *Eisentrager* were much more complicated than the government claimed. The tragedy of these cases is that whether or not the accused were in fact guilty, the government’s decision to withhold important legal protections from them makes it almost impossible to determine if the Court was right. Implied membership stipulates that the denial of constitutional protections to the accused in *Yamashita* and *Eisentrager* renders the government’s actions in those cases illegitimate.

Justice Black’s dissent in *Eisentrager* helps explain why the Court should have used implied membership to decide these cases. As mentioned above, a common theme in the Supreme Court opinions discussed in this section is that the Constitution requires the government of the United States to treat aliens in a manner that the authorities of other nations might not. In Justice Brewer’s words, “The Government of other nations have elastic power. Ours are fixed and bounded by a written Constitution.” Justice Black’s revelation in *Eisentrager* that, “United States citizenship... is enriched beyond price by our goal of equal justice under law... for

<sup>256</sup> *Fong Yue Ting*, 149 US at 743.

all persons coming within the ambit of our power” takes this concept and applies it to all punishment. Justice Black grasped the essence of implied membership: the hypothetical consent of every individual governed by the state matters. Extending constitutional protections to aliens — even overseas — ensures the legitimacy of the government in its relationship to all individuals against whom it uses coercive force.

#### D. *The Fourth Amendment*

The Fourth Amendment protects individuals from unreasonable searches and also from searches conducted without a warrant. In contrast to “the accused” of the Sixth Amendment and the “persons” referred to in the Fifth Amendment, the text of the Fourth Amendment establishes a “right of the people... against unreasonable searches and seizures.” In *Verdugo-Urquidez*, Chief Justice Rehnquist argued that this shift in language is an indication that the Fourth Amendment only applies to citizens, or to individuals who have otherwise established a “sufficient connection” to the United States. The Fourth Amendment is also distinct from the Fifth and Sixth Amendments in that it is primarily concerned with the treatment of individuals prior to capture, and also with the standards of evidence permissible at trial. In the same way that the United States government has argued at various points that it could satisfy the requirements of due process without granting a trial, a government could hypothetically extend the protections of the Fifth and Sixth Amendments to individuals without abiding by the constraints of the Fourth Amendment. In other words, it is not wholly unreasonable to treat the Fourth Amendment as a right or privilege beyond the guarantees of the Fifth and Sixth Amendments.

Justice Brennan’s arguments for applying the Fourth Amendment to aliens in *Verdugo-Urquidez* provide the most comprehensive articulation of implied membership in American constitutional law. Brennan’s dissent scathingly described the Court’s holding as an exercise in hypocrisy. In Brennan’s view, Chief Justice Rehnquist’s majority opinion amounted to the principle that, “although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws.”<sup>257</sup> In response to Rehnquist’s conclusion that the Fourth Amendment did not apply to *Verdugo-Urquidez* because he had not established a sufficient connection to the country, Brennan insisted that the United States had imposed a sufficient connection upon *Verdugo-Urquidez* by detaining him and seeking to convict him. As Brennan explained,

What the majority ignores... is the most obvious connection between *Verdugo-Urquidez* and the United States: he was investigated and is being

<sup>257</sup> *Verdugo-Urquidez*, 494 US at 279.

prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The ‘sufficient connection’ is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for the purposes of enforcing our laws. He has become, quite literally, one of the governed.<sup>258</sup>

Brennan recognized that nationality and location are irrelevant to the legitimacy of punishment. What matters is the extension of reasonable protections to the accused. In *Verdugo-Urquidez*, the government, by seeking to prosecute Verdugo-Urquidez in an American court, sought to represent the trial as a legitimate use of punishment. However, as Justice Brennan revealed in his dissenting opinion, the denial of Fourth Amendment rights to Verdugo-Urquidez — and the accompanying doctrine of punishing aliens without full constitutional constraints upon the government — made the government’s use of coercive force illegitimate.

Gerald Neuman uses Justice Brennan’s dissent in *Verdugo-Urquidez* to develop his mutuality of obligation model. Neuman focuses on Brennan’s discussion of the “basic notions of mutuality.”<sup>259</sup> After declaring that Verdugo-Urquidez is “a member of our community for the purposes of enforcing our laws,” Brennan also argues for the extension of constitutional rights to aliens on the basis of mutuality. According to Brennan,

Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive government behavior as are United States citizens investigated and prosecuted for the same alleged violations...When our Government holds these co-defendants to the same standards of conduct, the Fourth Amendment, which protects the citizen from unreasonable searches and seizures, should protect the foreign national as well.<sup>260</sup>

Neuman’s mutuality of obligation approach, “extends constitutional rights to aliens abroad only in those situations in which the United States claims an individual’s obedience to its commands on the basis of legitimate authority.”<sup>261</sup> In this light, Neuman’s model appears identical to implied membership. Indeed, in

258 *Verdugo-Urquidez*, 494 US at 283-84.

259 *Id.* at 284.

260 *Id.* at 285.

261 Neuman, *Strangers* at 99 (cited in note 36).

most situations, mutuality of obligation and implied membership would yield the same conclusions. However, Neuman does not appear to accept Brennan’s claim that aliens become members of the American community when the United States punishes them. According to Neuman, “the mutuality of obligation approach respects the written Constitution by making all the rights it contains presumptively applicable...[and] leav[ing] room for textual references or other inputs to rebut the presumption.”<sup>262</sup> Neuman limits the potential scope of application for his theory by adding this caveat to the mutuality of obligation model. It is not even clear that Neuman’s mutuality of obligation would lead to Brennan’s dissent in *Verdugo-Urquidez*. Were Chief Justice Rehnquist to reexamine his holding in light of Neuman’s model, he could argue that he used a textual reference — the use of the term “the people” in the Fourth Amendment — in order to rebut the presumption that the Constitution protects Verdugo-Urquidez against unreasonable searches and seizures. Neuman offers two examples of situations where mutuality of obligation would not apply. As Neuman explains, “the mutuality approach would not afford domestic constitutional rights to the residents of an adversary nation during armed hostilities; nor would it restrict an ideologically based policy of aid to foreign political parties.”<sup>263</sup> The denial of constitutional rights to citizens of an adversary nation during armed hostilities is consistent with the holdings in *Ahrens* and *Quirin*, indefinite detention at Guantanamo Bay, and Japanese internment. If the military commissions from *Yamashita* and *Eisenrager* had each been held only 1-2 years earlier, Neuman’s theory would support the Supreme Court’s decisions in those cases as well.

The crucial implication in Neuman’s model is that citizens are treated differently from aliens. His mutuality approach stipulates that most of the time when the government seeks to punish a foreigner, the government is temporarily obliged to extend constitutional protections to the accused. In contrast, implied membership follows Brennan’s revelation that whenever the government seeks to punish anyone, the target of government coercion is a member of the community for which the state exists. When the United States punishes someone, that person becomes a member of We the People, whose hypothetical consent and interests are incorporated into the general will or general good for which the social contract — in this case the Constitution — is established. The social contract and the Constitution are fundamentally for those upon whom the state seeks to impose legitimate coercion. Individuals who hold official citizenship are automatically in this group because they are the most immediate targets of government action. In Brennan’s words, “The focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not *against whom* these actions may be taken... [the] Bill of Rights...[is] a limitation on the Government’s conduct with respect to

262 Neuman, *Strangers* at 102 (cited in note 36).

263 *Id.* at 100.

all whom it seeks to govern.”<sup>264</sup>

When the government seeks impose coercive force upon anyone — alien or citizen — without reasonable protections, the government’s actions are not politically legitimate and should not be labeled as punishment; Hobbes’s term “hostile act” is an appropriate description for such a scenario. The government cannot claim — as the United States sought to in the Guantanamo cases — that it can provide foreigners with protections that are weaker than those enjoyed by citizens, but nonetheless reasonable. The fallacy of actual consent means that giving aliens weaker legal protections makes those protections unreasonable. To arbitrarily lessen an individual’s protections from government power is to make those protections unreasonable.

For these reasons, the Court in *Verdugo-Urquidez* should have adopted Brennan’s reasoning and ruled against the government. In the short-term, it may very well have been the case that a serious criminal would go unpunished. However, the government already felt that it had enough evidence to apprehend and extradite Verdugo-Urquidez before they raided his home in Mexico. It is thus possible that the government could have successfully prosecuted Verdugo-Urquidez even without the tally book recovered at his home. Furthermore, the consequences of Chief Justice Rehnquist’s majority opinion have proven to be much more enduring than whatever the failure to convict one individual might have been. By denying Verdugo-Urquidez the protections of the Fourth Amendment while prosecuting him using otherwise legitimate means, the United States government exercised illegitimate power under the guise of legitimate authority. Furthermore, Justice Rehnquist’s restrictive interpretation of the American social contract has yet to be overturned. His majority opinion in *Verdugo-Urquidez* is evidence of the unfortunate and enduring legacy of actual consent in American constitutional law.

#### E. Responses to Potential Criticism

There are two primary counterarguments to implied membership. The first is that implied membership is inflexible; the theory endangers the state by placing unrealistic constraints upon its coercive power. This is what Scalia had in mind when he declared in his dissenting opinion for *Rasul* that entertaining writs of habeas corpus submitted by Guantanamo detainees would have, “a potentially harmful effect upon the Nation’s conduct of a war.”<sup>265</sup> Two cases — *Korematsu v. United States* (1944) and *Ex Parte Milligan* (1866) — illustrate why this criticism fails.

In *Korematsu*, the Court upheld the constitutionality of World War II Japanese internment camps. The targets of government coercion included both citizens and foreigners. However, *Korematsu* is useful for understanding implied mem-

<sup>264</sup> *Verdugo-Urquidez*, 494 US at 288.

<sup>265</sup> *Rasul*, 542 US at 576.

bership because Justice Jackson’s dissent explains why the Constitution cannot be reconciled with unconstitutional military orders, even if they are deemed necessary for military success. On March 21st 1942, Congress passed legislation authorizing military commanders to establish military zones in the western United States from which they could exclude groups and individuals. Shortly thereafter, General DeWitt issued Civilian Exclusion Order No. 34, which “directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from [San Leandro, California].”<sup>266</sup> Justice Black began his opinion of the Court by noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”<sup>267</sup> Nevertheless, he and five other justices upheld General DeWitt’s order. In Black’s view, the Supreme Court is unable to “reject as unfounded the judgment of...military authorities and of Congress” during war.<sup>268</sup> As Justice Frankfurter explained in his concurring opinion, “the war power of the government is ‘the power to wage war successfully.’ Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless.”<sup>269</sup>

Justice Jackson provided an elegant solution to the dilemma faced by the Court in *Korematsu* by refusing to equate practical necessity with constitutionality. Jackson conceded that, “Defense measures will not, and often should not, be held within the limits that bind civil authority in peace.” Furthermore, Jackson acknowledged that, “No court can require...a [military] commander...to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be.” However, Jackson reasoned that, “a commander, in temporarily focusing the life of a community on defense, is carrying out a military program...[and] is not making law in the sense the courts know the term. He issues orders, and they may have certain authority as military commands, although they may be very bad as constitutional law.” According to Jackson, the majority erred by seeking to “confine military expedients by the Constitution.” Jackson pointed out that the logical extension of such an approach would “distort the Constitution to approve all that the military may deem expedient.”<sup>270</sup> Jackson concluded that even if practical necessity and the war power granted General DeWitt the military authority to issue Civilian Exclusion Order No. 34, the Court would be justified in ruling that the order was unconstitutional. In Jackson’s words,

Much is said of the danger to liberty from the Army program...But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order

<sup>266</sup> *Korematsu v. United States*, 323 US 214, 215-6 (1944).

<sup>267</sup> *Id.* at 216.

<sup>268</sup> *Id.* at 218.

<sup>269</sup> *Id.* at 224.

<sup>270</sup> *Korematsu*, 323 US at 245.

itself. A military order, however unconstitutional, is not apt to last longer than the military emergency...But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle...in criminal procedure...The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>271</sup>

The military may end up executing unconstitutional orders during the course of war. However, the Constitution should not be understood to sanction such actions. By its very nature, the Constitution seeks to limit power rather than expand it.

By distinguishing between legitimate and illegitimate exercises of coercive power, implied membership avoids the charge that it is dangerously inflexible. As a matter of practice, the state may end up exercising power during war for which it cannot claim legitimacy. Implied membership requires that when the state resorts to measures that would not stand the test of hypothetical consent, such actions are understood as illegitimate. Hobbes distinguishes between punishment and hostile actions in order to illustrate this point. For this reason, it is acceptable to kill a soldier during battle without bringing him to trial. However, Hobbes insists that both punishment and hostile action are legitimate because the sovereign possesses the legitimate authority to do whatever is necessary for the survival of the state. Implied membership rejects the claim that whatever is necessary for survival is legitimate. War is not an act of governance. In contrast, when the government seeks to punish an individual, it claims that its coercion is legitimate.

The distinction between illegitimate and legitimate power matters in this context for a number of reasons. First, the targets of illegitimate power have no duty to obey the state. Second, members of society may rightfully choose to punish individuals responsible for the exercise of illegitimate power. Even if those individuals are later pardoned or excused, the recognition that their actions were illegitimate is significant. As Justice Jackson warned in *Korematsu*, sanctioning an illegitimate power as legitimate makes it more likely that the state will resort to illegitimate means in the future. Finally, labeling a particular exercise of power as illegitimate may serve to charge the government with transgressing the moral standards of the community.

In the United States Constitution, the Suspension Clause imposes guidelines for when the government may temporarily cease to provide individuals with reasonable legal protections. The Suspension Clause states that, "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion, the public Safety may require it." In *Ex Parte Milligan*, the

<sup>271</sup> Id at 245-6.

Supreme Court correctly recognized the extreme importance of the Suspension Clause and its potential for abuse.<sup>272</sup> *Lambdin Milligan* was an American citizen who was convicted by a military commission and sentenced to death during the Civil War.<sup>273</sup> Justice Davis's majority opinion offered a stinging rebuke to claims of military necessity. As Davis explained, the Framers included the writ of habeas corpus in the Constitution because they "foresaw that troublous times would arise when rulers and people would...seek by sharp and decisive measures to accomplish ends deemed just and proper, and that principles of constitutional liberty would be in peril unless established by irrepealable law."<sup>274</sup> Davis excoriated the government for defending the use of military commissions. His opinion culminates in the following passage:

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that, in a time of war, the commander of an armed force...has the power, within the lines of his military district, to suspend all civil rights and their remedies and subject citizens, as well as soldiers, to the rule of his will, and, in the exercise of his lawful authority, cannot be restrained except by his superior officer or the President...If this position is sound to the extent claimed, then, when war exists...[a] commander...can, if he chooses...on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper...This statement...if true, [indicates that] republican government is a failure, and there is an end of liberty regulated by law...This nation, as experience has proved, cannot always remain at peace.<sup>275</sup>

While the facts in *Milligan* are constrained to the treatment of citizens, Davis's arguments point against the Court's holdings in *Quirin*, *Yamashita*, and *Eisentrager*, as well as the use of military commissions at Guantanamo.

Similar to Justice Jackson in *Korematsu*, Justice Davis acknowledged that military necessity might force the government to act in ways that would be unacceptable outside of war. However, Davis explained in detail how the Suspension Clause regulates this type of government conduct. According to Davis, the Constitution forbids the government from suspending habeas corpus unless there is an actual rebellion or invasion. Davis ruled that the government lacked the authority to suspend habeas corpus in Indiana, where the military commission convicted *Milligan*, because, "Martial law cannot arise from a threatened invasion."<sup>276</sup> Just

<sup>272</sup> *Ex Parte Milligan*, 71 US 2 (1866).

<sup>273</sup> Id at 108-09.

<sup>274</sup> *Milligan*, 71 US at 120.

<sup>275</sup> Id at 124-5.

<sup>276</sup> Id at 127.

as importantly, Milligan demonstrated that the Suspension Clause does not provide for the termination of the writ of habeas corpus or of intertwined rights, such as the right to a jury trial. As Davis explained,

It is essential to the safety of every government that, in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus...[However,] the Constitution... does not say [that], after a writ of habeas is denied a citizen, that he shall be tried otherwise than by the course of common law; if it had intended this result, it was easy, by the use of direct words, to have accomplished it.<sup>277</sup>

If the requirements of the Suspension Clause are met, the government may temporarily deny individuals habeas corpus, but once the invasion or rebellion has ceased, the government must extend full legal protections to those individuals. In Davis's words, "During the late wicked Rebellion...considerations of safety were mingled with the exercise of power...Now that the public safety is assured...[trials] can be decided without passion or the admixture of any element not required to form a legal judgment."<sup>278</sup> In this way, the Constitution places considerable restraints upon the potential exercise of illegitimate authority during war.

The Suspension Clause serves as the constitutional embodiment of implied membership. It expressly limits the denial of reasonable legal protections for the accused by requiring specific, extreme circumstances to arise in order for the government to withhold constitutional rights from detained individuals. Most importantly, the Suspension Clause makes clear that the government may only temporarily suspend access to constitutional protections. The absence of any reference to citizenship in the Suspension Clause requires proponents of preexisting membership and balancing to reach outside the Constitution to the illusion of actual consent in order to deny important legal protections to foreigners. Implied membership requires that the Suspension Clause apply to all individuals accused of crime. This interpretation is consistent with both the general understanding of the Constitution as a document concerned primarily with constraints upon the power of the government and with the language of the Suspension Clause.<sup>279</sup>

The second main objection to implied membership is that the social contract becomes meaningless if all individuals whom the state seeks to punish must be thought of as citizens. Treating a terror suspect as a citizen would seem to be a perverse doctrine to many people. According to the logic of actual consent, the

<sup>277</sup> *Milligan*, 71 US at 125-6.

<sup>278</sup> *Id* at 109.

<sup>279</sup> The Suspension Clause states that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." (The United States Constitution, Article I, § 9, cl. 2)

rights and privileges of citizenship are earned; an individual cannot earn these rights and privileges by committing crimes. This criticism misses the point. Were individuals to actually earn the rights of citizenship, some citizens might be more deserving than others of important legal protections. Implied membership recognizes that the official distinction of citizenship should be irrelevant for the purposes of punishment. However, citizenship and the social contract are still very much relevant in a theory of implied membership. Parties to the social contract must deliberate and enact policies in order for there to be any claim to legitimacy in the first place. Individuals do not earn their citizenship, but they may make their citizenship relevant through their participation in the political life of the social contract. Furthermore, official citizenship may be relevant as a necessary distinction for some government actions other than punishment. A requirement that individuals must hold official citizenship in order to hold public office is a reasonable method for ensuring that candidates are serious. In this case, implied membership does not require the government to treat citizens and aliens in the same manner because the government is not coercing the individuals it excludes from candidacy. Implied membership is not the same as the theory of universalism that Neuman criticizes. As explained in the previous chapter, universalism treats "all human beings on earth as subjects of the American social contract."<sup>280</sup> Implied membership treats all human beings whom the United States seeks to punish as members of the American social contract. Far from requiring that, "constitutional provisions...be interpreted as applicable to every person and at every place," implied membership only becomes relevant when the state seeks to punish an individual.<sup>281</sup> Finally, the social contract is still relevant in a theory of implied membership when the government carries out punishment because at its very essence, the social contract is a means for legitimizing the use of coercive force. In fact, the social contract is more relevant to punishment under a theory of implied membership because the reasonable constraints placed upon the government are not ignored when the target of government action is an alien. Implied membership ensures that reasonable protections from punishment are always a requirement of political legitimacy.

#### F. *Reexamining Guantanamo*

Implied membership views the practice of indefinite detention at Guantanamo Bay as an illegitimate exercise of coercive power. In each of the cases dealing with Guantanamo, the government relied heavily upon national security arguments and the Authorization for Use of Military Force (AUMF). Congress passed the AUMF shortly after the terrorist attacks of September 11th, 2001. The text of the AUMF purports to bestow authority upon the President,

<sup>280</sup> Neuman, *Strangers* at 109-10 (cited in note 36).

<sup>281</sup> *Id* at 6.

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organization or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>282</sup>

The government has offered scant evidence to supplement detentions made pursuant to the AUMF. In *Hamdi*, Justice O'Connor revealed that the "sole evidentiary support that the Government . . . provided to the courts for Hamdi's detention," was a statement submitted by a government official alleging that, "Hamdi 'traveled to Afghanistan' in July or August 2001, and . . . thereafter 'affiliated with a Taliban military unit and received weapons training.'" <sup>283</sup> Furthermore, the government has used the sweeping language of the AUMF to indefinitely detain individuals at Guantanamo who may have not even engaged in hostilities. As Kennedy observed in *Boumediene*, "Some of these individuals were apprehended on the battlefield in Afghanistan, [but] others [were apprehended] in places as far away as Bosnia and Gambia." Most importantly, each petitioner has maintained his innocence.<sup>284</sup>

According to implied membership, the practice of indefinite detention at the Guantanamo naval base is an illegitimate policy because the government withheld reasonable legal protections from the targets of coercive force. Justice Jackson's *Korematsu* dissent and Justice Davis's majority opinion for *Milligan* provide a blueprint for how implied membership would operate within the Constitution for the Guantanamo cases. Indefinite detention, like Japanese internment, is a rash and expedient military strategy that the Supreme Court should not seek to "confine . . . by the Constitution."<sup>285</sup> Instead, the Supreme Court should have ruled that the government's use of the naval base is unconstitutional, no matter what its practical appeal may be to members of the government or the military. At that point, the government would have had to either close down Guantanamo, or refuse to abide by the decision of the Supreme Court on the grounds that the threat posed by terrorism was so great that unconstitutional measures were necessary. This would have made for a more honest discussion of indefinite detention at Guantanamo.

Justice Davis's ruling in *Milligan* indicates that the only possible constitutional justification for indefinite detention is the Suspension Clause. However, the facts of the Guantanamo cases fail to meet the requirements of the Suspension Clause. As Justice Davis explained in *Milligan*, a suspension of the writ "cannot

282 *Boumediene*, 553 US at 733.

283 *Hamdi*, 542 US at 588.

284 *Boumediene*, 553 US at 735.

285 *Korematsu*, 323 US at 245.

arise from a threatened invasion."<sup>286</sup> Even if the requirements of the Suspension Clause were met, it would only allow the government to temporarily detain individuals. The Suspension Clause does not authorize the government to use military commissions.<sup>287</sup> Justice Scalia's dissenting opinion for *Hamdi* charts the proper course for the Court. In Scalia's words,

Where the government accuses a citizen of waging war against it, our Constitutional tradition has been to prosecute him in federal court for Treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, §9, cl. 2 allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause.<sup>288</sup>

According to implied membership, Scalia's reasoning must apply to aliens. Otherwise, the actions of the government fall short of the requirements of hypothetical consent and are thus illegitimate. That Scalia felt so strongly about the importance of extending constitutional provisions in *Hamdi* but not in *Rasul* points to both the persuasive power of actual consent as well as its potential for arbitrary and extreme results. Under a theory of implied membership, the hypothetical consent of the petitioners in all of the Guantanamo cases matter for the political legitimacy of the government's actions.

### G. Drones and Beyond

On February 4th 2013, NBC News disclosed a Justice Department memo in which attorneys from the Office of Legal Counsel, which provides legal advice to the White House, argue that it is constitutionally permissible for the United States to carry out drone strikes against American citizens in foreign countries.<sup>289</sup> The memo suggests that,

where the following three conditions are met, a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational

286 *Milligan*, 71 US at 127.

287 *Id* at 125-6.

288 *Hamdi*, 542 US at 615.

289 Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC News Investigations (NBC News February 4 2013), online at [http://openchannel.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite) (visited November 9, 2013).

leader of al-Qa'ida or an associated force would be lawful: (1) an informed high level official of the U.S. government has determined that the targeted individual poses an imminent threat...(2) capture is infeasible...and (3) the operation would be conducted in a manner consistent with the applicable law of war principles.<sup>290</sup>

The memo is a clear example of the balancing approach. In the style of *The Insular Cases*, the memo declares that, "The President has authority to respond to...[an] imminent threat...[due to his] constitutional responsibility to protect the country, [and] the inherent right of the United States to national defense under international law."<sup>291</sup> In short, the memo argues that constitutional protections such as the Fourth and Fifth Amendments are contextually dependent,<sup>292</sup> and that if the above three conditions are met, the use of lethal force on an American citizen without the extension of constitutional protections would amount to "a lawful act of national self defense."<sup>293</sup> Similar to the government's position in the Guantanamo cases, the Justice Department memo suffers from trying to "confine military expedients by the Constitution."<sup>294</sup> It is clear from the memo that the scenario contemplated is not an active battlefield, but rather a situation where "an informed high level official of the U.S. government" judges the guilt of a potential target. Recent comments by Senator Rand Paul hit at the central problem of drone strikes. In Paul's words,

[The President] is a politician. He was elected by a majority, but the majority doesn't get to decide who we execute. We have a process for deciding this. We have courts for deciding this...[When] you allow one man to accuse you in secret, you never get notified you have been accused... Your notification is the buzz of the propellers on the drone as it flies overhead in the second before you're killed... [When] people say, "Oh, the battlefield's come to America" and "the battlefield's everywhere...the war is limitless in time and scope," be worried, because your rights will not exist if you call America a battlefield for all time.<sup>295</sup>

In the same way that Justice Jackson argued that American citizenship is enriched

290 "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," Justice Department Memo, undated, 1.

291 "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," Justice Department Memo, undated, 1.

292 *Ibid*, 5-7.

293 "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," Justice Department Memo, undated, 1.

294 Korematsu, 323 US at 245.

295 Ashley Killough, "Rand Paul's #filibizzard filibuster," CNN, 6 March 2013, accessed online 21 March 2013, <http://politicalticker.blogs.cnn.com/2013/03/06/rand-pauls-filibizzard-filibuster/>.

by implied membership, Senator Paul's comments illustrate why American citizenship is diminished when the government withholds reasonable protections from the accused. The memo even states that "the condition that an operational leader present an 'imminent' threat...does not require...clear evidence...[because] the threat posed by al-Qa'ida...demands a broader concept of imminence."<sup>296</sup> It is thus clear that what the Justice Department memo claims is lawful is in fact an unconstitutional denial of legal protections. As Charlie Savage observed in a recent article, Administration lawyers are not simply proposing that the drone strikes are necessary, but also that they are "justifiable," and thus legitimate.<sup>297</sup> The correct interpretation of this scenario demanded by implied consent requires the government to concede that such actions are not constitutional. Normatively, this is appealing because the President should have to break the law in order to kill an individual outside the battlefield and without the intervention of the judiciary. The decision to kill someone illegitimately should include the risk that there will be legal consequences for those responsible for exercising illegitimate force. The President has taken a risk by carrying out drone strikes in such a manner. If there were no distinction between illegitimate and legitimate force, the government would be able to exercise limitless power with impunity. As is the case with Guantanamo, a more honest discussion of targeted killings would include an acknowledgement on the part of the government that it views the threat posed by terrorism as so great that unconstitutional measures are necessary.

Implied membership may also have implications for non-coercive government action. However, I tend to believe that this represents the type of hard case for which a model of hypothetical consent cannot provide clear answers. In *Plyler v. Doe* (1982), the Supreme Court forbade Texas from excluding the children of undocumented aliens from public schools.<sup>298</sup> Justice Brennan's opinion of the Court rested on the proposition that "the children's status as illegal aliens did not by itself afford the State a sufficient rational basis for denying the children the benefit of a public school education that was afforded as of right to other children in Texas."<sup>299</sup> The holding in *Plyler* provides at least one example of when implied membership should apply outside the realm of punishment. It may be that the denial of certain benefits amounts to or approaches the coercive force for which implied membership most certainly demands the equal treatment of all individuals.

At the very least, it is clear that the equal treatment of citizens and aliens

296 "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," Justice Department Memo, undated, 7.

297 Charlie Savage, *How a U.S. Citizen Came to Be in America's Cross Hairs*, (NY Times March 10, 2013) online at <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-america-cross-hairs.html?pagewanted=all> (visited April 2, 2013).

298 Steven G. Calabresi and Lena M. Barsky, "An Originalist Defense of *Plyler v. Doe*," unpublished manuscript, 1.

299 Steven G. Calabresi and Lena M. Barsky, "An Originalist Defense of *Plyler v. Doe*," unpublished manuscript, 1.

for the purposes of punishment is consistent with both social contract theory and the Constitution. A close look at the manner by which consent produces legitimacy reveals that implied membership represents a better understanding — if not a requirement — of both the social contract and the Constitution. Implied membership rejects the fallacy of actual consent, and as a result avoids arbitrary and unfair policies. Implied membership a better understanding of legitimacy, and should be expected to lead to better results in practice. Convenience, claims of necessity, and misguided reliance on actual consent have historically presented formidable obstacles to the realization of implied membership and continue to do so. However, proponents of implied membership have argued for its application throughout, providing hope that the equal treatment of the accused may someday become the norm.

## ARTICLE

### THE U.S. ASYLUM ADJUDICATION SYSTEM: FAILURE TO PROTECT

Caroline Cohn<sup>†</sup>

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#### I. INTRODUCTION

The United States has avowed—in international treaties and domestic legislation—its commitment to protecting persons fleeing persecution and its commitment to ensuring a fair trial and due process in its courts. However, throughout history and continuing into the present, legal scholars, advocacy groups, and legislators have criticized the United States for its adjudicatory failings in its trials for asylum seekers. Some domestic and international organizations have even labeled the United States' treatment of asylum seekers as constituting a human rights violation.<sup>1</sup> Despite these criticisms and other related calls for policy reform, effective systemic changes have yet to be implemented, and the asylum adjudication system continues to threaten the rights and safety of asylum seekers. This paper addresses two of the primary legal obstacles asylum seekers currently face in the United States: (1) a largely arbitrary judicial process, and (2) the difficulty of obtaining legal representation.<sup>2</sup>

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<sup>1</sup> *Report of the United Nations Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Addendum, Mission to the United States of America*, UN Human Rights Council, 7th sess. (Mar. 5, 2008), U.N. Doc. A/HRC/7/12/Add.2.

<sup>2</sup> See, for example, Philip G. Schrag, et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 *William & Mary Law Review* 651, (September 2010). Of the many obstacles asylum seekers face, I only focus on the two that have direct links to US domestic law and to international law signed and ratified by the United States. Among other obstacles faced by asylum seekers in the US legal system are (1) The United States does not provide government-funded interpretation at the asylum office, and interpreters at the immigration court are merely required to translate the questions directed to the applicant, rather than the full proceeding—the United States is an anomaly in this respect, as other western nations do provide at least some form of interpretation at both these stages and require the entire immigration court proceeding to be translated. (2) The United States has a one-year filing deadline to apply for asylum, which many asylum seekers are unaware of upon arriving in the United States. Since the filing deadline went into effect in 1998, about 21,000 refugees who would very likely have won asylum have been rejected.

## II. BRIEF HISTORY OF US ASYLUM LAW & EARLY CRITICISMS OF SYSTEMATIC BIAS

As early as the 1800s, the United States faced charges that racism and nativism were biasing its asylum policies, causing unequal acceptance and protection of those seeking refuge within its borders. The United States enacted various laws limiting the inflow of Asian as well as Southern and Eastern European immigrants and failed to admit Jewish refugees attempting to flee the Holocaust, which led to these accusations of racism and nativism.<sup>3</sup> Prior to 1948, the United States “had nothing resembling a refugee policy,” formally speaking, and instead passed immigration and asylum-related laws on an ad hoc basis. When the United States finally enacted its key piece of legislation for refugee protection<sup>4</sup>—the 1980 Refugee Act—its stated purpose was “to insure a fair and workable asylum policy which is consistent with [the United States’] tradition of welcoming the oppressed of other nations and with [its] obligations under international law.”<sup>5</sup> The Act granted either refugee status or asylum to individuals who had been, or feared they would be, persecuted in their country of origin on account of their race, religion, nationality, political opinion, and/or membership in a particular social group.<sup>6</sup> The Act also reaffirmed and enshrined into law the United States’ obligation to follow the international norm of non-refoulement, a norm that bans states from forcibly returning refugees to any place where their lives or personal freedom would be threatened on account of any of the abovementioned grounds.

Despite the reforms of the 1980 Refugee Act, the United States’ asylum policies continued to be criticized for being biased, particularly during the first decade after its implementation. During this first decade, the Cold War loomed large, and the United States was accused of viewing its asylum seekers through a strategic lens. Critics alleged that the United States offered asylum to individuals fleeing Soviet bloc countries for political and ideological reasons, rather than based on a neutral evaluation of the merits of their cases. More specifically, the United States readily accepted as refugees individuals who fled to the United States from Soviet bloc countries because it made the United States and its ideology “look good” and communism “look bad.” On the other hand, individuals who were fleeing the conflicts erupting in El Salvador and Guatemala during this same period often

3 Center for Civil and Human Rights, *Admission of Refugees and Asylees Under the Law: Reports on Current United States Procedures and Policies, and Their Origins, with Recommendations for Change* 1-7 (Notre Dame, IN: University of Notre Dame Press, 1991).

4 Karen Musalo, Jennifer Moore, and Richard A. Boswell, eds., *Refugee Law and Policy: A Comparative and International Approach* 66 (Durham, NC: Carolina Academic Press, 4th ed 2011).

5 *The Refugee Act of 1979, Committee on the Judiciary*. H.R. Rep No 608, 96th Cong, 1st Sess 67 (1979).

6 US Citizenship and Immigration Services, *Refugees and Asylum* (Department of Homeland Security September 1, 2011), online at <http://www.uscis.gov/humanitarian/refugees-asylum> (visited August 2013).

were not granted asylum because these regimes were friendly to the United States during the Cold War, and the United States did not want to risk destabilizing these strategic alliances. Thus, critics charged the United States with allowing ideological concerns to trump human rights concerns with respect to its refugee policy; it was systematically biasing its approvals or denials of asylum claims based on the asylum seeker’s country of origin, rather than on the merits of his or her case.<sup>7</sup>

In 1994, after the Cold War had ended, the United States reaffirmed its commitment to protecting individuals fleeing persecution when it ratified the Convention Against Torture, Article 3 of which similarly prevents states from returning or extraditing any person to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>8</sup> Despite such reaffirmations of the United States’ commitment to protecting asylum seekers, and attempts to solidify such promises on legal grounds, accusations that the US legal system unfairly treats and fails to protect asylum seekers continue to mount. Refugees continue to pile up.

## III. TODAY’S CRITICISMS

I have briefly recounted the history of criticisms of the US asylum adjudication system; now I will present recent criticisms. The present criticisms differ from past criticisms but equally call into question the United States’ assertion, upon enacting the 1980 Refugee Act, of having a “fair and workable asylum policy” that is “consistent with [its] tradition of welcoming the oppressed of other nations and with [its] obligations under international law.”

### A. Arbitrary Adjudication

Unlike previous charges of systematic bias—racist, nativist, political, ideological, or otherwise—the criticisms of the past couple of decades are suggestive of a more general dysfunction in the US asylum adjudication system. Investigative journalist Frederic Tulsy was the first to use statistical analyses while investigating failings of the asylum process in a 2000 report.<sup>9</sup> The data was based on an analysis of government statistics of 175,000 court cases.<sup>10</sup> His articles documented “extraordinary disparities in the records of immigration judges,” finding

7 Musalo, Moore, and Boswell, eds., *Refugee Law and Policy: A Comparative and International Approach* at 87 (cited in note 4).

8 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 3.1.

9 Frederic Tulsy *Judges Who Grant Asylum Show Extreme Differences in Rulings*, San Jose Mercury News (October 17, 2000). Tulsy’s articles incorporate the statistical analysis “conducted for the *Mercury News* by DMR Associates of Springfield, Va., an organization devoted to analyzing computer data for journalists.”

10 *Id.*

that “at one end of the spectrum, judges granted asylum in more than half the cases they had heard from 1995 through most of 1999...[and] at the other end, some judges granted asylum in less than 5 percent of the cases they heard, some less than 2 percent.”<sup>11</sup> He found that statistically significant disparities were the norm rather than the exception between immigration judges sitting in the same immigration courts, leading him to conclude that immigration courts were “one of the most arbitrary arenas in immigration policy ...where an asylum seeker’s hopes can depend as much on which judge hears the case as anything else.”<sup>12</sup> These stark disparities between grant and denial rates likely had dire consequences for asylum seekers. For example, Tulsy noted that “even when conditions in a country like Bosnia-Herzegovina or Somalia [we]re so dangerous [at the time of the trial] that most applicants win asylum, there [we]re many immigration judges who grant[ed] asylum in few or even no cases.”<sup>13</sup> Speculation suggests that many of these denied asylum seekers were returned to dangerous or even lethal situations, likely in violation of the United States’ legally binding non-refoulement obligations. Unfortunately, as I will show later on, these worrying disparities continue to persist and continue to have troubling implications for the safety of vulnerable individuals.

In 2002, a series of administrative measures were put in place that were intended to make the immigration adjudication system more efficient—not to cure its more disturbing deficiencies. Rather than improving efficiency, as intended, these measures instead shed light upon its systemic flaws. The efficiency measures allowed federal court judges to directly review decisions made by immigration judges. Rather alarmingly, the federal judges discovered inappropriate and even hostile treatment of asylum seekers by the immigration judges, which prompted an “unprecedented public rebuke of the immigration judges” in 2006 by then-Attorney General Gonzales.<sup>14</sup> He consequently called for “a comprehensive review of the immigration courts,” the results of which I will discuss later.<sup>15</sup>

This rebuke and subsequent call for review came shortly after a report was published by Transactional Records Access Clearinghouse (TRAC),<sup>16</sup> a research organization of Syracuse University, that revealed the persistence of judge-to-judge disparities in grant and denial rates. This report confirmed the persistence of the previously discussed Tulsy findings, which had been published several

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11 Id.

12 Id.

13 Tulsy, San Jose Mercury News (cited in note 9).

14 Musalo et. al, *Refugee Law and Policy* at 991 (cited in note 4).

15 Memorandum from Attorney General Alberto Gonzales to Immigration Judges (January 9, 2006), quoted in Id.

16 See Transactional Records Access Clearinghouse, *About Us*, TRAC (Syracuse University 2012), online at <http://trac.syr.edu/about/TRACgeneral.html> (visited August 2013). (“The Transactional Records Access Clearinghouse (TRAC) is a data gathering, data research and data distribution organization at Syracuse University.”)

years earlier.<sup>17</sup> It is important to note that TRAC only compared the denial rates of judges who decided a large number of cases and who worked in the same immigration court (there are just under sixty immigration courts in the United States in total). TRAC did so because cases that go into each court are assigned at random among the court’s judges, which ensures that each judge will have roughly the same proportion of asylum seekers with valid and invalid claims as every other judge sitting on the same court.<sup>18</sup> Thus, the differences documented in the denial rates among judges can be considered statistically significant “disparities” that “cannot be explained by differences in the legitimacy of asylum seekers’ claims.”<sup>19</sup>

In August of 2006, shortly after TRAC published its report, Attorney General Gonzales ordered the Executive Office for Immigration Review (EOIR) to undertake its own study of the judge-to-judge asylum denial rates documented by TRAC as a component of the “comprehensive review” of the immigration courts he had ordered.<sup>20</sup> The EOIR’s independent study confirmed TRAC’s report, finding that “some judges had inexplicably low denial rates while others were unusually high.”<sup>21</sup> Later, the Government Accountability Office (GAO)<sup>22</sup> also conducted its own study, which it published in September 2008. This study further confirmed the existence of the widespread decision disparities that had by then already been independently documented by Tulsy, TRAC, and the EOIR.<sup>23</sup>

### 1. Initial Reforms, Persisting Disparities

With such clear and consistent evidence of a problem, reforms were finally called for in 2006. The EOIR instituted additional training for immigration judges and ordered judges with unusually high and low asylum denial rates to be moni-

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17 TRAC, *Immigration Judges*, (Syracuse University July 31, 2006), online at <http://trac.syr.edu/immigration/reports/160/> (visited August 2013).

18 Comparing solely the denial rates of judges sitting in the same court controls for confounding variables that may be introduced by the particular city in which a court is located and the particular types of asylum seekers these different locations draw. For example, it would not be meaningful to compare the denial rates of an immigration judge sitting in a court in Florida with the rates of a judge in California, as there may be legitimate reasons why their rates would differ considerably, related to the merits of the asylum seekers’ cases.

19 TRAC, *Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective*, (Syracuse University September 2, 2010), online at <http://trac.syr.edu/immigration/reports/240/> (visited August 2013)

20 Id.

21 Id.

22 See U.S. Government Accountability Office, *About GAO*, (U.S. GAO 2013), online at <http://www.gao.gov/about/index.html> (visited June 30, 2013). (“The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the ‘congressional watchdog,’ GAO investigates how the federal government spends taxpayer dollars.”)

23 U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, (U.S. GAO September 2008), online at <http://www.gao.gov/new.items/d08940.pdf> (visited August 2013).

tored.<sup>24</sup> These measures, as well as the increased official and public attention on immigration judges, *did* appear to have an impact on reducing disparity rates, according to a follow-up study TRAC conducted. TRAC compared asylum decision disparities between 2008–2010 with the levels reported just prior to the Attorney General’s directive, finding that on average disparity levels had dropped by about 10 percent.<sup>25</sup> Despite these improvements, high disparities continue to exist across the board. As TRAC noted in its 2010 report, “the unfortunate bottom line remains. A very important element in deciding whether an asylum seeker is granted or denied asylum has little to do with the legitimacy of his or her claims, but a great deal to do with the particular judge to whom the asylum seeker was assigned.”<sup>26</sup>

Scholars suggest several factors to explain or partially account for the well-documented decision disparities, including (1) the “virtual impunity” that immigration judges have had for their seeming failures and documented misconduct, (2) the lack of an adequate complaint process against immigration judges, (3) the “lack of independence arising from the placement of immigration judges within the Justice Department,” (4) the “politicization of the immigration bench . . . during the Bush Administration,” and (5) the “crushing workload of immigration judges.”<sup>27</sup> A critical similarity among these proposed causal factors is that none has any relation

24 TRAC, *Asylum Denial Rate Reaches All Time Low* (cited in note 19).

25 See *Id.* (“Beginning in 2006, TRAC developed an online system where Immigration Judges themselves were able to compare their own asylum denial rates with those of every other judge—information they previously had not been able to access. . . . Reports on the judges were published annually beginning in 2006. This means that since that time practitioners, immigration rights groups, the media and the judges themselves have been able to easily check an important aspect of how these officials were performing.”)

26 *Id.*

27 Musalo et. al, *Refugee Law and Policy* at 1009 (cited in note 4). See for summary of scholars’ views and findings on this matter, which I have further condensed above. Regarding the lack of an adequate complaint process, Musalo et. al cite a 2005 unpublished paper by Shamus Roller, in which he notes, “Although there is a complaint process, advocates consider it to be totally inadequate. Complaints against immigration judges are to be handled by the Office of the Chief Immigration Judge and the Office of Professional Responsibility. There is very little transparency, and advocates have reported that they ‘rarely received even the most cursory of responses.’” This factor helps to explain charges of immigration judges’ “virtual impunity.” Musalo et. al cite from a 2008 Department of Justice source that asserts that “the selection of immigration judge [*sic*] was improperly influenced by political considerations, with judges being selected on the basis of their loyalty to President George W. Bush, or the depth of their conservative political beliefs.” Finally, Musalo et. al cite a 2009 article by Dana Leigh Marks which reports that “immigration judges handle an average of around 350,000 cases a year, and do not have the resources that federal court judges have to handle the huge volume of matters on their docket.” They also note that “a recent study found a high level of stress and burnout among immigration judges, . . . seen as another factor which could explain some of the troubling behavior and decision-making which has recently drawn so much attention.” See, also, Tulsy, San Jose Mercury News (cited in note 9). Tulsy’s article reports that “several [immigration judges] describe feeling pressured in their work, not to approve or deny, but to hear cases quickly.” Tulsy goes on to quote Judge Bruce W. Solow of the immigration court in Miami, who testified at a Labor Department hearing that focused on the nature of immigration judges’ responsibilities, stating, “Quite frankly, there is an impetus (*sic*) on productivity.”

to the merits of the asylum seeker’s case, and should therefore have no bearing on the verdict. Undue influence of any of these factors is a concerning prospect.

### B. Difficulty Obtaining Legal Counsel

Another feature that the abovementioned causal factors have in common is that the judges themselves are at least partially responsible for mishandling asylum claims. However, in addition to which judge hears the case, another factor that has been found to significantly affect trial outcomes is whether or not the asylum seeker has legal representation. A 2007 article published in the *California Law Review* noted, “the empirical data and statistical evidence overwhelmingly demonstrates that represented asylum seekers are far more likely to receive asylum than pro se asylum applicants.”<sup>28</sup> For example, the study notes that “EOIR statistics of Immigration Court representation in San Francisco . . . from fiscal year 2001 show that 46.1% of nondetained represented respondents received some form of relief . . . while 3.2% of nondetained, unrepresented respondents were granted relief.” Furthermore, the report states that this stark contrast is far from an anomaly; rather, it is “evident across the board in metropolitan areas where EOIR keeps stats.” More recently, in its 2010 report, TRAC came to the same conclusion, noting, “only 11 percent of those without legal representation were granted asylum; with legal representation the odds rose to 54 percent.”<sup>29</sup>

Unfortunately, according to section 292 of the United States’ Immigration and Nationality Act (the collection of statutes which governs US immigration law),<sup>30</sup> asylum seekers have a right to legal representation but only at “no expense to the government.” In other words, asylum seekers, who often cannot afford or gain access to legal counsel, may not be assigned a public attorney; the result is that many are unrepresented in immigration court.<sup>31</sup> Given the important influence that counsel has been found to have on outcomes,<sup>32</sup> as well as the importance placed in the United States on the right to representation, this section of the law has been the focus of much recent criticism and related calls for reform. Margaret H. Taylor is one of many scholars who argues the “qualified right” to counsel afforded to asylum seekers by existing law “means very little to aliens who cannot

28 Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seeker*, 95 *California Law Review* 169, 189-90 (February 2007).

29 TRAC, *Asylum Denial Rate Reaches All Time Low*.

30 8 USC § 1362

31 TRAC, *Asylum Denial Rate Reaches All Time Low* (cited in note 19). As of 2010, the proportion of asylum seekers who obtain legal representation has risen to 91%. Despite the increase, a large number continue to go unrepresented. In 2009, for example, almost 2000 asylum seekers were unrepresented in immigration court.

32 While there could be a third variable at work that leads the same asylum seekers who attain representation to be the ones who are granted asylum, such as an economic or cultural factor, it is likely that there is a causal relationship between being legally represented and being granted asylum.

afford a lawyer and are unable to find a volunteer attorney.”<sup>33</sup> Several features of the asylum adjudication process itself, such as the complexity of immigration and asylum law and the fact-specific nature of the investigation, have been pointed to as further grounds for the necessity of counsel to ensure a fair trial and a just outcome.<sup>34</sup> Some scholars and advocates assert that counsel is more necessary in asylum cases than in other types of court cases due to the cultural and language barriers faced by many asylum seekers.<sup>35</sup>

This parameter has even been criticized as being in direct violation of the United States’ human rights obligations under international and domestic law. For example, the Advocates for Human Rights, a US based non-governmental organization, notes that the United States’ “failure to ensure that all non-citizens have access to representation during their expulsion hearings violates ICCPR<sup>36</sup> [International Covenant on Civil and Political Rights] article 13.”<sup>37</sup> This article states that “an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and *shall ... be represented for the purpose* before ... the competent authority.”<sup>38</sup> The Advocates for Human Rights goes on to clarify that the UN Human Rights Committee interprets the phrase “lawfully in the territory” as including “non-citizens who wish to challenge the validity of the deportation order against them,”<sup>39</sup> which would include all asylum seekers.

The United Nations High Commissioner for Refugees’ (UNHCR) Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers also recognizes the importance of legal representation for asylum seekers and even explicitly recommends providing free counsel to asylum seekers. While not legally binding, these are important international guidelines followed by most of the states party to the 1951 Convention Relating to the Status of Refugees and the related 1967 Protocol. The United States is a party to the latter, and US immigration judges have often cited these Guidelines when handing down their decisions in asylum cases. These Guidelines recognize that “where possible, [asylum seekers] should receive free legal assistance.”<sup>40</sup> In line with these

33 Margaret H. Taylor, *Promoting Legal Representation For Detained Aliens: Litigation and Administrative Reform*, 29 Connecticut Law Review 1647, 1650 (1996-1997).

34 Pitsker, 95 California Law Review at 189 (cited in note 28).

35 *Id.* at 191.

36 The ICCPR is an international treaty that the United States signed in 1977 and ratified in 1992, thereby making it legally binding in the United States.

37 *The Refugee Protection Act of 2010, Hearings on S. 3113 before the Senate Judiciary Committee*, 111<sup>th</sup> Cong, 2d Sess 5 (May 19, 2010) (Written statement of the Advocates for Human Rights).

38 *International Covenant on Civil and Political Rights*, 999 UNTS 171 (1966) (emphasis added).

39 *The Refugee Protection Act of 2010, Hearings on S. 3113 before the Senate Judiciary Committee*, 111<sup>th</sup> Cong, 2d Sess 5 (May 19, 2010) (Written statement of the Advocates for Human Rights).

40 UNHCR’s *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 6 (UN High Commissioner for Refugees (UNHCR) February 26, 1999), online at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3c2b3f844>.

Guidelines, a number of Western, democratic states—including Canada, Austria, Belgium, Denmark, Finland, Germany, the Netherlands, Sweden, and the United Kingdom—provide representation to asylum seekers who would otherwise be unrepresented, seemingly recognizing the importance representation plays in fair proceedings.<sup>41</sup> The United States’ failure to provide government-funded counsel to asylum seekers makes it a notable anomaly among western nations who have taken similar vows to protect asylum seekers. This comparison to other nations underscores the United States’ shortcomings concerning its asylum policies governing provision of legal counsel.

### C. Additional Obstacle to Attaining Legal Counsel: Detention Conditions

The UNHCR Guidelines furthermore state that “detention should in no way constitute an obstacle to the asylum-seekers’ possibilities to pursue their asylum application.” Several critics argue that, together, detention conditions for asylum seekers and lack of government-funded counsel constitute a violation of the Due Process Clause of the Fifth Amendment to the Constitution, which “protects against undue interference with the right to counsel in deportation and ... removal proceedings.”<sup>42</sup> The particular nature of immigrant detention is said to qualify as “undue interference” with this right because detention by the Immigration and Naturalization Services (INS) often involves “confine[ment] at remote facilities with restrictive phone and visitation policies,” pressure and sometimes coercion “to abandon [the] search for a lawyer by INS officers and immigration judges ... intent on processing them quickly,” and “access to counsel and legal materials... [that] falls far below that which is minimally acceptable even for correctional institutions.”<sup>43</sup>

The UN’s Special Rapporteur on the Human Rights of Migrants similarly noted in his 2008 report that the particular circumstances of detention in the United States for asylum seekers, combined with the lack of government-funded representation, constitute de facto denial of right to counsel, which he notes is a “due process right that is fundamental to ensuring fairness and justice.”<sup>44</sup> Echoing American advocates, he identifies the remoteness of immigrant detention facilities as well as many facilities’ inflexible visitation schedules and advance notice schedule requirements as major obstacles to accessing legal counsel. And he indicates an additional obstacle that detention poses to accessing legal representation: the impact it has on one’s ability to earn income. Asylum seekers are affected by this more so than are many others in detention, as the duration of detention for immigrants be-

41 Musalo, *Refugee Law and Policy* at 946 (cited in note 4).

42 Taylor, 29 Connecticut Law Review at 1660 (cited in note 33).

43 *Id.* at 1651.

44 Report of the Special Rapporteur on the human rights of migrants A/HRC/7/12/Add.2 at 25 (cited in note 1).

fore their trial is often longer than it is for non-immigrant detainees. These lengthy detentions stem from a slow bureaucratic process and time requirements that are more lax on charging asylum seekers with an offense, since immigration-related offenses are considered civil rather than criminal charges.

#### D. Calls for & Objections to Government Provision of Counsel

Unsurprisingly, government-funded and appointed counsel has been a major theme among proposals for US asylum reform.<sup>45</sup> A 2010 report by the American Bar Association (ABA), for example, recommends government-funded counsel for asylum seekers who cannot obtain representation and suggests eliminating the “no expense to the government” clause of section 292 of the INA. In their widely used law school casebook, *Refugee Law and Policy*, Karen Musalo et. al similarly argue that “in light of the issues at stake for asylum seekers, and the difference that an attorney may make, considerations of fairness would argue for the provision of counsel at government expense to those asylum seekers who are unable to afford private counsel or secure *pro bono* representation.”<sup>46</sup> The Refugee Protection Act of 2013, which was still being considered in the Senate at the time of writing this paper—as well as its many similar precursors, none of which were enacted—explicitly calls for an insertion into the current INA that would reform section 292 to allow that “the Attorney General, or the designee of the Attorney General, may appoint counsel to represent an alien if the fair resolution or effective adjudication of the proceedings would be served by appointment of counsel.”<sup>47</sup>

Opponents of providing counsel at government expense often cite resistance to further burdening an already overburdened system with the costs associated with providing legal counsel. However, several scholars and advocacy groups argue that providing representation at government expense might actually be more cost effective than the status quo; for example, an article in the *Georgetown Immigration Law Journal* notes that many “adjudicators and practitioners believe when aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system.”<sup>48</sup> The ABA similarly asserts in its 2010 report, “Increased representation of noncitizens has the potential to benefit both these individuals and other stakeholders in the removal adjudication system by

45 *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, (ABA Publishing 2010), online at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf).

46 Musalo, *Refugee Law and Policy* at 950-951 (cited in note 4).

47 Refugee Protection Act of 2013, S. 645, 113<sup>th</sup> Cong, 1<sup>st</sup> Sess Senate Judiciary Committee (March 21, 2013), sec. 6.

48 Susan F. Martin, Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, *Georgetown Immigration Law Journal*, 14 (595).

making the system not only fairer, but also more efficient.”<sup>49</sup> But it is difficult to test these claims, and there has not yet been a robust study concerning relative cost effectiveness. However, in an article in the Opinion Pages of the *New York Times*, the director of Human Rights Watch’s refugee program points out the *human* in addition to the economic costs involved: “In truth, a system that in effect promotes bad legal advice not only does a disservice to refugees, with potentially life-and-death consequences, but also ends up costing the government by clogging the system with erroneous decisions and inefficiencies.”<sup>50</sup>

Another concern held by advocates of stricter rules on asylum involves the difficulty of distinguishing between economic migrants and asylum seekers. It is often argued that many people who seek refuge in the United States are frauds—economic migrants seeking prosperity in the United States, not individuals seeking refuge from persecution or torture. They therefore resist spending more resources on providing government-funded counsel for people whom they doubt are bona fide refugees and whose court cases are already viewed as wasting government resources. However, many scholars, activists, and even policymakers on the other side share the view that when one considers the potential *non-monetary* cost to a genuine asylum seeker—with the risk of an erroneous decision spelling deportation to his or her persecution or even death—this cost far outweighs the government’s interest in avoiding administrative or fiscal burdens.<sup>51</sup>

#### IV. CONCLUSION: PROSPECTS FOR REFORM?

There has been consistent documentation of the failings of the US asylum adjudication system, accompanied by various calls for reforms, by certain policymakers, scholars, advocacy groups, and even some international governmental organizations. However, until recently, the quick dismissals of proposed legislation, the relative lack of publicity of this issue, and the related lack of appeals among constituents for reform suggested that changes to the asylum system were not imminent or likely. The aforementioned Refugee Protection Act of 2013, for example, has very little chance of becoming law. It was referred to a Senate committee in March of 2013 and has received little to no attention since then. Indeed, asylum reform—which by definition has its greatest impact on non-US citizens—has been unable to attract a large constituency of American voters who might be able to pressure Congress into achieving reform.

49 *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 5-3 (ABA Publishing 2010), online at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf).

50 Bill Fredlick, *The Right to Representation* (The New York Times July 12, 2011), online at <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/asylum-seekers-the-right-to-representation>.

51 Musalo, *Refugee Law and Policy* at 951 (cited in note 4).

The summer of 2013 raised hope for asylum reform, as a surge of publicity surrounded the Immigration Bill being considered in Congress. This bill, which passed in the Senate in late June 2013, contains many provisions that would affect the experience of asylum seekers in the US legal system. Human Rights First, a prominent nonprofit advocacy group, praised the Senate's version of the Immigration Bill, saying, "the bill represents significant progress to improve U.S. asylum and refugee programs."<sup>52</sup> Human Rights First also noted that the bill "contains provisions that will improve access to counsel for vulnerable populations, expand the cost-efficient Legal Orientation Program that provides a lifeline to immigrants in detention, and increase the use of cost-saving and humane alternatives to detention." These provisions, if included in the final version of the bill, would directly address several of the issues with the asylum adjudication system that are discussed in this paper.

However, the prospect that these provisions will be included in a final bill is becoming increasingly unlikely. If an immigration reform bill is to become law, identical versions of the bill must pass in both the Senate and in the House of Representatives, and then be signed into law by the President. House Speaker Boehner already made clear that the House has "no intention of ever going to conference on the Senate bill" as he spoke to reporters on Capitol Hill in mid-November, meaning a compromise version of the Senate bill is highly dubious.<sup>53</sup> Whether an immigration reform bill will be passed *at all* by the current, highly polarized Congress hangs very much in doubt, and it is almost certain that if a bill is to pass, it will not be nearly as liberal as the Senate's version that has been so heavily praised by asylum reform advocates. Indeed, there has been particular opposition by members of the conservative House to the provisions of the Senate's bill that are viewed as "more lenient" toward noncitizens.

Despite the hopes raised this past summer for meaningful reform of the asylum adjudication system to take place on the coattails of broader immigration reform, prospects for reform have again been thwarted. The political odds indeed seem stacked against it, and it is unclear how and when they might be overcome in the future.

<sup>52</sup> Senate Immigration Bill Moves Forward with Protections for Refugees, Human Rights First (Human Rights First June 24, 2013), online at <http://www.humanrightsfirst.org/2013/06/24/senate-immigration-bill-moves-forward-with-protections-for-refugees/>.

<sup>53</sup> Molly Ball, *What Happened to Immigration Reform?*, (The Atlantic November 22, 2013), online at <http://www.theatlantic.com/politics/archive/2013/11/what-happened-to-immigration-reform/281705/>.

## ARTICLE

### COOLIES, WHITE SLAVES, AND PURITY CRUSADES: THE RISE OF MORALITY IN U.S. PROSTITUTION LEGISLATION FROM RECONSTRUCTION TO THE PROGRESSIVE ERA

Tierney O'Rourke<sup>†</sup>

In his 1869 utilitarian opus, *On Liberty*, John Stuart Mill examined the relationship between state authority and personal freedom. Integral to his theory was the role of morality in state action, on which he concludes: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because . . . in the opinions of others, to do so would be wise or even right."<sup>1</sup> However, time has shown that American society has largely rejected Mill's conclusion, as evidenced by its preoccupation with a moralized and moralizing civilization. This fixation is best illustrated by the complex history of prostitution in the United States. Not only does this history expose an American obsession with public and private morality, but it also lays bare the innate tension between social control and civil liberties, as well as the imbrications of race and gender with the creation of public policy. Most importantly, it reveals the inextricable role of morality as justification for the maintenance of a traditional social order.

The years between 1870 and 1915 saw the most volatile period in the history of American prostitution as a moral panic gripped the nation and spawned targeted attacks on vice and corruption in cities across the country. Recognizing massive social hysteria, the federal government quickly took up the cause, passing first the Page Act in 1875, and then the Mann Act in 1910. While on the surface both acts appear to be merely federal measures against the spread of prostitution and vice in American society, even a cursory analysis reveals that both were thinly veiled efforts to stymie shifting gender and race relations that were stimulated

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<sup>1</sup> John Stuart and David Spitz, *On Liberty: A Norton Critical Edition* § I at 10-11 (W.W. Norton 1975).

by widespread immigration, industrialization, and urbanization. As sociologists Brian Donovan and Tori Barnes-Brus explain in their essay, “Narratives of Sexual Consent and Coercion,” “laws against prostitution are created and used in specific cultural contexts to serve agendas that have less to do with illegal sex and more to do with maintaining social hierarchies marked by gender, race, and ethnicity.”<sup>2</sup> The Page and Mann Acts are no exceptions; both employed highly ambiguous language that gave the courts unprecedented power to take legal action against those who deviated from accepted gender, racial, and sexual norms. Driven by social anxieties concerning the shifting sociopolitical landscape, turn-of-the-century prostitution legislation relied increasingly on moral rhetoric that shielded legislative intent and thereby enabled prostitution legislation to encroach on civil liberties and function as a vehicle for social control.

Passed in 1875, the Page Act came about at the tail end of American Reconstruction during a radical shift in American society’s notions of civil rights and civil liberties. While some legislation, namely the Fourteenth Amendment, sought to expand citizenship and civil rights, other legislation, including the Page Act, sought to maintain the status quo by restricting the rights of certain groups and by narrowing the definition of what it meant to be “American.” Building on white America’s fears about the social and economic ramifications of emancipation and black enfranchisement, Reconstruction Era legislation often associated social ailments with a specific racial or ethnic group. U.S. legislators had ample opportunity to link such ailments with incoming immigrants, given the unprecedented levels of “new” immigration from Asia, Mexico, and Eastern and Southern Europe at the end of the nineteenth century.

In the American West, Chinese laborers comprised the vast majority of the immigrant population and were therefore associated with instances of vice and “immorality” in small laboring towns along the West Coast. Chinese immigrants rarely entered the country in family units; men were predominately single laborers who sought economic opportunity, while women sought positions as domestic servants in American households. The lack of familial ties amongst Chinese immigrants distinguished them from “mainstream” American patriarchy and allowed American politicians, legislators, and social reformers to hold “deviant” Chinese immigrants responsible for the vice rampant in laboring communities, including prostitution. The Workingman’s Party, which protected the interests of white laborers in response to the massive influx of inexpensive Chinese labor, went so far as to declare that Chinese prostitutes were responsible for nine-tenths of the cases of syphilis in California.<sup>3</sup>

Social reformers, on the other hand, sought to draw national attention to

<sup>2</sup> Brian Donovan and Tori Barnes-Brus, *Narratives of Sexual Consent and Coercion: Forced Prostitution Trials in Progressive-Era New York City*, 36 L & Soc Inquiry 597, 619 (2011).

<sup>3</sup> Brian Donovan, *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917* ch 6 at 111 (University of Illinois 2006).

the pervasive social depravity in immigrant communities. In his 1913 exposé, “White Slave Traffic,” the prominent Bostonian reformer O. Edward Janney painted a vivid and highly-racialized picture of the evils of the “Chinaman’s trade:” “In many cities on the Pacific Coast...many slave-pens for women have been built in the reconstructed Chinatown.... The women have little air, and are rarely allowed to leave their rooms.... Are they not slaves – literally slaves? How hopeless and helpless is the condition of those Chinese slave girls, no enlightened white woman can realize.”<sup>4</sup> Not only did Janney portray the racial “other” as the source of vice, but he also juxtaposed the “enlightened” and pure white woman with the down-trodden and enslaved Chinese girl, evoking fresh notions of slavery and racial anxiety in Reconstruction Era America. Other accounts focused on the interracial nature of Chinese vice districts populated by white clients and “colored” prostitutes, heightening social fears of racial mixing and thus drawing renewed interest from reformers.<sup>5</sup>

Percolating through the American conscience, these narratives fueled anti-Chinese sentiment and “helped shore up the political and social dominance of native-born white over Chinese immigrants.”<sup>6</sup> Additionally, they brought immigration to the forefront of political discussion and paved way for early efforts to codify, on a federal scale, prevailing moral and social mores in the United States. Prostitution served as the prime subject for a legal attack on public immorality, as it stood at the nexus of immigration and social vice. The Page Act of 1875 marked the first federal attempt to regulate prostitution, which accorded the federal government a say in American morality. While often cited exclusively as an immigration act, the Page Act focused almost entirely on immigration as a conduit for prostitution. Thrice the one-page document referenced prostitution: first, it excluded from the United States any “cooly,” or any “subject of China, Japan, or any Oriental country” who had “entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes;”<sup>7</sup> second, it deemed the “importation into the United States of women for the purposes of prostitution” a felony;<sup>8</sup> and third, it deemed “women imported for the purposes of prostitution” a special class of “obnoxious persons” forever barred from entering the U.S.<sup>9</sup> In effect, these three clauses generalized all immigrants of Asian origin, stigmatized them as carriers of vice and crime, and labeled Asian women as particularly immoral.

In addition to the racist and nativist rhetoric inhering in the term “cooly,” the Page Act employed vague language that lent itself generously to a broad

<sup>4</sup> O. Edward Janney, *White Slave Traffic*, in Thomas A. Foster, ed, *Documenting Intimate Matters: Primary Sources for a History of Sexuality in America* 112, 112 (University of Chicago 2012).

<sup>5</sup> Donovan, *White Slave Crusades* ch 6 at 112 (cited in note 3).

<sup>6</sup> Id at 110.

<sup>7</sup> Page Act of 1875 § 1, ch 141, 18 Stat 477.

<sup>8</sup> Page Act of 1875 § 3, ch 141, 18 Stat 477.

<sup>9</sup> Page Act of 1875 § 5, ch 141, 18 Stat 477-478.

and discriminatory application by the courts. By failing to define “lewd” and “immoral,” U.S. legislators left the act amenable to the interpretation of “xenophobic courts” that “supported the overwhelming anti-Chinese sentiments of native-born Americans.”<sup>10</sup> In turn, court rulings inextricably linked immigrants to vice and prostitution; the Act’s reliance on morality throughout the text was key in creating a space and justification for such discriminatory outcomes. Further, despite the relatively limited scope of the Page Act, it left a legacy of national importance that “paired immigration control with morals control.”<sup>11</sup> This relationship, as well as the role of morality in its creation, would be expanded and strengthened in the coming decades as moral and purity reformers gained social and political clout, and as social anxiety over immigration reached an apex.

In his book, *The Response to Prostitution in the Progressive Era*, historian Mark Thomas Connelly argues that American society at the turn of the century was driven by a desire to reinstate a strain of Jacksonian values known as “civilized morality,” which sought to homogenize “moral and cultural values, sexual and economic roles, religious sanctions, hygienic rules, and idealized behavioral patterns” across many ethnic groups living within the United States.<sup>12</sup> At the core of “civilized morality” was a deep commitment to progress via individual economic and social advancement. However, beneath these notions of individuality and social progress laid a potentially subversive predisposition to vice that necessitated conscious repression of latent immorality.<sup>13</sup>

The purity reform movement emerged as a champion of civilized morality, targeting instances of vice and social deterioration that were thought to stem from the changing economic and demographic landscapes around the turn of the century. David J. Pivar, author of *Purity Crusade: Sexual Morality and Social Control, 1868-1900*, argues that the purity reform movement began as a “cultural response to the effects of urbanization and industrialization,” but quickly became the creator of a new “variant of social Puritanism” that “directly influenced the development of a modern social system [and] educated Americans in common social values.”<sup>14</sup> Simultaneously, however, reformists were “quietly assisting in the channeling of social reconstruction,” guiding society towards a homogenous and unquestioned moral code that aligned with white middle-class values.<sup>15</sup> In essence, the purity crusade was an attempt to “force the reality of social conditions into line with the

10 Donovan, *White Slave Crusades* ch 6 at 111 (cited in note 3).

11 Grace Peña Delgado, *Border Control and Sexual Policing: White Slavery and Prostitution Along the US-Mexico Borderlands, 1903-1910* 43 W Hist Q 157, 160 (2012).

12 Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* 8 (University of NC 1980).

13 *Id.* at 8.

14 David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* ch 5 at 245 (Greenwood 1973).

15 *Id.* at 245.

dictates of civilized morality.”<sup>16</sup>

Although purity reformers targeted a variety of social ills, including alcohol, poverty, and poor working conditions, a large part of their work focused on creating a moral citizenry via the repression and restriction of sexuality in American society. Prostitution was at the forefront of this crusade, as it resided at the intersection of immigration and illicit sexual behavior. Well-intentioned efforts to curtail the sale and trade of sex were often coupled with elements of social control, as middle-class reformers sought to instill values of civilized morality in those whom they had “saved.” Brian Donovan notes, “the moral worthiness of [prostitutes] was contingent upon their training in domestic femininity,” and their “moral status depended on certain sex/gender practices.”<sup>17</sup> This evinces the purity reform movement’s focus on “reestablish[ing] norms of behavior, counter[ing] immorality, and reorient[ing] people in socially desirable directions” so as to align with white middle-class values.<sup>18</sup>

In the early 1900s, a group known as the “age-of-consent” reformers adopted the purity crusade’s fight against illicit sexual behavior. Distinguishing themselves from the purity reform movement, age-of-consent reformers sought not only social reconstruction, but also to effect legal changes that would cement their moral reforms. Specifically, they sought to “categorize illicit sexual behavior as a crime, with law deterring and constraining evil.”<sup>19</sup> While reform efforts were largely successful in achieving an increased age-of-consent for sexual activity at the local and federal level, and while these laws did see an increased conviction rate for rape and sexual abuse cases brought by young women, their ability to curtail national immorality was severely limited owing to the ameliorative nature of their championed laws, which “rarely engag[ed] in a fundamental criticism of the system.”<sup>20</sup> Building on the legacy of the Page Act, these laws often focused on the moral issues associated with deviant sexual practices rather than root causes, which had more to do with complex issues of race, class, and gender.

As America moved into the twentieth century, reformers built on the perceived success of the age-of-consent campaign by increasingly pushing for legal solutions to the moral crisis. When coupled with nativist sentiments brought on by continued surges in immigration, mainstream America’s commitment to a civilized morality resulted in discriminatory and homogenizing legislation that held the racial and ethnic “other” to blame for social problems. Using the Page Act as a model, legislators in Washington responded to the “current of nativist sentiment” by passing restrictive immigration acts in which “foreigners became the scapegoats

16 Connelly, *The Response to Prostitution in the Progressive Era* at 8 (cited in note 12).

17 Donovan, *White Slave Crusades* ch 6 at 123 (cited in note 3).

18 Pivar, *Purity Crusades* ch 4 at 139 (cited in note 14).

19 *Id.* at 139.

20 *Id.* at 152.

for the sexual anxieties of the native-born.”<sup>21</sup>

Historian Grace Peña Delgado argues that the convergence of immigration law and the moral purity movement at the turn of the century rendered U.S. borders a “gendered and sexualized project of the American state,” which sought to “prohibit the admission of ‘alien’ women and girls practicing prostitution and those who procured them.”<sup>22</sup> The Chinese Exclusion Act of 1882 continued the work of the Page Act in placing severe limitations on the number of Chinese immigrants admitted into the United States each year. In the wake of this act, many Chinese immigrants attempted to enter the country through the US-Mexico border, widening the scope of immigration policy while simultaneously strengthening the connection between immigration and sexual immorality.<sup>23</sup>

The Immigration Acts of 1903 and 1907 officially sanctioned this confluence, as “federal immigration law and morals purity legislation merged to regulate entry on the basis of sexual and gender qualifications.”<sup>24</sup> The Immigration Act of 1907 signaled a significant shift in prostitution legislation in that it allowed the deportation of female prostitutes, transferring blame from male procurers to the women themselves. This act effectively reinforced the social belief that female immigrants were a source of vice and sexual impropriety who fell outside the parameters of acceptable American femininity.

In the years after 1907, enforcement efforts shifted to complement legislative focus on sex and gender. The US Bureau of Immigration increasingly used deportation as a tool to control prostitution.<sup>25</sup> Additionally, further revisions to the 1907 Act granted lasting and expansive power to the Bureau, sanctioning the enforcement agency’s efforts to regulate immigration “on the basis of sexual and gender exclusions.”<sup>26</sup> Three years later, the Mann Act would solidify the role of the US Bureau of Immigration and would legitimize the use of morality as a justification for the restriction of civil liberties under the umbrella of what came to be known as “white slavery.”

While the international trafficking of women for prostitution had been a matter of both national and international concern since the 1870s—as evidenced by the Page Act and numerous international treaties on the matter—not until the twentieth century did the issue take on the racially-charged and morally-saturated label of “white slavery.” Drawing on abolitionist rhetoric of captivity, coercion, and brutality, white slavery activists sought to resurrect recent and painful notions of African slavery and bring them to the fore of American social consciousness. Additionally, this rhetoric relied on common social conceptions of the innate sex-

21 John D’Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* § III ch 9 at 209 (Harper, Row 1988).

22 Delgado, 43 W Hist Q at 157 (cited in note 11).

23 Id at 159.

24 Id at 161.

25 Id at 169.

26 Delgado, 43 W Hist Q at 159 (cited in note 11).

ual purity of white women, in contrast to the immorality associated with immigrant women and the racial “other” (an association further cemented by the aforementioned immigration legislation). White slavery perpetuated purity reformers’ perception of some immigrants as “racially distinct, inferior, and crime-prone,”<sup>27</sup> a belief supported by the US Immigration Commission’s 1909 investigation on the effects of immigration, which cited immigrants as a major source of urban vice.<sup>28</sup> Collectively, this led many Americans in the Progressive Era to perceive immigration and prostitution as “contiguous pieces in a jigsaw puzzle of social pathology.”<sup>29</sup>

A number of Americans, among them academics and reformers, sought to identify the underlying causes of the white slavery “epidemic.” While immigration was at the head of these investigations, many went deeper, citing urbanization, industrialization, and massive migration as catalysts for the traffic in women’s bodies. In her 1915 exposé, “‘Humanity’; or, What Every Father, Mother, Boy, and Girl Should Know,” Louis Krauss cited the following as responsible for white slavery: “the lure of the city,” “lack of protection in factories,” “industrial institutions,” “the lack of municipal vice commissions,” “dance halls,” “amusement parks,” “saloons,” “Chop-Suey joints,” “skating rinks,” “Ferris wheels,” “lack of frequent conferences between minister, parent, and child,” “lack of religious training and the love of God,” and, finally, “moral weakness.”<sup>30</sup> Broadly, Krauss’ review highlights four main bases for the white slave phenomenon: women in industrialized society, urban entertainment, immigrant culture, and immorality or lack of religiosity.

Krauss’s contemporaries built on her conclusions, focusing specifically on the woman’s shifting position in the newly urbanized and industrialized America. Ernest A. Bell, a Methodist clergyman and anti-prostitution crusader in Chicago, commented on the unique challenges facing young women in Chicago in his 1910 memoir, *Fighting the Traffic in Young Girls*: “she is so unlearned in the moral and social geography of the city that she is ... likely, if left to her own devices, to select her boarding house in an undesirable as in a safe and desirable part of the city; ... Her ignorance of the underworld and her loneliness and perhaps homesickness, conspire to make her a ready and an easy victim of the ‘white slaver.’”<sup>31</sup> Bell defined “white slavers” as “human vultures who fatten on the shame of innocent young girls. Many of these white slave traders are recruited from the scum of the criminal classes of Europe,” exposing nativist sentiments common among white

27 Donovan and Barnes-Brus, 36 L & Soc Inquiry at 607 (cited in note 2).

28 Frederick K. Grittner, *White Slavery: Myth, Ideology, and American Law* 63 (Garland 1990).

29 Connelly, *The Response to Prostitution in the Progressive Era* ch 3 at 48 (cited in note 12).

30 Louis L. Krauss, ‘Humanity’; or, What Every Father, Mother, Boy, and Girl Should Know, in Thomas A. Foster, ed, *Documenting Intimate Matters: Primary Sources for a History of Sexuality in America* 116, 116 (University of Chicago 2012).

31 Ernest A. Bell, *Fighting the Traffic in Young Girls* § I at 24 (Chicago 1910).

middle-class moralists in the Progressive Era.<sup>32</sup> New York City reformer George Kneeland echoed Krauss's concerns over urban entertainment, noting that "[n]o places of amusement are so filled with moral dangers to boys and girls as certain public dance halls."<sup>33</sup> Kneeland's focus on morality exemplified middle-class fears about the changing sexual dynamic among working-class city-dwellers, who were rapidly foregoing traditional sexual and marriage practices.

Contemporary scholarship on the white slavery panic cites similar social impetuses behind the moral white slave panic of the Progressive Era. David Pivar argues that "urbanization destroyed the close kinship ties of a pre-industrial era, and the urban culture lacked the restraints of the small town."<sup>34</sup> David Langum, author of *Crossing Over the Line: Legislating Morality and the Mann Act*, focuses on the shifting place of women in Progressive Era society, arguing that there existed a "sharp tension between the prevailing image of women as precious, domesticated, virtuous beings and the historically unprecedented fact of middle-class women moving into the crowded urban areas and living alone, without the male protection of a father, brother, or husband."<sup>35</sup> Estelle Freedman and John D'Emilio draw attention to shifting sexual mores among the working-class, who "were eager patrons of a nighttime world of commercialized amusements that mocked middle-class sexual ideals."<sup>36</sup> In focusing on one aspect of the white slavery panic, modern scholars have attempted to simplify the vastly complex and intricate nature of Progressive Era America.

Because the white slave trade resided at the intersection of urbanization, immigration, industrialization, and changing sexual norms, it quickly gained clout among American moralists and politicians who sought to stymie the departure from traditional "civilized morality." As Frederick Grittner, author of *White Slavery: Myth, Ideology, and American Law*, notes, "white slavery served as a political and psychological symbol to crystallize many of these cultural and social concerns."<sup>37</sup> Given its social relevance, the white slave trade received a great deal of exposure in the press and was often adopted as a form of public entertainment in novels and film. The white slave trade was so prevalent in Progressive Era society that many historians have referred to it as "moral panic" that demanded attention from the federal government.<sup>38</sup>

The Mann Act of 1910, also known as the White Slave Traffic Act, marked

32 Bell, *Young Girls* at 2 (cited in note 31).

33 George J. Kneeland, *Commercialized Prostitution in New York City, 1913*, in Thomas A. Foster, ed., *Documenting Intimate Matters: Primary Sources for A History of Sexuality in America* 104, 104 (Chicago 2012).

34 Pivar, *Purity Crusade* ch 3 at 105 (cited in note 14).

35 David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* ch 1 at 6 (Chicago 1994).

36 D'Emilio and Freedman, *Intimate Matters* § III ch 9 at 203 (cited in note 21).

37 Grittner, *White Slavery* at 61 (cited in note 28).

38 *Id.* at 61.

the capstone of Progressive Era moral reform efforts to combat the white slave epidemic while simultaneously securing a means of legally instituting and protecting a "civilized morality" in American society. A close analysis of the Act's language reveals not only the federal government's willingness to regulate public morality, but a linguistic ambiguity which allowed for discriminatory applications that severely restricted civil liberties in some instances. Legislators made no effort to veil their intent to regulate morality on the federal level; rather, the Act very clearly stated its purpose to "further regulate interstate commerce and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes."<sup>39</sup> The text further clarified its focus on morality, as well as its relation to prostitution, in stating that "any person who shall knowingly transport . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony."<sup>40</sup>

The Mann Act clearly failed to define its morally-charged language, affording the courts a great deal of interpretive power in the Act's implementation and, in essence, leaving the regulation of public morality up to local-level courts which were easily swayed by public conceptions of race and gender. Nowhere in the act are the terms "prostitution," "debauchery" or "immoral purpose" defined, which perhaps indicates that they represent a number of behaviors not normally associated with prostitution. While this legislative ambiguity was not necessarily intentional, its implications were unquestionably detrimental to the civil rights and civil liberties of immigrants, non-whites, and women living in the United States in the early years of the twentieth century, especially for those who did not subscribe to the socially accepted terms or "civilized morality."<sup>41</sup> Additionally, Supreme Court rulings in the seven years after the passage of the Mann Act only reaffirmed its ambiguity by upholding the power of the federal government to broadly regulate American morality.

In 1913, the first challenge to the Mann Act reached the Supreme Court in *Hoke v. United States*.<sup>42</sup> While the Court conceded that Congress did not have the explicit power to regulate prostitution, it unanimously held that the regulation of interstate commerce for "immoral purposes," including prostitution and "debauchery," fell well within Congressional purview under the Commerce Clause.<sup>43</sup> The majority opinion in *Hoke* reasoned that if Congress could regulate the interstate movement of lotteries and obscene literature, then it surely could do the same to prostitution.

In 1915, the Court heard the next significant challenge to the Mann Act

39 The White-Slave Traffic Act (Mann Act), 18 U.S.C. §§ 2421–2424 (1910).

40 The White-Slave Traffic Act (Mann Act), 18 U.S.C. §§ 2421–2424 (1910).

41 Connelly, *Prostitution in the Progressive Era* at 8 (cited in note 12).

42 *Hoke v. United States*, 227 U.S. 308 (1913).

43 The White-Slave Traffic Act (Mann Act), 18 U.S.C. §§ 2421–2424 (1910).

in *United States v. Holte*.<sup>44</sup> While this decision was not unanimous, it significantly broadened the scope of the Mann Act in ruling that women could be convicted of conspiracy to violate the Act. Justice Oliver Wendell Holmes delivered the opinion of the Court:

Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the Act of 1910 in the hope of blackmailing the man...she would be within the letter of the Act of 1910, and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach if we abandon the illusion that the woman always is the victim.<sup>45</sup>

In a stark deviation from the Act's original purpose of combating the traffic in white slaves, the Court's decision shifted judicial focus from male procurers to female prostitutes, painting women as cunning seductresses. The *Holte* ruling began a new era in the criminalization of prostitution that largely targeted women as carriers of vice and immorality.

The final and most expansive affirmation of the Mann Act came in 1917 with the Court's decision in *Caminetti v. United States*,<sup>46</sup> which dictated that because consensual extra-marital sex was "immoral," it fell well within the purview of the Mann Act. As a result, *Caminetti* significantly extended the scope of the Mann Act to include "voluntary acts of immorality, even where no commercial intention or business profit was shown."<sup>47</sup> This case, in particular, legitimized the White Slave Traffic Act's capacity to prosecute sexual practices that fell far outside accepted notions of prostitution. It also, however, served to violate proper sexual behavior within the bounds of "civilized morality."

The impact of *Caminetti* became evident almost immediately; just months after the Court delivered its opinion, the Attorney General edited his instructions on which cases to prosecute under the Mann Act to include those "involving married women (with young children) living with their husbands" in addition to women who likely conspired and "consented to the criminal arrangement."<sup>48</sup> As Marlene Beckman notes in her essay, "The White Slave Traffic Act: Historical Impact of a Federal Crime Policy on Women," this allowed attorneys to prosecute individuals engaged in "strictly personal sexual escapades that in no way involved either commercial gain or exploitation of innocent victims," but that fell outside of the

44 *United States v. Holte*, 236 U.S. 140 (1915).

45 *Holte*, 236 U.S. 140 at 145. Karen J. Maschke

46 *Caminetti v. United States*, 242 U.S. 470 (1917).

47 Marlene D. Beckman, *The White Slave Traffic Act: Historical Impact of a Federal Crime Policy on Women*, in Jaren J. Maschke, ed., *Pornography, Sex Work, and Hate Speech* 33, 35 (Garland 1997).

48 United States Department of Justice Circular No. 647., 26 Jan. 1917.

middle-class code of moral conduct.<sup>49</sup>

With the backing of the Supreme Court, lower courts around the nation effectively became "censor[s] of the nation's sexual morals,"<sup>50</sup> using the Mann Act to curtail unconventional sexual practices that fell outside socially acceptable norms through the twenties, thirties, and forties.<sup>51</sup> According to Brian Donovan and Tori Barnes Brus' extensive study of court records regarding prostitution trials in Progressive Era New York City, transcripts show that "jurors exercised their power based on assumptions that mirrored popular culture."<sup>52</sup> In doing so, the courts disproportionately targeted groups that were thought to pose a threat to ideals of race and gender, including women, immigrants, and racial minorities.<sup>53</sup> Accordingly, the courts severely restricted civil liberties for those who fell within one of the various threatening categories. In this manner, the courts became "instrumental in defining and enforcing racial and ethnic boundaries."<sup>54</sup>

Enforcement of the Mann Act took a particularly large toll on racial minorities whose behavior challenged racial hierarchies and notions of social acceptability. Langum argues that federal prosecutors "used the Mann Act as a club against blacks who dated white women" so as to reinstate white supremacy and perpetuate the belief that interracial relationships were immoral.<sup>55</sup> In her dissertation, "Any Other Immoral Purpose: The Mann Act, Policing Women, and the American State, 1900-1941," Jessica Rae Pliley echoes Langum's claim, explaining that enforcement agencies brought "pressure on interracial couples," thereby "policing the mobility of women and male respectability."<sup>56</sup> These white slavery prosecutions became yet another avenue for white supremacists to perpetuate the racial color line well into the twentieth century.<sup>57</sup>

The Mann Act had similar repercussions for immigrants, who courts and enforcement agencies alike continued to associate with social vice, crime, and sexual impropriety. However, unlike African Americans, who suffered under the weight of the judicial system, immigrants felt the injustice of the Mann Act at the hands of enforcement agencies, namely the U.S. Immigration Bureau, which turned increasingly to deportation as a tool. The original text of the Mann Act gave explicit power to the Commissioner-General of Immigration to "receive and centralize information concerning the procurement of alien women and girls with

49 Beckman, *White Slave Traffic* at 38 (cited in note 47).

50 *Id.* at 35.

51 *Id.* at 35.

52 Donovan and Barnes-Brus, 36 L & Soc Inquiry 613 (cited in note 2).

53 *Id.* at 598.

54 *Id.* at 597.

55 Langum, *Crossing Over the Line* at 9 (cited in note 35).

56 Jessica Rae Pliley, *Any Other Immoral Purpose: The Mann Act, Policing Women, and the American State, 1900-1941* \*2 (PhD dissertation, Ohio State University, 2010), abstract online at [http://rave.ohiolink.edu/etdc/view?acc\\_num=osu1281537489](http://rave.ohiolink.edu/etdc/view?acc_num=osu1281537489) (visited Nov 18, 2013).

57 Donovan and Barnes-Brus, 36 L & Soc Inquiry 606 (cited in note 2).

a view to their debauchery, and to exercise supervision over such alien women and girls.”<sup>58</sup> After the three Supreme Court rulings had extended the Act’s scope and legitimized discriminatory practices disguised as efforts to protect American morality, the bureau became the “protector of American family values against . . . misery, economic devastation, and sexual deviancy.”<sup>59</sup> As previously mentioned, the Bureau employed their newfound power to enforce American morality through extensive deportation of alien women “whose sexual behaviors were deemed antithetical to American moral values.”<sup>60</sup> Especially after *Holte*, which portrayed women as immoral temptresses, women bore the brunt of anti-vice policing at the hands of the US Immigration Bureau.<sup>61</sup> Doubly-bound as both females and immigrants, women immigrants faced almost assured deportation if they encountered a bureau official.

Beyond reinforcing racial, gender, and sexual hierarchies, the Mann Act left a deep impression on American society, affirming the role of the federal government in regulating American morality and proffering a restructured definition of American citizenship that necessitated superior moral conduct. As Donovan concludes, “Constructions of the white slave [and] the wicked woman . . . allowed for different arguments about the membership requirements for white America,” with belonging “predicated on ideologies of sexual purity and danger . . . . White slavery narratives illuminate a real contest over who has and who does not have the full privileges of American citizenship and racial whiteness.”<sup>62</sup>

Thus, the Page and Mann Acts’ adherence to a moral rhetoric that shielded efforts to maintain traditional power structures has crafted a narrative of prostitution legislation deeply rooted in notions of morality. This legacy is one that has carried over into the modern era as the global community has turned its attention to issues of human trafficking and sex slavery. As today’s legislators attempt to again tackle the imbrications of prostitution, immigration, and global economics, they would be well-advised to heed Emma Goldman’s 1911 warning: “What is really the cause of the trade in women?... Exploitation, of course.... Naturally our reformers say nothing about this cause.... It is much more profitable to play the Pharisee, to pretend an outraged morality, than to go to the bottom of things.”<sup>63</sup>

Only by setting aside prostitution’s long and complex history, only by consciously removing morality from the trafficking debate, can legislators begin to focus on the root causes of the growing global human trafficking network. Such an approach would at long last allow the global community to address what Linda Kerber has termed an issue of “statelessness,” which is most usefully understood

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58 The White-Slave Traffic Act (Mann Act), 18 U.S.C. §§ 2421–2424 (1910).

59 Pliley, *Any Other Immoral Purpose* at 2 (cited in note 56).

60 Delgado, 43 W Hist Q at 177 (cited in note 11).

61 Donovan and Barnes-Brus, 36 L & Soc Inquiry 601 (cited in note 2).

62 Donovan, *White Slave Crusades* at 129 (cited in note 3).

63 Emma Goldman, *Emma Goldman Analyzes “The Traffic in Women”, 1911*, in Kathy Peiss, ed, *Pornography, Sex Work, and Hate Speech* 285, 285 (Houghton 2002).

“not only as a status but as a practice, made and remade in daily decisions of presidents and judges, border guards and prison guards, managers and pimps. The stateless are the citizen’s other . . . . The stateless serve the state by signaling who will not be entitled to its protection, and throwing fear into the rest of us.”<sup>64</sup>

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64 Linda K. Kerber, *Toward a History of Statelessness in America*, 57 A Q 727, 745 (2005).

<b>ARTICLE</b>
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## HUMANITARIAN INTERVENTION, RtoP, AND THE RUSSO-CHECHEN WARS

Mila Rusafova<sup>†</sup>

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### I. INTRODUCTION

In the 1990s and early 2000s, Russo-Chechen relations were plagued by deep tensions, countless acts of terrorism and crimes against humanity. Two full-scale wars took place, the first of which took place from 1994-1996 and the second from 1999-2009. Massive civilian casualties, estimated at 100,000-250,000 for both wars, marked this period. Two hundred thousand refugees fled to neighboring Ingushetia during the first war alone, especially after Grozny, the Chechen capital city, was leveled by indiscriminate air raids in the Battle of Grozny from 1994-1995.<sup>1</sup> Despite repeated and blatant violations of international humanitarian law by both sides, the United Nations, the European Union, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), and individual countries like the US refused to get involved, claiming the conflict was an “internal Russian affair” and that Russian action was therefore protected by Article 2(7) of the UN Charter.<sup>2</sup> The article prohibits intervention “in matters which are essentially within the domestic jurisdiction of any state.” The international policy of appeasement toward Russia was favored over resolving the Chechen conflict for the following reasons: the determination to support the process of democratic reform in Russia, the desire to maintain strategic partnerships with then-Russian president Boris Yeltsin and the new Russian Federation, the deference given to a permanent member of the Security Council, and the priority of other issues requiring the cooperation of the Yeltsin government. The latter included the ratification of START II, the joint efforts in Bosnia, and NATO expansion.<sup>3</sup>

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<sup>1</sup> Chechnya: Cross-Border Movements Continue, UN Refugee Agency (UNHCR November 12, 1999), online at <http://www.unhcr.org/3ae6b81bb0.html> (visited December 1, 2012).

<sup>2</sup> UN Charter, Art 2.

<sup>3</sup> Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 35-42 (1998).

This paper will examine the ethics of the international community's decision to turn a blind eye to Russian human rights violations in Chechnya. Russia explicitly violated international humanitarian law by engaging in a protracted war and committing massive crimes against humanity. Yet the only official response Russia would receive was a cautious verbal condemnation. Were the anticipated costs of interference enough to justify Western appeasement or was this response selfishly motivated and ethically impermissible, even if legal according to the UN Charter? Can and should nations enforce the principle of human rights protection on a great power like Russia? Should the UN or another intergovernmental organization like the OSCE or NATO or an independent coalition of states have gotten involved to stop the crimes against humanity committed during the Chechen Wars?

This report will first detail the crimes against humanity committed by Russia and the violations of international law that these crimes represented. It will then examine in greater depth the motives behind the international response to the conflict and argue that these concerns did not justify sacrificing Chechnya. Finally, it will turn to the Responsibility to Protect doctrine—hereinafter referred to as RtoP—and discuss how this relatively new initiative, first established in 2005, can act as a guide in determining what the UN should have done in response to the Chechen conflict. It will momentarily set aside the problematic Russian veto in the Security Council, and explain how this document can inform future UN action in similar humanitarian crises.

The final arguments will discuss how international humanitarian law determined that at the time of the Chechen Wars international intervention was required to resolve the conflict and that the failure of international actors to get involved represents a major failure. An international coalition of nations and the imposition of multilateral sanctions may have motivated the Yeltsin government to change its actions in Chechnya. It would have sent a message to the newly developing Russian democracy that it must uphold human rights and remain accountable to its people and the international community at large. Based on the Chechen case, the report will make recommendations for incorporating RtoP into the UN Charter. This will ensure that the protection of human rights is a real UN responsibility.

## II. BACKGROUND ON THE CHECHEN CONFLICT

The Chechen case is a difficult one due to Chechnya's historical resistance to Russian rule. The modern conflict has its roots in the 18<sup>th</sup> century Caucasian Wars, when Russia expanded its territory into areas formerly under Turkish or Persian rule. After almost 80 years of resistance, Chechnya was finally forcefully annexed as a territory of the Russian Empire in 1859 and combined with Ingushetia under the Soviet Union to form the Chechen-Ingush Autonomous Soviet Socialist Republic (ASSR).

Chechen rebellion has historically flared up whenever the Russian state

faced a period of internal uncertainty. In 1918, during the Russian Bolshevik revolution, the North Caucasian people elected a president and declared their independence. By 1921, Bolshevik forces had crushed this new republic, but not before Turkey, Germany, Austro-Hungary, and the British government had recognized it.<sup>4</sup>

The Russians opposed the Chechens from 1859 onwards. The oppression continues to be substantial, evidenced by the brutality with which such rebellions have been suppressed. A notable example is the deportation of Chechen and other mountain peoples in three waves between 1943 and 1944 during World War II. Stalin personally ordered the deportations on the pretext of alleged collaboration with the invading German armies during the 1940-1944 Chechen insurgency. The operation took little over a week, and over 387,000 Chechens, including women, children, and the elderly, were loaded on cattle-wagons and transported to Central Asia and Siberia. Research has shown that 25% of the deportees died either in transit or in the months and years following their deportation.<sup>5</sup> It was not until 1957 that the surviving deportees were allowed to return to their homes, where they were now treated like foreigners and became victims of widespread job and educational discrimination.<sup>6</sup> This discrimination continued until 1991, when Chechnya again declared its independence from Russia under the leadership of Dzhokhar Dudayev.

This history helps explain the deep-seated Chechen animosity toward Russian rule and the resort to war in December 1994. Chechnya, like many other nations from the former Soviet bloc, took advantage of weakening Soviet control in the late 1980s to assert its sovereignty and demand recognition of its independence. Thus, when in 1992 President Yeltsin proposed the bilateral Federation Treaty, which outlined the powers reserved for the central and regional governments, Chechnya, along with Tatarstan, was the only of the 88 federal subjects of Russia to refuse to sign. Instead, the Chechen-Ingush ASSR declared its independence from Russia in September 1991 and then again, following the division of Chechnya and Ingushetia, as the Chechen Republic of Ichkeria in 1993.

Between 1991 and 1994 Chechnya was plunged into an undeclared civil war, where both sympathetic factions and those opposed to Dudayev fought for power. However, the issue of contention was never independence from Russia; ethnic Chechens universally supported the establishment of an independent Chechen state. During the conflict, Moscow supplied opposition forces with financial support, military equipment, and mercenaries. Unmarked Russian aircraft began combat operations over Chechnya. On November 29, 1994, Yeltsin issued

4 Peter D. DiPaolo, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4, *Indiana Journal of Global Legal Studies*, 435, 439 (1997).

5 Svante E. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51, *Europe-Asia Studies*, 85, 86 (1999).

6 DiPaolo, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4, *Indiana Journal of Global Legal Studies*, 439, 440 (1997).

an ultimatum to all warring factions in Chechnya, ordering them to disarm and surrender. When the government in Grozny refused, Russian forces began heavy aerial bombardments of Chechnya on December 1. Eventually a ground attack toward Grozny was launched on December 11.

An additional difficulty in assessing the Chechen case is that it brings up questions of secession and secession law, the latter of which is as yet a very ambiguous and poorly defined subset of international law. Allen Buchanan, in his article, *Theories of Secession*, outlines several of the main theories asserting a group has a moral right to secede, distinguishing primarily between the Remedial Right Only Theories and Primary Right Theories. According to these theories, it seems that Chechnya had a strong claim to independence, as its previously sovereign territory was unjustly taken by the state (1859 Russia). A majority of Chechens were in favor of independence, and the Chechens represented a distinct national group with their own common culture, history, and language. Chechnya also met the criteria laid out by Christopher Wellman in *A Defense of Secession and Self-Determination*, which stated that a group, in order to form its own state, must constitute a majority in that territory and have the capacity to effectively perform the legitimate functions of a state.<sup>7</sup>

Although the question of secession is beyond the scope of this paper, it is important to consider it, especially since the international recognition of Chechen independence may have completely changed the course of the war. This is because the Russian invasion would have then triggered Chapter VII of the UN Charter and legally justified an international response.<sup>8</sup>

### III. THE CHECHEN WARS AND CRIMES AGAINST HUMANITY

The RtoP doctrine, which will be discussed in greater depth in Part VI, is limited to cases of genocide, war crimes, ethnic cleansing, and crimes against humanity. The Rome Statute of the International Criminal Court (ICC), adopted in 1998, provides the most authoritative and widely accepted definition of these terms.

The two most applicable crimes to the Chechen case are crimes against humanity and war crimes. The list of acts in the ICC statute includes murder; extermination; enslavement; deportation; imprisonment; torture; rape and sexual slavery; persecution against a group based on political, racial, national, ethnic, cultural, religious, or gender grounds; enforced disappearances; apartheid; and other inhumane acts.

War crimes are defined in Part 2, Article 8, and include willful killing, torture, extensive destruction and appropriation of property not justified by military necessity, willfully depriving a prisoner of war of the right to a fair trial, unlawful

<sup>7</sup> Allen Buchanan, *Theories of Secession*, 26, Philosophy & Public Affairs, 31, 39-40 (1997).

<sup>8</sup> UN Charter, Art 53.

deportation, and the taking of hostages.<sup>9</sup> War crimes also extend to “intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities.”<sup>10</sup>

The Chechen War “was from the beginning a war against the civilian population rather than against military targets.”<sup>11</sup> Russia exhibited an unprecedented disregard for human rights and engaged in indiscriminate bombing of civilian areas as well as extrajudicial executions, torture, massacre, and the spreading of landmines. In the 1994-1995 Battle of Grozny alone, Russian air bombing and artillery shelling killed thousands of civilians and sparked a massive refugee flow. As a point of comparison, an average of over 4,000 blasts were recorded per hour during the most intensive fighting, whereas, in Sarajevo, which has set a kind of “standard of horror” in the post-Cold War era, the highest rate recorded was 800.<sup>12</sup>

Human Rights Watch detailed some of the human rights violations committed in Chechnya in its February 9, 2001 *Memorandum on Domestic Prosecutions for Violations of International Human Rights and Humanitarian Law in Chechnya*.<sup>13</sup> Human Rights Watch documented “thousands of serious human rights crimes, and... established that certain abuses such as the cycle of arbitrary detention and torture and extortion of detainees [were] widespread.”<sup>14</sup> Federal forces committed three well-known massacres in the first six months of the war, including 130 execution-style murders of civilians.<sup>15</sup> No one has been held criminally accountable for these actions. Torture and ill treatment were also widespread in official and unofficial detention centers, at checkpoints, and during sweep operations. Hundreds of Chechens were reported missing, with many “disappearing” after federal forces took them into custody. Finally, the report describes the bombing and shelling tactics used by Russian forces in the war:

Russian forces have carried out numerous bombings and shellings throughout Chechnya in apparent disregard for the physical security of the civilian population. Such attacks carried out indiscriminately or using disproportionate force are violations of international humanitarian law. Thousands

<sup>9</sup> Rome Statute, The International Criminal Court, (July 17, 1998), ICC Doc A/CONF.183/9 (defining the scope and applicability of the Responsibility to Protect by sovereign powers). Part 2, Art 8.

<sup>10</sup> *Id.*

<sup>11</sup> Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51, Europe-Asia Studies, 85, 86 (1999).

<sup>12</sup> *Id.* at 88.

<sup>13</sup> *Memorandum on Domestic Prosecution for Violations of International Human Rights and Humanitarian Law in Chechnya* \*1, Human Rights Watch, (Human Rights Watch February 9, 2012), online at <http://www.hrw.org/legacy/backgrounder/eca/chech-memo-0213.pdf> (Visited Nov 26, 2012)

<sup>14</sup> *Memorandum on Domestic Prosecution for Violations of International Human Rights and Humanitarian Law in Chechnya* \*4 (Human Rights Watch February 9, 2012), online at <http://www.hrw.org/legacy/backgrounder/eca/chech-memo-0213.pdf> (Visited Nov 26, 2012)

<sup>15</sup> *Id.*

of civilians have died as a result of Russian bombardments and artillery shelling and the homes of tens of thousands of Chechens have been destroyed or damaged. The city of Grozny and several villages were practically razed to the ground. Numerous convoys of fleeing civilians were attacked, causing numerous civilian casualties.<sup>16</sup>

There was a consensus among human rights organizations like Human Rights Watch, the International Committee of the Red Cross, and the Russian NGO, Memorial, that Russia was responsible for crimes against humanity and war crimes that were some of the worst seen in the post-WWII era. For example, Russian forces sent all men aged fifteen through sixty to filtration camps from which most never returned.<sup>17</sup>

Further, the Russian Procuracy did little to investigate the crimes committed by Russian forces to hold them criminally accountable. Government officials continuously downplayed serious abuses committed in Chechnya as “incidental” and “exceptional” and none of the commanding officers who presided over massacres were suspended.<sup>18</sup> Instead, a telling example is that General Vladimir Shamanov, who had direct oversight over the troops that committed the massacre in Alkhan-Yurt in December 1999 in which 41 civilians were killed and three raped, was awarded a “Hero of Russia” medal for his service in Chechnya mere weeks after the massacre took place.<sup>19</sup> The murder of nearly 20 journalists since 2000, including award-winning writer Natalya Estemirova, represents another attempt by Russia to inhibit the spread of knowledge regarding the Chechen conflict.<sup>20</sup>

Given the magnitude of the human rights abuses and the inadequate investigations, the UN should at the very least have ordered the writing of an authoritative report, similar to that written by the Independent International Commission on Kosovo in 2000 after the Kosovo War. Such a report would have documented the situation in Chechnya, offering suggestions for future action to secure peace in the region and how to deal with the devastating effects of the wars. The fact that, during the interwar period, the Chechen economy and infrastructure was completely destroyed and that nearly 40% of the population lived in refugee camps

16 Memorandum on Domestic Prosecution for Violations of International Human Rights and Humanitarian Law in Chechnya \*9 (Human Rights Watch February 9, 2012), online at <http://www.hrw.org/legacy/background/eca/chech-memo-0213.pdf> (Visited Nov 26, 2012)

17 Cornell, International Reactions to Massive Human Rights Violations: The Case of Chechnya, 51, *Europe-Asia Studies*, 85, 89-90 (1999).

18 Memorandum on Domestic Prosecution for Violations of International Human Rights and Humanitarian Law in Chechnya \* 2 (Human Rights Watch February 9, 2012), online at <http://www.hrw.org/legacy/background/eca/chech-memo-0213.pdf> (Visited Nov 26, 2012)

19 Id.

20 Nina Ognianova, *Why a killing in Chechnya is an international issue*, Committee to Protect Journalists, (Committee to Protect Journalists February 16, 2012), online at <http://cpj.org/2010/02/why-a-killing-in-chechnya.php> (Visited Dec 2, 2012).

would have justified such a report.<sup>21</sup>

#### IV. VIOLATIONS OF INTERNATIONAL LAW

Although RtoP did not yet exist at the time of the First Chechen War, Russian actions nonetheless constituted violations of international law. The Geneva Conventions, a set of treaties that established the standards of international law for the humanitarian treatment of the victims of war, addressed the case of non-international armed conflict in its Common Article 3 of 1949. The article states, “persons taking no active part in the hostilities ... shall in all circumstances be treated humanely” and, more specifically, prohibits “murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity... the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.”<sup>22</sup> Russia signed the 1949 Geneva Convention in 1949 and ratified it in 1954.

UN General Assembly Resolution 2444 of 1969 also prohibited countries from “launch[ing] attacks against the civilian population as such” while the OSCE Code of Conduct reaffirmed The Hague and Geneva Conventions.<sup>23</sup> This also called for participating states to make “widely available in their respective countries the international humanitarian law of war” and to “instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments.” The Code also “ensure[d] that such personnel are aware that they are individually accountable under national and international law for their actions.”<sup>24</sup> Russia signed the code and it went into effect on January 1, 1995, in the midst of the Battle of Grozny.

Additionally, in a total of 83 rulings, the European Court of Human Rights deemed Russia responsible for human rights violations in Chechnya. In nearly every case, the Court called upon the Russian government to explain the reason behind its failure to properly investigate the crimes and faulted Russia for failing to provide requested case files, “which amounts to serious non-cooperation with the court.”<sup>25</sup> Despite the rulings, Russia “has not taken sufficient steps to ensure ef-

21 Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 21 (1998)

22 Human Rights Watch. “Update on European Court of Human Rights Judgments against Russia regarding Cases from Chechnya. 20 Mar. 2009.

23 Resolution 2444, UN General Assembly, 23<sup>rd</sup> mtg (December 19, 1968), UN Doc A/RES/2444(XXIII) (clarifying circumstances for incurring the Responsibility to Protect).

24 Code of Conduct, OSCE Special Committee of the CSCE Forum for Security Co-operation in Budapest, 91<sup>st</sup> plenary mtg. (December 3<sup>rd</sup>, 1994), OSCE Doc DOC.FSC/1/95 (instruction and awareness for armed forced personnel to enforce the Responsibility to Protect).

25 Update on European Court of Human Rights Judgments against Russia regarding Cases from Chechnya, Human Rights Watch (March 20, 2009), online at <http://www.hrw.org/news/2009/03/20/update-european-court-human-rights-judgments-against-russia-regarding-cases-chechnya>, visited

fective investigations, hold perpetrators accountable, or prevent similar violations from recurring.” It is telling that only 27% of the court’s backlog of 97,000 cases originate from Russia.<sup>26</sup>

These are only some of the violations of international humanitarian law that Russia committed during the conflict with Chechnya. A further difficulty is that human rights violations were also committed on the Chechen side, particularly through terrorist attacks and hostage-takings, most famously in the Moscow Theater, Beslan School, and Budyonovsk hospital crises. While this makes it more difficult to take a side in the conflict, it perhaps strengthens the case to be made for the necessity of international action, as innocent civilians were killed on a near-daily basis throughout the 1994-2009 period.

#### V. INTERNATIONAL RESPONSES TO THE CONFLICT AND THEIR LEGITIMACY

Despite the severity and unexpected duration of the Chechen conflict, the general international response was to declare the crisis “an internal Russian affair” and refrain from serious involvement. The prevalent view was that Chechnya should not be allowed to become an obstacle in the Western relationship with Russia. The US, in particular, was very lenient. As Gail W. Lapidus of Stanford University maintains,

The [American] administration had two overriding concerns: to prevent what it viewed as a marginal problem from derailing progress on high-priority issues in Russian-American relations; and to support President Yeltsin politically, out of a conviction that his continuation in office, and friendly personal relationship with President Clinton, was indispensable both to continuing economic and political reform and to Russian-American partnership on a broad range of international issues.<sup>27</sup>

The priorities of the United States government demonstrated implicit approval of Russian policy. It was not until Yeltsin’s policy in Chechnya began undermining his own political effectiveness and authority, jeopardizing his prospects of reelection and threatening to derail the whole process of reform, that US criticism of the war could be presented as congruent with support for Russian reform.<sup>28</sup>

The EU, refusing to issue a strong condemnation of Russian military actions, took a similar stance on the Chechen War. Similarly, Turkey did not inter-

(December 2, 2012).

<sup>26</sup> Id.

<sup>27</sup> Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 35-36 (1998)

<sup>28</sup> Id at 43.

vene due to its own Kurdish secessionist problem, while Iran refrained so as to maintain its close relations with Russia due to common strategic interests. Only Eastern Europe and the Commonwealth of Independent States (CIS) were more vocal, especially Poland, Estonia, Latvia, and Lithuania, for fear that the conflict would not be confined to Chechnya and would set a dangerous precedent for Russian military action in the region.

The International Court of Justice (ICJ) also took a strong stance, urging the Council of Europe to refuse Russia membership and appealing to the US to freeze a \$6.8 billion IMF loan to Russia.<sup>29</sup> Instead, in 1995, Russia received the \$6.8 billion loan and an additional \$10.2 billion in 1996. This continued Western financial support for Russia at a time when the Russian government was failing to collect over 30% of tax revenues owed to it, caused a number of figures in Russia and the West to accuse Western governments and the IMF of “indirectly helping finance the war.”<sup>30</sup> This response contrasts sharply with the US reaction to human rights violations in Turkey in 1994, when the US cut military aid to Turkey by 10% and threatened to sever commercial relations.<sup>31</sup>

Thus, rather than criticizing Russia and taking action to stop human rights abuses in Chechnya, the international community rewarded Russia with \$17 billion in loans and admission to the Council of Europe in February 1996.

It is easy to argue that the UN or NATO should have been involved, as they were in other conflicts, like that in Yugoslavia and, more recently, in Libya, without considering the political motives behind the international response. As a major world power and permanent member of the Security Council, Russia, weakened after the collapse of the Soviet Union, remained a force to be reckoned with. Following almost half a century of Cold War relations, Western countries were eager to build a better relationship with the new Russian Federation and welcome it into the community of democratic states. Further, the Russian veto in the UN Security Council would always block any attempt at intervention in the near abroad. Thus, the historical behavior of tiptoeing around Russia is both rational and practical when viewed in light of the political environment of the 1990s. Fear of Russian retaliation, even more potent considering Russia’s position as a great power, UN Security Council member, and major oil supplier, must be taken into account when trying to understand the sorely inadequate international response to the wars in Chechnya.

Armed intervention in Russia was out of the question, as it would never have been approved by the UN and would have further antagonized Russia. How-

<sup>29</sup> Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51, *Europe-Asia Studies*, 85, 94 (1999).

<sup>30</sup> Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 40 (1998)

<sup>31</sup> Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51, *Europe-Asia Studies*, 95 (1999).

ever, international condemnation of Russian actions in Chechnya and multilateral sanctions should have been implemented. There was an important window of opportunity before the conflict began, in 1992 and 1993, when, under the influence of Foreign Minister Andrey Kozyrev, Russia had a pro-West policy and was eager to build partnerships with the US and Europe. During this time, Yeltsin worked hard to maintain friendly relations with Clinton and Russia was generally conciliatory toward the West, endorsing many Western foreign policy positions on world conflicts. It was within this political environment, before Russia once again turned inwards and focused its attention on the near abroad, that Western efforts at preventive diplomacy would have been the most likely to succeed. This is true because tensions with Chechnya had been building since 1991 and a number of Russian and foreign observers considered a military confrontation a real possibility well in advance of the 1994 invasion. Moreover, the Russian leadership's decision to use force "was by no means a 'last resort' after all avenues for a peaceful resolution of the conflict had been exhausted," giving international actors further leeway to influence the course of the conflict.<sup>32</sup> For these reasons, the window of opportunity during which war had not yet become a political necessity, and the fact that "peaceful outcomes to disputes are more likely when third parties apply unequivocal pressures to negotiate before the conflicting sides mobilize politically or deploy armed force," it is likely that international actors like the UN (barring the Russian veto), the EU, and the OSCE, or independent states like the US and other major trading partners, could have used the threat of multilateral sanctions and efforts to encourage peaceful negotiation.<sup>33</sup>

A second reason to believe that international interference would not have been met with the degree of Russian hostility expected is that the First Chechen War was extremely unpopular domestically. As Lapidus cites, "the intervention provoked a wave of criticism from broad circles in Russian society, with public opinion polls indicating that over 60 percent of the population opposed the use of force, and about 25 percent were prepared to recognize Chechen independence."<sup>34</sup> The war was a critical issue in the 1996 presidential elections, which was one of the primary reasons for the negotiation of a ceasefire and the signing of the Khasavyurt Accord in August 1996. The First Chechen War quickly developed into a political embarrassment for Russia, both domestically and internationally, especially since it was initially planned as a brief and effective "surgical strike." Instead, it stretched into a prolonged war in which Russian forces were constantly set back by Chechen guerrilla warfare despite Russia's overwhelming manpower, weaponry, and air support. This caused the widespread demoralization of federal forces and the almost universal opposition of the Russian public to the conflict. It

<sup>32</sup> Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 7 (1998)

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 21.

is thus likely that, even if international attempts at preventive diplomacy had failed in the 1992-1993 period, the Yeltsin government would have been responsive to Western aid in ending the conflict. If such efforts had been framed delicately and in terms of helping Russia get out of a difficult situation, then international criticism, sanctions, and efforts for mediation could have had a positive impact on the outcome of the war. Russia would have been unlikely to retaliate "given the real divisions within the Russian elite over the resort to military force, and the lack of public support for it, the possible costs of speaking out frankly were exaggerated and the moral and political price of restraint underestimated."<sup>35</sup>

It seems international fears regarding the costs and consequences of intervention were exaggerated, given that there were several very important factors that favored Russian cooperation. There were serious moral and ethical implications as a result of the international community not responding. While the primary justification for refusing to get involved was not wanting to jeopardize the development of Russian democracy, the international community's failure to act distorted Russia's view of an ideal democracy. At a time when Russian democracy was in its formative stages, the UN failed to enforce the principles of human rights, rule of law, accountability, and transparency as fundamental tenets of liberal democracy. The Russian government was not held accountable to its people or to the international community, which ultimately hurt the development of Russian democracy, which has progressively become even more undemocratic during the Putin era. Whether or not UN intervention would have affected the course of Russian democratic development is uncertain, but what is known is that in a time of critical transition the UN failed to enforce the very principles it was meant to defend.

## VI. THE ETHICS OF INTERVENTION AND THE RtoP DOCTRINE

The Chechen case raises several important questions concerning the UN's moral responsibilities and the future of humanitarian intervention. While humanitarian intervention is illegal according to a black letter reading of the UN Charter, Russian actions nonetheless violated important norms of international law. However, because these laws are non-binding and superseded by the Charter according to Article 103, their enforcing power is ambiguous.<sup>36</sup>

RtoP is perhaps the most promising new theory for guiding future action in cases of humanitarian crises. First articulated after the Rwandan genocide by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, RtoP has grown increasingly influential. It was written into the Outcome Document of the 2005 World Summit in Paragraphs 138 and 139, which were reaffirmed in 2006 by UN Security Council Resolution 1674, a report by Secre-

<sup>35</sup> Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23, *International Security*, 5, 45 (1998)

<sup>36</sup> UN Charter, Art 103.

tary-General Ban Ki-moon in 2009, and General Assembly Resolution 63/308.<sup>37</sup>

The most important tenets of the RtoP doctrine are that each state and the international community “has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansings, and crimes against humanity.”<sup>38</sup> Further, the UN is “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII . . . should peaceful means be inadequate.”<sup>39</sup> RtoP thus introduces the idea of sovereignty as a responsibility rather than a right, but its implementation remains bound to the UN Security Council. The ICISS report, however, seems to suggest some leeway in this respect, as it claims that:

The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.<sup>40</sup>

The RtoP doctrine thus legitimizes intervention and the potential use of force in humanitarian crises.

Regardless, RtoP as it stands today would have created no legal imperative for the UN to intervene in Chechnya in the 1990s. Left to the discretion of the Security Council, the Russian veto would once again have blocked any attempts at intervention. It is for this reason that RtoP should be incorporated into the UN Charter itself. Integration into the Charter, the only document of enforceable international law, would give human rights and the Responsibility to Protect doctrine an official and legal place in international law and compel the UN to take action in cases of severe human rights atrocities. Only then would the protection of human rights truly be a responsibility and not merely a recommendation with little practical force.

This is of course an ideal scenario, as Russia, China, and many developing countries would protest the amendment of the Charter to incorporate RtoP. Nonetheless, RtoP provides a set of moral guidelines that states and the UN should follow and can use to judge states’ actions in armed conflicts. Further, the ICISS report opens the door to the possibility of non-Security Council approved unilateral or multilateral action in response to humanitarian crises.

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37 World Summit Outcome Document, UN General Assembly, (September 15, 2005), UN Doc A/60/L.1 (redefining the Responsibility to Protect in modern terms in accordance with the UN Charter and Security Council).

38 *Id.*

39 *Id.*

40 ICISS Report 13.

Looking back at the Chechen conflict from the perspective of RtoP, it can be concluded even more definitively that the UN had a responsibility to stop Russia’s perpetration of war crimes and crimes against humanity. The Chechen case closely parallels the recent Libyan crisis of 2011, which was also an internal affair in which the Qaddafi regime was responsible for crimes against humanity. Instead of turning a blind eye, the UN Security Council issued Resolution 1973, authorizing military intervention in Libya. In consequence, multi-state coalition began military operations, instituting a no-fly zone in an effort to prevent the massacre expected should Qaddafi’s troops have reached Benghazi. The Libyan intervention is an example of a legitimate and effective application of RtoP in the case of an internal humanitarian crisis.

In sum, it can be concluded that according to both international law present at the time and the new doctrine of RtoP, the UN should have taken a firmer position with respect to Russian intervention in Chechnya. The crimes against humanity and war crimes committed during the conflict should have triggered the UN responsibility to protect in the form of international condemnation, multilateral sanctions, and the writing of an authoritative report. The Chechen case raises the serious moral question of how to enforce human rights on a major world power, and the answer is that the UN should weigh the likely ethical costs of both intervention and non-intervention and try to act in the way that is most likely to uphold the UN’s core principles. Should the UN be prevented from acting due to a Security Council veto, other international actors like NATO, the EU, the OSCE, or an independent coalition of states should step forward to defend these values and the innocent people. In the end, the international community should do its best to hold even superpowers accountable to their citizens and the norms governing international law.

## VII. CONCLUSION

This paper aims to demonstrate that the Russo-Chechen Wars of 1994-2009 warranted an international response due to the crimes against humanity and war crimes committed on both sides. Russian military action in Chechnya constituted a serious violation of a number of international commitments and yet the international community, including the UN, the US, the EU, and the OSCE, was reluctant to get involved or even take a firm stance on the issue. Since any ethical analysis of international action must also take into account the practical side by considering the likely costs of intervention and non-intervention, it has been shown that international concerns over negative consequences in the form of Russian retaliation or derailing the Russian democratic movement were exaggerated. Further, the international reaction to the war failed to defend the principles of international humanitarian law and enforce the values of human rights, rule of law, and accountability.

Although the Second Chechen War is finally over and Grozny has been rebuilt, this conflict demonstrates the reluctance of the international community to act to enforce the fundamental principles of international law on a great power and the ability of the UN Charter to be used to justify non-intervention in a “conscience-shocking situation crying out for action.”<sup>41</sup> It is for these reasons nations take to heart their role in the international responsibility to protect, and that the RtoP doctrine should be incorporated into the UN Charter.



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41 *Id.*