INTERNATIONAL AND TRANSNATIONAL REGULATION OF PRIVATE SECURITY SERVICES: EFFECTIVE COMPLEMENTARITY?

OTTAVIO QUIRICO*

ABSTRACT

Regulation is progressively subject to a process of privatization and globalization, so much so that the expressions "global law" and "transnational regulation" are often opposed to the classical distinction between "domestic law" and "international law". The area of security services is also undergoing this evolution and is increasingly governed by private regulatory initiatives, complementing public norms transnationally. Since security entails the use of force, such a process raises particular issues with respect to fundamental rights, which are crucial to the establishment of a transparent level playing field. A systemic analysis based on contracts, services, compliance, and enforcement mechanisms demonstrates that transnational private regulation theoretically harmonizes with fundamental public norms, but practical implementation is complex, specifically in conflict situations. This is essentially due to the narrow inclusion of fundamental substantive rules in contractual clauses, as well as flaws in the effectiveness and interaction of private and public implementation mechanisms. It is argued that such problems are basically grounded in the fact that private security contractors mostly do not legally qualify as "combatants" in conflict situations: this question should

* Senior Lecturer, University of New England, School of Law, Australia (oquirico@une.edu.au); Honorary Lecturer, Australian National University, Centre for European Studies (ottavio.quirico@anu.edu.au); Alumnus, European University Institute (ottavio.quirico@eui.eu).

be addressed separately, particularly within the framework of the existing conventions on the laws of war. The issue is critical and affects not only the responsibility of Private Security Companies (PSCs) and their personnel, but also their protection and fundamental rights, as well as the liability of third persons.

I. INTRODUCTION: THE MARKET OF FORCE

The contemporary period has been defined as one characterised by the "corporatisation" of security services and the emergence of a profitable transnational market for force as a new form of governance.[1]

Security services cover a wide spectrum of activities, which have as a common denominator the potential involvement of the use of force.[2] They can be basically classified according to two categories: that is, military services, including activities relating to hostilities, and protective services, including activities that relate to the surveillance and protection of persons and goods.[3] Examples of military services include combat operational support and possibly protection of military sites, whereas security services encompass activities such as intelligence gathering and crime prevention.[4]

A brief overview shows that private companies have long operated in non-war contexts and are more or less numerous in different states. For instance, a relevant number of security enterprises operate in the U.S.[5] In contrast, military services have

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1. *See* DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 26 (2005); P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 188 (2003); Fiona De Londras, *Privatized Sovereign Performance: Regulating the "Gap" Between Security and Rights?* 38 J.L. & SOC'Y 96, 102–03 (2011); CHARLES NEMETH, PRIVATE SECURITY AND THE LAW 12 (5th ed. 2018).

2. *See* CARLOS ORTIZ, PRIVATE ARMED FORCES AND GLOBAL SECURITY: A GUIDE TO THE ISSUES 48 (2010); Stephanie M. Hurst, "*Trade in Force*": *The Need for Effective Regulation of Private Military and Security Companies*, 84 S. CAL. L. REV. 447, 450 (2011); Elke Krahmann, *Security: Collective Good or Commodity?* 14 EUR. J. INT'L REL. 379, 381–83 (2008); Molly Dunigan & Ulrich Petersohn, *Introduction*, *in* THE MARKETS FOR FORCE: PRIVATIZATION OF SECURITY ACROSS WORLD REGIONS 9 (Molly Dunigan & Ulrich Petersohn eds., 2015).

3. Raymond Saner, Private Military and Security Companies: Industry-Led Self-Regulatory Initiatives versus State-Led Containment Strategies 5 (2015), http://repository.graduateinstitute.ch/record/293251/files/WP11_CCDP_2015.pdf; Helena Torroja, *Introduction*, *in* PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS VIOLATIONS BY PRIVATE MILITARY AND SECURITY COMPANIES 3 (Helena Torroja ed., 2017).

4. *See* FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-2, HC 577, at 10 tbl.1 (UK); JAMES COCKAYNE WITH EMILY SPEERS MEARS, ET AL., BEYOND MARKET FORCES: REGULATING THE GLOBAL SECURITY INDUSTRY 16–17 (2009) (ebook); CHARLES P. NEMETH, PRIVATE SECURITY: AN INTRODUCTION TO PRINCIPLES AND PRACTICE 29 (2017).

5. *See Security Services Industry in the U.S. – Statistics & Facts*, STATISTA, https://www.statista.com/topics/2188/security-services-industry-in-the-us (last visited June 23, 2018); A. Claire Cutler, *The Legitimacy of Private Transnational Governance:*

been traditionally provided worldwide, mainly by state agents.[6] This scenario changed with the relatively recent breakthrough of private enterprises providing security services in military contexts.[7] Some prominent examples are Aegis, G4S, L3, Sabre International Security, GardaWorld, and Slavonic Corps, operating in topical contexts such as Iraq, Afghanistan, Syria, Yemen and Libya.[8]

The outsourcing of security functions to private enterprises in military contexts prompted the development of regulation by private security service providers in a field that involves the application of fundamental norms and has traditionally been governed by public regulation.[9] This phenomenon is in line with the growing "transnationalisation" of norms within the context of global law.[10] In order to understand the importance of these developments, it is sufficient to consider that the International Code of Conduct (CoC) for Private Security Service (PSS) Providers, that is, a private regulatory instrument, is the reference in the field.[11] By contrast, after years of work, the UN is still discussing the possible adoption of a Convention on Private Military and Security Companies (PMSCs).[12] Both instruments holistically address PSC conduct in war and non-war contexts. Such a trend nevertheless raises concerns with respect to existing fundamental rights, which are

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Experts and the Transnational Market for Force, 8 SOCIO-ECON. REV. 157, 158 (2010); CHRISTOPHER SPEARIN, PRIVATE MILITARY AND SECURITY COMPANIES AND STATES 2 (2017); NEMETH, *supra* note 1, at 12, 139–41.

6. Cutler, *supra* note 5, at 157–58; HIN-YAN LIU, LAW'S IMPUNITY: RESPONSIBILITY AND THE MODERN PRIVATE MILITARY COMPANY 3 (2015); Dunigan & Petersohn, *supra* note 2, at 1.

7. SARAH PERCY, REGULATING THE PRIVATE SECURITY INDUSTRY 25–40 (2013).

8. *See Private Military & Security Companies (PMSC)*, GLOBAL POL'Y F., https://www.globalpolicy.org/nations-a-states/private-military-a-security-companies.html (last visited June 23, 2018); Cutler, *supra* note 5, at 158; Saner, *supra* note 3, at 26; Torroja, *supra* note 3, at 2; Stuart Wallace, *Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective?*, 35 B.U. INT'L L.J. 69, 74–75 (2017); NEMETH, *supra* note 1, at 14.

9. *See* LIU, *supra* note 6, at 3; SPEARIN, *supra* note 5, at 2; Dunigan & Petersohn, *supra* note 2, at 7–8.

10. *See* Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC'Y 20, 20–23 (2011); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 16 (2005); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 L. & CONTEMP. PROBS. 117, 117–18 (2013).

11. *International Code of Conduct for Private Security Service Providers*, INT'L CODE CONDUCT ASS'N ¶ 20 (Nov. 9, 2010), https://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf.

12. José Luis Gomez Del Prado (Chairperson/Rapporteur), *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, at 2, UN Doc. A/HRC/15/25 (July 2, 2010) [hereinafter Gomez Del Prado, *Rep. of the Working Group*]. Assuming that security services involve the use of force in war and non–war contexts, the notion of "PSC" encompasses that of "PMC".

crucial to defining a transparent level playing field.[13] Issues arise not only with respect to first generation human rights, that is, individual claims such as the basic rights to life, equitable process and freedom from torture, but also with regard to second generation human rights, that is, welfare claims, such as labour rights.[14]

This article considers the evolving concept of "transnational private regulation"[15] from the standpoint of both "substantive" and "procedural" norms,[16] with a particular focus on proceedings. The ultimate aim is assessing whether the progressive transnational "privatization" of regulation in the field of security is effectively consistent with fundamental public rules and apt to create a transparent level playing field.[17] Along the lines of existing private regulation, particularly the CoC for PSS Providers, and public instruments, notably the UN Draft Convention on PMSCs, the analysis holistically considers PSCs operating in war and non-war contexts, proceeding in two steps. The study first outlines the private regulatory framework for security services and its interaction with public rules against the background of basic human rights standards. Contracts, services, and particularly compliance and enforcement mechanisms are taken into account. Secondly, the article assesses the practical effectiveness of such a regulatory framework by considering key cases in and outside conflict situations. It is eventually argued that private and public rules are complementary in the sector, but flawed effectiveness is a serious obstacle to the creation of a transparent market, particularly owing to the ambiguous legal status of private security contractors as 'non-combatants' in conflict situations.

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13. *Id*. at 10; COCKAYNE, *supra* note 4, at 18–21.

14. Federico Lenzerini & Francesco Francioni, *The Role of Human Rights in the Regulation of Private Military and Security Companies, in* WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 55 (Francesco Francioni & Natalino Ronzitti eds., 2011); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 751 (2008).

15. Cafaggi, *supra* note 10, at 20.

16. That is, primary and secondary Hart's rules. *See* H.L.A. HART, THE CONCEPT OF LAW 79 (3d ed. 2012).

17. *See* George Andreopoulos & Shawna Brandle, *Revisiting the Role of Private Military and Security Companies*, 31 CRIM. JUST. ETHICS 138, 148 (2012). According to both authors, "such [peer assessment] mechanisms and procedures are not and cannot be substitutes for legal accountability. In fact, the challenge here would be to explore ways in which legal and peer accountability could interact in mutually reinforcing ways." *Id*. Along similar lines, see Daniel Warner*, Establishing Norms for Private Military and Security Companies*, 40 DENV. J. INT'L L. & POL'Y 106, 116 (2012).

II. A HYBRID REGULATORY FRAMEWORK

A. Private Regulatory Initiatives in the Field of Security Services

There is currently no international or regional public regulation comprehensively addressing Private Security Companies (PSCs). At the international level, the UN Draft Convention on PMSCs provides guidelines for regulation, but is not yet a binding instrument.[18] Regionally, Articles 2(2)(k) and 38 of Directive 2006/123/EC of the European Parliament and the Council on Services in the Internal Market[19] excluded, up until 2010, a decision on the development of uniform rules in the matter of security in the EU.[20] Despite the expiration of the deadline and relevant practical problems, for instance, in the matter of licensing,[21] such a decision has not yet been adopted.[22]

At the national level, existing or suggested rules vary from state to state, based mainly on their constitutional foundations, the social perception of PSCs, and quantitative resort to security services.[23] In states where protective services have traditionally been provided by private firms, such as the U.S., public regulation exists, addressing the phenomenon.[24] In contrast, rules governing military services have been traditionally framed worldwide to address public legal persons, but not private enterprises, with the exception of mercenaries, who nevertheless constitute a separate category.[25] Thus, PSCs active in the military sector initially operated in the

18. Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12.

19. Council Directive 2006/123/EC arts. 2, 38, 2006 O.J. (L 376).

20. *See* Nigel D. White & Sorcha MacLeod, *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, 19 EUR. J. INT'L L. 965, 981–84 (2008).

21. *See* Case C-189/03, Comm'n v. Netherlands, 2004 E.C.R. I-9291; Case C-171/02, Comm'n v. Portugal, 2004 E.C.R. I-5674; Case C-514/03, Comm'n v. Spain, 2006 E.C.R. I-993.

22. Mark Button & Peter Stiernstedt, *Comparing Private Security Regulation in the European Union*, 28 POLICING & SOC'Y 398, 399 (2016); *MEPs Call for EU Rules on Private Security Companies*, EUR. PARLIAMENT (May 3, 2017), http://www.europarl.europa.eu/news/en/press-room/20170502IPR73109/meps-call-for-eu-rules-on-private-security-companies.

23. *See e.g.*, MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS (Christine Bakker & Mirko Sossai eds., 2012); *National Regulations*, PRIV. SECURITY MONITOR, http://psm.du.edu/national_regulation/index.html (last visited June 23, 2018).

24. *See National Regulations*, *supra* note 23; NEMETH, *supra* note 1, at 22.

25. Marina Mancini et al., *Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the 21st Century?*, *in* WAR BY CONTRACT, *supra* note 14, at 399.

absence of specific regulation, within a "legal vacuum".[26] Such a gap prompted the enactment of a relevant set of rules by private security firms, targeting security as a whole, including war and non-war contexts. This phenomenon is a particular aspect of global private regulation.[27]

Private regulation in the field of security services encompasses a variety of initiatives, differently identified as "codes of conduct," "ethical codes," "private codes of conduct," or "voluntary principles."[28] These norms operate at the regional, national, and transnational levels, and have a different origin and scope of application.[29] The main regulators are PSCs themselves, often acting in conjunction with governmental and non-governmental organisations.[30]

Some multi-stakeholder initiatives by states, international organisations (IOs), non-governmental organisations (NGOs), and private enterprises, established along the lines of collaborative rule-making between public and private actors,[31] target the conduct of corporations at large, and thus, also set up a transnational regulatory framework for private companies operating in the security sector.[32] In particular, the United Nations Global Compact (UNGC) developed ten principles and a number of practical resources to support participating companies in adopting and implementing conflict-sensitive business practices.[33] The

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26. *See* Nathaniel Stinnett, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses,* 28 B.C. INT'L & COMP. L. REV. 211, 212, (2005); Sorcha MacLeod, *Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus'*, 62 NETH. INT'L L. REV. 119, 126 (2015).

27. *See* DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW 23–25, 148–152 (2008); Sarah McCosker, *The "Interoperability" of International Humanitarian Law and Human Rights Law: Evaluating the Legal Tools Available to Negotiate Their Relationship*, *in* INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 146, 170 (Andrew Byrnes, Mika Hayashi & Christopher Michaelsen eds., 2013).

28. *See* MacLeod, *supra* note 26, at 127–28; Evgeni Moyakine, *From National and International Frustrations to Transnational Triumph? Hybrid Transnational Private Regulatory Regimes in the Industry of Private Military and Security Companies and Their Effectiveness in Ensuring Compliance with Human Rights*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 209, 211 (2015); Wallace, *supra* note 8, at 86.

29. COCKAYNE, *supra* note 4, at 134–70; Carsten Hoppe & Ottavio Quirico*, Codes of Conduct for Private Military and Security Companies: The State of Self-Regulation in the Industry, in* WAR BY CONTRACT*, supra* note 14, at 363–65; EVGENI MOYAKINE, THE PRIVATIZED ART OF WAR: PRIVATE MILITARY AND SECURITY COMPANIES AND STATE RESPONSIBILITY FOR THEIR UNLAWFUL CONDUCT IN CONFLICT AREAS 139–46 (2014).

30. *See* Moyakine, *supra* note 28, at 212–14.

31. Cafaggi, *supra* note 10, at 36–37.

32. *See* Moyakine, *supra* note 28, at 212; Wallace, *supra* note 8, at 98–102; NEMETH, *supra* note 4, at 137.

33. White & MacLeod, *supra* note 20, at 980; Karen Ballentine & Virginia Haufler, *Enabling Economies of Peace: Public Policy for Conflict-Sensitive Business*,

Organisation for Economic Co-operation and Development (OECD) drafted the Guidelines for Multinational Enterprises as a set of non-binding corporate social responsibility (CSR) rules established by governments for private enterprises, which can voluntarily endorse them.[34] Notably, efforts are underway in the OECD to deal with risks arising for companies active in conflict zones, which may have important implications for PSCs.[35]

Other multi-stakeholder initiatives specifically target the activity of PSCs on a transnational scale. The International CoC for PSS Providers was elaborated under the auspices of the Swiss Confederation and recently adopted and signed by numerous PSCs.[36] It is the most relevant and comprehensive private regulatory initiative in the field and targets the conduct of both PSCs and their personnel.[37] The Code specifically focuses on the use of force and weapons, personnel training, and the prohibition of acts particularly dangerous for fundamental rights, such as torture and forced labour.[38] The Voluntary Principles on Security and Human Rights (VPSHR) have been commonly drafted by the U.S., UK, Netherlands, Norway, NGOs and private companies, and outline a CSR framework for enterprises active in the extractive and energy sector.[39] They include a specific section addressing PSCs operating on behalf of extractive and energy enterprises, focusing on respect for the rule of law, the use of force, and personnel background checks.[40] Another fundamental reference is the Sarajevo CoC for PSCs, a set of rules developed by the non-governmental organisations Saferworld (UK) and Centre for Security Studies.[41] This Code is based on European and international best practices and provides fundamental principles for voluntary adoption by PSCs when national regulation is either weak or absent. At the regional level, within the EU, the basic framework for CSR has been

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UN GLOBAL COMPACT 49 (Feb. 2009), https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Enabling_Economies_2009.pdf.

34. Guidelines for Multinational Enterprises, OECD (2011), http://www.oecd.org/corporate/mne (last visited June 23, 2018).

35. *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, OECD 3 (2006), https://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf; White & MacLeod, *supra* note 20, at 978.

36. *International Code of Conduct for Private Security Service Providers*, *supra* note 11.

37. MacLeod, *supra* note 26, at 121.

38. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 35–37, 40.

39. *What are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/ (last visited July 2, 2018).

40. *Id.*

41. SEESAC, THE *SARAJEVO CODE OF CONDUCT* FOR PRIVATE SECURITY COMPANIES (2006), http://www.seesac.org/res/files/publication/544.pdf.

set out by the representatives of the Confederation of European Security Services (CoESS) and the Trade Union Federation Uni-Europa, thus overcoming Directive 2006/123/EC. This led to the adoption of the CoESS/Uni-Europa Code of Conduct and Ethics for the Private Security Sector.[42]

Often, private regulation is exclusively industry-driven,[43] and thus set up by PSCs themselves, either individually or collectively, especially on a transnational basis. These rules seek to complement each other and also integrate multi-stakeholder initiatives. They encompass a wide range of conduct and address activities having a different nature, because some enterprises, often labeled "PSCs", for instance AECOM, simply provide technical and management support services to a broad range of markets, including the security sector, whilst other companies, for instance, Xe Services LLC, Dyncorp, and Aegis, operate exclusively in the security sector.[44] Industry-driven regulation has a different scope of application. At the federative level, in the UK, PSCs operating overseas that satisfy strict disciplinary standards can join the British Association of Private Security Companies (BAPSC).[45] On a regional scale, based on the criterion of the "host" country, the Private Security Company Association of Iraq (PSCAI) adopted a Charter for PSCs operating in the Iraqi State.[46] On a global scale, the International Stability Operations Association (ISOA) adopted rules on CSR that seek to ensure respect for ethical standards by PSC members operating in conflict and post-conflict situations.[47]

B. Contracts, Services, and Fundamental Rights

PSCs may enter into contracts with states, governmental and non-governmental organisations and other private entities. Specific administrative procedures are usually established for publicly outsourcing military services, for instance, the US Logistic Civil

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42. Europa & Confederation of European Sec. Servs., *Code of Conduct and Ethics for the Private Security Sector*, PRIV. SECURITY MONITOR (July 18, 2003), http://psm.du.edu/media/documents/industry_initiatives/coess_code_of_conduct.pdf.

43. Cafaggi, *supra* note 10, at 32–33.

44. Saner, *supra* note 3, at 25; *see also* AECOM, https://www.aecom.com (last visited July 2, 2018).

45. BRIT. ASS'N PRIV. SECURITY COMPANIES, http://www.bapsc.org.uk (last visited July 2, 2018).

46. *See* PRIVATE MILITARY, http://www.privatemilitary.org/security_associations.html #.VywbWiHkXHo (PSCAI was disestablished on December 31, 2011) (last visited July 2, 2018).

47. *See* INT'L STABILITY OPERATIONS ASS'N, https://stability-operations.site-ym.com/ (including different versions of the Code of Conduct) (last visited July 2, 2018).

Augmentation Program (LOGCAP).[48] Otherwise, freedom of contracts applies when the hiring subject is a private entity.[49] So far, the major number of contracts have been entered into by the U.S., Canada and the UK, where the perception of the use of force as a state monopoly is not absolute.[50] Basic private rules establish that PSCs are allowed to contract solely with legitimate and recognised states, international organisations, non-governmental organisations, and private companies, by carefully considering their accountability.[51] More fundamentally, PSCs are required not to engage in contracts that might violate CSR rules governing the provision of services, with respect to substance, compliance, and enforcement issues.[52] In fact, PSC personnel are usually compelled to behave humanely and with integrity, objectivity, and diligence.[53] However, transnational private regulation does not compel PSCs to embody CSR rules into contracts. This has been subject to criticism, in particular, because existing international human rights rules addressing private enterprises are usually embedded in soft legal instruments,[54] such as the Ruggie Principles on corporate responsibility,[55] and thus, could only be made compulsory by being included in contractual clauses, according to standard conflict of laws rules.[56]

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48. Dep't of the Army, *Logistics Civil Augmentation Program: Army Regulation 700–137*, ARMY PUBS (Mar. 23, 2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN2768_AR700-137_Web_FINAL.pdf.

49. *See* Convention on the Law Applicable to Contractual Obligations art. 3, June 19, 1980, 1980 O.J. (L 266).

50. *See* James Cockayne & Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, INT'L PEACE INST. 3 (Mar. 2009), https://www.ipinst.org/wp-content/uploads/publications/pmsc_epub.pdf; Saner, *supra* note 3, at 24.

51. *ISOA Code of Conduct Version 13.1*, INT'L STABILITY OPERATIONS ASS'N ¶ 4 (Oct. 20, 2011), https://c.ymcdn.com/sites/stability-operations.site-ym.com/resource/resmgr/docs/s_800_13_en_t_-_code_of_cond.pdf; *see also* Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 23. For a scholarly viewpoint, see PERCY, *supra* note 7, at 56–58.

52. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 20.

53. *Id.* at ¶ 28; Comm'n on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 4–5 (Aug. 26, 2003).

54. CORINNA SEIBERTH, PRIVATE MILITARY AND SECURITY COMPANIES IN INTERNATIONAL LAW: A CHALLENGE FOR NON-BINDING NORMS: THE MONTREUX DOCUMENT AND THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS 26–30 (2014); *see also* Moyakine, *supra* note 28, at 219–20.

55. John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

56. *See* Michael Cottier, *Elements for Contracting and Regulating Private Security and Military Companies,* 88 INT'L REV. RED CROSS 637, 642–43 (2006); Laura Dickinson, *Contract as a Tool for Regulating Private Military Companies, in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 217–18 (Simon Chesterman & Chia Lehnardt eds., 1st ed. 2007) (ebook); Hurst, *supra* note 2, at 479–80; De Londras, *supra*

As to the provision of services, along the lines of existing public regulation, duly licensed PSCs are requested to comply with norms governing arms trafficking and are allowed to provide preemptive and defensive services.[57] Therefore, PSCs and their employees must operate mainly in view of deterrence, balancing the provision of security services with the legitimate concerns of persons who can be affected by their activities. Basically, firms are requested to observe the ethical standards of the contracting party, the law of the "host" state, human rights, international humanitarian law[58] and emerging best practices.[59] Therefore, fundamental rights are a driving force for the development of primary transnational private regulation in the field of security.[60] On the whole, the use of force is only allowed for preemptive and defensive purposes.[61] This approach is consistent with the tendency to exclude PSC personnel from performing "inherently State functions,"[62] notably "direct participation . . . in hostilities,"[63] albeit the scope of the notion is far from being clearly outlined,[64] which dangerously blurs the

note 1, at 115; Joseph C. Hansen, *Rethinking the Regulation of Private Military and Security Companies under International Humanitarian Law*, 35 FORDHAM INT'L L.J. 698, 731 (2012); MOYAKINE, *supra* note 29, at 146–51; Norms on the Responsibilities of Transnational Corporations, *supra* note 53, at 6.

57. *See* Federal'nyi Zakon RF o Chastnoi Detektivnoi I Okhrannoi Deyatel'nosti v Rossiiskoi Federatsii [Federal Law of the Russian Federation on Private Detective and Security Activities in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1992, No. 2487-1, art 11; DEL. CODE ANN. tit. 24, §§ 1301–1341 (2018); PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, *supra* note 4, at 7–8, 45; Gomez Del Prado, *Rep. of the Working* Group, *supra* note 12, at 26–30.

58. *See* LINDSEY CAMERON & VINCENT CHETAIL, PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW 385–538 (2013) (ebook); PERCY, *supra* note 7, at 45.

59. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 21–22; *see also* Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 27; CAMERON & CHETAIL, *supra* note 58, at 668; COCKAYNE, *supra* note 4, at 44.

60. Hurst, *supra* note 2, at 452–64; MOYAKINE, *supra* note 29, at 105–55; Cafaggi, *supra* note 10, at 24–25; De Londras, *supra* note 1, at 97.

61. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 30–31; *see also* Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 28–29, 34–35.

62. Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 26–27.

63. *Id.* at 28–29.

64. For instance, the UN Draft Model Law on PMSCs broadly includes in "military operations" security services usually provided by military personnel, such as affording "armed escorts to government vehicles." José L. Gomez Del Prado & Margaret Maffai, *United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self Determination & the Wisconsin International Law Society: Model Law for the Regulation of Private Military and Security Companies*, 26 WIS. INT'L L.J. 1078, 1080 (2009); *see also* NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 47 (2009) (ebook).

distinction between PSCs and mercenaries.[65] Furthermore, firms are invited to maintain a high level of technical and professional proficiency and adopt proper rules of engagement (Standard Operating Procedures), including accurate record-keeping and incident reporting.[66] Compliance with best international practices relating to the use of force is also recommended, in particular, with respect to the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials.[67]

Reference to existing public rules is important, because it potentially compels PSCs to abide by obligations that might be otherwise inapplicable. This is particularly true of international rules, for instance, the Convention against Torture,[68] addressing primarily states and state agents, not private legal persons.[69] Therefore, private regulation has the potential to establish a crucial link between fundamental public norms and PSCs, especially at the supranational level.[70] In this respect, nevertheless, private regulation is questionable because of its elusive content, which does not specify how rules addressing states and state agents may also apply to PSCs and their employees.[71] For instance, general statements of "compliance with international and domestic law" do not clarify how rules addressing public entities can actually extend to private legal persons.[72]

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65. Whilst under art. 47 of Additional Protocol I to the Geneva Conventions mercenaries take "direct part in hostilities," the International Convention against the Recruitment, Use, Financing and Training of Mercenaries refers to either taking "part in the hostilities" or "participat[ing] directly in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 1125 U.N.T.S. 3; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries arts. 1 & 3, Dec. 4, 1989, 2163 U.N.T.S. 75.

66. *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at ¶ 2.6.

67. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 32.

68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26,1987).

69. *See* Angelina Fisher, *Accountability to Whom?, in* PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 46, 56–58 (Simon Chesterman & Angelina Fisher eds., 2009) (ebook); Cafaggi, *supra* note 10, at 28; De Londras, *supra* note 1, at 107–08; Nigel White, *Regulation of the Private Military and Security Sector: Is the UK Fulfilling Its Human Rights Duties?*, 16 HUM. RTS. L. REV. 585, 590 (2016).

70. LA DIMENSION PLURIDISCIPLINAIRE DE LA RESPONSABILITE SOCIALE DE L'ENTERPRISE [THE PLURIDISCIPLINARY DIMENSION OF CORPORATE SOCIAL RESPONSIBILITY] (Marie-Ange Moreau & Francesco Francioni eds., 2007) (Fr.).

71. *See* Hoppe & Quirico, *supra* note 29, at 371–72; James Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, *in* FROM MERCENARIES TO MARKET, *supra* note 56, at 207.

72. *See SARAJEVO CODE OF CONDUCT*, *supra* note 41, at ¶ 2.1; *DynCorp International Code of Ethics and Business Conduct*, DYNCORP INT'L 4 (2012), http://www.dyn-intl.com/media/coe_bc_brochure.pdf.

C. Compliance and Enforcement Mechanisms

Under private regulation, specific procedures and sanctions exist for inducing respect of rules governing the provision of security services. Since PSCs deal with the market of force, compliance and enforcement mechanisms specifically aim to prevent and repress violations of fundamental rights. Basically, it is useful to distinguish rules on compliance from rules on enforcement, whereby rules on compliance preemptively limit access to security services and are based on ex-ante control, whilst rules on enforcement are triggered by breaches of substantive norms and rely upon ex-post monitoring and reporting.[73] Compliance and enforcement rules are complementary means of implementation.[74]

In light of the structure of substantive rules, compliance and enforcement mechanisms are developed at different levels in existing transnational security networks, that is, locally, regionally, and internationally.[75] In principle, private mechanisms for compliance and enforcement tend to coordinate with each other and with public rules, based on core fundamental rights. This is true of existing domestic proceedings and should also apply to prospective international enforcement mechanisms.[76]

With regard to general implementation mechanisms addressing security companies as well as other corporations, the activity of PSCs may be relevant to the UNGC enforcement proceedings, which are based on progress communication and naming and shaming techniques.[77] Nevertheless, for the time being the security sector appears to be absent from the categories of reporting companies.[78] More pertinently, the activities of PSCs are relevant to enforcement mechanisms under the OECD Guidelines, which are based on the good offices and mediation of National Contact Points (NCPs) in

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73. *See* Cockayne, *supra* note 71, at 205–06; Hoppe & Quirico, *supra* note 29, at 362; Renée De Nevers, *(Self) Regulating War?: Voluntary Regulation and the Private Security Industry*, 18 SECURITY STUD. 479, 481, 498 (2009); Moyakine, *supra* note 28, at 217–19.

74. Moyakine, *supra* note 28, at 217 (generally considering ex–ante and ex–post procedures as enforcement mechanisms).

75. Ruggie, *supra* note 55, at 27; *see also* White & MacLeod, *supra* note 20, at 986.

76. *See* Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 21–49 (outlining domestic and international mechanisms to investigate the responsibility of PMSCs and their personnel).

77. *See* COCKAYNE, *supra* note 4, at 174–75.

78. *See* White & Macleod, *supra* note 20, at 978–79; *Our Participants*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/participants (last visited July 2, 2018).

cases of unlawful acts committed by a business enterprise operating from an OECD member state.[79]

With respect to private mechanisms of implementation exclusively governing security services, they regulate both the conduct of PSCs and their personnel. The two aspects are intertwined since the responsibility of the companies originates from the liability of their personnel. Ex-ante, self-regulatory initiatives support the application of transparent and fair public licensing systems, which are based on public administrative procedures.[80] This aim is achieved via the disclosure of information by PSCs to public authorities, particularly concerning internal procedures, as well as through compliance by PSCs with licensing conditions imposed by national regulation.[81] In fact, public norms require PSCs and their employees to comply with basic legal standards by proving the possession of necessary professional qualifications, absence of threats to state security, and clearance from judicial convictions.[82] Private rules complement substantive regulation and focus, in particular, on compliance with licensing proceedings concerning the trafficking and brokering of arms and strategic goods.[83] Sometimes federative private regulatory initiatives establish a process for screening the accountability of new PSC members and granting membership status.[84] As to the qualification of personnel, private regulation requires the establishment of efficient procedures for the selection of new employees, notably via collaboration with public authorities, in order to assess the accountability and integrity of candidates. The focus is on the successful completion of training, with particular regard to the use of armed force by employees authorized to carry firearms.[85]

Ex-post, self-regulatory initiatives provide that PSCs investigate, sanction, and report accountability to relevant public authorities for both: (1) their acts, and (2) those of their personnel.[86]

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79. *OECD Guidelines for Multinational Enterprises*, OECD 72–73 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

80. *See*, *e.g.,* ILL. ADMIN. CODE tit. 68, § 1240.200 (2018); Law on Private Security art. 11 (B.O.E. 2014, 83) (Spain).

81. *See International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 45.

82. *See* PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, *supra* note 4, at 24.

83. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 22 & 61.

84. *Membership*, BAPSC, http://www.bapsc.org.uk/membership.html (last visited July 2, 2018).

85. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 59.

86. CAMERON & CHETAIL, *supra* note 58, at 663–64.

With regard to the responsibility of PSC personnel, private security firms are requested to investigate inappropriate staff behavior and to cooperate with official investigations into allegations of contractual violations, as well as breaches of fundamental rights and international humanitarian law.[87] Therefore, enforcement of private regulatory standards is essentially based on monitoring and reporting the conduct of employees by ad hoc organs that are either internal or external to PSCs.[88] Effective remedies are also envisaged, including the termination of employment and recommendations for the prevention of recurrence of unlawful conduct.[89] Procedures are supposed to be quick, fair and transparent and include records about any allegations, findings and disciplinary measures available to competent authorities upon request.[90]

As to the responsibility of PSCs, to date not many self-regulatory initiatives have set up a complete ex-post enforcement mechanism. The main example is the ISOA CoC (version 13.1),[91] which is enforced via the ISOA Enforcement Mechanism, centered on a Standards, Oversight & Compliance Committee (SOCC).[92] The details of the proceedings established by this mechanism are currently unavailable,[93] but they are likely to follow the ISOA Standards Compliance and Oversight Procedure, which complemented version 12 of the ISOA CoC, threatening members failing to uphold its provisions with the possibility of dismissal.[94] Building on the CoC and Enforcement Mechanism of the preceding

87. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 67(c); *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at § 2.21; *DynCorp International*, *supra* note 72, at 12; *ISOA Code of Conduct*, *supra* note 51, at ¶ 3; *Business Ethics Policy*, G4S ¶ 4.1, http://www.g4s.us/-/media/g4s/corporate/files/group-policies/business-ethics-policy.ashx?la=en (last visited July 2, 2018).

88. *Code of Conduct and Ethics for the Private Security Sector*, *supra* note 42, at 7; *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 6(d); *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at § 2.20(h)–(i); *Code of Business Ethics and Standards of Conduct: Statement of Conformance*, GARDAWORLD 2–3 (Oct. 27, 2017), http://garda-federal.com/images/flowdowns/GWFS%20Statement%20of%20Conformance.pdf; *Guiding the Way: Code of Ethics and Business Conduct*, L3, at 30 (Jan. 2012), https://secure.ethicspoint.com/domain/media/en/gui/17948/English.pdf.

89. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at 67(a)(c) & (f).

90. *Id.* at 67(b) & (d).

91. *ISOA Code of Conduct Version 13.1*, *supra* note 51.

92. *Committees & Working Groups*, ISOA, http://iframe.stability-operations.org/?page=Committees (last visited May 2, 2018).

93. *How to Submit a Standards Complaint*, ISOA, http://iframe.stability-operations.org/page/Standards_Complaint/How-to-Submit-a-Standards-Complaint.htm (last visited July 2, 2018).

94. *See* Hoppe & Quirico, *supra* note 29, at 373–74.

International Peace Operations Association (IPOA),[95] the ISOA Standards Compliance and Oversight Procedure established the competence of a Standards Committee to address complaints against a member company.[96] Complaints were submitted by Member companies or their personnel to a Chief Liaison Officer,[97] which excluded external independent monitoring. Screening was exercised by an Administrative Panel, which decided whether a complaint was well-founded and determined its eventual submission to the Review Panel.[98] The Review Panel could either dismiss the complaint or submit it for hearing to the Compliance Panel, that is, the full Standards Committee, which could then decide to either impose sanctions, or reject the complaint.[99] Sanctions consisted of expulsion from ISOA and were enforced by a Disciplinary Panel, including the full ISOA Board of Directors.[100] The final decisions of the Review Panel and Compliance Panel were advertised in a public forum.[101] Expulsion entailed the impossibility of readmission for a minimum period of twelve months.[102]

The International CoC for PSS Providers is complemented by oversight mechanisms for private security entities,[103] allowing monitoring and the submitting of complaints against associated PSCs.[104] However, a more ambitious Oversight Mechanism was initially envisaged, including ex-ante and ex-post compliance procedures,[105] which was seen as a crucial step for the effective operation of substantive rules, along the lines of the UN Framework for Business and Human Rights.[106]

Some CSR rules also envisage the accountability of private enforcers. Such is the case, for instance, of the Sarajevo CoC, which requires the establishment of clear responsibilities for the boards of governors to enforce.[107] Similarly, the L3 Code of Ethics and

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95. *See International Peace Operations Association (IPOA),* CROSSROADS GLOBAL HAND, http://www.globalhand.org/en/search/all/organisation/26247?search=%22fair+trade%22 (last visited July 2, 2018).

96. Int'l Stability Operations Ass'n, Standards Compliance and Oversight Procedure (Sept. 25, 2009), https://perma.cc/9TBN-NRM6.

97. *Id.* at § 2.3.

98. *Id.* at § 3.

99. *Id.* at § 4.

100. *Id.* at § 6.

101. *Id.* at §§ 5.12, 6.11.

102. *Id.* at § 6.12.

103. *See* INT'L CODE CONDUCT ASS'N, https://www.icoca.ch/ (last visited July 2, 2018).

104. *International Code of Conduct for Private Security Service Providers, supra* note 11, at ¶ 12.

105. Elements of Governance & Oversight Mechanism for the Int'l Code of Conduct for Priv. Security Providers 2 (2013) (unpublished manuscript) (on file with Int'l Code of Conduct Ass'n).

106. *See* Ruggie, *supra* note 55, at 24.

107. *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at ¶ 2.20(c).

Business Conduct provides that concerns about violations of standards in the areas of internal control or auditing may be raised with the Audit Committee of the Board of Directors.[108] With respect to the interaction between public and private norms, the responsibility of private enforcers may particularly arise for failing to prevent or sanction grave breaches of fundamental rights committed by subordinates, according to the doctrine of command responsibility.[109] This doctrine maintains that superiors can be held responsible for failing to prevent or sanction offenses committed by their subordinates within both public and private organizations.[110] PSC superiors have the power to sanction employees through disciplinary action, and fully exercise the power to prevent human rights violations, because they can train PSC personnel, issue orders ensuring crime prevention, and report violations to public authorities.[111] Thus, in the case of a failure to exercise disciplinary action and report violations to public authorities, PSC personnel monitoring subordinate employees may be subject to prosecution.[112] However, practice seems to demonstrate that the exercise of these powers cannot be easily implemented.[113]

III. EFFECTIVENESS

Based on the categorisation of the services provided by PSCs, the enforcement practice relating to PSC incidents may be divided into two main areas, that is, on the one hand, war contexts and, on the other, non-war contexts. Conflicts entail, by nature, a highly dangerous environment, and thus there is a possibility that PSCs and their employees may violate fundamental private and public rules. However, cases of non-compliance by PSCs and their

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108. *Guiding the Way: Code of Ethics and Business Conduct*, *supra* note 88, at 30.

109. *See* Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 28; NEMETH, *supra* note 1, at 276–79.

110. ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 182 (3d ed. 2013).

111. *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999), http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf; Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgement, ¶ 316 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

112. *See* Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 293 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf.

113. THOMAS BRUNEAU, PATRIOTS FOR PROFIT: CONTRACTORS AND THE MILITARY IN U.S. NATIONAL SECURITY 145 (2011).

employees with basic private and public regulation also exist outside conflict situations.[114] Although it is not easy to collect information about the practical implementation of private enforcement mechanisms, which may be due to the fact that the emergence of transnational private regulation in the field is a relatively recent phenomenon, there are reported situations involving alleged human rights breaches by PSCs. In some cases, action has also been brought in domestic courts for violation of national law.[115] The following review is a selection of cases aiming to critically assess the effectiveness of transnational private regulation in war and non-war contexts, against the background of public regulation, in light of the distinction between ex-ante control and ex-post enforcement.

A. Ex-ante Control

In the context of PSCs, labour rights abuses are particularly troublesome with respect to preemptive monitoring. According to José Gómez del Prado, former Chairperson of the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights, PSCs operating in contexts such as Iraq and Afghanistan recruit personnel through a network of international contact companies in developing countries, where manpower is cheap.[116] PSC employees have experienced contractual irregularities and poor work conditions.[117] In case of injury or death, claims submitted by private security guards or their families have often been denied, preventing the achievement of health care or compensation.[118]

Recruitment of personnel with a negative human rights record is likely to have happened in Colombia, where the government implemented a large-scale demobilization of paramilitary groups involved in breaches of human rights and international

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114. *See, e.g.,* NEMETH, *supra* note 1, at 280.

115. *See Private Military & Security Companies and Their Impacts on Human Rights: Recent Developments*, BUS. & HUM. RTS. RESOURCE CTR. (Apr. 30, 2013), https://www.business-humanrights.org/sites/default/files/media/documents/pmsc-bulletin-issue-4-30-apr-2013.pdf (describing some of the actions brought forth in domestic courts regarding violations of national law).

116. José L. Gómez Del Prado*, Impact on Human Rights of a New Non-State Actor: Private Military and Security Companies*, 18 BROWN J. WORLD AFF. 151, 163 (2011).

117. José L. Gomez Del Prado*, Impact on Human Rights of Private Military and Security Companies' Activities*, GLOBAL RES. (Oct. 11, 2008), http://www.globalresearch.ca/impact-on-human-rights-of-private-military-and-security-companies-activities/10523.

118. *See id*; Dave Ritchie, et al., *Who Protects the Guards?: The Facts Behind G4S in Southern Africa*, WAR ON WANT 8–15 (May 2007), https://waronwant.org/sites/default/files/Who%20Protects%20the%20Guards.pdf.

humanitarian law during a forty-year civil war.[119] Reports from officials, NGOs, and local residents indicate that demobilized paramilitaries have been employed in security-related jobs in licensed firms.[120]

These cases demonstrate that ex-ante control on recruited personnel is difficult to implement, especially in developing countries, where PSCs often operate. This may not only facilitate breaches of fundamental labour rights, but also further human rights violations by recruited personnel, owing to a lack of adequate background and training.[121]

B. Ex-post Enforcement Outside Conflict Situations

Ex-post enforcement mechanisms have proven effective with respect to breaches of complementary private and public substantive regulation outside war contexts. Notably, it is not uncommon for PSCs to run immigration centers. A relevant case concerns G4S, which committed to complying with CSR rules by voluntarily adopting an advanced business and ethics policy.[122] More specifically, the company is bound to respecting fundamental rights according to the principles, procedures and practices established by the Universal Declaration of Human Rights (UDHR).[123] In this regard, G4S declares it endeavours to work with business partners that behave consistently with human rights and to ensure that contractual requirements do not infringe upon fundamental rights.[124] The company also ensures that its employees do not compromise internationally accepted human rights conventions.[125] In spite of this advanced CSR regime, Global Solutions (GSL, now G4S) and its employees were involved in violations of fundamental rights while providing immigration detention services through subsidiary GSL Australia, in breach of

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119. Amnesty Int'l, *Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?*, AI Index AMR 23/019/2005, at 27–40 (Aug. 31, 2005).

120. *Id.* at 42.

121. Hurst, *supra* note 2, at 475–81 ("[A] PMSC could ensure all of its personnel are trained in human rights and IHL, and that it hires only employees with a background free of human rights abuses."); *see also* Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, *in* FROM MERCENARIES TO MARKET, *supra* note 56, at 245; Olga Martin-Ortega, *Business Under Fire: Transnational Corporations and Human Rights in Conflict Zones*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 189, 201 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010); Rebecca DeWinter-Schmitt, *Human Rights and Self-Regulation in the Apparel Industry*, *in* PRIVATE SECURITY, PUBLIC ORDER, *supra* note 69, at 142–47; Dunigan & Petersohn, *supra* note 2, at 10–11.

122. *Business Ethics Policy*, *supra* note 87.

123. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

124. *Business Ethics Policy*, *supra* note 87, at ¶¶ 1.3, 1.4, 4.1.

125. *Id.* at ¶¶ 3, 4.1.

the 1966 International Covenant on Civil and Political Rights[126] and 1948 UDHR.[127] Initially, GSL denied the allegations and claimed to be "committed to promoting best practice in human rights in its policies, procedures and practices."[128] However, in June 2005 the Australian NCP (ANCP) for the OECD Guidelines for Multinational Enterprises received a submission from several non-governmental organisations and decided to convene a mediation session in Canberra on 28 February 2006, at the end of which GSL committed to upholding the human rights of those in its care.[129] GSL agreed to ensure contract renegotiation by making reference to human rights standards and international conventions as the framework for a service delivery model.[130] GSL also indicated it was willing to make its own "random audits" available for external scrutiny, change its monitoring system in order to make it more effective, review the terms of reference and composition of its Community Advisory Committee to enhance external engagement, and expand a "client survey" to include input and feedback from persons visiting the detention centers.[131] In April 2006, it was considered that the company had met the demands.[132]

This case proves that multi-layered private regulatory initiatives can be effective in ensuring respect for fundamental rights within the field of security services, particularly in countries where the rule of law is key to the functioning of the State.[133] In fact, although GSL was initially not fully compliant with its own CSR rules, the broader framework established under the OECD Guidelines and related third-party enforcement mechanisms ultimately granted respect for fundamental rights. Most significantly, despite the fact that NCP procedures are voluntary and recommendations by NCPs are not compulsory, because the OECD Guidelines are not legally binding, practice shows that the action of NCPs can be effective in promoting CSR standards, to the extent that GSL agreed to review its internal enforcement

126. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

127. AUSTL. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, COMPLAINT BY MR HUONG NGUYEN AND MR AUSTIN OKOYE AGAINST THE COMMONWEALTH OF AUSTRALIA (HREOC REPORT NO. 39) 7 (2007), http://www.humanrights.gov.au/sites/default/files/content/pdf/legal/hreoca_reports/hrc_report_39.pdf.

128. *Statement by the Australian National Contact Point 'GSL Australia Specific Instance'*, OECD 1 (Apr. 6, 2006), http://www.oecd.org/dataoecd/28/2/36453400.pdf.

129. *Id.* at 3.

130. *Id.* Attachment B, at 3.

131. *Id.* Attachment B, at 4.

132. *Id.* at 3.

133. *See* COCKAYNE, *supra* note 4, at 215–17.

mechanisms.[134] The case also proves that general enforcement mechanisms targeting multinational enterprises may integrate enforcement mechanisms established by transnational private rules focusing on security and make them more effective, according to institutional complementarity.[135] Recently, G4S became a party to the International CoC for PSS Providers and further improved the efficiency of its private enforcement procedures by creating a comprehensive mechanism for monitoring violations of self-established CSR rules.[136] In fact, a CSR Committee, comprising of G4S senior managers, is now entrusted to monitor compliance with CSR policies throughout the Group.[137] The CSR Committee reports to the Audit Committee, which includes company directors and is vested with the power to investigate the duty performance of employees, in collaboration with third party experts and external auditors.[138] However, in contexts where the application of the rule of law is problematic, the effective implementation of the OECD Guidelines via the NCPs with respect to PSCs is controversial.[139]

Besides private implementation, effective public enforcement mechanisms are essential to applying substantive human rights standards.[140] For instance, in *Williams v. Office of Security Intelligence, Inc.*, Bernard Ferron and Ray Overcash, a private security company and its employees were held responsible for negligently patrolling an apartment complex in Florida and consequently enjoined to pay $800,000 in compensatory damages.[141] In *Price v. Gray's Guard Service, Inc.* and the Fidelity and Casualty Company of New York, the use of firearms by private security firms was in issue.[142] More specifically, a private security guard regularly armed with a gun was on service at Greater Jacksonville Fair, Florida, while he was suddenly attacked and hit by two men whom

134. *See ForUM vs Aker Kværner ASA*, OECD WATCH (June 20, 2005), http://oecdwatch.org/cases/Case_81.

135. Moyakine, *supra* note 28, at 221; Wallace, *supra* note 8, at 99.

136. *Safeguarding Our Integrity*, G4S, http://www.g4s.com/en/Social%20Responsibility/Safeguarding%20our%20integrity (last visited July 9, 2018).

137. *CSR Committee*, G4S, http://www.g4s.com/en/investors/corporate-governance/csr-committee (last visited July 11, 2018).

138. *G4S Audit Committee*, G4S, http://www.g4s.com/en/investors/corporate-governance/audit-committee (last visited July 11, 2018).

139. Wallace, *supra* note 8, at 108–11.

140. *See e.g.*, DAVID A. MAXWELL, PRIVATE SECURITY LAW: CASE STUDIES (1992); Doraval Govender*, The Management of Security Incidents by Private Security,* 24.3 AFR. SECURITY REV. 291 (2015); Cleber da Silva Lopes*, Assessing Private Security Accountability: A Study of Brazil,* 25 POLICING & SOC'Y 641 (2015) (providing a critical analysis of other countries); NEMETH, *supra* note 1, at 141–308.

141. Williams v. Office of Sec. & Intelligence, Inc., 509 So. 2d 1282, 1283–84 (Fla. 3d DCA 1987).

142. Price v. Gray's Guard Serv., Inc., 298 So. 2d 461, 462–64 (Fla. 1st DCA 1974).

he had previously prevented from entering a gate closed to the public.[143] Before the two assailants could wrestle him to the ground, the security guard managed to draw his pistol and fire, killing one of them, whilst the other fled.[144] In the ensuing proceedings, the conduct of the guard was considered a form of legal protection for his own life and physical integrity from sudden and imminent peril and death, within the limits of self-defense.[145]

C. Ex-post Enforcement in Conflict Situations

Accounts have reported incidents entailing questionable use of force by security contractors in conflict situations.[146] In this context, ex-post private enforcement mechanisms rely fundamentally upon monitoring and reporting, a system that has nevertheless proved quite problematic. The Nisoor Square incident is an example where armed private security guards used lethal force against real or perceived threats.[147] On 16 September 2007, private security contractors working for the PSC Blackwater Worldwide were running an armed convoy through Baghdad.[148] Iraqi government officials allege that Blackwater contractors killed seventeen civilians and wounded twenty-four more in the Nisoor Square neighbourhood without justification.[149] Blackwater alleged the contractors acted in self-defense.[150] The U.S. reaction led to different investigations.[151] In this respect, it is difficult, or rather impossible, to qualify private security contractors as "combatants" in conflict situations. This is due to contractors not having the right to take "direct participation in hostilities": they cannot be considered "armed forces of a party" under article 43(1) and (2) of Additional Protocol I to the Geneva Conventions on international armed conflicts.[152] Such a qualification is also consistently excluded in

143. *Id.* at 463–64.

144. *Id.* at 464.

145. *Id.* at 465–66.

146. *Private Security Contractors at War: Ending the Culture of Impunity*, HUM. RTS. FIRST 7 (2008), http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf.

147. *Id.* at 1; NEMETH, *supra* note 1, at 221.

148. *Private Security Contractors at War*, *supra* note 146, at 1, 5.

149. *Id.* at 1, 11.

150. *Id.* at 5.

151. *See id.* at 5–7, 18–21.

152. *See* MELZER, *supra* note 64, at 34; Mirko Sossai, *Status of Private Military and Security Company Personnel in the Law of International Armed Conflict*, *in* WAR BY CONTRACT, *supra* note 14, at 201.

internal armed conflicts under Additional Protocol II to the Geneva Conventions.[153]

As a consequence, former Blackwater guards faced trial for voluntary manslaughter and firearms violations before the District Court of Columbia.[154] This is not considered to be the most appropriate substantive and procedural approach to conflict situations, since, for instance, it does not allow invoking the preclusion of intent in cases of "collateral damage" and "death, damage, or injury incident to a lawful attack."[155] In January 2010, in a ninety-page decision, the Federal District Court of Columbia dismissed the charges without any comments on the legality of the shooting, on the ground that the constitutional rights of the contractors had been violated because of the way in which their confession statements had been collected in the immediate aftermath and subsequent investigations.[156] The Court of Appeals for the District Court of Columbia remanded the case and three of the accused were convicted for either murder or manslaughter in 2014.[157] In 2017, the same Court ordered retrial for murder and resentencing for manslaughter, considering, inter alia, that private security contractors "work in a hostile environment in a war zone in which the enemy could strike at any moment."[158]

Following the incident, Blackwater competitors filed a complaint with the IPOA to initiate a review as to whether or not the company had violated the IPOA Code of Ethics under the IPOA Enforcement Mechanism.[159] As a consequence, the company announced its withdrawal from IPOA for one year.[160] This prevented investigations, since the IPOA could not take action against non-active members, so that the outcome was a public statement by the

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153. *See* Luisa Vierucci, *Private Military and Security Companies in Non-International Armed Conflicts:* Ius ad Bellum *and* Ius in Bello *Issues*, *in* WAR BY CONTRACT, *supra* note 14, at 261.

154. United States v. Slough, 677 F. Supp. 2d 112, 115 (D.D.C. 2009), *vacated*, 641 F.3d 544 (D.C. Cir. 2011).

155. 18 U.S.C.§ 2441(d)(3) (2008). *See also* Tara Lee, *MEJA for Street Crimes, Not War Crimes*, DE PAUL RULE L.J. 1, 5–6 (2009).

156. *Slough*, 677 F. Supp. 2d at 166.

157. United States v. Slough, 641 F.3d 544, 555 (D.C. Cir. 2011); United States v. Slough, 22 F. Supp. 3d 1 (D.D.C. 2014); *Four Former Blackwater Employees Sentenced to Decades in Prison for Fatal 2007 Shootings in Iraq*, U.S. DEP'T JUST. (Apr. 13, 2015), https://www.justice.gov/opa/pr/four-former-blackwater-employees-sentenced-decades-prison-fatal-2007-shootings-iraq*; see also* NEMETH, *supra* note 1, at 220.

158. United States v. Slatten, 865 F.3d 767, 818 (D.C. Cir. 2017).

159. *See* Richard Lardner, *Blackwater Withdrawal Ends Inquiry*, USA TODAY (Oct. 12, 2007), https://usatoday30.usatoday.com/news/world/2007-10-12-blackwater_N.htm (last visited July 12, 2018).

160. *Id.*; DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 81 (2009).

IPOA acknowledging the withdrawal and declaring that Blackwater was a member in good standing.[161]

The Nisoor Square case contributed to cast a highly negative stigma on Blackwater. At the time of the incident, as a member of IPOA, Blackwater was bound by the private regulation of the Association outlined in 2007.[162] Version 11 of the IPOA CoC, in force from 1 January 2006 to 11 February 2009,[163] compelled associated Members operating in conflict and post-conflict environments to comply with the rules of international humanitarian law and human rights established by public and private regulation, including the UDHR, Geneva Conventions[164] and their Additional Protocols,[165] the Convention against Torture, VPSHR, and Montreux Document on Private Military and Security Companies.[166] Under the IPOA CoC, PSCs were supposed to investigate legal accountability for their conduct and that of their personnel and to cooperate with official investigations into allegations of contractual violations and breaches of international humanitarian law and human rights.[167] The whole situation proves that the unusual IPOA enforcement mechanism might have made sense from a theoretical standpoint, but was practically ineffective. Its weakness depended upon the faculty attributed to IPOA Members of withdrawing from the Association in the case of adverse actions, thus leading to a context where enforcement was completely voluntary.[168] In 2009, following the Blackwater case, the ISOA enforcement mechanism was revised and made more effective and

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161. *Lardner, supra* note 159.; *see also* CAMERON & CHETAIL, *supra* note 58, at 660–61.

162. ISENBERG, *supra* note 160, at 81.

163. International Peace Operations Association (IPOA) Code of Conduct Version 11 (2006) (unpublished manuscript). For a critical view, see De Nevers, *supra* note 73, at 509.

164. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287.

165. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 261.

166. INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008), http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

167. IPOA Code of Conduct Version 11, *supra* note 163.

168. Hoppe & Quirico, *supra* note 29, at 373.

impartial, particularly through the exclusion of the Members' faculty of withdrawal.[169]

Human rights violations in Abu Ghraib are another critical example. In January 2004, the U.S. Army's Criminal Investigation Division received information on abuses committed on Iraqi detainees at the Abu Ghraib correctional facility in Iraq, involving private contractors from TITAN Corporation and Consolidated Analysis Centre Incorporate (CACI) International. Investigations followed and reports recommended that PSCs give contractors an official reprimand, remove them, and revoke their security clearance.[170] Accounts later called for immediate disciplinary action and further inquiries to refer responsible persons to the Department of Justice for prosecution.[171] Reportedly, CACI and TITAN personnel lacked formal military training, and outsourcing contracts did not embed human rights protection.[172] CACI developed its own internal investigations, with negative outcomes.[173] The response of TITAN was less defensive, since the company removed employees allegedly involved in human rights violations.[174]

In 2004, lawsuits were filed against CACI and TITAN before U.S. courts for failing to properly screen and supervise their employees.[175] In late 2007, the suits against CACI were allowed, even though action against TITAN had been dismissed.[176] In the course of such action, the US District Court of Columbia held that "[s]erving as a translator for the interrogation of persons detained by the U.S. military in a combat zone" has a "direct connection with actual hostilities."[177] This raises, again, the question of the legal

169. Érika Louise Bastos Calazans, *Regulating the Business Activities of Private Military and Security Companies under International Law*, ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 103, 108 (2014).

170. Anthony R. Jones & George R. Fay, *Investigation of Intelligence Activities at Abu Ghraib*, *Executive Summary*, FIND LAW 1 (Aug. 23, 2004), http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.

171. *See Private Security Contractors at War*, *supra* note 146, at 15–16; Jones & Fay, *supra* note 170, at 2.

172. Jones & Fay, *supra* note 170, at 50; GEORGE C. LOVEWINE, OUTSOURCING THE GLOBAL WAR ON TERRORISM: PRIVATE MILITARY COMPANIES AND AMERICAN INTERVENTION IN IRAQ AND AFGHANISTAN 86 –87 (2014); Deborah Avant, *The Emerging Market for Private Military Services and the Problems of Regulation*, *in* FROM MERCENARIES TO MARKET, *supra* note 56, at 221.

173. *See CACI Reports Preliminary Findings of Internal Investigation*, CACI (Aug. 12, 2004), http://www.caci.com/about/news/news2004/08_12_04_NR.html; *Truth and Error in the Media Portrayal of CACI in Iraq*, CACI, http://www.caci.com/iraq/truth_and_error_in_media_portrayal_of_caci_in_iraq.doc (last visited July 11, 2018).

174. *See Private Security Contractors at War*, *supra* note 146, at 52.

175. Ibrahim, et al. v. Titan Corp., et al., Saleh et al., v. Titan Corp., et al., 556 F. Supp. 2d 1 (D.D.C. 2007).

176. *Id.* at 11–12.

177. *Id.* at 9.

qualification of PSC personnel as non-combatants, their participation in hostilities and the adequacy of ensuing non-military remedies. Eventually, the Court of Appeals ruled that CACI contractors were "integrated into combatant activities over which the military retains command authority," and thus protected by the preemption defense, excluding civil and criminal jurisdiction.[178]

In 2008, new lawsuits were filed by Iraqi civilians against CACI in U.S. federal courts with the help of the Centre for Constitutional Rights.[179] In *Shimari v. CACI Int'l*, a motion to dismiss was denied in part by the District Court for the Eastern District of Virginia.[180] This decision was nevertheless reversed by the same Court, dismissing the case for lack of subject matter jurisdiction over military personnel.[181] The Court of Appeals for the Fourth Circuit reinstated the case on 30 June 2014, holding that human rights infringements committed in a U.S. controlled prison by a private contractor in conspiracy with soldiers could be heard under the Alien Torts Statute.[182] On 18 June 2015, the District Court dismissed the case again, in light of the political question doctrine and the "plenary" and "direct" control of the military over security contractors and national defense interests.[183] However, the Court of Appeals subsequently reinstated the case, holding that torture cannot be considered non-justiciable for political purposes.[184] Subsequent motions to dismiss the case have been rejected, considering the battlefield pre-emption doctrine not applicable to private security contractors.[185] In *Quraishi v. Nakhla et al.*, a motion to dismiss was denied on 29 July 2010,[186] but on 21 September 2011, the Appeals Court for the Fourth Circuit held that the Plaintiffs' claims were preempted by military immunity from jurisdiction and the tort law battlefield preemption.[187] Following a petition for re-

178. Saleh et al. v. Titan Corp. et al., 580 F.3d 1, 9 (D.C. Cir. 2009).

179. *See CCR Files Four New Abu Ghraib Torture Lawsuits Targeting Military Contractors in U.S. Courts*, CCR JUST. (June 30, 2008), https://ccrjustice.org/home/press-center/press-releases/ccr-files-four-new-abu-ghraib-torture-lawsuits-targeting-military.

180. Shimari v. CACI Int'l, No. 1:08-cv-827, 2008 U.S. Dist. LEXIS 112067, at *5 (E.D. Va. 2008).

181. Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 874 (E.D. Va. 2013).

182. Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 536–37 (4th Cir. 2014).

183. Shimari v. CACI Premier Tech., Inc., 119 F. Supp. 3d 434, 438, 453 (E.D. Va. 2015).

184. Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 161–62 (4th Cir. 2016).

185. Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 789–90 (E.D. Va. 2018) (accepting the motion to dismiss for failing to state a claim for only some of the counts).

186. Quraishi v. Nakhla et al., 728 F. Supp. 2d 702, 768 (D. Md. 2010).

187. Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 206 (4th Cir. 2011).

hearing, the case was voluntarily dismissed by the plaintiff in 2012.[188]

In 2006, the Centre for Constitutional Rights, International Federation for Human Rights and Republican Attorneys' Association acted in German Courts on behalf of Abu Ghraib victims, based on universal jurisdiction.[189] The complaint was nevertheless dismissed, since the Prosecutor General required a domestic link to establish German jurisdiction over crimes committed by non-nationals against foreigners abroad.[190] Following a request for revision, the Stuttgart Higher Regional Court confirmed the dismissal based on a lack of retrospective jurisdiction, in addition to issues of interstate procedural cooperation.[191] It has been noted that the case puts "the principle of universal jurisdiction under political pressure."[192]

More fundamentally, contracts have involved private contractors in direct participation in hostilities. A clear example is the Agreement for the Provision of Military Assistance of 31 January 1997 between the Independent State of Papua New Guinea (PNG) and Sandline International, a PSC incorporated in the Bahamas.[193] On 31 January 1997, PNG and Sandline entered into an agreement whereby Sandline would provide the "manpower, equipment and services" to assist the armed forces of PNG to overcome a group referred to as "the illegal and unrecognized Bougainville Revolutionary Army."[194] Sandline personnel were promised a U.S. $36 million compensation, half on signing the contract and the other half within thirty days from the deployment of forces.[195] The contract concerned sensitive services, such as "[intelligence gathering] to support effective deployment and operations" as well as conduct of "offensive operations."[196] The

188. Al-Quraishi v. Nakhla et al., 728 F. Supp. 2d 702 (D. Md. 2010), *rev'd,* 657 F.3d 201 (4th Cir. 2011) (voluntarily dismissed on October 5, 2012).

189. Völkerstrafgesetzbuch [CCAIL][Code of Crimes against International Law], § 1, para. 1, http://www.iuscomp.org/gla/statutes/VoeStGB.pdf (last visited Oct. 26, 2017) (Ger.).

190. Bundesgerichtshof [BGH][Federal Court of Justice] Apr. 5, 2007, 3 [ARP] 156/06-2, 2007 (Ger.).

191. Oberlandesgericht [OLG][Higher Regional Court] Apr. 21, 2009, Criminal Panel 5, 2009 (Ger.).

192. Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint against Donald Rumsfeld Under the German Code of Crimes Against International Law*, 6 GERMAN L.J. 689, 717 (2005); CASSESE, *supra* note 110, at 274.

193. COCKAYNE, *supra* note 4, at 201.

194. PRIVATE SECURITY MONITOR, AGREEMENT FOR THE PROVISION OF MILITARY ASSISTANCE BETWEEN THE INDEPENDENT STATE OF PAPUA NEW GUINEA AND SANDLINE INTERNATIONAL (Jan. 31, 1997), http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf.

195. *Id.*

196. *Id.*

agreement provided a joint liaison between commanders of the PNG defense forces and Sandline, with faculty "to engage and fight hostile forces, repel attacks therefrom, [and] arrest any persons suspected of undertaking or conspiring to undertake a harmful act".[197] Such a regulatory framework goes beyond the use of force for exclusively defensive purposes, usually asserted by private codes of conduct.

Interestingly, on signing the agreement, PNG accepted to automatically grant Sandline International and its personnel "all approvals, permissions, authorisations, licenses and permits to carry arms, conduct its operations and meet its contractual obligations."[198] Furthermore, the contract did not define a precise framework for fundamental rights and did not include any reference to private regulation in this respect, but simply engaged Sandline International to provide "appropriate standards of personnel proficiency," with particular regard to the use of armed force.[199] Thus, private rules imposing respect for fundamental rights embedded, for instance, in the General Policy of Sandline International,[200] were not subject to jurisdictional remedies.

In March 1997, Sandline deployed an eighty-man unit outside Port Moresby, but this presence angered the PNG army and almost prompted a military coup, triggering a serious political crisis.[201] Reportedly, Sandline contractors were fought, captured and detained by PNG armed forces.[202] This demonstrates that the problem of the qualification of PSC personnel acting in war contexts affects not only their responsibility, but also their safety, fundamental rights—notably the right to life—and the responsibility of third persons. In fact, under the law of war, militaries have the right to use armed force offensively and can be legitimate targets of armed attacks in international and non-international armed conflicts. Civilians do not have this right, but they become legitimate targets when taking direct part in hostilities.[203] The agreement between PNG and Sandline thus seems to be dangerously inconsistent with international humanitarian law. Whilst, in these circumstances, no casualties

197. *Id.*
198. *Id.*
199. *Id.*
200. SANDLINE, http://www.sandline.com/company/ (last visited July 12, 2018).
201. Tim McCormack, *The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, 1 Y.B. INT'L HUMANITARIAN L. 292, 295 (1998).
202. *Id.* at 296.
203. Protocol I, *supra* note 165, at art. 51; Protocol II, *supra* note 165, at art 13. *See also* Guido den Dekker & Eric PJ Myjer, *The Right to Life and Self-Defense of Private Military and Security Contractors in Armed Conflicts*, *in* WAR BY CONTRACT, *supra* note 14, at 176–77.

were reported among the contractors, there are cases where private security guards operating in conflict situations, for instance, escorting military material, have been attacked and killed.[204] As a follow up to the Sandline affair, in accordance with an arbitration clause,[205] only PNG insolvency was referred to an Arbitral Tribunal established in Queensland, according to the UNCITRAL Arbitration Rules.[206] The Tribunal held PNG liable to pay Sandline $18 million USD plus interest.[207]

IV. CONCLUSION: EFFECTIVENESS AND COMPETITIVENESS

Private systems of regulation governing the provision of security services are rapidly expanding transnationally. In addition to a plurality of individual industry-driven codes of conduct, chief examples of transnational private regulation include general initiatives, such as the OECD Guidelines for Multinational Enterprises, and ad hoc initiatives, such as the International CoC for PSS Providers, VPSHR, COESS/Uni-Europa CoC for the Private Security Sector, and ISOA CoC. Substantively, these rules focus, in particular, on the use of force and respect for fundamental rights, aiming to complement existing public regulation. Procedurally, ex-ante transnational private regulation focusing on security fosters transparency and compliance by PSCs with public licensing systems. Ex-post, transnational private regulation provides mechanisms for investigating, sanctioning, and reporting accountability to relevant public authorities for the acts of both companies and their personnel.[208] Responsibility of PSC personnel is supposed to be enforced by internal or external ad hoc monitoring organs, whilst mechanisms screening the accountability of security firms are still in a phase of progressive development.

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204. *Private Security Contractors at War*, *supra* note 146, at 50.

205. PRIVATE SECURITY MONITOR, *supra* note 194, at 5.

206. G.A. Res. 65/22, UNCITRAL Arbitration Rules (Dec. 6, 2010).

207. The Arbitral Tribunal considered the contract enforceable under English law, albeit holding it in breach of PNG law. Sandline Int'l Inc. & Papua N.G., 117 I.L.R. 552 (Arb. Tribunal 1998); *see also* Damian Sturzaker & Craig Cawood, *The Sandline Affair Illegality and International Law*, 1999 AUSTL. INT'L L.J. 214, 223 (1999). PNG appealed the decisions to the Supreme Court of Queensland under Sections 38(2) and 38(4)(b) of the 1990 Queensland Commercial Arbitration Act, but the Supreme Court dismissed the case, holding that the application of foreign law by the Arbitration Tribunal was not subject to appeal before the Australian Courts. Papua N.G. v. Sandline Int'l Inc. [1999] QSC BC9901173, 117 I.L.R. 565 (2000) (Queensl.).

208. According to consistent scholarly opinions, this is critical to the accountability of PSCs. Andreopoulos & Brandle, *supra* note 17, at 149; Hurst, *supra* note 2, at 473–75.

Theoretically, private substantive and procedural rules tend to coordinate with each other and with public rules, along the lines of coordinative complementarity. Public rules remain ultimately essential for private regulation to operate effectively.[209] Within this framework, practice demonstrates that the effectiveness of private regulation is controversial. In fact, first, contracts embed self-imposed rules governing the provision of security services to a limited extent, thus often excluding them from jurisdictional control under conflict of laws rules. Secondly, the objectivity and transparency of monitoring, sanctioning, and reporting mechanisms is sometimes flawed. Specifically, effectiveness is likely to be altered in countries where the implementation of the rule of law is troublesome, and in conflict situations, which make private investigations difficult, and further affect the effectiveness of public proceedings.[210]

This framework is particularly problematic with regard to human rights, which tend to be attributed "constitutional" status in domestic and international law.[211] Because of the use of force, accountability is much more essential in the field of private security than in other transnational private regimes.[212] Notably, in conflict situations, the basic question arises as to how transnational private regulation can be effective if it is supposed to complement public regulation that is itself difficult to implement.[213] It is argued that these issues are fundamentally grounded in the legal qualification of PSC contractors as non-militaries in war contexts. Clarifying such a basic question is critical to establishing a transparent level playing field for security services, with particular regard to

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209. In this respect, Cockayne speaks of "hybrid regulatory harmonization." Cockayne, *supra* note 71, at 215.

210. Moyakine, *supra* note 28, at 221 ("Examined from the angle of institutional complementarity, effectiveness of transnational private regulation appears to depend on the credibility and legitimacy of public institutions, such as the judicial bodies on the national and international levels. . . . The degree of effectiveness, just as legitimacy, depends on different relationships of recognition that [transnational private regulatory regimes] enter into with their surroundings: for instance, interaction with and connection to other normative orders, such as state legal systems and other [transnational private regulatory regimes].").

211. U.S. CONST. amend. XIV, § 1; 1958 CONST. (Fr.); RAINER ARNOLD, THE PROCESS OF CONSTITUTIONALISATION OF THE EU AND RELATED ISSUES 41 (Siskova Nadežda ed., 2008); BARDO FASSBENDER, TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES 307 (Nicholas Tsagourias ed., 2007).

212. Cockayne, *supra* note 71, at 207; COCKAYNE, *supra* note 4, at 47–48; Deirdre Curtin & Linda Senden*, Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J. LEGAL STUD. 163, 170 (2011); Moyakine, *supra* note 28, at 224.

213. *See* CAMERON & CHETAIL, *supra* note 58, at 623–62; Hurst, *supra* note 2, at 470–73; De Nevers, *supra* note 73, at 488; Marcus Hedhal, *Unaccountable: The Current State of Private Military and Security Companies*, 31(3) CRIM. JUST. ETHICS 175, 176–77, 183–87 (2012).

companies operating in armed conflicts.[214] The issue affects not only the responsibility of PSCs and their personnel, but also their protection and fundamental rights, as well as the liability of third persons. It is therefore suggested that, instead of taking a holistic approach to the regulation of PSCs, private CoCs and the UN Convention on PMSCs should address PSCs operating in and outside conflict situations as separate matters, whereby the status of private contractors operating in war contexts deserves particular attention. Possibly, rather than drafting a new Convention, the status of PSCs operating in armed conflicts should be clarified within the framework of the existing conventions on the laws of war.

214. Hurst, *supra* note 2, at 447, 480, 482–85 ("By increasing the force of compulsory regulations, PMSCs could more easily avoid the costs associated with free riders and uncertainty regarding the PMSCs' duties with respect to human rights and international humanitarian law. By establishing and working in environments that respect and protect human rights and international humanitarian law, PMSCs would find a more conducive environment for commercial efficiency and economic growth.").

TRANSFORMING ADVERSARY TO ALLY: MOBILIZING CORPORATE POWER FOR LAND RIGHTS

DIANA KEARNEY

I. INTRODUCTION

"They cut me, left me for dead and took my land," Sam explained.[1] Frustrated by his repeated refusal to sell his family's 13-acre plantation in Uganda, three employees from Formosa Tree Planting ambushed Sam with machetes, hoping that his death would leave the land unprotected.[2] When Sam survived, Formosa managers paid him a visit in the hospital.[3] They would buy his land at a fraction of its market value, they explained, so that he could afford his hospital treatment.[4] In desperate need of cash, Sam relented.[5] Without the income from his coffee and banana crops, Sam and his family found themselves homeless and in dire economic straits.[6]

1. Benon Herbert Oluka, *Uganda: Chinese Firm Accused of Land Grabbing*, ALL AFR. (May 23, 2016), http://allafrica.com/stories/201605231544.html.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

In June 2016, members of Brazil's indigenous Guarani-Kaiowá community came together to repossess their ancestral lands from the farmers who had displaced them.[7] The loss of land had devastated the Guarani, pushing them into such desperate living conditions that Guarani children were dying of starvation.[8] Negotiations between the Guarani and settlers broke down, however, and the farmers reached for their guns.[9] They opened fire on the crowd, seriously wounding five—including a twelve-year-old boy—and killing Guarani health worker Clodiodi de Souza.[10] As community leader Tonico Benites observes, the land conflict's ever-mounting death toll indicates that "[a] slow genocide is taking place."[11]

A wealthy cohort of locals agreed to build an air strip and deep water shipping port to attract tourists in Casiguran, Philippines.[12] The plans were complicated, however, by the thousands of Filipino farmers and fishing families living on the land slated for construction.[13] To pave the way for the development, the project managers evicted hundreds of families from their homes.[14] For the farmers and fisherfolk who subsisted off the land, such evictions were tantamount to losing one's home and job in one fell swoop.[15]

Tragedies like this have grown increasingly common.[16] Accounts of businesses evicting smallholder families with violence, threats,

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7. Bruce Douglas, *Dispute Turns Deadly as Indigenous Brazilians Try to 'Retake' Ancestral Land*, THE GUARDIAN (July 14, 2016), https://www.theguardian.com/global-development/2016/jul/14/dispute-turns-deadly-indigenous-brazilians-ancestral-farmland-guarani-kaiowa.

8. *Guarani Indian Children Die of Starvation*, SURVIVAL INT'L (Feb. 22, 2007), http://www.survivalinternational.org/news/2231; Paulo Victor Chagas, *Poverty and Hunger Kill Indigenous Guarani-Kaiowá People of Brazil*, AGÊNCIA BRAZ. (Sept. 17, 2016, 3:28 PM), http://agenciabrasil.ebc.com.br/en/direitos-humanos/noticia/2016-09/poverty-and-hunger-kill-indigenous-guarani-kaiowa-people-brazil.

9. Douglas, *supra* note 7.

10. *Id.*

11. Rick Kearns, *'A Slow Genocide': Gunmen Attack Indigenous Again in Brazil*, INDIAN COUNTRY TODAY (June 16, 2016), http://indiancountrytodaymedianetwork.com/2016/06/16/slow-genocide-gunmen-attack-indigenous-again-brazil-164811 ("A slow genocide is taking place. There is a war being waged against us. We are scared. They kill our leaders, hide their bodies, intimidate and threaten us . . . . We are fighting always for our land.") (quoting Guarani-Kaiowá leader, Tonico Benites).

12. *Land Grabs in the Philippines: "It's Like They Have Killed Us Already"*, OXFAM INT'L, https://www.oxfam.org/en/countries/land-grabs-philippines-its-they-have-killed-us-already (last visited May 8, 2018).

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* Jina Moore, *Resolving Land Disputes: Can Governments Keep Land Quarrels from Turning Violent?*, 5 CQ RESEARCHER 421, 421 (2011), http://library.cqpress.com/cqresearcher/document.php?id=cqrglobal2011090600 (commenting that "[c]onflicts over land ownership are intensifying around the globe").

and coercion no longer shock the informed reader.[17] These are paradigmatic examples of "land grabs," or land acquisitions that are undertaken without the evicted party's consent, or that otherwise violate their human rights.[18] Despite the international community's recognition that "forcible transfer of population" constitutes a crime against humanity,[19] they are accelerating in pace.[20] Such displacement generates ripple effects that extend long past whatever violence accompanies eviction itself, leaving victims homeless and without access to their usual sources of income, food, water, and community ties. While such grabs violate a spectrum of human rights, they have proven particularly dangerous for the rights to food and water. With smallholder farmers producing 80% of the food consumed in sub-Saharan Africa and Asia,[21] encroaching on these plots places famished regions at an even greater risk of hunger. The fact that 60% of food produced on grabbed land is exported, rather than used to feed local communities,[22] further underscores the destructive impact that land grabs have upon local

17. *See, e.g., The Suffering of Others,* OXFAM INT'L 4–15 (Apr. 2015), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf (documenting corporate use of violence and threats of violence against local communities resisting land grabs in Cambodia, Laos, Honduras, Guatemala, and India); Friends of the Earth, *Land Grabbing, Palm Oil & Violence in Honduras: The Case of Grupo Dinant,* https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/wpallimport/files/archive/Issue_Brief_7_Hondus_and_Grupo_Dinant.pdf (last visited May 8, 2018) (recounting Dinant-funded assaults and murders against members of the local population); *Violent Corporate Land Grabbing in Papua New Guinea*, OAKLAND INST. (Dec. 1, 2013), http://www.oaklandinstitute.org/violent-corporate-land-grabbing-papua-new-guinea (discussing the beatings, arrests, and physical intimidation that corporate security guards use against locals protesting their displacement); Oluka, *supra* note 1 (recounting the rape of a woman who refused to sell her land to Formosa Tree Planting).

18. The most widely cited definition of "land grab" comes from 2011's Tirana Declaration, which identifies grabs as acquisitions or concessions which do one or more of the following: (i) violate human rights, particularly the equal rights of women; (ii) were not preceded by the free, prior, and informed consent of the affected land users; (iii) are not based on thorough impact assessment, or the social and environmental impacts, including gendered impacts; (iv) are not grounded in transparent contracts that specify clear and binding commitments about activities, employment, and benefits sharing; or (v) were not concluded via effective democratic planning, independent oversight, and or the meaningful participation of affected communities. *Tirana Declaration*, INT'L LAND COALITION ¶ 4 (May 26, 2011), http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf.

19. Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For the forcible transfer of a community to qualify as a crime against humanity, it must also be part of a widespread or systematic attack against a civilian population and the actor must have knowledge of the attack.

20. Kerstin Nolte & Wytske Chamberlain, *Africa Remains a Target as Global South 'Land Rush' Moves to Production*, THE CONVERSATION (Oct. 11, 2016, 2:50 AM), http://theconversation.com/africa-remains-a-target-as-global-south-land-rush-moves-to-production-66345.

21. Kanayo F. Nwanze, *Smallholders Can Feed the World,* IFAD (Feb. 2011), https://www.ifad.org/documents/10180/ca86ab2d-74f0-42a5-b4b6-5e476d321619.

22. *The Truth About Land Grabs*, OXFAM AM., https://www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/land-grabs/ (last visited Mar. 7, 2018).

food security, as does the fact that two-thirds of land grabs take place in food insecure regions.[23] Even if incoming landowners grow a larger volume of food than the smallholders they displace, agricultural growth fights malnutrition far more effectively if that growth is concentrated in the hands of the smallholders themselves.[24] Thus, land grabs are deadly not only because of the violence that so often accompanies forced evictions, but because of the long-term impacts on hunger, malnutrition, and the communities' ability to earn a living.

In light of these grave consequences, one might reasonably ask how these expulsions have become so commonplace. This is due in large part to the enabling environment that has developed: first, billions of people do not hold formal title[25] to the land that they live and rely upon, exposing them to claims that the land is not truly "theirs." Indeed, a mere 10% of land used collectively by communities are formally titled.[26] This insecure tenure leaves communities vulnerable to predation by outsiders who are interested in taking advantage of the gap between formal and informal land tenure.

Second, the spike in corporate grabs is illustrative of a larger trend in global relations. The power of transnational corporations (TNCs) vis-à-vis the state has climbed markedly over the past sixty years, with TNCs now exercising so much control that "the most powerful law is not that of sovereignty but that of supply and

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23. Sarah Small, *The Land Battle: 15 Organizations Defending Land Rights*, FOOD TANK, http://foodtank.com/news/2015/07/the-land-battle-15-organizations-defending-land-rights (last visited May 8, 2018).

24. Mike Roth, *USAID Issue Brief: Land Tenure and Food Security*, USAID 3 (June 2013), https://www.land-links.org/wp-content/uploads/2016/09/Land-Tenure-and-Food-Security.pdf.

25. Formal tenure rights can be defined as "those that are explicitly acknowledged by the state and which may be protected using legal means." This stands in contrast to informal land rights, which "are those that lack official recognition and protection." FAO, FAO LAND TENURE STUDIES 3: LAND TENURE AND RURAL DEVELOPMENT 7–11 (2002), http://www.fao.org/3/a-y4307e.pdf [hereinafter FAO LAND TENURE STUDIES 3]. While this distinction is instructive, it glosses over the fact that certain agencies within a government may recognize land as formally held, whereas other branches of the government refuse to recognize it as such. For example, the Brazilian Constitution recognizes ancestral indigenous peoples' lands as theirs to possess and use. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.). However, Brazilian courts and police instead enforce the conflicting claims of more recent land developers. *UN Rights Expert Urges Brazil Not to Evict Guarani and Kaiowá Indigenous Peoples from Their Traditional Lands*, UN OHCHR (Aug. 11, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16308&LangID=E (discussing a Federal Court order to evict indigenous peoples from their territory and detailing the role that police play in carrying out these forced removals) (last visited May 8, 2018).

26. *Why a Global Call to Action?*, LAND RIGHTS NOW, http://www.landrightsnow.org/en/about/ (last visited May 8, 2018).

demand."[27] Sixty-nine of the world's 100 largest economies belong to corporations rather than states,[28] fashioning a world order in which the long-accepted norms of who can be a "global superpower" have become unsettled.[29] As Benjamin Barber observes,

> [b]y many measures, corporations are today more central players in global affairs than nations. We call them multinational but they are more accurately understood as transnational or postnational or even antinational. For they abjure the very idea of nations or any other parochialism that limits them in time or space.[30]

This sharp rise in corporate power leaves TNCs with mounting influence over the lives of individuals and governments alike.[31] This holds particularly true in low-income states, where corruption tends to run high and rule of law skews low.[32] At times, the growing corporate footprint can be positive: businesses entering less-developed regions can create jobs, introduce technology, and spur economic growth in ways that benefit the local community.[33] But

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27. Parag Khanna, *These 25 Companies Are More Powerful than Many Countries*, FOREIGN POL'Y (Mar. 15, 2016), http://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/ (forecasting that "corporations are likely to overtake all states in terms of clout.").

28. Duncan Green, *The World's Top 100 Economies: 31 Countries; 69 Corporations*, WORLD BANK (Sept. 20, 2016), https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations.

29. Khanna, *supra* note 27.

30. BENJAMIN R. BARBER, JIHAD VS. MCWORLD: TERRORISM'S CHALLENGE TO DEMOCRACY 23 (2010).

31. *See* SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 149 (2012) (discussing the rising influence that corporations have over the lives of individuals and the enjoyment of their human rights); *see also* JOINT COMMITTEE ON HUMAN RIGHTS, ANY OF OUR BUSINESS? HUMAN RIGHTS AND THE UK PRIVATE SECTOR, 2009-10, HL 5-I & HC 64-I, at 22 (UK) ("The globalisation of the world economy has made the corporate sector a more important influence on human rights for good or ill than almost any other constituency. Through its spreading supply chains it touches directly the lives of millions.") (quoting Sir Geoffrey Chandler, former Director of Shell International).

32. *See* Vinay Bhargava, *The Cancer of Corruption*, WORLD BANK GLOBAL ISSUES SEMINAR SERIES 2 (Oct. 2005), http://siteresources.worldbank.org/EXTABOUTUS/Resources/Corruption.pdf ("[m]easures of corruption and poor governance are negatively correlated across countries with income per capita and with scores on the UN Human Development Indicators. That is, richer countries and countries with higher human development ratings tend to have less corruption and better functioning governments."); WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016, at 24–25 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (providing a systematic ranking of countries' rule of law by income group, and demonstrating that countries in the low and lower-middle income groups have significantly weaker rule of law scores than countries in the upper-middle and high-income groups).

33. *Entrepreneurs and Small Businesses Spur Economic Growth and Create Jobs*, WORLD BANK (June 20, 2016), http://www.worldbank.org/en/news/feature/2016/06/20/entrepreneurs-and-small-businesses-spur-economic-growth-and-create-jobs; *see also* Beata

this mutually beneficial relationship is rare–or at least, the advantages are overrun by the problems that investors introduce. Typically, "the relation between human rights and money, between moral and economic globalization, is more antagonistic, as can be seen, for example, in the . . . practices of the large global corporations."[34] In the context of land grabs, the consequences of this hostile relationship have become painfully clear: TNCs across the globe have been grabbing land from local communities at ever-faster rates, leaving a trail of human devastation in their wake.

Yet "land grabber" and "rights abuser" is not the role that corporations are doomed to play. Though the corporate idolatry of the shareholder leads us to assume that financial calculations inevitably take precedence over human rights,[35] the two ends are not diametrically opposed. Business is not a zero-sum game in which CEOs are forced to select between profit and respecting human rights.[36] Over the past few decades, more sophisticated TNCs have begun to appreciate the value of burnishing their image as a responsible actor on human rights. Executives now recognize that a strong record of corporate social responsibility (CSR) attracts consumers,[37] retains high-performing employees,[38] and mitigates

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Javorcik, *Multinationals Indeed Bring Good Jobs to Host Countries – Here's Why*, WORLD BANK (July 17, 2015), http://blogs.worldbank.org/developmenttalk/multinationals-indeed-bring-good-jobs-host-countries-here-s-why; Darrell M. West, *Technology and the Innovation Economy*, BROOKINGS (Oct. 19, 2011), https://www.brookings.edu/research/technology-and-the-innovation-economy/ (discussing the economic benefits that accrue when new technologies are introduced to economies).

34. MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 7 (Amy Gutmann ed., 2001); *see also* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1461 (2012).

35. *See, e.g.,* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2002) (contending that the social responsibility of corporations is only to maximize profit).

36. *See generally* ANDREW W. SAVITZ WITH KARL WEBER, THE TRIPLE BOTTOM LINE (2nd ed. 2013) (exploring the mutual benefits that companies, communities, and shareholders receive from strong corporate human rights practices).

37. *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html.; *see also Consumers Favour Fairtrade as Ethical Label of Choice*, FAIRTRADE FOUND. (Sept. 3, 2013), http://www.fairtrade.org.uk/en/media-centre/news/september-2013/consumers-favour-fairtrade-as-ethical-label-of-choice (noting the consumer preference for goods they believe have been ethically sourced); *Cadbury: An Ethical Company Struggles to Insure the Integrity of Its Supply Chain*, YALE SCH. MGMT. (Aug. 2008), http://som.yale.edu/our-approach/teaching-method/case-research-and-development/cases-directory/cadbury-ethical-company (detailing Cadbury's abrupt change in cocoa sourcing after consumer outrage over child labor in their supply chain hurt sales).

38. Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 16 NEW ENG. J. PUB. POL'Y 109, 112–13 (2001) ("Many corporations have discovered that substantial positive benefits can flow from building a reputation as an ethical company. Employees prefer to work for ethical companies. A reputation for ethical business practices attracts better qualified, better motivated job applicants."). Jeroen van der Veer, Committee of Managing Directors of Shell, echoes this sentiment: "In my view the successful companies of the future will be those that integrate business and employees' personal values. The best

against the expensive prospect of conflict with local communities.[39] The converse is also true: the reputational stain of abusive human rights practices inflicts very real damage onto a company's bottom line.[40] What is more, the steady rise in transparency for corporate behavior occurring in regions that companies once considered invisible means TNCs are increasingly incentivized to behave in ethical ways toward marginalized communities. In today's marketplace, it pays to be nice. As former Unilever CEO Niall FitzGerald explained, "[c]orporate social responsibility is a hard-edged business decision. Not because it is nice to do or because people are forcing us to do it . . . but because it is good for our business."[41]

Given the ever-larger shadow that corporations cast over global affairs, TNCs are poised to play a transformative role in stemming the tide of human rights violations–including land grabs. By conducting rigorous due diligence on land acquisitions,[42] refusing to cooperate with governments that sell land off occupied lands as "unowned," and advocating for improved government and corporate policies on land, TNCs can curtail the global land grab pandemic. When considering the steady rise in power that TNCs exercise over governments, particularly in less developed regions, corporations are perhaps the only actor wielding sufficient influence to make this happen. The business sector can thus be instrumentalized as a vector for positive change in land rights and beyond. To date, civil society has largely failed to exploit this potential; companies "have been minimally engaged by civil society, governments, and multilateral institutions as potential

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people want to do work that contributes to society with a company whose values they share, where their actions count . . . ." Bill Holland, *Corporate Social Responsibility and Employee Engagement "Making the Connection,"* MANDRAKE (June 2011), http://www.mandrake.ca/bill/news/articles_june_2011.asp.

39. For an excellent examination of the costs that companies bear when their operations lead to conflict with local communities, see RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR (2014), https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

40. *See generally* DON TAPSCOTT & DAVID TICOLL, THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS (2003) (arguing that greater transparency in corporate operations is inevitable and increasingly demanded by an array of stakeholders, leading to increased accountability for corporate behavior and an incentive to reshape their values).

41. Larry Elliot, *Interview: Niall FitzGerald, Co-Chairman and Chief Executive, Unilever*, THE GUARDIAN (July 4, 2003, 9:24 PM), https://www.theguardian.com/business/2003/jul/05/unilever1.

42. "Rigorous due diligence" means a company looks beyond national title registries to ensure that it is not investing in land that local communities rely upon. In addition to looking at formal title, it means accounting for customary tenure practices and ensuring that marginalized populations like women, minorities, and other groups are protected from discriminatory land tenure practices.

partners in atrocity prevention" and other efforts to ward off human rights abuses.[43] This can and must change.

This article proceeds in three parts. First, it reviews the global land grab phenomenon, detailing the scope of the conflicts and what TNCs have done to accelerate the rate of dispossession. This includes an examination of the role that secure land tenure plays in warding off evictions of smallholder farmers, and highlights the advantages and pitfalls of formally titling property. Part III then explores corporate human rights obligations around human rights in general and land rights in particular. Though land has traditionally been viewed as the exclusive domain of the state—indeed, control over territory is one of the hallmarks of statehood[44]—this article posits that business will have a vital role to play in protecting land rights in the years ahead. Given this emerging reality, civil society would thus be well advised to engage a new actor, TNCs, in a domain that has been historically dominated by governments. Part IV thus concludes with a blueprint for how TNCs can be transformed from the architects of widespread human rights abuses into land rights–and, in turn, human rights—allies.

II. THE GLOBAL LAND RUSH

A. The Scale

The past twenty years have witnessed a surge in land investments across the developing world, with wealthy governments and businesses snapping up land for large-scale food production, financial speculation, and other profit-generating activity. The 2008 food crisis accelerated the scramble.[45] With global food prices almost tripling between 2000 and 2008,[46] arable land transformed into a much sought after commodity almost overnight.[47] Rather than benefitting from the spike in property values, however, local communities have been trampled underfoot. In a rush to acquire land, TNCs have displaced an estimated 15

43. *Policy Dialogue Brief: The Power of the Private Sector in Preventing Atrocities and Promoting the Responsibility to Protect,* STANLEY FOUND. 2 (Oct. 26–28, 2016), https://www.stanleyfoundation.org/publications/pdb/PowerofthePrivateSector_SPC1216.pdf.

44. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 376 (5th ed. 2009) ("[I]n order to qualify as a state, an entity must have a defined territory. Sovereignty over a specific territorial area is therefore an essential element of statehood.").

45. Sue Branford, *Food Crisis Leading to an Unsustainable Land Grab*, (Nov. 21, 2008, 7:01 PM) THE GUARDIAN, https://www.theguardian.com/environment/2008/nov/22/food-biofuels.

46. Dep't of Econ. & Soc. Affairs, Rep. of the Global Social Crisis, at 61, U.N. Doc. ST/ESA/334 (2011), http://www.un.org/esa/socdev/rwss/docs/2011/rwss2011.pdf.

47. *See* Branford, *supra* note 45.

million people across the Global South annually,[48] and have cut millions more off from access to the natural resources that they depend upon for survival.[49] While not all such large-scale acquisitions are land grabs—for example, a company may have taken care to ensure that all affected communities gave free, prior and informed consent; were fully and fairly compensated; and endured no human rights abuses—an extraordinary number are just that.

In addition to the number of people displaced, the scale of the global land rush is also remarkable in terms of acreage. The Oakland Institute estimates that 500 million acres have been bought or leased in the developing world over the past decade,[50] an area larger than Mexico. Each transaction typically involves the transfer of 10,000 hectares of land or more, or the equivalent of 5,000 small farms; given that these small farms produce food almost exclusively for local consumption, whereas the majority of investors grow produce exclusively for export, such land transfers have grave implications for local malnutrition rates.[51] Bank speculation has likewise threatened food security. Only 12% of land acquired by financial industry actors is put under production,[52] cutting off invaluable food sources for local populations. And as alluded to above, the hungriest regions of the world have been disproportionality impacted. Africa, Southeast Asia, and Latin America have been targeted for the largest number of grabs, with Sub-Saharan Africa bearing the brunt of the loss.[53] Some countries have ceded an astonishing percentage of their territory to investors. Sierra Leone, for example, has sold off 32% of its landmass over the past ten years alone.[54] Given that the majority of these land deals are unfolding in states already beset

48. CHRISTOPHER MCDOWELL, CAN COMPENSATION PREVENT IMPOVERISHMENT? REFORMING SETTLEMENT THROUGH INVESTMENTS AND BENEFIT-SHARING 20 (Michael M. Cernea & Hari Mohan Mathur eds., 2008). More recent estimates are difficult to find from reliable sources; however, given that the speed of large scale land acquisitions is accelerating, it is likely that this figure is significantly higher in 2017.

49. *See* Kyle F. Davis et al., *Land Grabbing: A Preliminary Quantification of Economic Impacts on Rural Livelihood*, 36 POPULATION & ENV'T 180, 180 (2014).

50. Anuradha Mittal & Nickolas Johnson, *We Harvest–You Profit: African Land LTD's Land Deal in Sierra Leone*, OAKLAND INST. 4 (June 2014), http://www.oaklandinstitute.org/we-harvest-you-profit.

51. Oxfam International, *A Beginner's Guide to Land Grabs*, YOUTUBE, at 0:44 seconds (Oct. 4, 2012), https://www.youtube.com/watch?v=ExCQlobfAUU.

52. Pan African Parliament et al., *Making Investment Work for Africa: A Parliamentarian Response to "Land Grabs,"* INT'L INST. SUSTAINABLE DEV. (IISD) 3 (July 21–22, 2011), http://www.iisd.org/pdf/2012/land_grabs_africa_en.pdf.

53. *Global Map of Investments*, LAND MATRIX (2016), http://www.landmatrix.org/en/get-the-idea/global-map-investments/ (last visited May 8, 2018).

54. Fatmata S. Kabia, *Behind the Mirage in the Desert—Customary Land Rights and the Legal Framework of Land Grabs*, 47 CORNELL INT'L L.J. 709, 710-11 (2014).

by serious hunger problems,[55] land grabs are on track to exacerbate malnourishment across the Global South.

But who exactly are these investors? Understanding just who is buying up land, and displacing tens of millions in the process, is essential to crafting effective strategies for minimizing land grabs and the human toll they exact.

B. The Cast

A range of actors, from the predictable to the surprising, is implicated in land conflicts. First, private investors lease or purchase property for a variety of business ventures. Agribusiness companies buy farmland for large-scale agricultural production;[56] extractive companies acquire resource-rich properties for oil, gas, and mine extraction;[57] hydropower companies take control of rivers and the surrounding shores;[58] and timber and palm oil companies snap up forests to harvest trees.[59] Even the seemingly benign tourism sector has been accused of land grabs, evicting local populations to develop hotels and other attractions.[60] Still, other private investors, like banks and pension funds, buy land merely for speculation, leaving the soil untouched and gambling that it will rise in value.[61] Public entities have likewise joined in the global land

55. *A Beginner's Guide to Land Grabs*, *supra* note 51, at 0:55 seconds.

56. Grain, *Land Grabbing by Global Agribusiness*, GLOBAL RES. (June 14, 2016), http://www.globalresearch.ca/land-grabbing-by-global-agribusiness/5530797 (providing a snapshot of recent agribusiness land grabs).

57. Philippe Sibaud, *Opening Pandora's Box: The New Wave of Land Grabbing by the Extractive Industries and the Devastating Impact on Earth*, GAIA FOUND. 8 (2012), http://www.gaiafoundation.org/wp-content/uploads/2015/11/Opening-Pandoras-Box.pdf ("The extent and the scale of the increase in extraction over the last 10 years is staggering . . . Across Latin America, Asia and Africa, more and more community lands, rivers and ecosystems are being despoiled, displaced and devoured by mining activities. . . . The rights of farming and indigenous communities are increasingly ignored in the race to grab land and water.").

58. *See, e.g.*, E. Zerrouk, *Water Grabbing/ Land Grabbing in Shared Water Basins: The Case of Salween River Hatgyi Dam*, 2 J. WATER RESOURCES & OCEAN SCI. 68 (2013) (describing the displacement resulting from a hydroelectric dam construction and operations).

59. Diana Parker, *Indigenous Communities Demand Forest Rights, Blame Land Grabs for Failure to Curb Deforestation,* MONGABAY (Mar. 25, 2014), https://news.mongabay.com/2014/03/indigenous-communities-demand-forest-rights-blame-land-grabs-for-failure-to-curb-deforestation/.

60. *See generally* Benjamin Gardner, *Tourism and the Politics of the Global Land Grab in Tanzania: Markets, Appropriation and Recognition*, 39 J. PEASANT STUD. 377 (2012) (presenting tourism-motivated land grabs that displaced the Maasai people in Kenya); *Land Grabbing*, FRIENDS EARTH EUR., http://www.foeeurope.org/land-grabbing ("Land grabs are also driven by the . . . tourism industr[y].") (last visited May 8, 2018).

61. *See Farming Money: How European Banks and Private Finance Profit from Food Speculation and Land Grabs*, FRIENDS EARTH EUR. 7, 24 (Jan. 2012), https://www.foeeurope.org/sites/default/files/publications/farming_money_foee_jan2012.pdf.

rush.[62] Governments of food-importing states like the United Arab Emirates, China, and Israel seek to secure a reliable source of food for their populations by purchasing land overseas.[63] All of these direct investors, public and private alike, have obligations under international human rights law to ensure that they are not adversely impacting local communities, particularly those displaced by their acquisitions.

Those responsible for physically removing communities from their ancestral lands are not the only ones charged with respecting their human rights. The United Nations Guiding Principles on Business and Human Rights (UNGPs), a soft law instrument governing corporate human rights obligations, mandates that companies further down the land grabbers' supply chains must also ensure that they are neither causing nor contributing to human rights violations.[64] This means that traders, factory owners, retailers, and every business in between must conduct due diligence on the products that it purchases, so that they avoid inadvertently purchasing goods from a company that grabbed land.[65] Coca Cola, for example, must ensure that the sugar it adds to its soft drinks was not cultivated on stolen property. Otherwise, the company risks profiting off the hunger, violence, and other indignities that displaced families endure.

The UNGPs recognizes that different companies face varying degrees of difficulty in carrying out this due diligence obligation.[66] Conducting a rigorous inquiry into the origin of one's products may be simple for those close to the input's point of origin. For example, a refinery that purchases raw sugar cane directly from a plantation down the road may have little trouble investigating the land's title and ownership history. These investigations prove far more

62. It should be noted that many of the TNCs which are technically part of the private sector enjoy the tacit or express support of their governments in making these overseas land purchases, blurring the line between "corporate" and "government" land grabs.

63. Brad Plumer, *Chinese Firms and Gulf Sheiks Are Snatching Up Farmland Worldwide. Why?,* WASH. POST (Jan. 26, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/26/chinese-firms-and-gulf-sheiks-are-grabbing-farmland-worldwide-why/.

64. According to the U.N. Guiding Principles on Business and Human Rights, "The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 13, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs]. Though the UNGPs remain soft law, they are widely referenced and viewed as the most authoritative source on corporate human rights obligations worldwide.

65. *Id.* at Principles 15(b), 17.

66. *Id.* at Principle 17(b).

complicated, however, for a high-volume sugar trader that buys from multiple refineries. It may not even know where its sugar was grown. Tracing sugarcane back to its fields becomes increasingly fraught as the product passes through multiple hands—from refinery, to trader, to syrup factory, to retailer, and so on—leaving the producer of the final product with no easy task. A grocery store may have little idea where the syrup it sells was refined, much less grown.

Regardless of the complexity, the UN General Assembly affirmed that corporations have human rights obligations to assess actual and potential human rights impacts of their operations, a responsibility which demands monitoring both its own production processes and those of their business partners.[67] Absent such obligations, companies would be free to profit off the human rights abuses that others directly commit. A plantation owner can charge less for his crops if the land was stolen rather than purchased at a fair price, for example, which allows him to sell his produce at reduced prices, which ultimately increases sales. The UNGPs ensure that ignorance—or willful blindness, as is so often the case—does not shield corporations from responsibility for the abuses that line their pockets. Thus, businesses of all stripes have human rights obligations towards communities fighting off land grabs.

In a counter-intuitive twist, conservation groups have also intensified the pandemic with something called "green land grabs," or forcible displacement motivated by environmental concerns.[68] In an effort to protect delicate ecosystems from human interference, environmental activists strive to maximize the total acres classified as conservation land. This is, of course, an admirable goal. Yet some NGOs have developed an unrestrained zeal for preservation, and "protect" land by encouraging governments to evict indigenous communities from territories that they have lived upon, and

67. *Id.* at Principle 17. International organizations have promulgated standards that articulate how private sector actors can implement these obligations with respect to land rights. *See, e.g.*, *Voluntary Guidelines on the Responsible Governance of Tenure*, FAO 1, 4, 23 (2012), http://www.fao.org/docrep/016/i2801e/i2801e.pdf (articulating the responsibilities that non-state actors have with respect to securing land tenure rights); *Principles for Responsible Investment in Agriculture and Food Systems,* COMM. ON WORLD FOOD SEC. (CFS) (2014), http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (last visited May 8, 2018).

68. Chris Lang, *Green Grabs are Not the Solution to Land Grabs,* REDD (July 7, 2016), http://www.redd-monitor.org/2016/07/07/green-grabs-are-not-the-solution-to-land-grabs/ (lamenting the trend in which "big environmental organisations, and charities are buying up land in the Global South in the name of conservation. . . . Far too often this has involved 'forest conservation'. Tens of thousands of people have been evicted from wildlife parks and protected areas.").

painstakingly cared for, over centuries.[69] This conservation-at-all-costs mentality has proven a dangerous form of idolatry. Environmental groups have incited violence in the name of conservation, convincing governments to deploy armed forces to forcibly remove indigenous communities from their customary lands.[70] The plight of Cameroon's Baka hunter-gatherer community illustrates such a tragedy. The tribe has periodically clashed with "anti-poaching squads" funded by the World Wildlife Federation (WWF), leading to violent conflict that has left members of the indigenous community dead and many others evicted from their homelands.[71] Kenya's Ogiek tribe is facing similar pressures, periodically fending off attempts by Kenyan police to remove them from their ancestral home in the Mau Forest; though the Ogiek often hold their ground, other times they are unsuccessful and their homes are burned to the ground.[72] While some fear that the Ogiek's presence will degrade the environment, the community has been exemplary stewards of the forest for generations.[73] For many conservation organizations, however, the mission to maximize land demarcated as "preserved" supersedes all other considerations–even human. Such a myopic perspective not only ignores the human suffering that will take place upon eviction, but overlooks the conservation skills that native groups have honed over generations.

Finally, government ministers and tribal leaders are likewise implicated in land grabs. Governments may grant concessions to TNCs or other investors on the premise that land is uninhabited, when in reality communities either (1) reap the land's resources but

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69. *See* Marcus Colchester, *Conservation Policy and Indigenous Peoples*, 28-1 CULTURAL SURVIVAL Q. MAG. (Mar. 2004), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/conservation-policy-and-indigenous-peoples; Gina Cosentino, *Governing the Global Commons: How UNSR Anaya's Study on Extractive Industries Can Inform a New Global Human Rights Regulatory Regime for Transnational Conservation NGOs Operating on or Near Indigenous Territories*, 32 ARIZ. J. INT'L & COMP. L. 209, 228–29 (2015) (detailing the pressures that environmental NGOs have placed on indigenous communities' lands).

70 . *Corporate Monitor: Illegal Evictions in Kenya*, FIRST PEOPLES WORLDWIDE (Jan. 2014), http://www.firstpeoples.org/first-peoples-corporate-monitor.htm (discussing the evictions of the Sengwer, Masaai, and Batwa people from areas in Kenya and Uganda earmarked for national parks, and noting that such evictions "have been traced to government partnerships with large international environmental NGOs.").

71. *Two NGOs Clash Over the Rights of a Tribe in the Cameroons*, TRT WORLD (Feb. 8, 2017), https://www.trtworld.com/mea/two-ngos-clash-over-the-rights-of-a-tribe-in-the-cameroons-293143.

72. Rachel Savage, *Kenya's Ogiek People Forced from Homes amid 'Colonial Approach to Conservation'*, THE GUARDIAN (Aug. 18, 2016, 5:38 AM), https://www.theguardian.com/global-development/2016/aug/18/kenyas-ogiek-people-are-seeing-their-land-rights-brutalised.

73. *See Ogiek: Forest Beekeepers,* SURVIVAL INT'L, http://www.survivalinternational.org/tribes/ogiek (last visited May 8, 2018).

live elsewhere;[74] (2) use the land seasonally, as is the case for nomadic populations;[75] (3) are allowing the land to lie fallow for soil regeneration;[76] or (4) live upon the land under communal tenure, but do not hold formal title.[77] Government ministers are often well aware of such uses, but do not advertise these land patterns to investors in an effort to facilitate the sale.[78] Unscrupulous traditional leaders have also facilitated land grabs. These leaders may present themselves as the only authority that must be consulted before communal land is sold.[79] In such cases, these chiefs may receive the price of land that was theirs to hold in stewardship, not to sell.

Myriad actors are responsible for contributing to the land crisis. Given the apparent lack of accountability these grabbers face, one might reasonably assume that this bleak picture—in which communities are pushed off their lands and into poverty, smallholder farmers square off against the some of the world's

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74. *'Land Grabbing': Is Conservation Part of the Problem or the Solution?*, IIED BRIEFING (Sept. 2013), http://pubs.iied.org/pdfs/17166IIED.pdf ("Allocated land is often considered empty or vacant because it lacks permanent settlements or signs of agriculture. But much is in fact used by local communities for livestock grazing, seasonal or shifting cultivation, subsistence hunting and for harvesting forest products.").

75. Safia Aggarwal & Mark S. Freudenberger, *USAID Issue Brief: Tenure, Governance, and Natural Resource Management*, USAID 4 (Apr. 2013), https://land-links.org/wp-content/uploads/2016/09/Tenure-Governance-and-Natural-Resource-Management.pdf.

76. *A-B-C's of Land Tenure and Property Rights: Definitions are Important!*, USAID, https://www.land-links.org/wp-content/uploads/2017/02/USAID_Land_Tenure_ABCs_of_Land_Tenure.pdf (last visited May 8, 2018) (noting that fallow land has "less clear tenure and [leads to conflicting] latent [property] claims."); *see also* Mark Freudenberger, *USAID Issue Brief: The Future of Customary Tenure*, USAID 5 (Apr. 1, 2011), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Customary_Tenure_Brief_0-1.pdf ("In many countries, the state claims ownership over all land that has not been farmed or developed, while communities believe that they have customary claims to forests and ancient fallows.").

77. Econ. Comm'n for Afr., Land Tenure Systems and Their Impacts on Food Security and Sustainable Development in Africa, at 28, U.N. Doc. ECA/SDD/05/09 (2004) [hereinafter Land Tenure Systems] ("In contrast to this, the majority of rural producers gain their land on the basis of customary rights rooted in notions of community and kinship, and through derived rights - a series of informal contractual relations (such as sharecropping) with those who hold primary rights. While the State has a predisposition towards the emergence of formal statutory systems, it lacks the capacity to create a comprehensive system of land administration which would impose control within a formal land tenure regime over the rural areas."); *see also* Aggarwal & Freudenberger, *supra* note 75, at 4 ("Customary land tenure systems operate in many dryland areas, and communal tenure is a common feature with overall authority for land vested in traditional leaders.").

78. OLIVIER DE SCHUTTER, TAINTED LANDS: CORRUPTION IN LARGE-SCALE LAND DEALS 25 (2016), https://www.globalwitness.org/en/reports/tainted-lands-corruption-large-scale-land-deals/ ("In addition to bribery, local elites—such as government ministers or senior public officials, their family members, or powerful companies—may be tempted to use their positions of power to influence land demarcation in order to get beneficial treatment and increase their own land holdings at the expense of less powerful members of society, including indigenous persons or ethnic minorities.") (footnote omitted).

79. *See id.* at 28 (discussing the type of corruption in which "chiefs or other community leaders . . . acting as 'representatives' of their communities, give away communal land.").

wealthiest corporations, and local police fuel the violence—stands to deteriorate further still. Yet land rights advocates have several promising solutions in their tool belt, each of which can be strengthened through partnering with TNCs: small-scale landowners can register their land in formal systems; corporations can conduct vigorous due diligence on the land rights practices of their business partners; and TNCs can promote respect for community land rights among governments and other companies. Each of these solutions will be considered in turn.

C. The Titled Solution

As alluded to above, the land grab phenomenon persists in large part because of the disjuncture between formal and informal land tenure.[80] Many countries have yet to recognize traditional land rights in their formal property registries,[81] increasing the risk of land dispossession:[82] if a prospective buyer relies upon these registries to view the current owner, and no party is listed, this enables the would-be buyer to claim that the land is "unowned." Even in countries where governments do recognize the right to customary land tenure in national legislation, many fail to take the next step and register each plot of land into the formal systems, similarly leaving communities exposed to land grabs.[83] The troubles

80. The exploitation of the gap between formal and informal land tenure began when colonizers introduced a "formal" system into their overseas colonies, and considered property held under traditional patterns to be "informal" and inferior. Indeed, throughout much of Africa, the "colonial powers alienated local populations . . . [by] declaring them tenants on crown land as a way to collect taxes and/or extract labor." Stein T. Holden & Keijiro Otsuka, *The Roles of Land Tenure Reforms and Land Markets in the Context of Population Growth and Land Use Intensification in Africa*, 48 FOOD POL'Y 88, 89 (2014). The newly independent African states adopted this model of elevating what they characterized as "formal" land rights and subordinating "informal" land rights. In Cote d'Ivoire, for example, the French colonial powers "largely ignored customary institutions, declaring all unused land property of the state, and the postcolonial Ivorian state continued the policy of marginalizing customary institutions in the de jure legal regime." Ryan Bubb, *The Evolution of Property Rights: State Law or Informal Norms?*, 56 J. L. & ECON. 555, 556 (2013).

81. The ways in which African states approach property rights can be broadly divided into two camps: those "communal regimes," which uphold communal tenure (e.g., Ghana), and "user rights regimes," which eschew traditional rights in favor of enforcing the land claims of whatever party is currently farming the land (e.g., Cote d'Ivoire). Catherine Boone, *Property and Constitutional Order: Land Tenure Reform and the Future of the African State*, 106 AFRICAN AFF. 557, 563–64 (2007).

82. Holden & Otsuka, *supra* note 80, at 90 ("Lack of recognition of customary land rights in statutory law represents a severe threat to tenure security and future livelihood opportunities for marginalized groups.").

83. DE SCHUTTER, *supra* note 78, at 15–16 ([C]ustomary and traditional forms of land tenure are often not recognized by law within such countries. Even when they are recognized on paper, customary land rights may be poorly protected in practice . . . . Many governments fail in particular to register or recognize . . . communal lands, thus making land grabbing easier.").

of Brazil's Guarani-Kaiowá population illustrate this phenomenon. While the Brazilian Constitution guarantees indigenous persons exclusive rights to their ancestral lands,[84] authorities have largely failed to formalize their occupancy in national title registries.[85] This has created a system of dual claims, with ranchers snapping up the "empty" lands and marginalizing the Guarani in the process. Brazilian courts have ruled in favor of the ranchers holding formal title, [86] sending the Guarani's constitutional protections up in smoke.

TNCs have regularly exploited the chasm between informal and formal tenure rights, purchasing or leasing land used by communities but not held under formal title. With an astonishing proportion of land held under customary property regimes–the World Bank estimates that only 2-10% of African land is held under formal title,[87] for example—the opportunity for investors to profit off tenure insecurity looms large. This is because

> [i]t is far easier to evict the present occupiers of land intended for leasing if they cannot establish or enforce legal title and have no access to justice.
>
> The states where land grabs have occurred have largely been ones where property interests of the

84. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.) (committing Brazil's government to demarcating all indigenous lands, and to protecting and ensuring respect for their property).

85. For example, as of 2015, the government has only registered 0.7% of the Guaraní-Kaiowá's traditional territory as indigenous. Kristina Kroyer, *Resource Conflicts Between Landholders and Indigenous People in Mato Grosso do Sul, Brazil: Policies, Sources, and Consequences in a Historical Perspective*, 3 REVISTA ÑANDUTY 131, 132 (2015); *see also* Iago Morais de Oliveira, *Indigenous Peoples and Land Demarcation in Brazil: A Never-Ending Process?*, OXFORD HUM. RTS. HUB (Dec. 13, 2016), http://ohrh.law.ox.ac.uk/indigenous-peoples-and-land-demarcation-in-brazil-a-never-ending-process/ ("Even though there is a chapter in the Brazilian Constitution dedicated to Indians (Chapter VIII), which formally recognizes their right to have the lands they traditionally occupy demarcated (article 231), violations of their right to property are increasing."); Fiona Watson, *Brazil's Treatment of Its Indigenous People Violates Their Rights,* THE GUARDIAN (May 29, 2013, 11:46 AM), https://www.theguardian.com/commentisfree/2013/may/29/brazil-indigenous-people-violates-rights (observing that the Brazilian government has failed to protect indigenous land rights, that they are in fact considering a new piece of legislation that would further hamper their ability to demarcate land as indigenous, and that displaced communities are "tired of waiting for the federal authorities to take action.").

86. *See, e.g.*, *Guarani and Kaiowá Apyka'i Community Risks Imminent Eviction*, FIAN INT'L (May 19, 2016), http://www.fian.org/library/publication/guarani_and_kaiowa_apykai_community_risks_imminent_eviction/ (discussing the eviction of indigenous groups from lands they re-occupied after being forced off their ancestral homes); John Vidal, *Brazil's Guarani Indians Killing Themselves over Loss of Ancestral Land*, THE GUARDIAN (May 18, 2016, 12:18 PM), https://www.theguardian.com/environment/2016/may/18/brazils-guarani-indians-killing-themselves-over-loss-of-ancestral-land (detailing a recent court ruling that ordered the indigenous group off their ancestral land).

87. KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION xxi (2003).

> current occupants, although recognized by the local population, are not legally enforced or not enforceable.[88]

Tenure insecurity breeds land grabs.

Fortunately, this problem has at least one solution: given the nearly universal belief that formal land rights override informal land rights on the ownership hierarchy,[89] enshrining tenure rights into formal registry systems has become a critical safeguard for many communities.[90] And registering land does not just deter evictions. Secure tenure[91] encourages smallholders to invest in their land, incentivizes the use of environmentally sustainable farming methods, and creates job opportunities, all of which boost local food security.[92] Indeed, states that have invested in programs designed

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88. Lea Brilmayer & William J. Moon, *Regulating Land Grabs: Third Party States, Social Activism and International Law*, *in* RETHINKING FOOD SYSTEMS 123, 133 (Nadia C.S. Lambek et al. eds., 2014).

89. Kabia, *supra* note 54, at 714.

90. Land Tenure Systems, *supra* note 77, at 28 (commenting on the popularity of the "approach [that] argues that most land policy frameworks in Africa advocate formal statutory land titling as the ideal form of landholding for the promotion of development . . . . [and that] the State has a predisposition towards the emergence of formal statutory systems.").

91. Secure tenure often, but not always, means formally registering rights to land. Tenure is considered secure if rights to use, or transfer, or inherit, or otherwise control the property are recognized by the powerful actors in that society. *See Land Tenure Security*, IFAD 1 (Feb. 2015) https://www.ifad.org/documents/38714170/40196966/Scaling+up+results+in+land+tenure+security.pdf/9be8e8e7-1a76-4b2c-9ab6-328f6c20df67 (defining tenure security as "people's ability to control and manage land, use it, dispose of its produce and engage in transactions, including transfers."); FAO LAND TENURE STUDIES 3, *supra* note 25, at 19 (observing that the sources of tenure security "vary from context to context," and may include recognition of property rights from powerful groups including government actors, the community itself, farmers associations, the administrative state, or even warlords). The term "powerful actors" often refers to governmental bodies, but in certain contexts, it may refer to other actors, such as the community itself, farmers' associations, or local warlords. *See id.* at 19–20. Secure tenure rights may refer to "freehold" property rights, in which there is full private ownership. *See id.* at 18–19 (writing that some argue that there can only be full tenure security "when there is full private ownership (e.g., freehold)"). It may also refer to an array of lesser associated land rights, such as usufruct rights (the right to use the property for a particular purpose), tenancy rights, a right to derive income from the land, a right to transfer the land to one's inheritors, a right to exclude others from the land, and so on. *See id.* at 10.

92. *See Primer: Land Tenure and Property Rights,* USAID (Mar. 2014), https://www.usaidlandtenure.net/wp-content/uploads/2016/09/USAID_Land_Tenure_Primer_2014-updated.pdf [hereinafter *Primer*]. Though definitions of what constitutes "customary land rights" vary, it typically refers to communal land access that is enjoyed by an entire group, in which families exercise individual use of residential and agricultural plots and joint use of pastoral plots, but are not at liberty to sell the land held in common. *See supra* note 77. Land is regarded as an intergenerational asset. This stands in contrast to formal or private property rights, in which formalized land titles bequeath ownership to the named individual. *See also* Holden & Otsuka, *supra* note 80, at 95 ("It is also obvious that formal recognition of customary tenure rights for poor and marginalized groups can have a huge impact on their future livelihoods opportunities."); FAO LAND TENURE STUDIES 3, *supra* note 25, at 18 ("Without security of tenure, households are significantly impaired in their ability to secure sufficient food and to enjoy sustainable rural livelihoods.").

to ensure equitable land tenure administration[93] have enjoyed higher rates of growth, improved food security, and more favorable health outcomes.[94] Secure land rights likewise have become the foundation for the social fabric of many rural communities, serving as "a source of prestige and often power."[95]

Of course, security of tenure is not always an antidote for malnutrition.[96] Other factors like favorable climatic conditions, availability of seeds and fertilizers, and the absence of armed conflict all play important roles in agricultural productivity. And caution is warranted, as poorly designed or implemented titling schemes can make things worse. Formalizing tenure may result in a failure to recognize crucial land use rights, effectively erasing such rights in the process.[97] Registration introduces a "contested terrain, since [it] involve[s] decisions about who counts and who does not."[98] This risk runs particularly high for women, whose rights are less likely to be recognized in the formalization process.[99] Formalizing customary tenure also opens the door to potential "distress sales," in which the owner fends off a short-term emergency like famine by selling the land at an undervalued price, despite the long-term net loss such a sale creates.[100] Furthermore, a community may have relied upon communal tenure as a form of protection, relying upon this ownership structure to prevent investors from identifying who has the authority to sell the land.[101] And even if the rights are flawlessly recorded, legal recognition on paper cannot guarantee

93. This refers not only to ensuring that customary lands are formally recognized, but that women within these communities enjoy equal access rights, inheritance rights, and other land use rights that feed into tenure security.

94. *See* FAO LAND TENURE STUDIES 3, *supra* note 25, at 6.

95. *Id.* at 5.

96. *See, e.g.*, Saturnino M. Borras & Jennifer C. Franco, *From Threat to Opportunity? Problems with Codes of Conduct for Land Grabbing*, *in* RETHINKING FOOD SYSTEMS 147, 158 (Nadia C.S. Lambek et al. eds., 2014) ("Gaining legal recognition of poor people's land rights has never alone guaranteed that they will actually be respected and protected in the courts or on the ground; for the rural poor, there remains a difficult and contested process involving struggles to actually claim those rights and 'make them real' in fact.").

97. FAO LAND TENURE STUDIES 3, *supra* note 25, at 20 ("[T]itling and registration projects, if poorly designed, can reduce security of many rural residents by failing to recognise certain rights, often held by women and the poor, and allowing them to be merged into simplistically conceived 'ownership' rights. The rights to important uses of the land, for example, to gather minor forest products or to obtain water, may not be recognised by the legal system and may be effectively destroyed").

98. Borras & Franco, *supra* note 96, at 158.

99. *See generally Land Rights and Food Security,* LANDESA RURAL DEV. INST. (Mar. 2012), http://www.landesa.org/wp-content/uploads/Landesa-Issue-Brief-Land-Rights-and-Food-Security.pdf (discussing the myriad roadblocks women face in continued use of land when property rights become formalized).

100. FAO LAND TENURE STUDIES 3, *supra* note 25, at 21.

101. For example, land titling schemes that force individuals to be named "owners" can threaten the ability for indigenous and other local groups to confront would-be land grabbers as a collective whole that must be consulted. DE SCHUTTER, *supra* note 78, at 16.

that the benefits of formalized rights will be realized, as courts and security forces may fail to enforce those rights.[102] Still, the fact that it remains an imperfect solution does not mean formalizing tenure is bad; it simply means that context matters. In certain settings, "secure tenure" may be better achieved through means other than formal registration of full ownership rights, such as ensuring that land use or seasonal rights are recognized by relevant authorities, as is outlined in Footnote 91 *supra*. It also means that rather than embracing any land formalization scheme as a universal good, we must qualify this truism to hold that well-designed and well-executed land formalization creates an enabling environment for small-scale farmers to flourish.[103] The litany of benefits associated with formalizing tenure[104] means that it is an important avenue to explore.

The increasing influence of TNCs over states suggests that business can play a critical role in advocating for respect for communities' land rights. Regardless of the specific context, or whether formalization is the best way to secure tenure, TNCs' clout positions them to ensure respect for community land rights. The urgency of channeling business influence to protect land tenure for smallholders becomes clear when we consider that (1) there is a clear connection between secure land tenure and improved nutrition and development outcomes for low-income communities, and (2) corporate power is climbing compared to states—a power which impacts the enjoyment of property rights. Corporate operations have come to play an outsized role in the lives of untold millions, particularly in regions where ineffectual rule of law has left a power vacuum. Yet given that land registries and assigning formal title officially remain the domain of the state—indeed, sovereign control over territory is perhaps the state's most defining characteristic[105]—the role of business in securing tenure is not immediately clear. How, then, can corporations promote secure rights?

III. CORPORATE OBLIGATIONS ON LAND TENURE

Despite the traditional dominance of governments over the enjoyment of the right to land, TNCs can promote stable land use, and in turn, help communities realize the concomitant human

102. *See* FAO LAND TENURE STUDIES 3, *supra* note 25, at 21.

103. *See id.* at 6.

104. *See, e.g.*, *Primer*, *supra* note 92; Holden & Otsuka, *supra* note 80, at 93.

105. DAMROSCH ET AL., *supra* note 44, at 376. This truism is perhaps undergoing the first hints of change, with companies controlling massive portions of state territory on which they behave, for all intents and purposes, as a sovereign.

rights benefits in at least two ways. First, corporations can uphold their obligations under international human rights law to respect the human rights of those communities affected by their operations. This obligation asks companies to follow the "do no harm" principle, a deceptively simple command that swells into a Herculean task for companies with complex supply chains. Second, corporations can promote security of tenure by reaching beyond the minimum dictates of international law, inciting governments and other companies alike to fight for secure tenure for smallholders. This "human rights plus" approach will be explored in part IV.

A. Corporate Due Diligence: Current Practice and International Human Rights Law Obligations

First, companies can support secure tenure rights by adhering to their international human rights law obligations to conduct human rights due diligence on their operations and those of their business partners. Under the UNGPs, corporations have an obligation to respect the human rights of people affected by their operations, to remedy those who have been harmed, and to seek to prevent or mitigate adverse human rights impacts committed by their suppliers and business partners.[106] These obligations require companies to conduct "human rights due diligence." Traditionally, of course, companies have not conceptualized due diligence as a way to screen for human rights violations. Rather, due diligence has been viewed as a means of minimizing the risk of bad investments, legal liabilities, or other financial drains.[107] This increasingly

106. UNGPs, *supra* note 64, at Principle 13.

107. In the corporate context, due diligence can be broadly defined as "a process of discovery that is relevant in key business transactions, as well as operational activities. . . . [it is] '. . . mainly a legal and financial course of action, first designed to avoid litigation and risk, second to determine the value, price and risk of a transaction, and third to confirm various facts, data and representations'." LINDA S. SPEDDING, DUE DILIGENCE HANDBOOK: CORPORATE GOVERNANCE, RISK MANAGEMENT AND BUSINESS PLANNING 3 (2008) (ebook) (quoting Charles Bacon, CEO of Due.Com).

archaic[108] vision of "due diligence" is rooted in the assumption that a company's only duty is to maximize returns to shareholders.[109]

Recent developments in international law and the rising costs of committing human rights violations have turned this conventional wisdom on its head. The past decade has seen international law's purview turn toward corporations. This is evident from recent decisions in regional human rights courts, in which judges have begun to constrain corporate behavior through the back-door mechanism of state accountability. The African Commission on Human and Peoples' Rights (ACHPR) and West Africa's ECOWAS Community Court of Justice (ECCJ), for example, have both found states liable for failing to prevent corporations from committing human rights abuses in their territory.[110] Increasing willingness to hold corporations accountable for human rights abuses is also reflected in the International Criminal Court's (ICC) September 2016 Policy Paper on Case Selection, in which the Prosecutor

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108. For example, Allstate Corp. Chairman and CEO Tom Wilson writes, "For decades, corporations have been expected to concentrate on one mission: Maximizing profits for shareholders. While that might have been appropriate decades ago, it isn't now. The emphasis on profits has widened the trust gap between corporations and society, resulting in an adversarial relationship between the private and public sectors. Let me be clear: Shareholders must get a good return, but at the same time corporations must work to be a force for good in society." *How Corporations Can Be a Force for Good*, WASH. POST (Sept. 29, 2016), https://www.washingtonpost.com/opinions/how-corporations-can-be-a-force-for-good/2016/09/29/08e99268-7ac4-11e6-ac8e-cf8e0dd91dc7_story.html?utm_term=.493925a59047.

Along similar lines, Pepsi CEO Indra Nooyi recently penned an article explaining her company's increased attention to corporate social responsibility, writing: "Ten years ago, as my colleagues and I were thinking about the future of our company, we saw some major changes on the horizon. People were increasingly looking for healthier foods. Environmental issues like water scarcity and climate change were threatening ecosystems, livelihoods, and economies around the world. And the competition for the next generation of talent was becoming more intense than ever. We had a choice to make. Continue with business as usual. Or fundamentally transform our business, turning obstacles into opportunities. We chose the latter approach, and it has propelled our company forward ever since." Indra Nooyi, *10 Years Ago, I Said PepsiCo Had to Be About More than Making Money. Here's What's in Store for the Next 10*, LINKEDIN (Oct. 17, 2016), https://www.linkedin.com/pulse/10-years-ago-i-said-pepsico-had-more-than-making-money-indra-nooyi?trk=eml-b2_content_ecosystem_digest-hero-22-null&midToken=AQHiNQmMS2kQBQ&fromEmail=fromEmail&ut=3lFOVMXZ2FAns1. While critics may argue that this is mere lip service to improved behavior, the very fact that CEOs feel such statements are valuable indicates the turn away from the shareholder-idolatry model.

109. *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf (writing that the "primary responsibility" of a business is to the shareholder, which demands that companies maximize profit within the bounds of the law).

110. *See, e.g.*, Social and Economic Rights Action Center v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf (finding that Nigeria violated its human rights obligations by failing to prevent oil companies from committing widespread human rights abuses in the Niger River Delta); SERAP v. Nigeria, ECW/CCJ/JUD/18/12 (Dec. 14, 2012), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf (finding the same outcome as mentioned above).

announced her prioritization of land grab, resource grab, and environmental destruction cases.[111] She continued on to affirm her interest in investigating "organisations [sic] (including their structures) and individuals allegedly responsible for the commission of the crimes."[112] Though legal persons as an entity cannot be prosecuted under the Rome Statute, the announcement indicates an interest in prosecuting corporate executives and investigating the role of the corporate structures.[113] Even ostensibly "pro-private" adjudicatory bodies, like the International Centre for Settlement of Investment Disputes (ICSID), are embracing corporate human rights obligations: an ICSID panel recently rejected a company's argument that human rights duties apply only to states, noting that guaranteeing the right to water and respecting others' rights to adequate housing and living conditions are, in fact, private sector obligations.[114] As the panel opined,

> [I]nternational law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.[115]

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111. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ¶ 41, Int'l Crim. Ct. (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf ("[T]he Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.").

112. *Id.* at ¶ 42.

113. *Company Executives Could Now Be Tried for Land Grabs and Environmental Destruction,* GLOBAL WITNESS (Sept. 15, 2016), https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmental-destruction-historic-move-international-criminal-court-prosecutor/; Shehab Khan, *CEOs Can Now Be Tried Under International Law at The Hague for Environmental Crimes*, INDEPENDENT (Sept. 19, 2016), http://www.independent.co.uk/news/business/news/ceos-hague-international-law-tried-environmental-crimes-icc-a7315866.html. Though the prosecutor has always had the mandate to prosecute corporate executives, should he or she have so chosen, this new Policy Paper is perceived as signaling an increased willingness to actually exercise that power.

114. Urbaser S.A. & Consortio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1193–1210 (Dec. 8, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

115. *Id.* at ¶ 1195 (footnote omitted).

As an arbitration body tasked with protecting corporate investment interests, ICSID's acknowledgment that the private sector has human rights obligations carries significant weight.

Fifteen years ago, the idea that companies have human rights obligations was unthinkable. What caused this shift? The major sea change in international law's approach toward corporations came with the introduction of the 2011 UNGPs. These Principles demand that (1) states require companies to conduct human rights due diligence where the nature of their business operations pose significant risk to human rights;[116] and (2) businesses conduct human rights due diligence processes to "identify, prevent, mitigate and account for how they address their impacts on human rights[,] [and install] [p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute."[117] Principles 17-21 outline what such due diligence processes must entail in concrete terms, which includes vetting all corporate operations linked to its supply chain and business relationships;[118] implementing an ongoing due diligence process rather than treating it as a one-time exercise;[119] ensuring meaningful consultation with populations that may be impacted by their operations;[120] and mitigating against or preventing any human rights violations that the due diligence process uncovers.[121]

Though still in soft law form, the UNGPs have already started to influence corporate behavior in real, albeit limited, ways.[122] Civil society has strengthened implementation further still, drafting guidance documents that help businesses translate these legal norms into actionable steps.[123] The UNGPs thus stand apart as the single most important development on corporate liability under international law. Parallel developments in international criminal law, regional human rights decisions,

116. UNGPs, *supra* note 64, at Principle 4 and Commentary.

117. *Id.* at Principle 15(b) and (c).

118. *Id.* at Principle 17.

119. *Id.* at Principle 17(c).

120. *Id.* at Principle 18(b).

121. *Id.* at Principle 19.

122. Civil society members have successfully used the UNGPs as a tool to convince corporations that they must adhere to these standards. Caroline Rees & Rachel Davis, *Where We're at: Taking Stock of Progress on Business and Human Rights*, SHIFT (Aug. 2016), http://www.shiftproject.org/resources/viewpoints/taking-stock-progress-guiding-principles/ (writing "Five years later [after the signing of the UNGPs], significant progress on business respect for human rights has been made," and continuing on to outline the ways in which the UNGPs have improved corporations' human rights awareness and track records).

123. *See, e.g.*, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies*, BUS. RESPECT HUM. RTS. (2016), https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf.

and UN declarations are all expanding the scope of corporate liability for human rights violations further still.

Second, as Footnote 64 details, the idea that corporations have human rights obligations has become more palatable as the private sector's "short-term profits at all costs" mentality erodes. This is due in large part to the increased visibility of behavior overseas, raising consumer awareness about the social footprint of their purchases.[124] Such visibility makes human rights abuses an increasingly expensive prospect. For brand-conscious companies in particular, the financial burden of a tarnished image can be enormous.[125] David Kinley and Junko Tadaki explain the financial pressures that induce companies to respect human rights, writing:

> [I]ncreasing exposure of human rights infringements by corporations has clearly signaled to businesses that alongside other reasons, it may well be in their commercial interest to rethink their actions and policies in terms of their social impact. Thus, on the negative side, a tarnished brand image and loss of consumer goodwill is not good for business; on the positive side, corporate respect for human rights will not only engender goodwill, but will eventually contribute to a stable, rule-based society in host states, which in turn promotes the smoother and more profitable operation of business.[126]

Countless examples illustrate these dynamics. The financial damage inflicted by reports on child slavery in the cocoa supply chain has forced chocolate producers like Cadbury's,[127] Mars,[128] and

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124. James Epstein-Reeves, *Consumers Overwhelmingly Want CSR*, FORBES (Dec. 15, 2010, 9:58 AM), https://www.forbes.com/sites/csr/2010/12/15/new-study-consumers-demand-companies-implement-csr-programs/#466b8c6c65c7 (reporting that 88% of consumers surveyed wanted companies to try to improve society and the environment, and that 83% of consumers believe that companies should provide financial support to charities).

125. STANLEY FOUND., *supra* note 43, at 6 ("Large corporations are accountable to their shareholders, and they need to maintain their reputations. The onset of atrocities imperils all elements of business success."). *See generally* SAVITZ WITH WEBER, *supra* note 36 (detailing the financial ruin that can result from a poor corporate image).

126. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 953 (2004) (footnote omitted).

127. *Cadbury: An Ethical Company Struggles to Insure the Integrity of Its Supply Chain*, YALE SCH. OF MGMT. (Aug. 2008), http://som.yale.edu/our-approach/teaching-method/case-research-and-development/cases-directory/cadbury-ethical-company.

128. FAIR TRADE INT'L & MARS INC., *Mars and Fairtrade International Announce Collaboration*, INT'L LABOR RTS. FORUM (Sept. 27, 2011), https://www.laborrights.org/releases/mars-and-fairtrade-international-announce-

Hershey[129] to source from Fairtrade certified cocoa; backlash over sweatshops in its supply chain spurred Nike to transform itself into an apparel industry leader in monitoring factories for labor violations; [130] and Citigroup committed to financing charitable projects in low-income countries after enduring a barrage of negative coverage over its socially destructive investments.[131] Bad press can and does force companies to end abusive practices.

In addition to backlash from customers, dissent within the adversely affected communities likewise exacts a high cost on companies' bottom line. The expense of failure to avoid conflict with local communities has been well documented:[132] extractive industry companies Newmont and Buenaventura, for example, lost an estimated $1.69 billion in profits after conflict with the local populations halted production at their Peruvian mine;[133] Meridian Gold sank $350 million into developing a mine in Argentina that never became operational, because the community successfully resisted their attempts to relax local health and environmental regulations;[134] and local protests over water usage for the Pascua Lama copper mine in Chile eventually led the company to stop construction on the $8.5 billion project.[135] TNCs must account for the reaction that both consumers and those living near their operations are likely to have to corporate human rights violations, and mitigate against their very real expense.

The converse is also true: Just as there is pressure to avoid a poor human rights reputation, so too there is a growing recognition of the financial advantages of cultivating an admirable human rights reputation. [136] Consumers respond positively to stories of

collaboration (noting Mars' commitment to source 100% of its chocolate from fair trade producers by 2020).

129. *Raise the Bar, Hershey! Campaign Welcomes Hershey's Announcement to Source 100% Certified Cocoa by 2020*, INT'L LABOR RTS. FORUM (Oct. 3, 2012), http://www.laborrights.org/releases/raise-bar-hershey-campaign-welcomes-hersheys-announcement-source-100-certified-cocoa-2020.

130. Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2013, 10:00 PM), http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5.

131. GEOFFREY HEAL, WHEN PRINCIPLES PAY: CORPORATE SOCIAL RESPONSIBILITY AND THE BOTTOM LINE 69–70 (2008).

132. For an excellent report on the cost of conflict in the extractive industry, see DAVIS & FRANKS, *supra* note 39.

133. Steven Herz et al., *Development Without Conflict: The Business Case for Community Consent*, WORLD RESOURCES INST. 40–44 (Jonathan Sohn ed., 2007), http://www.wri.org/sites/default/files/pdf/development_without_conflict_fpic.pdf.

134. *Id.* at 27–32.

135. *Conflict with Communities a Big Cost to Business*, U. OF QUEENSL. (May 13, 2014), https://www.uq.edu.au/news/article/2014/05/conflict-communities-big-cost-business.

136. JULIA RUTH-MARIA WETZEL, HUMAN RIGHTS IN TRANSNATIONAL BUSINESS: TRANSLATING HUMAN RIGHTS OBLIGATIONS INTO COMPLIANCE PROCEDURES 214 (2015) (observing that corporations that have developed an advanced understanding of human rights issues "will grant them a competitive advantage in new markets where similar human rights

companies implementing strong corporate policies on human rights,[137] and TNCs have taken note: an impressive 84% of companies with revenue over $10 billion USD have implemented human rights policies.[138] This was not the case ten years ago, illustrating the increased attention major TNCs are forced to pay to human rights.

Thus, the twin pressures of emerging legal obligations and rising financial costs are pushing TNCs to expand their corporate due diligence to account for a new form of risk: human rights violations. Given the egregious human rights abuses that flow from land conflict, corporations must extend this rigorous due diligence to vetting new and existing land acquisitions, both in their own operations and throughout their supply chain. But what does due diligence look like in the context of land?

B. Due Diligence on Land

Conflicting land claims require companies to look beyond the narrow confines of national land title registries. While these registries contain information that corporations no doubt should review, all too often they fail to account for the land's customary use.[139] This leaves a dangerous gap in ownership rights, particularly when the country has no national legislation clarifying the relationship between customary and formally registered land rights.[140] As discussed above, registries may overlook communal land rights, indigenous rights, seasonal or nomadic rights, natural resource collection rights, and other longstanding land uses that authorities characterize as "informal."[141] And in many parts of the

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issues prevail, compared to those corporations who have not implemented a human rights strategy . . . . The benefits of a human rights policy will go beyond reputation and assurance processes, fostering business growth and commercial opportunities by granting access to new markets, new suppliers and, most importantly, new consumers.").

137. *Id. See generally* SAVITZ & WEBER, *supra* note 36.

138. James Wood, *The New Risk Front for GCs – Nearly Half of Contracts Have Human Rights Clauses*, *LB Research Finds*, LEGAL BUS. (Sept. 8, 2016, 8:46 AM), https://www.legalbusiness.co.uk/blogs/the-new-risk-front-for-gcs-nearly-half-of-contracts-have-human-rights-clauses-lb-research-finds/. This figure falls to 46% when taking into account companies that earn below $10 billion in revenue. *Id.*

139. Rachel S. Knight, *Statutory Recognition of Customary Land Rights in Africa*, FAO LEGIS. STUDY vi (2010), http://www.fao.org/docrep/013/i1945e/i1945e00.pdf.

140. *See, e.g.,* Jennifer Duncan, Michael Lufkin & Reem Gaafar, *The Land Bill (Draft 3): Analysis and Policy Recommendations*, LANDESA RURAL DEV. INST. 7, 14, 17 (Oct. 2013), https://s24756.pcdn.co/wp-content/uploads/Ghana-Land-Bill-Final-Landesa-Report-23-Oct-13.pdf (critiquing a Ghanaian land bill for failing to clarify the relationship between traditional tenure and formally registered land rights).

141. Liz Alden Wily, *Customary Land Tenure in the Modern World,* RIGHTS & RES. 3 (Nov. 2011), http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7713/customary%20land%20tenure%20in%20the%20modern%20world.pdf?sequence=1&isAllowed=y (noting that

world, only a fraction of the land is held under formal title. In sub-Sahara Africa, for example, an estimated 90% of the land remains untitled.[142] This leaves a massive region vulnerable to competing claims and leads to conflict when investing companies do not investigate the realities of land use beyond national registries.

As a corollary to the inadequacy of checking public registries, investors must also remain aware that due diligence requires more than securing government approval to acquire land. Government sanctioned concessions in no way guarantee against land conflict. According to the Munden Project, between 93 and 99% of territories granted to companies are populated, [143] meaning that these concessions will engender land conflict with local communities almost as a matter of course. Yet public officials have every incentive to advertise untitled land as "unused," as they stand to reap all of the financial benefits and suffer none of the attendant losses of land investments, which will instead be borne by the displaced community.[144] Responsible companies must remain aware of these dynamics and investigate land use patterns in practice, not just on paper, if they want to avoid displacing local populations.

Inspecting true land use patterns, then, requires direct outreach to local communities to gauge just who would be adversely impacted by a land acquisition. It bears emphasis that "community" means the entire community, not simply approval from a powerful subsection therein: just as businesses cannot rest assured that government approval means they have complied with their human rights obligations, approval from traditional community leaders likewise does not suffice. The reason for this is twofold: first, a traditional leader may succumb to the same temptations as his governmental counterpart: money. A chief may sell "his" property to an investor and pocket the money for himself, when in reality the land belongs to the community as a whole and is not truly the chief's to sell.[145] This form of corruption runs rampant.

"[f]ew commons are acknowledged as the property of the communities in national land laws" and discussing the failure of national registries to account for communal land tenure).

142. Mark Bowman, *Land Rights, Not Land Grabs, Can Help Africa Feed Itself*, CNN (June 18, 2013, 6:17 AM), http://www.cnn.com/2013/06/18/opinion/land-grabs-africa-mark-bowman/.

143. Andrea Alforte et al., *Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions*, RIGHTS & RES. 1 (Oct. 30, 2014), http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf.

144. For an excellent discussion of the corruption that fuels transactions between transitional investors and local government officials, see generally DE SCHUTTER ET AL., *supra* note 78.

145. *Id.* at 6 (noting that petty corruption surrounding land grabs involves "exchanges of small amounts of money or favors (i.e. bribes) and most often involves local . . . community leaders, such as village chiefs.").

As a second but related concern, companies investing in land should remain aware that traditional leadership structures may marginalize constituencies whose preferences TNCs must account for under international human rights law. Women's voices, for example, are unlikely to be heard if an investor only seeks input from customary leaders.[146] The interests of ethnic minorities, children, the elderly, and other less influential groups are also prone to being ignored by the local elite.[147] Borras and Franco detail a typical pattern in which communities are effectively stripped of their land rights by their own leadership:

> [T]he question of representation of social groups, especially in rural communities in the South, is problematic, uneven, and politically contested—whether negotiations are transparent or not. In many places, a minority elite section of a community often claims to represent the poor even when it does not. On many occasions in many countries, local elites forge formal contracts with investors in the name of their communities despite having no real consultative process and mandate. Often in such situations, the rural poor have little opportunity to set the record straight, while other, more powerful, stakeholders have little interest in ensuring that oppositional voices are even heard, much less taken into consideration, if doing so could mean scuttling the deal altogether.[148]

As such, corporations must take pains to ensure that they are investigating the impact that their land acquisitions have on all local groups, powerful and powerless alike. Checking with the local

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146. Victoria Tauli-Corpuz, *Indigenous Women Are Raising Their Voices and Can No Longer Be Ignored*, RTS. & RESOURCES, http://rightsandresources.org/en/publication/view/the-guardian-indigenous-women-are-raising-their-voices-and-can-no-longer-be-ignored/ ("While indigenous people worldwide struggle to secure their collective and individual land and resource rights, customary . . . laws typically restrict indigenous women's access to land . . . . [Indigenous] communities can be discriminatory as well. It is important that laws recognising community tenure ensure women's rights. 'Custom' does not grant immunity to those who marginalise and abuse women.") (last visited May 8, 2018); *see also* Duncan, Lufkin & Gaafar, *supra* note 140, at 4 ("[C]ustomary rules typically discriminate against women's land rights.").

147. *See, e.g.*, Irit Tamir & Diana Kearney, *Community Voice in Human Rights Impact Assessments*, OXFAM AM. 31 (2015), https://www.oxfamamerica.org/static/media/files/COHBRA_formatted_07-15_Final.pdf (observing that to grasp a real understanding of a community's attitude toward an incoming company, the business must reach "beyond traditional leadership to ensure that the voices of vulnerable groups like women, children, the elderly, and minorities have been afforded an opportunity to be heard").

148. Borras & Franco, *supra* note 96, at 159 (footnote omitted).

chief is simply not enough. Fortunately, businesses interested in capturing the "community voice"—to the extent that they are able, given that uniformity of opinion may not exist—may reference guidelines on how to conduct human rights impact assessments.[149] And no one is better positioned to help companies implement these guidelines than lawyers.

C. The Lawyer's Role: Implementing UNGPs and Land Due Diligence

Fulfilling the requirements of the UNGPs and performing adequate due diligence on land acquisitions may, at first blush, feel overwhelming. Not only would this require monitoring of land acquisitions in one's own operations, but it would require companies to vet suppliers and business partners to safeguard against buying products from companies that have land grabbed themselves; this appears to be a daunting and prohibitively expensive task. And for many companies, this is true. While it is relatively simple for a business to ensure that its own factory operations are not generating human rights abuses, it is more challenging to ensure that none of their suppliers or business partners are committing such violations. This holds especially true for companies with complex supply chains, in which each input it buys has passed through multiple manufacturers. Adidas, for example, may have no idea which plantation grows the rubber used in its sneakers, or even which country or part of the world it originates from; all Adidas may know is which large multinational commodity trader sold the rubber to them. Such is the reality of modern day supply chains.

Fortunately, civil society groups have drafted guidance documents that outline the concrete steps involved in due diligence processes, both for the UNGPs[150] as a whole, and for land rights[151]

149. *See, e.g.*, Caroline Brodeur, *Community-Based Human Rights Impact Assessment: The Getting It Right Tool Training Manual*, OXFAM AM., https://www.oxfamamerica.org/static/media/files/COBHRA_Training_Manual_-_English.pdf (last visited May 8, 2018); Faris Natour & Jessica Davis Pluess, *Conducting an Effective Human Rights Impact Assessment*, BSR (Mar. 2013), https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf.

150. *See, e.g., Doing Business with Respect for Human Rights*, *supra* note 123; Natour & Pluess, *supra* note 149 (explaining how a company can carry out human rights impact assessments (HRIAs), which are a critical portion of carrying out adequate due diligence); *Business and Human Rights: A Five-Step Guide for Company Boards*, EQUALITY & HUMAN RIGHTS COMM'N (May 2016), https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf (instructing British companies how to uphold the UNGPs and respect human rights, reviewing both international human rights law obligations and British regulations).

151. *See, e.g.*, *Respecting Land and Forest Rights: A Guide for Companies*, INTERLAKEN GROUP & RTS. & RESOURCES INITIATIVE (Aug. 2015), https://www.ifc.org/wps/wcm/connect/31bcdf8049facb229159b3e54d141794/InterlakenGroupGuide_web_final.pdf?MOD=AJPERE

in particular. And these guidance documents are not just directed at companies' corporate social responsibility departments: lawyers play an integral role in the due diligence process, [152] and are increasingly expected to help a company navigate its human rights obligations. [153] A recent survey of 275 General Counsel's offices found that legal is now the primary department assigned to handle human rights issues, surpassing compliance, social responsibility, or social and environmental affairs departments. [154] In-house lawyers have also seen a sharp rise in human rights clauses inserted into commercial contracts, and nearly half of respondents confirm that their company has a human rights policy in place.[155] This figure climbs to 84% when considering only companies that earn over $10 billion in revenue.[156] As John Ruggie observes, "[w]here previously corporate counsel expressed deep skepticism about the implications of the UN Guiding Principles, corporate in-house legal leaders are now challenging their outside counsel to proactively advise them on human rights risks." [157] Unlike their predecessors, transactional lawyers are now expected to develop competence in international human rights obligations.

To help them decipher private sector obligations under international human rights law, NGOs have drafted guidance documents tailored for attorneys.[158] Law firms are likewise striving

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S; Karol Boudreaux & Yuliya Neyman, *Operational Guidelines for Responsible Land-Based Investment*, USAID (Mar. 2015), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated-1.pdf; OECD & FAO, OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS (2016), http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf (discussing a range of human rights obligations shouldered by agribusiness, including land rights).

152. Transactional lawyers that are familiar with the UNGPs are poised to make significant positive impacts on investment and business decisions that affect land rights. However, in-house legal counsel may face serious constraints in applying the UNGPs. For many in-house counsels, the pressures of positioning oneself not only as a competent lawyer, but also as a skilled businessperson, creates a disincentive for applying the UNGPs when doing so threatens short-term profits. Executives may frown upon suggestions that raise expenses over the short-term, such as purchasing from ethical producers or conducting vigorous due diligence. Law firms advising these companies may not face the same level of pressure to suggest the cheapest short-term options.

153. John F. Sherman III, *The UN Guiding Principles: Practical Implications for Business Lawyers*, IN-HOUSE DEF. Q. 50, 54–57 (2013), http://www.shiftproject.org/media/resources/docs/UNGPsimplicationsforlawyers.pdf.

154. Wood, *supra* note 138.

155. *Id.*

156. *Id.*

157. John G. Ruggie, *Corporate Lawyers and the Guiding Principles*, SHIFT PROJECT (Nov. 2013), http://www.shiftproject.org/resources/viewpoints/corporate-lawyers-un-guiding-principles/.

158. *See, e.g.*, *IBA Practical Guide on Business and Human Rights for Business Lawyers*, INT'L BAR ASS'N (May 28, 2016), https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4; *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession*, ADVOCATES INT'L DEV. (2013), http://www.l4bb.org/reports/A4IDBusinessandHumanRightsGuide2013(web).pdf.

to ensure that their lawyers review transactions through a human rights lens. In November 2016, White & Case, Debevoise & Plimpton, Clifford Chance, Hogan Lovells, and several other elite firms released a report outlining their approach to UNGP implementation.[159] Lawyers in positions that are not traditionally associated with human rights compliance will increasingly find themselves as the first line of defense against abuses. As such, educating the legal profession is crucial. These guides offer invaluable insights into how companies can begin to approach the intricate task of human rights due diligence.

Despite these advances in the international legal framework, and the private sector's growing recognition of such obligations, international human rights law remains an inadequate tool for protecting human rights. As a soft law instrument, the UNGPs lack a binding framework for corporate accountability. Furthermore, as human rights lawyers are painfully aware, what laws exist might be flouted with impunity by governments and business alike. When international law is unable to protect populations from abuse, then alternative advocacy strategies must be considered. Business has become a critical ally to that end. A "human rights plus" approach, where civil society pushes companies beyond their human rights obligations and transforms them into human rights advocates, has proven a promising avenue.

IV. TRANSFORMING ADVERSARY INTO ALLY

Civil society can—indeed, must—transform transnational corporations from recurrent human rights abusers into human rights champions. Advocates should not view corporations as a homogenous lot, conjuring images of evil empires that drive toward profit while crushing local populations underfoot. This caricature is rooted in some truth, of course. But the perception of the private sector as "the enemy" is so dangerous because it becomes a self-fulfilling prophecy. This assumption exacerbates distrust between civil society and the private sphere, and in "certain forums that address the nexus between business and human rights . . . there is a lack of participation from business actors because there is a general perception that they are often targeted as negative actors or adversaries and not appreciated as potential partners." [160] Fortunately, we are not predestined to live in a world where

159. Allen & Overy et al., *Law Firm Business and Human Rights Peer Learning Process*, BUS. HUM. RTS. (Nov. 2016), https://business-humanrights.org/sites/default/files/documents/Law%20Firm%20BHR%20Peer%20Learning%20Process%20Report%20-%20FINAL%20ONLINE.pdf.

160. STANLEY FOUND., *supra* note 43, at 3.

business is inevitably incompatible with human rights. NGOs should take advantage of the changing attitude toward corporate responsibility and help channel the ever-growing influence that TNCs wield in order to protect human rights.

But how? As rational actors,[161] companies can calculate when the gains of a prospective violation outweigh the costs. For those who have grown accustomed to impunity, the benefits of stealing land or committing another abuse can dwarf the consequences they regularly face: which is to say, none. Thus, it is no surprise that NGOs advocating for improved human rights practices and respecting the land rights of local communities are frequently met with stiff resistance from governments, companies, and other actors whose behavior they seek to change. The NGOs' message may thus fall on deaf ears.

Other private sector actors, however, can deliver that same message of respecting land and other human rights with far more success. Because the North Star for business is maximizing profit, if a company demonstrates that it can respect human rights and still earn money–or better yet, that respecting human rights is more profitable than violating them–this message becomes far more persuasive to other businesses calculating the financial impact of its behavior. Where an NGO's message may be perceived as "preaching," and thus viewed with skepticism, a corporate land rights champion is likely to be perceived as a credible voice by companies and governments alike.

A. Private Sector Influences Private Sector

TNCs are well positioned to exert influence over other businesses, particular those within the same industry. Companies compare themselves to their competitors. If one company adopts a socially responsible practice or speaks out against a human rights abuse, other companies are encouraged to follow suit, lest they get left behind in the court of public opinion. Publicly promoting and enacting responsible behavior also illustrates to competitors that there are very real financial benefits to be gained from respecting

161. Social scientist Jon Elster defines a rational actor as one who "chooses the action that best realizes his or her desires, given their beliefs about what their options are and about the consequences of choosing them . . . . The beliefs are themselves inferred from the available evidence by the procedures that are most likely, in the long run and on average, to yield true beliefs." John Elster, *Emotional Choice and Rational Choice*, *in* OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 1, 3 (Peter Goldie ed., 2009), http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199235018.001.0001/oxfordhb-9780199235018-e-12. Of course, many companies and governments may behave in irrational or short-sighted ways. However, this article assumes that the majority of such actors are in fact rational in attempting to maximize their conception of the good.

human rights. As discussed above in Part I, consumers prefer to purchase from socially conscientious companies, and when a business markets itself as such, competitors may be forced to mimic them. This ignites a race to the top.

These dynamics have already played out in the context of land grabs. In November 2013, Coca Cola committed to a zero tolerance policy for land grabs in its supply chain;[162] its chief competitor, PepsiCo, adopted the same policy several months later.[163] Other agribusiness giants like General Mills, Associated British Foods, Unilever, and Nestlé made similar land commitments soon thereafter.[164] No agribusiness company wanted to be viewed as regressive on the land grabbing issue, spurring them all to progress.[165] A similar pattern unfolded in the Australian banking industry. After National Australia Bank (NAB) released a policy statement promising to respect land rights in June 2014, rival bank Westpac took note and made a virtually identical commitment just one week later.[166] In both of these cases, civil society made that first critical step, pushing Coca Cola and NAB to make that initial commitment, and their competitors could not afford to be left behind. Companies that had previously ignored these human rights obligations were thus—unwittingly—refashioned into human rights advocates within a matter of months.

In addition to generating positive influence through peer pressure, TNCs can also improve the private sector's human rights practices through intra-industry collaboration. Businesses have formed coalitions to combat specific human rights abuses endemic to their trade. Groups of companies can be emboldened to push for advancements that individual businesses would hesitate to advocate for on their own.[167] Brazilian companies that trade in ethanol, for example, have joined forces to fight child labor in the grain ethanol supply chain.[168] There are also a growing number of

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162. *The Coca-Cola Company Declares "Zero Tolerance" for Land Grabs in Supply Chain*, OXFAM INT'L (Nov. 8, 2013), https://www.oxfam.org/en/pressroom/pressreleases/2013-11-08/coca-cola-company-declares-zero-tolerance-land-grabs-supply-chain.

163. *PepsiCo Declares "Zero Tolerance" for Land Grabs in Supply Chain,* OXFAM INT'L (Mar. 18, 2014), https://www.oxfam.org/en/pressroom/pressreleases/2014-03-18/pepsico-declares-zero-tolerance-land-grabs-supply-chain.

164. STEFANIA BRACCO, THE ECONOMICS OF BIOFUELS: THE IMPACT OF EU BIOENERGY POLICY ON AGRICULTURAL MARKETS AND LAND GRABBING IN AFRICA 110 (Nick Hanley ed., 2016).

165. *See id.*

166. *Banking on Shaky Ground: One Year On*, OXFAM AUSTL. (May 5, 2015), https://www.oxfam.org.au/2015/05/banking-on-shaky-ground-one-year-on/.

167. *See* Office of the High Commissioner of Human Rights (OHCHR), *Business and Human Rights: A Progress Report*, OHCHR (2000), http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf.

168. *Id.*

multi-stakeholder initiatives (MSIs) that aim to address a range of sustainability issues that their industry encounters. The palm oil industry's Roundtable on Sustainable Palm Oil (RSPO),[169] the mining industry's International Council on Mining & Metals (ICMM),[170] and the sugar industry's Bonsucro[171] represent just a few of the MSIs that bring together influential companies to draft industry-wide human rights standards. While the effectiveness of these MSI-driven commitments vary, the growing recognition that these companies need to at least appear respectful of human rights bodes well for eventual, if not immediate, implementation.

B. Private Sector Influences Public Sector

Companies can also influence a state's human rights practices. The financial might of large TNCs can persuade a government to rethink virtually any of its policies. Traditionally, companies have exercised this influence to extort favorable treatment from governments: Barrick Gold convinced the Papua New Guinean government to amend environmental regulations so it could legally dump an astounding level of toxic mining waste into rivers;[172] Exxon contracted with the governments of Cameroon and Chad to absolve itself of human rights obligations to populations living near its pipeline project;[173] and British company Soco International has extracted oil exploration permits on nominally "protected" lands in the DRC, in violation of Congolese and international law.[174] No government is immune from heavy corporate influence. And as history has shown time and again, those governments that refuse to kowtow have paid the price. The nationalization of British Anglo-Iranian Oil Company sparked the 1953 overthrow of Iran's Prime

169. *About Us*, ROUNDTABLE ON SUSTAINABLE PALM OIL, http://www.rspo.org/about (last visited May 8, 2018).

170. *About Us*, INT'L COUNCIL ON MINING & METALS, http://www.icmm.com/en-gb/about-us (last visited May 8, 2018).

171. *About Bonsucro*, BONSUCRO, https://www.bonsucro.com/what-is-bonsucro/ (last visited May 8, 2018).

172. *Support for Mining Over Democratic Principles in Papua New Guinea*, MINING WATCH CAN. (July 18, 2010, 7:23 AM), http://miningwatch.ca/blog/2010/7/18/support-mining-over-democratic-principles-papua-new-guinea.

173. *Chad-Cameroon Pipeline: New Report Accuses Oil Companies and Governments of Secretly Contracting out of Human Rights*, AMNESTY INT'L U.K. (Sept. 8, 2005, 12:00 AM), https://www.amnesty.org.uk/press-releases/chad-cameroon-pipeline-new-report-accuses-oil-companies-and-governments-secretly.

174. Melanie Gouby, *Democratic Republic of Congo Wants to Open Up Virunga National Park to Oil Exploration*, THE GUARDIAN (Mar. 16, 2015, 12:51 PM), https://www.theguardian.com/environment/2015/mar/16/democratic-republic-of-congo-wants-to-explore-for-oil-in-virunga-national-park.

Minister Mohammad Mossadeq,[175] for example, while the United Fruit Company laid waste to so many Latin American administrations that it "had possibly launched more exercises in 'regime change' on the banana's behalf than had even been carried out in the name of oil."[176] That TNCs wield significant power over governments is beyond dispute.

This authority does not always have to drive toward nefarious ends, however. Companies can channel their influence to force better human rights practices, a tactic that has proven particularly appealing when a company's financial considerations align with greater respect for human rights. The tech industry has a strong financial stake in promoting free speech in repressive countries, for example. China's censorship alone costs companies like Google, Facebook, and Snapchat billions in lost revenue,[177] giving their CEOs every reason to advocate for the rights to expression and free speech. Other times, companies may lobby on behalf of human rights initiatives in order to burnish their public image, which in turn boosts their bottom line. Irish clothing retailer Primark, for example, publicly advocated for the UK to adopt transparency rules surrounding the use of forced labor in corporate supply chains.[178] No doubt this commitment was made only after careful consideration of the financial gains to be reaped from appealing to conscientious consumers. And business support for the 2015 UK Modern Slavery Act contributed to the law's eventual adoption,[179] underscoring the substantial impact that corporate respect for human rights can have upon governments. It is clear that "[b]y virtue, specifically, of their economic and political muscle, TNCs are uniquely positioned to affect, positively and negatively, the level of enjoyment of human rights."[180] Human rights advocates must pounce on any opportunity to use this influence for the greater good.

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175. Saeed Kamali Dehghan & Richard Norton-Taylor, *CIA Admits Role in 1953 Iranian Coup*, THE GUARDIAN (Aug. 19, 2013, 2:26 PM), https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup.

176. Daniel Kurtz-Phelan, *Big Fruit*, N.Y. TIMES (Mar. 2, 2008), http://www.nytimes.com/2008/03/02/books/review/Kurtz-Phelan-t.html (quoting Peter Chapman).

177. Julie Makinen, *Chinese Censorship Costing U.S. Tech Firms Billions in Lost Revenue*, L.A. TIMES (Sept. 22, 2015, 2:00 AM), http://www.latimes.com/business/la-fi-china-tech-20150922-story.html.

178. *See Primark Stores Ltd. Modern Slavery Statement 2016,* PRIMARK (Dec. 2016), https://www.primark.com/-/media/ourethics/modern-slavery-act/primark-msa-statement.ashx.

179. *Sustaining Momentum: Bold Leadership to Combat Forced Labour and Human Trafficking*, Issue in *Top 10 Business & Human Rights Issues in 2016*, INST. FOR HUM. RTS. & BUS., https://www.ihrb.org/library/top-10/top-ten-issues-in-2016 (last visited May 8, 2018).

180. Kinley & Tadaki, *supra* note 126, at 933.

While individual companies can pressure governments to improve human rights practices, this influence is magnified further still when companies pool their influence to confront a government as a group. For cash-strapped states in particular, ignoring a faction of businesses that can move their operations abroad is an expensive prospect. Clothing retailer H&M recently assembled such a team. When Cambodia's garment factory workers protested to raise the nation's abysmal minimum wage, H&M collaborated with other apparel industry companies to pressure the Cambodian government to listen to the workers' demands.[181] Eight TNCs wrote an open letter to the Cambodian Deputy Prime Minister, urging him to respect collective bargaining rights and institute a living wage for garment workers, while reassuring him that the companies would factor the higher wages into their retail prices rather than move operations overseas.[182] The Cambodian government raised the minimum wage by 28% two weeks later.[183] Because the nation's economy relies so heavily upon the garment sector, these TNCs exercised outsized influence over the government's policies. Companies can thus be transformed into powerful advocates for improving others' human rights.

C. Self-Reinforcement: Private Sector Influences Itself

Finally, it bears mention that the very exercise of convincing others to respect human rights–be they companies, governments, or other actors–ingrains this respect for human rights into an organization's own DNA. Businesses that preach socially conscious behavior begin to absorb this attitude into their corporate identity, which leaks into other facets of its operations.[184] As discussed above in Part I, companies that are perceived as socially responsible attract and retain high performing employees, who want to view

181. Miles Brignall, *Fashion Retailers Agree to Raise Minimum Wage in Cambodia*, THE GUARDIAN (Sept. 21, 2014, 10:22 AM), https://www.theguardian.com/business/2014/sep/21/fashion-retailers-offer-raise-minimum-wage-cambodia.

182. Letter from Philip Chamberlain, Head of External Stakeholder Engagement, C&A, et al. to H.E. Keat Chhon, Permanent Deputy Prime Minister, Cambodia, http://www.industriall-union.org/sites/default/files/uploads/documents/Cambodia/letter_to_dpm_cambodian_government_september_2014.pdf.

183. Associated Press, *Cambodia Increases Garment Industry Minimum Wage*, BUS. FASHION (Nov. 12, 2014, 5:05 PM), https://www.businessoffashion.com/articles/news-analysis/cambodia-increases-garment-industry-minimum-wage.

184. For a discussion on organizational identity, including how organizational culture and behavior form, see Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RES. ORGANIZATIONAL BEHAV. 263 (1985).

themselves as "doing good,"[185] a trend which is particularly on the rise among millennials.[186] Ford Motor chairman Bill Ford observes,

> A company has to be more than just a paycheck. It has to give people something more . . . .
>
> If you don't have a culture that means something, then you're just going to have the experience of a bunch of transient employees who go to the next company . . . and they won't give it a second thought.[187]

Championing human rights can become a self-reinforcing exercise, attracting employees that care about the moral fiber of their employer.

D. Importing These Lessons to Land Rights

Land rights advocates should apply these lessons to safeguard against land grabs and help communities strengthen their tenure security, both of which stand to improve nutrition and a host of development outcomes. This means working with companies not only to ensure that their own land transactions protect the rights of impacted communities, but to transform them into land rights champions.

Becoming a land rights champion includes both passive resistance and active lobbying. TNCs can refuse to cooperate with governments that sell off indigenous and communally held lands as "unowned," in recognition that public registries do not account for the full range of land rights that are actually being exercised on any given plot. Without their corporate customers, governments lose the incentive to push communities off of their ancestral lands.[188] TNC

185. *See* DAVIS & FRANKS, *supra* note 39, at 23.

186. *See* Jeanne Meister, *The Future of Work: Corporate Social Responsibility Attracts Top Talent*, FORBES (June 7, 2012, 11:03 AM), https://www.forbes.com/sites/jeannemeister/2012/06/07/the-future-of-work-corporate-social-responsiblity-attracts-top-talent/#22e266363f95 (finding that 53% of total respondents surveyed, and 72% of respondents who are students about to enter the workforce, are seeking a job where they can make a positive societal impact).

187. Julie Bort, *Ford Chairman: Employees Voluntarily Worked with No Pay to Keep Us out of Bankruptcy in 2008*, BUS. INSIDER (Mar. 13, 2017, 5:34 PM), http://www.businessinsider.com/ford-chairman-employees-worked-with-no-pay-to-thwart-bankruptcy-2017-3.

188. A company's refusal to buy land held only under customary tenure will save the land for the local community when it is the only prospective customer; in other cases, however, the government may have enough prospective buyers that the government minister may simply find an alternate buyer, rendering the first company's "passive resistance" ineffective in saving the land for the local community. Thus, the eventual impact of passive resistance on any particular plot of land depends upon the context. Nevertheless, a company should not

land champions can also actively lobby governments to pursue titling programs and related measures designed to maximize tenure security. The motives do not have to be purely altruistic. There are very real financial benefits to having a complete picture of the existing land rights and uses,[189] whether formal or informal. As detailed above, the cost of conflict is high: not only can it lead to a disruption in production and potential legal fees, but negative publicity can exact a heavy toll on corporate image, and in turn, the TNC's bottom line. It is in a TNC's own self-interest to operate in contexts where land rights are clearly mapped out,[190] and to avoid regions where the legal pluralism surrounding land rights can engender conflict with local communities. Civil society can play upon these financial considerations—highlighting both the financial benefits of a positive human rights reputation and the high costs of conflict with community—in order to mold businesses into land rights champions.

V. CONCLUSION

As an actor that wields considerable influence over governments and other private sector actors, TNCs have a critical role to play in promoting respect for land rights, and in turn, improving food security in some of the world's most impoverished regions. Their financial might makes them uniquely positioned to encourage governments to strengthen land tenure and respect existing rights. The private sector's unique "role in providing a variety of services to state governments and citizens puts it in an important intermediary position that can be used to promote messaging for peace or complicate attempts to organize and form violent movements."[191]

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buy into the false logic that it is not contributing to an action that it knows will cause widespread human rights violations simply because if it does not do it, another organization will.

189. *The Financial Risks of Insecure Land Tenure: An Investment View*, MUNDEN PROJECT 3 (Dec. 2012), http://rightsandresources.org/wp-content/uploads/2014/01/doc_5715.pdf ("Our initial examination shows the potential for bottom-line financial damage range from massively increased operating costs – as much as 29 times over a normal baseline scenario, according to our modeling – to outright abandonment of an up-and-running operation. And this modeling finds firm empirical support in the case studies we analyzed. . . . . [that] risk provides a strong incentive for the private sector to contribute to clarifying and securing tenure rights.").

190. *Id.* Despite the fact that clearly defined land rights can safeguard company money, in other contexts, companies may find that operating in states with such clearly demarcated property has become too expensive, encouraging them to purchase land in regions with overlapping land claims. *Id.* at 23. Such an approach often winds up being short-sighted; TNCs may believe they are saving money by purchasing land in less expensive regions where prices are depressed by their ability to displace, rather than buy land from local land users; however, as noted above, this can also lead to costly conflict.

191. STANLEY FOUND., *supra* note 43, at 2.

Despite historical challenges, civil society should not be fatalistic about the prospect for getting business to adopt responsible human rights practices and push their competitors to do the same. Companies are a varied lot whose financial calculations are forever changing according to prevailing social norms, and should be approached as such. TNCs increasingly recognize the benefits of corporate social responsibility.[192] As Don Tapscott and David Ticoll conclude, today "[s]takeholders have historically unprecedented opportunities to . . . scrutinize the corporate world. They have new power to influence performance or even cripple companies almost overnight."[193] Now more than ever, civil society can harness the power that has so often been a destructive force for good.

This is especially true in the realm of land rights. In an arena crowded with such a diverse set of actors, "[e]fforts to secure land and property rights in an effective and inclusive manner must rely on multi-stakeholder partnerships between government, private sector, and civil society actors, and must operate at all levels, from the local to the global."[194] By conducting rigorous due diligence on land acquisitions,[195] refusing to cooperate with governments that sell land off occupied lands as "unowned," and advocating for improved government and corporate policies on land, TNCs can curtail the global land grab pandemic. Civil society must do its part to transform these companies into human rights champions.

192. Tracey Keys et al., *Making the Most of Corporate Social Responsibility*, MCKINSEY & CO. (Dec. 2009), http://www.mckinsey.com/global-themes/leadership/making-the-most-of-corporate-social-responsibility.

193. TAPSCOTT & TICOLL, *supra* note 40, at xiii.

194. Roth, *supra* note 24, at 1.

195. "Rigorous due diligence" means a company looks beyond national title registries to ensure that it is not investing in land that local communities rely upon. In addition to looking at formal title, it means accounting for customary tenure practices and ensuring that marginalized populations like women, minorities, and other groups are protected from discriminatory land tenure practices.

ASSESSING THE "PROPER JUDICIAL ROLE" IN REVIEWING IMMIGRANT DETENTION

MEGAN K. BRADLEY*

* J.D. Candidate, Florida State University College of Law 2018. Special thanks to Professor David Landau for his valuable guidance, encouragement, and comments.

I. INTRODUCTION

The United States leads the world in the number of immigrants detained. On any given day, the United States administratively detains over 30,000 immigrants.[1] While immigrant detention has been a part of American policy for decades, the scope and usage of detention has greatly expanded.[2] This expansion reflects changes in American policy toward immigrants and the ability of the legislative and the executive branches of government to develop immigration law and policy without much interference from the judicial branch.[3] Immigrant detention is governed by the Immigration and Naturalization Act ("INA").[4] The INA prescribes for mandatory and discretionary detention of immigrants by the Secretary of Homeland Security and the Attorney General.[5] Three of the main provisions for immigrant detention are: 8 U.S.C. 1225(b), 8 U.S.C. 1226(a), and 8 U.S.C. 1226(c). Under these provisions, an immigration officer may detain any immigrant arriving at the borders who is not clearly and beyond a doubt entitled to entry,[6] or any immigrant who is

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1. *United States Immigration Detention*, GLOBAL DETENTION PROJECT (May 2016), https://www.globaldetentionproject.org/countries/americas/united-states; *see also ERO Facts and Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 1, 3 (Dec. 12, 2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

2. *See generally* Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11 (2010) (providing an in-depth historical account of the development of increased detention).

3. In 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act made amendments to the Immigration Nationality Act (contained in Title 8 of the U.S. Code) that drastically increased the use of detention. Pub. L. No. 104-132, 110 Stat. 1214 (1996); Pub. L. No. 104-208, 110 Stat. 3009–546 (1996). These amendments widened the definition of an aggravated felony, broadened the use of mandatory detention by applying it to certain crimes, asylum seekers, and noncitizens with final orders of removal. 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2011); Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1837 (2011); *see also* Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. 1, 1–11 (Jan. 2013), http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery (discussing the growth and expansion of immigration enforcement policies). The terrorist attacks of September 11, 2001 led to the Patriot Act, which allowed for detention double the time allowable of a noncitizen without removal proceedings or criminal charges. Pub. L. No. 107-56, 115 Stat. 272 (2001); *see* Sayed, *supra*, at 1836–44; Benson, *supra* note 2; D'vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RES. CTR. (Sept. 30, 2015), http://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/; *see also Immigration Detention 101*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last visited Apr. 20, 2018).

4. *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2011).

5. *Id.*

6. 8 U.S.C. § 1225(b)(2)(A) (2011).

already present in the United States and is subject to removal.[7] The strongest detention provision used is 8 U.S.C. 1226(c), which mandates detention of any immigrant with a criminal background.[8] For years academics have called for substantive and procedural reform to the detention of immigrants.[9] Yet, the expansion has gone virtually uninterrupted.

The Supreme Court recently decided *Jennings v. Rodriguez*, a case involving a challenge to immigrant detention.[10] Before reaching the Supreme Court, in *Rodriguez v. Robbins*,[11] the Ninth Circuit Court of Appeals held that there is an implicit limit of reasonableness on the detention of immigrants, in order to avoid a violation of the Due Process Clause of the Constitution.[12] The Ninth Circuit held that every six months, immigrants detained by the government are entitled to a bond hearing, where the government has the burden to show by clear and convincing evidence that the immigrant is either a danger to the public or a flight risk.[13] If the government does not satisfy its burden, the immigrant should be released on bond.[14] On appeal to the Supreme Court, the government argued that the Ninth Circuit "overstep[ped] the proper judicial role," and that the Ninth Circuit's ruling "conflicts with th[e Supreme] Court's longstanding rule that the political Branches . . . have plenary control over which aliens may physically enter the United States and under what circumstances."[15] The government's argument that the Ninth Circuit overstepped the proper judicial role raises a difficult question: what is the proper judicial role in reviewing immigrant detention?

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7. 8 U.S.C. § 1226(a) (2011).

8. 8 U.S.C. § 1226(c) (2011).

9. *See generally* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365 (2007) [hereinafter Slocum, *Canons*] ("A large part of immigration scholarship has been focused on the goal of ensuring that the government treats aliens fairly."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (discussing how courts used procedural due process as a surrogate for substantive rights and noting that procedural surrogates stunted the development of needed sound immigration law).

10. Jennings v. Rodriguez, 138 S. Ct. 830 (2018). This Note does not fully address the holding or implications of *Jennings* because *Jennings* was decided by the Court after this note was written. *Jennings* deserves a thorough analysis at a later date.

11. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (note the name change from Robbins to Jennings reflects a change in the agency official in charge of the detention).

12. *Id.* at 1069.

13. *Id.* at 1070–73.

14. *Id.*

15. Petition for Writ of Certiorari at 10, Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

In modern immigration case law from the Supreme Court, a division exists in regard to the proper judicial role. In a leading case on immigrant detention, *Zadvydas v. Davis*, two competing views on the role of the judiciary are presented.[16] On one end of the spectrum is Justice Kennedy, who advocates for a narrow role for the judiciary in the immigration context.[17] On the other end is Justice Breyer, who uses statutory interpretation and the canon of constitutional avoidance to find that there is a limit of reasonableness on the detention at issue in *Zadvydas*.[18] Yet, both of these conceptions of the judicial role are unsatisfying because both refuse to review the statute for its constitutionality. This Note argues that courts, specifically the Supreme Court, should rule on the constitutionality of immigrant detention, as opposed to deferring to the other branches or using statutory interpretation. This Note further tries to understand why courts try to avoid a constitutional holding in a situation where there are serious constitutional questions.

This work is organized as follows: Part II will discuss the view Justice Kennedy promoted in his dissenting opinion in *Zadvydas* about the proper judicial role in reviewing immigrant detention. This is the view the government presented to the Supreme Court in *Jennings*. Here, the proper judicial role is narrow and circumscribed for two primary reasons: a robust concept of plenary power, and perceived institutional shortcomings of the judicial branch that make it ill-suited to resolve these issues. This section will also present rebuttals to these justifications by arguing the scope of the inquiry is not immigration policy as a whole; rather, the inquiry for courts is the narrower question of whether a detention scheme that could result in the indefinite, possibly permanent, deprivation of liberty violates the Due Process Clause. By shifting the scope of the inquiry, the force of the plenary power doctrine is weakened, and the justiciability and institutional concerns are reduced. Part III presents an opposing view that Justice Breyer in *Zadvydas*, and the Ninth Circuit in *Jennings*, share about the proper judicial role. In this view, courts review detention statutes with a thumb on the scale. Courts use canons of statutory interpretation to enforce constitutional limits. This section will further explore why courts may feel confined to using tools of statutory interpretation and why statutory interpretation may not provide enough protection for immigrants. Part IV

16. Zadvydas v. Davis, 533 U.S. 678 (2001).
17. *Id.* at 705–06, 725 (Kennedy, J., dissenting).
18. *Id.* at 689 (majority opinion).

presents an idea of what the role of the judicial branch should be in immigrant detention. This section argues that courts, including the Supreme Court, should review laws relating to immigrant detention for constitutionality and act as a safeguard against the deprivation of liberty. This section discusses why there is a need for judicial resolution. The constitutional harm in immigrant detention is serious. Courts have the duty and the power to protect individual rights in this situation, and by abdicating this duty to meaningfully review immigrant detention schemes for constitutionality, courts damage their own legitimacy. Finally, this section attempts to suggest changes that would make the detention scheme constitutional.

II. JUSTICE KENNEDY'S VIEW ON THE PROPER ROLE OF THE COURT IN IMMIGRANT DETENTION

This part will discuss the view of the judicial role that Justice Kennedy presented in *Zadvydas*, and what supports this narrow view of the judicial role, specifically a strong version of the plenary power doctrine and institutional weakness of the Court. This section challenges these justifications by arguing that although these justifications may be true in the immigration context generally, they are inapplicable when indefinite detention is at stake. Further, the argument that plenary power prevents courts from acting is particularly weak because the idea of a robust plenary power is outdated.

In *Zadvydas*, Justice Kennedy authored a dissent joined by the Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.[19] Justice Kennedy wrote that by finding ambiguity in a clear statute and invoking the canon of constitutional avoidance the majority of the Court caused, "systemic dislocation in the balance of powers" and that the Court's interpretation of its "proper authority" raised serious constitutional questions.[20] Further, Justice Kennedy stated the Court, "[i]n the guise of judicial restraint" substituted its judgment for the discretion and authority of the Executive.[21] Justice Kennedy acknowledges that, "lengthy, even unending, detention" may in certain situations raise a constitutional question.[22] However, he says the Court's statutory construction has no textual basis and is contrary to the purpose of Immigration

19. *Id.* at 705 (Kennedy, J., dissenting).
20. *Id.* (rejecting the role the Court assumed in reviewing immigrant detention).
21. *Id.* at 705–06.
22. *Id.* at 706.

and Nationality Act.[23] In his view, Congress had taken enough steps in the procedure provided in the initial removal hearings to protect against arbitrary detention.[24] Justice Kennedy's view, although not accepted, is influential, as evidenced by three other Justices joining his dissent. Additionally, this is the view the government argued for in *Jennings*.[25]

In sum, there are two primary justifications for a narrow judicial role in reviewing immigrant detention. First, the power over immigration is a part of the foreign affairs power. Thus, the plenary power doctrine prevents courts from acting. Second, justiciability concerns, such as the political question doctrine, and in a broader sense, institutional limits of the judiciary, justify a narrow role for the judiciary in immigration.

A. A Robust Plenary Power in Immigration

The usage and scope of the plenary power doctrine in immigration has been voluminously written about and discussed.[26] Plenary power in immigration exclusion decisions was prominent in an early decision, *Chae Chan Ping v. United States*.[27] In *Chae Chan Ping*, the Supreme Court held "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory [and] is a proposition which we do not think open to controversy." [28] The Court also held that the exclusion decisions are "not questions for judicial determination." [29] In its holding, the Court forcefully insisted that Congress has broad powers in dealing with foreign affairs, which included immigration. A few years later, the Court ruled in *Fong*

23. *Id.* at 706–07.

24. *Id.* at 706–07, 718–19.

25. Petition for Writ of Certiorari, *supra* note 15, at 10.

26. *See e.g.,* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 50–62 (5th ed. 2009); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 550–54 (1990) (discussing a classic conception of plenary power and a more modern view); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1994) [hereinafter Legomsky, *Ten More Years*]; Ernesto Hernández-López, Kieymba, *Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193, 194–204 (2012).

27. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889). At issue in *Chae Chan Ping* was legislation Congress passed prohibiting Chinese immigrants from reentering the United States. Chinese laborers who attempted to return to the United States were denied entry. As a result, the Chinese laborers sued the U.S. government. *Id.*

28. *Id.* at 603.

29. *Id.* at 609.

Yue Ting v. United States that "[t]he power of Congress . . . to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."[30] These early cases laid the framework for broad control of immigration by the political branches. Based on these precedents, the Court was deferential to the judgment of the political branches on immigrant exclusion issues for many years.[31]

Robust plenary power in immigration is often justified by the Court on the basis that control over immigration is part of the foreign affairs power of the government. The Court has held:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [32]

From a classical plenary power perspective, the Constitution, through direct textual grants, vests the power over foreign affairs in the Legislative and Executive branches. Based on these textual delegations, the power has been vested in the political branches and there is no role for the Court.[33] Further, there are vestiges of the *Curtiss-Wright* view of the Executive power in foreign affairs. Under the *Curtiss-Wright* view, the President is the "sole organ" in foreign affairs and the Court's role is limited.[34] According to the Court in *Curtiss-Wright*, the President must have discretion and

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30. Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893).

31. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). In *Knauff*, a German woman working in the United States sought naturalization after having married a United States citizen. Knauff was detained on Ellis Island and subsequently excluded by immigration officials on national security grounds. The Supreme Court affirmed the executive branch decision stating the following: "[T]he decision to admit or to exclude an alien may be lawfully placed with the President . . . . The action of the executive officer under such authority is final and conclusive. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543.

32. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

33. U.S. CONST. art. I, § 8. Article I gives Congress the power to declare war, to raise and support armies, to provide and maintain a navy, and to confirm appointments of ambassadors and treaties. U.S. CONST. art. II, § 2. Article II vests in the President the commander in chief power over the Army and the Navy, the power to appoint and receive ambassadors, negotiate treaties, and take Care that the laws be faithfully executed.

34. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

the Court must be limited to avoid embarrassment.[35] As a general observation, there is a domestic component of immigration policy. Immigration involves foreign nationals entering the domestic United States and becoming citizens. It seems that to classify immigration as wholly under the foreign affairs power is probably incorrect. This point raises particularly interesting questions about the roles of the Executive and Legislature in relation to each other that are not fully discussed in this paper.[36]

B. Limiting the Plenary Power Doctrine

It is apparent that the Court is still unwilling to second guess the political branches decisions to exclude immigrants.[37] The longstanding precedent and attitude of the Court shows that the decision to exclude is fundamentally a job for the political branches. But there are issues with this, justifying a limited role for the Court in reviewing immigrant detention. Immigrant detention is distinct from immigration exclusion decisions and policy as a whole.

The lens being used to justify a small role for courts is too wide. If the focus is on immigration policy in general, courts should have a limited role. Primarily for the reasons the plenary power exists, there are other textual grants in the Constitution over this power. Additionally, as an institution, courts, specifically the Supreme Court, lack the ability to make policy in immigration.[38] However, if the focus is on the review of the detention itself, the plenary power justification is weakened. Concededly, there is a risk of looking at detention out of context. As Justice Kennedy argues, detention is leverage for the United States in international negotiations and

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35. *Id.* The Court stated that in regards to foreign affairs, "[i]t is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom . . . ." *Id.* at 320. The Court also quoted an earlier case stating, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers*." *Id.* at 322 (emphasis added by *Curtiss-Wright* Court) (quoting Mackenzie v. Hare, 239 U.S, 299, 311 (1915)). For more information and analysis on the *Curtiss-Wright* precedent, see Edward A. Purcell Jr., *Understanding* Curtiss-Wright, 31 LAW & HIST. REV. 653 (2013); Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127 (1999).

36. For a discussion of the division of immigration power between the legislature and executive, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

37. Legomsky, *Ten More Years*, *supra* note 26, at 934.

38. *See infra* Part II (C).

the Court should not interfere with that.[39] But, this does not overcome the deeply held belief that individuals should be free from detention. The Court has acknowledged in other civil detention scenarios that the freedom from restraint is at the core of American fundamental values.[40] Accordingly, when liberty is at stake, a strong form of plenary power is illogical if the political branches are the actors orchestrating the detention scheme. In his article, *As Old as the Hills: Detention and Immigration*, Professor Benson asks, "[w]hat forces might limit the growth of detention?"[41] The judicial branch could be a force that limits the growth of detention.

Further, the plenary power has been weakened in other areas under the umbrella of foreign affairs. In an analogous area to immigration, the wartime powers, plenary power has not stopped the Court from reviewing actions of the political branches for constitutionality. As in immigration, plenary power is prominent in the war power context because of the textual grants in the Constitution.[42] However, the plenary power doctrine did not stop the Court from reviewing the detention of enemy combatants at Guantanamo Bay.[43] Many scholars have discussed the implications of these cases.[44] For the purpose of this paper it is useful to acknowledge that the Court "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."[45] In this instance, the plenary power doctrine was undercut, and there is a willingness of the Court to review cases involving foreign affairs when there is a grave rights component to the case.

Although Justice Kennedy's view on the Court's role in immigration was convincing to a few Justices in 2001, it may be

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39. Zadvydas v. Davis, 533 U.S. 678, 725 (2001) (Kennedy, J., dissenting).

40. *See* Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that a Louisiana statute allowing the continued detention of an individual with mental illness violates the Fourteenth Amendment); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm . . . .").

41. Benson, *supra* note 2, at 54.

42. The Constitution vests in Congress the power to declare war, and to raise and fund an army and navy. U.S. CONST. art. I, § 8. Simultaneously, the Constitution vests in the President the commander in chief power over the army and navy. U.S. CONST. art. II, § 2.

43. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

44. *See, e.g.*, Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173 (2012); Brian G. Slocum, The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law, 84 DEN. U. L. REV. 1017 (2007); Daniel S. Severson, *The Court and the World: An Interview with Associate Justice Stephen G. Breyer*, 57 HARV. INT'L L.J. 253 (2016).

45. *Hamdi*, 542 U.S. at 535.

outdated. Part of this is related to the erosion of the plenary power doctrine in other areas, such as wartime power. But, even in modern immigration law, it seems that a strong plenary power argument may be outdated and unconvincing. In three of the most relevant cases on immigrant detention, *Zadvydas v. Davis*, *Demore v. Kim*, and *Clark v. Martinez*,[46] and in most Appellate Circuits, courts have not recognized the plenary power as stopping the courts from reviewing the statutes. There is an early case in immigrant detention that used the plenary power to avoid making a holding on the constitutionality of a detention. In 1953, the Court held in *Shaughnessy v. United States ex rel. Mezei*,[47] that a non-citizen facing exclusion is not entitled to any due process, even if the result is indefinite detention.[48] The Court held that exclusion was a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[49] *Zadvydas* did not overrule *Mezei*, rather it distinguished the cases by drawing a line between being denied entry at the border and being detained once entered.[50] In *Jennings*, the government cites and relies on the holding in *Mezei*.[51] However, the government's reliance on *Mezei* may be misplaced, as it has not been as relevant in modern immigration cases due to the use of constitutional avoidance.[52]

Another important modern immigration case is *Demore v. Kim*.[53] In *Demore v. Kim*, the Court held that immigrants with

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46. Zadvydas v. Davis, 533 U.S. 678 (2001); Demore v. Kim, 538 U.S. 510 (2003); Clark v. Martinez, 543 U.S. 371 (2005).

47. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). In *Mezei*, an Eastern European immigrant, Ignatz Mezei had lived in the United States for more than 25 years. He left the country to visit his dying mother in Romania, was denied entry into Romania, and remained in Hungary for 19 months. When he returned to the United States, he was permanently denied entry on the basis of national security. Mezei was denied entry to Britain, France, and approximately a dozen other countries. After 21 months of living on Ellis Island, he applied for habeas corpus arguing he was being unlawfully detained.

48. *Id.* at 215.

49. *Id.* at 210.

50. *Zadvydas*, 533 U.S. at 693; *see also* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 145 (2015) ("In *Zadvydas*, the Court avoided directly overruling *Mezei* by distinguishing it.").

51. Petition for Writ of Certiorari, *supra* note 15, at 10.

52. Kagan, *supra* note 50, at 145.

53. Demore v. Kim, 538 U.S. 510 (2003). Kim was a citizen of South Korea who became a lawful permanent resident of the United States in 1986. In 1996, Kim was convicted of first-degree burglary in a California state court; the following year, he was convicted of a second crime, petty theft with priors. The Immigration and Naturalization Service (INS) administratively determined that Kim was removable because of his convictions. Removal proceedings were commenced, and pursuant to 8 U.S.C. §1226(c), the INS detained Kim. Kim filed a writ of habeas corpus challenging the constitutionality of his detention. He claimed his due process rights were violated because the INS had not determined he was a flight risk or a danger to society. The district court held the statute

criminal records could be detained during their removal proceedings.[54] However, the Court was not wholly deferential to the political branches. Underlying the Court's reasoning was a strong presumption that the majority of these types of detentions lasted less than 90 days.[55] The government recently submitted to the Supreme Court a letter explaining that the figures they presented to the Court regarding the time of detention in *Demore* were incorrect and immigrants are actually being detained a lot longer than 90 days.[56] The third case is *Clark v. Martinez*.[57] Martinez and her husband entered the United States from Cuba during the Mariel boatlift in 1980.[58] They were allowed to temporarily enter the United States on humanitarian parole, but never became permanent residents because of their prior criminal convictions.[59] Based on their past convictions they were ordered removed.[60] They petitioned for habeas corpus relief. The Supreme Court held that inadmissible immigrants ordered removed cannot be held indefinitely after the initial 90-day removal period.[61] The Court held that in order to avoid constitutional problems, the statute must be read to have limits of reasonableness.[62]

More interesting is that the five Circuits that have addressed mandatory detention under 1226(c) have held that, read in the light of the Constitution, there must be a limit on detention.[63] The

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was unconstitutional and ordered Kim released on bond. The Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed the Ninth Circuit, holding that deportable immigrants can be detained during their removal hearings. Writing for the majority, Justice Rehnquist focused on the fact that having deportable immigrants with criminal histories was a danger that Congress properly addressed. The Court distinguished this case from *Zadvydas* because the detention in *Zadvydas* was indefinite; here, the periods of detention were typically less than 90 days.

54. *Id.* at 512.

55. *Id.*

56. U.S. DEP'T. OF JUSTICE, OFFICE OF THE SOLICITOR GEN., RE: DEMORE V. KIM, S. CT. NO. 01-1491 (2016); Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J. (Aug. 30, 2016, 3:48 PM), http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756. Based on the letter, it actually seems like the Court's holding in *Demore* was probably wrong.

57. Clark v. Martinez, 543 U.S. 371 (2005).

58. *Id.* at 374.

59. *Id.*

60. *Id.*

61. *Id.* at 386.

62. *Id.* at 385.

63. *See* Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469 (3d Cir. 2015) (holding that indefinitely detaining an immigrant in a prison is a violation of the Due Process Clause); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016).

Ninth Circuit has held that detention cannot be unreasonably long or there is a violation of due process.[64] The Third Circuit heard the case *Diop v. ICE/Homeland Security* that concerned a Senegalese individual being detained under 8 U.S.C. § 1226(c).[65] The petitioner, Cheikh Diop, was detained for 1,072 days.[66] The Third Circuit concluded, "the statute authorizes only detention for a reasonable period of time."[67] Further, the Third Circuit held that the Due Process Clause refers to "'any person,' which means that aliens, no less than native-born citizens, are entitled to its protection."[68] The Sixth Circuit has also held that INS may detain an immigrant for a reasonably required time to complete removal, but if the process takes an unreasonably long time, the detainee may seek habeas review.[69] However, there is a narrow split between the Circuits on what is considered reasonableness. The Ninth and Second Circuits have held that six months is the maximum time allowed for detention that is reasonable.[70] The Third, Sixth, and First Circuits concluded that in reviewing reasonableness, a rigid six-month rule is inappropriate; instead, these Circuits accepted an individualized approach.[71] The Supreme Court's recent decision in *Jennings v. Rodriguez* will impact the decisions in these Circuits because the Supreme Court found that 8 U.S.C. § 1226(c) was not ambiguous.[72]

C. Institutional Shortcomings that Prevent the Judiciary from Answering Immigration Questions

A restricted role for the judicial branch in immigration is also justified on the basis that, as an institution, courts cannot balance and appreciate the policy choices involved in immigration.[73] These

64. *Tijani*, 430 F.3d 1241; *see also Robbins*, 804 F.3d 1060.

65. *Diop*, 656 F.3d 221; *see also Chavez-Alvarez*, 783 F.3d 469 (holding that indefinitely detaining an immigrant in a prison is a violation of the Due Process Clause).

66. *Diop*, 656 F.3d at 226.

67. *Id.* at 223.

68. *Id.* at 231.

69. Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

70. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015).

71. Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016); *see also* Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 474 (3d Cir. 2015).

72 Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018).

73. *See* Matthews v. Diaz, 426 U.S. 67, 81 (1976) ("Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."); Daniel R. Schutrum-Boward, *United States v. Texas and Supreme Court Immigration Jurisprudence: A Delineation of Acceptable Immigration Policy Unilaterally Created by the Executive Branch*, 76 MD. L. REV. 1193, 1206–07 n.119 (2017).

justifications echo that of the political question doctrine. Professor Legomsky has identified seven justifications for the application of the plenary power doctrine, which inhibits the Supreme Court from reviewing immigration policy.[74] One of the most important justifications is that immigration choices are viewed as political questions.[75] Turning back to the *Zadvydas* case, Justice Kennedy argues three main points in his criticism of the majority's outcome. In his first point, Justice Kennedy argues that judicial orders mandating the release of a detained immigrant will undermine the nation's ability to "speak with one voice on immigration and foreign affairs matters."[76] Next, he states there are substantial interests in protecting the community from immigrants with criminal histories.[77] Finally, he states the six-month release period creates perverse incentives.[78]

Justice Kennedy states that the majority's decision will require the Executive to "surrender its primacy in foreign affairs and submit reports to the courts respecting its ongoing negotiations in the international sphere."[79] This critique relates back to the previous discussion of plenary power, which is a part of the political question analysis. However, Justice Kennedy's point is more specific. He argues that the Court's opinion will create ripple effects and will interfere with foreign affairs relationships.[80] Justice Breyer responds in the majority opinion by saying it is unclear how the judicial review of individual detention would impact these negotiations, and further, judges can handle it with the appropriate sensitivity.[81] It is somewhat unclear what Justice Kennedy meant when arguing that review by courts will impact international negotiations, but from other portions of his dissent, it seems that he meant the United States can use immigrants being detained as leverage in international negotiations; yet, that seems problematic. Holding individuals indefinitely to impact any type of foreign affairs negotiation is a dangerous and unfair idea.

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74. LEGOMSKY & RODRÍGUEZ, *supra* note 26, at 114.

75. *Id.*; *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261 (1984) (providing a general discussion of how the political question doctrine operates as an argument for plenary power in immigration). *See generally* Louis Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976) (providing a general overview and discussion of the political question doctrine).

76. Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting).

77. *Id.* at 711, 713.

78. *Id.* at 711–12.

79. *Id.* at 725.

80. *See id.* at 711–12.

81. *Id.* at 696 (majority opinion).

Justice Kennedy's broader point in his dissent is that as an institution, the Court is just not good at balancing foreign affairs concerns.[82] In his opinion, he states that the Court's six-month rule will incentivize immigrants to hinder or hurt reparation negotiations or removal proceedings.[83] The Court is not privy to the confidential information the political branches have.[84] An additional consideration here is that elected officials are better able to make foreign affairs choices because they are accountable to the citizens. It is more democratic to have elected officials of the legislature and the executive make foreign affairs decisions.[85] In contrast, judges and Justices in the federal system are appointed for life and not politically accountable.[86] Additionally, having elected officials in control of foreign affairs decisions allows for faster change when needed. Citizens can change the direction of foreign affairs by electing a different party or person with different ideas. In contrast, courts may be slow and unlikely to make rapid changes.

Finally, Justice Kennedy presents an argument that the Court risks legitimacy by making decisions in immigration.[87] He mentions a story about an immigrant that had a criminal conviction, who committed a rape while he was released on bail waiting to be removed.[88] Professor Benson asked what forces might limit the growth of immigrant detention.[89] Professor Benson asked this question after providing many examples of how fear of immigrants, largely unjustified, led to the expansion of detention.[90] The fear is that an immigrant who is not detained could pose a danger to the community, and releasing that immigrant would risk the safety of citizens. What actor would be willing to take that risk? Justice Kennedy seems to state that courts should not be the actors taking that risk. Further, by making decisions in immigration, which is considered foreign affairs, the Court risks

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82. *Id.* at 711, 718, 725.

83. *Id.* at 711–12 (Kennedy, J., dissenting).

84. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[The President] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources . . . . Secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results.").

85. Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law,* 71 VA. L. REV. 1071, 1170 (1985).

86. *Id.*

87. Zadvydas v. Davis, 533 U.S. 678, 715–17 (2001) (Kennedy, J., dissenting).

88. *Id.* at 715–16.

89. Benson, *supra* note 2, at 54.

90. *Id.*; *see also* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 289 (2004).

the political branches choosing not to follow what the Court decides. Again, this justification is similar to the reasons behind justiciability doctrines. The Court has to carefully weigh how big a problem it would create if it dealt with the foreign affairs questions, compared to how big an issue it would create if the Court did not resolve it.

D. Rebutting the Institutional Shortcomings Argument

The main flaw with these justifications is that they, again, conflate immigration policy generally with the indefinite detention of immigrants. These are two different inquiries. Setting immigration law and policy is a job for the political branches. However, the vindication of an individual right is something courts do all the time. By reviewing a detention for its constitutionality, courts are conducting a routine analysis. One of the arguments against normal judicial review and analysis of detentions is the citizenship status of immigrants. It is argued that aliens in the United States are guests, so they are asking for privileges and are not entitled to rights.[91] The Court's precedent does not support this view. The Court has drawn a line between immigrants that have entered U.S. territory and immigrants stopped at the border. The Court has held that once immigrants enter into the U.S., they are entitled to due process.[92] However, aliens who have not passed "through our gates," are not entitled to due process.[93] This is another area that may have been eroded by an extraterritorial application of the Constitution at Guantanamo Bay.

The prudence and legitimacy concerns of the Court in this area are real. However, the risk of the political branches not following the Court's holding or the risk of bad results from a holding, have to be weighed against the rights that are at stake. The same concerns were present in the Guantanamo cases, which involved the wartime powers of the political branches.[94] But, the Court weighed the need for a judicial resolution and the protection of individual rights against the possible risk of damage to the Court that could result from a bad decision. By continually failing to act to protect the rights of immigrants, the Court risks losing

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91. LEGOMSKY & RODRÍGUEZ, *supra* note 26, at 114.

92. *See* Plyler v. Doe, 457 U.S. 202, 215 (1982); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976).

93. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 212 (1953).

94. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 54 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 533 U.S. 723 (2008); *see also* Sayed, *supra* note 3, at 1844–47 (discussing the Guantanamo cases).

legitimacy as well. In his book, *The American Supreme Court*, Professor McCloskey gives a history of the Supreme Court.[95] He notes that some of the low points in the Court's history are when the Court failed to protect individual rights, such as in the *Dred Scott* case, *Plessy v. Ferguson*, and the *Korematsu* case.[96] By not acting, the Court is still acting in the immigrant detention situation, because it is allowing the deprivation of liberty to continue.

III. JUSTICE BREYER'S VIEW OF THE COURT IN IMMIGRANT DETENTION

This Section will focus on a broader, but still limited, view of the proper judicial role that Justice Breyer, writing for the majority, presented in *Zadvydas*. This is the role that the Ninth Circuit took on in *Jennings*.[97] The essence of this view is that courts use their discretion in statutory interpretation to avoid raising doubts about the constitutionality of the statute. This section will discuss why courts may constrain themselves to statutory interpretation instead of constitutional interpretation. Namely, the complexity of the administrative regime regulating immigration and the background influence of plenary power. Further, this section will analyze the cost of taking a statutory approach to the detention question.

Justice Breyer's view is that the Court has a duty to interpret statutes in order to avoid violations of the constitution in immigration law.[98] Justice Breyer states that a "cardinal principle" of statutory interpretation is that the Court should ascertain a construction of the statute that avoids constitutional questions.[99] He writes that the Court has "read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."[100] Justice Breyer writes that a statute authorizing indefinite, possibly permanent, detention would raise serious constitutional issues about due process.[101] Accordingly, in the view of the Court, "the statute, read in light of the Constitution's demands . . . . does not permit indefinite detention."[102] Justice

95. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (4th ed. 2005).
96. *Id.* at 62, 135, 141.
97. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
98. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).
99. *Id.*
100. *Id.*
101. *Id.* at 690.
102. *Id.* at 689.

Breyer provides a review of limits on civil detention and criticizes the "sole procedural protections available" to aliens, which are administrative hearings where the aliens bear the burden of proof.[103] Justice Breyer finds that the congressional intent is not clear and accordingly, the Court can use the canon of constitutional avoidance.[104] Justice Breyer then reads an implicit limit of six months into the statute for immigrant detention.[105]

In confronting the plenary power argument, Justice Breyer states, "that power is subject to important constitutional limitations."[106] In addressing the institutional concerns about the Court hurting repatriation negotiations, Justice Breyer states it is unclear how the court reviewing immigration detention with the "appropriate sensitivity" would interfere with the negotiations.[107] Further, in regards to the expertise and information superiority of the Executive branch argument, Justice Breyer responds, "that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention."[108] Justice Breyer hints that the statute, if accepted as authorizing indefinite detention, would be unconstitutional.[109] He is careful to say that the congressional intent is unclear, so the Court can use the canons of construction to resolve the ambiguity.[110] But would the Court find the statute to be unconstitutional if it clearly mandated indefinite or permanent detention? Or would the Court use the plenary power doctrine to avoid the issue? This is a shortcoming of the constitutional avoidance canon. It may seem like a good solution to resolve a constitutional violation without the Court risking much or binding itself to a constitutional holding, but it creates difficult questions. Justice Breyer seems to present an argument for the Court to review the statute for constitutionality, but then says it can be fixed with a six-month limit on the detention.

A. Why the Constitutional Avoidance Canon?

The constitutional avoidance canon is a substantive canon of statutory interpretation that allows courts to put a thumb on the

103. *Id.* at 692.
104. *Id.* at 689–90, 696–99.
105. *Id.* at 701.
106. *Id.* at 695.
107. *Id.* at 696.
108. *Id.* at 700.
109. *Id.* at 690.
110. *Id.* at 689–90, 696–99.

scale to accept one reading of a statute and reject another.[111] In an influential article from 1990, Professor Motomura stated that the application of the constitutional avoidance canon can be characterized as the "'underenforcement' of constitutional norms for prudential reasons."[112] Although his article was written before *Zadvydas*, *Demore*, and *Martinez,* his idea is shown in these cases. When the Court can, it will narrow the question to avoid infringing on the other branches or creating controversy. Professor Motomura argued that by using the constitutional avoidance canon, the Court has created what he calls "phantom constitutional norms."[113] The phantom norms are created because the Court uses one set of constitutional, or sometimes just public policy norms when applying the avoidance canon.[114] But, if the Court is ever forced to confront the constitutional question, it uses a different set of constitutional norms, namely the plenary power.[115] Accordingly, the first set of norms are illusive and unreal. In response to the criticisms of using substantive canons, such as the constitutional avoidance canon, Professor Slocum has argued that the use of the constitutional avoidance canon actually provides protection to immigrants.[116] He introduces what he calls the "'lowest common denominator' principle," which holds that through consistent statutory interpretation, immigrants are afforded greater rights, even if they are not explicitly receiving constitutional protections.[117] There are convincing components to Professor Slocum's argument. It is better to have something than nothing in terms of protecting immigrants. But, it is hard to understand why the Court still chooses statutory interpretation in a situation where constitutional rights are being deprived, and the majority of judges do not adhere to the old version of the plenary power.

1. The complexity of immigration and typical justifications for deference to agencies.

Courts may be more comfortable with the constitutional avoidance canon because of the complicated administrative scheme that manages immigration. For the purposes of this paper, the

111. *See* Slocum, *Canons*, *supra* note 9, at 366; *see also* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 813 (2010).

112. Motomura, *supra* note 26, at 563.

113. *Id.* at 549.

114. *Id.*

115. *Id.* at 549–50.

116. Slocum, *Canons*, *supra* note 9, at 376.

117. *Id.* at 393.

discussion is limited to the administrative framework governing detention, with a discussion of removal proceedings. An important piece of the detention framework is the administrative adjudication called a *Joseph* hearing.[118] An ICE officer makes the initial determination that an immigrant is included in the mandatory detention scheme.[119] The *Joseph* hearing is held to determine whether the immigrant is "properly included" in the mandatory detention provision.[120] The Immigration Judge, or "IJ," can make this conclusion before or after the conclusion of the underlying removal case and may rely on the underlying merits decision in making the threshold bond decision.[121] The IJ will not consider an immigrant included in the mandatory detention category only when the IJ is convinced that "the Service is substantially unlikely to establish at the merits hearing . . . the charge or charges that . . . subject the alien to mandatory detention."[122] The immigrant may also show that he is not subject to mandatory detention because he is a citizen or he was not convicted of a felony.[123] The burden in a *Joseph* hearing is on the immigrant.[124] After a *Joseph* hearing, the immigrant may appeal to the Board of Immigration Appeals (BIA).[125] The BIA is highly deferential to the initial decision.[126]

If an immigrant meets his burden at the *Joseph* hearing, and establishes that he is not subject to mandatory detention, the IJ will conduct a bond hearing and determine whether the immigrant is a flight risk or danger to the community.[127] However, the Department of Homeland Security (DHS) may obtain an automatic stay of the release on bond by filing a notice of intent to appeal.[128] If the immigrant does not meet his burden at the *Joseph* hearing, there is no opportunity for him to challenge his detention pre-removal.[129] Habeas review is available to detainees, but because of

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118. Joseph, 22 I. & N. Dec. 799 (Bd. of Immigration Appeals 1999). Scholars have criticized the procedural defects of *Joseph* hearings. *See* Sayed, *supra* note 3, at 1849; *see also* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 73–76 (2006).

119. 8 C.F.R. § 236.1(d) (2016); *see also* Sayed, *supra* note 3, at 1850.

120. *Joseph*, 22 I. & N. Dec. at 800.

121. *Id.*

122. *Id.* at 806.

123. Sayed, *supra* note 3, at 1850.

124. *Id.*

125. *Id.* at 1850–51.

126. *Id.* at 1851; *see also Joseph*, 22 I. & N. Dec. at 800.

127. Sayed, *supra* note 3, at 1851.

128. *Id.* at 1857.

129. 8 C.F.R. § 1003.19(h)(1)(i)(E) (2006); *see also* Sayed, *supra* note 3, at 1851–52.

the fracturing among Circuits and the confusion over what level of deference the IJ deserves, habeas review is not uniformly applied by the courts.[130]

The reasons why courts defer to agencies in general, may also be reasons why courts prefer to make a holding based on a statutory question, as opposed to a constitutional question. Justifications for deferring to agency judgment are: agencies can develop expertise and are more politically accountable than courts.[131] In her article, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, Professor Das discusses the complicated relationship between courts and executive agencies in immigration.[132] She notes that it is still unsettled what degree of deference courts should have toward agency decisions in immigration.[133] Moreover, an invocation of the constitutional avoidance canon avoids the difficult question of what would happen if the Court found detention unconstitutional. Does the Court determine what is required for a detention scheme to be constitutional, does it go to the agency, to Congress?[134] These difficult questions make a decision based on statutory interpretation easier than a decision based on constitutional interpretation. While these questions are tough, there are modest solutions to reforming *Joseph* hearings, capable of relieving some of the procedural and substantive due process issues.[135] For example, providing better access to legal help, a translator at the hearing, and elimination of the automatic stay provision would make the *Joseph* hearings fairer. Additionally, the burden shifting the Ninth Circuit did in *Jennings* seems reasonable and is a step in the right direction.[136]

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130. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146–50 (2015).

131. *See* Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 310–12 (2011).

132. Das, *supra* note 129, at 150–51.

133. *Id.* at 163–66.

134. There are additional administrative hurdles, like the *Vermont Yankee* principle, that prevents a Court from imposing additional procedural requirements on an agency in rulemaking. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978). *Vermont Yankee* also applies to agency adjudications. Pension Benefit Guarantee Corp. v. LTV Corp., 496 U.S. 633 (1990).

135. *See infra* Section IV.

136. Rodriguez v. Robbins, 804 F.3d 1060, 1086–90 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

2. Plenary power may factor into the choice between statutory interpretation and a constitutional interpretation.

Statutory interpretation is easier than constitutional interpretation because it creates less waves. Professor Sunstein has argued that courts underenforce constitutional rights using statutory interpretation for good reasons, including "the courts' limited factfinding capacities, their weak democratic pedigree, their limited legitimacy, and their likely ineffectiveness as frequent instigators of social reform."[137] Part of this is included in the discussion about deference to agencies because of their expertise and accountability. The suggestion that the judiciary is ineffective as a frequent instigator of social reform is interesting though, because there have been instances where the judiciary, specifically the Supreme Court, has been a part of instigating important social reform. However, courts rely on the political branches to respect and enforce their holdings. So, if courts, especially the Supreme Court, held that immigrant detention is unconstitutional, the realization of real change in immigration would be dependent on the actions of the legislature and executive. The canon of constitutional avoidance is a way courts can avoid intruding on the political branches. This relates back to the plenary power discussion. Academics have predicted the death of the plenary power since 1990, and largely the old view of the plenary power is gone.[138] But, in the choice between a statutory or constitutional decision, the plenary power may loom in the background of the courts' choices. Courts may want to avoid making a radical constitutional holding because there is this uncertainty about the division of power in the area. This also relates to the institutional and prudence concerns of the courts. Statutory interpretation-based holdings are less powerful in the sense that Congress is free to amend the statute. Statutory interpretation may be courts hedging their bets that their holdings either backfire or the political branches do not adhere to it.

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137. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113 (2005); *see also* Slocum, *Canons*, *supra* note 9, at 376; Motomura, *supra* note 26, at 563.

138. *See* Legomsky, *Ten More Years*, *supra* note 26, at 934 (revising his original prediction of the total death of the plenary power); *see also* Motomura, *supra* note 26, at 553–60 (presenting a classic view on the plenary power as well as a more modern view on the plenary power).

B. Why not the Constitutional Avoidance Canon?

Scholars have questioned the wisdom of the Court's use of the constitutional avoidance canon.[139] The constitutional avoidance canon in general is problematic when the Court uses it to dodge difficult questions that deserve real answers. But, there are situations where the use of the constitutional avoidance canon is not really controversial. For example, if a statute is ambiguous, and one reading of the statute seems to limit free speech and another reading does not limit speech, it is reasonable to accept the interpretation that does not limit speech. But, this does not appear to be what is happening in the context of immigrant detention. For example, the language of 1226(c) is not ambiguous; it explicitly states that immigrants who have been convicted of aggravated felonies shall be taken into administrative custody until they are removed.[140] The first issue is that by using the constitutional avoidance canon, courts create ambiguity where there really is not ambiguity. The second issue in using the constitutional avoidance canon is that courts just assert reasonableness and do not provide a full explanation or analysis. Professor Motomura argued the Court's questionable statutory interpretation and use of the constitutional avoidance canon in immigrant detention has confused and led to underdeveloped constitutional law.[141] He advocated for a transition to making "direct and candid" constitutional decisions.[142] The use of the constitutional avoidance canon does address the underlying problem of whether this type of detention is constitutional. As an example, by using this canon in *Zadvydas*, the Court created precedent that detention without a bond hearing is acceptable as long as the detention does not last longer than six months.[143] What makes six months a reasonable limit to hold someone without a bond hearing? The Court seemed to create an arbitrary number that satisfies due process without a full explanation. Further, by not making a constitutional holding, it becomes more unclear as to what rights immigrants have.

As a broader argument against the Court's use of the constitutional avoidance canon, the body entrusted to be the final

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139. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1208 (2006); *see also* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 463 (2005).

140. 8 U.S.C. § 1226(c) (2011).

141. Motomura, *supra* note 26, at 549.

142. *Id.*

143. Zadvydas v. Davis, 533 U.S. 678, 689–90, 701 (2001).

word on the Constitution should not avoid the question. The most extreme consequence of the Court continually avoiding constitutional questions would be that we stop asking the Court. The generally accepted American practice is judicial supremacy. Although scholars have disagreed over whether judicial supremacy is the best design, for nearly 150 years America has accepted judicial supremacy over the Constitution.[144] If the Court fails to check the political branches, the only hope is that popular support for/against government action will check the government. In the United States, it seems that the public cares about the Constitution and wants constitutional principles followed. However, the general public desire to enforce constitutional norms does not work in immigration because the general public suffers from an overall lack of information and education on immigration.[145] Because of the complexity of immigration, there are many misunderstandings of the process. Additionally, politicians often inflame the public by scapegoating immigrants through manipulated data and inflammatory stories.[146] Accordingly, we have not seen a public movement for immigrant rights and constitutional protection. Further, immigrants have no voice in the government. They cannot express their dissatisfaction or issues with detention through the voting process. All they have is habeas review by the courts. In this type of situation, the Court should objectively make a decision on the Constitution, even if the right thing is unpopular. The Court is the only actor in the government that currently has the ability to protect immigrant's constitutional rights.

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144. MCCLOSKEY, *supra* note 94, at 10.

145. Ana Swanson, *Here's How Little Americans Really Know About Immigration*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/01/heres-how-little-americans-really-know-about-immigration/?utm_term=.0229cd605070.

146. As an example, President Donald Trump has made many inflammatory quotes about immigrants. At the announcement of his candidacy he stated, "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Carolina Moreno, *9 Outrageous Things Donald Trump Has Said About Latinos*, HUFFINGTON POST (Aug. 31, 2015, 3:49 PM), http://www.huffingtonpost.com/entry/9-outrageous-things-donald-trump-has-said-about-latinos_us_55e483a1e4b0c818f618904b. Further, in a speech where then President-elect Trump discussed his immigration goals, he continually referenced and brought on stage, "parents who lost their children to sanctuary cities and open borders." Domenico Montanaro et. al., *Fact Check: Donald Trump's Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM), http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration. President Trump continually referenced Americans who were killed by immigrants, such as Sarah Root, Grant Ronneback, Kate Steinle, and Marilyn Pharis. *Id.*

IV. WHAT THE COURT'S PROPER ROLE IN IMMIGRANT DETENTION SHOULD BE

This Section will attempt to make suggestions as to what the proper role of the judiciary is in immigrant detention cases, using *Jennings v. Rodriguez*[147] as an example. In *Jennings*, a majority of the Court found the Ninth Circuit improperly applied the canon of constitutional avoidance. Further, the Court reversed and remanded with instructions for the Ninth Circuit to address the constitutionality of indefinite immigrant detention. The Supreme Court's holding and opinions from *Jennings* are not fully analyzed or addressed in this paper.

Because the United States has largely accepted judicial supremacy, the Supreme Court has the final word on the Constitution.[148] The Court should use that power in these instances to protect individual liberties. In a concluding point, this Section will also reiterate suggested procedural changes to immigrant detention that would make the detention of immigrants fairer.

A. Jennings v. Rodriguez

As an illustration of the proper judicial role, this Note will analyze the *Jennings v. Rodriguez* case, which went before the Supreme Court on November 30, 2016 and was decided on February 27, 2018.[149] Again, the opinions and holding of *Jennings* are not adequately addressed in this paper and warrant full analysis at a later date.[150] This part will present the preliminary facts of the case.

Alejandro Garcia commenced the case, filing a petition for a writ of habeas corpus in the Central District of California on May 16, 2007.[151] His case was consolidated with Alejandro Rodriguez

147. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

148. This paper does not fully address the debate between popular constitutionalism and a weaker view of the court and judicial supremacy. Some scholars have suggested that a lot of constitutional interpretation takes place outside of the courts, and therefore discredits judicial legitimacy. *See generally*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

149. *Jennings,* 138 S. Ct. 830.

150. I primarily use the facts of *Jennings* to illustrate why courts should conduct constitutional analysis of immigrant detention laws. The impact of the *Jennings* holding is not fully discussed. Furthermore, at the time this paper was submitted for publication, *Jennings* was still pending before the United States Supreme Court. *Jennings* is an important case that warrants future exploration in the future.

151. Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

and they were certified as a class under Federal Rule of Civil Procedure 23.[152] The district court certified a class defined as:

> all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a [6a] hearing to determine whether their detention is justified.[153]

The district court also approved the creation of subclasses in correspondence to the following statutes: 8 U.S.C. 1225(b), 1226(a), 1226(c), 1231(a).[154] The class does not include suspected terrorists. Additionally, the class excluded any detainee subject to final order of removal.[155]

The district court entered a preliminary injunction that applied to class members detained pursuant to 8 U.S.C. 1225(b) and 1226(c).[156] The preliminary injunction mandated the government provide each detainee with a bond hearing before an IJ.[157] Further, the government must release members of each subclass, unless the government can show by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.[158] The government appealed, and on April 16, 2013, the Ninth Circuit affirmed.[159] The Ninth Circuit used a two-prong test for evaluating the injunction. First, the court considered whether the plaintiff was likely to be successful on the

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152. Originally, when they moved for class certification the motion was denied. The Ninth Circuit Court of Appeals reversed the district court's order denying class certification. Rodriguez v. Hayes, 591 F.3d 1105, 1106 (9th Cir. 2010) [hereinafter *Rodriguez* I]. The Ninth Circuit held that the class satisfied the requirement of Federal Rule 23 and any concern that the differing statutes authorizing detention would render class adjudication impractical could be addressed through the formation of subclasses. *Id.* at 1126. The government petitioned for panel rehearing or rehearing en banc. *Robbins*, 804 F.3d at 1066. In response, the appellate panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) does not bar certification of the class and the court unanimously voted to deny the government's petition. *Id.* at 1066.

153. *Robbins*, 804 F.3d at 1066.

154. *Id.*

155. *Id.*

156. Rodriguez v. Robbins, 715 F.3d 1127, 1130–31 (9th Cir. 2013) [hereinafter *Rodriguez* II].

157. *Robbins*, 804 F.3d at 1066.

158. *Rodriguez* II, 715 F.3d at 1130–31.

159. *Id.* at 1146.

merits of the case.[160] Second, the court evaluated whether the plaintiff would suffer irreparable harm unless the preliminary injunction was granted.[161] The Ninth Circuit held that freedom from imprisonment is at the heart of the liberty the Due Process Clause protects, and thus, indefinite detention would raise serious constitutional concerns.[162]

On August 6, 2013, the district court granted summary judgment to the class members and entered a permanent injunction.[163] The district court "require[d] the government to provide each detainee with a bond hearing by his 195th day of detention."[164] "[T]he district court further ordered that bond hearings occur automatically . . . [and] that the government bear[s] the burden of proving 'by clear and convincing evidence that [the] detainee[s] [are] a flight risk or a danger to the community to justify [any] denial of bond' . . . ."[165] "[T]he district court declined to order IJs to consider the length of detention or the likelihood of removal during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing."[166]

The government appealed the entry of the permanent injunction, arguing that the Ninth Circuit erred in applying the canon of constitutional avoidance.[167] Rodriguez cross-appealed regarding the procedural requirements for bond hearings.[168] The Ninth Circuit affirmed the issuance of the permanent injunction.[169] The Ninth Circuit reversed in part and ordered that IJs should consider the length of detention and there should be a new bond hearing automatically every six months.[170]

B. Courts Should Hold that the Indefinite Detention of Immigrants Under 1225(b), 1226(a), 1226(c) is Unconstitutional

The Ninth Circuit used the constitutional avoidance canon and imposed procedural requirements on the detention of immigrants. However, the Court in *Jennings* held that the Ninth Circuit

160. *See id.* at 1144–46.
161. *See id.*
162. *Id.* at 1146.
163. Rodriguez v. Robbins, 804 F.3d 1060, 1071 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1072.
169. *Id.* at 1090.
170. *Id.* at 1089–90.

improperly applied the constitutional avoidance canon and remanded with instructions for the Ninth Circuit to reach the constitutional question.[171] The Court stated that because the Ninth Circuit erroneously used the constitutional avoidance canon, it did not consider the constitutional arguments on their merits.[172] Thus, the Court did not reach those arguments either.[173] However, the Court also instructed the Ninth Circuit to first decide whether it continues to have jurisdiction and whether a class action is still the appropriate vehicle for the claim.[174]

Leaving aside for a moment the questions over jurisdiction and the class action,[175] federal appellate courts, and eventually the Supreme Court, should hold that indefinite detention of immigrants is unconstitutional. Courts should reach the constitutional question, and find it is unconstitutional, for three reasons: (1) courts, especially the Supreme Court, have the power and duty to make a constitutional holding in a situation where individual rights are being violated, (2) a constitutional holding has value as a symbolic message that immigrant rights matter, and (3) courts can make reasonable suggestions to the detention procedures that would alleviate the substantive and procedural due process issues.

1. Courts, especially the Supreme Court, have the power and duty to make a constitutional holding in the immigrant detention context.

Federal appellate courts have the ability to make authoritative constitutional decisions. This is especially true of Supreme Court. Since Justice Marshall's famous decision in *Marbury v. Madison*, the United States, has largely accepted judicial supremacy.[176] Despite judicial review being well established in American

171. Jennings v. Rodriguez, 138 S. Ct. 830, 851–52 (2018).

172. *Id.* at 851

173. *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

174. *Id.* at 851–52.

175. Again, this note is not fully addressing the holding and repercussions of the *Jennings* case. The jurisdictional question, as well as the class action question, will be important findings and crucial for the immigrants' claims.

176. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is."); *see also* ALEXANDER HAMILTON, THE FEDERALIST NO. 78 ("[The] courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.")

constitutional law, there remain debates over the scope of judicial review.[177] These debates often include discussion as to the level of deference courts should give to the political branches and justiciability,[178] including standing law and the political question doctrine. As discussed at length above, these debates and doctrines should not prevent the judicial branch from serving as a meaningful check on the executive and legislative branches when they are violating the Constitution. The statutes that authorize immigrant detention are both substantive and procedural violations of the Due Process Clause.

The statutes that authorize detention are substantively unconstitutional. 8 U.S.C. § 1226(c) mandates indefinite, possibly permanent, detention of immigrants.[179] 8 U.S.C. §§ 1225(b) and 1226(a) also authorize the indefinite, possibly permanent, detention of immigrants.[180] Indefinite detention does not comply with the Due Process Clause.[181] Detention may be useful and proper, but there has to be a finite time that an immigrant can be held. Congress must reevaluate this policy. The Court has determined, through the constitutional avoidance canon, that a six-month limit is reasonable before a bond hearing can be held.[182] But, in theory, the government could hold bond hearings every six months and comply with the Court's holding, while still detaining an immigrant forever. This deprives an individual of liberty in contravention of the Constitution.[183]

Further, there are severe procedural due process issues with immigrant detention. *Joseph* hearings need to be completely overhauled.[184] One scholar identified two procedural problems with *Joseph* hearings: the burden on the immigrant and the automatic stay provision.[185] First, at a *Joseph* hearing, the immigrant holds

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177. *See* R. George Wright, *The Distracting Debate over Judicial Review*, 39 U. MEM. L. REV. 47 *passim* (2008); *see also* Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 *passim* (1982); Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 *passim* (2004).

178. Entrenched in the debate over deference to the political branches is the plenary power doctrine. An additional issue in this debate is the level of deference a court gives an administrative agency in the bureaucratic state. *See, e.g.*, Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984); Auer v. Robbins, 519 U.S. 452, 463 (1997). *See generally* Das, *supra* note 129.

179. 8 U.S.C. § 1226(c) (2011).

180. *Id.* at §§1225(b), 1226(a).

181. Zadvydas v. Davis, 533 U.S. 678, 690, 699 (2001) (stating that a statute allowing indefinite detention would raise serious constitutional problems because at the heart of the Due Process Clause is a prohibition on endless imprisonment by the government).

182. Zadvydas v. Davis, 533 U.S. 678, 701–02 (2001).

183. U.S. CONST. amends. V, XIV.

184. *See* Sayed, *supra* note 3, at 1849–58, 1865–77.

185. *Id.* at 1852.

the burden of proving that he is not subject to detention.[186] Because of the complexity of immigration law and the lack of legal aid or advice, immigrants are at a disadvantage.[187] Further, immigrants are not adequately advised of their legal rights, and there are difficulties in securing pro bono representation.[188] Additionally, if a non-English speaking immigrant has to proceed pro se, his language barrier might further inhibit the effectiveness of his representation.[189] As a result of these factors, the immigrant may be unable to meet the burden. Moreover, IJs decisions in *Joseph* hearings can be appealed to the Board of Immigration Appeals (BIA); but, the BIA is highly deferential to DHS.[190] Second, the automatic stay provision in *Joseph* hearings is problematic.[191] DHS is not required to give more than a conclusory statement saying there are legal arguments which support continued detention.[192] Based on this meager showing, the IJ will stay the order of the immigrants release on bond.[193]

As a final point, the administration of immigrant detention raises deep concerns. There were fifty-six deaths in ICE custody during the Obama administration.[194] During detention, substandard medical care often endangers immigrants' lives. In a joint report published by the American Civil Liberties Union, the Detention Watch Center, and the National Immigrant Justice Center, the deaths of Evalin-Ali Mandza, Amra Miletic, Pablo Gracida-Conte, Anibal Ramirez-Ramirez, Irene Bamegna, Fernando Dominguez-Valdivia, Victor Ramirez-Reyes, and Mauro Rivera Romero were examined.[195] Each individual died from

186. *Id.*

187. Sayed, *supra* note 3, at 1852–54; *see also Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court,* NAT'L IMMIGR. JUST. CTR. (Sept. 2010), http://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf.

188. Sayed, *supra* note 3, at 1854–57, 1874.

189. *Id.* at 1874.

190. Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 68 (2011); *see also* Sayed, *supra* note 3, at 1851.

191. Sayed, *supra* note 3, at 1857–58.

192. *Id.*

193. *Id.*

194. ACLU, Det. Watch Network & Nat'l Immigrant Justice Ctr., *Fatal Neglect: How ICE Ignores Deaths in Detention*¸ ACLU 5 (Feb. 2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf [hereinafter ACLU, *Fatal Neglect*]; *see also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L.L. REV. 601, 603 (2010) (discussing the poor medical treatment in immigrant detention centers).

195. ACLU, *Fatal Neglect*, *supra* note 193, at 7–21.

treatable medical conditions.[196] In some cases, the ICE officials administered the wrong dosage of medication, refused to call an ambulance, or simply withheld care for an extended time.[197]

There is another issue in the detention of immigrants. Immigrants may be detained in centers privately owned and operated.[198] Over sixty percent of immigrants are held in private facilities.[199] Companies are profiting from the detention of immigrants, which creates perverse incentives.

Courts have a duty to make a constitutional holding. In *Zadvydas*, the Court promised to "listen with care" when liberty is at issue.[200] Liberty and, in some cases, life are at issue here. The Supreme Court, specifically, also has the power to make a constitutional holding. In the wartime powers context, Justice O'Connor in *Hamdi* wrote that the Court will,

> accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[201]

Additionally, Justice O'Connor wrote that "the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."[202] She further stated that, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are

196. *Id.* at 7–9, 13, 15–16, 18, 20.

197. *Id.* at 3–5.

198. *Id.*; *see also* John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM), https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom.

199. *Immigration Detention Map & Statistics*, CIVIC: END ISOLATION, http://www.endisolation.org/resources/immigration-detention (last visited Apr. 20, 2018).

200. Zadvydas v. Davis, 533 U.S. 678, 700 (2001).

201. Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).

202. *Id.* at 536.

at stake."[203] Based on the individual liberties at stake in immigrant detention, the plenary power should no longer stop the judiciary from acting.

2. A constitutional holding has value as a symbolic message that immigrant rights matter.

Constitutional holdings can help evolve a democratic society and enhance the best parts of civil society, while rejecting the worst. By refusing to make a constitutional holding and dodging the hard questions with either statutory interpretation or the plenary power, courts send the message that immigrant rights are not a priority. After the disappointing deadlock in the Deferred Action for Parents of Americans (DAPA) case, a constitutional holding would convey an important message to immigrants: that they matter.[204] The failure to protect immigrant rights allows for immigrants to continually be repressed and allows the xenophobia and racism that underlies immigration law to persist.

In this situation, courts need to be the champions for immigrant rights and protect them because the immigrants do not have a voice and the public either does not know, does not care, or believes the stereotypical, inflammatory stories used by politicians.[205] Average Americans seem to lack adequate information about immigration.[206] Thus, it seems incorrect to assume majority rule, or the will of the people, should determine the constitutionality of immigrant detention. There is evidence that the popular consensus would have allowed school segregation

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203. *Id.*

204. The Supreme Court affirmed Texas's refusal to implement DAPA, which would have allowed the immigrant parents of children born in the United States to remain in the United States. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

205. See President Donald Trump's speech in Nevada, blaming immigrants for the loss of American jobs. Domenico Montanaro et al., *supra* note 145 ("[M]ost illegal immigrants are lower-skilled workers with less education who compete directly against vulnerable American workers and that these illegal workers draw much more out from the system than they can ever possibly pay back. And they're hurting a lot of our people that cannot get jobs under any circumstances."). The President has also advocated for the mass deportation of immigrants. *See* Jose A. DelReal, *Trump's Latest Plan Would Target at Least 5 Million Undocumented Immigrants for Deportation*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/politics/trumps-latest-plan-would-target-at-least-5-million-undocumented-immigrants-for-deportation/2016/09/01/d6f05498-7052-11e6-9705-23e51a2f424d_story.html?utm_term=.3b86380da3af.

206. Ana Swanson, *Here's How Little Americans Really Know About Immigration*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/01/heres-how-little-americans-really-know-about-immigration/?utm_term=.0229cd605070.

to continue.[207] Thankfully, the Court took a meaningful stand. In discussing *Brown v. Board of Education*, Professor Smith stated, "[s]ometimes inherent limitations on judicial efficacy may hinder effective implementation of judges' declarations of law. However, judges can still make positive contributions to their governmental branch by using the symbolic power of the Constitution."[208] The idea that rulings of courts, whether adhered to or not, are symbolically important, weakens the argument that the judicial branch should not act in foreign affairs because of the risk of losing legitimacy. Even if the political branches do not follow what the Court holds, they have made a statement and that matters to the individuals involved in the litigation and society as a whole.

3. Courts can make suggestions to the detention procedures that would alleviate the substantive and procedural due process issues.

For courts, especially the Supreme Court, the hardest question to answer is what would substantive and procedural due process look like in the area of immigrant detention. The practical consequences may be a reason as to why the courts are hesitant to rule on the constitutionality of the detention scheme. This question is difficult, but not impossible. Ultimately, it would be up to Congress to implement a new structure, but the Court can make procedural suggestions. A constitutional detention would use detention in a very limited way.[209] It would be extremely limited in its applicability and its length.[210] In order to limit the number of immigrants eligible for detention, there needs to be serious reform to what constitutes an aggravated felony under §1226(c).[211] Currently, many misdemeanors are considered aggravated felonies.[212] Crimes of "moral turpitude" have also been overused to

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207. MCCLOSKEY, *supra* note 94, at 148–49; *see also* Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 937 (1997).

208. Smith, *supra* note 206, at 939 (discussing the Court's announcement in Brown v. Board of Education).

209. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("And this Court has said that government detention violates th[e] [Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'") (internal citations omitted).

210. *Id.*

211. 8 U.S.C. § 1226(c) (2011).

212. *See* Erica Steinmiller-Perdomo, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1174–77, 1179–87 (2014); Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions,* 74 N.Y.U. L. REV. 1696, 1699 (1999).

detain more people.[213] Thus, it is important to limit the number of immigrants detained. Instead of contracting with private detention facilities, the government should shift funding to community-based alternatives, which would give immigrants better access to medical care, their families, legal counsel, and the community.[214]

Procedurally, there are also problems with the process immigrants go through when they are detained. In her article, Shalini Bhargava argued that the procedures at *Joseph* hearings violate due process as determined by the test in *Matthew v. Eldridge*.[215] *Matthews v. Eldridge* is the current framework promulgated by the Court to evaluate procedural due process issues in administrative hearings.[216] It involves three prongs: the private interest, the risk of erroneous deprivation of an interest and the value of additional procedures, and the government's interest.[217] Bhargava argued that because immigrants bear a high burden in *Joseph* hearings, and there is a large risk of erroneous deprivation of liberty, the government interest in detaining immigrants is outweighed.[218] Thus, under *Matthews,* to satisfy procedural due process, there must be additional procedures.[219] Several scholars have reviewed the scheme and made suggestions that would fix some of the procedural problems in *Joseph* hearings.[220] The Ninth Circuit's holding to shift the burden to government to prove immigrants are dangerous and a flight risk is a good start.[221] It is an improvement from the previous system that required immigrants to prove they are not subject to mandatory detention.[222] Other suggestions have included: eliminating the automatic stay provision; facilitating better access to legal counsel, translators, and representatives; having different IJs preside over the *Joseph* hearing and removal hearing; and enforcing a hard

213. 8 U.S.C. § 1182(2)(A) (2013); *see also* Steinmiller-Perdomo, *supra* note 211, at 1175.

214. *See* ACLU, *Fatal Neglect*, *supra* note 193, at 22.

215. Bhargava, *supra* note 117, at, 54–55.

216. Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (The framework promulgated by the Court to evaluate such procedural due process issues is as follows: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.")

217. *Id.*

218. Bhargava, *supra* note 117, at 54–55.

219. *See id.* at 55.

220. *See generally* Sayed, *supra* note 3; Bhargava, *supra* note 117.

221. Rodriguez v. Robbins, 804 F.3d 1060, 1070–73 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

222. *See id.* at 1090.

deadline for release if the immigrant is still detained after a certain period of time while waiting for a hearing.[223]

V. CONCLUSION

In his article, *As Old as the Hills: Detention and Immigration*, Professor Benson poses the questions, "How will you answer when you are asked: Did you know people were being imprisoned? Did you know how many? Why did you let your government put immigrants in prison?"[224] While extoling the virtue and importance of personal liberty, the United States, in what has been described as a "culture of secrecy," detains thousands of immigrants.[225] Immigrants receive insufficient procedural protections and they are deprived indefinitely, possibly permanently, of their liberty. As a result, scholars such as Professor Benson have asked: why is the Court letting the political branches do this? For years, the Court seemed to accept "immigration exceptionalism," which Professor Motomura defined as "the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking [sic]—for example, judicial review."[226] In modern immigration cases, this has not been wholly true. The Court has accepted that the executive and legislature have discretion in immigration, but it is not unlimited. But, the idea that immigration is nonjusticiable either because of the plenary power or lack of institutional ability still persists.

Justice Kennedy's dissent in *Zadvydas* revealed an outdated belief in a strong plenary power doctrine.[227] Although it is fairly easy to show that the plenary power that was created in *Chae Chan Ping*[228] is no longer the standard, it is more difficult to combat the institutional concerns of the judicial branch in immigration. However, by shifting the focus from immigration policy to the specific immigration detention, courts have the institutional capabilities to decide the case. An alternate view was Justice Breyer's choice to use statutory interpretation to read a limit of reasonableness into the statute.[229] This is the most

223. *See generally* Sayed, *supra* note 3; Bhargava, *supra* note 117.

224. Benson, *supra* note 2, at 11.

225. Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), http://www.nytimes.com/2010/01/10/us/10detain.html.

226. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999).

227. Zadvydas v. Davis, 533 U.S. 678, 705–06 (2001) (Kennedy, J., dissenting).

228. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

229. *Zadvydas*, 533 U.S. at 689.

accepted view and will likely continue to be the way the Court handles these questions. But, there are shortcomings in this approach. By failing to make a constitutional holding, the Court muddles its role, constitutional norms, and fails to adequately protect immigrants.

In both of the ways that the Court has chosen to handle immigrant detention issues, they have missed the mark. The refusal to conduct a constitutional analysis and make a holding shows that there are still undercurrents of hesitance caused by the plenary power doctrine, and there is an unwillingness to make a potentially unpopular decision and protect immigrants. There are times in the history of the Court that are considered institutional failures;[230] not because the Court necessarily overstepped its permissible role, but because the Court failed to properly check the political branches and protect individual rights. Widespread immigrant detention may be one of these situations. The Court should fulfill its duty and use its power as the supreme word on the Constitution to protect immigrants' rights to be free from restraint and end the substantively and procedurally flawed detention of immigrants.

230. *See* MCCLOSKEY, *supra* note 94.

MODUS VIVENDI: A DOCTRINAL ANALYSIS OF THE SAME-SEX MARRIAGE VS. RELIGIOUS FREEDOM PROBLEM

JONATHAN GROSSO*

* MSW, Juris Doctor Candidate, 2018

I. INTRODUCTION

The Supreme Court's landmark decision in *Obergefell v. Hodges* revolutionized the law of marriage, normalizing the experiences shared by those members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community in seeking socially recognized, legal, monogamous relationships.[1] *Obergefell* held that same-sex couples deserve the same right to marry as opposite-sex couples.[2] However, the decision raised as many questions as it answered. As many scholars and commentators have recognized, the next front in the conflict over marriage involves the balance between the rights recognized in *Obergefell* and the religious freedom of those who object to same-sex marriage.[3]

Mississippi is only the most prominent example of this conflict. The state passed a religious protection bill during the 2016 session allowing businesses to deny services for LGBT citizens based on the "sincerely held religious belief" that marriage is and always should be between a man and a woman.[4] Texas, Florida, and North Carolina have already approved similar laws, while other states including Missouri, and Colorado were still considering similar protection bills after it was tabled in the 2016 session.[5]

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. *Id.*
3. *See* Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749 (2016).
4. H.B. 1523, 2016 Reg. Sess. (Miss. 2016). This bill was temporarily blocked in the initial case of Barber v. Bryant; however, the decision was reversed on appeal due to lack of standing. Thus, the bill became law in October 2017. *See* Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).
5. *2016 State Religious Freedom Restoration Legislation*, NAT'L CONF. STATE LEGISLATURE (Dec. 31, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/2016-

Many have written on the tension between same-sex couples seeking the rights of marriage and religious objectors.[6] For the most part, however, these studies deal with the constitutional issues in the abstract, discussing the balance between competing constitutional interests and the most promising ways to reconcile them.[7] This Note makes a new contribution by discussing how to translate these arguments into a practical doctrinal approach. Other studies have not fully captured the role played by state legislatures in shaping the law post-*Obergefell*. This Note closes the gap, looking closely at what is occurring post-*Obergefell* and determining the necessary rules that courts should apply when assessing claims of religious exemption to respecting same-sex marriage and state laws permitting those claims. This proposal suggests that courts address legislative initiatives by scrutinizing the legislation for flaws which would make the law over-reaching, over-inclusive, designed with animus for a particular minority, or unduly burdensome to a particular minority.

Part II begins by laying out the historical and jurisprudential background of the current state statutes. Part III discusses the recent approaches taken by state lawmakers addressing potential conflicts between religious freedom and marriage equality. Part IV analyzes existing proposals to address the issue, beginning with how current theorists have viewed the dichotomy of religious freedom regarding same-sex marriage and freedom. Here, the Note explains why existing studies do not offer enough guidance for states seeking to reconcile the apparent tensions between marriage and religion. Part V draws from international examples of how other countries have adjusted to same-sex marriage while still accommodating religion as guidance for the doctrinal analysis. Part VI will provide a doctrinal test that courts can apply when determining if state legislation in the United States is a valid protection of religious freedom, while still protecting rights for same-sex couples to marry. The doctrinal test specifically

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state-religious-freedom-restoration-act-legislation.aspx; *Which U.S. States Have Passed Religious Laws?,* BBC (Apr. 7, 2016), http://www.bbc.com/news/world-us-canada-35990353.

6. *See* Koppelman, *supra* note 3; James M. Donovan, *Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples*, 49 LOY. L.A. L. REV. 39 (2016); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) [hereinafter Laycock, *Culture Wars*]; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274 (2010).

7. *See* DOUGLAS LAYCOCK, ET AL., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008) [hereinafter LAYCOCK, EMERGING CONFLICTS]; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206 (2010); Koppelman, *supra* note 3.

looks at whether a law is over-inclusive, over-reaching, unduly burdensome, or written with particular animus. Part VII provides a brief conclusion.

II. HISTORY OF LGBT RIGHTS AND RELIGIOUS FREEDOM

A. Culture Wars

Obergefell marks a strong "victory" for LGBT citizens and supporters but a potential for great concern and uncertainty since the Court's decision did not resolve how conflicts between religious objections and the right to marry should be resolved.[8] *Obergefell* emphasizes growing support for marriage equality and increasing tolerance for same-sex marriage.[9] Nevertheless, opposition to same-sex marriage is far from a distant memory.[10] According to Pew Research Center, in 2001, 57% of Americans opposed same-sex marriage, while today that number has decreased to 32%.[11] In 2001, a mere 35% of the US population supported same-sex marriage, but as of 2017 that number has jumped to 62%.[12] While the numbers may imply that post-*Obergefell* LGBT citizens are no longer at risk of public disapproval or discrimination, the 32% opposition still poses a risk to LGBT rights if protections are non-existent. Further, religious citizens deserve a level of protection for their beliefs in a democratic society. Accordingly, it is the responsibility of the federal government and the state governments to continue to recognize the values of a large portion of the population, the religious, and ensure compromise is reached to protect that section of society's rights, while still honoring the right for same-sex couples to get married.

Currently, opposition is present in the public as LGBT citizens are not included in anti-discrimination laws nationwide.[13] Until equal protections are granted, it is the job of the courts to ensure a modus vivendi that provides for the rights of all parties. This Note proposes the test courts can apply to legislation designed to protect

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8. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

9. *Id.*

10. *See* Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), http://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html?_r=0.

11. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/.

12. *Id.*

13. *See State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURE (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

religious or marriage equality rights with an aim at equity for both parties in light of an arguably temporary conflict. This is not a permanent problem; in fact, some religious sects have begun to embrace same-sex married couples and condone both the wedding services and the continued commitment the couples' vow to hold in a fashion similar to that of opposite-sex couples.[14] However the religious teachings which condemn homosexuality are permanently codified in the ancient texts and regardless of how much the opposition may dwindle, there is still a likelihood that some people will fervently believe homosexuality is a sin.[15] We must then provide a society in which coexistence is possible.[16] Any successful balance must begin with assessing the current constitutional framework before setting a consistent framework for equality. The Note turns to this next.

B. The Obergefell Holding and Religious Freedom

The Court in *Obergefell* extended the right to marry to same-sex couples as a fundamental right under the Due Process Clause.[17] The Court relied on four principles in reaching its decision: (1) personal choice and individual autonomy; (2) the importance and weight of the two-person union marriage creates; (3) values of family and childrearing; and (4) the necessity of marriage to keep societal order.[18] The Court in *Obergefell* determined that the Constitution does not permit a state to bar same-sex couples from marriage on the same terms as opposite-sex couples.[19]

However, in determining that same-sex couples should share in the right to marriage, the Court affirmed protection for religious followers by stating that "those who adhere to religious doctrines, may continue to advocate . . . [that] same-sex marriage should not

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14. David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/;
see also GAYCHURCH.ORG, https://www.gaychurch.org/ (last visited Apr. 13, 2018).

15. Masci & Lipka, *supra* note 14.

16. This line of argument is referred to as "live-and-let-live." Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015); *see also* Laycock, *Culture Wars, supra* note 6, at 879 (noting "[t]here is no apparent prospect of either side agreeing to live and let live.").

17. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

18. *Id.* at 2599–601.

19. *Id.* at 2607.

be condoned."[20] The *Obergefell* Court provided that the First Amendment ensures religious believers are still protected when teaching their principles and honoring the deep aspirations they have long revered, and that those who support same-sex marriage may "engage those who disagree . . . in an open and searching debate."[21] In his dissent, Chief Justice Roberts aptly points out the tension that *Obergefell* created when he said "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage."[22] The hard questions that Chief Justice Roberts mentioned have already begun to play themselves out before the judiciary, but at the same time, the State legislators have added further complications by proposing new legislative protections for LGBT citizens and citizens with religious objections.[23] Many of these conflicts arise because of statutory protections for religious liberty, including the federal Religious Freedom Restoration Act.[24] The Note next evaluates how these statutes have reshaped the legal landscape.

C. Religious Freedom and the Federal Religious Freedom Restoration Act

Religious freedom is an important aspect of the American tradition, but it is not without limitations. As Nancy Knauer has written: "Whereas freedom of belief is said to be absolute, religiously motivated actions (or inaction) are subject to secular regulation."[25] Conversely, religious belief or exercise cannot form a blanket statement protection in light of potential discrimination that it may condone.[26] Freedom of religion was designed to protect rights such as worship, prayer, and congregation as a community both in public and in private.[27]

The Supreme Court first dealt with the complex and ambiguous difference between unrestricted religious belief and occasionally limited religious action in the 1878 decision of *Reynolds v. United States*.[28] In *Reynolds,* the Court invalidated a religious exercise

20. *Id.*
21. *Id.*
22. *Id.* at 2625 (Roberts J., dissenting).
23. *See Legislation Affecting LGBT Rights Across the Country,* ACLU, https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country (last visited Apr. 13, 2018).
24. 42 U.S.C. § 2000bb(a)(3) (1993).
25. Knauer, *supra* note 3, at 760 (citing Emp't Div. v. Smith, 494 U.S. 872, 879 (1990)).
26. *Id.*
27. JOHN WITTE JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 41–62 (4th ed. 2016).
28. Reynolds v. United States, 98 U.S. 145 (1878).

defense against anti-bigamy laws holding that to allow such sweeping protection would "be to make . . . religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[29] In 1963, the Court created the "compelling interest" test in *Sherbert v. Verner*.[30] Under this test, government action violated the Free Exercise Clause if it burdened an individual's exercise of religion and the government failed to show the action was narrowly tailored to further a compelling state interest.[31] Yet in 1990, the Court overturned the *Sherbert* decision and re-affirmed the *Reynolds* holding in *Employment Division v. Smith*.[32] The Court held in *Smith* that the Free Exercise Clause, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[33] Further, such a law of general applicability must only satisfy a rational basis inquiry even if the law has the incidental effect of burdening a particular religious practice.[34]

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to reinstate the *Sherbert* "compelling interest" test and require strict scrutiny whenever a governmental action "substantially burden[s] religious exercise."[35] Originally, the Federal RFRA applied to both federal and state action, but was limited to just federal action in the 1997 case *City of Boerne v. Flores*.[36] Consequently, twenty-one states have enacted their own RFRAs[37] with some merely mimicking the Federal RFRA's "compelling interest" test, while others extend coverage under the act in controversial ways.[38] Part II discusses differences in State RFRAs as well as other legislative initiatives aimed at protecting religious freedom as they relate to same-sex marriage. The next section discusses recent case law in which courts attempted to

29. *Id.* at 167.
30. Sherbert v. Verner, 374 U.S. 398 (1963).
31. *Id.* at 406.
32. Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act, 42 U.S.C. §2000bb (1993).
33. *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263 n. 3 (1982)).
34. *See id.* at 888–90; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
35. 42 U.S.C. § 2000bb(a)(3) (1993).
36. City of Boerne v. Flores, 521 U.S. 507 (1997).
37. *State Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURE (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.
38. *See, e.g.,* Indiana Religious Freedom Restoration Act, IND. CODE. § 34-13-9 (2015).

balance the rights of religious freedom and same-sex protection in practice, as well as the few cases in which the courts have addressed legislation focused on striking this balance.

D. Balancing Freedom of Religion and LGBT Protections

While the legislative proposals to balance these rights are a recent development, courts have been addressing concerns between these opposing parties for many years now. Through the judicial branch, principles of equality supported by state anti-discrimination laws have been interpreted to prevent places of public accommodation from denying same-sex couples services when such services would not reasonably be seen as an affirmation on the part of the service provider. This is evident in cases such as *Elane Photography LLC v. Willock*,[39] *Sweetcakes by Melissa*,[40] and *Craig v. Masterpiece Cakeshop*.[41] The underlying principle in these cases is equality in for-profit services, regardless of the size of the company. While these cases touch on difficult questions of constitutional protections, such as free exercise, freedom of speech, and concerns of compelled speech and conduct, the courts typically resolve each case in an ad-hoc way, creating more questions of contradiction and unresolved tension than the court answers.

As detailed below, the approaches thus far are largely inconsistent, with each court deciding the merits and outcome of the case with subjective resolve of constitutional protection conflicts, without concluding the limitations the decision would have, or addressing the potentially valid claims many religious defendants could bring. This is largely because the courts are unclear about the role religious beliefs should play in the commercial context, especially with small businesses. This section outlines the complexities of these cases, and the gaps these cases create.

One important note to make before discussing the cases is that the Supreme Court has concluded for-profit companies are capable of First Amendment religious protections.[42] This furthers the need for a balance between religious rights and same-sex marriage based on the valid standing that companies must assert religious

39. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

40. *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).

41. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) *cert. granted sub nom*, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (U.S. June 26, 2017) (No. 16-111).

42. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

protection regardless of the for-profit nature of their business. This of course is not an unlimited defense, as *Hobby Lobby* asserts, rights of religious freedom are still held to the compelling government interest test.[43] But it is arguably problematic to extend the holding in *Hobby Lobby* to the conflicting rights paradigm because discrimination poses a great threat to society in the form of minority-specific dignitary harm, which should outweigh the availability of less restrictive means of achieving governmental interests of equal protection and nondiscrimination. In other words, it is harder, if not impossible, to find a truly less restrictive means of equal protection in public accommodations except to enforce anti-discrimination laws across the board. This conflict is further explained in Part VI below.

Elane Photography is one of the most cited cases on the issue of balancing rights. In *Elane Photography*, a New Mexico photographer refused to photograph a same-sex commitment ceremony.[44] The couple sued claiming the photographer's refusal was a violation of the New Mexico Human Rights Acts (NMHRA).[45] The court held that Elane Photography was not exempt from public accommodation laws, including NMHRA, and that the act of refusing to photograph the ceremony on the fact that the couple was same-sex violated the law.[46] Further, the court determined NMHRA did not violate Elane Photography's first amendment right of religious exercise.[47] New Mexico's RFRA was inapplicable in this case because the government was not a party.[48] Further, the court reasoned that Elane Photography was allowed to post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they must still comply with applicable antidiscrimination laws.[49] What appears concerning in the *Elane Photography* opinion is the answer provided for the metaphor of a Klu Klux Klan (KKK) photographer and an African-American customer that Elane Photography argued in furtherance of their defense.[50] The court reasoned that if Elane Photography were permitted an exemption from the NMHRA law of discrimination

43. *Id.* at 2759.
44. *Elane Photography*, 309 P.3d at 59.
45. *Id.* at 60.
46. *Id.* at 77.
47. *Id.* at 77.
48. *Id.* at 77.
49. *Id.* at 70.
50. *Id.* at 72.

against LGBT people, then a KKK photographer could be permitted the same exemption, and that this result would be in desolation of all anti-discrimination protections.[51]

But this analogy ignores the fact that Elane Photography's claim is based on conflicting protected class statuses, not merely viewpoint disagreement. The court appropriately points out that the KKK is not a protected class. However, the court seems to discredit Elane Photography's protected-class status—as RFRA and other statutes make clear, religious freedom enjoys specific protections in American law that could apply to a group like the KKK.[52] While the outcome in the case is still justified on other grounds, this specific line of reasoning downplays the religious protected-class status that Elane Photography claimed. In this way, the court ignored a question mostly unresolved in current jurisprudence: How do we balance the interests of those in these two conflicting protected classes in the public sphere, where most transactions occur based on commercial interaction?

A similar controversy arose in Oregon in 2013 when a bakery refused to make a cake for a same-sex couple.[53] The owners of the bakery, Sweetcakes by Melissa claimed baking a wedding cake for a same-sex couple would violate their religious beliefs; however, the administrative law judge who heard the case disagreed and required a payment of $135,000.[54] The judge determined that Sweetcakes was not a religious institution, and thus, was not exempt from O.R.S. § 659A.409, Oregon's anti-discrimination statute.[55] O.R.S. § 659A.409 lists sexual orientation as a protected class and also prohibits places of accommodation from advertising that they intend to refuse service on the basis of any protected class.[56] Further, the court reasoned that providing a cake to all customers was not automatically evidence that the bakery condoned the behavior or beliefs of customers, because the bakery could place a sign inside the shop informing customers that their services did not condone any message the consumers may hold.[57] Lastly, in *Craig v. Masterpiece Cakeshop, Inc.* the Colorado Court of Appeals addressed a similar resistance by a bakery to provide a cake for a same-sex couple.[58] The court in *Craig* relied on the holding in *Elane*

51. *Id.*
52. *See id.*
53. *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).
54. *Id.* at 1.
55. *Id.* at 62.
56. OR. REV. STAT. § 659A.409 (2015).
57. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 288 (Colo. App. 2015).
58. *Id.* at 276–77.

Photography to assert that Masterpiece was required to adhere to neutral laws of general applicability regarding discrimination, but that they were still able to post a sign stating they did not condone the message of any customer.[59] The court concluded that providing expressive services was not a violation of First Amendment freedom of speech because a reasonable person would not interpret providing a product or service as condoning the message of the customer.[60]

However, the deeper concern in this case is the many contradictions that courts create or ignore resolving when attempting to determine a valid outcome. In *Masterpiece*, the court vaguely undermines the decision it ultimately reached when stating "that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated."[61] The court refuses to address this potential.

The question then becomes: what circumstances would validate a compelled speech First Amendment defense? Would a bakery be able to argue a valid First Amendment defense of its religious refusal if the customers requested a cake that stated "support gay marriage"?[62] There is no clear answer in the current case law. *Masterpiece* suggests one solution: look at the message or content written on a cake.[63] However, permitting a claim of compelled speech based on the content of the cake would create a complicated and arbitrary analysis for courts. Nevertheless, *Masterpiece* correctly recognizes that the courts should not always strike a balance that disfavors religious objectors. Unfortunately, neither state religious-liberty legislation, nor cases like *Masterpiece,* offer real guidance about when or how such a balance should be struck.

Perhaps, the best-known attempt to balance the competing interests in cases like *Masterpiece* came soon after the *Obergefell* decision, when a clerk in Kentucky refused to sign marriage licenses for same-sex couples.[64] The clerk subsequently faced imprisonment for refusing to perform the duties of her job. In the suit brought against the clerk, Kim Davis, the court found that the requirement to sign marriage certificates was merely a part of her job and not a

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59. *Id.*
60. *Id.* at 287.
61. *Id.* at 288.
62. *See infra* Part V (Northern Ireland's gay cake controversy).
63. *See Masterpiece*, 370 P.3d at 284–85.
64. *See Kim Davis Stories*, HUFFPOST, https://www.huffingtonpost.com/topic/kim-davis (last visited Apr. 13, 2018); *see Kim Davis Stories*, ABC NEWS, http://abcnews.go.com/topics/news/us/kim-davis-rowan-county.htm (last visited Apr. 13, 2018).

substantial burden of her religious freedom under the First Amendment or Kentucky's RFRA.[65] In reaching this decision, the court found that the state was not requiring Davis to condone same-sex marriage, nor did the state restrict Davis's ability to engage in a variety of religious activities such as weekly service, prayer, and believing firmly that marriage is between one man and one woman.[66] However, the court reasoned that Davis's "religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk."[67] After the case, Kentucky passed a new law removing the requirement that a clerk sign the marriage license.[68]

At first, Davis's case seems to offer a satisfactory resolution to the conflict embodied in cases like *Masterpiece* and *Elane Photography*: religious objectors cannot be excused from official duties that they took on as a part of a job. In contrast, Davis even held a different kind of job; she was a public servant who took an oath to carry out certain responsibilities, whereas the baker or photographer in *Masterpiece* or *Elane Photography* merely worked in a private business. Nevertheless, there is no clear limit to the idea of duty articulated in Davis's case. Does a photographer have a duty to comply with state civil rights laws? If there are exceptions to this responsibility, where should religious objectors—or courts—look to define them? While the court may have satisfactorily resolved the *Davis* case, the decision did not deliver a doctrinal approach that can apply fairly across different cases.

While the courts have appeared to favor "neutral" application of equal protection, the above controversies and the decisions of the state courts in resolving these cases clearly highlight the inconsistent and incomplete nature of this debate. Religious freedom deserves protection just as much as same-sex rights to marriage when both are grounded in constitutional rights as outlined in Supreme Court case law, but the decisions and statutes balancing these interests have taken a rather subjective and inconsistent approach. The next section highlights recent judicial interpretations of legislative proposals, which should provide more consistent attempts at balancing these two protected classes and their rights. However, as concluded below, the resolution presented is insufficient. The courts thus far have not struck a fair balance, partially because of the interpretation of courts in cases like *Elane Photography* and *Masterpiece*, or because of an incomplete analysis

65. Miller v. Davis, 123 F. Supp. 3d 924, 943 (E.D. Ky. 2015).
66. *Id.* at 944.
67. *Id.*
68. KY. REV. STAT. ANN. § 402.100(1)(d) (West 2016) *amended by* S.B. 216, 2016 Leg., Reg. Sess. (Ky. 2016) (removing the signature requirement of section (1)(d)).

of the First Amendment jurisprudence in these recent controversies. For this reason, it is the responsibility of the legislature to implement laws properly balancing these rights, and the court's role to affirm these initiatives are constitutionally valid. To do so, the courts need a definitive, impartial, and consistent doctrinal approach.

E. Judicial Responses to Legislative Initiatives

There have been few cases thus far in which courts address legislative proposals addressing same-sex marriage protection and religious freedom rights; however, this field will likely grow due to the persistent tension that exists and the novel nature of this problem. However, in developing an adequate doctrinal analysis, we can look to the few cases in which the courts have addressed state legislative action and the outcome of these controversies.

Three cases define the current framework for an analysis of religious protection legislation, specifically *Romer,*[69] *Windsor*, [70] and most recently *Barber*.[71] In *Romer*, the Court addressed a pre-enforcement challenge to Colorado's Amendment Two which invalidated local government ordinances, including LGBT people in anti-discrimination policies, and precluded local government from adding LGBT people to protections moving forward.[72] The Court determined the amendment was designed with animus to exclude LGBT people from equal protections of the law.[73] In *Windsor*, the court determined that laws motivated by "an improper animus" require special scrutiny.[74] The *Windsor* Court focused on the "design, purpose, and effect" of the challenged law in determining the validity.[75] In *Windsor*, the Court was faced with a challenge of the Defense of Marriage Act (DOMA) and determined that the principal purpose of the law was to impose inequality and place same-sex couples in second-tier relationships.[76] The Court struck down the federal statute because the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence."[77]

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69. Romer v. Evans, 517 U.S. 620, 624 (1996).
70. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
71. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016).
72. *Romer*, 517 U.S. at 624.
73. *Id.* at 632.
74. *Windsor*, 133 S. Ct. at 2693.
75. *Id.* at 2689.
76. *Id.* at 2694.
77. *Id.* at 2693.

Lastly, in *Barber* the court applied *Romer* and *Windsor* to determine that the motivation of Mississippi HB 1523 was to single out LGBT and unmarried people for unequal treatment under the law.[78] Of particular interest in this case was the court's holding that HB 1523 discriminated not only against LGBT citizens, but that the bill discriminated against religious believers who may hold beliefs counter to those protected in the bill.[79] Such a distinction between religious beliefs that are protected and those that are not is unconstitutional.[80] A state is not permitted to establish preference for certain religious beliefs over others.[81] HB 1523 was struck down due to its preference for the religious belief that marriage must be between opposite sexes and that sexual intercourse is reserved to such a union.[82] The focus in *Barber* then shifted from a question of potential discrimination against same-sex couples, where little case law exists, to a question of potential Establishment Clause concerns, a field with ample case law guidance.[83] In determining the invalidity of Mississippi HB 1523, the court in *Barber* focused on the beliefs the legislature intended to protect and concluded that religious protections written in a way that limits coverage to only certain religious beliefs created a violation of the Establishment Clause.[84]

The *Elane Photography, Masterpiece,* and *Sweetcakes by Melissa* cases occurred in states that had already passed legislation to include sexual orientation in anti-discrimination clauses. However, in states that do not include sexual orientation as a protected class, which is currently twenty-eight states[85], there are no legal grounds for same-sex couples who are denied necessary services or goods to bring a claim. Thus, the risk to same-sex couples is that when states without sexual-orientation protection enact religious-protection laws, the scale may be tipped in a way which creates state-condoned discrimination against LGBT citizens—similar to what occurred with Mississippi HB 1523 in *Barber* where the court determined protection for religious belief was already sufficient under existing case law and that HB 1523 was constitutionally invalid.[86]

The purpose of this note is to find a middle-ground solution that dignifies both same-sex rights to marriage and rights to religious

78. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017) (reversing the preliminary injunction and rendering a dismissal for want of jurisdiction).

79. *Id.* at 716.

80. *Id.* at 717.

81. U.S. CONST. amend. I.

82. *Barber*, 193 F. Supp. 3d at 719.

83. *Barber*, 193 F. Supp. 3d at 716.

84. *Id.*

85. *State Public Accommodation Laws*, *supra* note 13.

86. *Barber*, 193 F. Supp. 3d at 723.

freedom through legislative initiatives. As Part III shows, such a solution will take on even more importance as states continue to pass and enforce legislation on the subject. These initiatives are the ones courts will likely address in the near future, but also provide the foundation for further initiatives that the court may need to address. Thus, an analysis of these laws will provide affirmation of how the doctrinal analysis in this Note can serve a valuable role in developing a consistent approach for many years to come.

III. CURRENT STATE OF AFFAIRS REGARDING LGBT LEGISLATION AND DISCRIMINATION

A. Sexual Orientation as a Protected Class

Currently, twenty-two states include sexual orientation as a protected class in non-discrimination laws relating to employment, housing, and nondiscrimination.[87] Utah prohibits discrimination on the basis of sexual orientation in employment and housing, but specifically excludes public accommodation.[88] The challenge in mitigating conflict between the rights to same-sex marriage and religious freedom is that the discussion may not even be occurring in states which do not include protection for sexual orientation. Cases such as *Elane Photography* arise from claims of discrimination supported by a statute protecting LGBT citizens in that state. However, in states without anti-discrimination coverage for sexual orientation[89] there is no requirement that a complaint of discrimination based on sexual orientation in public accommodations even be heard. Nevertheless, in the aftermath of *Obergefell,* state laws may conflict with federal constitutional protections. The next section reviews recently passed and pending laws, some of which serve to protect religious communities, while others may appear to be invalid based on Fourteenth Amendment, equal protection grounds. Given the wide range of laws on the subject, it is more important for the courts to consistently distinguish those laws that respect both competing interests from those laws that do not.

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87. *Non-Discrimination Laws,* MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Apr. 13, 2018); *Cf. State Public Accommodation Laws*, *supra* note 13.

88. UTAH CODE ANN. § 34A-5-106, § 57-21-5 (West 2016).

89. Twenty-seven states do not include sexual orientation as a protected class for employment, housing, and/or public accommodation. *See Non-Discrimination Laws*, *supra* note 87.

B. Religious Freedom Bills

The legislative initiatives of more traditionally conservative states in the union have gained a large following in the news lately regarding controversial policies towards LGBT citizens and rights to self-identify for public bathroom use, as well as marriage.[90] States, such as North Carolina and Georgia, serve as prime examples of how the public on a national level has quickly shifted from being against same-sex marriage to supporting it as a majority.[91] In light of the potentially anti-LGBT bills proposed by both states, the media as well as celebrities, politicians from other states, and a large amount of the general public have exclaimed outrage and dissatisfaction.[92] The reality is that the over-expansive anti-LGBT laws proposed by states, such as Georgia and Mississippi, have not come to fruition (or were thwarted soon after passing)[93], but other states have successfully passed similar religious belief protection bills.[94] Some are valid protections for religious people, some are redundant with current First Amendment protections, but some could lead to massive gaps in protection for same-sex couples and their right

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90. *See Blacklash Grows Against N Carolina's Discrimination Law*, BBC (Mar. 30, 2016), http://www.bbc.com/news/world-us-canada-35928098; *Pearl Jam Cancel North Carolina Concert Over HB2 Law*, BBC (Apr. 19, 2016), http://www.bbc.com/news/world-us-canada-36079415; *NBA Moves North Carolina All-Star Game Over 'Bathroom Bill'*, BBC (July 22, 2016), http://www.bbc.com/news/world-us-canada-36863216; Steve Benen, *NCAA Joins Backlash Against North Carolina's Anti-LGBT Law*, MSNBC (Sept. 13, 2016, 11:02 AM), http://www.msnbc.com/rachel-maddow-show/ncaa-joins-backlash-against-north-carolinas-anti-lgbt-law.

91. Merrit Kennedy, *Time Warner, Others Join Disney In Opposing Georgia's 'Religious Liberty' Bill*, NPR (Mar. 24, 2016, 2:14 PM), http://www.npr.org/sections/thetwo-way/2016/03/24/471711888/time-warner-others-join-disney-in-opposing-georgias-religious-liberty-bill; Timothy Holbrook, *Georgia, North Carolina Bills Are About LGBT Discrimination. Period.*, CNN (Mar. 28, 2016, 11:54 AM), http://www.cnn.com/2016/03/25/opinions/georgia-religious-freedom-law-threatens-lgbt-rights-holbrook/.

92. Jackie Wattles, *Georgia's 'Anti-LGBT" Bill: These Companies Are Speaking Out the Loudest*, CNN MONEY (Mar. 25, 2016, 11:21 AM), http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill/; Mollie Reilly, B*usinesses Are Joining the Fight Against North Carolina's Anti-LGBT Law*, HUFFPOST, (Mar. 24, 2016, 4:52 PM), http://www.huffingtonpost.com/entry/businesses-nc-anti-lgbt law_us_56f42b8ee4b0c3ef52184903.

93. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016); Madison Park, *Judge Blocks Controversial Mississippi Law*, CNN (July 1, 2016, 7:01 AM), http://www.cnn.com/2016/07/01/us/mississippi-religious-freedom-law-blocked/; Ralph Ellis & Emanuella Grinberg, *Georgia Gov. Nathan Deal to Veto 'Religious Liberty' Bill*, CNN (Mar. 28, 2016, 5:46 PM), http://www.cnn.com/2016/03/28/us/georgia-north-carolina-lgbt-bills/.

94. *See Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, https://www.aclu.org/other/anti-lgbt-religious-exemption-legislation-across-country#cws16 (last visited Apr. 13, 2018).

to the benefits of marriage. The following is a brief analysis of the major laws passed that factor into this debate.

1. Variances in State Religious Freedom Restoration Acts (RFRA)

a. Texas

Texas's protective legislation for religious freedom carefully addresses the issue with clear and limited definitions. According to the law, "'free exercise of religion' means an act or refusal to act that is substantially motivated by sincere religious belief."[95] The act holds that "a government agency may not substantially burden a person's free exercise of religion"[96], and should such a burden occur, the existence can be used as a defense in any judicial proceeding.[97] Texas's RFRA provides that the law may not be used to justify or condone civil rights violations, but that the act is fully applicable to claims regarding employment matters for religious organizations.[98] Lastly, the act limits the category of "religious organization" to organizations that primarily function for religious purposes and do not engage in activities that would disqualify it from tax exemption.[99] Most RFRAs largely echo the federal RFRA; however, Texas goes beyond the federal RFRA by including the explicit language prohibiting the act's use as a mechanism for violating civil rights law.[100]

b. Indiana

Indiana's RFRA is a prime example of a RFRA that exceeds the intended scope of the federal RFRA.[101] Indiana only recently passed its RFRA during the 2015 legislative session, and reactions have been volatile due to the overreaching and broad nature of the Act.[102] Unlike Texas, Indiana does not include language prohibiting the use of its RFRA as a defense against civil rights cases nor does it limit

95. Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (West 2017).
96. *Id.* at § 110.003.
97. *Id.* at § 110.004.
98. *Id.* at § 110.011(a)–(b).
99. *Id.* at §110.011(b).
100. *Id.* at § 110.011(a)–(b).
101. S.B. 101, Ind. Reg. Sess., 119th Gen. Assemb. (Ind. 2015).
102. Ed Payne, *Indiana Religious Freedom Restoration Act: What You Need to Know*, CNN POLITICS (Mar. 31, 2015, 12:53 PM), http://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/.

protection to religious entities.[103] Indiana's RFRA provides protection for individuals, in addition to religious organizations, when government action substantially burdens exercise of religion.[104] In essence, Indiana's RFRA creates the type of unlimited and lawless claim of religion the Court tried to prevent in *Reynolds*.

2. Pastor Protection Bills

a. Texas

During the 2015 legislative session, Texas passed a "pastor protection act."[105] This act protects religious organizations, organizations controlled by religious organizations, and individuals employed by religious organizations from being required to solemnize any marriage or provide "services, accommodations, facilities, goods, or privileges" related to the marriage, if doing so would violate a deeply held religious belief.[106] While the statute does not define religious organizations, the Federal government defines religious organizations as churches, nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.[107] Accordingly, Texas's "pastor protection act" is limited to religious entities and likely would not result in LGBT discrimination in public accommodations.

b. Florida

Florida passed a "pastor protection act" during the 2016 regular session similar to the one in Texas.[108] H.B. 43 creates § 761.061, to provide protections for certain individuals with religious opposition to providing services, accommodations, facilities, goods, or privileges related to same-sex marriage due to a deeply held religious belief.[109] The main difference between Florida's "pastor protection act" and Texas's is that Florida's includes religious

103. S.B. 101, Ind. Reg. Sess., 119th Gen. Assemb. (Ind. 2015).

104. IND. CODE ANN. § 34-13-9-7 (West 2017).

105. "Pastor Protection Act" is the informal name of the statute. S.B. 2065, 84th Leg. Sess. (Tex. 2015) (codified at TEX. FAM. CODE ANN. §§ 2.601-2.602 (West 2017)).

106. *Id.*

107. I.R.S. Tax Pub. No. 1828 (Rev. 8), 501(C)(3) TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 1 (2015).

108. H.B. 43, 2016 Reg. Sess. (Fla. 2016).

109. FLA. STAT. § 761.061 (2016).

corporations[110], a religious fraternal benefit society[111], as well as religious schools and educational institutions.[112]

c. Pending Pastor Protection Bills

Mississippi, New Jersey, and Ohio have all introduced pastor protection bills; however, there is no update on the status of such initiatives.[113] The bills, as they were first introduced, largely reflect the Texas framework. If these bills return and follow the format of Texas, they would be permissible religious protection.

3. First Amendment Defense Acts

In 2015, the First Amendment Defense Act (FADA) was proposed in the U.S. House.[114] While it did not gain much traction during the 2016 or 2017 sessions, the legislation will likely be up for consideration again during the 2018 session and President Donald Trump has agreed he would sign the bill should it make it to his desk.[115] The FADA prohibits federal discriminatory action against a person who acts on the belief that marriage is between one man and one woman, and that sexual relations are to be reserved for such a union.[116] The FADA defines discriminatory action as government action to alter federal tax treatment, require a tax, penalty, or payment, or deny, delay, or revoke certain tax exemptions and/or deduction of any charitable contribution.[117] Discriminatory action also includes government action to "deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person" or "withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit

110. *Id.* at § 761.061(c).
111. *Id.* at § 761.061(d).
112. *Id.* at § 761.061(e).
113. *Past Anti-LGBT Religious Exemption Legislation Across the Country*, *supra* note 94.
114. H.R. Res. 2802, 114th Cong. (2016).
115. Several websites and newspapers linked to Donald Trump's press release supporting FADA, however the White House demonstration has deleted the original source. Julie Moreau, *GOP Reintroduces Bill Pitting 'Religious Freedom' Against Gay Marriage*, NBC NEWS (Mar. 12, 2018, 1:54 PM), https://www.nbcnews.com/feature/nbc-out/gop-reintroduces-bill-pitting-religious-freedom-against-gay-marriage-n855836; *see also* Mary Emily O'Hara, *First Amendment Defense Act Would be 'Devastating' for LGBTQ Americans*, NBC NEWS (Dec. 20, 2016, 3:46 PM), https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416.
116. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).
117. *Id.*

program."[118] In 2016, Georgia, Hawaii, Illinois, Oklahoma, Washington, and Wyoming proposed State FADAs which precisely model the Federal FADA.[119] While none of these initiatives passed, they may receive increased attention during the Trump administration and are worth discussing here. On both a Federal and State level, the FADA has worrisome Establishment Clause issues. By recognizing the beliefs of one religion sect (the idea that marriage is strictly a one female, one male engagement, and that sexual interactions are reserved purely to such form of commitment), the governmental entity would be prioritizing religions which hold these beliefs over ones which do not. In this sense, the FADA runs into the same issues that HB 1523 faced in *Barber*.

4. Other Religious Freedom Bills

Ohio introduced a bill that specifically provided protections for businesses that refused to provide goods or services for same-sex marriage ceremonies on the grounds of conscience and religious freedom.[120] This bill did not limit the scope to small businesses, but covered all types of businesses.[121] Kansas passed a bill related to student associations, which prohibited postsecondary educational institutions from denying benefits to religious student associations on the grounds that the religious student association requires membership to be contingent upon religious beliefs.[122] Tennessee passed a bill protecting therapists and counselors, who refuse to provide service on religious grounds, from state action.[123] This bill does not limit the religious objection to the issue of same-sex marriage, and is in direct conflict with the American Counseling Association code of ethics.[124] Mississippi successfully passed H.B. 1523, but the law was blocked by a federal judge on grounds that the measure in its current form was "state-sanctioned discrimination"[125] The law was found to be a violation of the equal protections clause of the Fourteenth Amendment, and declared a form of official preference for certain

118. *Id.*
119. *Past Anti-LGBT Religious Exemption Legislation Across the Country*, *supra* note 94.
120. H.B. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).
121. *Id.*
122. S.B. 175, 2016 Leg. Sess. (Kan. 2016).
123. H.B. 1840, 109th Reg. Sess. (Tenn. 2016).
124. *See* 2014 ACA CODE OF ETHICS, AM. COUNSELING ASS'N 5 (2014), https://www.counseling.org/resources/aca-code-of-ethics.pdf (last visited Apr. 13, 2018).
125. Park, *supra* note 93.

religious beliefs over others, violating the First Amendment.[126] However, the judgment was overruled on appeal due to a finding that the plaintiffs lacked standing in the original suit.[127] Thus, the law went into effect in October 2017.[128] The case has since been appealed to the Supreme Court, which has yet to declare whether it will be heard.[129]

While some of these legislative proposals may be invalid and unduly burdensome, there will always be a need for religious protection. Equally, there must be a balance between conflicting rights. Other scholars have recognized this need for an approach that balances the sincere beliefs of religious objectors and the civil rights of LGBT individuals. Part IV looks at several of the key scholarly solutions proposed to this dilemma, while Part V considers how other countries have approached the issue. As Parts IV and V argue, many of these approaches have promise, but they fail to offer clear guidance to courts that will have to address the enforcement of state laws in the near term.

IV. THEORIES FOR MODUS VIVENDI

This Part explores current theories for resolving the perennial tension between same-sex marriage rights and religious freedom through a discussion of proposed solutions by U.S. scholars. This Part also offers a glance at solutions reached by countries similar to the U.S. which have already been through the same-sex marriage challenge. Other scholars provide significant guidance for creating a clear framework for balancing the discussed competing rights at stake, but each theory on its own remains insufficient. Further, the differences between U.S. rights of religion and those of the countries that have traversed this road before clearly prove these international approaches would be insufficient to remedy the U.S. problem.

This Part begins with a survey of approaches proposed by other

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126. *Id.*

127. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).

128. Geoff Pender, *Court Denies Rehearing, Clears HB 1523 to Take Effect*, CLARION LEDGER (Oct. 1 2017, 2:57 PM), http://www.clarionledger.com/story/news/politics/2017/10/01/court-denies-rehearing-clears-hb-1523-take-effect/721369001/.

129. Emily W. Pettus, *U.S. Supreme Court Asked to Block Mississippi LGBT Law*, CLARION LEDGER (Oct. 10, 2017, 2:07 PM), http://www.clarionledger.com/story/news/2017/10/10/us-supreme-court-mississippihb-1523/751097001/. However, the Supreme Court is set to rule on the *Masterpiece* case this term. *See* Masterpiece Cakeshop, Ltd. v. Co. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ (last visited Apr. 13, 2018).

scholars, asking whether they can strike the kind of balance required by constitutional law in marriage cases, including extreme hardship, cost-distribution, and the conflicting rights assessment.

Next, this Part examines the strategies used in other nations to resolve similar struggles.

A. Exemptions Except in Extreme Hardship

Douglas Laycock, one of the most well-known authorities in the realm of religious freedom, asserts that conscientious objectors can refuse services when such services are readily available somewhere nearby.[130] Laycock insists that both sides should let the other live in peace and not demand limitations on their freedoms.[131] Further, Laycock holds that the dignitary harm to same-sex couples of being denied services is outweighed by the harm done to religious objectors forced to violate deeply held religious beliefs.[132]

Laycock suggests that exemptions for businesses should be granted with the stipulation that businesses intending to refuse services or goods to homosexual citizens announce the exclusion.[133] The idea behind this theory is twofold: first, that a free society should not force businesses to violate sincerely held beliefs, and second, that a free market will course correct – businesses which announce their exclusion will suffer the economic harm of appearing discriminatory. Laycock himself downplays the harms such signs could cause same-sex couples,[134] but other scholars are quick to draw comparisons between "heterosexuals only" and "whites only" signs.[135]

The idea of posting a sign outside is similar to the notion of a "color peopled not allowed" warning and runs counter to the entire purpose of anti-discrimination laws. Anti-discrimination law has important expressive, as well as practical, purposes. Carving out an exemption for same-sex couples seeking services would send a powerful message that their rights carry less weight than others do. Other scholars correctly point out the unconstitutionality of such blanket exemptions based on the currently undefined and potentially subjective character of the terms "substantial burden"

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130. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 200.

131. Laycock, *Culture Wars, supra* note 6, at 839.

132. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 198. *But see* Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Law*, 22 J.L. & POL'Y 705 (2014).

133. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 199.

134. *Id.* at 200.

135. *See* Lim & Melling, *supra* note 132, at 711–13; Donovan, *supra* note 6, at 110.

and "extreme hardship,"[136] as well as the impracticality as to how these exemptions would be implemented.[137] In the sphere of churches in their separate and private activities, exemptions are acceptable and historically granted. However, in public, religious beliefs which manifest themselves in action or inaction should be subject to the standards and policies of the law.

The courts in *Masterpiece, Elane Photography*, and *Sweetcakes by Melissa*, each noted that a reasonable customer would not assume that providing services to all customers, regardless of sexual orientation, is approval of same-sex marriage, but rather that such services are done in compliance with the law.[138] Thus, a sign stating what the courts above considered obvious would be unnecessary. Further, some scholars insist that exemptions open doors to larger acts of discrimination.[139] While the idea of exemptions seems like an easy solution, the grave damage of posting signs and the "slippery-slope" idea of exemptions, such as the ones Laycock proposes, make this argument an insufficient solution to the problem.

B. Distributing the Cost of Exemptions

Another theory regarding exemptions for religious beliefs is that a court should weigh each party's ability to distribute the cost associated with permitting the specific exemption. For example, when exemptions are made for religious opposition to a military draft, the burden that such an exemption creates is shifted to the government to draft someone else, so the burden is then shifted in a small quantity to all other potential draft candidates.[140] Laycock defines this theory by stating that "[t]he rise of one set of liberties threatens the decline of another, older set of liberties."[141] Nancy Knauer instead asserts that this conflicting rights paradigm, post-*Obergefell,* is actually an attempt by proponents of religious marriage exemptions to broaden the role of religious beliefs and

136. For an in-depth analysis of the short-comings of current and recently proposed religious exemption laws, see Case, *supra* note 16, 469–70 (insisting that the *Smith* decision was correct, the RFRA was a mistake, and religious exemptions are not in the tradition of American liberty).

137. *Id.* at 470.

138. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 287 (Colo. App. 2015); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).

139. *See* Donovan, *supra* note 6, at 110.

140. *Masterpiece*, 370 P.3d at 290.

141. Laycock, *Culture Wars*, *supra* note 6, at 840.

moral conviction in public life.[142] Permitting an exemption against serving LGBT people in the public sphere burdens a specific population, Knauer writes, often the same-sex couple, in a way that is unable to be spread.[143] The act of denying a same-sex couple permission to use a venue creates a heavy burden upon that one couple to locate a different venue that might be accommodating. Ira C. Lupu and Robert W. Tuttle further suggest that this burden shift includes a level of severe dignitary harm for the same-sex couple facing the denial, a reoccurring negative theme of permitting exemptions.[144]

An alternative discussed by some theorists to avoid the dignitary harm to same-sex couples, the burden to religious small-business owners, and the hefty price of litigation, would be to have states create a list of LGBT friendly providers (i.e. cake makers, photographers, therapist, adoption agencies) and disburse it amongst citizens.[145] This would avoid a situation in which an LGBT person is turned away and harm is brought upon either party in the situation.[146] However, the logistics of creating such a list raises concerns of practicality and creates a potential image of separation. Even further, the states that feel most fervently about a religious opposition to same-sex marriage would likely not create such a list. While these approaches could theoretically provide temporary resolution, the approaches are individually focused and would not produce a consistent approach or result.

C. Conflicting Rights Assessment

James Donovan suggests that when rights conflict, favor should be shown for the right which provides an unintentional conflict, over those which "overtly frustrate the rights of another."[147] In the example of a bakery, the customer who requests a cake does not know about the baker's religious belief, and thus is unintentionally obstructing the religious rights of the baker. However, when the baker refuses to provide the cake, that obstruction is intentional and thus, under Donovan's theory, the baker cannot claim the larger burden.[148] By its very nature, anti-discrimination legislation exists to prevent members of minority communities from becoming second class citizens. Thus, the above-mentioned approaches, while

142. Knauer, *supra* note 3, at 756.
143. *Id.* at 754.
144. Lupu & Tuttle, *supra* note 6, at 288–89.
145. Laycock, *Culture Wars*, *supra* note 6, at 840.
146. Lupu & Tuttle, *supra* note 6, at 283-84 nn.43–48.
147. Donovan, *supra* note 6, at 112.
148. *See id.*

providing a temporary fix for this perennial issue, fail to prevent a society in which same-sex couples may become second-class citizens or religious believers may become ostracized. Others, such as Knauer and Laycock, also mention these seemingly conflicted rights; however, theorists up until now have only addressed the issue from a hypothetical perspective. But now the dust is settling, *Obergefell* already happened, and we must press forward with a clear and consistent approach to the conflicting rights problem. The most logical place to start is by balancing state legislation to ensure both parties are afforded their rights and proper protections. Part V highlights international approaches to this issue in an effort to better support a U.S. solution that protects religious freedom and same-sex marriage rights simultaneously.

The U.S. scholarly proposals above provide theoretic piece-meal solutions to a complex and systematic problem. The theoretical nature of these proposals is due largely to the novelty of the same-sex right to marriage. Until now, scholars have mostly dealt with the constitutional issues at stake in such cases in the abstract, offering little to courts that are currently grappling with the questions studied here. Courts need a coherent, fair doctrinal approach in cases that pit same-sex marriage rights against religious freedom. Part V next considers whether other countries have found a solution that would help the courts develop such an approach.

V. MODELING U.S. SOLUTIONS THROUGH AN ANALYSIS OF INTERNATIONAL PRACTICES

The U.S. is not the first country to legalize same-sex marriage. The Netherlands, Denmark, Belgium, Canada, and Spain (among a larger list) have beaten the U.S. to legalizing same-sex marriage by over a decade.[149] These countries are known to be, in many senses, more liberal and progressive; however, even these countries faced criticism and backlash from religious citizens and churches and made some compromises to accommodate. As this section notes, the following solutions, while producing a successful balance in their respective country, would likely not work completely in the U.S. system due to the emphasis our country places on religious freedom. But, through an analysis of international resolutions to controversies currently facing the U.S. system, we can better

149. Olivia B. Waxman, *21 Other Countries Where Same-Sex Marriage is Legal Nationwide*, TIME (June 26, 2015), http://time.com/3937766/us-supreme-court-countries-same-sex-gay-marriage-legal/.

determine the approach the courts should take by incorporating the successful portions of these solutions into ours.

A. Balancing Religious Freedom vs. Same-Sex Marriage in the United Kingdom

The issue of the conflicting rights paradigm plagued other countries as well. One such case was the United Kingdom and the religious pushback after the 2007 Regulation pursuant to the Equality Act 2006, focusing on improving human rights and fundamental freedoms for European Union Nations. Regulation 3 is of particular interest in this discussion, which states:

> (1) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B …., A treats B less favourably than he treats or would treat others (in cases where there are no material differences in the circumstances). ….
>
> (3) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if A applies to B a provision, criterion or practice –
>
> (a) which he applies or would apply equally to persons not of B's sexual orientation,
>
> (b) which puts persons of B's sexual orientation at a disadvantage when compared to some or all others (where there are no material differences in the relevant circumstances),
>
> (c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there are no material differences in the relevant circumstances), and
>
> (d) which A cannot reasonably justify by reference to matters other than B's sexual orientation.[150]

Two cases play a significant role in the English media's perception of the issue: *Ladele v. London Borough of Islington* and *McFarlene v. Relate Avon Ltd.*[151] In both cases, the issues were the alleged discrimination appellants faced due to their religious beliefs, and the inaction they took towards the duties of their employment because of those religious beliefs.

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150. Ladele v. London Borough of Islington [2009] EWCA (Civ) 1357, [63] (appeal taken from Eng.) (citing Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, Regulation 3 (Eng.)).

151. *London Bourough*, [2009] EWCA (Civ) 1357; McFarlene v. Relate Avon Ltd., [2009] U.K. Emp't App. Trib., No. 0106/09/DA (Eng.).

Ladele focuses on the rebellion of a Kim Davis-esque government registrar, which took place well before the Kim Davis incident.[152]

McFarlene addresses a therapist who refused to provide counseling for a same-sex couple.[153]

1. Ladele v. London Borough of Islington

In this case, the registrar, Ms. Ladele, refused to officiate civil partnerships between same-sex couples due to religious objection.[154] Ms. Ladele argued that, because she was at risk of disciplinary action for her refusal to officiate civil partnerships of same-sex couples in accordance with her job requirements, she was being discriminated against.[155] The question on appeal was whether the equality policy of the Islington and the 2003 Regulation violated Ms. Ladele's religious freedom. The Tribunal held that Ms. Ladele was not being discriminated upon, instead she was being required to comply with the requirements of her job.[156] The Tribunal in *Ladele* took a similar approach to the holding of *Miller v. Davis* with one clear distinction, in *Ladele,* the Tribunal explicitly weighed the availability of alternative forms of religious exercise for Ms. Ladele in determining whether she had violated the relevant anti-discrimination law.[157] This distinction, while present in U.K. jurisprudence, is nowhere to be found in U.S. jurisprudence. This is likely because U.S. case law prohibits government from determining the validity of a religious belief or questioning the necessity of practice of such beliefs.[158]

2. McFarlene v. Relate Avon Ltd.

In *MacFarlene*, the tribunal answered whether a potential violation of Article 9 existed when a therapist voiced refusal to counsel same-sex couples.[159] Relying heavily upon the verdict in

152. *London Bourough*, [2009] EWCA (Civ) 1357 at [1].
153. *McFarlene*, [2009] U.K. Emp't App. Trib., No. 0106/09/DA (Eng.).
154. *London Bourough*, [2009] EWCA (Civ) 1357 at ¶ 7.
155. *Id.* at ¶ 10.
156. *Id.* at ¶ 52.
157. *Id.*
158. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." Emp't Div. v. Smith, 494 U.S. 872, 887 (1990). "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 887 (citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).
159. McFarlene v. Relate Avon Ltd., [2009] U.K. Emp't App. Trib., No. 0106/09/DA

Ladele, the tribunal determined that the policy of requiring compliance with all company policies against discrimination was not discriminatory to MacFarlene.[160] On appeal, the court directly addressed the claim that the lower tribunal decision was insensitive to religious freedom when it asserted that providing "legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled."[161] The court firmly differentiated between the protection of the right to beliefs and the protection of the substance or content of such beliefs. The court asserted that the law only concerns itself with the first protection.[162] The court of appeals drew a bold line in claiming the law could not protect beliefs grounded purely in religion due to the irrational, as well as "divisive, capricious and arbitrary" nature such laws would take.[163] Compared to American protections for religious freedom, this sentiment appears to provide only hollow protection for religious freedom. What is the point in holding a religious belief if you cannot act in accordance with such a belief? Again, this is the issue which justifies RFRAs and religious freedom bills in the first place. While not absolute, protection must be provided for both the belief and the practices of religions because religions often require both.

Ultimately, the above mentioned cases were brought before the European Court of Human Rights which determined the alleged discrimination both parties faced in being unable to exercise their religious beliefs against members of the homosexual community in their job roles did not exist.[164] Further, the court held that in both cases there was not an interference with Article 9 rights to religion because both appellants had voluntarily accepted employment that did not accommodate their religion but had other available ways to practice their religion without undue hardship or inconvenience.[165]

This approach permits more restrictions on religious freedom than would likely be allowed under United States law.[166] Given the Court's current interpretation of the RFRA and concerns for religious freedom in *Obergefell* itself, The Court would likely reach a different conclusion from the U.K. court's conclusion that

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(Eng.).

160. *Id.* at [32] (citing London Bourough, [2009] EWCA (Civ) 1357).

161. McFarlane v Relate Avon Ltd. [2010] EWCA (Civ) 771 [23].

162. *Id.* at [22].

163. *Id.* at [24].

164. *See generally* Eweida v. United Kingdom, 37 Eur. Ct. H.R. (2013).

165. *Id.* at 59.

166. *See supra* Part I.

voluntarily accepting employment implicitly waives any claim of religious freedom to refuse to perform any portion of the job itself.[167] Further, the decisions in the U.K. weigh the availability of other venues for religious freedom in the determination of whether discrimination has occurred.[168] In the United States, it would be unlikely that a court would reason the existence of other venues for religious expression should factor into a determination of religious freedom in employment, housing, or public accommodation.

In 2010, the U.K. enacted the Equality Act geared towards protecting people from discrimination on the basis of age, gender, or sexual orientation.[169] However, the Equality Act still provided for religious exemptions for religious organizations.[170] Of particular interest is the clear line the act draws between permissible discrimination regarding sexual orientation within the religious organization for religious purpose[171] and impermissible discrimination because the action, service, or good is done on behalf of public authority and under a contract between the religious organization and the public.[172] Because of the distinction the U.S. system places on separation of church and state, the mandate requiring religious organizations to forgo religious exercise that may result in discrimination because the specific action, service, or good in question is done for the public would likely be untenable. Moreover, under RFRA, *Hobby Lobby* shows that U.S. courts do not draw a clear distinction between religious institutions and private businesses run at least partly by religious individuals.[173] The distinction in the U.S. system here would require the restriction of religious exercise to be an unintentional by-product of a general rule of neutral application, an approach subtler than what the U.K. applies. Even further, the U.K.'s anti-discrimination efforts are largely legislative, while this Note discusses a judicial solution since a congruent legislative one across all states is unlikely and implausible.

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167. McFarlane v Relate Avon Ltd. [2010] EWCA (Civ) 771 [23].

168. *Id.*

169. Equality Act, 2010, c. 15 (Eng.).

170. The Equality Act, 2010, c. 15, § 2(a)(b), sch. 23 (Eng.) (stating ministerial exception for participation in activities as well as service and goods).

171. *Id.* at § 2(7), sch. 23.

172. *Id.* at § 2(10), sch. 23. *See also* Part 3 (services and public function; Part 29 (provision of services)).

173. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772 (2014).

B. Northern Ireland's "Conscience Clause"

With a piece of legislation that sounds as if it is straight out of the U.S. courts, Northern Ireland is facing its own difficulties balancing same-sex marriage rights, religious freedoms, and cake. The case involves the refusal of Ashers Bakery to accommodate the request of a customer to bake a cake that said "support gay marriage" for an upcoming anti-homophobia event.[174] The district court determined that the refusal was indeed a form of direct discrimination, and the court of appeals upheld the decision.[175] The conclusion depended largely on a central and straight forward question: "did the claimant, on the prescribed ground, receive less favourable treatment than others?"[176] However, at the appeals level, the defense took a different approach, claiming that requiring the bakery to make a cake in support of same-sex marriage was discriminatory against their religious belief.[177] The appeals court denied any claim of discrimination against religious believers on the basis that under the relevant anti-discrimination laws, the bakery was not being treated any less favorably than anyone else.[178] The court suggested that to avoid violations of a religious belief, the bakery could refuse to provide all services of a religious or political message, but it could not be selective.[179]

There are distinctions worth drawing between this Irish cake case and the American cake cases, specifically when contrasted with the reasoning of compelled expressive conduct and speech in the *Masterpiece* opinion.[180] As noted earlier, the court in *Masterpiece* lends some credibility to the idea that a message on a wedding cake could be allotted first amendment protection in the U.S. but refused to expand on this potential since the facts of the case do not include a message.[181] Conversely, the North Irish court takes a strong stance that in the commercial sphere, prohibiting denial of services on religious grounds, regardless of what the cake says, is what the

174. Lee v. Ashers Bakery Co., [2016] NICA 39 (N. Ir.), http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Decision%20in%20Ashers%20Bakery%20Appeal/j_j_Summary%20of%20judgment%20-%20Lee%20v%20Ashers%20Baking%20Co%20Ltd%2024%20Oct%2016.htm.

175. *Id.*

176. *Id.*

177. *'Gay Cake' Case: Northern Ireland Attorney General Says Judgement Against Ashers Was Wrong*, BBC (May 10, 2016), http://www.bbc.com/news/uk-northern-ireland-36261498.

178. *Ashers Bakery Co.,* [2016] NICA 39 (N. Ir.).

179. *Id.*

180. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

181. *Id.* at 286.

prevention of discrimination requires.[182] It is likely that the distinction between the dicta in *Masterpiece* and the direct denial of a compelled speech defense hinges on the determination that for-profit companies can exercise religion, a purely American concept.

C. Religious Exemption in Canada

In an employment law setting, one Canadian case provides an adequate example of religious exemption jurisprudence, *Ontario (Human Rights Commission) v. Christian Horizons.*[183] In *Christian Horizons*, the defendant, a religious organization, was found to have discriminated against an employee because she was a lesbian.[184] The issue in the case was whether Christian Horizon could benefit from the religious exemption law, § 24(1)(a) of the Ontario *Human Rights Code*.[185] The Tribunal determined there were three prongs that Christian Horizons had to prove to claim exemption benefits: (1) Christian Horizons is a religious organization, that is (2) primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified, and (3) the restriction in employment to similar people is a reasonable and legitimate qualification because of the nature of the employment.[186]

The Ontario Supreme Court rejected the lower court holding that Christian Horizon could not rely on their religious exemption because of the nature of the activity and the clientele served.[187] The Court determined that the correct interpretation of section 24(1)(a), the Canadian religious exemption law, required an analysis of the specific activity the religious organization engages in to determine if the religious activity is seen as fundamental by group members.[188] Next, a court must determine if the activity furthers the religious purpose, therefore serving the interests of the members of the religious organization.[189] Lastly, should such determinations be made, a BFOQ is conducted.[190]

To qualify under the BFOQ, the required characteristic must be

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182. *Ashers Bakery Co.*, [2016] NICA 39 (N. Ir.).

183. Ont. Human Rights Comm'n v. Christian Horizons, 102 O.R. 3d 267, 2010 Can LII 2105 (Can. On. S.C.).

184. *Id.*

185. *Id.* at ¶ 15; The Ontario Human Rights Code was enacted in 1962 as the first protection against discrimination in Canada. Available at http://www.ohrc.on.ca/.

186. *Id.* This three-prong test is commonly referred to as the "BFOQ Requirement."

187. *Id.* at ¶ 75–78.

188. *Id.* at ¶ 73.

189. *Id.*

190. *Id.*

"tied directly and clearly to the execution and performance of the task or job in question."[191] In this analysis, focus must be placed on how the religious organization's mission is manifested in the particular job at issue.[192] In *Christian Horizons*, the Court concluded, "[a] discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and . . . the attributes needed to satisfactorily perform the particular job."[193] Thus, the Court concluded, Christian Horizons had unjustifiably discriminated against an employee on account of her sexual orientation and required the organization to remove the restriction on same-sex relationships because it had not met the BFOQ standard.[194]

The challenge in implementing the *Christian Horizon* approach to religious exemption in U.S. jurisprudence would be that such a test shifts the determination of a valid religious principal from the religious believer to the court entirely. While this would result in a fairer, more even-handed approach, it could appear to undermine the First Amendment's right to religious belief and prohibition of governmental involvement. As stated in U.S. case law, the courts cannot tell someone whether their belief is justified or fundamental to their religion.[195]

In 1996, the Supreme Court of Canada declared in *Gould v. Yukon Order of Pioneers* that human rights legislation should be given a broad, liberal, and purposive approach to ensure the laws are given full effect.[196] Accordingly, Canadian legislation prohibits discrimination with respect to services open to the public or which the public has access to.[197] The determination of a service open to the public or one the public has access to hinges upon the specific service being provided and not the nature of enterprise or service provider.[198] The court concluded that under the relevant statute, s. (8) exempted discrimination must be of a kind necessary to the furtherance of the fundamental objects of the religious organization in question.[199] This approach provides a clear line in the sand where discrimination is strictly prohibited; however, such an approach cannot solve the complexity of religious freedom as it plays out in U.S. public services. Too many U.S. public services are provided by

191. *Id.* at ¶ 90.
192. *Id.*
193. *Id.* at ¶ 103.
194. *Id.* at ¶ 121.
195. Emp't Div. v. Smith, 494 U.S. 872, 887–88 (1990).
196. Gould v. Yukon Order of Pioneers, [1996] S.C.R. 571, 1996 Can LII 231 (Can. S.C.).
197. *Id.* at 574.
198. *Id.*
199. *Id.*

religious organizations with dual purposes: to both meet a public need, but also to further a fundamental religious objective.[200]

As this section has indicated, there is value in looking to other countries when trying to determine the U.S. approach to balancing same-sex rights and religious freedom. Nonetheless, differences between the U.S. and other jurisdictions preclude a straightforward application. When considered as a whole, theoretical proposals and international approaches create a foundation from which a complete doctrinal analysis can be synthesized. The next section draws from the above U.S. cases, theories, and international comparisons to devise a tool for courts to reach a consistent conclusion that strikes the balance of these constitutional rights and freedoms.

VI. MODUS VIVENDI IN THE U.S.: DOCTRINAL ANALYSIS WITH QUESTIONS

In lieu of legislation on the part of the federal government or a unified effort from the states to protect same-sex marriage rights, as well as religious freedom in a reasonable manner, it is up to the courts to determine where the line is drawn and what crosses over the line from protection of religion to becoming harmful towards same-sex couples exercising their right to marry. This doctrinal analysis will save time and costs for courts and citizens by reducing the length of litigation and creating a clear line determining the available protections of religious freedom and rights to marriage for all.

A. Doctrinal Analysis

The doctrinal analysis sets a standard that courts can apply to avoid ad hoc approaches based on the facts of each given case. The goal of the doctrinal analysis developed here is to approach all constitutional arguments from both sides with one consistent framework, with an emphasis on equal protection and resolutions that benefit society as much as possible. The doctrinal analysis is as follows:

In determining the validity of religious protection laws, the court must strictly scrutinize the language of the law and its effects to ensure the law is not motivated by

200. For example, Catholic Charities USA and the Salvation Army. Other examples include Faith-Based Adoption agencies.

improper animus, and is not over-inclusive, over-reaching, or overly burdensome to one party placing such party outside the equal protection of the law.

The first prong of this test is improper animus. As explained in *Windsor, Romer,* and *Barber*, courts look at the "design, purpose, and effect" of a challenged law to determine if the law singles out a group for unequal treatment.[201] However, this portion of the analysis is the most subjective, and thus should be the least depended on. It is not impossible to think that what one person considers a necessary defense of a religious right, would appear to another as discrimination or unequal treatment. Under this prong of the analysis, courts should be cautious to avoid relying on the feelings of the parties, and instead focus on whether the law inherently subjects an individual or group to lesser treatment due to a minority status or opinion.

Next, the court considers over-inclusiveness. In terms of religious protection bills, the legislation must limit the protection to a clearly defined religious group of people that are closely affiliated with the religious activity mentioned (i.e. marriage ceremony, pastor) without ambiguities that could extend such rights to others or people performing non-religious activities. In other words, a religious exemption should be permitted only in cases where religion is a genuine occupational requirement. Examples of such places of employment include churches, synagogues, religious adoption agencies, and religious community service organizations. For-profit corporations, both large and small, should not be permitted exemption from neutral laws of general applicability because religion is not an occupational necessity, and compliance with anti-discrimination laws does not mean condoning the message of a customer. Conversely, under this prong the court must still ensure that the proposed legislation does not violate the Establishment Clause of the First Amendment by favoring tenets of one religion over another.

The next prong requires a court to investigate whether the legislation is over-reaching in terms of religious exemption, meaning the legislation restricts jurisdictions within the state's purview from adding LGBT citizens to anti-discrimination laws on local and regional levels. The purpose behind this prong is to prevent states from hindering local initiatives which provide increased protections for all in the public space, since such initiatives, if implemented properly, are inherently good.

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201. Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016) *rev'd*, 860 F.3d 345 (5th Cir. 2017).

After the first three prongs, the court should use a burden balancing analysis to ensure that all parties are receiving equal protection under the proposed law. This analysis must take into consideration the restriction the bill would propose and any availability of alternative providers in that state, while maintaining equal protection. For this analysis, the court must first reach a conclusion that under the other prongs, the religious protection bill is valid. Then, the court must balance the burden of exemption placed upon the same-sex couple with the burden that the religious objector(s) would face should an exemption be denied, and equally address the burden vice-versa. For example, if a Catholic charity refuses to allow same-sex couples to adopt, the question then becomes whether the same-sex couple is able to find adoption services elsewhere without undue difficulty. In performing this balancing test, the court must consider the availability of other venues for same-sex couples to gain services and products, as well as the availability of other venues for religious people to exercise their religion. This balancing test will likely require an analysis of the region or state that such legislation covers, as available alternatives can vary. We need not address the burden balancing test for bakeries because a law protecting for-profit entities will likely not pass the first three prongs. For laws which make it to the final part of the doctrinal analysis, courts should focus the burden balancing prong on the presence of adoption services, marriage officiants, and therapists/social service providers within the jurisdiction available to same-sex couples.

By applying this analysis, the court can better assess the limitations that should apply to religious freedom claims and the protection of same-sex couples to marriage without hallowing out either right.

B. Applying the Doctrinal Analysis

To better understand the potential application of this doctrinal test we can apply it to a few of the recently passed laws.

1. Florida's Pastor Protection Bill

Looking first at Florida's "pastor protection bill", we see that the law is not designed with improper animus. Based on the various

versions of the bill that passed through the Florida House of Representatives, it is evident that the bill was designed to protect religious organizations only.[202]

The statute is not over-inclusive. The statute restricts the exemption to organizations in which religion is occupationally necessary and does not create ambiguity which could be used to extend exemption to non-religious businesses or service providers. However, it is still important to remember that if any of the protected organizations contract outside of religious activity into the public sphere they shall be held to all the neutral laws and principles that govern society. Further, the statute is not over-reaching in that it does not prohibit local and regional governments from enacting same-sex protection in anti-discrimination clauses. Lastly, the court must consider whether the statute would be highly burdensome to same-sex couples. Because the statute limits exemption to religious organizations with a clear outline of what constitutes a protected religious organization it is likely to not create a higher burden on same-sex couples. Alternative venues for same-sex couples to receive the services provided by religious organizations are readily available in Florida.

2. North Carolina's Public Facilities Privacy & Security Act

North Carolina's bill, on the other hand, violates the doctrinal analysis. North Carolina's bill prohibits local and regional governments in the state from including LGBT people in anti-discrimination laws.[203] The act of including a party in a nondiscrimination policy is an inherently positive act of societal stability and equality, and thus, should not be prohibited without strong reasoning. The implications of prohibiting protection for LGBT citizens would result in a severe burden on same-sex couples extending far beyond the religious protection field. Further, the bill was proposed as retaliation to the actions of Raleigh, Charlotte, Chapel Hill, and Durham, which enacted LGBT protections on the city level. The reactionary nature of this bill arguably indicates an animus in the legislator's intent, and thus overly burdens same-sex couples.

202. H.B. 43, 2016 Leg., Reg. Sess. (Fla 2016).
203. H.B. 2, 2016 Gen. Assemb., Reg. Sess. (N.C. 2016).

3. Mississippi's "Protecting Freedom of Conscience from Government Discrimination Act"

Mississippi's bill presents an alarming number of issues under the doctrinal analysis. The Mississippi "Protecting Freedom of Conscience from Government Discrimination Act" directly lists three religious principles that are protected: (1) marriage as the union of one man and one woman, (2) sexual relations as reserved to such a union, and (3) the definition of man and woman as the "immutable biological sex."[204] This law creates unequal treatment for any religion that doesn't share those three idealisms regarding marriage and sexual interactions. In addition to disadvantaging same-sex couples in an unbalanced way, this law disadvantages those whose religion disagree with these three principals, such as those who adhere to the Hindi faith.

C. Anticipating Criticism

In reviewing this article, critics may claim this note is irrelevant, that same-sex marriage supporters have won and the right to same-sex marriage will trump religious objection in every capacity soon enough. However, the validity of all opinions and the sacred nature of religion in our society warrant a balanced conclusion to this culture war. A dialogue of this nature—regarding the balance between same-sex marriage and religious objection—remains necessary. Although there is a shift in some Christian denominations creating room for same-sex couples in churches, many other denominations still hold fervently that the Bible prohibits same-sex relations as a sin and many other religions concur. Interpretations of religious texts have changed over time, but the core values as outlined in the specific text are clear on the issue and cement the perennial nature of this issue. The above mentioned doctrinal test is the adequate compromise for these juxtaposed parties because it addresses the plausible constitutional defenses of religious business owners and the way courts can respect legislative attempts to protect these religious entities, as well as same-sex couples.

VII. CONCLUSION

Religious freedom is a core American value. Cemented into the constitution and the fabric of our society, religion and its protection

204. HB 1523, 2016 Reg. Sess. (Miss. 2016).

are here to stay. Equally, LGBT citizens are not going anywhere. In a free society that values liberty and justice for all, it is up to the government to provide equal protections and the necessary space for all to live out the values they hold dear. The Supreme Court expanded the right to marriage to same-sex couples in *Obergefell*, bestowing upon LGBT citizens the legal title and privileges such unions provide. In response, state legislatures have proposed new initiatives to increase protection for religious freedoms and more specifically, objections to the validity of same-sex marriage. This Note attempted to provide a fair compromising conclusion to the alleged culture wars through an analysis of the pending and recently passed religious protection bills, judicial responses thus far, recent proposed theories, and approaches by other countries in handling the conflicting rights paradigm. Many scholars have addressed the potential claims of both religious objectors and same-sex couples from a vague theoretical perspective. This doctrinal analysis, instead, deals with the legislative side of the debate, thus providing a fairer, more consistent, and broader conclusion. I implore discussion regarding this doctrinal analysis, and any suggestions for increased efficiency in this field. With the recent election creating a republican house, senate, and president, the 2018 legislative session is likely to produce many religious freedom protection initiatives. Furthermore, the politicians and lobbyists, which pushed so heavily over the past few years to create religious protection bills, will continue to push these legislative ideas. The doctrinal test will serve the judicial branch by reducing the time it takes to assess all these new laws and determine their validity.