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Editor's Note

I am pleased to present the Amherst College Undergraduate Law Review's fourth issue. First and foremost, I would like to thank the editorial board and the contributors for all of their hard work this past semester. This issue would not have been possible without the editorial board's commitment to this publication, despite some setbacks that occurred halfway through the semester as a result of the COVID-19 outbreak. I would also like to congratulate the contributors whose articles have provided thoughtful insights on topics ranging from campaign finance law and democratic elections to prosecuting international terrorists. We hope that you enjoy this issue. Please email any feedback or subscription requests to aclawreview@amherst.edu.

Sincerely,

Amy Pass

Editor-in-Chief

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The Amherst College Law Review (ACLR) was born out of the desire to foster undergraduate scholarship in the liberal arts. Among our peers, the ACLR stands alone for its interdisciplinary approach to the study of law.

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An Analysis of the Political and Legal Impact of *Citizens United* and Potential Remedies to Its Shortcomings

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Abstract:

In 2010, the United States Supreme Court dramatically changed American politics with its decision in Citizens United v. F.E.C. In a five – four decision, the Court held that, under the First Amendment, the government could not restrict independent political contributions from corporations, nonprofits, labor unions, or other associations, thus changing the way American electioneering is funded and regulated. In the ten years since the Citizens United decision, the proliferation of unregulated corporate money entering the American political arena has created an election system that is fundamentally undemocratic and legally untenable. This article will serve as an analysis of the Citizens United decision, its effects on campaign finance in the United States, and how corporate campaign spending in the wake of Citizens United has changed American politics. Additionally, the article will present both a legal and political argument against the Citizens United decision and propose potential remedies to the decision's adverse effects on campaign finance law and democratic elections in the United States.

Introduction:

The rule announced today that Congress must treat corporate speakers exactly like human beings in the political realm represents a radical strength – a radical change in the law.

– Justice John Paul Stevens[1]

For over one hundred years, Congress and the courts have recognized the importance of regulating corporate electioneering in federal elections.[2] However, as time has passed, the

[1] Oral Dissent of Justice Stevens at 16:45, *Citizens United v. F.E.C.,* 558 U.S. 310 (2010) (No. 08–205), *available at https://www.oyez.org/cases/2008/08-205.*
[2] Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. §441b (2006)).

conventional understanding of free speech has changed, resulting in new rights for corporate bodies such as labor unions and business entities.[3] These freedoms have amplified the power of corporate entities in the political arena by giving them similar rights to that of an individual.[4] This newfound corporate right was realized in the monolithic 2010 Supreme Court case, *Citizens United v. F.E.C.*, in which the Court held that, under the First Amendment, the government could not restrict independent political contributions from corporations, nonprofits, labor unions, or other associations.[5] This decision, which was decided by a five-justice majority, reasoned that restrictions on corporate political speech, along with past decisions that supported such restrictions, were opposed to the principles of the First Amendment and were thus unconstitutional.[6] This decision found no compelling state interest that justified limiting the political speech of corporations,[7] and thus also weakened the Bipartisan Campaign Reform Act of 2002 (BCRA), which created stricter restrictions on corporate electioneering, leaving the federal government virtually no way to combat the adverse impact of corporate money in politics.[8] This decision illustrated a drastic shift away from past case law,[9] legislative precedent,[10]

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[3] Morning Edition, *When Did Companies Become People? Excavating The Legal Evolution,* NATIONAL PUBLIC RADIO (Jul. 28, 2014, 4:57 AM), https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution.
[4] *Id.*
[5] *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).
[6] *Id.*
[7] *Id.* at 365.
[8] *Id.*
[9] *Buckley v. Valeo*, 424 U.S. 1 (1976); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v F.E.C,* 540 U.S. 93 (2003).
[10] Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. §441b (2006)); Taft-Hartley Act of 1947, Pub. L. No. 80-101, §304, §313, 61 Stat. 136, 159. Taft-Hartley was replaced by the Federal Election Campaign Act Amendments of 1976, but the restrictions were kept. Pub. L. No. 94-283, §112, §321, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. §441b).; Federal Election Campaign Act of 1972, Pub.L. 92–225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101; Federal Election Campaign Act Amendments of 1974, 2 U.S.C. ch. 14 § 431; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–115, 116 Stat. 81 *thru* 116 Stat. 116; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–115, 116 Stat. 81 *thru* 116 Stat. 116.

public opinion,[11] and even deviated from the same Court's previous decisions to uphold bans on corporate speech just three years prior.[12]

This article will examine the legal and political impact of the *Citizens United* decision and propose potential remedies to the adverse effects the decision has on free and fair electioneering in federal elections. The article suggests that the Supreme Court's majority decision in *Citizen United v. F.E.C.* is the product of flawed legal reasoning that deviates from legislative precedent and fails to account for a compelling state interest that has been well recognized for a century. Furthermore, the author argues that the prevailing argument in *Citizens United* was manufactured through bad-faith political gamesmanship that undermines fundamental democratic ideals. Thus, the *Citizens United* decision is unconstitutional and should be overturned through either a constitutional amendment or legislative action.

The Impact of *Citizens United:*

Like many of the decisions handed down by the Supreme Court, the *Citizens United* decision has various, far-reaching implications for American life, which makes analyzing the decision fundamentally interdisciplinary. In *Citizens United,* there are legal implications that touch upon such issues as corporate speech and campaign finance law as well as political implications that expand the debate around free speech, access to politics, and fair elections. This intersection of politics and the law is not new, but in this case, it manifests in a particularly important way because of the enormous legal impact of the decision and the potential political motivations of the relevant parties.

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[11] Dan Eggen, *Poll: Large majority opposes Supreme Court's decision on campaign financing,* WASHINGTON POST, Feb. 17, 2010, https://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.
[12] *F.E.C. v. Wisconsin Right to Life,* 551 U.S. 449, 469-470 (2007).

A. The Legislative Aftermath of Citizens United

For over a century, both Congress and the courts have recognized the sanctity of federal elections and have attempted to safeguard the process from unfair influence.[13] This began in 1907 when a bipartisan Congress passed the Tillman Act, which prohibited corporations and nationally chartered (interstate) banks from making direct financial contributions to federal candidates.[14] After Tillman, this trend continued with efforts being taken to further strengthen restrictions on corporate political spending through measures like the Taft-Hartley Act of 1943,[15] the Federal Election Campaign Act of 1971 (FECA),[16] the creation of the Federal Elections Commission (FEC) to monitor and regulate federal elections,[17] and the Bipartisan Campaign Reform Act of 2002 (BCRA).[18]

Throughout the 20th century, the courts adopted a view similar to that of Congress by identifying the dangers corporate electioneering poses and by ruling on corporate free speech. In *Buckley v. Valeo* (1976), the Supreme Court struck down election expenditure limits for candidates and individuals, but upheld bans on corporate expenditures. The reasoning used by the Court was that a ceiling for corporate political spending served the government's interest "in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[19] Then, in *Austin v Michigan Chamber of Commerce* (1990), the Court identified a compelling state interest in

[13] Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. §441b (2006)).
[14] *Id.*
[15] Taft-Hartley Act of 1947, Pub. L. No. 80-101, §304, §313, 61 Stat. 136, 159. Taft-Hartley was replaced by the Federal Election Campaign Act Amendments of 1976, but the restrictions were kept. Pub. L. No. 94-283, §112, §321, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. §441b).
[16] Federal Election Campaign Act of 1972, Pub.L. 92–225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101.
[17] Federal Election Campaign Act Amendments of 1974, 2 U.S.C. ch. 14 § 431.
[18] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–115, 116 Stat. 81 *thru* 116 Stat. 116.
[19] *Buckley*, 424 U.S. at 3.

limiting corporate political speech.[20] This was due, in part, to the threat posed by large corporate treasuries that are amassed with the aid of favorable state laws despite having little public support.[21] A decade later, in 2003, the constitutionality of BCRA was at the center of *McConnell v F.E.C.,* in which Appellants argued that elements of the Act violated the First Amendment right that was outlined in *Buckley.*[22] In *McConnell*, a five-justice majority upheld BCRA in part on the grounds that corporations had other available ways to engage in political speech through corporate political action committees (PACs) which rendered BCRA only partially restrictive. Keeping most of the law intact.[23] Then, in *F.E.C. v. Wisconsin Right to Life* (2007) the Court further clarified BCRA by limiting certain restrictions on election advertisements, further showing their support for such restrictions by outlining specific parameters for them. All of these decisions, along with long-standing legislative support, shows the historical precedent for restrictions on corporate electioneering and sets the stage for the *Citizens United* decision in 2010.

However, after the *Citizens United* decision delegitimized the aforementioned restrictions*,* legislation regulating corporate political speech was further weakened and individual corporate rights were further extended illustrating not only the expansion of the decision, but also deference to its reasoning. Immediately following the decision, it was clear to many, including various legal scholars,[24] that *Citizens United* would have long-standing implications for political speech in the United States.[25] In response, federal legislation was immediately drafted to

[20] *Austin*, 494 U.S. at 652.
[21] *Id.* at 652.
[22] *McConnell,* 540 U.S. at 102-03.
[23] *Id.* at 203-04.
[24] *Citizens United v. FEC: Corporate Political Speech*, 124 Harv. L. Rev. 75 (2010); Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections As People?*, 39 W. St. U. L. Rev. 203 (2012).
[25] *Citizens United v. FEC: Corporate Political Speech*, 124 Harv. L. Rev. 75.

counteract the decision's adverse effects.[26] Four months after the decision, Democratic Representative Chris Van Hollen (D-MD) introduced the DISCLOSE Act in the House which was designed to amend the FECA in order to strengthen disclosure requirements for campaign spending.[27] These new disclosures were meant to combat the spread of unregulated (dark) money that was likely going to enter the political realm after *Citizens United* gave corporations the right to spend money as they saw fit.[28] After being slightly amended, the act passed in the House of Representatives with a 219 – 206 majority in June of 2010 but was then defeated in the Senate by a Republican filibuster which halted the bill's progress.[29] Then, in 2012, the bill was again debated in the Senate, but advocates for the bill were unable to save it when they failed to invoke cloture by only seven votes, killing the bill for a second time.[30]

Since the defeat of the DISCLOSE Act in 2010 Senator Sheldon Whitehouse (D-RI), along with numerous House Democrats, have introduced variations of the bill in every Congress since, none of which have been able to pass in the House.[31] The most recent legislative action regarding this bill came in 2019 when the essence of DISCLOSE was included in H.R. 1 which successfully passed in the House by a 41-vote majority that split down party lines.[32] Currently, H.R. 1 has yet to advance to the Senate and is in legislative limbo,[33] but even if the bill were to hit the Senate floor it is unlikely that it would pass since the Senate is currently controlled by Republicans and the bill has seen no support from any congressional Republicans since its

[26] DISCLOSE Act, H.R. 5175, 111th Cong. (2010) (as passed by House, Jun. 24, 2010).
[27] *Id.*
[28] *Id.*
[29] S.3628, 111th Cong. (2010) (as failed in Senate, Sep. 23, 2010).
[30] R. Sam Garrett, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress,* Version 61 CONGRESSIONAL RESEARCH SERVICE at 4 (Dec. 13, 2018).
[31] H.R.4010, 112th Cong. (2012); H.R.148, 113th Cong. (2013); H.R.430, 114th Cong. (2015); S.1585, 115th Cong. (2017); H.R.2977, 116th Cong. (2019).
[32] H.R. 1, 116th Cong. (2019).
[33] *Id.*

inception.[34] This deadlock in Congress has led to numerous calls to action from individuals at all levels of government including Senator, and former Presidential candidate, Bernie Sanders (I-VT),[35] former Secretary of State John Kerry,[36] and various state legislatures who have condemned the *Citizens United* decision and have advocated for widespread campaign finance reform to remedy its negative impacts.[37]

This lack of congressional action has left state and local legislatures few options when attempting to oppose *Citizens United*. In the wake of the decision, sixteen state legislatures called for a constitutional amendment to overturn *Citizens United*, most of which are non-binding resolutions.[38] However, some go as far as to demand an Article V Convention which would begin the process of drafting an amendment.[39] Additionally, over 400 municipalities have passed resolutions supporting amendments to the Constitution that would overturn *Citizens United,*[40] demonstrating the public support for campaign finance reform.

In addition to the lack of legislative action being taken against the decision, *Citizens United* has been further bolstered by the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* in which the Court struck down Arizona's public finance law which publicly matched funds for candidates in state races, using *Citizens United* as a

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[34] *Id.*
[35] Nancy Remsen, *Sen. Bernie Sanders, I-Vt., offers constitutional amendment on corporate "citizenship"*, BURLINGTON FREE PRESS, Dec. 8, 2011, https://archive.is/20120712225339/http://blogs.burlingtonfreepress.com/politics/2011/12/08/sen-bernie-sanders-i-vt-offers-constitutional-amendment-on-corporate-citizenship/#selection-311.0-311.86.
[36] Susan Crabtree, *Sen. Kerry backs changing Constitution to deal with Supreme Court decision,* THE HILL, Feb. 2, 2010, https://thehill.com/homenews/senate/79289-kerry-backs-changing-constitution-to-deal-with-scotus-decision.
[37] *State Resolutions in Support of Amending the Constitution,* FREE SPEECH FOR THE PEOPLE (n.d.), https://freespeechforpeople.org/state-resolutions-in-support-of-amending-the-constitution/.
[38] Joan McCarter, *Oregon becomes 16th state to call for amendment overturning Citizens United*, DAILY KOS, Jul. 2, 2013.
[39] *Id.*
[40] *State & Local Support By the Numbers,* UNITED FOR THE PEOPLE (n.d.), http://united4thepeople.org/state-local/.

justification.[41] Under the Arizona law, if a participating candidate was outspent by a non-participating opponent, the participating candidate would receive added government funds matching the money raised privately up to three times the original government subsidy.[42] Upon review, the Court found that the matching provision substantially burdened political speech[43] and that the state lacked any compelling interest in equalizing the electoral funding,[44] thus rendering the law unconstitutional on First Amendment grounds,[45] further illustrating the court's broad interpretation of free speech post-*Citizens United*.

B. The Dissenting View

In the main dissenting opinion, penned by Justice John Paul Stevens, the minority argued that while the majority's reasoning had rhetorical appeal, it failed to account for the clear, "distinction between corporate and human speakers."[46] The minority reasoned that, unlike individuals, corporations are not members of society since they cannot vote or run for office, are potentially controlled by non-residences, and could have interests that fundamentally conflict with the interests of the public.[47] Additionally, while the majority did not find a compelling state interest in regulating corporate political speech, the minority went as far as to argue that, given the bloated power of corporations, lawmakers had a distinct democratic duty "to take measures designed to guard against the potentially deleterious effects of corporate spending in local and

[41] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721 (2011).
[42] Alia B. Rau, *Clean Elections arguments to be heard in court,* THE ARIZONA REPUBLIC, Apr. 11, 2010.
[43] *Arizona Free Enterprise Club's Freedom Club PAC,* 564 U.S. at 736.
[44] *Id.* at 748.
[45] *Id.*
[46] *Citizens United,* 558 U.S. at 394.
[47] *Id.* at 394.

national races."[48] Furthermore, the minority argued that the "ban" on corporate speech outlined by the *Citizens United* decision fails to actually amount to a ban since, in *Austin*, the Court expressly stated that corporate entities could engage in political speech through the use of PACs. [49] The dissent also rejects the decision's view that the anticorruption interest (which originally justified a compelling state interest in limiting corporate political speech) is not sufficient to restrict speech in this case since, in past cases, the Court has found numerous instances in which protecting against corruption – whether it be quid pro quo corruption or not – is a valid reason to restrict speech.[50] The dissent also argued that the ruling threatened the integrity of both United States elections and the Supreme Court itself. By failing to see the apparent dangers posed by unregulated corporate political speech and by showing unfettered deference to the First Amendment, the dissent held that the Court was impugning its own legitimacy.[51]

C. The Political Effects of *Citizens United*

As was feared by the minority, *Citizens United* has enabled a surge of unregulated dark money to enter the political sphere which has had a palpable impact on both the nature of electioneering and the outcome of federal elections at large. The first major election after *Citizens United* was the 2012 presidential election, which saw a 594% increase in independent expenditures from the 2008 election – an increase from $144 million in 2008 to $1 billion in

[48] *Id.* at 394.
[49] *Id.* at 415.
[50] *Id.* at 452.
[51] *Id.* at 396.

2012.[52] As seen in Figure 1, outside spending as a percent of total election spending also skyrocketed in 2010 in response to the decision.

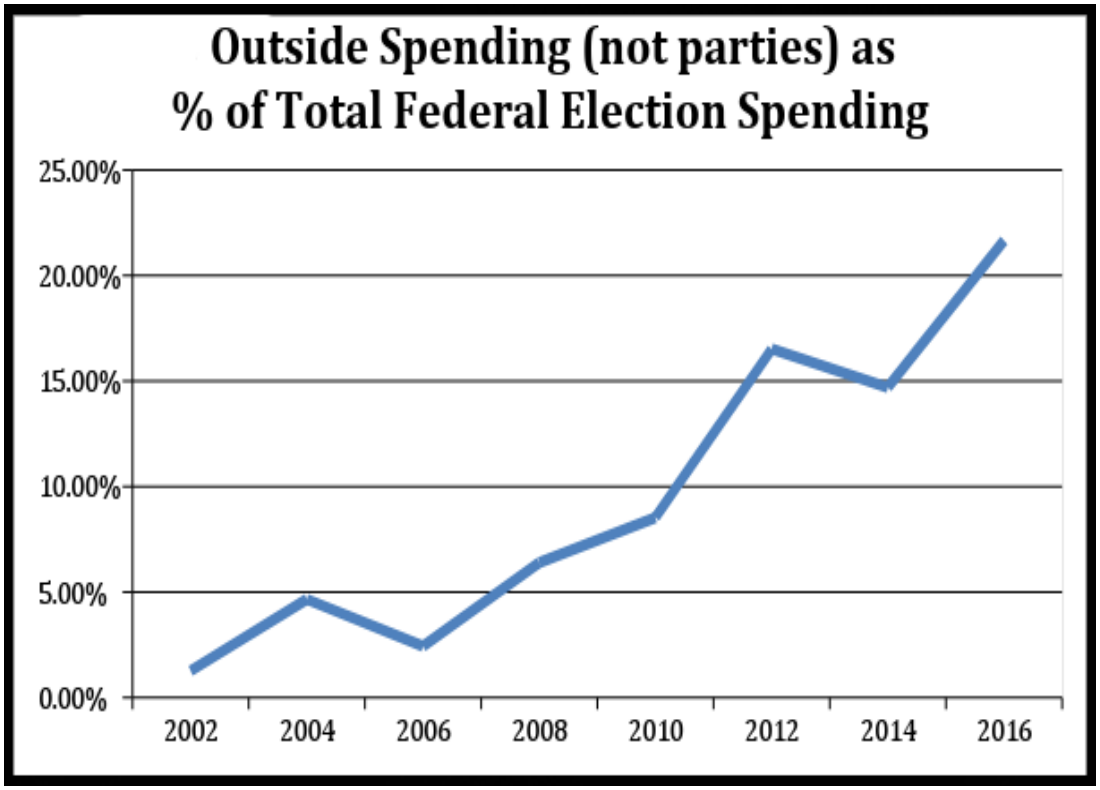

Figure 1[53]

No added risk was incurred by corporations who helped finance campaigns, meaning that corporations who funneled money into politics post-*Citizens United* saw no financial or social repercussions for their actions, which was likely the result of weakened disclosure requirements.[54] Then, during the 2016 election cycle, "more than one out of every five dollars spent in connection with presidential and congressional campaigns was spent by committees and groups

[52] Wendy L. Hansen et al., *The Effects of Citizens United on Corporate Spending in the 2012 Presidential Election,* 77 THE JOURNAL OF POLITICS, 535, 535 (2015).
[53] Bob Biersack, *8 years later: How Citizens United changed campaign finance,* OPEN SECRETS (Feb. 7, 2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/.
[54] Hansen, *supra* note 52, at 535.

with access to unlimited and unrestricted sources of funds,"[55] demonstrating the extraordinary power now wielded by private entities in the political realm. As was highlighted in the dissent to *Citizens United*, this power affects which voices are heard, who controls public discourse, and who is in power.[56]

In addition to the increases in spending, unfettered corporate activism has damaged relationships among corporate entities. In the wake of *Citizens United*, political connection and partnership between corporate entities has weakened,[57] which could have a chilling effect on general political discourse, meaning that it suppresses free and fair debate, because it discourages collaboration and communication and increases corporate siloing. This siloing could also be contributing to the growing divide seen today in American political discourse since corporations now have far more control over discussion and can influence the masses more easily. Additionally, the new corporate right to political speech has hindered the FEC's ability to regulate corporate activism. As former FEC Chair Ann Ravel put it right before her resignation, "The mission of the FEC is essential to ensure a fair electoral process. Yet since the Supreme Court's *Citizens United* decision, our political campaigns have been awash in unlimited, often dark money."[58]

Besides increases in spending, these changes in U.S. campaign finance law have also impacted the outcomes of federal elections.[59] For instance, there is strong evidence to support the

[55] Biersack, *supra* note 53.
[56] *Citizens United,* 558 U.S. at 441.
[57] Rui Albuquerque et al., *Citizens United vs. FEC and Corporate Political Activism,* EUROPEAN CORPORATE GOVERNANCE INSTITUTE (2019).
[58] Nour Abdul-Razzak et al., *How Citizens United gave Republicans a bonanza of seats in U.S. state legislatures,* THE WASHINGTON POST, Feb. 24, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/24/how-citizens-united-gave-republicans-a-bonanza-of-seats-in-u-s-state-legislatures/.
[59] *Id.*

notion that removing bans on outside spending increases the electoral success of Republican candidates and leads to more ideologically conservative state legislatures.[60] Nour Abdul-Razzak, Carlo Prato, and Stephane Wolton found that the *Citizens United* decision, "increased the GOP's average seat share in the state legislature by five percentage points."[61] In effect, if it were applied to the past twelve Congresses, this increase would have resulted in the House's controlling party being flipped, "a total of eight times."[62] Additionally, the researchers found that, "In states where union membership is relatively high and corporations relatively weak, *Citizens United* did not have a discernible effect on the partisan balance of the state legislature. But in states with weak unions and strong corporations, the decision appeared to increase Republican seat share by as much as 12 points."[63] These findings illustrate how *Citizens United* does not protect all forms of collective speech, but rather only promotes the speech of corporate entities with deep pockets.

The Case Against *Citizens United*:

A. The Legal Precedent

Ultimately, *Citizens United* rests on flawed legal reasoning based on an untenable argument that was potentially designed out of political gamesmanship to further the interests of those who stood to benefit from its acceptance. The decision did so by negating one hundred years of legal, legislative, and social precedent that clearly outline a compelling government interest in restricting corporate speech. As previously mentioned, the Supreme Court had upheld regulations on corporate political speech beginning in 1976 with its decision in *Buckley* and then

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

further upheld such bans in *Austin, McConnell,* and *Wisconsin Right to Life*.[64] All of these cases recognized a compelling state interest in restricting corporate speech and collectively identified the dangers corporations pose to the fairness of the electoral process.[65] In addition to discussions in case law, the dangers of corporate political speech have even been identified by former Chief Justice William Rehnquist, a devout conservative originalist, who wrote in a 1982 dissenting opinion that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process."[66] Rehnquist, in this dissent, clearly outlines the dangers of corporate political speech and approves of Congress' ability to regulate corporate spending in the political arena. This clear legal support combined with the stance taken by Rehnquist – a staunch advocate for the First Amendment and conservative thought leader – articulates the brazen disregard for *stare decisis* on display in *Citizens United*.

B. The Legislative and Social Precedent

Beyond the legal theories that protected these restrictions there is also clear legislative support for such regulation. As far back as 1907, Congress has recognized the power of corporate treasuries and has attempted to protect the electoral process from their unfair influence.[67] Throughout the 20th century congresses controlled by both Republicans and Democrats have

[64] *Buckley*, 424 U.S. 1 (1976); *Austin*, 494 U.S. 652 (1990); *McConnell,* 540 U.S. 93 (2003); *Wisconsin Right to Life,* 551 U.S. 449 (2007).
[65] *Buckley*, 424 U.S. 1 (1976); *Austin*, 494 U.S. 652 (1990); *McConnell,* 540 U.S. 93 (2003); *Wisconsin Right to Life,* 551 U.S. 449 (2007).
[66] *Fed. Election Comm'n v. Nat'l Right to Work Comm*., 459 U.S. 197, 209 (1982).
[67] Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. §441b (2006)).

continued to pass laws that reflect the importance of restricting corporate political speech, and have done so with bipartisan support.[68] Additionally, like in the courts, conservative legislators, like John McCain (R-AZ), have drafted and promoted legislation that directly restricts corporate speech.[69] Legislative support for restrictions on corporate speech has continued even after the decision was handed down but have been halted mainly by legislators who see political expedience in doing so. Both the DISCLOSE Act and H.R. 1 currently have no clear path to becoming law even though the latter has been passed by a duly elected House[70] and the former has only been stalled by a filibuster, a tool seen by many as undemocratic.[71]

Furthermore, public support for restrictions on corporate political speech has not waivered over time. When it was passed in 1907, the Tillman Act was seen as "merely the first concrete manifestation of a continuing congressional concern for elections 'free from the power of [corporate] money.'"[72] In fact, part of why the Tillman Act was able to be passed in the first place was because of a scandal involving insurance companies who committed campaign finance fraud, which bolstered cries for reform amongst the population.[73] These cries have persisted through history and represent one of the factors driving Congress to continue to pass laws that protect the democratic process.

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[68] Taft-Hartley Act of 1947, Pub. L. No. 80-101, §304, §313, 61 Stat. 136, 159. Taft-Hartley was replaced by the Federal Election Campaign Act Amendments of 1976, but the restrictions were kept. Pub. L. No. 94-283, §112, §321, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. §441b).; Federal Election Campaign Act of 1972, Pub.L. 92–225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101; Federal Election Campaign Act Amendments of 1974, 2 U.S.C. ch. 14 § 431; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–115, 116 Stat. 81 *thru* 116 Stat. 116.

[69] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–115, 116 Stat. 81 *thru* 116 Stat. 116.

[70] H.R. 1, 116th Cong. (2019).

[71] Robert Schlesinger, *Why the filibuster is a problem,* U.S. NEWS, Jan. 25, 2010, https://www.usnews.com/opinion/blogs/robert-schlesinger/2010/01/25/why-the-filibuster-is-a-problem.

[72] United States v. United Auto. Workers, 352 U.S. 567, 575 (1957) (quoting Hearing for H. Comm. on Elections, 59th Cong. 12 (1906) (statement of Samuel Gompers, President, Am. Fed'n of Labor)).

[73] Jason S. Campbell, *Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?,* LOYOLA OF LOS ANGELES L. REV. 171 (2011).

Moreover, this public support for restrictions on corporate political speech has continued to grow, with eighty percent of respondents in a Washington Post-ABC News poll saying they oppose the decision (with sixty five percent claiming they "strongly" oppose the decision) a month after the high Court's ruling.[74] Additionally, this poll revealed that seventy-two percent of respondents supported congressional action to curb the ruling by reinstating limits on independent expenditures,[75] further demonstrating the current public support for campaign finance reform.

Prior to the *Citizens United* decision, a Gallup poll found that while fifty-five percent of Americans believe that the same campaign spending rules should apply to corporate entities as to individuals[76] around fifty-two percent of Americans actually would favor placing limits on campaign contributions in service of a fair election over protecting free speech rights.[77] This Gallup poll, in particular, highlights the central issue in *Citizens United* – the rhetorical appeal of the decision. It is clearly appealing to show deference to the First Amendment. It is a pillar of American democracy. However, even though it often feels better to side with the First Amendment broadly, it is imperative to ensure that the underlying principle of the Amendment is honored, which is the preservation of democratic debate and discussion.

In this instance, the Court showed blind deference to the First Amendment in service of corporate speakers without recognizing the dangers those speakers posed to the underlying democratic ideals that are at the foundation of American government. As a result, the Court failed to make a hard call on an unavoidable constitutional issue, which ultimately resulted in the

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[74]Eggen, *supra,* note 11.
[75] *Id*.
[76] Lydia Saad *Public Agrees with Court: Campaign Money Is "Free Speech"*, GALLUP, Jan. 22, 2010, https://news.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx.
[77] *Id.*

weakening of American democracy. This failing by the Court emboldened corporate entities in the political realm and severely weakened the government's ability to protect the most valuable member of American society, the individual.

C. The Case Against Corporate Personhood

The continued acceptance of corporate personhood when it comes to free speech rights is based on flawed legal reasoning and is a significant threat to the American individual. As was explained by the dissent in *Citizens United,* corporate speech is not the same as individual speech but rather is derivative speech, meaning that it is based on a collective of individual speakers who maintain their own individual speech rights.[78] Corporate speech was originally meant to represent the interests of various individuals who had incorporated for one purpose,[79] making any corporate speech actually only speech by proxy.[80] Therefore, the true speech that was meant to be protected was the speech of the individuals who made up the organization. However, given the loose interpretation of what a corporate entity is and the enormous size of many corporations within the U.S., it is quite possible to envision a scenario in which corporate speech does not reflect the views of all individuals within any given body. In other words, corporations regularly fail to have one unified voice or any one clear speaker in contemporary America, which pokes a hole in the logic that corporate speech is merely a stand-in for individual speech.

Furthermore, the restrictions placed on corporate speech do not restrict individual speech, demonstrating a major flaw in the majority's reasoning. The Court reasoned that these corporate restrictions limited the freedom of individuals to speak, but this is not true. Regardless of any

[78] *Citizens United*, 558 U.S. at 466.
[79] Morning Edition, *supra,* note 3.
[80] *Citizens United*, 558 U.S. at 466.

corporate restrictions, individuals within a corporation still have the right to engage in political speech in their individual capacities however they see fit.[81] This fact, which was lost on the Court majority, demonstrates how these bans on independent corporate spending are actually not bans at all since the speech of the individual is in no way stifled. Additionally, these bans on corporate speech have long given corporate bodies another way of engaging in political speech, the PAC. The majority looked past this fact and focused only on the burden placed on corporate speech,[82] which negligently overlooks the point of the PAC.[83]

The bloated power of corporations can have a huge effect on political discourse because it could drown out noncorporate voices and could result in corporate domination of electioneering.[84] This is exactly what happened in 2012.[85] This 'loudest-in-the-room effect' is fundamentally undemocratic since it has the potential to muffle relevant viewpoints when engaging in political debate.[86] However, even if corporate speech was protected speech, the aforementioned concerns clearly outline a compelling state interest in regulating it. As such, a democratically-elected legislature should be able to pass legislation to challenge the threats posed by corporate speech.[87]

In deciding this case, the majority sided mostly with Citizens United, a conservative nonprofit organization that has long worked to further conservative ideologies in the United States.[88] The organization has a history of attacking liberal media productions,[89] aggressively

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[81] *Id.* at 466.
[82] *Id.* 337-338.
[83] *Id.* at 475, 476.
[84] *Id.* at 466.
[85] Hansen, *supra* note 52, at 535.
[86] *Citizens United*, 558 U.S. at 472.
[87] Oral Dissent of Justice Stevens, *Citizens United v. F.E.C.,* 558 U.S. 310 (2010) (No. 08–205), *available at https://www.oyez.org/cases/2008/08-205.*
[88] *FAQs*, CITIZENS UNITED, http://www.citizensunited.org/frequently-asked-questions.aspx.

advocating against democratic presidential candidates[90] and supporting conservative ones.[91] In its arguments, Citizens United argued that its First Amendment right to free speech was under threat, that BCRA prohibited speech, and implied that a level of corporate homogeneity existed among American corporations.[92] However, none of these claims are true, potentially hinting at the true motivations behind Citizens United's argument – the political gains that could be made by its party. In reality, it is more likely that arguments for protecting corporate speech made by Citizens United were meant to tip the scales in favor of a specific political ideology using the immense wealth controlled by corporate bodies rather than a good faith attempt to protect the speech of individuals. Whether or not *Citizens United* was decided on partisan grounds is still up for speculation. However, it is undeniable that many of the arguments made by Citizens United seem to be based in something other than fact, demonstrating a potentially faulty rationale behind the arguments for corporate personhood with which the court sided.

The Challenges Ahead: Political and Legal Hurdles:

The hurdles established by *Citizens United* leave the future of campaign finance reform uncertain. The decision in *Citizens United* represents a huge victory for the American corporation which now has rights similar to that of the individual while simultaneously retaining the power of a huge incorporated body. As seen in the aftermath of *Citizens United*, the decision

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[89] *U.S. group wants Moore film banned*, BBC NEWS, June 18, 2004, http://news.bbc.co.uk/2/hi/entertainment/3817993.stm.

[90] Stephanie Mencimer, *Hillary's Hero: Judge Royce Lamberth,* MOTHER JONES, Jan. 13, 2008, https://www.motherjones.com/politics/2008/01/hillarys-hero-judge-royce-lamberth/.

[91] Robert Costa, *Trump enlists veteran operative David Bossie as deputy campaign manager,* WASHINGTON POST, Sept. 1, 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/09/01/trump-enlists-veteran-operative-david-bossie-as-deputy-campaign-manager/.

[92] *Citizens United*, 558 U.S. at 320-322.

enabled corporations to engage in political speech however they see fit, which gives them a great amount of power over government since practically all levels of government are controlled by elected officials. Additionally, the current political make-up of Congress implies that any legislative challenge to *Citizens United,* is unlikely to pass. Regardless of the grim road ahead, it is paramount that the American people work towards overturning the negative elements of *Citizens United* if the country is to see a return to fair electoral processes.

A. The Argument in Favor of the *Citizens United* Decision

Some scholars have argued that the Court was justified in its reasoning because the decision actually favors free speech and dialogue, which in turn protects democracy.[93] These proponents of *Citizens United* have argued that the Court properly disregarded corporate wealth when coming to its decision because the notion that political speech cannot be limited on the basis of the speaker's wealth is a necessary component of the First Amendment.[94] This was outlined in *Buckley* when the court struck down expenditure limits for individuals and candidates.[95]

Furthermore, as the Court did, these proponents have adopted a different view of the American corporation, arguing that these bodies make valuable contributions to political discourse and represent principal sectors of the general constituency.[96] Proponents agree with the Court's argument that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and

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[93] Alex Osterlind*, Giving A Voice to the Inanimate: The Right of A Corporation to Political Free Speech Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).*, 76 Mo. L. Rev. 259 (2011).
[94] *Id.* at 275.
[95] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[96] Osterlind, *supra,* note 93, at 275.

advising voters on which persons or entities are hostile to their interests."[97] Proponents of *Citizens United* believe that the value of corporate speech in political discourse outweighs its negative effects and that restrictions on corporate speech chill huge swaths of the constituency, thus having a far worse effect on overall political discussion.[98] This argument attacks the government's interest in regulating speech, claiming that the chilling effect of restrictions outweigh those of corporate speech and that corporate governance and democracy is far better at reconciling conflicting political interests within corporations.[99] Ultimately, the proponents of *Citizens United* argue that political discourse is safer when corporations are allowed to freely partake in the conversation, that restrictions based on wealth are unconstitutional, and that the government's interest in restricting corporate speech is far more harmful to political discourse than the inclusion of corporations in said discourse.[100]

B. Remedies

What remedies exist seem dire. However, in the face of these obstacles, it appears that these are the only options available to those wishing to correct the shortcomings of *Citizens United*. The first option would be to trigger an Article V amendment convention. This strategy would involve Congress proposing a constitutional amendment, the Twenty-Eighth Amendment, which would declare that human beings, not corporations, are persons entitled to constitutional rights and would outline what rights would be given to a corporation within the bounds of reason.[101] As previously mentioned, this idea has gotten support from over four hundred

[97] *Citizens United*, 558 U.S. at 354.
[98] Osterlind, *supra,* note 93, at 275.
[99] Osterlind, *supra,* note 93, at 276.
[100] Osterlind, *supra,* note 93.
[101] *We the People, Not We the Corporations,* MOVE TO AMEND (n.d.), https://movetoamend.org/.

municipalities across the U.S.,[102] which gives support to the idea that an amendment is possible. Admittedly, however, this is the more extreme strategy. It would involve two-thirds of Congress and two-thirds of the states in the union to ratify, which is unlikely given the current make-up of Congress. However, even in the face of this opposition, there are various groups working to fight against the adverse effects of *Citizens United*, like Common Cause,[103] Move to Amend,[104] the ACLU,[105] End Citizen United,[106] Represent Us,[107] and many more,[108] which bodes well for the future of campaign finance reform. Many of these groups advocate for overturning *Citizens United* and believe that restrictions on corporate power should be enumerated in the U.S. Constitution. With this public pressure, there may be a future in which a constitutional amendment is possible.

Another, less extreme, option is to push current legislation through Congress. H.R. 1 is "the most comprehensive package of anti-corruption reforms since Watergate,"[109] and is currently awaiting consideration by the Senate after being passed by the House. The bill is seen as a rebuke of the Washington establishment, and more specifically, the *Citizens United* decision, in that it was written and passed by Democratic representatives who campaigned to get special

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[102] *State & Local Support by the Numbers, supra,* note 40.
[103] Common Cause, *Citizens United & Amending the U.S. Constitution*, COMMON CAUSE, https://www.commoncause.org/our-work/money-influence/campaign-finance/citizens-united-amending-the-u-s-constitution/.
[104] *We the People, Not We the Corporations, supra,* note 101.
[105] ACLU, *The ACLU and Citizens United,* ACLU, https://www.aclu.org/other/aclu-and-citizens-united.
[106] Simone Pathé, *Campaign Finance Reform PAC Wants to Be a Player in 2016,* ROLL CALL, Aug. 13, 2015, https://www.rollcall.com/2015/08/13/campaign-finance-reform-pac-wants-to-be-a-player-in-2016-2/.
[107] Represent Us, *What is Citizens United?*, REPRESENT US, https://represent.us/action/citizens-united-2-2/.
[108] Sara Swann, *100+ democracy reform groups push Congress to overturn Citizens United*, The Fulcrum, Sep. 5, 2019, https://thefulcrum.us/campaign-finance/congress-overturn-citizens-united.
[109] Chris Pappas, *Not up for debate: ending corruption and the power of special intersts in Washington,* THE HILL, Feb. 7, 2020, https://thehill.com/blogs/congress-blog/politics/481952-not-up-for-debate-ending-corruption-and-the-power-of-special.

interests and corporate money out of the political arena.[110] H.R. 1 is "multifaceted," in that it not only takes direct aim at *Citizens United* but also addresses issues such as voting rights, campaign finance, redistricting, government transparency, and ethics.[111] In many ways, H.R. 1 represents a desire for a change in politics that would be similar in magnitude to the change spurred by *Citizens United*. With broad public support,[112] this bill follows the norms of the past century and was passed by a duly elected House. However, in response, Senate Majority Leader Mitch McConnell (R-KY), has openly vowed not to bring the bill up for consideration in the Senate, even after Senate Democrats unanimously signed on to the Senate's version of the bill.[113] McConnell has even gone as far as to describe the bill as a "radical, half-baked socialist proposal,"[114] equating what many see as sensible, progressive legislation with far left "socialism."

This blatant stonewalling by Senate Republicans leaves little room for any kind of compromise that could help H.R. 1 become law and is categorically undemocratic for a number of reasons. First, the content of H.R. 1 that addresses campaign finance law has been argued in Congress for nearly a decade[115] and has been stalled numerous times by the GOP.[116] This stalling appears to be a ploy by conservative legislators who would rather avoid the campaign finance

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[110] Common Cause, *What is the For the People Act – also known as H.R. 1?,* COMMON CAUSE, Jan. 4, 2019, https://www.commoncause.org/democracy-wire/what-is-the-for-the-people-act-also-known-as-h-r-1/.
[111] *Id.*
[112] Ella Nilsen, *New polling shows voters — including independents — want Congress to pass an anti-corruption bill,* VOX, Jan. 3, 2019, https://www.vox.com/policy-and-politics/2019/1/3/18148633/hr1-voters-independents-anti-corruption-bill-poll.
[113] Kate Acley, *Senate Democrats take up HR 1 battle cry,* ROLL CALL, Mar. 28, 2019, https://www.rollcall.com/news/congress/senate-dems-take-up-hr1-battle-cry.
[114] Steve Benen, *McConnell suggests voting-rights proposal is 'socailist'*, MSNBC, Mar. 6, 2019, http://www.msnbc.com/rachel-maddow-show/mcconnell-suggests-voting-rights-proposal-socialist.
[115] H.R.4010, 112th Cong. (2012); H.R.148, 113th Cong. (2013); H.R.430, 114th Cong. (2015); S.1585, 115th Cong. (2017); H.R.2977, 116th Cong. (2019).
[116] H.R 1, 116th Cong. (as passed by House on March 8, 2019).

debate all together because of the negative political ramifications the debate may have for them. This should be corrected since political victories should always come after the preservation of good-faith political discourse. This discussion surrounding campaign finance law has been brewing since *Citizens United*. The main reason for its delayed action has been due to the political calculations of one party, which, as a matter of principle, is wrong. However, regardless of how the bill made it to the Senate, the reality is that the bill has officially reached the Senate and deserves to be debated. Any unfair stalling notwithstanding, H.R. 1 fairly went through the lower chamber of Congress and now must be confronted.

In all likelihood, the bill will not survive in the current Senate, however, the bill deserves to die on its merits and not because of a political calculation. The current stance taken by McConnell has no basis in democratic procedure because it is undemocratic to allow a bill which has been passed by the House to die waiting in limbo because of the threat it poses to one party. In fact, the current state of H.R. 1 is similar to what the advocates for the *Citizens United* decision claimed was undemocratic and unconstitutional in the first place. If the bill dies on its merits, at least it would have gone through a democratic process. The current state of H.R. 1 illustrates the dangers of corporate power in government because corporate interests have been given priority over the interest of the public. The state of the bill is, in essence, a stifling of free speech and further illustrates how the decision in *Citizens United* was a blatant miscarriage of justice that damaged American democracy.

At the foundation of American democracy rests the ability to have a free and fair election. However, without free and fair political debate and discourse these sorts of elections are impossible. The Supreme Court erred when it decided *Citizens United* because, in an attempt to

protect free discourse, it actually allowed the wolf into the hen house by giving corporations a blank check in the political arena. Corporations have long tried to sway political decision-making in this country, and the *Citizens United* decision marks their greatest achievement to date. Corporate spending in federal elections acts like a bull horn and has the ability to drown out all other voices. This is fundamentally undemocratic and hurts the most valuable member of American society, the individual. With little regulation, large corporations will continue to have a bloated power over federal elections, which directly contradicts the idea of a *fair* election. As a result, *Citizens United* must be diminished in some way. Otherwise the democratic ideals that prop up the United States will continue to be eroded under the influence of large corporate entities who seem to care more about power and self-dealing than the democratic process.

International Law, Terrorism, and Piracy: A Strategy for the Prosecution of International Terrorists by United States' Courts

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Abstract:

The twenty-first century has been plagued by international terrorism from its onset. From the attacks on September 11th, to the nearly two-decade long conflict in Afghanistan, to the rise and fall of the Islamic State, international terrorism exists as a malignant cancer upon the international system. Since the September 11th attacks, the United States has led the world in combating the threat posed by international terrorists. While several strategies have been implemented by the Unites States' government in combatting terrorism, the primary focus has been one of force. Such a reliance on the use of the military to pursue international terrorists has not been proven entirely effective. A new, criminal justice-centered strategy may prove more effective in pursuing and prosecuting international terrorists. In this paper, a new strategy based in the legal concepts of *hostis humani generis* and universal jurisdiction will be proposed. This new strategy would allow the United States to capture international terrorists in any hidden location to be tried in American courts for crimes against humanity. This strategy, while less concerned with military force, may prove to be more effective at pursuing terrorists by using the power and weight of the US legal system against them.

Introduction:

The morning of September 11th will always be remembered. On that day, the world was forever changed, and the course of history was altered. What occurred next, was a new era of national security and foreign policy. This new era has guided the United States' policy and international relations to this day. The attacks ushered in a new conflict, the Afghanistan Conflict, and was used in partial support of the invasion, and the following occupation of Iraq from 2003-2011. While the US entered an era of "forever wars," it also began capturing terrorists from across the globe with an aim to cripple any and all terrorist networks with links to

Al-Qaeda and what would eventually become the Islamic State of Iraq and Syria (ISIS). Questions regarding the containment and prosecution of these captured terrorists plagued both the Bush and Obama administrations, as the realms of both US and international law were affected.

The question of what to do about captured terrorist prisoners and how to prosecute them is still a subject of great contention within both policy-based and legal frameworks. An old and often overlooked principle of international law, in tandem with existing precedent, may provide new answers to such a question. One overlooked principle of international law is *hotis humani generis*, wherein criminals of international order can be designated as enemies of all mankind. Another is universal jurisdiction, which allows states to claim jurisdiction over criminals wherever they reside due to the nature and severity of their crimes. By applying the concepts of *hostis humani generis* and universal jurisdiction, the United States can justifiably capture terrorists and their conspirators to be charged as enemies against all mankind for engaging, aiding, and/or having knowledge of war crimes and other crimes against humanity. Through this, the US may have a new avenue of prosecution and achieving justice for the heinous acts of international terrorists. In this paper, the concepts of *hostis humani generis* and universal jurisdiction will be analyzed to propose their application to justify the capture and prosecution of terrorists. Furthermore, this paper will attempt to highlight some of the implications if such a principle were to be applied by the United States government.

Legal Concepts:

A. *Hostis Humani Generis*

The legal concept of *hostis humani generis* is a centuries old concept that has primarily existed within piracy laws. Piracy law's origins can be traced to Ancient Rome, where pirates sailed the Mediterranean Sea. During the tenure of Cicero, the Roman Empire was victim to several acts of piracy, prompting Cicero to state that pirates committed crimes against civilization; an English jurist, Edward Coke, would later paraphrase this as "*hostis humani generis*," which translates to "the common enemy of all man."[117] This principle, set forth in Roman law by Cicero, would be used to capture and try ancient pirates. Roman law went even further to conclude that because piracy was practiced beyond the jurisdiction of organized states, pirates "were an enemy of [no individual state but] the [entire] human race."[118] Such a legal concept would not remain in the ancient world, however, as the eighteenth century saw it resurface as a tool to combat piracy.

Known as "the golden age of piracy," the early eighteenth century saw piracy become what we now know it as today: ragged groups of men attacking the ships of European powers and looting their cargo for personal economic gain. To combat the scourge of piracy in the Caribbean Sea and Indian Ocean, several European powers began enacting laws against and issue proclamations condemning acts of piracy. Many during the era thought of pirates as engaging in conflict against the very fabric of the established world and Western society. Many writings of the time reflected this belief as the "idea of piracy as personal war against civilization is recurrent throughout the literature of the time."[119] From the eighteenth century onward, states,

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[117] Thomas J.R. Stadnik Esq., *Pirates—The Common Enemy of All, the Enemies of the Human Race, the Law of War and the Rule of Law*, International Law, LexusNexis Legal Newsroom (November 9, 2019), https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/posts/pirates-_2d00_-the-common-enemies-of-all_2c00_-the-enemies-of-the-human-race_2c00_-the-law-of-war-and-the-rule-of-law.
[118] Douglas R. Burgess Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. Miami Int'l & Comp. L. Rev. 293, 302 (2006).
[119] Id., at 307.

including the United States, began to crack down on piracy across the world. In 1820, the Supreme Court heard the case of Thomas Smith who had been convicted of piracy. In the holding, the justices cited British common law wherein pirates were not only considered as violating the laws of the nation, but the laws of society as well and therefore, were enemies of mankind.[120] This proclamation implied that rouge criminals would no longer hurt state interests throughout the globe.

The principle of designating individuals as enemies of mankind has remained one located in piracy laws, but a trial in Israel during the 1960s would set precedent for its application in other areas of the law. In 1961, the Israeli government captured and tried Adolf Eichmann, a former Nazi who was hiding in Argentina. To prosecute Eichmann and provide justification for Israeli jurisdiction the prosecution relied on the concept of *hostis humani generis.* The prosecution stated that the crimes committed by Eichmann extended beyond the realm of Israel: "These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself."[121] The prosecution also argued that there does not need to be a territorial link to establish jurisdiction as the act is "so deeply offensive to the entire international community that the case may be brought in any other state if the country of the culpable person takes no action."[122] Furthermore, they argued that "every national court assumes the power to adjudicate the case, acting as a delegate of the international community."[123] In addition, the prosecution made the claim that Nazi officials themselves had "made themselves *hostis humani generis* and, according to custom, 'everyone who catches them is competent to try

[120] United States v. Smith, 18 U.S. 153, 161, (1820).
[121] DC (Jer) 40/61 Adolf Eichmann v. State of Israel, 5721, 1, 8 (1961) (Isr).
[122] Leora Bilsky, *The Eichmann Trial and the Legacy of Jurisdiction*, Politics in Dark Times: Encounters with Hannah Aendt, 199, (Seyla Benhabib et al. 2010).
[123] Id.

them like pirates, slave traders, and white slavers."[124] In advancing their argument, the prosecution also cited old piracy law, stating that those identified as *hostis humani generis* as having

> …renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defense, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.[125]

In addition, the prosecution cited a previous English case wherein a British court stated that those designated *hostis humani generis* "[are] no longer a national, but *"hostis humani generis"* and as such [they are] justiciable by any State anywhere."[126] By citing this case, and applying the old legal principle of *hostis humani generis*, the Israeli prosecution was able to establish Israel's jurisdiction to prosecute Eichmann. In the end, Eichmann was convicted of war crimes, crimes against Israel, and crimes against humanity, all on multiple counts. Eichmann was then sentenced to death and the precedents were set. The international community largely ignored what was set by the Israeli courts, regarding the trial as a "Jewish issue" and the legal implications of the set doctrine were not explored.[127]

B. Universal Jurisdiction

[124] D. Lasok, *The Eichmann* Trial, 11 Int'l. and Comp. L. Q. 355, 363 (1962).
[125] DC (Jer), *supra* note at 8.
[126] Id., at 9
[127] Bilsky, *supra* note 6 at 199.

Universal jurisdiction is heavily tied to *hostis humani generis*. Universal jurisdiction is the legal notion that a national court may prosecute a criminal for an international crime depending on the severity of the crime itself. In its report, *The Princeton Principles on Universal Jurisdiction*, the Princeton Committee on Universal Jurisdiction elaborates on the concept by stating "universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction,"[128] and that it "may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law." [129] The Committee further states that "A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law."[130]

The concept of universal jurisdiction also opposes the concept of state sovereignty, which is the complete and respected control of territory and persons within a state's borders.[131] Universal jurisdiction may be applied despite the principles of state sovereignty primarily for three reasons. The first being that there are shared values and interests within the international community.[132] While every state varies in their own unique national interests, they still share some common values and interests, such as security and maintaining order. Second, there is a common requirement to enforce measures that counter actions which oppose such shared values

[128] M. Cherif Bassiouni et al., *The Princeton Principles on Universal Justice*, 28 (2001).
[129] Id.
[130] Id. at 28-29.
[131] U.N. Charter art. 2.
[132] Bassiouni M. Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,* 42 Va. J. Int'l L., 81, 96 (2001-2002).

and interests. Third, there exists an "assumption that an expended jurisdictional enforcement network will produce deterrence, prevention, and retribution and ultimately enhance world order, justice, and peace outcomes."[133] This theory, however, does not apply to all cases where a state may want to invoke such a concept. Its application is dependent on the origin of the crime. Crimes that originated within nations and act against national law are not subject to universal jurisdiction. If they were to originate within the greater international system of states and go against the international order,[134] it is possible for a state to claim jurisdiction under the concept of universal jurisdiction.

The history of universal jurisdiction is also a history of *hostis humani generis*, and provides precedent for its invocation. Piracy laws dating back to the Roman Emperor Cicero are often seen as providing the basis for the concept.[135] The case of Thomas Smith in *United States v. Smith*[136] serves as additional precedent wherein the Supreme Court stated that Smith's actions act against no one state but the laws of nations and society at large.[137] The judgement of Adolf Eichmann also provides precedent for the use of universal jurisdiction. Key to the prosecution's argument, and the judgement given to Eichmann, was that the crimes committed by him and other Nazis were so severe that the Israeli government acted on behalf of the international community.[138]

Precedents of the Nuremberg Trials:

[133] Id.
[134] Id.
[135] Id. at 108.
[136] United States v. Smith., 18 U.S. at 161.
[137] Id., at 161.
[138] Blisky *supra* note 11.

As terrorism in its current state is a new form of criminal violence, there is not a substantial amount of legal precedent regarding the prosecution of terrorists and their crimes against the international order. There is, however, vast precedent for the prosecution of individuals for the crimes they committed. As individuals across time have committed crimes, courts and tribunals have found ways to prosecute them for the specific crimes they committed. One of the most prominent examples is the Nuremberg Trials following the end of World War II. The cases heard during the trials provide some precedent for prosecuting individuals for their specific offenses against humanity.

After the surrender of the Axis powers in 1945, the United States, Britain, France, and the Soviet Union were faced with the challenge of holding the conspirators of Nazi atrocities accountable. They went on to establish the International Military Tribunal (IMT). The IMT became the presiding council during the Nuremberg Trials, comprised of judges from all four allied nations. The Tribunal created the legal basis according to which they would prosecute the accused Nazis that were standing trial. Article II of Control Council No. 10 states the crimes for which the accused were to be tried. The crimes consisted of crimes against peace, war crimes, crimes against humanity, and membership in categories of a criminal group or organization declared criminal by the IMT.[139] It was here that the IMT established what would become some of the most notable crimes of international law. In the charter of the IMT, crimes were clearly defined to provide an understanding of what constituted such high crimes. Crimes of peace were defined as

[139] Control Council L. No. 10, art. II, Int'l Mil. Trib., Dec. 20 1945.

> namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[140]

War crimes were defined as

> namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[141]

While crimes against humanity were defined as

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[142]

[140] Charter of the Int'l Mil. Trib., art. VI, Aug. 08 1945.
[141] Id.
[142] Id.

These definitions allowed the court to prosecute the accused Nazis for the crimes they were accused of. The Nuremberg Trials went on to convict several high-ranking Nazi officials of these crimes.

A large reason why the Nuremberg Trials and the IMT were able to accomplish what they did was due to the concept of international law. Whereas national laws are bound by specific codes and regulations, international law "is the gradual expression, case by case, of the moral judgements of the civilized world."[143] International law, as exemplified by the trial itself, is not a collection of specified codes, but is instead bound by a shared global understanding of morality. In addition to exemplifying international law, the trials also shed light on a general principle of peace; he who "makes or plans to make aggressive war is a criminal."[144] To preserve peace, those that plan on or act to disrupt it, must be designated as war criminals and held accountable for their actions. The trial also established the practice of holding individuals themselves accountable for such heinous actions against humanity. The verdict against Herman Goering demonstrates this, as the Tribunal found that he was "the leading war aggressor…his guilt is unique in its enormity."[145] In finding Goering and others responsible for the war, the IMT was able to frame war "as an atrocity committed by criminal conspirators…"[146] The legacy of the trials is one that remains notable in the field of international law.

[143] Henry L. Stimson, *Perspectives on the Nuremberg Trial*, "The Nuremberg Trial: Landmark in Law," 681 (Guénaël Mettraux, 2008).
[144] Id.
[145] Noah Weisbord, *The Crime of Aggression: The Quest for Justice in a World of Drones, Cyber Attacks, Insurgents and Autocrats*, "The Nuremberg Avant-Garde Moment," 51 (2019).
[146] Id. at 52.

Terrorism and The War on Terror:

Modern terrorism is a new force against international order. Modern terrorism can be seen as groups of individuals who act outside the norms of the international system of states for private or political gains. Many states recognize international terrorist organizations and their goals, often rooted in religion or political ambitions. The aptly named "War on Terror" has become one of the defining conflicts of the twenty-first century, affecting the international system and how states respond to acts of terrorism.

While terrorist acts occurred during the mid- to late-twentieth century, the War on Terror effectively began on the morning of September 11th, 2001. On that day, terrorists affiliated with Al-Qaeda, hijacked four planes with intent to attack the United States. In total, the attacks claimed the lives of 2,977 Americans,[147] most of whom were civilians. In response, the US launched immediate action against those responsible and began what would become the longest recorded armed conflict in the history of the United States. On September 18th, 2001, the United States Congress passed the Authorization for Use of Military Force (AUMF). This joint resolution provided authority to the president of the United States to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[148] With this, the United States now had the legal authority necessary to pursue terrorist organizations across the globe.

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[147]CNN Editorial Staff, *September 11 Terror Attacks Fast Facts*, CNN (las visited November 10, 2019) https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html.
[148] Authorization for Use of Military Force, Pub. L. No. 107-40, S.J. Res. 23, 107th Cong. (2001).

The US soon began a lengthy military conflict in the Middle Eastern country of Afghanistan. The US remains there to this day, conducting missions designed to counter and deter terrorist operations. In 2003, the United States took military action against another Middle Eastern country, Iraq. US military operations lasted from 2003-2011, wherein the United States helped topple the regime of Saddam Hussein and pursue terrorists affiliated with the Iraqi cell of Al-Qaeda. In 2013, a new terrorist group emerged, taking advantage of the political chaos in the region. ISIS, as they would be known, became one of the most prominent terrorist threats of the decade, with its influence in the region lasting until 2018 or 2019. The war has affected the international community as well in a variety of ways. Since the US is a member of NATO, several countries were drawn into the Afghanistan conflict in accordance with Article V of the North Atlantic Treaty.[149] England and other partner countries also assisted the US during the invasion and occupation of Iraq from 2003-2011. In addition, the international system has had to act under the threat of international terrorism, as terrorist attacks have occurred across the globe from several different organizations including Al-Qaeda, ISIS, and Hamas.

While the War on Terror waged on, the United States and the international community faced the challenge of the war's legality and what to do about terrorists in the international system. One measure put forth was the United Nations Security Council Resolution 1373. The Resolution, passed unanimously on September 28th, 2001, created measures for member states to abide by in combating global, international terrorism. Most notably, the Resolution provides arguably sweeping power to states in attempts to combat terrorism. It declares

[149]The North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 stat. 2241, 34 U.N.T.S. 243.

> states shall…Take the necessary steps to prevent the commission of terrorist acts… Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.[150]

Through the United Nations Security Council Resolution 1373, the international community defined measures to combat international terrorism.

Another measure used was a policy instituted by the Bush administration that cited a military order giving the president "the authority to detain without limit any non-citizen the president has 'reason to believe' is a member of Al-Qaeda, is involved in international terrorism, or has knowingly harbored such members or terrorists."[151] The Bush administration's policy, based on broad interpretations of legal work, was not exempt from the courtroom. Several cases on behalf of alleged terrorists and conspirators were brought to US courts, including some to the Supreme Court. To mitigate legal rulings and court battles, the US government often made deals, or, depending on the case, moved the accused into civil custody instead of military custody.[152] To avoid questions about the trials of terrorists in military commissions, Congress passed the Military Commissions Act of 2006. The Act devised the process by which military commission trials were to be conducted and established that those deemed "un-lawful enemy combatants"

[150] S. Res. 1373 (September 28, 2001).
[151] Global Anti-Terrorism Law and Policy, 456 (Victor V. Ramraj et al. eds. Vol 2. 2012).
[152] Id., at 454-456.

were to be tried in military commissions.[153] This is just one of many measures however, and it is important to note that the "relevant spheres of authority overlap…the relationship of the spheres of authority to one another, and their applications as binding law, is fraught with dispute and contentiousness."[154] While attempting to provide legal clarity on the issue of how to legally prosecute terrorists and obtain justice for their crimes, the application of US law and international law can be easily intertwined.

In addition to the multiple domestic and international measures, a long-standing policy of the United States during the War on Terror has been to identify and treat captured terrorists as "enemy combatants," specifically unlawful enemy combatants. The term was first coined by the Supreme Court in *Ex Parte Quirn.*[155] The Court, in determining the legality of having saboteurs tried in military commissions, concluded that "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency un-lawfu1."[156] Identifying captured terrorists as enemy combatants came into contention during the Bush administration. This was primarily due to the fact that unlawful enemy combatants are not protected under the Geneva Convention as they are non-state actors.[157] As terrorists are non-state actors, they are not bound by Geneva Convention statues, nor can then be considered "lawful enemy combatants"; thus their prosecution has been left to military tribunals. In 2009, the Obama administration stopped officially using the term "unlawful enemy combatant,"[158] but its infamous legacy remains.

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[153]Military Commission Act of 2006, P. L. No. 109–366, 109th Congress (2006).
[154] *Supra* note 33 at 478.
[155] Ex Parte Quirn, 37 U.S. 1 (1942).
[156] Id., at 31.
[157] Convention Relative to the Treatment of Prisoners of War, Geneva art. 4, Aug. 12 1949, 6 U.S.T. 3316, U.N.T.S. 135.
[158] William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. Times (March 13, 2009).

Extradition:

In discussing concepts such as universal jurisdiction, it is important to note that a legal framework is already in place. Where universal jurisdiction may sideline sovereignty, extradition respects state sovereignty and relies on cooperation between governments. Extradition is a concept that has long existed as a part of the international framework and relations between countries. Regarding anti-terrorism efforts specifically, such treaties "function significantly in the suppression of terrorism" as they "play a more covert role within the grand scheme of international cooperation in combatting terrorism."[159] The principle is simple: a formal surrendering of criminal offenders from one state to another. Conditions for extradition are outlined within the US Code, and states that "Whenever there is a treaty or convention for extradition between the United States and any foreign government … any justice or judge of the United States … may, upon complaint made under oath … issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered."[160] Extradition treaties are drawn between countries, and usually offer a list of crimes the countries agree to extradite offenders for.[161] New treaties have begun to take a different approach to "dual criminality" and have agreed to "make all felonies extraditable."[162] There are also lists of crimes that countries will not extradite individuals for, including certain political crimes. With particular attention to terrorism, several recent treaties often "expressly exclude terrorist offenses or other

[159] Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 Ind. L. J., 767, 771 (1992).
[160] 18 U.S.C. § 3184.
[161] Jonathon Masters, *What is Extradition*, Council on Foreign Relations, https://www.cfr.org/backgrounder/what-extradition (last visited Nov. 12, 2019).
[162] Michael John Garcia & Charles Doyle, Extradition To and From the United States: Overview of the Law and Recent Treaties, Cong. Res. Serv. (2010).

violent crimes from the definition of political crimes for purposes of the treaty,"[163] preventing any possible inadvertent extradition protections for terrorists. Currently, the list of countries the United States has bilateral treaties with is contained with the US Code. Notably, of the countries in the Middle Eastern region, where the US has been combating Islamic/jihadist terrorist organizations, the only countries it has formal bilateral extradition treaties with are Iraq and Pakistan.[164] Afghanistan and Syria are not on the list, although they are known as countries where terrorist cells of Al-Qaeda and ISIS persist.

In practice, extradition may appear straightforward, however, several factors and circumstances can impede the process, as "extraditions are often contentious and sometimes become embroiled in geopolitical friction."[165] Similar to other issues within the international community, geopolitical struggles can complicate various procedures, including extradition. States can deny extradition to other states based on a wide variety of factors as well. Extradition also becomes complicated as it requires proper procedure through correct channels of government. This requires a level of trust between governments, which may be difficult if relations between them are not stable. In addition, alerting the government through proper channels raises concerns that parties within the government that are sympathetic to those who are about to be extradited may warn them of the effort, further impeding the process. Such a fear is a valid concern, as the fear of alerting Osama Bin Laden by directly discussing his capture with Pakistani officials was a concern during the Obama administration leading up to the famous 2011 raid on Bin Laden's compound.[166]

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[163] Id., at 7.
[164] 18 U.S.C. § 3181.
[165] Masters, *supra* note 46.
[166] Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama Bin Laden*, N.Y. Times (2015).

As previously stated, extradition relies on treaties between countries. When there are no treaties, however, extradition again becomes complicated. In the United States, the matter of extradition with no treaty has been settled at the appellate court level. In the 1990s a case was heard in court regarding the extradition of a resident alien of the US to the International Tribunal for Rwanda. A Texas state judge originally challenged the extradition arguing that the Constitution provided for the executive to uphold extradition requests through treaties that were confirmed through the Senate.[167] The case reached the Fifth Circuit Court of Appeals wherein it ruled that "'although some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor … [relevant jurisprudence] require that the authorization come in the form of a treaty.'"[168]

Questions have also arisen over whether extradition treaties should exist if they haven't been updated.[169] The mid-twentieth century saw a period of widespread decolonization across the globe. However, several extradition treaties pre-date post-Second World War colonial independence. While questions arise and challenges have been made, many countries have opted to continue to abide by their longstanding treaties, primarily as the treaty conditions were agreed upon by the country's post-colonial founders.[170]

Analysis and Application:

A. The Current Strategy

[167] Garcia & Doyle, *supra* note 43 at 4.
[168] Id.
[169] *Supra* note 44 at 5.
[170] Id.

Prior to introducing a new strategy, it is important to first analyze the existing one. By doing so, its flaws can be examined, then remedied by the new proposal. One of the key flaws in the current international and US strategies of combating international terrorism is the lack of a universal definition of terrorism. While this critique may seem small, it is one of the most frequent critiques of the system,[171] as its implications are larger than they may seem. Not having a universally accepted definition of terrorism hinders legal action and cooperation between states within the international community. Two main problems arise within the current practice of allowing individual states to define terrorism. The first being that definitions, and what certain states include in their definitions, vary. The second draws in part from the first: whom one state may define as a terrorist, another could define as a militant nationalist or a freedom fighter, not an international terrorist. To emphasize the severity of the issue, the organization with the largest collection of member states, the United Nations (UN), does not have an agreed upon definition of terrorism. Instead, the UN has frequently described acts that constitute terrorism in several documents it publishes including both General Assembly and Security Council resolutions.[172][173] The United States has an established definition of international terrorism; however, it varies from other countries' and the UN's descriptions of terrorist actions.[174] The US's legal definition is its alone, and as such, adds challenges to international cooperation and the effectiveness of measures already in place to prosecute terrorists.

Another critique of current strategies aimed at combating terrorism is that several strategies focus too much on the use of force as opposed to legal remedies. The US strategy

[171] Gregory E. Maggs, *Terrorism and the Law: Cases and Materials* (2d ed., 2010).
[172] G.A. Res. 71/151, 4, ¶ 4 (Dec. 20 2016).
[173] S. Res. 1566, 2 ¶ 3 (October 8. 2004).
[174] 18 U.S.C. § 2331.

against ISIS is an example of such a flaw. Little was said by either the Obama or Trump administrations on how the US would combat ISIS using legal remedies. Instead, an extensive aerial bombing campaign in support of local allies on the ground cost taxpayers over $6.2 billion in a two-year period.[175] Legal efforts are often discussed and praised as a crucial part of overarching counterterrorism strategies, yet they are routinely absent in application.[176] Another example is the US strategy against Al-Qaeda under the Bush administration. In the presiding document outlining the executive's overarching counterterrorism strategy, it is stated that the US will "use every tool available to disrupt, dismantle, and destroy their capacity to conduct acts of terror. The final element to the defeat goal is an aggressive, offensive strategy to eliminate capabilities that allow terrorists to exist and operate— attacking their sanctuaries; leadership; command, control, and communications; material support; and finances."[177] The language used in the document is aggressive and assertive, indicating the use of force as the primary tool in the strategy. While that is *a* strategy, the lack of any thought to use of legal remedies in pursuing terrorists raises some notable concerns. The strong reliance on military force to address international terrorism, rather than pursuing legal avenues, has in part shaped the War on Terror into what it is today.[178]

While legal remedies have not been a large part of counter- and anti-terrorism strategies, they have had a role, nonetheless. The United States has currently prosecuted 906 alleged

[175] LTC Stephen E. Schemenauer, *Using the Rule of Law to Combat the Islamic State*, U.S. Army War C., 4 (2016).
[176] Id.
[177] Cent. Intelligence Agency, *National Strategy for Combating Terrorism*, 17 (2003).
[178] A. Trevor Thrall and Erik Goepner, *Step Back: Lessons for U.S. Foreign Policy from the Failed War on Terror*, The Cato Institute, https://www.cato.org/publications/policy-analysis/step-back-lessons-us-foreign-policy-failed-war-terror (last visited Nov. 13, 2019).

terrorists[179] spanning the eighteen years since the September 11th attacks. One of the most effective means by which federal prosecutors have been able to prosecute terrorists is through the "Providing Material Support to Terrorists" statute of the US Code.[180] The statue, a part of the 2001 USA Patriot Act,[181] criminalizes providing terrorists with material support or resources needed to conduct acts of violence.[182] Multiple factors contribute to the effectiveness of this statue, including the fact that terrorist organizations are often large in scope and require several individuals to aid and abet their violent ambitions, frequently consisting of support through the provision of materiel. The necessity for terrorist organizations to have a network of individuals working in a supporting capacity provides countless opportunities for the US to capture and prosecute supporting parties. In addition, the crime of providing support in such a manner is substantive, wherein conspiracy to provide material is also criminal, allowing for further prosecution by the US government.[183] Other means by which the federal government have prosecuted terrorists have been through charging them for crimes such as criminal conspiracy, immigration violations, and making false statements.[184] These charges provide "wide latitude" for federal prosecutors, yet are ultimately rooted in domestic US law.[185] Although the United States has prosecuted terrorists for certain crimes in the past, the US has yet to prosecute terrorists for crimes against humanity, regardless of the fact that terrorist attacks kill hundreds to

[179] Trevor Aaronson and Margot Williams, *Trial and Terror,* The Intercept (Betsy Reed et al. 2019) (Last visited Nov. 16, 2019) https://trial-and-terror.theintercept.com/.
[180] Michael J. Ellis, *Disaggregating Legal Strategies in the War on Terror*, 121 Yale L.J. 237, 241 (2011).
[181] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, P.L. 107–56, 107th Cong. § 805 (2001).
[182] 18 U.S.C. § 2339A (2001).
[183] Ellis, *supra* note 65 at 242.
[184] Aaronson and Williams, *supra* note 61.
[185] Id.

thousands of civilians and pose an existential threat to both the United States and the international community.

B. A New Strategy

Although the United States currently has a legal strategy for prosecuting terrorists, a new strategy is necessary to more effectively hold terrorists and their conspirators accountable for their high crimes, not only against the US, but against the international community as well. Such a policy could be found in prosecuting those in question as enemies of mankind and charging terrorists, and their supporters, with crimes against humanity, using universal jurisdiction as justification for the intrusion of sovereignty. While this policy may be bold, it will prove to be more effective than current strategies to hold terrorists accountable.

The new approach would be applied in all facets of US foreign policy. It would begin with efforts by the Department of Defense, along with the Central Intelligence Agency and the Department of State. They would be responsible for the apprehension of terrorists, similarly to how they currently operate. Special Forces units and intelligence agents would collect intelligence on suspected terrorists and their locations, then be used to infiltrate and extract them from wherever they may be hiding. Under the concept of universal jurisdiction, any trespass of state sovereignty would be permissible due to the severity and nature of the crimes terrorists commit. Universal jurisdiction would not only allow the US to momentarily bypass a state's sovereignty but would also give the US jurisdiction to try terrorists in its own courts. This is due in large part to the fact that terrorist crimes affect both the US directly and indirectly, indirectly through attacks against the international system of which the US is a dominant power. Upon

capture, terrorists would be brought to the US to stand trial as enemies of all mankind who committed crimes against humanity. By doing so, terrorists could be captured anywhere and tried based on the nature of their crimes and activities. Additionally, the US would not be acting entirely on its own accord, but as a delegate of the international system. In pursuing terrorists in this manner, the US is not only protecting its own interests, but the interests of the entire international community.

Terrorist organizations exist outside the realm of the international system, and so do the crimes they commit. As they are non-state actors and are not tied to any specific government regimes, terrorist organizations and their networks exist outside the realm of the greater international system. Additionally, several terrorist organizations are multinational, with networks and connections extending across state borders. The crimes they commit work against the established international order, often striking states for political reasons to disrupt the existing order. The September 11th attacks exemplify this notion as the attacks were perpetrated by members of Al-Qaeda, a non-state, international terrorist organization. The attacks were political in nature as they challenged a dominant Western power and destroyed figureheads of Western capitalism and politics—not only disrupting the US, but the international order as well. The formation of ISIS is also an example of how terrorists disrupt the established international order, as they intended to seize existing land to form their own caliphate in the Middle East and eventually form one on a global scale. It is also important to remember that the concept of universal jurisdiction is not dependent on the location where the crime was committed but simply on the nature of the crime itself in relation to international laws and the greater international

system.[186] Universal jurisdiction should be invoked when capturing terrorists and obtaining proper legal jurisdiction for prosecution due to the non-state nature of terrorist activities and terrorists' desire to actively work against the existing international system. The US could invoke universal jurisdiction not only to capture terrorists that have committed crimes against the US specifically but any terrorist, as they threaten the international system of which the US is a prominent member and leader.

In addition to universal jurisdiction, the crimes and actions of terrorists are exactly what make them enemies of all mankind. The rationale for designating terrorists enemies of all mankind is similar to how universal jurisdiction can be invoked to capture and try any terrorist. As they exist outside the international system and aim to disturb the established international order, they are enemies of all mankind. Similar to pirates, terrorists "engage in a 'war against the world,' challenging both the sovereignty of the state's laws and the fundamental structure of the state itself."[187] Pirates were, and still are, considered to work against states as a whole and their collective presence still presents a threat to the international system. Where pirates were designated enemies of mankind for such behavior, so too can terrorists. The prosecution in the Eichmann case felt similarly as they too stated that "by declaring war against all mankind, all mankind must declare war against [enemies of mankind]; so that every community hath a right by the rule of self-defense, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property."[188] Working against the established order and disrupting world security are inherent to

[186] Bassiouni, *supra* note 12.
[187] Douglas R. Burgess Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. Miami Int'l & Comp. L. Rev. 293, 326 (2006).
[188] DC, *supra* note 9.

the activities, and very nature, of international terrorists. As the world becomes more connected through increased globalization, terrorist actions are able to disrupt more parts of the ever-interconnected system of states. Due to the threat they pose, and the vast damage and destruction they have already caused in the greater system—such as the September 11th attacks—terrorists can be designated enemies of mankind.

Charging terrorists with crimes against humanity would be a first of its kind, but precedents set in the Nuremberg and Eichmann trials indicate that such an application is possible. The question of what constitutes crimes against humanity was addressed at Nuremberg, wherein the IMT defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population."[189] A more recent definition of crimes against humanity can been found within the Rome Statue of the International Criminal Court (ICC). The statue holds crimes against human to mean,

> any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection

[189] Control Council L. No. 10, art. II, Int'l Mil. Trib., Dec. 20 1945.

> with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid: Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[190]

Under both the definition set by precedent from the Nuremberg Trials and the definition set by the ICC, terrorist actions would constitute crimes against humanity. As previously mentioned, terrorists are non-state actors who actively threaten and disrupt the US and greater international system. They achieve this by targeting civilian populations in either large-scale attacks like the September 11th attacks, or smaller scale attacks against localized communities. Regardless of where the attack occurs, terrorist attack trends show they favor targeting civilian populations. Furthermore, these attacks are pre-planned and are supported by a network of conspirators. They are designed to inflict a large number of casualties and to incite fear in the general populace. Intended targets and casualty statistics are also important factors to consider in identifying terrorist actions as crimes against humanity; the September 11th attack alone killed roughly 3,000, an overwhelming amount of civilians. In addition, global deaths caused by terrorists have been routinely above 10,000 per year.[191] In 2014 alone, the number of deaths as a result of terrorism globally reached 32,763.[192] It is the very nature and severity of terrorist attacks which make them crimes against humanity, and their crimes should be tried as such.

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[190] Rome Statute of the International Criminal Court. art. 7, ICC, (2011) https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf.
[191] Statista Research Department *Number of fatalities due to terrorist attacks worldwide between 2006 and 2017*, Statista (2018) (Last visited Nov. 15, 2019) https://www.statista.com/statistics/202871/number-of-fatalities-by-terrorist-attacks-worldwide/.
[192] Id.

C. The Osama Bin Laden Raid: A Practical Example

In 2011, a raid on a Pakistani compound by members of US Navy SEAL Team Six led to the death of Osama Bin Laden. The Obama administration carefully crafted a legal rationale for the raid, however a rationale founded in the concepts of *hostis humani generis* and universal jurisdiction may have also been applied. In the several weeks leading up to the raid, the Obama administration had worked extensively with military and intelligence personnel to gather information and plan for the raid. The administration also had to consult with legal advisors about the legality of the raid. One legal aspect they had to consider was Pakistan's sovereignty, as Bin Laden and his associates were residing in a compound in Pakistan. Jeh C. Johnson, the Pentagon's general legal counsel at the time, wrote a legal brief arguing in favor of the legality of infringing upon Pakistan's sovereignty. In the brief, Johnson and the rest of the legal team "decided that a unilateral military incursion would be lawful because of a disputed exception to sovereignty for situations in which a government is "unwilling or unable" to suppress a threat to others emanating from its soil."[193] The team of lawyers also offered other legal strategies that would justify the incursion into Pakistan, such as the fact the operation was covert in nature, that secrecy was key to mission success[194] and that alerting the Pakistani government might have tipped off Bin Laden.

While the legality of the raid based on the rationale provided by the administration's legal counsel held, a possibly overlooked strategy to justify the incursion may be found in international legal principles about enemies of mankind and universal jurisdiction. Until his death, Osama Bin Laden was the leader of the international terrorist group Al-Qaeda and was the

[193] Savage, *supra* note 51.
[194] Id.

architect behind the September 11th attacks. To reiterate, the attacks killed several thousand people, many of whom were civilians. The attacks were also planned for months with intended targets. Since Al-Qaeda is a non-state terrorist organization and the attacks were targeted against civilians for political and religious motives, Osama Bin Laden and his Al-Qaeda associates could be considered enemies of mankind and in addition, could be charged with having committed crimes against humanity. Based on the September 11th attacks and other Al-Qaeda attacks which disrupted the international order, universal jurisdiction could have been invoked for the raid, providing justification for the United States to enter Pakistan to kill or capture Osama Bin Laden.

D. Critiques of the Strategy

In proposing a new strategy, it is important to note the possible critiques that may arise and to address them accordingly. One criticism exists where an application of the new strategy could lead to an increase in the deployment of US Special Operations forces and whether such an increase in deployments is an authorized expansion of executive power. Currently, authorization for the deployment of US forces by the executive branch can be found in both the Constitution and the War Powers Resolution of 1973. In the Constitution, Article Two states that the president "shall be Commander in Chief of the Army and Navy of the United States."[195] This expressly gives the president power over the military of the United States. However, the Constitution limits this power by also expressly giving Congress the power to declare war.[196] This has come into contention frequently since the end of the Second World War, as the US has frequently been involved in conflicts without declaring war. Congress addressed this contention in the War

[195] U.S. Const. art. 2 § 2.
[196] U.S. Const. art 1 § 8.

Powers Resolution of 1973, where it stated that the president must inform Congress within 48 hours of sending armed forces into conflict and only allowing them to stay in conflict for a total of 60 days—with a 30-day extension—without congressional approval in the form of an Authorization Utilization of Military Force (AUMF).[197] While the US Congress passed AUMFs for both Afghanistan and Iraq, the present question is whether, under the proposed strategy, an AUMF would be needed to capture terrorists for prosecution. In short, the answer is no, as such operations would not exceed 60 days. Another question then arises as to whether the frequent and repeated deployment of Special Operations forces to capture terrorists in foreign states would be an extension of the power allotted to the president in both the Constitution and the War Powers Resolution. Such actions would be allowable under both documents. In addition, the president would be able to exercise his power through the Secretary of Defense and DoD.[198] This is codified in Title 10 of the US Code, which provides for the creation of the US Special Operations Command (USSOCOM).[199][200] In acting as an extension of the executive, the president and Secretary of Defense would have authority and control over the implementation of US Special Forces. Title 10 also confines authority within USSOCOM while they commit certain activities, including counterterrorism operations.[201] The frequency of deployments for Special Forces, however, could be contentious. If they became far too frequent, it could be seen as an infringement on Congress' war-making ability and could present a constitutional question about the scope of the president's ability to send troops into hostilities. Such a question is important to

[197] 50 U.S.C. § 1541–1549.
[198] Andru E. Wall, Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action, 3 Harv. Nat'l Sec. J., 85, 98 (2011).
[199] Id.
[200] 10 U.S.C. § 161-169.
[201] Wall, *supra* note 87 at 99.

ask when considering the application of the new strategy. Currently, however, there is no definitive answer to the question.

Additionally, other questions arise regarding the role and powers of the president and the executive under such a strategy. The Supreme Court has provided an answer and has decided on the foreign police power of the president before. In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court held that the president is the "the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[202] The president, in applying the new strategy, would be legally justified in deciding to invoke universal jurisdiction and order an intrusion on state sovereignty. Furthermore, the Supreme Court has also established precedent on presidential actions during a time of war. In the *Prize Cases*, the Supreme Court held that the president acted in a time of war and that as commander-in-chief, he has the authority to use military forces in defense of national security.[203] The current era that the US and the international system find themselves in is what could be considered a time of war. The war is not between state actors but between states and non-state actors—the title of the current international conflict is the "Global War on Terror" as coined by President George H. W. Bush.[204] States may not have officially declared war—it's hard to officially declare war against non-state actors—but have operated accordingly: troop deployments, combat operations, policies enacted in line with defined, strategic goals. As the US and the international system as a whole are currently in a time of war, holdings from the *Prize Cases* could be applied to justify the president's use of operational forces to advance both national and international security interests.

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[202] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[203] Prize Cases, 67 U.S. 635 (1862).
[204]The White House, *Address to the Joint Session of the 107th Congress* (September 20th, 2001).

One of the largest criticisms of the new strategy can be found in its intrusion on state sovereignty. State sovereignty is one of the defining features of the international system. Under the concept of sovereignty, a state has complete authority within its borders. Specifically, states "do not simply have ultimate authority over things political; they have authority to relegate realms of activities, issues, and practices to the economic, social, cultural, and scientific realms of authority or to the states' own realm—the political."[205] State sovereignty is so integral to the international system that the United Nations Charter directly states that "The Organization is based on the principle of the sovereign equality of all its members."[206] While sovereignty and respect of it are key to the preservation of the international system, the proposed strategy would only be applied in the limited circumstance of pursuing terrorists. A legal test could also be developed wherein judges are able to evaluate whether the invocation of universal jurisdiction was necessary and the incursion on sovereignty permissible. The test could include an evaluation of the crime the terrorist committed to determine whether it is a high crime of international law and evaluate the severity of the crime. If the crime is deemed a high crime of international law, such as crimes against humanity, then the incursion on state sovereignty would be upheld under universal jurisdiction and the principle of enemies of mankind. It is key to the application of the newly proposed strategy that it not be abused. Abuse of this policy could take many forms, with the worst being an over application wherein states increasingly use this policy to ignore state sovereignty and detain any individual they would deem *hostis humani generis*. From this arises additional concerns. An over application would have the dual effect of diminishing the severity of the charge as well by normalizing its use. While high crimes must be met with an equally high

[205] Janice E. Thompson, *State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research*, 39 No. 2 Int'l Stud Q., 213, 214 (1995).
[206] U.N Charter art. 2, ¶ 1.

charge, the application of *hostis humani generis* and universal jurisdiction must be limited to strict circumstances. If it were to be abused by states, including the US, it could lead to the deterioration of relations between states, thus crippling the international system.

Another criticism of the proposed strategy is that it conflicts with extradition treaties. Extradition treaties are, in part, due to a respect to state sovereignty. It involves a formal request for one state to apprehend and extradite a desired criminal to another state. The formality allows state sovereignty and authority to be respected while at the same time allowing for nations to pursue justice within the international system. Disregarding the use of extradition could lead to similar issues regarding the disrespect of state sovereignty, wherein such a practice "violates international law by disrupting world order, infringing upon the sovereignty and territorial integrity of other states, and violating the human rights of the individuals seized."[207] Moreover, a concern exits over whether the US could have jurisdiction over an individual obtained overseas without using the provided extradition channels. While the concern is noted, the matter has already been discussed by the Supreme Court. In *Ker v. Illinois*, the Court held that the abduction of Ker in Peru to stand trial in Illinois for crimes he committed there did not impede the Court from trying him for said criminal activity.[208] In addition, the concern of US legal counsel during the raid on Osama Bin Laden's compound is rational; Formal extradition could have alerted the very terrorists the US would want to capture. In such instances an alternative legal justification would be needed to capture the terrorists without alerting them, enabling the US to obtain justice for terrorists' high crimes.

[207] Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 Yale J. of Int'l. L., 294, 336 (1987).
[208] Ker v. Illinois, 119 U.S. 436 (1886).

Conclusion:

The twenty-first century has begun with an era marked by international conflict. Prominently beginning on September 11th, the War on Terror has disrupted the international system and ushered in decades of political turmoil and conflicts between states and non-state actors. The US has been one of the key figures in the War on Terror, and as such, has had immense interest in preserving national security and security for the greater international system. The US government's current strategy in pursuing said security has produced some results—the diminished influence of Al-Qaeda in Afghanistan and Iraq and the fall of ISIS are two notable accomplishments. However, the strategy has had a focus in the use of force as opposed to the use of legal remedies. Through an increase in criminal justice-centered strategies, the US would be able to effectively obtain justice for the heinous actions of terrorists, by allowing states to capture terrorists wherever they hide and to hold them accountable for their atrocities. As terrorists exist and act outside the established international system, a challenge is presented to strategies which provide more emphasis on a criminal justice approach. By applying the *hostis humani generis* and universal jurisdiction, the United States may have a way to shift its current counterterrorism strategy from a force-reliant model to a more criminal justice-focused model. These concepts would then allow the US to capture terrorists wherever they may hide for prosecution as enemies of all mankind who have committed crimes against humanity. While such a strategy may be bold, it is necessary in order to finally hold terrorists accountable within the parameters of the law and the greater international order.

Legislating Consent and Autonomous Preferences

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Abstract:

Consent is critical because it enables us to plan our lives intentionally, according to our preferences. Without presumptions of autonomous consent, it would be difficult to determine responsibility and to conduct generally cooperative affairs. Sometimes consent goes wrong – we find that we cannot realize our intentions, even though consent seemed to be present. Three aspects of consent should be considered in crafting rules to best promote autonomous consent: it has power to help us structure our lives; it should reflect our considered preferences; and it has a somewhat complicated relationship to intention. Good legal guidelines for ensuring consent and crafting appropriate contracts make progress toward ensuring that legal consent enhances autonomy. Nonetheless, there will be unavoidable cases in which legality is not enough to make consent fully autonomous. In this essay, I discuss each of the above aspects of consent before considering the practical need to legislate a rule-based account of consent.

Introduction:

Consent is critical. It enables us to make intentional plans according to our preferences. When successful, consent lets us see ourselves reflected in our own and others' actions. But sometimes we say that we consent to something yet feel estranged from its ultimate effects. This is usually a sign of faulty consent. Three aspects of consent should be considered in legislation: it has power to help us structure our lives; it should reflect our considered preferences; and it has a somewhat complicated relationship to intention. Problems with each of these aspects can lower the quality of consent and the degree of autonomy that consent reflects. At the same time, it is difficult to create a system that recognizes and is sensitive to the autonomous quality of consent

and is not too cumbersome to be usable. In this essay, I discuss each of the above aspects of consent before considering the practical need to legislate a rule-based account of consent.

Ability to plan: Misunderstanding over interpretation of an agreement

Example: Baird Textile Holdings Ltd v. Marks & Spencer Plc[209]

Prior to the lawsuit, Baird Textile Holdings had supplied clothes to Marks & Spencer for thirty years. When Marks & Spencer ended all supply arrangements between the two firms, effective at the end of the production, Baird sued Marks & Spencer for failing to give reasonable notice. However, the Court decided that no contract could be implied by the previous thirty years' arrangements; the two parties had misunderstood the terms of their engagement. Baird interpreted the longstanding agreement to mean that Marks & Spencer consented to be bound by the agreement absent explicit future communication, while Marks & Spencer did not interpret their arrangements as signifying such consent.

Consenting to agreements is an important way of exercising power to plan for an autonomous future. Baird thought that Marks & Spencer had consented to be bound by an agreement under which Baird would continue to supply clothing to Marks & Spencer. Baird may have made long-term staffing and capital plans on the basis of that continuing relationship. When the relationship was abruptly terminated, it became apparent that the two firms had not established what had been consented to in their relationship. This misunderstanding had tangible consequences for Baird, which suddenly faced a significantly reduced revenue stream. The ability to consent to enter agreements is critical to making long-term plans; without it, it would

[209] Baird Textile Holdings Ltd v. Marks & Spencer Plc, [2001] EWCA Civ 274 (28 February 2001), http://www.bailii.org/ew/cases/EWCA/Civ/2001/274.html.

be difficult to invest in the future. Presumed consent is part of what makes contracts binding in general; without the consent of Marks & Spencer, Baird could not hold that company liable for not maintaining their agreement.

Exercising our ability to plan in general is an important way in which we manifest our autonomy. Reliable agreements are necessary to plan, and consent is necessary to make those agreements legitimate. Without consent, agreements are not thought to be binding; consent is necessary to make them so. Consent, therefore, is necessary for autonomous action. It seems intuitive and morally bedrock that autonomy is valuable. Actions typically fall somewhere in between being fully and not at all autonomous; the degree of autonomy that a particular action expresses depends on the degree to which the preferences it is based on are autonomous.

Preferences: Change in options lead one party to renege on an agreement

Example: Texaco, Inc. v. Pennzoil, Co.[210]

Pennzoil, Co. contacted the Getty Entities (the Getty Oil Company and the J. Paul Getty Museum) with an offer to merge the two oil companies and buy out the museum's shares at $110 per share. The museum signed a Memorandum of Agreement, agreeing to the deal conditional on the Getty Oil board approving it at a January 2 meeting, after which the Memorandum would expire. The board did not agree to the deal on the grounds that the offer price was too low and began looking for other buyers. The following day, the board approved an offer of $110 per share with a $5 stub from Pennzoil and the parties issued identical press releases announcing their agreement. On January 5, Texaco, Inc. contacted the Getty Museum, offering to purchase

[210] Texaco, Inc. v. Pennzoil, Co., 729 S.W.2D 768 (1987) (Warren, E., majority). https://www.courtlistener.com/opinion/2443517/texaco-inc-v-pennzoil-co/.

their shares for $125 per share. On January 6, the Getty Oil board voted to withdraw their agreement with Pennzoil and signed a merger agreement with Texaco. Pennzoil subsequently sued Texaco for tortious interference.

According to Justice Harding's opinion, one of the main questions in the court determination was "whether the evidence supports the jury's finding that there was a binding contract between the Getty entities and Pennzoil, and that Texaco knowingly induced a breach of such contract."[211] They decided that the Memorandum of Agreement was sufficient to constitute a binding contract, noting that "If there is no understanding that a signed writing is necessary before the parties will be bound, and the parties have agreed upon all substantial terms, then an informal agreement can be binding, even though the parties contemplate evidencing their agreement in a formal document later."[212] The expanded range of options, in this case, was insufficient to invalidate the prior consent.

Preferences are the means through which consent manifests our autonomy. For consent to express autonomy, it must reflect our autonomous preferences. When we act on less autonomous preferences, we express a lesser degree of autonomy. Consent is most fully autonomous when it follows from preferences that are freely formed (a) on the basis of sound judgement, absent manipulation or coercion and (b) in the presence of an adequate range of options, with at least some knowledge of those options. The consent of children is often not considered valid because their preferences lack (a), (b), or both. In the presence of external pressures or limited (knowledge of) options, we may adapt our preferences differently from what we would choose given adequate options and independent reflection.

[211] 729 S.W.2D 768 (1987) (Warren, E., majority).
[212] Id.

The members of the Getty board expressed a preference to sell their holdings for $115 per share, a price that, after negotiations, they determined was the best available. The Getty board had begun searching for other buyers before agreeing with Pennzoil on the $110 plus $5 stub deal, and at the time when they made their agreement, was presumably unaware that they could obtain a better offer elsewhere. After Getty and Pennzoil had confirmed their agreement, however, Texaco offered Getty $125 per share. If Getty had been able to consider the Pennzoil and Texaco offers simultaneously, they would have chosen to transact with Texaco, rather than Pennzoil, to receive a greater profit.

The Getty board members could argue that their originally expressed preference to transact with Pennzoil lacked the distinctive mark of considered judgement because it was made in the absence of a wide range of options. That preference, the members might argue, was not expressive of autonomy. The consent it led to would therefore not be the right kind of autonomy-confirming consent. Their later preference to transact with Texaco, on the other hand, was formed in response to a wider range of options. This second preference reflects more of their own preferences and less of the informational constraints they faced. The argument that Getty originally faced an insufficient range of options may be contested, but it nevertheless demonstrates a general relationship between consent, preferences, and autonomy. If the reason we care about consent is that it allows us to manifest our autonomy, the preferences that our consent expresses must also express our autonomy (that is, the preferences must be freely formed). Adaptive preferences are not freely formed. Consent that follows from adaptive preferences can only express a compromised version of autonomy.

Intention: Attribution of responsibility for an unwanted consequence of an intended action

Example: Carnival Cruise Lines, Inc. v. Shute[213]

Eulala and Russell Shute, residents of Washington State, bought tickets for a cruise operated by Carnival Cruise Lines, headquartered in Florida. While off the coast of Mexico, Ms. Shute was injured after slipping on a deck mat. The Shutes filed suit against the cruise line in Washington State. However, they had clicked "I agree to the terms and conditions" when they purchased their cruise tickets, and one of the conditions was that any litigation regarding the cruise must be pursued in Florida. The Court interpreted clicking "I agree" to the terms and conditions as meaning that "I am expressing my intent to be bound by the terms I am likely to have read (whether or not I have done so) and also by those unread terms in the agreement above that I am not likely to have read but that do not exceed some bound of."[214] In this case, the Court sided with Carnival Cruise Lines, ruling that the suit should have been brought in Florida courts. In their decision, they noted that "clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."[215] In other words, if the terms are fundamentally unfair then the fact that the relevant parties agreed to them is not necessarily sufficient to make them binding.

The relationship between consent and intention is complex. Ideally, we would only consent to actions with desirable consequences and, in doing so, express our preference for those ideal consequences. In reality, we often consent to actions that have unavoidable consequences that we would never intend to bring about otherwise. Although we sometimes know the consequences of our actions, more often we do not. It is not always clear whether we consent to undesirable

[213] 499 U.S. 585 (1991), https://supreme.justia.com/cases/federal/us/499/585/.
[214] Barnett, Randy E. "Consenting to Form Contracts" (2002). *Fordham Law Review*: 627-645, pp. 638-639.
[215] Id. at 639.

consequences when we consent to an action. The Shutes did not realize that in consenting to purchase cruise tickets, they were also consenting to bring any litigation against the cruise line in a Florida court.

Tom Beauchamp argues that any foreseeable effects of an action that an agent chooses to take are "tolerated," and are thus included as part of the intentional action. He dismisses the idea that one can distinguish between an act that an agent does intentionally and one that is "merely" a foreseen consequence of an intentional action. Instead, he suggests a distinction between what an agent intends (the goal of the action) and an intentional action (a consequence that the agent knows will arise).[216] In the kind of simple examples that Beauchamp gives, this seems like a plausible claim. If Socrates needs to walk outside and it is raining, he knows that his shoes will get wet. Even if getting wet was not his primary intention, he cannot complain that he did not intend to get his shoes wet on the way. Because he knew that they would get wet, his intention was to {walk *and* wet his shoes}, not simply to walk. With more complicated scenarios, Beauchamp's account is less convincing. On his account, one might say that the fact that Shute would not have willingly agreed to bring litigation in Florida is irrelevant: she had a choice between {buying the cruise ticket *and* agreeing to the litigation terms} and {to not buy the ticket and not be bound by the terms}. Nothing prevented Shute from reading the terms when she bought the ticket; she actually indicated that she *had* read and agreed to them. Agreeing to the terms is simply part of the action that Shute freely agreed to when she purchased the tickets. Analogously to how the rainy walker intended to {walk *and* get wet}, Beauchamp could claim that Shute intended to {buy the cruise ticket *and* agree to the litigation terms}, not simply to

[216] Tom Beauchamp. "Autonomy and Consent." In *The Ethics of Consent: Theory and Practice*, edited by Franklin Miller and Alan Wertheimer, 55-74. Oxford: Oxford University Press, 2009. p. 67.

{buy the ticket}. Beauchamp's analysis seems to confuse the connection between an action and its undesired but foreseeable consequences.

In the Socrates case, the connection between it raining outside and Socrates getting wet is necessary and unavoidable. There is nothing that he – or anyone else – can do to prevent his shoes from getting wet as he walks outside in the rain. In the *Shute* case, the connection between buying the ticket and agreeing to the terms is not logically necessary – the cruise line could reasonably sell tickets without the litigation-in-Florida provision. The connection between buying the ticket and agreeing to the terms, moreover, might not hold in a society with different legal regulations or stronger consumer protections. Walking in the rain, in contrast, would result in wet shoes even in a society with completely different rules. With necessary connections between intentional act and unchosen consequence (as in the Socrates case), human actions would not affect the causal relationship. Some unnecessary connections (as in the *Shute* case), in contrast, might not hold under different legal systems (even if it is difficult to change legal systems once established).

It is precisely because the connection between an intended act and its unintended effect is not necessary that the bundling of the two into a single intention is troubling in the *Shute* case. It would be illogical for Socrates to say that he did not consent to the connection between the intended act (walking outside in the rain) and its foreseeable consequence (getting wet) because that connection is natural and unavoidable. The connection between the intended act (buying the ticket) and its foreseeable, though not intentional, consequence (limitations on where she could bring lawsuits) comes from a particular legal arrangement rather than from a necessary connection. Thus, it is reasonable for Shute to protest against the consequence. The reason for

the connection is relevant to Shute's complaint. Shute did not consent to a situation where regulations and consumer protections were such that she would find herself in a situation where she could not buy a ticket without agreeing to specific terms. At the same time, she knew that she would have to agree to the terms in order to purchase her ticket. She may challenge this condition, but we can assume that change will not come quickly enough to affect her case. The connection between cause and effect is dependent on the actions and prejudices of others, which she disapproves of and might even actively oppose. But despite the system being unfair and not one Shute *would* consent to, she recognizes that she *is* a part of that system. Although agreeing to only bring lawsuits in Florida is not part of Shute's intention, it is nonetheless part of her intentional action.

Ultimately, Shute knew she would be subject to certain terms if she bought her cruise ticket, yet she bought the ticket anyway. We can plausibly assume that nobody forced her to make that decision. But it still seems wrong to say that Shute consented to being restricted by the state in which she could bring lawsuits even when that was part of the intentional action that she evidently consented to by purchasing the ticket. The best way to reconcile these facts seems to be to recognize that while Shute did consent to {buying the cruise ticket *and* agreeing to the litigation terms} and {to not buy the ticket and not be bound by the terms}, her consent was not fully autonomous because it did not follow from autonomous preferences. The fact that Shute could not both buy the cruise ticket *and* be unrestricted in legal fora, both of which she wanted, shows that in forming her preference she lacked (b), an adequate range of options. Although being legally restricted is part of her intentional action, her consent for that consequence is less than fully autonomous because it was based on a preference formed in response to restricted

options and (if she did not fully understand the terms she agreed to) incomplete information. What Shute would have ideally chosen is only partially reflected in the outcome of her action.

Implementing Consent:

Without assumed autonomous consent, it would be difficult to determine responsibility and to conduct generally cooperative affairs. Absent that assumption, our legal system would avoid wrongly attributing responsibility, but at the cost of failing to attribute responsibility in many cases where it is appropriate. It can be difficult to judge the quality of consent without intimate knowledge of the consenting party's individual history and external influences. Even so, we need some way to judge consent for practical purposes. There must be some way to know when to enforce a contract or informal agreement. There must be some way to know when to call one person handing her watch to another a mugging and when to call it gift-giving. Analyzing every instance of consent to determine whether it expresses autonomy is too onerous to be practicable. Because of practical constraints, we should turn to a straightforward way of looking at consent in a rule-based system. We should create social or legal rules of consent that empower certain actions or expressions to grant socially or legally recognized consent.

In some situations, autonomous consent and rule-based consent will not line up. Rule-based consent may be too broad. Shute, for example, may not have been able to bring her suit against Carnival Lines if she had had to travel across the country to do so, but the Court decided that was less important than the efficiency savings from having a single forum for lawsuits for a company that carries passengers all over the world. Rules might also be too narrow. They may not cover what parties feel they have reasons to consider to be consent, like

how Baird considered their long-standing agreement with Marks & Spencer to represent the latter's consent to continue their arrangements. In response, our rules governing consent should provide a way to register when rules do not capture the true quality of consent. This exists to some extent in the form of appellate courts. But the appeals process is often so time and resource intensive that some parties who feel that rules of consent and contracts have failed them may not appeal court decisions for practical reasons. Simply registering an appeal that some particular consent was not sufficiently autonomous may not change the ruling. Even so, appeals can at least indicate where future work needs to be done and can serve as a record of people's intentions. Despite the existence of notable exceptions, legal rules about consent should be made with the aim of capturing what would likely be people's informed preferences selected from an adequate range of options.[217]

Following certain guidelines in writing contracts or creating binding informal agreements can increase the quality of consent they express. First, parties should be as explicit as possible about the scope of their agreement. Defining the conditions under which the terms would apply as narrowly as possible would reduce confusion about when contracts are enforceable, as was seen in *Texaco, Inc. v. Pennzoil, Co*. Second and relatedly, parties should maintain clear records of agreements, their own or that of another party, they wish to use in the future to indicate consent. Third, parties should take actions to reduce the room for disagreement about what

[217] For instance, consent rules may invalidate excessively usurious lending. While particular individuals in desperate circumstances might be willing to borrow money at high interest rates, they would not autonomously choose to do so (e.g. in the presence of a wider range of adequate options). The preference to take on such a loan could only be adaptive; invalidating consent to an agreement like that prevents individuals from acting on that non-autonomous preference. Whether that legal interference is acceptable without providing other adequate options, of course, is open to debate.

constitutes consent. Introducing mandatory waiting periods between expressing interest and signing important binding contracts, for instance, is an example of such an action.

And always, it is important to consider what is and is not reasonable to include in the terms of an agreement. It is difficult to spell out exactly what constitutes common sense, but it is clearly important and may at times conflict with contractual terms. As Andrew Kull writes,

> Common sense sets limits to a promise, even where contractual language does not. Though a promise is expressed in unqualified terms, a person does not normally mean to bind himself to do the impossible, or to persevere when performance proves to be materially different from what both parties anticipated at the time of formation. ... The force of the implicit claim is hard to deny: I did not mean my promise to extend to this circumstance; nor did you so understand it; to give it that effect would therefore be to enforce a contract different from the one we actually made.[218]

As Justice Warren notes, an informal agreement can be binding if "the parties have agreed upon all substantial terms."[219] Cooperating parties should always strive for mutual understanding about the terms of their cooperation. Otherwise disagreements over what constitutes an informal agreement may arise, as in *Baird Textile Holdings Ltd v. Marks & Spencer Plc*. Again, some degree of judgement and the exercise of common sense will be necessary to decide when parties have indeed agreed on "all substantial terms." What is or is not fair to expect often depends on the social context. Despite the necessity of leaving

[218] Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies,* 43 Hastings L.J. 1, 38-39 (1991), cited in Barnett, Randy E., "Consenting to Form Contracts" (2002). *Fordham Law Review*: 627-645.
[219] 729 S.W.2D 768 (1987) (Warren, E., majority).

room for flexibility, some kind of rule-based consent system that assumes conditions under which consent can be considered sufficiently autonomous is also needed to structure social and political life. Providing that structure is, after all, an important function of law, the clearer that legal expectations are, the more confidently individuals and corporations can plan for the future. Even an imperfect set of rules or guidelines for consent is more desirable than leaving consent legally undefined.

As a concluding cautionary note, it is important not to reify legal consent. Legal correctness is not the only consideration that makes consent autonomy-enhancing. While good legal guidelines for ensuring consent and crafting appropriate contracts make progress toward ensuring that legal consent enhances autonomy, there will be unavoidable cases in which even well-crafted rules with built-in room for appeals will miss something essential to autonomy. On the topic of sexual consent, Robin West writes that the "focus particularly on consent as the marker of both legal and moral sex, and on non-consent as the marker of both injury and criminality, runs the risk of virtually defining the harms caused by consensual sex out of existence, or at least minimizing their significance."[220] For laws to promote holistic consent, they must consider why that consent would be desirable in the first place.

[220] Robin West, "Consensual Sexual Dysphoria: A Challenge for Campus Life," 2017, *Journal of Legal Education* 66 (4): 804-821.

The Mental Health Crisis in America's Prisons: How Did We Get Here and Where Do We Go Next?

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Abstract:

This article will explore the history of mental health treatment in the United States and its relation to the American legal system. American attitudes toward mental health have evolved over time as research has progressed. What was once widely misunderstood has become less stigmatized and more seriously acknowledged. However, the number of incarcerated individuals suffering from mental illness continues to increase. As legislation regarding mental health treatment gets repealed over time, some individuals do not receive adequate support for their mental illnesses and ultimately find themselves in the criminal justice system. Additionally, lack of proper mental healthcare increases recidivism rates, as well as the cost of maintaining prisons and caring for prisoners. This article will explore the ways that legislation relating to mental healthcare has changed over time. The article will then examine the current state of mental health in relation to incarcerated individuals and the impact of the lack of care on incarcerated people. Finally, the author will analyze recent recommendations for mental health care legislation inside and outside of prisons and suggest the best practices moving forward.

Introduction:

The relationship between law and psychology is complex. A notable intersection of the two disciplines is that of mental illness and the legal system, or more specifically, the relationship between mental illness and incarcerated individuals. The purpose of this paper is to review the history of the relationship between mental illness and the law, as well as the current state of this relationship. Additionally, this article aims to advocate for reform within the American legal system to help mitigate the mental health crisis in the criminal justice system moving forward.

To begin, the author will examine the history surrounding mental health treatment in the United States, including the development and subsequent closure of institutions and treatment programs for individuals with mental illness. The author will also discuss various acts of legislation that impacted how mental health was viewed and treated in society at large. The author will then explore the increase in the number of incarcerated individuals with mental illness and examine the events leading up to this increase. Next, the author will evaluate current American perceptions about mental health and the law. The author will then review where American society stands today in regards to mental health issues as well as what the general public understands about the relationship between the law and mental health. The author will conclude by advocating for change and providing recommendations for the best practices moving forward. In doing so, the author will evaluate recent suggestions of ways to address the mental health crisis in prisons and discuss the efficacy of these programs thus far.

Individuals with mental illness are facing the criminal justice system and imprisonment at increasing rates, rather than receiving support and treatment for their conditions. By addressing these issues at their roots and focusing on preventative programs and proper care, American society can reduce the number of incarcerated individuals who suffer from mental illness and help people find treatment before they encounter legal trouble. Providing adequate support for individuals inside and outside of prison will benefit both individuals who are incarcerated and the public as a whole.

Background:

The 1800s – 1900s: Mental Health Legislation in America

Mental health has historically been a widely misunderstood and stigmatized issue in the United States. Throughout the 1800s and early 1900s, public hospitals and asylums often featured horrific living conditions and mental illness was perceived as a shameful disease.[221] In 1946, President Harry Truman signed the National Mental Health Act, which aimed to address the lack of research relating to psychiatric disorders and to assist in the development of "more effective methods of prevention, diagnosis, and treatment."[222] While the Act established important research and advisory organizations to help achieve its goals, those organizations ended up lacking significant funding and resources.[223] President John F. Kennedy attempted to address this gap with the Community Mental Health Act.[224] Aiming to strengthen the body of research on mental health issues, the Act allocated federal funding for research centers, facilities for individuals with mental illness and disabilities, and community mental health centers.[225] Unfortunately, ongoing economic crises and wars still prevented the programs from being adequately funded.

The relationship between individuals with mental illness and the criminal justice system reached a turning point in 1967 when California passed the Lanterman-Petris-Short Act. Aspiring to "end the appropriate, indefinite, and involuntary commitment of persons with mental health disorders," this legislation made involuntary hospitalization of individuals with mental illness significantly more complicated by placing restrictions on the requirements for and

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[221] Deanna Pan, *TIMELINE: Deinstitutionalization And Its Consequences*, Mother Jones (April 29, 2013), https://www.motherjones.com/politics/2013/04/timeline-mental-health-america/.
[222] National Mental Health Act, Pub. L. No. 487, 60 Stat. 421 (1946).
[223] Id.
[224] Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).
[225] Id.

duration of an individual being hospitalized.[226] Although the Act had positive intentions, it inadvertently created a societal pressure to "re-institutionalize" individuals who had been released without receiving adequate treatment.[227] As a result, the number of individuals with mental illness in the criminal justice system nearly doubled within a year after the Act was passed.[228] President Jimmy Carter recognized the severity of the issue and quickly created the Presidential Commission on Mental Health after assuming office. The Commission was created to recommend policies to address deficiencies in current mental health practices.[229] After several years of work, the Commission inspired the Mental Health Systems Act in 1980, which sought to improve mental health services and to promote mental health throughout the United States.[230] The Act dedicated over $800 million in grants to expand and improve community mental health centers and worked to empower states and localities with resources to address mental health.[231] The Mental Health Systems Act is widely regarded as a landmark piece of legislation for individuals with mental illness due to its direct and symbolic impact on mental health policies in America. The optimism brought by the Mental Health Systems Act was short-lived, however. In 1981, less than a year after its passage, President Ronald Regan signed the Omnibus Budget

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[226] Lanterman-Petris-Short Act, West's Ann.Cal.Welf. & Inst.Code § 5000-5121 (1967).
[227] E. Fuller Torrey, M.D., Appendix to *Out of the Shadows: Confronting America's Mental Illness Crisis* (1997).
[228] Id.
[229] Gerald N. Grob, *Public Policy and Mental Illnesses: Jimmy Carter's Presidential Commission on Mental Health*, 83(3) The Milbank Quarterly, 1 (2005).
[230] Mental Health Systems Act, Pub. L. No. 96-398, 94 Stat. 1564 (1980).
[231] Jessica W. Hart, *How Presidents Have Shaped Mental Health Care*, National Alliance on Mental Illness (February 15, 2019), https://www.nami.org/Blogs/NAMI-Blog/February-2016/How-Presidents-Have-Shaped-Mental-Health-Care.

Reconciliation Act, which repealed the Mental Health Systems Act and cut funding for mental health care by approximately 30%.[232]

The Early 2000s – Present Day: Impact on the Criminal Justice System

Over the next several decades, extensive research examined the relationship between mental illness and prisons. In 2004, studies suggested that approximately 320,000 inmates in prisons and jails, or 7% to 16% of all inmates, were suffering from serious mental illness.[233] Yet, there were only about 100,000 beds available in psychiatric hospitals during that same year.[234] In other words, as a result of deinstitutionalization and a lack of mental health legislation, psychiatric hospitals at the time only had the resources to treat less than a third of incarcerated individuals with mental illnesses.

In the coming years, problems such as funding and access to necessary resources only worsened. After the Great Recession in 2009, states reduced public mental health spending by almost 4.5 billion dollars. This marked the largest decrease in funding for mental health services since deinstitutionalization several years prior.[235] The next year, there were only 43,000 beds available for psychiatric patients in the United States. This amounts to a ratio of about 14 beds per every 100,000 people, which is the same rate as in 1850 – more than 200 years earlier.[236] Comparatively, the number of prisoners showing symptoms of serious mental illness by 2014 was approximately 149,000, or 20% of the population.[237] As in 2004, the number of individuals

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[232] Pan, *supra* note 1.
[233] Id.
[234] Id.
[235] Id.
[236] Id.
[237] *Serious Mental Illness Prevalence in Jails and Prisons*, Treatment Advocacy Center (September 2016), https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3695.

with mental illness in prison alone was more than triple the total number of beds available for patients, creating a noticeable disjunction between the opportunities available for treatment and the reality of life for many individuals with mental illness.

In the entire United States, 19% of all adults experienced mental illness in 2018.[238] This number nearly triples when looking at prison populations, with levels of prevalence ranging from 44% to 75% depending on the carceral system and gender. At the low end of this range, 61% of women and 44% of men in federal prisons have at least one mental health problem. Toward the middle, 73% of women and 55% of men in state prisons have at least one mental health concern. The issue is most prevalent at the local jail level, where an estimated 75% of women and 63% of men deal with at least one mental health issue.[239] One of the most common diagnoses in prisons is schizophrenia. While the prevalence of schizophrenia is approximately 1.5% in the general population, it ranges from 2.3% to 3.9% within prison populations.[240] There are more than three times as many people in the United States with some type of serious mental illness who are incarcerated than people receiving the necessary support they need in hospitals.

Why is this the case? Failure to promote treatment for individuals with mental health problems frequently leads to incarceration rather than hospitalization. If people cannot get adequate support for their mental illness in the general community, their symptoms may worsen. This can sometimes result in individuals committing or being accused of crimes, which may be due to reduced capacity to make proper decisions. Thus, higher rates of individuals with mental

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[238] *Mental Health By The Numbers,* National Alliance on Mental Illness, https://www.nami.org/learn-more/mental-health-by-the-numbers.
[239] Sarah Varney, *By the numbers: Mental illness behind bars*, PBS News Hour: Broken Justice (May 15, 2014), https://www.pbs.org/newshour/health/numbers-mental-illness-behind-bars**.**
[240] Robert Rigg, *Are There No Prisons: Mental Health and the Criminal Justice System in the United States*, 4 U. Denv. Crim. L. Rev. 103 (2014).

illness may end up with prison sentences. Additionally, many individuals have mental health disorders prior to their encounters with the legal system. These disorders worsen upon incarceration.[241] Failure to provide preventative treatment coupled with the exacerbating effects of prison on mental illness result in abnormally high rates of incarceration for individuals who suffer from mental illness.

Another reason why the rates of mental illness are so high in prisons is that inmates with mental illness remain incarcerated longer than other individuals. In Orange County Jail in Florida, the average stay for all inmates is 26 days, compared to 51 days for inmates suffering from mental illness.[242] In Riker's Island in New York, the average stay across all inmates is 42 days, whereas inmates with mental illness stay for 215 days on average.[243] One significant reason for such a wide disparity is that it may be more difficult for inmates with mental illness to comprehend and obey rules in correctional facilities. Nineteen percent of inmates suffering from mental illness were charged with a prison rule violation, while only 9% of inmates without any mental health conditions faced similar charges.[244] These violations may add extra time on to current sentences. Another reason for the gap in average stay time is that inmates with serious mental illnesses who are awaiting trial are often incarcerated for longer periods of time. Depending on the state, these inmates may need to complete a psychiatric evaluation to determine competency to stand trial.[245] However, a 2015 survey of hospital officials revealed that pretrial inmates in more than thirty states were on waitlists for hospital services.[246] Most inmates

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[241] Varney, *supra* note 19.
[242] *Supra* note 17.
[243] Id.
[244] Id.
[245] Id.
[246] Id.

received services within 30 days, but some reported waits ranging from six months to one year.[247] Pretrial inmates suffering from mental illness may spend more time imprisoned and waiting for hospital services than they would spend if they went to trial and were convicted of their charges.[248] Inmates with mental illness are thus spending disproportionate amounts of time in prison for circumstances beyond their control, which only further diminishes their access to proper treatment to remedy their situations.

The Current State of Mental Healthcare in Prisons

The availability of mental health services for incarcerated individuals is currently inadequate. Many are not able to get the care that they need while they are in prison, despite receiving care for other physical issues.[249] Poor mental health has detrimental effects on one's well being, making proper mental healthcare a necessity. Being denied proper mental health services is as unacceptable as being denied medical services for physical ailments, yet it still happens regularly in prisons.

There has been a decline over the years in the quality and type of services that are available to treat mental health problems. Although mental health does not have a 'one-size-fits-all' solution, it is often treated as such in jails and prisons. Most commonly, some inmates are placed in suicide-watch cells while others are given antipsychotic drugs.[250] These are often ineffective remedies as each individual varies in the care that they need. When individuals

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[247] Id.
[248] Id.
[249] Id.
[250] Christine Herman, *Most Inmates With Mental Illness Still Wait For Decent Care,* NPR (February 3, 2019), https://www.npr.org/sections/health-shots/2019/02/03/690872394/most-inmates-with-mental-illness-still-wait-for-decent-care.

with mental health problems are isolated from other inmates in an attempt to mitigate behavioral issues, their conditions may actually regress.[251] A lack of social interaction and increased feelings of isolation have both been shown to aggravate many symptoms of mental illness.[252] Other prisoners are heavily medicated and may receive stronger doses than are necessary to treat an issue. This can cause side effects that are sometimes more harmful than helpful.[253] Inmate care varies widely depending on the location and the number of prisoners receiving care. Still, it is a widespread theme that inmate care is not appropriate in type nor sufficient in amount.

If a substantial portion of prisoners do not receive the treatment that they need for mental health conditions, American communities will feel the resulting impacts once inmates are released. When inmates suffering from mental illness do not receive adequate care in prison and are not directed to proper care upon release, their issues get worse after they have served their sentence.[254] This leads to an increase in recidivism as individuals are not well-adjusted to life outside of prison, leaving them to deal with their mental illnesses on their own.[255] Individuals who initially ended up in prison as a result of their mental health problems or whose conditions worsened while serving their sentence may find themselves in the system again if they do not receive adequate treatment.[256]

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[251] Leo Caselli, *Sane Solutions to the Crazy Lack of Mental Health Care within Prisons*, 2 Mental Health L. & Pol'y J. 43 (2013).
[252] Herman, *supra* note 30.
[253] Id.
[254] Id.
[255] Christina Canales, *Prisons: The New Mental Health System*, 44 Conn. L. Rev. 1725 (2012).
[256] Id.

In addition to increased recidivism rates, failure to provide adequate care also increases healthcare costs and prison costs, often paid by taxpayers.[257] The tendency for an individual with a mental illness to serve a longer sentence means that the cost of supporting the inmate during their time incarcerated will be higher.[258] Additionally, individuals may need to seek out extra services upon release to make up for the exacerbation of their illnesses during their prison sentences.[259] This can increase personal costs and cause economic strain on the individual, which may have detrimental effects on their overall health and well-being. In extreme cases, individuals that cannot afford to get care for themselves may end up in situations where they are more likely to reoffend and re-enter the criminal justice system.[260] Thus providing adequate care is not just important for individuals suffering from mental illness, but also for society at large because it will help mitigate the costs of healthcare inside and outside of prison.

Analysis:

The current state of the American criminal justice system makes one thing clear: prisons have a mental health crisis. As this issue gets worse, it is important to consider how different organizations and communities can work to improve the situation. One potential solution is to refine and standardize the insanity defense. Another is to provide mental healthcare to prisoners. Additional methods have also been proposed, including suicide prevention efforts, medical interventions, special care for unique populations, public and police education, and innovative

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[257] Jennifer M. Reingle Gonzalez, PhD & Nadine M. Cornell, Phd, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104(12) Am J Public Health (December 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232131/.
[258] Id.
[259] Id.
[260] Id.

strategies such as incorporating nature into daily life. The following section examines these attempted solutions in order to highlight the best practices for future treatment.

The Insanity Defense

Insanity is a legal concept referring to someone's state of mind at the time of a crime, while mental illness is a psychological concept referring to an individual's mental well-being.[261] Although legal insanity is not always equated to mental illness, the two often do overlap. The insanity defense generally refers to a defense in which the defendant admits the action but asserts an absence of culpability due to a mental issue, though legal standards of insanity have changed over time and differ today based on jurisdictions.[262] One of the first uses of the insanity defense was the M'Naghten Rule, a standard adopted in the United States based off of an 1843 case in the United Kingdom.[263] This rule found that an individual was not legally responsible if they were not aware of their conduct and did not know that their conduct was wrong.[264] The M'Naghten standard was very restrictive and difficult to meet, and did not consider mental illness or someone's ability to control their behavior.[265] Next, in 1953, a federal appellate court developed the Durham Rule, which argued that the test of insanity should state that someone is legally insane if their behavior was a result of mental illness or mental defect.[266] However, this rule was very broad as it did not define the type or scope of mental illness required for one to be deemed legally insane.[267] The Brawner Rule, created in 1972 by the American Law Institute in

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[261] *Insanity Defense*, Cornell Legal Information Institute (2017), https://www.law.cornell.edu/wex/insanity_defense#.
[262] Id.
[263] Id.
[264] Id.
[265] Id.
[266] Id.
[267] Id.

response to issues caused by the Durham Rule, was a mix of prior standards and contained both a cognitive and motivational component. It asked if the individual had the capacity to recognize the criminality of their conduct and whether they could control their behavior to conform to the law.[268] The Brawner Rule became the standard in federal courts and about half of the states.[269] However, in 1984, after a man attempted to assassinate President Reagan and was found not guilty by reason of insanity, public outcry pushed for a reform of the insanity defense. The Insanity Defense Reform Act removed the motivational component introduced by the Brawner Rule and essentially returned to the M'Naghten Rule with an appreciation of mental illness – that is, the new standard recognized that mental illness may influence a person's conduct.[270] Today, the insanity defense varies by state. Some states have moved to the rule determined in the Insanity Defense Reform Act, while many others still use the Brawner Rule to determine legal insanity.[271]

Despite its many changes over time and across jurisdictions, the insanity defense helps combat the struggle between psychology and the law. The American Psychological Association (APA) released a formal statement arguing in favor of the insanity defense. It asserted that the insanity defense is essential to maintaining the moral integrity of criminal law.[272] Without it, individuals suffering from mental illness may not receive fair treatment during legal proceedings. The APA favored a standard of legal insanity that recognizes the wrongness of the action, but

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[268] Id.
[269] Id.
[270] Id.
[271] Id.
[272] *American Psychiatric Association Statement on the Insanity Defense*, American Psychiatric Association, Reform of the Federal Defense 139-147 (1983), https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=94539.

considers the cause to be mental disease or defect.[273] That is, the insanity defense should not excuse the action; rather, it should hold the individual accountable while still offering them an opportunity to seek treatment and rehabilitation rather than imprisonment.[274] By implementing a standard insanity defense that promotes accountability and encourages treatment rather than incarceration, individuals with mental illness may be less likely to face jail or prison time for actions that are a result of their mental issues. This defense would help reduce the high numbers of incarcerated individuals with mental illness and would thus reduce prison costs.

Although several professional organizations such as the APA are in favor of the insanity defense, there is much opposition. There is extensive public concern that the insanity defense "excuses the crazy" and allows individuals to get away with certain actions due to their mental issues.[275] However, this is a common misconception. Variations of the insanity defense are used in less than 1% of felony trials, and when the defense is raised, it is only successful about 25% of the time.[276] Much of this success occurs as a result of plea agreements.[277] Others who argue against the insanity defense believe that individuals may use it as an excuse to be acquitted despite factual guilt.[278] However, this is incredibly difficult to accomplish. The burden of proof for insanity is generally shifted to the defense, meaning that the defense will need to prove legal insanity to the court. The amount of work it takes to prove that someone is legally insane is too strenuous for the insanity defense to be used frivolously. So though public argument against the

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[273] Id.
[274] Id.
[275] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 777 (1985).
[276] *A Crime of Insanity: Insanity on Trial*, PBS (2014), https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/faqs.html.
[277] Id.
[278] Morse, *supra* note 55.

insanity defense may appear to be valid, many of these concerns are unrealistic and not reasonably likely to occur.

Benefits of Providing Mental Healthcare to Prisoners

In addition to the APA's statement on the insanity defense, the World Health Organization (WHO) has offered recommendations about improving the relationship between the legal system and mental health. The WHO examined the benefits of providing mental healthcare and identified groups that may have positive outcomes if adequate care programs are implemented.[279] First, current inmates will have improved quality of life and reduced recidivism rates.[280] Prison and jail employees will be under less stress at their jobs which will enhance their performance and attitudes at work.[281] Finally, communities will be safer and more comfortable as re-offending rates will decrease and former inmates will have an easier time readjusting to life outside prison.[282]

Similar to treating a physical ailment, treating mental health issues can help enhance an individual's overall well-being. Providing mental healthcare to prisoners assists in their adjustment to community life after release, which will likely decrease recidivism rates since individuals will be more well-adjusted to society and less likely to re-offend.[283] By revisiting and revising the mental health treatment and care that is provided in prisons, we can help inmates focus on rehabilitation and healing rather than serving out retributive sentences. An emphasis on rehabilitation will assist them in their adjustment back into society upon release. Moreover,

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[279] Jonathan Beynon & Natalie Drew, *Mental Health and Prisons*, World Health Organization (2016), https://www.who.int/mental_health/policy/mh_in_prison.pdf.
[280] Id.
[281] Id.
[282] Id.
[283] Id.

emphasizing support and treatment can help destigmatize mental health within prisons and within American society as a whole. Transparency about treatment encourages openness and conversation. Furthermore, reducing stigma within jails and prisons in particular would help individuals feel more comfortable getting necessary help.

Providing mental healthcare to prisoners benefits not only the inmates themselves but also the prison employees. Prisons that provide mental healthcare to inmates are more likely to promote a healthy work environment.[284] If mental health is a focus for the inmates, it will likely be a priority for the employees as well. Creating an environment that is focused on mental well-being is vital to the success of all of the individuals who are a part of the prison environment. Additionally, it takes the burden of addressing prisoners' mental health concerns off of prison employees, who often feel as though assisting prisoners with their mental illnesses is a part of their jobs.[285] However, this is the responsibility of doctors and trained professionals rather than correctional officers. Providing professional mental health treatment in prisons thus would reduce strain on employees, which would improve correctional officers' general attitudes toward work.[286] Promoting mental healthcare for both inmates and employees of correctional facilities will foster a strong, supportive environment that focuses on healing and rehabilitation as well as strong mental well-being.

The benefits of providing mental healthcare within prisons extend beyond the prison walls. Providing adequate care for mental illness has positive effects on the community as a whole. As mentioned above, when prisoners receive proper care during their time in prison, the

[284] Id.
[285] Id.
[286] Id.

number of re-offending incidents decreases.[287] This improves overall community safety and comfort and may lessen tensions between community members and former inmates. Furthermore, mental healthcare in prisons also helps reduce the number of individuals returning to prison, decreasing overcrowding within the criminal justice system.[288] Improving care within prisons can help reduce the overall cost of prisons in the long term by reducing recidivism and diverting individuals away from prisons and into treatment facilities.[289] Although many of the benefits assist inmates and employees of correctional facilities, providing proper mental health care in prisons will foster safer and more supportive communities.

Diversion to Community-Based Mental Health Programs

Emphasizing diversion prior to incarceration has been widely suggested as a means of addressing the mental health crisis. Many individuals who are incarcerated would be better treated in a community-based mental health program. Diverting individuals to support services rather than prison will decrease the number of individuals who fail to receive proper care while incarcerated. It will also improve overall safety in prisons as the number of incidents caused as a result of mental issues will decrease.[290] Individuals who attend treatment programs rather than face incarceration will have more positive mental health outcomes and will not face the negative consequences associated with being a mentally ill individual in prison.

Addressing mental health and substance abuse issues *before* individuals find themselves in legal trouble would reduce the number of individuals in the criminal justice system.[291] It

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[287] Id.
[288] Id.
[289] Id.
[290] Canales, *supra* note 35 at 1761.
[291] Id.

would also encourage treatment rather than imprisonment for people suffering from issues that they have no control over. This would save costs associated with the criminal justice system, such as the cost of maintaining prisons. For example, building separate psychiatric prison hospitals is expensive and ineffective because they have limited capacity and are associated with low release rates. If mental health issues are addressed prior to incarceration, the cost of psychiatric prison hospitals can be avoided. It would also improve overall community health, safety, and security.[292] By diverting people with mental illnesses away from prisons and into treatment programs, it is much less likely that these individuals will develop a criminal history.[293] By not losing time to a prison sentence, they will be able to participate in regular programs and receive higher quality long-term treatment and support. Focusing time and resources on diversion programs may be beneficial for both individuals and the community, as there may be improved outcomes and reduced costs associated with treatment.

National Institute of Corrections Recommendations for Improving Treatment

The National Institute of Corrections (NIC) has issued guidelines for expanding and improving treatment for prisoners with mental health issues. These guidelines were suggested in 2004 after much research relating to the mental health crisis in prisons was conducted.[294] Although not all of the recommendations have been implemented in all jurisdictions, they provide a positive baseline for how to improve individual well-being and public confidence with

[292] Id.
[293] Id.
[294] Holly Hills, Ph.D. et. al, *Effective Prison Mental Health Services: Guidelines to Expand and Improve Treatment*, U.S. Department of Justice National Institute of Corrections (May 2004), https://s3.amazonaws.com/static.nicic.gov/Library/018604.pdf.

respect to this crisis. The guidelines include the standardization of evaluations, the standardization of treatment, suicide prevention work, and specific care for special populations.

The first recommendation is to create national standards for evaluations such as the insanity defense.[295] Presently, criteria for use of the insanity defense varies by jurisdiction. Although there are many similarities in tests across states, there is no national standard for what it means to be deemed legally insane. Creating national standards would help eliminate the disparities between different jurisdictions and subject everyone in the United States to the same guidelines. This would boost public confidence in the defense as the rulings would be more uniform and therefore seemingly more legitimate. It would also reassure the public that the insanity defense is not being used frivolously as a means of being acquitted of crimes. Standardizing evaluations would help streamline the justice system and raise overall confidence in its legitimacy.

The next recommendation put forth by the NIC is to standardize mental health and substance abuse treatment. Standardizing treatment within prisons and jails would help inmates adjust to treatment programs and receive constant support, allowing them to maintain their progress once released from prison. It would also give them a sense of stability, which is important for many individuals suffering from mental illness.[296]

Another NIC recommendation is suicide prevention work. Inmates suffering from mental health issues may be more likely to commit suicide upon release from prison due to their difficulty adjusting to life outside of prison.[297] Within prison, providing suicide-resistant items

[295] Id.
[296] Id.
[297] Id.

and clothing can help reduce the number of suicides committed by inmates. Monitoring individuals with suicidal thoughts or tendencies can also decrease suicide risk. By providing adequate education related to suicide prevention and continuing education and treatment beyond prison, we can reduce the number of individuals considering suicide during or following their prison sentence. Suicide is a prevalent issue in America and affects ex-prisoners at higher-than-average rates, particularly those who are released from prison later in life. Controlling for a variety of variables, individuals who were released from prison later in life committed suicide approximately five times more frequently than individuals who were released earlier or never incarcerated.[298] By focusing on suicide prevention for current and former prisoners, more lives would be saved annually.

Next, medical interventions are a significant component of mental healthcare. Physical illness and mental illness are not mutually exclusive. Many mental illnesses stem from a physical or neurological issue.[299] Various medical interventions may be helpful when treating inmates with mental illness. For example, while some inmates may be successful in group therapy or treatment programs, other individuals may require medication to reconfigure their brain chemistry and address the root of their illness. Some inmates may need a combination of both. Medical treatment for all prisoners may be difficult to apply in practice as many prisons do not have adequate staff or support for general medical needs and psychiatric issues can often go undetected.[300] In institutions that do have funding for appropriate staff, medical professionals

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[298] Lisa Barry et. al, *Increased Risk of Suicide Attempts and Unintended Death Among Those Transitioning From Prison to Community in Later Life*, 26(11) American Journal of Geriatric Psychiatry, 1 (2018).
[299] Hills et. al, *supra* note 74.
[300] Chad Kinsella, *Corrections Health Care Costs*, Prison Policy Initiative (January 2004), https://www.prisonpolicy.org/scans/csg/Corrections+Health+Care+Costs+1-21-04.pdf.

should provide screenings to identify signs of mental illness so that inmates can receive proper medical interventions.

The NIC has provided many important recommendations for improving mental health treatment. It is clear from these recommendations that mental health treatment is a complex issue that must be treated with great care. These guidelines are an effective baseline for the improvement of treatment. However, many of these guidelines have not been adopted by all jurisdictions. Rates of mental illness are still extremely high in prison populations today.[301] Additionally, many inmates are still waiting for adequate care and do not have access to the necessary treatments.[302] It is important to continue keeping mental health in the conversation, particularly when it comes to individuals who are currently or were formerly incarcerated.

Special Populations

Giving particular attention to incarcerated women is another important consideration when examining the ways to improve healthcare. Approximately 231,000 women and girls are currently incarcerated in the United States.[303] Mental illness often affects women differently than it does men. Women are more likely than men to be diagnosed with unipolar depression and often present signs and symptoms of mental illness that are tied to anxiety or depression.[304] It is vital that women in the criminal justice system receive the care that will work the best for them. While care for men may need to be more focused on substance abuse, care for women may need

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[301] Varney, *supra* note 19.
[302] Herman, *supra* note 30.
[303] Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (October 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html.
[304] *Gender and women's mental health*, World Health Organization (2019), https://www.who.int/mental_health/prevention/genderwomen/en/.

to focus more heavily on depression.[305] Taking gender differences into consideration when providing mental health treatment will ensure that each individual receives the correct and appropriate care.

In addition to incarcerated women, special populations such as violent offenders and sex offenders may need to receive more specialized treatment.[306] Violent offenders may require care focused more heavily on controlling and managing anger. Sex offenders may have unique diagnoses that require different care. Catering to each individual population is a necessary consideration when working with mental illness treatment. Treatment programs affect individuals in different ways; therefore, the diversity of populations must be taken into consideration when creating standardized treatment programs.

Other Recommendations for Improving Treatment

Beyond the NIC, other institutions have examined ways to improve mental health services within prisons. One emerging method for enhancing overall mental well-being is to incorporate nature into everyday life. Other suggestions include increasing funding and addressing the criminalization of and characteristics common among individuals with mental illness. Although not all of these suggestions have been studied in-depth, they are important to consider as alternative solutions moving forward and are worthy of further research.

An innovative method for reducing mental health issues within prisons involves increasing the presence of nature and natural elements within institutions. "Biophilic design" consists of principles, attributes, and practices for cities to bring nature into the daily life of those

[305] Id.
[306] Hills et. al, *supra* note 74.

without access to it.[307] Biophilic design typically takes the form of farms and gardening programs within prisons. It is a relatively new concept worthy of further study; however, current research suggests that a small number of programs have been implemented successfully. Nature can trigger positive psychological reactions within individuals. Inmates who have had the opportunity to partake in activities in natural environments have been shown to have lower recidivism rates and better mental health.[308] Incorporating nature into everyday life is a relatively simple intervention that could likely be implemented in many prisons across the United States. Creating gardening programs can be done outside in small areas and may be managed by local community members. These programs would give individuals a sense of purpose—they are working to help something grow—and would improve their overall psychological state. Introducing nature as a form of improving mental health will not cure all of the individuals who suffer from mental illness, but it may improve the overall atmosphere of prisons by decreasing stress and emphasizing healthy mental well-being.

Another method for addressing the mental health crisis is to increase the funding that is available for inmate care. While inmates have a right to healthcare for physical and mental conditions, treatment programs are frequently underfunded.[309] Even if they wanted to, it is difficult for prisons to provide adequate care due to the cost limitations. It is important for prisons to have the necessary funding to keep a sufficient number of services available, including mental health professionals, systems to keep track of records, screening procedures, and

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[307] Jana Söderlund et. al, *Improving Mental Health in Prisons Through Biophilic Design*, 97(6) The Prison Journal (November 8, 2017), https://journals.sagepub.com/doi/full/10.1177/0032885517734516.
[308] Id.
[309] Canales, *supra* note 35.

protocols to ensure that care is received quickly. Each of these components have been shown to improve the quality and outcome of mental health services individually.[310] However, no prison system has been shown to provide all of these elements due to the cost of maintaining them.[311] If more funding is allocated toward mental healthcare in prisons, the benefits mentioned in the above sections of this paper could be reaped. Unfortunately, this is unlikely to occur on a wide scale across America. With the multitude of economic and social issues the country faces in regular everyday life, prisons and inmates are often overlooked. It may be more worthwhile to focus on smaller interventions first to prove that inmate mental health is a relevant issue that must be addressed. Then in the future, increased funding for mental health services could greatly improve the American prison system and significantly reduce the mental health crisis it currently faces.

By acknowledging the high rates of criminalization and the characteristics common among individuals with mental illness, we can work to solve the many problems that arise with mental health and the law. One way to do this is by training police officers to identify possible symptoms of mental illness so that they can evaluate when an individual may be in crisis before arresting them. If police officers have the training to feel confident in referring individuals to psychiatric facilities, it may increase the number of people who receive help and decrease the number of individuals with mental illness who are put in prison.[312] However, this may be difficult to achieve due to the time it takes to adequately train somebody to recognize the signs of mental illness.

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[310] Id. at 1759.
[311] Id. at 1760.
[312] Id.

Inadequate support systems also lead to high incarceration rates for people with mental illness. If the friends and family of an individual with a mental illness distance themselves from the person, the individual may end up in a crisis that results in arrest. By educating the public on how to properly support individuals with mental illness, those individuals will be more likely to seek care before ending up in legal trouble.[313]

Furthermore, mental illness is a significant problem among homeless individuals. Affordable housing programs and increased availability of shelters would provide individuals with a regained sense of stability. As a result, fewer individuals would turn to crime as a means of survival. These initiatives could also offer proper psychiatric care and rehabilitation for those struggling with mental illness.[314] By addressing the reasons why individuals with mental illness are frequently incarcerated, we can decrease the prevalence of mental illness within prisons and improve overall public safety and mental well-being.

Recommendations in Practice

While the aforementioned recommendations have great benefits in theory, they may play out differently in practice. Standardizing treatment has been proven effective in several states, though it may be difficult to implement on a larger scale due to high costs. Resources may be better used to focus on diversion to community-based programs until the expenses related to care within prisons can be reduced. Reforming the insanity defense may be an effective solution, especially if it is standardized among states. Although not all strategies may be effective in practice, many of them are worth further studying and pilot testing.

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[313] Id.
[314] Id.

Implementing and standardizing mental health treatment plans during and after prison has been proven to be effective in several states. In Oklahoma, the Department of Mental Health and Substance Abuse Services has partnered with the Department of Corrections since 2006 to develop and implement a program that assists individuals with mental illness in their transition to community-based services after prison.[315] Assessments show that individuals who went through this program were less likely to return to prison after a three-year period and were more likely to seek alternative outpatient or community services.[316] In New York, inmates who received treatment for mental illnesses during their time incarcerated are required to receive discharge planning and optional appointments with personal providers that will be seen after discharge.[317] This helps connect individuals to services both within and outside of prison so that they can continue receiving crucial treatment and support. Inmates in Colorado who suffer from serious mental illness work with behavioral health clinicians to ensure that their needs are addressed while they are incarcerated. These technicians continue to work with inmates upon release, meeting with parole officers and making referrals to other service providers so that their clients can maintain a strong network of support.[318] At the state level, implementing and standardizing mental health services in prison and beyond has been shown to be effective because it connects individuals to treatment centers and maintains a constant system of assistance.

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[315] Kil Huh et. al, *Prison Health Care: Costs and Quality*, The Pew Charitable Trusts (December 8, 2017), http://www.pewtrusts.org/~/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf.

[316] Id.

[317] Id.

[318] Id.

While providing stronger mental health care in prisons has been effective in several states, it may be difficult to implement on a wider scale. Mental health care is important but comes at a cost: according to some estimates, it may cost taxpayers approximately $15 billion annually to fund treatment for individuals in jails and prisons with mental health disorders.[319] However, community mental health services incur a cost of about $10,000 per person, while housing the same inmate in jail would cost approximately $31,000.[320] As such, it may be more beneficial to focus time and efforts on diversion programs rather than on new programs within prisons. For example, if every individual with a mental health issue was diverted to a community treatment program, it would take the burden off of the criminal justice system to provide extensive mental health services. The potential benefits of increasing mental healthcare within prisons are indisputable and would have positive effects on inmates, prison employees, and the community. However, it is unlikely that significant changes will actually be made to the system due to the high expenditure that would be necessary. If the cost can be reduced in the future, providing mental healthcare in prisons may be a feasible method of addressing the mental health crisis in practice. Until then, the upfront cost of implementing a mental healthcare system in prisons remains prohibitive. Temporary diversion to community-based centers may be a more reasonable and cost-effective alternative.

Reforming and standardizing the insanity defense is likely to be one of the most effective methods for combating the mental health crisis in American prisons. States currently use a wide

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[319] Kinsella, *supra* note 80.

[320] Mary Giliberti, *Treatment, Not Jail: It's Time to Step Up*, National Alliance on Mental Illness (May 5, 2015), https://www.nami.org/Blogs/From-the-Executive-Director/May-2015/Treatment,-Not-Jail-It%E2%80%99s-Time-to-Step-Up.

variety of "insanity defenses," ranging from standards like "guilty but insane" to "not guilty by reason of insanity."[321] With each of these verdicts, many states also recommend or require treatment for mental health issues. Standardizing the type of defense as well as the required outcome would reduce public skepticism of the insanity defense. Rather than seeing it as a frivolous defense used to "excuse the crazy," public perception would likely shift toward viewing it as a means of directing individuals to treatment while holding them accountable for their actions. A solution to reforming the insanity defense could be creating a new national standard of "guilty but with mental illness." This defense would combine many of the defenses currently in use to encourage the most effective treatment and punishment. Individuals found "guilty but with mental illness" would be required to receive treatment for their mental health issues but would also face punishment in the form of a reduced sentence, extended probation, or community service. Imposing consequences for criminal behavior will hold individuals with mental illness accountable for their actions. At the same time, directing these individuals to treatment services will enable them to improve their mental health. This would build public confidence: the insanity defense would no longer be seen as allowing individuals to "get away" with something. Additionally, by requiring treatment instead of prison sentences, the number of individuals entering prison with a mental illness would decrease. Individuals would be able to get help before facing long sentences or a cycle of reoffending. Many different variations of the insanity defense are currently in use, so it would be practical to develop a reformed and standardized version. An innovative defense such as "guilty but with mental illness" could be pilot tested in several states to ensure its effectiveness before becoming the national standard.

[321] *Supra* note 41.

The insanity defense provides a way for individuals struggling with mental illness to receive help for their mental issues while being held accountable for their actions, and standardizing and reforming a new defense will likely be an effective practice to mitigate the mental health crisis in the criminal justice system.

Suicide prevention work can begin within prisons and spread to the larger community. Measures shown to be effective in prisons include regular training of correctional and medical staff, evaluations of inmates for suicide risk, and procedures for effective communication regarding concerns about prisoners.[322] Additionally, providing housing and clothing that are suicide-resistant and instituting stricter supervision for at-risk inmates have been shown to be effective in reducing suicides.[323] Upon release, inmates deemed to be at risk for suicide attempts should be directed to treatment programs and general community support so they can be monitored for signs of suicidal thoughts or actions. Institutions such as police departments and schools can also educate the general public about the risk factors surrounding suicide. Suicide prevention is a solution that can work well in practice both within and beyond prisons. Correctional officers and medical staff can create environments that deter inmates from suicide, while educating the general public can help stop suicides on a community level.

Despite the magnitude of the mental health crisis in American prisons, there are many feasible strategies for mitigating the problem. Some, such as increasing funding, may not be practical for several years until other social and economic issues are addressed first. Others, such

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[322] Linda Peckel, *Preventing Suicide in Prison Inmates*, PsychiatryAdvisor (December 19, 2017) https://www.psychiatryadvisor.com/home/topics/suicide-and-self-harm/preventing-suicide-in-prison-inmates/.

[323] *Preventing Suicide in Jails and Prisons*, World Health Organization (2007), https://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf.

as standardizing mental health treatment plans, have already been proven to be effective in some states. Strategies like reforming the insanity defense are plausible and may have great benefits in practice, though they will likely take time to standardize throughout the nation. While not every strategy is possible, it is reassuring to communities that several solutions may be successful if they are effectively implemented.

Conclusion:

American perceptions of mental illness have faced several drastic changes in the past century. Mental illness was historically stigmatized until it became the focus of several landmark pieces of legislation in the 1900s. Since then, public funding and support for mental health services has decreased while the number of incarcerated individuals with mental illness has sharply spiked. Jails and prisons in America today are filled with a high percentage of individuals suffering from mental health issues who are not receiving adequate support and treatment.

Individuals with mental health issues should be treated respectfully and fairly in the criminal justice system. The insanity defense is necessary to maintain the integrity of the justice system and provide individuals with mental illness a fair opportunity to defend themselves and seek treatment. Improving treatment can benefit inmates, employees, and larger communities, thereby urging American society as a whole to take action to increase mental health awareness. Finally, guidelines regarding standardization of treatment programs, suicide prevention work, and individualized care for special populations will help prisons and related organizations provide the most effective resources and care. Although these guidelines have not all been

adopted, they provide a baseline for positive change and suggest that influential organizations are taking steps in the right direction.

The mental health crisis in jails and prisons is a serious issue facing the United States today. Although it will not be fixed overnight, it is something that Americans need to continue fighting for. All citizens have a right to seek treatment and support for their mental health issues. American society must continue working to address mental health in the justice system and implement policies that will benefit both the individual and the community.