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THE LIFE OF ARBITRATION LAW HAS BEEN EXPERIENCE, NOT LOGIC: GORSUCH, KAVANAUGH, AND THE FEDERAL ARBITRATION ACT

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ABSTRACT

Over the past 50 years, the international business community has settled on the device of international commercial arbitration to resolve the overwhelming number of disputes that arise in their commercial agreements. One reason is that many business people are suspicious of the domestic courts of many host countries and have always sought the comfort of a neutral forum. Arbitration is neutral (i.e., not tied directly to any particular domestic legal system), efficient and confidential. Much of this evolution has been triggered by events in the United States—in particular a long series of United States Supreme Court decisions that ended the courts' traditional hostility to arbitration, and established, firmly and with virtually no reservations, the legitimacy of arbitration. But this line of decisions was not pre-ordained. The fundamental law, the United States Arbitration Act, usually referred to as the Federal Arbitration Act (FAA), is cryptic and skeletal in its language and the United States Congress has not seen fit to alter it in any substantial form since it was first enacted in 1925. Virtually all the arbitral innovations and pro-arbitration developments in the United States have grown out of a now-long line of court decisions—essentially a kind of common law development—that has moved a great distance away from the nearly-deceptive simplicity of the FAA. All these developments in the United States have fostered similar pro-arbitration innovations around the world. The U.S. view of arbitration has now become the international norm.

But just recently, after the appointment of two new Supreme Court Justices, Neil Gorsuch and Brett Kavanaugh, and the an-

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nouncement of two Supreme Court decisions—New Prime Inc. v. Oliveira, and Henry Schein v. Archer & White Sales—we have seen a great deal of concern and apprehension within the arbitration community. Gorsuch and Kavanaugh are two justices who believe in "originalism" and "textualism" as interpretative techniques. While these techniques are respectable, they do not work in the context of arbitration law. While both techniques urge an interpretation that relies almost exclusively on the express language of statutes and the "original" meaning of those statutes, the fact that the FAA was enacted in 1925, has not been significantly amended, and is a mere skeleton of principles of arbitration law and procedure make them poor vehicles for principled decisions that preserve and protect arbitration. If arbitration must go back to what it was in 1925, all these years of positive pro-arbitration evolution will be lost, and the arbitration process will be damaged irreparably. At the same time, we do not wish to be too apocalyptic. These are only two cases and not all Supreme Court justices abide by the Gorsuch-Kavanaugh interpretative principles. After an exhaustive analysis of the two cases in light of all the modern, judicially-created pro-arbitration innovations, we urge the arbitration community to adopt a kind of "watchful waiting" posture. This is not the end of arbitration as we know it, but we are all justified in our concerns for the future.

I. INTRODUCTION

The U.S. Supreme Court (hereinafter the "Supreme Court" or the "Court") is the main architect for developing the arbitration doctrine in the United States. Many of the Court's decisions have been so doctrinally powerful that it has had a major impact on international arbitration as well. Put a bit differently, it is no understatement to say that the doctrine and practice of arbitration has thrived because of the Court's willingness to re-evaluate and reformulate the law on arbitration. While an extremely important statute, the Federal Arbitration Act (FAA)[1] provides mainly a framework, indeed only a skeleton for arbitration practice. The Court has effectively re-written the content of the FAA in its decisional law. It has done so in order to accommodate policy objec-

[1] Federal Arbitration Act, 9 U.S.C. §§1-16 (1947) (also known as The U.S. Arbitration Act of 1925. The Federal Arbitration Act ("FAA") consists of three separate chapters: (1) §§ 1-16; (2) the New York Convention on Recognition and Enforcement of Arbitration Awards (which is a misnomer, as it also regulates recognition and enforcement of arbitral agreements); and (3) the Inter-American Arbitration Convention).

tives and redress political concerns that the Act, on its face, simply does not address. Therefore, the understanding of the FAA is buried in decisional law and arbitration doctrine is centered on purpose-oriented pragmatism. Rather than anchoring their decisions in analytical and logical statutory interpretation, the Court gives arbitration-related cases a reading, and subsequently a decision, in light of a "strong federal policy favoring arbitration."[2] These days, the FAA is mainly effectuated through judicial opinions and not legislative changes.

However, the Court's consistent favoring of arbitration in its decisions does not meet with the approval of all scholars, lawyers, judges, and courts. There have, of course, been some relatively unsuccessful challenges to this line of cases. There have always been adversaries of arbitration who eagerly await any opportunity to dismantle arbitration in favor of judicial recourse: either by limiting the arbitral tribunal's jurisdictional powers at the front-end of the procedure, by pushing the court to elaborate a doctrine on *in*arbitrability that excludes, among other things, statutory and regulatory matters, and by eliminating the "hands-off" judicial deference at the back-end of the procedure. Any opening will be enough to a wage war on arbitration, which has already been in the making—intentionally and unintentionally—for several years now. Therefore, it is important that the United States Supreme Court gives arbitration its unconditional and unqualified support, which, thus far, it has. The already-settled arbitration issues enjoy a large degree of immunity due to *stare decisis*, and should therefore, in principle, be irreversible and irrevocable.[3]

However, as the Supreme Court bench changes, we must reevaluate the main policy objectives and political concerns of the "new court" in order to develop some predictive techniques for anticipating subsequent decisions. There are a number of unsettled issues that may be in the danger-zone. Further, the Court might

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[2] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (The FAA signals a congressional policy favoring arbitration agreements notwithstanding any state policies to the contrary); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration clauses in international commercial agreements must be honored and enforced); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (applying the *Mitsubishi* principle to domestic contracts involving the rights of purchasers of shares of stock. *Mitsubishi*, 473 U.S. 614 (1985)).

[3] What we mean here is any discussion with respect to commercial arbitration ("between merchants"), international and domestic. We hope and believe that the Court will come down strongly in opposition to the enforcement of arbitration clauses in consumer contracts of adhesion.

decide to pour new wine in old bottles and *totally* re-evaluate even settled issues. Up until today, arbitration has been *relatively* free from ideological battles, and perhaps still is. But certain considerations of social engineering may steer the Court toward comprehensive "judicial consistency" in order to push their main agenda. Any departure from a strong, pragmatic interpretation of the FAA will be seized upon by the adversaries of arbitration. Justice Gorsuch and Justice Kavanaugh's constitutional agenda, wrapped in "consistency" clothing, will inevitably lead to an "originalist" interpretation (wrapped in "textualism") that can lead to results that are absolutely unwelcomed in the arbitration community. Thus far, the Court has been *against* judicial recourse as opposed to *for* arbitration, primarily motivated by *deeply rooted legal need*.[4]

The constitutional landscape in the United States is facing significant disruption due to methodological differences in constitutional and statutory interpretation—primarily motivated by differences in ideology. These spill-over burdens will likely affect statutory interpretation in various settings. We will be justly-criticized, indeed idle, bystanders if we silently accept the methodological approach to crucial federal legislation that has defined, promoted, enabled, and fostered commerce, trade, and investment—including arbitration law. It is our duty, as scholars and citizens of the world, to make the case that ideologically motivated dogma cannot and must not define the destiny of a twenty-first century citizenry.

In *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010), the late Justice Antonin Scalia, writing for the majority, criticized "judge-made" law with respect to the applicability of extraterritoriality in §10(b) of the Securities Exchange Act 1934. In *Morrison*, the Court elaborated on a new doctrine anchored in originalism but sold as textualism.[5] Justices Stevens' concurring opinion pointed out that Scalia's criticism of applying judge-made rules is misplaced and that Congress had in fact invited an expansive role for judicial elaboration in the open-ended statute.[6] The Court elaborated a doctrine with the tacit approval of Congress but the lack of "permissive" language paved the way for a new future for §10(b). The fundamental question we pose in this article is, what disruption to the normal order of things Justices Gorsuch and

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[4] *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF UNITED STATES ARBITRATION, at xxviii (6th. ed. 2018) [hereinafter "*The law and Practice of U.S. Arbitration*"].

[5] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

[6] *Id.* at 276 (Stevens, J., concurring).

Kavanaugh will risk in order to engineer their new ideas into the fabric of Supreme Court jurisprudence? Constitutional agendas aside, will their deep philosophical convictions, that clearly shape their approach to statutory interpretation, affect U.S. arbitration law?

We worry that they may have such an impact. We see *New Prime Inc. v. Oliveira*[7] and *Henry Schein v. Archer & White Sales*[8] as striking illustrations of a Court either surreptitiously or unintentionally reintroducing judicial hostility towards arbitration in the name of methodological consistency. Both cases are pro-arbitration in nature, but only as the decisions deal with the low-hanging fruit of arbitration doctrine. The two holdings standing alone will not significantly harm the current scope and understanding of the FAA, but both cases include language and reasoning that potentially can be used by adversaries of arbitration to cause serious and long-term damage to U.S. arbitration law. Both cases represent a possible doctrinal basis for striking down a substantial amount of the judge-made law that has grown out of arbitration law and practice.

In *New Prime*, the Court (re)introduced an "intent-based" and "actual language" approach to the reading of the FAA. In *Schein*, the Court downsized its own role in elaborating upon the content of the Act. In the hands of arbitration's adversaries, who would like to dismantle much of our current arbitration jurisprudence, the pragmatic, purpose-oriented approach of these two cases could grow into outright hostility toward arbitration. It appears clear to the authors that the Court, in both *New Prime* and *Henry Schein*, focused on the text, precedent, history, and architecture of the FAA (and much less so the accompanying decisional law). But the decisions did not rely on ethics or prudence. It is probably in the latter two aspects that purposivism or consequentialism has grown. The "strong federal policy favoring arbitration" is anchored in the latter approach to statutory interpretation. The judicial policy favoring arbitration has long been the sole canon of interpretation with respect to the FAA. Perhaps a better approach would be to recognize this proposition formally.[9] This very likely does not re-

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[7] *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

[8] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

[9] Frank H. Easterbrook, *forward* to ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West. Eds., 2012) (may prove to be a living doctrine and expand to include this canon, or alternatively expose "intent-based" or "actual language" approaches as a "falsity" when confronted with arbitration law, in general, and in particular the FAA. This is very unlikely, not only because Antonin Scalia tragically passed away

present the view of the entire Court, but the remaining justices may find their hands tied by this new constitutional agenda. This approach plays right into the hands of those who wish to reinstate the judicial supremacy (or hegemony) of the courts. In other words, the reasoning in these cases may well lead us into a fatal misunderstanding of U.S. arbitration law.

It can be alleged that arbitrators are empowered with *de facto* law—making capacity without public responsibility or accountability. We concede that this argument has substance. It stands on a base of logic and reason and has captured the attention of many. The criticism has had such an impact that even proponents of arbitration are of the opinion that arbitration should be "judicialized,"[10] partly due to the exponential growth in subject-matter arbitrability. A number of different schools of thought have emerged in both the domestic and international arbitration community.[11] One school of thought gives arbitrators a quasi-judge like role. Similarly, many argue with deep conviction that the default "arbitral trial" must include, among other things, pre-trial discovery, cross-examination, and back-end scrutiny.[12] The war on arbitration can be full-blown, piece-meal, creeping, or unintentional.

Sometimes, the answers to contemporary debates are to be found in old wisdom; as Justice Holmes said, the life of law has not been logic, but experience.[13] Many answers lie in the hidden truths

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[with an overall remarkable legacy and to be remembered in particular for a great sense of humor, eloquent writing, legal finesse, and an almost unconditional and unqualified adherence to *stare decisis*], but because originalism has survived).

10 "Judicialization" can mean slightly different things. In this respect, the authors mean: (a) procedural intricacies and formality in the arbitral procedure—essentially turning it into a bastardized form of litigation and (b) virtually unfettered judicial intervention by national courts—prior, during, and after the arbitration itself. For a good discussion on the judicialization of arbitration *see e.g.* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized", or Harmonized?*, (2003) 19(1) OHIO ST J DISP RESOL 35; Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* (2010) U ILL L REV 1; and William W. Park, *Arbitrators and Accuracy*, (2010) 1 J. OF INT'L DISP. SETTLEMENT 25–42.

11 *E.g.*, "contractual school of thought" and the "status school of thought."

12 Thus, the "second-look" doctrine. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

13 The role of scholars is crucial in addressing primarily the piecemeal, creeping, and unintentional war on arbitration. They do so by constantly pointing out the history and evolution of arbitration and disseminating ideas on how to improve the system without turning it into a playground for American trial lawyers or to the court's pre-trial procedure (like mediation). Four arbitration scholars have helped shape the opinions of the authors of this article: Thomas E. Carbonneau, Kaj Hobér, Emmanuel Gaillard, and Jan Paulsson. Professor Carbonneau in all of his writings takes a philosophical, economic, historical, psychological, and legal approach to human conflict and dispute resolution. This makes his work meaningful in a myriad of ways.

of judicial and arbitral evolution and history. They all culminate in the same thing: a deeply rooted legal need and an aspiration for adjudicatory efficiency and effectiveness. History has taught us that functionality can be perfection in and of itself. The bottom line is this: The U.S. law on arbitration has evolved to recognize the superior role of the judicial decisions, in particular those of the Supreme Court and the much less important role of the FAA text. In the absence of continued legislative modification, the FAA has become a "living statute" through the work of the federal courts.[14]

II. The Evolution of United States Arbitration Law—Case Law Has Rewritten the Federal Arbitration Act

The evolution of U.S. law on arbitration can best be described by human and legal experience, in general, and by pragmatic thinking, in particular. As we earlier quoted, Justice Oliver Wendall Holmes has written: "The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[15] Arbitration is not perfect. It does not promote justice and fairness in the same manner that (supposedly) litigation within the judicial system does. But experience tells us that, because arbitration is workable, it is still needed. Continuing in echoing Holmes, one could say that, "practicality is the primary reason for creation of law; the observance and application of logical proposi-

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Professor Hobér has a profound understanding of international dispute resolution that has helped the authors understand and approximate the vast difference between domestic arbitration, international commercial arbitration, and investment treaty arbitration. *See, e.g.*, Kaj Hober, International Commercial Arbitration in Sweden (2011); Emmanuel Gaillard, Legal Theory of International Arbitration (2010); Jan Paulsson, The Idea of Arbitration (2013).

14 The United States Congress has been totally derelict in its obligations in the area of arbitration. The 1925 statute was enacted without much thought and without much sophistication. This may be justified given that era's general lack of interest in arbitration. There have been sporadic attempts since 1925 to amend the FAA. However, such attempts have not met with success. One possible answer to this inaction is simply that Congress has not owned up to its responsibilities. But another—and the likely more probable explanation—is that Congress is not unhappy with the way the Supreme Court and the lower federal courts have modernized U.S. arbitration law through case law. This would not be the first time in our history when Congress simply decided to "let the courts handle it."

15 Oliver Wendell Holmes, The Common Law 1 (Boston, Little, Brown & Co. 1881).

tions should not prevent the application of functional legal rules for the regulation of social conduct."[16] Briefly stated, the Court's logic and analytical reasoning in support of arbitration is often based on flawed reasoning and serious shortcomings in its justifications. The bottom line is this: arbitration experience rests, in fact, on a sound method that justifies "legal madness,"—a method nonetheless anchored in policy objectives and political concerns.[17]

The federal law on arbitration—commonly referred to as the Federal Arbitration Act ("FAA")—was enacted in 1925.[18] It was "special interest legislation" enacted to promote consistent determinations between state and federal courts. At the time the FAA was enacted, the courts were hostile towards arbitration. The hostility rendered the procedure a less desired venue for redressing commercial grievances.

It is true that the FAA is archaic and perhaps in need of updating; despite the fact that the U.S. law of arbitration is not fully visible in the FAA's text and that it is the oldest arbitration statute, it is still functioning because judges have elaborated on its scope and meaning.[19] In fact, the act itself is not as "favorable" to arbitration as it has sometimes been made out to be. This was understood by the Court subsequent to the Act's inception. Initially, the Court was more hostile and rendered a series of cases that were adverse to a pro-arbitration doctrine.[20]

However, the early hostility began to change about fifty years ago. The FAA's continuing legitimacy and landmark status lies at the feet of the U.S. Supreme Court, not of Congress. The legislative history of the FAA and the historical context in which it was enacted stands in stark contrast to the current U.S. law on arbitration. The Court has indeed transformed the content and purpose of the statute. One of us described this evolution:

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16 THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 166 (4th ed. 2017).

17 For a more general discussion on dispute resolution as such and the history of alternative dispute resolution, in particular, *see* MICHAEL L. MOFFITT & ROBERT C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION (2005) and JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION, THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004).

18 *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 645-47 (2nd ed. 2014) (providing a short outline of the FAA).

19 *See* Ylli Dautaj, *The Act Is Not the Entire Story: How to Make Sense of the U.S. Arbitration Act*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Apr. 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/.

20 *See, e.g.*, *McDonald v. West Branch*, 466 U.S. 284 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Wilko v. Swan*, 346 U.S. 427 (1953); *Am. Safety Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968).

> Simply reciting the act's provisions conceals many of the major contributions made by the statute to the arbitration process in general. First, note that the statute was enacted in 1924, long before the alternative dispute bandwagon began rolling. Second, it minimizes—at least in theory—the manner in which a court may interrupt or interfere with the arbitration process.[21]

The Supreme Court's "interruption" or "interference" with the original intent or actual language of the FAA has caused the pendulum in the U.S. law of arbitration to swing to maximum apogee from the initial position of hostility.[22] Through its decisional law, the Court has effectively rewritten the content of the FAA to accommodate policy objectives, political concerns, and global commercial realities. Statutory methodology and ideological convictions have been cast aside. There is now a well-settled judicial doctrine on arbitration. The Court is superior, and the text is inferior. Functionally, civil dispute resolution has trumped deeply rooted issues of pride, ego, and philosophical convictions. The currency and standing of arbitration are at an all-time high. In particular, the role arbitration plays in promoting, fostering, and enabling trans-border commerce, trade, and investments makes it a vital mechanism transnationally as well. Arbitration has taken on an almost religious standing in both domestic and international applications. So far there has been no legal fundamentalism in the Court's case law on arbitration. The ideological battle has been manifested elsewhere but not in the area of arbitration. The Court has filled the necessary gaps of the legislation in order to foster an adjudicatory framework that responds to the constitutional need of access to justice.

The Supreme Court has emphasized that it has had congressional approval (at least by way of Congress' silence and inaction) in establishing the doctrinal framework of arbitration. The Court can ground almost any case favoring arbitration in an analysis of the core objectives of the FAA that grow out of Section 2 of the Act. But a great deal of the Supreme Court's arbitration jurisprudence has gone well beyond Section 2's express language. Through the Court's liberal reading of the FAA, the justices have unquestionably reformulated and effectively re-written the FAA.[23]

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21 WILLIAM F. FOX, INTERNATIONAL COMMERCIAL AGREEMENTS AND ELECTRONIC COMMERCE 309 (6th ed. 2018).

22 *See* PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 2-5 (2013).

23 *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S.Ct. 1801 (1976).

Thus, the application of the FAA reads differently than its content. Put a bit differently, the presumption of validity of arbitration agreements and arbitral awards is rooted less in statutory language and more in pragmatic reasoning. This is the better approach and the Court is to be commended for its sensitive approach to the immediate needs of the business community. At least in this area of its case law, the Court has not genuflected toward philosophical convictions or ideological preferences. Instead it has provided almost total judicial deference prior to, during, and subsequent to the arbitral procedure.[24] Judicial intervention in the arbitral procedure is now very rare, with only a few "common law exceptions." But even so, to a certain extent arbitral procedure is becoming "judicialized" (or as is sometimes discussed in the context of international commercial arbitration, it is becoming "Americanized"). We believe this represents a major danger to arbitral autonomy, in particular, and to functional, effective civil dispute resolution, in general.

Perhaps the most significant judge-made contribution to U.S. arbitration law has been what is normally referred to as "federalization." The concept grows out of the Supreme Court's articulation of the now-virtually unquestioned "strong federal policy favoring arbitration." The policy has served as the bedrock of current understanding and interpretation of the FAA. Federalization made the FAA *de facto* the only law on arbitration in the United States. Federalism has allowed the Court to eradicate any opposition to the pro-arbitration policy. The policy is emphatic, unequivocal, and clear. Born described the work of the Court in the following manner:

> The U.S. Supreme Court has held that the domestic FAA "contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." At the same time, the Court has also repeatedly declared that the FAA creates a body of substantive federal rules relating to arbitration: in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." As a consequence, it is well settled that U.S. state law rules which single out and purport to render inter-state and international arbitration agreements invalid, illegal, or revocable are preempted by

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24 *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938 (1995).

> the FAA. As noted above, it is also settled, in both domestic and international contexts, that the FAA and federal law establish the presumptive separability of the arbitration agreement, provide the exclusive standards for interpreting arbitration agreements and for confirming and vacating arbitral awards.[25]

Grounded in freedom of contract, arbitration is promoted as an effective, efficient procedure used to remedy private grievances through a privatized system of justice. Individual liberty is at the core of American identity, and is perhaps the reason why arbitration, clothed in contractual freedom, has resonated so well with political groups, the business community, and the American citizenry in general. Freedom of contract paves the way for a liberal and positive understanding of arbitration, allowing the courts to construe the FAA liberally which in turn adds important content to the Act. But examined closely, there are other motivations to be found at the intermediate level of arbitration. For example, one major accomplishment of arbitration has been to develop a functional, workable, and effective system of dispute resolution domestically and internationally. Most importantly, it is an adjudicatory system that is not hampered by backlog. Quite the opposite, it assists overly burdened courts so that litigants in judicial recourse can enjoy constitutional guarantees. The integration of freedom of contract into the framework of arbitration jurisprudence requires the lower courts to give unqualified and unconditional judicial deference to arbitration. The Courts need to embrace a "hands-off" approach.[26] Thus, we have the coming together of three separate concepts: (a) the evolution of a concept of freedom of contract that favors private justice; (b) policy objectives that promote the idea of arbitration; and (c) important political concerns. This is the basis for the Supreme Court's crafting the "strong federal policy favoring arbitration." The policy has allowed the Court to elaborate a doctrine on adjudication that rewrites the litigation landscape in the United States. All of this is done with Congress' tacit approval. The deference applied by all courts is so unqualified and uncondi-

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25 BORN, *supra* note 18, at 160-61 (citations omitted).

26 Freedom of Contract "absolute." *See, e.g.*, *Hall Street Associates, LLC*, 552 U.S. 576 (2008) (where the Supreme Court found that a court's only supervisory power over an arbitral award is found in §§9-11 of the FAA and that the parties cannot contract for judicial recourse to review the merits of the award.). At the end of the day this is a weird and unusual battle between freedom of contract and pro-arbitration sentiments—i.e. doctrine vs. policy. *See also* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PERSPECTIVE 809-20 (6th ed. 2009).

tioned that the policy could be rebranded as an "emphatic deferral policy favoring arbitration."

Prior to the FAA and the Court's liberal, purpose-oriented and pragmatic approach to its vague language, a judge would be hostile toward the arbitral procedure. For example, "a judge would not issue an injunction ordering a party to proceed with arbitration and appoint an arbitrator or arbitrators in good faith, on penalty of being found in contempt of court."[27] The pro-arbitration policy goes beyond merely redressing judicial bias or hostility. It is now more compelling than merely fulfilling a statutory duty. When the Court confronts the FAA, the policy favoring arbitration is now an interpretative tool in and of itself. The doctrine can be comfortably used as a canon of construction: in comes an arbitration-related dispute and out goes a pro-arbitration decision that is anchored in policy rather than in analytical and logical statutory interpretation. In resolving cases, the courts should ask themselves one simple and direct question: Do the facts and circumstances of this case resonate with the "strong federal policy favoring arbitration?"

III. *NEW PRIME INC. V. OLIVEIRA*

At the outset, the Supreme Court was asked to determine whether the FAA's "transportation workers" exception in § 1 also excluded independent contractors. In deciding the issue of exclusion, the Court encountered the secondary question of whether a court or an arbitral tribunal should make that threshold determination. The basic question is whether the courts should leave all these issues to the arbitral tribunal or whether there remains a role for the courts in interpreting an important federal statute. The Court dealt with two fundamental questions: (1) should a court or the arbitral tribunal determine threshold arbitrability matters pursuant to a delegation clause—in the case at hand, whether the § 1 exclusion to the FAA applies; and (2) whether the exclusion applies to independent contractors?

The decision was unanimous and announced on January 15, 2019. Justice Gorsuch delivered the opinion of the Court, in which all other members joined, except Justice Kavanaugh who took no

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[27] VÁRADY, *supra* note 26, at 57.

part in the case, and Justice Ginsburg who filed a concurring opinion.

The Petitioner, New Prime, is an interstate trucking company that engages the services of drivers as "independent contractors" through an "operating agreement" ("the Agreement"). The Agreement included both an arbitration clause and a jurisdictional delegation clause (i.e. a "Kaplan Clause") which delegates to the arbitral tribunal the authority to decide questions of the tribunal's own jurisdiction.[28] One of their drivers, Mr. Oliveira filed a class action in federal court against *New Prime* for an alleged failure to pay the drivers a minimum wage pursuant to state laws. Not surprisingly, *New Prime* filed a motion to compel arbitration pursuant to § 4 of the FAA. In response Mr. Oliveira argued that § 1 of the FAA expressly excludes contracts of employment for transportation workers. New Prime further argued that "any question about § 1's applicability belonged to the arbitrator alone to resolve."[29] The FAA § 1 "employment contract exclusion" is debatable in scope and meaning. This presented the Court with an opportunity to take an emphatic stance to redress the controversy.

The District Court, as well as the Circuit Court, held that the threshold question of arbitrability, even in the face of the jurisdictional delegation clause, does not include matters of statutory interpretation, such as whether the exclusion applies to independent contractors. Both courts determined that it was within the court's ambit to determine this narrow threshold matter. Each court then proceeded to answer the subsequent question relating to exclusion of independent contractors. The District Court held that the exclusion does not apply to independent contractors, but the Circuit Court disagreed and held that the exclusion applies to independent contractors by way of assessing what was meant with "employment" in 1925 when the FAA was drafted and enacted. Therefore, the Court lacked authority to compel arbitration. The Supreme Court granted certiorari.

In deciding the case, the Supreme Court first opined that a court does not have "limitless" powers to compel arbitration, notwithstanding FAA §§ 3-4 and a contractual jurisdictional delegation clause. FAA § 2 limits such powers to arbitration agreements involving commerce and maritime transactions. FAA § 2 is informed by § 1. Thus, the threshold question is this whether the contract—i.e. the Agreement—is subject to the FAA, and there-

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[28] *See infra* notes 108-23 (for a longer discussion on the Kapan Clause).

[29] *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 534 (2019).

fore to the court's jurisdictional duty to compel arbitration. The Court analyzed the language in § 1 in light of the time in which the FAA was adopted. It reasoned that: "By the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers. And it seems Congress 'did not wish to unsettle' those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate."[30] (citations omitted)

But, in fact, this is not the first question a court ought to address. The jurisdictional delegation clause confers competence (usually stated as the doctrine of *kompetenz-kompetenz*) on the Tribunal to determine threshold matters. Put a little differently: Is it the court or the tribunal that is empowered to determine whether an independent contractor falls under the FAA § 1 exclusion? We believe that the Court should have emphatically held that it is within the arbitrator's jurisdiction if there is a valid delegation clause of the same. Instead, the Court held that "[g]iven the statute's terms and sequencing [the Court] agree[s] with the First Circuit that a court should decide for itself whether § 1's 'contract of employment' exclusion applies before ordering arbitration."[31] Accordingly, the court should "determine[ ] that the contract in question is within the coverage of the Arbitration Act."[32]

This reasoning is grounded in a highly questionable understanding of the interplay between FAA §§ 1, 2, 3, and 4. The better approach would have been to recognize the delegation clause's full effect in giving the tribunal authority to decide threshold questions subject to arbitration.[33] The Court's pronouncements on this crucial issue trouble us because adversaries of arbitration will claim that there is no longer a deferential review to arbitration agreements with a clear and unmistakable jurisdictional delegation clause. The Court should henceforth determine threshold matters itself, e.g. whether the agreement was procured through duress or mistake. It will be motivated on a fair reading of the savings clause. We believe that an approach that is far healthier for arbitration would have been to leave the determination to the tribunal and not, at this point in the controversy, reach the second question.

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30 *Id.* at 537.

31 *Id.*

32 *Id.* at 538 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395, 402 (1967)).

33 *Id.* (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 68-69 (2010)).

The second issue addressed by the Court went to whether the Agreement and New Prime's independent contractors fall under the FAA § 1 exception. As the Court posed the question:

> What does the term "contract of employment" mean? If it refers only to contracts that reflect an employer-employee relationship, then § 1's exception is irrelevant and a court is free to order arbitration, just as New Prime urges. But if the term *also* encompasses contracts that require an independent contractor to perform work, then the exception takes hold and a court lacks authority under the Act to order arbitration, exactly as Mr. Oliveira argues.[34]

The short answer is that the Court agreed with the independent contractor, Mr. Oliveira. The Court reasoned that "[w]hen the Congress enacted the [FAA] in 1925, the term "contracts of employment" referred to agreements to perform work . . . Accordingly, his agreement with New Prime falls within § 1's exception . . . ."[35] Thus, the Court lacked authority to order arbitration.

However, while taking up this question, the Court emphasized that "[it is] a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.' "[36] As the Court suggested, the issue is: "[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands. We would risk, too, upsetting reliance interests in the settled meaning of a statute. [omitted]."

We believe that the Court overemphasized the actual language and the original intent of the FAA, in general, and the meaning of contracts of employment, in particular. The Court reasoned that no one "has . . . suggested any other appropriate reason that might allow [the Court] to depart from the original meaning of the statute at hand."[37] But going all the way back to 1925 to resolve a question under the FAA does not take into consideration either the evolution of the U.S. law on arbitration or the contemporary approaches to interpreting the statute. The Court focused on the text of the FAA, the precedent, the history, and the architecture of the statutory language, but failed to acknowledge and build into its

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34 *Id.* at 539.

35 *New Prime*, 139 S. Ct. at 543-44.

36 *Id.* at 535 (citations omitted).

37 *Id.* at 539.

opinion the "strong federal policy of arbitration" that has developed since 1925. The Court made it clear that the policy has limits and that the Court is bound to respect such. In a word, the appropriate reason for departing from the "original meaning"[38] is the U.S. law on arbitration itself.

Following his standard approach emphasizing "originalism," Justice Gorsuch engaged heavily with the term's supposed meaning at the time the FAA was adopted. The evidence to support that "contract of employment" meant "an agreement to perform work" at the time the FAA was enacted, the Court reasoned, turns on the fact that "contract of employment" was "[not] defined in any of the (many) popular or legal dictionaries the parties cited . . . ."[39] In short, dictionaries in 1925 treated employment as a synonym for work. Finally, the Court reasoned that case law confirms what the dictionaries suggest.

Up to this point in the opinion, the Court worked mainly with the concepts: actual language and original intent. This level of analysis automatically gets into a logical and analytical reading of the text, accompanying case law, and history. But the Court then moved to a kind of architectural approach emphasizing sequencing and structure. The Court stated:

> More confirmation yet comes from a neighboring term in the statutory text. Recall that the Act excludes from its coverage "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce." Notice Congress didn't use the word "employees" or "servants," the natural choices if the term "contracts of employment" addressed them alone. Instead, Congress spoke of "workers," a term that everyone agrees easily embraces independent contractors. That word choice may not mean everything, but it does supply further evidence still that Congress used the term "contracts of employment" in a broad sense to capture any contract for the performance of *work* by *workers*.[40]

The Court outlined the parties' stances—i.e. the "etymological debate"—on the words "employee" and "employment" and concluded that the only matter truly at issue was the meaning of the term "contracts of *employment*" in 1925 when the FAA was enacted.[41] Interestingly, the Court opined that "New Prime's effort

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[38] *Id.* (It appears that "original meaning" is used as a catchphrase for "actual language" and "original intent.").

[39] *Id.*

[40] *Id.* at 540-41 (citations omitted).

[41] *New Prime*, 139 S. Ct. at 536.

to explain away the statute's *suggestive* use of the term 'worker' proves no more compelling."[42] The emphasis of shutting down the Court's power to elaborate upon "suggestive" language seems to call for only "permissive" language. This is the approach taken by late Justice Scalia in *Morrison v. National Bank of Australia*.[43]

In trying to persuade the Court to compel arbitration, New Prime also invoked the "strong federal policy favoring arbitration" in its efforts to explain that the FAA is to be interpreted liberally and that one of its main purposes was to counteract judicial hostility to arbitration. The Court disagreed and instead commented:

> If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] . . . account of" legislative compromises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent." By respecting the qualifications of §1 today, we "respect the limits up to which Congress was prepared" to go when adopting the Arbitration Act.[44]

Finally, New Prime invited the Court to take a position favoring alternative dispute resolution that would help remedy a deeply rooted legal need in U.S. civil adjudication. The Court posited—and then clearly rejected—an opportunity to "tangle" with an even broader argument suggested by New Prime. To the contrary, the Court stated:

> Finally, and stretching in a different direction entirely, New Prime invites us to look beyond the Act. Even if the statute doesn't supply judges with the power to compel arbitration in this case, the company says we should order it anyway because courts always enjoy the inherent authority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. That, though, is an argument we decline to tangle with.[45]

So, ultimately, the Court refused to take a stance that would have furthered a strong policy favoring arbitration. Instead, the Court concluded:

> When Congress enacted the Arbitration Act in 1925, the term "contracts of employment" referred to agreements to perform work. No less than those who came before him, Mr. Oliveira is

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42 *Id.* at 542.

43 *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

44 *Id.* at 543 (citations omitted).

45 *Id.*

> entitled to the benefit of that same understanding today. Accordingly, his agreement with New Prime falls within §1's exception, the court of appeals was correct that it lacked authority under the Act to order arbitration . . . .[46]

Writing separately, Justice Ginsburg concurred in the opinion and agreed that words should be interpreted according to their meaning at the time a statute is enacted. On this basic point, there is little disagreement, but looking at the broader picture the question is rather, one of scope, degree, nuance, and context. Later in her opinion, she gets closer to our position: "Congress, however, may design legislation to govern changing times and circumstances."[47] In citing other contexts and legislation, she concedes that some statutes (not all) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes."[48] And this, in fact, is the Supreme Court's arbitration doctrine as evolved over these many years. The Court has enlarged the text in light of modern policy objectives and political concerns. Due to deeply rooted legal need, the Court gives every arbitration case a reading in light of the "strong federal policy favoring arbitration." Ginsburg concluded by quoting *West v. Gibson*:[49] "As these illustrations suggest, sometimes, '[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.'"[50]

Actually, the interpretation of FAA § 1's "employment contract exclusion" had earlier been subject to an intent-based analysis. In *Circuit City Stores, Inc., v. Adams*,[51] the Court construed the exclusion narrowly by, among other things, reasoning that "[the Court] believe[s] this interpretation comports with the *actual language* of the statute and the *apparent intent* of the Congress which enacted it."[52] The focus on actual language and apparent intent seems, however, to have been primarily motivated in narrowing the exception itself in order to further promote the strong federal pol-

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46 *Id.* at 543-44.

47 *Id.* at 544.

48 *New Prime*, 139 S. Ct. at 544 (Ginsburg, J., concurring) (citations omitted).

49 *Id.* (Ginsburg, J., concurring) (quoting *West v. Gibson*, 527 U. S. 212, 218 (1999)).

50 *Id.* (citations omitted).

51 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (in reversing the *Craft* Doctrine, the Court held that the exclusion in FAA § 1 applies *only* to employment contracts of *interstate* transportation workers).

52 *Rojas v. TK Comme'ns, Inc.*, 87 F.3d 745, 740 (5th Cir. 1996) (quoting *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995)).

icy favoring arbitration. *Circuit City* is consistent with other precedent that narrows the exclusion and stands in contrast to the Ninth Circuit's contention that the FAA is simply not applicable to labor nor employment contracts.[53] Professor Thomas Carbonneau has perhaps the most cogent analysis of *Adams*. He believes:

> [The Court] refused to examine the common meaning of the words "involving commerce" at the time the FAA was enacted. . . . The Court asserted that it would be unreasonable to "deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment." Additionally, the Court stated that it need only "construe the 'engaged in commerce' language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose." . . . The Court concluded that "the text of the FAA forecloses. . .a construction which would exclude all employment contracts from the FAA." While it conceded that the historical arguments advocating for the analysis of Congress' understanding of its commerce power in 1925 were not "insubstantial," the Court stated that these arguments were insufficient to give it a basis for adopting a construction of the statute that "goes beyond the meaning of the words Congress used."[54]

In *New Prime*, the Court (and the lower Court of Appeals) seems to have relied so heavily on precedent that it misstated the underlying methodology, and also disregarded the true purpose and consequence of its holding. The ultimate outcome of *New Prime* (an outcome we find frightening) may permanently undercut the long-term legitimacy of arbitration and establish a gateway for a war on arbitration. If too much weight is placed on the Gorsuch approach in *New Prime* (an excessive focus on the mere language of the statute, coupled with a questionable understanding of precedent, historical context, and architecture) the employment contract exclusion may evolve into the version given to us by the Ninth Circuit: "Based on the wording of [FAA] § 2, the pre-New Deal understanding of the Commerce Clause, the legislative history of the FAA, and the suggestions gleaned from [precedent and case law], we hold that the FAA does not apply to labor [n]or employment contracts."[55]

Eventually, the dissent in that opinion became the law. Because not much of the text is clear *per se*, it seems to mean that the

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[53] *See generally Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Craft v. Campbell Soup. Co.*, 161 F.3d 1199 (9th Cir. 1998).

[54] CARBONNEAU, *supra* note 4, at 99-100.

[55] *Craft*, 161 F.3d at 1206.

Court can decide what is clear in light of a strong federal policy favoring arbitration—which comports to §§ 2 and 3 powers. When it does so, the historical context as well as the legislative history is null and void. Conservative as well as liberal legal methodological preferences are substituted for functionality.[56] The life and experience of arbitration has been purpose-oriented and consequence-awareness. Pragmatism takes center-stage.

IV. HENRY SCHEIN V. ARCHER & WHITE SALES

The decision in *Schein* was unanimous and delivered on January 8, 2019 by Justice Kavanaugh. In the petition for certiorari, the Court was asked to decide whether there is a wholly groundless exception to the jurisdictional delegation clause. In this regard, the central question was whether the court or an arbitral tribunal should determine *all* threshold matters where the jurisdictional delegation clause is "clear and unmistakable."

Archer and White ("A&W"), a small business that distributes dental equipment, entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute their equipment. A&W sued the manufacturer's successor-in-interest and Henry Schein Inc ("Schein") for alleged antitrust violations. A&W sought both money damages and injunctive relief.

A&W brought its action in federal court at which point Schein invoked the FAA to compel arbitration in accordance with the arbitration clause in the underlying contract. The arbitration clause expressly excluded from arbitration claims for injunctive relief. A&W resisted arbitration by claiming that the request for injunctive relief barred the parties' pursuing arbitration, even if sought only in part. In granting the writ of certiorari, the Supreme Court directed the parties to address the single question: "Who decides whether the antitrust dispute is subject to arbitration?"[57] In many cases, this question may be simply and quickly answered, but in A&W and Schein's contract the arbitration clause expressly referred to the American Arbitration Association Rules ("AAA Rules"). Schein contended that the incorporation of the AAA

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[56] *See Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001) (for an example where the court refused to engage in an historical context analysis. It is our opinion that the Court did what needed to be done to read the FAA in light of the strong federal policy favoring arbitration).

[57] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

Rules gives to the arbitrator the power to determine threshold issues of arbitrability. A&W's response was succinct: "[W]here the defendant's argument for arbitration is wholly groundless . . . the District Court itself may resolve the threshold question of arbitrability."[58] The district court agreed with A&W relying on circuit court precedent which had elaborated a wholly groundless exception. The central question posed by the Supreme Court is simply stated: "In light of disagreement in the Courts of Appeals over whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act, we granted certiorari."[59]

The Supreme Court held—in line with its pro-arbitration policy—that courts should respect the arbitration agreement, including the jurisdictional delegation clause. The Court held that: "The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes."[60] Further, it held that the "wholly groundless" exception is inconsistent with the FAA and that the Court is "not at liberty to rewrite the statute passed by Congress and signed by the President."[61]

The Court, however declined to address whether the delegation clause at hand was clear and unmistakable. This failure to address an issue of great importance undercuts much of the relevance and impact of the decision. We need more clarity on whether incorporating arbitration rules (which include a *kompetenz-kompetenz* clause or "positive" *kompetenz-kompetenz* clause) satisfies the contractual jurisdictional delegation as developed in *First Options* (the "Kaplan Clause") also with respect to "negative" *kompetenz-kompetenz*.[62] The Court's holding raises no major concerns *per se*, but what it did *not* hold, and the reasoning justifying what it actually held, is worrisome.

The Court's opinion requires more parsing and closer analysis. A&W attempted to "overcome the statutory text and this Court's cases" by advancing four main arguments.[63] The Court said that

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58 *Id.*

59 *Id.* (referring to the split in the federal courts of appeals: *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F. 3d 522 (4th Cir. 2017); *Douglas v. Regions Bank*, 757 F. 3d 460 (5th Cir.2014); *Turi v. Main Street Adoption Servs., LLP*, 633 F. 3d 496 (6th Cir. 2011); *Qualcomm, Inc. v. Nokia Corp*., 466 F. 3d 1366 (Fed. Cir. 2006); *Belnap v. Iasis Healthcare*, 844 F. 3d 1272 (10th Cir. 2017); *Jones v. Waffle House, Inc.*, 866 F. 3d 1257 (11th Cir.2017)).

60 *Id*. at 527.

61 *Id.* at 528.

62 *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995).

63 *Henry Schein, Inc.*, 139 S. Ct. 524 at 530-31.

"none is persuasive."[64] We believe that each should be addressed separately.

First, that FAA §§ 3 and 4 essentially compels arbitrability questions to initially be decided by a court of law. However, as the Court pointed out: "[T]hat ship has sailed."[65] In *First Options* the Court discussed a contractual jurisdictional delegation clause. The Kaplan analysis is simple and straightforward.[66] A court determines if a valid arbitration agreement exists:"[I]f a valid arbitration agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court *may not* decide the arbitrability issue."[67] This reasoning and justification captures the proper position for a court to take on an arbitration clause. Of course, one defect of *Schein* is the Court's failure to squarely address the delegation issue. The Court had ample opportunity to not only address the negative-effect doctrine and to elaborate an approach that would not only align with its previous reliance on contractual freedom and general deference but build it stronger and showcase the pro-arbitration approach to the ICA community.

Second, A&W argued that FAA § 10 provides for back-end judicial review, and thus by reverse logic, the courts "at the front end should also be able to say that the underlying issue is not arbitrable."[68] The Court reasoned that: "Congress designed the Act in a specific way, and it is not [the Court's] proper role to redesign the statute."[69] We agree that the rejection of A&W's second argument is correct, but the Court's reasoning totally sidesteps the historical evolution of § 10. On occasion, the federal courts have used common law concepts in reviewing vacatur and rounds in the vacatur procedure, and have justified a court's providing "clarification" of arbitral awards. The *Schein* Court could have reasoned that front-end and back-end supervisory powers would have completely judicialized the arbitral procedure, made it costly, formal, time-consuming, and cumbersome. Essentially, the Court could have elaborated a pro-arbitration doctrine of negative *kompetenz-kompetenz*. The Court should have held, unequivocally, that in cases of delegation, a court's only function is at the back end of the procedure and only if the parties have not agreed otherwise. This

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64 *Id.* at 530.

65 *Id.*

66 *See First Options,* 514 U.S. 938.

67 *Henry Schein, Inc.*, 139 S. Ct. at 530 (emphasis added).

68 *Id*. at 530.

69 *Id*.

further distinguishes the U.S. emphasis on contractual freedom for the whole of the arbitral procedure (which stands in stark contrast to other jurisdictions such as Germany). Moreover, even at the back end of the procedure there ought to be some deference to the decision of the arbitrator. However, that is a debate about at what stage—if at any—the court should review the jurisdictional decision of the arbitrators if jurisdictional matters have been delegated. Whatever the approach, the Court should have articulated this scope of concern much more clearly.

The Court should have held that parties can delegate *all* issues of arbitrability, substantive as well as procedural. The Court should have held that party autonomy limits judicial intervention at the front-end as well as the back end. This analysis would have left the Court with one question left to decide: Is the incorporation of institutional rules "clear and unmistakable" evidence that the parties intended for the arbitrator to finally decide all matters of arbitrability, and thus for the Court to refrain from judicial review at the back-end as well? The answer should have been based not on fairness and procedural guarantees, but on arbitral efficacy—i.e. the very reason motivating the pro-arbitration policy. In doing so, the Court should have emphasized the role of strengthened arbitral authority in a pro-arbitration jurisdiction by remaining consistent with the history of shielding the system from judicial scrutiny and echoed the gravamen of a self-regulatory and autonomous arbitral procedures. This would have reconfirmed the authority of arbitrators to interpret the arbitration agreement and been in line with a long line of authority such as *Howsam v. Dean Witter Reynolds, Inc*;[70] *Green Tree. Fin. Corp. v. Bazzle*;[71] *Oxford Health Plan, LLC v. Sutter*;[72] and *BG Group, PLC v. Republic of Argentina*.[73] Moreover, double exequatur reintroduces judicial hostility. The FAA's main achievement has been to nearly eliminate judicial hostility to arbitration practices. The purpose of elaborating a "strong federal policy favoring arbitration" would have been in vain. That would, indeed, have been a better approach than to tackle the dull argument presented by A&W.

Third, A&W contended that it would be a waste of time and money to send frivolous arbitrability matters to the arbitrator. The arbitrator "will inevitably conclude that the dispute is not arbitra-

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70 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

71 *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

72 *Oxford Health Plan, LLC v. Sutter*, 569 U.S. 564 (2013).

73 *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014).

ble and then send the case back to the district court."[74] There are countless ways in which the Court could have declared this argument meritless. The Court did not do an adequate job on this issue, but we agree with two aspects of the Court's reasoning. The Court was correct in pointing out that the "exception would inevitably spark collateral litigation . . . over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless."[75] There is, as the Court put it, " no reason to create such time-consuming sideshow."[76] In addition, the Court properly commented that one should not assume that arbitrators would inevitably reject cases where a judge might rule differently.[77] We appreciate that the Court recognized that arbitration is not supposed to be perfect, but rather is only expected to be workable and reasonably fair. It opined that "[i]t is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way."[78] However, the Court reasoned that "the Act contains no 'wholly groundless' exception," and that the Court "may not engraft [their] own exceptions onto the statutory text."[79] This comment ignores the scores of cases in which the federal courts have used common law techniques to amplify and expand the arbitrator's authority and the creation of judge-made exceptions within the purview of the FAA's statutory language. The scope and understanding of the FAA are enriched by decisional law.

A&W's fourth argument was that the wholly groundless exception is necessary to deter frivolous motions to compel arbitration.[80] The Court properly noted that A&W "overstates the problem" and that "arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable."[81] Moreover, arbitrators can impose fee-shifting and cost-shifting sanctions to "deter and remedy frivolous motions to compel."[82] Finally, the Court noted spot-on that they "are not aware that frivolous motions to compel arbitration have caused a substantial

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74 *Henry Schein, Inc.*, 139 S. Ct. at 524.

75 *Id.*at 531.

76 *Id*.

77 *Id*.

78 *Id*.

79 *Id.* at 530 (citing *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 556-557 (2005)).

80 *Henry Schein, Inc.*, 139 S. Ct. at 531.

81 *Id.*

82 *Id.*

problem in those Circuits that have not recognized a 'wholly groundless' exception."[83] In this otherwise excellent reasoning, the Court unfortunately also re-emphasized for no good reason, the incorrect premise that the court "may not rewrite the statute simply to accommodate that policy concern."[84] We hope the words "simply" and "that" were added with the awareness that the Court has—and still can— interpret the statute broadly to accommodate policy objectives and political concerns.

Accordingly, the Court held that the "wholly groundless" exception that had been developed in the courts of appeals decisional law (primarily the Fifth Circuit) was inconsistent with the FAA. The Court reinforced the jurisdictional supremacy of the arbitral tribunal when empowered to hear threshold questions of arbitrability. In an interesting analogy (citing *AT&T Technologies Inc. v. Communications Workers*), the Court held that it cannot interfere with the merits of an arbitral award "even if it appears to the court to be frivolous," and thus neither can it interfere with the "'gateway' questions of arbitrability, such as whether the parties have agreed to arbitrate or whether the their agreement covers a particular controversy."[85] This follows naturally from the jurisdictional delegation clause developed in *First Options of Chicago, Inc. v. Kaplan*.[86] In that case, the Court confirmed freedom to contract unequivocally by implicitly recognizing judicial deference to arbitrators as the bedrock concept. Citing *Rent-A-Center*, the Court emphatically held that "[u]nder the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[87] For these reasons, the arbitral tribunal determines what has "clearly and unmistakably" been delegated to them. For these reasons, there is no such exception as "wholly groundless."

But there were some missed opportunities in A&W. Here, the Court could have clarified the jurisdictional issue once and for all. This would have, simultaneously, aligned United States arbitration law with commonly established practice and doctrine in other pro-arbitration jurisdictions. The better approach—contrary to what Professor Bermann stated in his amicus brief—would be for the Court to hold emphatically that the incorporation of arbitration

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83 *Id.*

84 *Id.*

85 *Id.* at 529 (citing *AT&T Tech. Inc. v. Commc'n Workers*, 475 U.S. 643, 649-50 (1986)).

86 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

87 *Henry Schein, Inc.*, 139 S. Ct. at 529 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

rules with a *kompetenz-kompetenz* clause clearly and unmistakably delegates *all* the threshold jurisdictional matters to the tribunal with finality or at least the presumption of deference at both the front and back end.[88] It is true that these clauses generally refer to positive *kompetenz-kompetenz*, but it is equally true that the Court has repeatedly shed light on what the U.S. law on arbitration should and could be—*de lege ferenda*—, not only what it supposedly "is." The Court could have opined in *obiter dictum* that the distinction between procedural and substantive arbitrability, on one hand, and between negative and positive *kompetenz-kompetenz*, on the other, are both artificial in nature. We disagree, however, and Barceló has articulated that "potentially biased decision makers on the jurisdictional issue will have the final word most of the time."[89] This sentence alone undercuts the foundation of arbitral and judicial co-existence—i.e. trust and responsible merchants.[90] Whatever the case may be, the Court was sleeping on their *Kompeten-zzz* under the strong federal policy favoring arbitration. The Court could have cleared-up some of the question marks in this respect. While sleeping, the world was watching—including the adversaries to the procedure.

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[88] He is not the only prominent professor of this opinion. *See also* John J. Barceló III, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View*, CORNELL L. SCH. LEGAL STUD. RES. PAPERS SERIES (Sept. 7, 2017). The author has been a leading authority on this matter for many years. For example, sixteen years ago he published *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND J TRANSNAT'L L. 1115 (2003). We respectfully disagree, however, with both scholars' approaches to this issue. Our disagreement is not so much with their overall arbitration philosophy in general and opinions on arbitrability in particular, but more in scope, nuance, and degree on the particular aspect of negative *kompetenz-kompetenz*. Albeit at the outset, we must admit and recognize that the logical and analytical approach of the two scholars might be more "sound" in isolation of historical context and the deeply rooted legal need for arbitration and contract freedom. The disagreement is underpinned—as can be seen generally throughout this paper—by the life of arbitration as mandated by its growing importance and role in the world legal order. The disagreement is best explained by the emphatic title of this paper: *The Life of Arbitration Law Has Been Experience, not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act*. Make no mistake, the main battle is one of jurisdictional standing: the debate centers around supposed fairness and procedural guarantees *versus* arbitral efficacy (mainly judicial economy and workability). The main concern of your authors is that the adversaries of the arbitral system will find any way they can to judicialize the arbitral procedure and eventually turn it into what it was actually escaping and in fact providing an alternative to.

[89] John J. Barceló, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View*, CORNELL L. SCH. LEGAL STUD. RES. PAPER SERIES (Sept. 7, 2017).

[90] The caveat being that we are talking essentially about commercial undertakings in which an arbitration agreement is negotiated and drafted. The context, and thus the outcome, changes significantly when and if the setting is a consumer contract of adhesion.

Moreover, a better approach would have been for the Court to announce that the "wholly groundless" exception does not block frivolous attempts to transfer disputes from the court system to arbitration. The Court could have reasoned that engrafting such a common law exception into the statute would "judicialize" the arbitral procedure and mandate. This would conflict with the "strong federal policy favoring arbitration." Instead however, the Court concluded "that the 'wholly groundless' exception is inconsistent with the text of the Act and with our precedent."[91] In fact, the Act as written does not represent the U.S. law on arbitration, and the decisional law does not clearly settle this issue. The exception should be stricken from arbitration law on the basis of policy objectives and political concerns—not on supposed intrinsic logic and analysis. The Court opined that it "must interpret the Act as written, and the Act in turn requires that [the Court] interpret the contract as written."[92] The reasoning provides for mere lip-service to the history and evolution on the U.S. law of arbitration. It represents the supremacy of freedom of contract, but at the same time strips the Court of its elaborative powers and refuses to answer the only real issue with respect to threshold arbitrability questions. The Court has a duty to enforce the arbitration agreement as written, the meaning of which must be read in light of contract freedom and the "right to arbitrate." In other words, the evolution of the U.S. law on arbitration has sought to empathically do justice to the political concerns motivating the rise of the policy objectives underpinning arbitration.

From a pro-arbitration standpoint, the Court's approach to "wholly groundless" might be applauded, but the Court's reasoning is fatally wrong. The Court grasped for low hanging fruit. It failed to see the bigger picture implications in its reasoning and failed to address *all* of the issues presented by the case. Decisional law can indeed create exceptions; for example, the Court has elaborated common law grounds for judicial review of arbitral awards. This is an honored tradition in U.S. arbitration law and simply cannot be ignored.

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91 *Henry Schein, Inc.*, 586 U.S. at 529.

92 *Id.*

V. United States Arbitration Law: Where Does It Go From Here?

The United States Supreme Court has now decided the second of a trilogy of cases that will likely define U.S. law on arbitration for the next century. Up to this point, arbitration law at the Supreme Court has not been terribly ideological: liberals and conservatives seem to be in general agreement on most issues. It certainly does not have the emotional baggage of abortion, civil rights or other touchy issues. Illustrative of this is that Justice Breyer is perhaps the biggest proponent of the procedure.[93] Also, arbitration has been nearly immune from competing concepts of statutory interpretation. Because of this, we assumed that the Gorsuch and Kavanaugh originalist approach would have minimal impact—that things would go on as per usual.

But Justice Gorsuch in *New Prime* focused extensively (as an originalist or strict textualist would do) on the original intent and actual language of the FAA.[94] Moreover, Justice Kavanaugh's reasoning in *Henry Schein* presents several misconceptions of the inferior role of the text and the superior role of the Court. A great deal of this has bypassed the attention of the arbitration community. The question is now whether the adversarial position, sometimes manifested as judicial resistance, will find roots in the Supreme Court by way consistently applying the FAA as written and understood at the time it was enacted. The traditional approach has been described by Mark Kantor:

> [T]he US Federal courts have for many decades strayed from the exact text of the FAA in the course of developing US federal arbitration law. Instead, the Federal courts have developed a sort of 'common law' of arbitration, building on their notions of how to fill legislative gaps or to find modern interpretations to effectuate the FAA's purposes.
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> These different approaches toward divining legislative meaning are part of the basic legal philosophy differences between the conservative and liberal wings of the Supreme Court. Those dif-

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93 With an exception for his consistent stance against "adhesive arbitration," perhaps best articulated in his, Stevens', and Ginsburgs' dissent in *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001). The "adhesive arbitration" debate is one where ideological battles have taken center stage even in arbitration law.

94 Justice Breyer cited this approach in his dissenting opinion in *Jam v. Int'l Fin. Corp*., 139 S. Ct. 759 (2019) (Breyer. J., dissenting). This goes to show that the approach will not slip the attention of the other justices and probably not the Circuit and District courts either.

> ferences will play out in many areas of US law but, in light of *New Prime*, one of them now may be the interpretation of the FAA.[95]

At best, originalism makes sense in constitutional interpretation, but that is a matter of methodological preference. It may, in many instances, have the virtues of clarity, foreseeability, and strengthening democratic input in social engineering. But, as we see it, that approach applied to arbitration law and policy (developed over many, many years) would have disastrous implications.

Of course, we do not for a minute object to doctrinal changes over time that reflect new realities. We concede that judges may properly consider changes in doctrine that promote desirable socio-economic outcomes. We further recognize that the Supreme Court has had a dramatic impact on law outside the borders of the United States. Much of this is synthesized in the insightful commentary of Professor Mark Van Hoecke who has written:

> A hypothesis about the exact meaning of a legal concept, rule, principle and the like, does not only refer to finding out what their authors had in mind. The normative context today and the socially desirable result also co-determine that meaning. Hence, this meaning is evolving and may change in the course of the years, without any change in the texts. A unanimity today as to the meaning of a legal text does not prevent scholars in the future wording new hypotheses as to a slightly or even completely different meaning.[96]

We believe, based on past decisions and practices, that the Supreme Court has had an obligation to re-enact the FAA in order to turn it into a modern law of arbitration. So far, they have done it with merit. In the subsections that follow, we will briefly illustrate and discuss certain instances where the Supreme Court has created a federal common law of arbitration that goes well beyond the skeletal language of the FAA itself. In fact, Justice Breyer's methodological approach on statutory interpretation seem most in sync with the strong federal policy favoring arbitration. His approach goes as follows: "Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past."[97]

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[95] Young-OGEMID post (01/21-2019). Quoted with the permission of Mark Kantor.

[96] MARK VAN HOECKE, METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? 14 (2011).

[97] *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 781 (2019) (Breyer, J., dissenting).

We will also highlight how the outcome could have been far different if an originalist/textualist interpretation of the FAA had been applied. Our list—(i) federalization; (ii) separability and *kompetenz-kompetenz*; (iii) clarification and vacatur; and (iv) subject-matter arbitrability—is illustrative, not exclusive.[98]

A. *Federalization*

The Court developed the doctrine of preemption. In a word this means that the FAA essentially supersedes state arbitration law by constantly and repeatedly emphasizing the "*federal* policy favoring arbitration." On its face, the FAA nowhere requires state courts to defer to the FAA.[99] The act does not refer to a federal preemption, nor does it refer to federalization or applying on the basis of federal question. The question of "federalization" in the arbitration context has its roots in the larger constitutional debate on "federalism" in the United States political system. Justices such as Antonin Scalia, Clarence Thomas, and Sandra Day O'Connor have objected to this development. Justice O'Connor "emphasized that the U.S. Congress in 1925 did not *intend* the FAA to be binding on states and state courts. In her view, the Court had, over time and numerous decisions, rewritten the FAA and converted it into an 'edifice' of law 'of its own making' . . . ."[100] Surely this evolution was motivated by policy objectives and political concerns, but it can be alleged that such is not enough to trump the democratic order of separation of powers as evidenced by the constitution. It is true, of course, that in many instances, for example the *Erie* Doctrine (federal courts sitting in diversity actions must apply substantive state law) unequivocally held that state courts must be controlling as a matter of constitutional law.[101] "The only means of circumventing the *Erie* limitations was to argue that the

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[98] Other interesting issues that should probably be researched include: whether arbitrators can include "non-signatory" parties pursuant to the FAA; whether a court should enforce consumer arbitration agreements; whether a "superior-party" should be able to waive class-action arbitrations (in short, "the class-action waiver dilemma"); whether "opt-in" provisions are legally sound creations of contract freedom; whether "manifest disregard" is still a common law ground for vacatur, and if it is, to what extend; whether courts can impose sanctions for frivolous vacatur actions; whether the court or arbitrator should determine whether the contract was procured through corruption and whether the arbitrator has a duty to disclose to relevant authority; etc.

[99] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[100] CARBONNEAU, *supra* note 16, at 80.

[101] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

FAA actually creates substantive federal rights and, therefore, a 'type' or 'ersatz' firm of federal question jurisdiction."[102] The broader discussion of federalism per se is beyond the scope of this paper but cannot be ignored by scholars inside or outside the United States.

The Court has elaborated a "federal preemption doctrine" in a line of decisions stretching back a number of years.[103] The doctrine reinforced federalization and confirmed the juridical power of the FAA. A "federalism trilogy" "demonstrated that the court was convinced that a fundamental congressional policy was embedded in the FAA: To establish an effective national legal regulation of arbitration and thereby remedy the dysfunctionality if U.S. civil litigation."[104] Thus, the FAA became binding on the states and has become, in essence, the only law of arbitration in the United States.

Under the preemption doctrine, the Court moved toward a right to arbitrate almost any matter under the FAA.[105] There is no express language in the FAA articulating this, although it may plausibly be argued that these concepts are *implied* in the scope and meaning of the FAA. But, however developed, federal courts now almost uniformly compel arbitration of all issues when an arbitration clause is found in an agreement.

Through the fundamental objectives in FAA § 2 the Court has elaborated a "strong policy favoring arbitration" and all the subsequent case law favoring arbitration due to the policy. The FAA is the law on arbitration and federal case law provides the sole interpretative base for the Act. The Gorsuch and Kavanaugh approach to the FAA might severely undercut the preemption principle or else lay the framework for waging a war on the scope and meaning of the FAA. The latter will eventually and inevitably undercut the principle.

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102 CARBONNEAU, supra note 16, at 185.

103 *See, e.g.*, *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17 (2012); *Oxford Health Plan LLC v. Sutter*, 569 U.S. 563 (2013); *Preston v. Ferrer*, 552 U.S. 346 (2011); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); and *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

104 CARBONNEAU, *supra* note 4, at 292. *See also* "the trilogy": *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *See also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Volt Info. Scis., Inc. v. Leland Stanford Univ.*, 489 U.S. 468 (1989).

105 *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (the Court essentially held that if the parties' agreed to arbitrate, they should arbitrate).

B. *Kompetenz-Kompetenz*

Kompetenz-Kompetenz is a generally recognized doctrine in arbitration that in essence provides that it is the arbitral tribunal that must resolve any questions of the tribunal's jurisdiction. There is no role for courts in making this determination.[106] But as with so much else in arbitration law, the FAA is totally silent on the issue. Instead, it can now be included on a contractual basis through a so-called "Kaplan jurisdictional delegation clause,"[107] by stating "clearly and unmistakably" that the arbitrators can determine their own jurisdiction.[108] By incorporating a "Kaplan clause," the arbitrators have, in and of themselves, the juridical competence to determine the contract's validity and whether the dispute is covered by the arbitration agreement (e.g. whether the Tribunal has gap-filling powers).[109] It should be mentioned briefly that both the leading cases—i.e. *Kaplan* and later *Howsam*—concerned domestic arbitration.[110] However, in *BG Group plc v. Republic of Argen-*

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[106] *Kompetenz-Kompetenz* is intimately linked with the doctrine of separability. The United States Supreme Court has declared the doctrine as an integral part of the U.S. law on arbitration. *E.g.*, *Prima Paint Corp.*, 388 U.S. 395 ("except where the parties otherwise intend—arbitration clauses . . . are 'separable' from the contracts in which they are embedded"). *See also Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006).

[107] For the purposes of this paper, it does not matter whether we refer to the delegation of arbitrability matters as "threshold," "jurisdictional," or "gateway" matters/issues. Moreover, it does not matter if we call the delegation of jurisdiction a "delegation clause," "jurisdictional delegation clause," and a "Kaplan clause." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) marked a new phrase, as a "delegation" clause.

[108] Named after the case in which it was held that parties are permitted to incorporate a clause that allows arbitrators to determine threshold questions of arbitrability instead of the court—e.g. whether a contract is valid, whether the subject-matter is arbitrable, whether the arbitrators have mandate to hear the dispute, etc. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.938 (1995).

[109] The reader may find a more nuanced debate on the threshold powers, he or she should read about a possible "common law" framework for the same; that is, instead of the contractual basis established in *First Options*. *See Oxford Health Plans LLC v. Sutter*, 568 U.S. 1065 (2013); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Moreover, it should be said that arbitral agreements are generally considered "valid, irrevocable, and enforceable;" the contract defenses under state law (e.g. formation, duress, unconscionability, etc.) are unlikely to be successful due to the Supreme Court having elaborated clear pro-arbitration FAA § 2 objectives.

[110] *Howsam v. Dean Witter Reynolds, Inc*, 537 U.S. 79 (2002); *First Options*, 514 U.S. 938. These cases clearly establish that the presumption is that the arbitrator decides threshold issues of arbitrability, e.g. allegations of waiver, delay, or a defense. The general consensus however seems to be that the Kaplan jurisdictional clause applies also to international arbitration; *See, e.g.*, *China Minmetals Materials Imp. and Exp. Co., Ltd v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003). In *Howsam* the Court established the difference between "substantive arbitrability" (existence, validity, and scope) and "procedural arbitrability" (e.g. waivers, pre-arbitration obligations, etc.). The rule for procedural arbitrability is laxed in comparison with substantive

tina, the Court unmistakably articulated that this now governs also in international arbitration matters.[111]

The FAA predates what is now collectively referred to as "the U.S. law on arbitration." The 1925 perception is just unrealistic, and Congress has been unwilling—and unable to—enact a new law and has instead given tacit approval for the Court to elaborate a doctrine on arbitration. The judicial legislation is pragmatic, policy-oriented, and underpinned by a purposive interpretation. This is a striking development because if we look either at the express language of the FAA or even if we try to examine the intent of the FAA, it would be hard—if not impossible—to reach the conclusion that the FAA gives private parties the power to strip courts of significant threshold powers. The significantly different views of freedom of contract that prevailed in 1925 (during the infamous Lochner Era) would probably not mandate such an interpretation. The Court elaborated a broad concept of freedom of contract to preserve the federal policy favoring arbitration even though this may have trampled on some earlier ideas of proper statutory interpretation. The later Court decisions uphold the Kaplan doctrine on a pragmatic basis—one that grows from the purpose of the FAA.

The Kaplan doctrine is a landmark decision in establishing the arbitral jurisdictional supremacy through, on the one hand, contractual freedom and, on the other hand, reiterating the unwavering Court deference and continuous empowerment of the arbitral procedure. Without the U.S. Supreme Court elaborating a contractual basis for the doctrine in its decision in *First Options*,[112] the autonomy of arbitrators would be limited. This would significantly undermine the arbitral autonomy, but more importantly, would markedly weaken, possibly even destroy, the legitimacy and effectiveness of the procedure. Moreover, once the arbitrator determines its validity, the court's deference is substantial.

Establishing a contractual basis for *kompetenz-kompetenz*, the parties eliminated the courts from the front-end of the arbitration.

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arbitrability; i.e. there is a presumption in favor of arbitral autonomy to determine the "who decides" questions with respect to procedural issues. In civil law jurisdictions, procedural arbitrability issues would probably be called "issues of admissibility."

111 *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014); *Kobe Properties Sarl v. Checkpoint Systems, Inc.*, 134 S. Ct. 1198 (2014). Albeit, the Court did elaborate on yet another distinction with respect to arbitral autonomy in "who decides issues." The distinction lies between substantive and procedural arbitrability.

112 *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contract between the parties").

The Court filled a gap in the FAA in order to align the Court with modern arbitration statutes in other pro-arbitration jurisdictions.[113] In so doing, the Court has created perhaps an even broader gap-filling role for both the Court and for parties through freedom of contract. This is a powerful corrective to any misuse of the FAA—i.e., the Court can align the vague (and sometimes non-existent) language in the FAA by adding content or rebranding the meaning and understanding of the current text by interpreting it in light of the strong federal policy favoring arbitration. Moreover, the invocation of the delegation doctrine, in general, and the arbitration doctrine, in particular, demands enormous deference by the courts to the acts of the parties and the determinations of the arbitrators.[114] This makes the parties the masters of their procedure—a result virtually everyone has welcomed.

However, even though *kompetenz-kompetenz* is accepted and welcomed as a positive concept, there is another aspect to the doctrine that requires analysis. The question is whether and to what extent the delegation clause can limit courts from intervening to determine jurisdictional questions, and, if courts can indeed intervene, at what stage should the courts do so—i.e. (negative) *kompetenz-kompetenz*. Some of these as yet unresolved issues regarding the doctrine generate much confusion. For example: What constitutes clear and unmistakable evidence that the parties did contractually delegate the jurisdictional threshold matters to the arbitrator? Are there or should there be limits on what cannot be delegated? How does one delegate as a matter of contract language? Is it enough to incorporate institutional arbitral rules that include a *kompetenz-kompetenz* clause in order to delegate jurisdictional questions?[115] When and how much should a Court intervene in order to determine whether the arbitrator(s) have jurisdiction? Is there really a need for front-end and back end supervision? Can both be eliminated; i.e. could parties agree to delegate all matters finally and exclusively to the arbitrator(s)? What is the standard for review by courts—prima facie test of arbitrability or a full de novo review? If the court proceeding comes first, *prima facie* or *de novo*? Is the incorporation of institutional rules clear and unmistakable evidence that the parties intended to dele-

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113 *See also BG Group PLC*, 572 U.S. at 134 (where the Court emphatically reinstated the almost unconditional jurisdictional delegation to the arbitrators by incorporating a "Kaplan Clause.").

114 For a more recent case, s*ee, e.g.*, *Oxford Health Plan, LLC*, 569 U.S. 564.

115 *See* VÁRADY, *supra* note 26, at 141, and the "reverse presumption" dilemma.

gate finally the jurisdictional decision? Are general *kompetenz-kompetenz* clauses in major institutional rules "positive" *kompetenz-kompetenz* clauses only and, therefore, to be distinguished from "negative" ones?

As mentioned, the general reference to *kompetenz-kompetenz* refers to the arbitrator's own competence to determine her jurisdiction. For academic purposes, this has been described as "positive *kompetenz-kompetenz.*" The reverse—i.e. "circumstances under which a national court will stay its own proceedings . . . and refer the parties to arbitration" in order to determine issues of arbitrability is coined "negative" *kompetenz-kompetenz*.[116] The dilemma as to whether and to what extent a court should intervene rests on two competing policy objectives: arbitral efficacy, on one hand, and supposed fairness and procedural guarantees, on the other.[117] This distinction has to be understood with some caution. It presupposes that judicial recourse offers significant fairness and procedural guarantees and efficacy.[118] That is not always the case and differs significantly from one jurisdiction to another. In fact, the entire motivation underlying arbitration is motivated, among other things, by court congestion and lack of expertise in specific commercial matters. Nonetheless, we need to have a reference point for purposes of comparison and arguing based on pros and cons. Therefore, with hesitation we accept this generalization as a true thesis.

However, let us elaborate on a pro-arbitration stance in this respect. If the parties have included a jurisdictional delegation clause, a modern pro-arbitration approach should: (1) remove the court from a *de novo* review of jurisdiction at the front-end, at best reviewing *prima facie*; (2) if the arbitration is on-going or tribunal established, refuse to review altogether at the front-end; (3) review with deference at the back-end;[119] and (4) allow contractual freedom to delegate the final competence to the arbitrator, i.e. no re-

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116 Barceló, *supra* note 88, at 1.

117 *Id.* at 2.

118 Procedural efficacy refers, among other things, to the fact that a court will perform a *de novo* review at the back-end anyways, so why not save time and costs. This was tried by the respondent in Schein but failed plat on its face—the Court emphatically held that "that ship has sailed." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

119 *See BG Group PLC V. Republic of Argentina*, 572 U.S 25 (2014) (With this case in mind, the Court could attribute substantive arbitrability issues with the same general deference as portrayed with respect to procedural arbitrability issues. In doing so, the Court would limit review of jurisdictional manners in the same manner as it limits the review of facts and law in the arbitral award.).

view whatsoever and instead recognize full arbitral autonomy as authorized by the parties pursuant to freedom of contract. However, that does not resolve what constitutes evidence of such delegation in a clear and unmistakable manner. That is, indeed, another matter altogether and an appropriate standard has to be formulated by either the legislative branch or the Court.

Our strong support for a pro-arbitration stance and our utmost respect for arbitral autonomy and freedom of contract can be traced back to the gravamen of arbitration and commercial dealings. Arbitral success rests on the edifice of freedom of contract, court deference (with the caveat of light-touch supervision, particularly at the back-end), and heightened arbitral autonomy. If parties opt for arbitration, especially if the seat is in France, Switzerland, or the United States, they opt *de facto* for heightened standing of arbitral autonomy. Sophisticated merchants should know this. If jurisdictions get into the habit of striking down final delegation clauses, they will no longer be considered arbitration-friendly and will fall short in the competition for arbitration business. Courts should be cautious not to fall into the seductive trap of power by way of reclaiming jurisdictional supremacy and hegemony.

In this respect, the Court has more work to do, and in both *New Prime* and *Schein*, Justices Gorsuch and Kavanaugh failed to further the doctrine to align it with a modern pro-arbitration understanding.[120] Not only could they bring clarity to *status quo* in domestic matters, but the Court could actually—considering especially the silence in the New York Arbitration Convention and the UNCITRAL Model Law—reclaim its fame and its position as the main architect in elaborating a pro-arbitration policy on ICA. The Court should cherish, preserve and extend that which makes their

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120 *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *Henry Schein*, 139 S. Ct. 524 (2019). France has taken a liberal approach and refuses the courts of jurisdiction once a tribunal has been established and if the respondent approaches the court prior, the court is instructed to conduct a *prima facie test* only. France would review only at the back-end, albeit *de novo*. Germany, on the other hand, conducts a full *de novo* review. At the end of the day, however, the preferred approach is a policy choice. Your authors are more in favor of the French and Swiss philosophy of arbitration as articulated by, among other authors, Carbonneau (albeit American), Fouchard, Gaillard, Goldman, and Kaufman-Kohler. The U.S. approach differ from both and have the potential to further the more arbitral friendly French approach even further. This would continue to pave the way for the U.S. as the most favorable seat for arbitration. If not, the arbitration evolution will continue the trend of making "lawyers laugh and legal philosophers weep." *Guru Nanak Found. v. Rattan Singh & Sons*, (1981) 4 SCC 634 (India).

approach especially business and arbitration friendly—"the strong role the U.S. Supreme Court accords to party autonomy."[121]

The bottom line is this, the Gorsuch/Kavanaugh approach may well undercut *kompetenz-kompetenz* by expanding the powers of the reviewing courts. If the Court were to further advance the original intent and actual language approach, it might be impossible to avoid interpreting FAA § 4 to mean that a federal court should review *de novo* any jurisdictional challenge.

C. *Grounds for Setting-Aside or Refusing Enforcement of an Arbitral Award (Vacatur) and Action to Clarify an Arbitral Award*

1. Vacatur

The grounds for vacating an arbitral award in FAA § 10 are, briefly stated: (1) award procured by corruption or fraud; (2) award made with "evident partiality"; (3) arbitrators guilty of misconduct; (4) arbitrators exceeded their powers. While it is not entirely clear from the statute's text that this is an exclusive or exhaustive list, there is no language in § 10 that appears to permit a court to review the merits of the award or any findings of fact that accompany the award. In examining § 10 we need to keep in mind that it was enacted in 1925, when arbitration was much less respected, and courts were far less deferential. It is hard to imagine that a 1925 Congress intended courts to defer, generally and with respect to merits, review particularly with regard to matters which were, then, not considered proper subjects of arbitration such as antitrust and securities disputes.[122]

Over time, the federal courts created common law grounds of vacatur into the content of the provision such as (a) manifest disregard of the law; (b) capricious, arbitrary, or irrational arbitrator determinations; and (c) determinations that violate a statutory public policy. In theory, this limits judicial deference, but in practice it has had no substantial effect.[123] As we stated above, giving the court the power to make arbitration law by common law meth-

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121 Barceló, *supra* note 88, at 25.

122 This skepticism also played out in the elaboration of the "second-look" doctrine, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

123 Moreover, it is believed that some or all of these grounds originates from cases dealing with labor arbitration. For a discussion on review of the merits and manifest disregard in particular, *see* VÁRADY, *supra* note 26, at 943-60.

ods and thus giving less significance to the text of the FAA has both positive and negative consequences—or as we have said—for better or for worse. Evolution of arbitration law through common law methods lacks support in the statutory language but does align with the policy favoring arbitration. Allowing courts to inquire into the merits through judicial review undermines arbitral autonomy, the respect for parties' contracts, and the policy objectives and political concerns shaping the rationale of deference to arbitration. With the benefit of hindsight, it becomes apparent that the common law grounds have also been interpreted in light of a "strong federal policy favoring arbitration," and thus have had a limited practical effect. We do not favor broadening vacatur powers (permitting long delays and costly vacatur procedures) because such a development may well disrupt the current favored position of arbitration in the legal system. It may be necessary for courts to become far more aggressive in assessing sanctions and penalties for frivolous attempts at vacatur.

However, current experience tells us, that the actual *vacatur* of arbitral awards remain a very rare exception rather than the norm. This is the preferred approach and must be applauded as the courts continue to honor the "strong federal policy favoring arbitration."[124] We urge great caution in any court moving toward any shift in the doctrines of review that permit the courts to give broader meaning and application to, for example, the words 'undue process,' 'evident partiality,' 'misconduct,' or 'imperfect execution of powers'.[125] The FAA § 10 lays out the grounds in which the relevant district court may order to vacate an award. The ground in subsection 2 reads: "where there was evident partiality or corruption in the arbitrators, or either of them." This is an area that is not settled yet and where the Gorsuch and Kavanaugh approach might undercut the pragmatic, purposivist oriented interpretation of the FAA.

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[124] But with so much else, this is a likely prediction of the future but not an absolute one. A "better approach" is not equal to the "only approach." In fact, it seems that the federal courts of appeals have once again received a bit of a habit to vacate arbitral awards. We should not draw too many conclusions yet, but it is worth monitoring the development. *See Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC*, 2019 WL 333339 (9th Cir. Jan. 28, 2019); *Sw. Airlines Co. v. Local 555, Transp. Workers Union of America AFL-CIO*, 2019 WL 139247 (5th Cir. Jan. 9, 2019); and *Koester v. U.S. Park Police*, 2019 WL 81105 (Fed. Cir. Jan. 3, 2019).

[125] *See* CARBONNEAU, *supra* note 4, at 138-39.

2. Clarifying Awards

The development of modern arbitration law has not been exclusively the province of the Supreme Court. The courts of appeals (the federal circuits) have also had an impact. For example, the Second Circuit created a mechanism by which the courts may clarify an arbitral award.[126] This has the singular advantage of allowing the award to stand instead of setting it aside in its entirety. Vacating awards due to minor errors (e.g. typographical errors) forces the parties to redo the procedure or go to court. This is inevitably a cumbersome, costly, time-consuming and largely unnecessary process. When a court invokes the mechanism of clarification, the court in effect "remands" the award back to the tribunal. The tribunal then, among other things, has a second shot at explaining in clear terms what it meant. This mechanism can actually promote finality—the "one-stop-shop" principle—and also enhance arbitral legitimacy. How this mechanism fits with the doctrine of *functus officio* and the FAA § 10(a)(3)'s requirement to vacate an "incomprehensible award" is unclear. But the law of arbitration has not been logic, it has been all about experience. The tool to remand back for clarification sits well with the "strong federal policy favoring arbitration." It does, however, contradict the text of the statute and the doctrine on *functus officio*. We shall not engage in a debate on whether the mechanism is so crucial that the objectives of the U.S. law on arbitration mandates its existence, but we do wish to emphasize that it is a favorable procedure that will likely bear the test of time. We will likely see more such ventures in the near future.

D. *Subject-Matter Arbitrability and the FAA*

If Gorsuch's intent-based and actual language approach to the FAA become the new norm, what will become of all the current doctrine on subject-matter arbitrability? Subject matter arbitrability is one of the most important developments in modern arbitration law—leaving to the arbitral tribunal the authority to decide virtually all issues in a dispute, no matter what the subject matter covers. To answer this question, we must divide the issue of subject-matter arbitrability into, two separate components: domestic arbitration matters and international arbitration matters. To

126 *See Hardy v. Walsh Manning Sec., LLC*, 341 F.3d 126 (2d Cir. 2003).

understand the underlying tension in either context, the reader must understand the position of the adversaries of contemporary arbitration. The crux of the matter for the adversary is a jurisdictional battle between the true source of judicial power and an illegitimate scam. Arbitration was "perceived by commentators, the judiciary, practitioners, and captains of industry as a blunt and imprecise methodology for dispute resolution."[127] With respect to arbitrability, the early hostility was manifested primarily in *Wilko v. Swan* and the *American Safety* case.[128]

In domestic arbitration, the widening of subject-matter arbitrability was motivated primarily by three factors: (1) respect for the parties' agreement; (2) respect for arbitral autonomy; and (3) other precedential decisions that echoed decisions that emphasized the distinctiveness of international commercial commerce and trade.[129] In the international setting, the United States Supreme Court took on a strong leadership role by elaborating a nearly universal doctrine on subject-matter arbitrability that was grounded in arbitral autonomy and freedom of contract, but also anchored in the distinctness of the international nature of the agreements. Notably, neither § 2 nor § 3 of the FAA address subject-matter arbitrability. Congress' silence (and total inaction) on this issue has allowed the Court to circumvent certain concerns of public policy (including public interest and public law concerns) having to do with subject-matter *in*arbitrability. A great deal of this discussion is beyond the scope of this article. We do not directly address the question of whether many issues should or should not be subject to arbitration such as antitrust, corruption, securities, bankruptcy, labor, consumer protection and the like. We do note, however, that on virtually all of these issues, the Supreme Court has spoken decisively in favor of arbitration.

Statutory and regulatory matters traditionally belonged to the subject matter jurisdiction of the courts because most scholars and most government entities believed that the courts were the best vehicle for adjudicating matters of public policy and public interest. It was always taken as a given that the judiciary had the primary, if not the exclusive, role in interpreting statutes enacted by the demo-

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127 MARTINEZ-FRAGA, *supra* note 22, at 1.

128 *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); *Wilko v. Swan*, 346 U.S. 427 (1953).

129 *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), reh'g denied, 419 U.S. 885 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *See* BORN, *supra* note 18, at 635, 668.

cratically elected Congress. The source of the doctrine of subject-matter *in*arbitrability—which has been less significant than expected—is to be found in Congress' desire to exclude certain statutory and regulatory matters from private adjudication. In fact, "[t]he Court never identified a true statutory command of inarbitrability—despite clear and unambiguous phraseology to that effect in a number of congressional statutes."[130] In truth, the core concept underlying subject-matter arbitrability is not a matter of contractual freedom, but rather that a democratically-elected legislative branch is responsible for shielding the public from unwarranted intrusions upon the judicial function. Moreover, Congress has a duty to protect its citizenry; for example, through environmental law, public health law, tax reforms, labor legislation, etc. In order to protect vulnerable groups and the society at large, the Congress could clearly spell-out where grievances could (and should) be and not be redressed. Whether all statutory and regulatory matters should be arbitrable is subject of continuous debate. Even more debatable is arbitration with respect to the Civil Rights Act and in the adhesive context.

Nonetheless, in recent times, federal courts have seen fit to enhance the arbitral process at the expense of the traditional role of the courts. These cases have had the effect of undermining any of *in*arbitrability and have paved the way for the courts to craft an almost universal–and judge-made—doctrine that gives arbitral tribunals almost plenary authority to decide any issues involving the subject-matter of a dispute. The court has concluded repeatedly that nothing in the provisions of the FAA *prohibits* the submission of statutory and regulatory disputes to arbitration. Thus, elaborating an almost universal subject-matter arbitrability. On the other hand, it has failed to acknowledge that nothing in the FAA *permits* statutory nor regulatory matters. This can partly be explained by partisan politics and stalemate in the legislative body. "Despite the . . . political gridlock and diminution of resources, American society must still provide constitutionally sufficient civil justice for its citizens."[131] Dynamic business needs nurturing and a proactive Court cannot sit idly by. This is the definition of public accountability and responsibility. The Supreme Court has under-

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[130] CARBONNEAU, *supra* note 16, at 95. For an unwavering stance on delegation even in matters that could potentially harm the public interest, *see PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (the Court held that threshold questions with respect to RICO claims should be considered first by the arbitrators).

[131] CARBONNEAU, *supra* note 4, at 45.

stood this and therefore elaborated an extensive doctrine on subject-matter arbitrability and rejected to even semi-seriously consider a doctrine on subject-matter *in*arbitrability.

1. Subject-Matter Arbitrability and International Commercial Arbitration

The Supreme Court has been enormously powerful in crafting an emphatic policy favoring arbitration including the vital area of international commercial arbitration (ICA), where the Court has played a leading role in providing legitimacy to—and defining the contours of–ICA. But, history has not been straightforward. U.S. courts traditionally took a more reserved stance, as evidenced by the Supreme Court in *Wilko v. Swan* and the Circuit Court in *American Safety Equipment Corporation v. JP Maguire Co.*[132] The Supreme Court reasoned that the Securities Act was enacted:

> [T]o protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.[133]

The Court's opinion is emphatic: Arbitration is inferior in the jurisdictional battle for standing. It is limited to commercial controversies arising in matters that are not of public policy interest, i.e. where the Congress regulates or enacts statutes to protect the public. In light of this narrow understanding of the arbitral procedure and the arbitrators' autonomy, the Second Circuit reasoned that: "A claim under antitrust laws is not merely a private matter. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . We do not believe Congress intended such claims to be resolved elsewhere than the courts."[134]

Both decisions were purely based on public interest, which is *per se* a subjective concept that changes over time and conflicts with other policies, e.g. economic policies and policies of interna-

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132 *Am. Safety Equip Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

133 *Wilko v. Swan*, 346 U.S. 427, 438 (1953). On the same lines, it was held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974) that "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate form for the final resolution of rights created by Title VII."

134 *Am. Safety Equip. Corp.*, 391 F.2d at 826-27.

tional affairs. *American Safety* increased the standing of courts and weakened the legitimacy of arbitral agreements and the authority of an arbitral tribunal to decide disputes.

However, things were about to change. The pro-arbitration policy was crafted, and the Court established an almost universal subject-matter arbitrability and a pro-enforcement rationale that is resoundingly clear. In fact, this development is one of the expressions of a strong federal policy favoring arbitration. The Court has articulated a nearly universal subject-matter arbitrability doctrine in line with its "hands-off" approach.

In this respect, three cases demonstrate the importance of judge-made law: *The Bremen v. Zapata Off-Shore Co*;[135] *Scherk v. Alberto-Culver Co*;[136] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[137] This has been described as one of four pillars of U.S. arbitration law and the third of the "trilogies."[138] The Court has, through this string of cases, played an architectural role in crafting the subject-matter arbitrability doctrine—in domestic arbitration and in ICA.

In *The Bremen* (which involved the enforcement of a forum-selection-clause) the Court stated that international commercial contracts implicate special policy concerns and the "[d]omestic strictures on judicial jurisdiction and the enforceability of contract provisions had to yield to the provisions in the parties' bargain."[139] Prior to *The Bremen*, the Court was hostile towards the exercise of contract authority and generally invalidated forum-selection clauses.[140] The Court in this case understood the risk and complex international transactions associated with business in the global marketplace. The Court had thereby adapted to global commercial realities. The court held that:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a *parochial* [emphasis added] concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world mar-

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135 *M/S Breman v. Zapata Off Shore Co.*, 407 U.S. 1 (1972).

136 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *reh'g denied*, 419 U.S. 885 (1974).

137 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

138 CARBONNEAU, *supra* note 4, at 49, CARBONNEAU, *supra* note 16, at 41-46.

139 CARBONNEAU, *supra* note 16, at 322.

140 *See Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180 (1959), *reh'g denied*, 359 U.S. 999 (1959).

> kets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[141]

Domestic perceptions nor domestic approaches should function as a barrier to transnational practices, in general, and in international adjudication in particular. *The Bremen* was important in establishing that domestic realities are sometimes at unease with international ones. In fact, "the Bremen set the stage for everything that followed."[142] Building on this notion, the Court continued in accommodating the demand for neutrality, expertise, finality, and enforceability in the transnational context. In a word, *The Bremen* underscores the internationally-minded decisional law in the absence of rules, it announces a "comprehensive regulatory framework for private international transactions through the invocation of a single but vital legal concept."[143]

However, in *Scherk*, the parties agreed to arbitrate in Paris. Alberto-Culver alleged that Scherk's breach violated the 1933 Securities Act and the 1934 Securities Exchange Act. The central question in Scherk was whether that issue of regulatory law could be resolved by arbitrators? The court held that:

> A parochial [emphasis added] refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.
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> . . . .
>
> For all these reasons, we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by

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141 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972).

142 Fox, *supra* note 21, at 350-59. In fact, the Court in *Scherk* followed the reasoning and held that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of. Forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." This conflation of arbitration clauses on the one hand and forum selection clauses on the other has been repeated on other occasions. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). *See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

143 Thomas E. Carbonneau & William E. Butler, International Litigation And Arbitration: Cases And Materials 248-49 (2d ed. 2013). The authors argue that "*The Bremen* is good law and acts as the foundation for the Court's gradual articulation of a judicial policy on trans-border litigation and international arbitration. *The Bremen* is the first case in which the Court established a clear boundary between law for domestic and international matters, holding that domestic rules may be inapposite in the international sector." *Id.* at 257. *Conversely see Monrosa v. Carbon Black Export,* 359 U.S. at 248–49. *The Bremen* overruled this decision, which was a manifestation of the traditional view of U.S. courts that forum-selection clauses with a "less convenient forum" are essentially contrary to public policy.

> the federal courts in accord with the explicit provisions of the [FAA].[144]

Accordingly, the Court, concluding that contracts calling for arbitration were vital to both global commerce and international contracting, took a leadership position in preserving the integrity of ICA at the expense of the courts.

The ruling in favor of international comity in *Scherk* was followed by the Court's decision in *Mitsubishi*. There, the Court cited *Scherk* with approval and determined that there was a virtually irrebuttable presumption favoring the enforcement of the provisions of freely-negotiated transborder contracts. It decided that antitrust disputes arising from national law were arbitrable. International arbitrators could rule on the application. The stance favoring arbitration and arbitrability also characterizes the enforcement stage of the arbitral process.

The U.S. Supreme Court took the leading role in reshaping international commercial arbitration by enhancing arbitrability. In *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth Inc*,[145] the court stated that:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes all require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[146]

The *Mitsubishi* decision has given international tribunals heightened standing and arbitration agreements an increased currency and legitimacy.[147] *Mitsubishi* essentially recognized that arbitration has been—and would continue to be—the favored means of litigating international disputes. Countries had decided to submit some of its mandate to private justice in order to stimulate and foster a global business environment that was friendly to trade, commerce, and investment. National courts ought to respect that choice.

But, *Mitsubishi* is not free of defects. In a later portion of the opinion, *Mitsubishi* took a weird turn that at least somewhat undercuts much of the pro-arbitration reasoning in the opinion. The

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144 *Scherk*, 417 U.S. at 516-20.

145 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

146 *Id.* at 629.

147 For the second leading case on antitrust and international commercial arbitration, *see Eco Swiss China Time Ltd v. Benetton International NV*, Case C126/97, [1999] ECR I-3055 (1999).

Court recognized that national courts could exercise some significant powers of review when and if an award was subject to enforcement in domestic courts. Establishing the well-known "second-look doctrine" the Court, playing lip-service to the importance of international commercial arbitration at the beginning of the opinion, at the end of the opinion opened up the possibilities for judicial review and judicialization of the procedure.

Scherk and *Mitsubishi* established that a "special regime emerged for international business contracts that allowed international arbitrators to rule upon claims based upon U.S. regulatory law."[148] In these two cases and many others, the Court has blurred the distinction between domestic and international arbitration in relation to subject-matter arbitrability and "made universal subject-matter arbitrability an integral part of U.S. domestic law."[149] The Court was willing to enhance arbitration by protecting and implementing its purposes. These cases signal clearly that the U.S. legal system had taken a business efficient and effective pro-arbitration stance. Initially, it was surmised that the U.S. courts would enforce international dispute resolution clauses providing for arbitration that may not have been enforceable domestically, given that the Court formulated a very strong favoring international commerce and arbitration. These days virtually that same policy also underlies domestic arbitration.

While these cases do not give us the entire landscape of U.S. arbitration law, they indisputably signal its evolution in the area of ICA. *Mitsubishi* resonated globally. The Court paved the way for pro-arbitration sentiments in the world, strengthening arbitration by enhancing subject-matter arbitrability and not allowing for an international agreement to be denied enforcement because of—among other things—domestic public interest concerns. By decisional law giving effect to honest enforcement of arbitral agreements and awards, the Court crafted a policy strongly and "emphatically" favoring international commercial arbitration.[150]

Therefore, the pro-arbitration stance in respect of whether a dispute is capable of being referred to arbitration is, like arbitration itself, a result of deeply rooted legal need and economic competition. Learned commentators wrote that: "In the international sphere, the interests of promoting international trade, as well as

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148 CARBONNEAU, *supra* note 16, at 324.

149 *Id.* at. 326.

150 *See* CARBONNEAU, *supra* note 16, at 334.

international comity, have proven important factors in persuading the courts to treat certain types of dispute as arbitrable."[151]

If other states have determined for themselves that certain regulatory and statutory matters are arbitrable (e.g. antitrust), why should a U.S. court decline to recognize such an award or arbitral agreement? It was probably carefully considered in each jurisdiction that has taken a stance on the matter. If states decide that it was unwise, they are free to make subject-matters *in*arbitrable. In fact, the arguments against arbitrating antitrust claims (and other statutory and regulatory matters) are motivated by the importance of the laws and the jurisdictions regulatory role in furthering and protecting public policy goals and objectives. It is a compelling argument—it is logically sound and analytically rich. But, law and commerce are not always logical. As has been said elsewhere in this paper, the life of law and arbitration has been experience in light of practicality.

If the *American Safety* rationale would rule, national courts would more easily refuse enforcement of arbitral awards, national courts would generally have a bigger role in setting-aside awards at the seat of arbitration, and national courts would also have the power to refuse enforcement. Such court interventions would totally judicialize the arbitration procedure. If somehow the *American Safety* approach movement becomes too powerful and influential by waiving the bandwagon of public interest, its negative effects should be limited to scaling back arbitrability only. Thus, rather than collectively transforming the entirety of the procedure by allowing for intense judicial interference and pushing for formal intricacies akin to court litigation, the courts or legislators could make certain issues inarbitrable.

Scherk distinguished *Wilko*, and *Mitsubishi* rendered it essentially null and void as a doctrine.[152] The final overruling came with *McMahon* and *Rodriguez de Quijas*, which was based on the reasoning in *Scherk* and *Mitsubishi* but applied in the domestic context.[153] In this way, the Court had elaborated a doctrine on ICA and used that to elaborate a doctrine on the U.S. law of arbitration. With all this said, neither Scherk[154] *nor* Mitsubishi[155] would have

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151 NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 124 (2009).

152 *See* BORN, *supra* note 18 at 965-966.

153 *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *reh'g denied*, 483 U.S. 1056 (1987).

154 *Scherk*, 417 U.S. 506.

155 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

been decided the way they were if the actual language or original intent approach had prevailed at the time the cases were decided. Ultimately, with that approach finding its way into the methodological understanding of the FAA, it may lead to the federal courts once again competing with international arbitration for jurisdictional supremacy. It is evident that the 1925 intention of the FAA was not in favor of allowing arbitrators to decide claims that implicate U.S. regulatory or statutory law. The reasoning of Justice Reed in Wilko v. Swan[156] might eventually find its way back—i.e. the often-disparaged *Wilko* doctrine might come to haunt the arbitration community. The Gorsuch Court might end-up adopting language that has been outdated since *Mitsubishi* (for example, such adopted in the infamous *American Safety Equipment Corporation v. JP Maguire Co*[157] mentioned above). The *Wilko* and *American Safety* reasoning is probably more in line with the intention and actual language of the FAA with respect to subject-matter arbitrability.

In all of its decisional rulings, the Court reinforced the unconditional independence and autonomous standing of arbitration.[158] The arbitral procedure is anchored in the principle of contract freedom and hands-off approach in the supervision of arbitral agreements and arbitral awards. With the Court's intent-based and actual language approach, the evolution of the doctrine on arbitrability would have looked substantially different.

VI. Trying to Predict the Future: Some Tentative Concluding Remarks

What we mainly want to highlight is our concern regarding Gorsuch's intent and actual language approach, and Kavanaugh's lack of appreciation for the judges' role in making arbitration law. What will happen if this approach is taken in future cases? It will certainly result in a change on the meaning and scope—and therefore the understanding—of the FAA. Up until these two most recent cases, the issue has been less an interpretative problem than one might initially had expected, because virtually every arbitra-

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156 *Wilko v. Swan*, 346 U.S. 427 (1953).

157 *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (1968).

158 *See also Vimar Seguros y Reseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.,* 460 U.S. 1 (1983).

tion-related matter was given a pro-arbitration touch by the Court. However, the current validity of the text in the FAA—through "purposivist" decisional law—might be under unintentional, unwelcomed siege. The doctrinal development of arbitration is intimately linked to the emphatic policy favoring arbitration. If the case law will no longer re-write the content, will the policy remain intact? What stance will the court take on subject-matter arbitrability in international business contracts? In short: will the new, likely unintentional, interpretative framework, lead to a new hypothesis on the understanding of the FAA? It is clear that arbitration sceptics will seize this moment to try to elaborate a new, much more restrictive doctrine on arbitration in general and ICA in particular.

The current theory of arbitration rests on a doctrine crafted with a pro-arbitration bias, i.e. a hierarchal understanding of the FAA as subordinate to decisional law, which in turn can re-write its content. This has been motivated by the role arbitration plays in legal civilization. Essentially, the U.S. Supreme Court has helped shape the world view on ICA by adopting a methodology that strongly favors arbitration, so much so that it has deduced hypotheses on the content of the FAA that are mostly value and purpose based. But to be clear, these are not the values or intent of the original drafters in 1925. The systematic understanding of arbitration may be redefined, and therefore a new hypothesis of arbitration deduced as a result of Gorsuch's and Kavanaugh's interpretation in *New Prime* and *Schein*. This would disrupt the evolution of arbitration in the U.S. but also of ICA as such.

Much can be said of the new conservative bench seeking to redo the constitutional landscape in the United States (for *better* or *worse*). With a constitutional agenda in mind, the justices seem eager to adopt a consistent methodological approach to statutory interpretation. These consistency cravings can spill-over to interpreting federal legislation conservatively despite having been given a more pragmatic approach for decades. The U.S. Supreme Court was instrumental in elaborating a judicial doctrine on arbitration by construing the FAA liberally and will, in fact, continue to do so. Judicial legislation has been crucial in light of the bi-partisan deadlock in the U.S. Congress. The stalemate has prevented the enactment of a new arbitration act. Congress has instead provided the Court with tacit approval of being the chief architect in elaborating the federal doctrine on arbitration by altering and adding to the enacted statute. For these reasons, the Act is the oldest still func-

tional arbitration act in the world. With Congress' approval the FAA has become a "living statute."

Through decisional law it made the Court's rulings superior and the text inferior. Once the judicial doctrine on arbitration became the norm, every arbitration-related matter was interpreted in light of a "strong federal policy favoring arbitration." *Stare decisis* makes the settled principles irrevocable and irreversible. Any future issue will receive a pro-arbitration touch in light of the judicial policy favoring arbitration. Contractual freedom fill the gaps of federal legislation and the Court cements the words into law. Put differently, the text of the FAA does not override the interest in effectuating the intent of the contracting parties.[159] By judicial deference, the Court has transformed arbitration into an autonomous procedure that regulates itself. Arbitration is autonomous in a domestic context and almost a-national in a transnational context. All this, however, will likely still only the better or best approach but does not represent the only approach going forward. Justices Gorsuch and Kavanaugh have put consistent, emphatic arbitration evolution unintentionally on its head by reasoning in a way that opens a can of worms—making it possible for adversaries of arbitration to put the pro-arbitration landscape under siege. They will do so by seizing upon (1) the intent-based and actual language approach in understanding the scope and meaning of the FAA (as presented by Justice Gorsuch), and (2) making the case against judge-made law with respect to elaborating on the scope and meaning of the FAA (as presented by Justice Kavanaugh).

Adversaries will utilize (1) or (2) in an organized and streamlined effort to (a) limit arbitral autonomy; (b) limit the arbitral tribunal's jurisdictional powers—and thus, arbitral autonomy, too—at the front-end of the procedure (i.e. elaborate an anti-arbitration stance on negative *komptetenz-kompetenz*); (c) elaborate a doctrine on *in*arbitrability that excludes statutory and regulatory matters; and (d) eliminate the "hands-off" judicial deference in the supervision and enforcement of arbitral awards. This is just one step toward judicializing the arbitral procedure. In conjunction with heightened court intervention, the adversaries will call for formal, intricate court-like procedures grafted onto the arbitration process. They will logically and analytically articulate why fairness and procedural guarantees should trump arbitral efficacy. Essentially, the adversaries are of the same opinion as the Court in *McDonald v. City of West Branch, Michigan*, in which it opined that:

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159 *See Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (Stevens. J., dissenting).

> [F]inally, arbitral fact finding is generally not equivalent to judicial fact finding. As we explained [in a previous case] "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." (citations omitted) It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial.[160]

If the Court returns to its early position of judicial hostility and again gives the courts overwhelming and exclusive powers to control arbitration (even if tied to a consistent constitutional agenda, and loud, logical, and analytical adversaries) arbitration and all of its attendant strengths will be thrown back hundreds of years. The landscape of dispute resolution will be burdened with institutions poorly designed to meet the constitutional and procedural needs of its citizenry. Justice and fairness will be an ancient memory of a long-forgotten past—if it ever existed in the manner as was proclaimed when contrasted with arbitration. Functionality in civil adjudication will be a dead aspiration of a workable legal order. Moreover, the world of international arbitration will lose its main architect in elaborating a sustainable and legitimate doctrine on international commercial arbitration. The only thing in common between the justice system in the outlined scenario and that of today is a *deeply rooted legal need* for a procedurally workable alternative dispute resolution mechanism that is faster, cheaper, and renders *reasonable* substantive fairness. The main difference is that we actually have it today. When courts have resumed jurisdictional hegemony and independent contractors—such as Uber drivers—commence actions or class actions all over U.S., at least we can remember that arbitration once remedied an adjudicatory and constitutional crisis.

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160 *McDonald v. City of West Branch, Michigan,* 466 U.S. 284, 291-92 (1984). The adversaries are probably also more in support of cases such as *Wilko v. Swan* 346 U.S. 427 (1953); *American Safety Corp. v. J.P. Maguire & Co.*, Inc., 391 F.2d 821 (2d Cir. 1968); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

THE NEED FOR AN INDEPENDENT CHILDREN'S COMMISSIONER IN HONG KONG: A GOOD GOVERNANCE IMPERATIVE

*Katherine Lynch**

I. Introduction

Hong Kong children face numerous health, welfare and safety concerns. Almost twenty percent of all children in Hong Kong live below the poverty line without adequate nutrition.[1] Recent tragic child abuse cases highlight the urgent need for a more effective coordinated child protection system.[2] There are high rates of school bullying and parental corporal punishment.[3] Students suffer mental health issues related to academic, familial and social pressures.[4] These concerns highlight the need for a comprehensive and holistic approach to children's health, welfare and protection in Hong Kong.[5] The United Nations Convention on the Rights of the Child ("UNCRC"), to which Hong Kong is a signatory, obliges the Government to implement proper measures to respect children's rights as enshrined in the Convention and to establish a national mechanism with a clear mandate to monitor children's rights.[6] A

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1 *See* Office of the Gov't Economist Fin. Secretary's Office, Hong Kong Poverty Situation Report 2017 (2018), https://www.povertyrelief.gov.hk/eng/pdf/Hong_Kong_Poverty_Situation_Report_2017.

2 *See Public News: 26% of Child Abuse Prevention Cases Involve Special Learning Needs Children*, Citizen News (Feb. 8, 2018), https://www.aca.org.hk/media-report/20180208_hkcnews.pdf.

3 *See* OECD, PISA 2015 Results (Volume III): Students' Well-Being 2017), http://www.oecd.org/education/pisa-2015-results-volume-iii-9789264273856-en.htm.

4 *See* discussion in Cissy So, *Alarming data on suicide*, https://www.thestandard.com.hk/section-news/section/4/206277/Alarming-data-on-suicide; Sylvia Kwok Lai Yuk Ching, *Positive Education Calls for Immediate Attention*, Acta Psychopathologica, Vol 2 No 2:17, May 2016 ISSN 2469-6676.

5 *See* H.K. Comm. on Children's Rights, Why We Need to Have a Child Policy in the New HKSAR Government in 2012?, http://www.childrenrights.org.hk/v2/archive/04concerns/ChildrenCommission_20120622.pdf.

6 *See Convention on the Rights of the Child*, United Nations Treaty Collection (Nov 20, 1989), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter

multi-disciplinary group of stakeholders including medical, legal, social work and education professionals, NGOs and community groups have urged the Government to establish an independent "Children's Ombudsman" or "Commissioner" to advocate for Hong Kong children, with power to investigate all complaints related to child rights and interests.[7] There is also international pressure—the United Nations Committee on the Rights of the Child ("UN Committee") has repeatedly encouraged the Hong Kong Government to establish an independent Children's Commissioner.[8]

The Chief Executive has made "good governance" a top Government priority, stating in 2017: "Good governance is vital, whether in discharging the responsibilities of the Government as a 'service provider' or a 'regulator,' or in taking up the new roles of the Government as a 'facilitator' and 'promoter' . . . ."[9] Soon thereafter the Chief Executive announced the formal establishment of a new Hong Kong "Commission on Children" in May 2018, providing reason for cautious optimism.[10] This article evaluates this new Commission and asks how the performance of the Commission as promoter of children's rights and interests in Hong

=4&lang=en. (Hong Kong has been a party to the UNCRC since 1994 covering the needs of children (i.e. care and protection) but also a range of civil, political, economic, social and cultural rights.).

7 Including NGOs "Hong Kong Committee of Children's Rights," "Against Child Abuse and Kids' Dream" and broad-based initiatives such as the "1.1 Million Campaign" launched in 2016. *See also* discussions on the need for a Children's Commissioner at the three Children's Issues Forums held in Hong Kong in 2009, 2012 and 2015.

8 *See* H.K. COMM. ON CHILDREN'S RIGHTS, RESPONSE TO THE REPORT OF THE HKSAR UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, LC PAPER NO. CB(2)923/13-14(08) (Feb. 17, 2014);). *See also* Anne Scully-Hill, *The Hong Kong Government, the UN Committee on the Rights of the Child and the Disagreement over the Need for a Children's Commissioner for Hong Kong: Conflicting Perspectives on How Best to Implement Children's Rights,* in 2 INTERNATIONAL PERSPECTIVES ON DISPUTES ABOUT CHILDREN AND CHILD PROTECTION: COLLECTED ESSAYS ON PREVENTING ABUSE, PARENTAL RESPONSIBILITIES AND EMPOWERING CHILDREN 212 (Katherine Lynch & Anne Scully-Hill eds., 2015).

9 *See* Press Release, New Philosophy for Strengthening Governance, HKSAR Gov't of the H.K. Special Admin. Region (Oct. 11, 2017), https://www.info.gov.hk/gia/general/201710/11/P2017101100455.htm. The Chief Executive's commitment to good governance was re-stated in her 2018 Policy Address, with particular emphasis on institutional safeguards and accountability. *See The Chief Executive's 2018 Policy Address*, HKSAR GOV'T OF THE H.K. SPECIAL ADMIN. REGION ¶¶ 7, 21 (Oct. 10, 2018)), https://www.policyaddress.gov.hk/2018/eng/policy_ch02.html [hereinafter *2018 Policy Address*].

10 The Chief Executive stated in her campaign pledge that she would establish a "responsive and high-level body" working for the benefit of Hong Kong children. *See* Press Release, Government Establishes Commission on Children, Gov't of the H.K. Special Admin. Region (May 31, 2018), http://www.info.gov.hk/gia/general/201805/31/P2018053100340.htm. The Commission's first two meetings were held in June and October 2018.

Kong can be improved. A discussion of challenges facing Hong Kong children—one of the main stakeholders of the Commission—provides important context for this evaluation. Thereafter, the rationale for establishing a Children's Commissioner or Ombudsman as an aspect of good governance is discussed, along with the attributes they need to be effective.[11] The Government's historical approach to monitoring children's rights and interests is then considered, along with comparative research on the approaches of Norway, the UK, and Australia relating to Children's Commissioners. This provides a basis for analyzing the role and functions, composition and structure, policy and research focus, and financial resources of the new Commission on Children. The Government's decision to establish this Commission, while important, does not go far enough. To be effective, this Commission must evolve into an independent statutory body, grounded in the UNCRC with enhanced powers of advocacy, investigation, monitoring, and reporting.[12] Swift reform is necessary to ensure the Commission adopts a rights-based systemic approach for improving advocacy and protection for children and develops the necessary credibility and high levels of public trust.[13] This is an important human rights and good governance imperative for Hong Kong.

II. Discussion

The scale and complexity of the problems facing Hong Kong children—child poverty, abuse and neglect, mental health issues, school bullying, corporal punishment and marginalization in society—highlights the need for improved advocacy for and protection of children's rights and interests in Hong Kong.

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11 See discussion of the various factors influencing the Ombudsman's degree of influence as promoter of good governance in Selma Danzsic, Republic of Slovk. Human Rights Ombudsman, Ombudsman as Promotor of Good Governance, (2006), https://thesis.eur.nl/pub/3817/.

12 *See* UNICEF, HK Expects the Commission on Children to Evolve into an Independent Statutory Body for Children, (2018), https://www.unicef.org.hk/en/unicef-hk-expects-the-commission-on-children-to-evolve-to-an-independent-statutory-body-for-children/ (last visited Apr. 5, 2019).

13 Just as reforming the Hong Kong Ombudsman by substantially increasing its investigative powers helped shape the Ombudsman into an independent watchdog institute dealing effectively with public grievances and enjoying a high level of credibility and public trust. *See* Johannes Chan & Vivian Wong, *The Politics of the Ombudsman: The Hong Kong Experience, in* Research Handbook on the Ombudsman 91, 111–112 (Marc Hertogh & Richard Kirkham eds., 2018).

A. *High Rates of Child Poverty—Malnourishment and Inadequate Housing*

Government statistics from the 2017 "Hong Kong Poverty Situation Report" are staggering—one-fifth of Hong Kong's population lives below the poverty line and of these, approximately 300,000 are children.[14] Sadly, nearly half of the children living in poverty do not get enough food to eat, and lack balanced nutrition.[15] Although the Government formed a "Commission on Poverty" to help alleviate poverty, the number of children living in poverty is increasing (even after government policy intervention).[16] This is alarming for a developed country enjoying strong economic growth; a 2018 Oxfam report revealed that income inequality in Hong Kong has worsened.[17] Children from low-income families suffer the most from this widening disparity, which is exacerbated by the absence of a comprehensive child policy to protect children's best interests and tackle intergenerational poverty.[18]

A 2017 Society for Community Organization ("SOCO") study found almost 90% of Hong Kong children living in poverty are de-

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14 The Report indicates that 1.377 million residents live below the poverty line, an increase of 25,000 from 2016. *See* OFFICE OF THE GOV'T ECONOMIST FIN. SECRETARY'S OFFICE, *supra* note 1.

15 Society for Community Organization ("SOCO") research indicates that 25.8% of children living in poverty cannot afford three meals a day. *See* Soc'y for Cmty. Org., *Research Report on the Quality of Life of the Children Living in Poverty* and Soc'y for Cmty. Org., *Child Deprivation Research Report*, CHILD POVERTY RESEARCH SERIES 27 (Nov. 2018) [hereinafter *Child Deprivation Research Report*]. *See also* Sze Lai-shan, *The Current Situation of Child Poverty in Hong Kong,* REFORMING HONG KONG'S CHILD & FAMILY JUSTICE SYSTEM (Anne Scully-Hill et al. eds., 2016).

16 From 0.172 million children in 2016 to 0.177 million. SOCO's Sze Lai-shan argues that the Government's "Comprehensive Social Support Scheme" fails to address the needs of Hong Kong children in families living below the poverty line and needs reviewing as it uses 20-year-old adjustment criteria. *See* Peace Chiu, *Record 1.3 million People Living Below Poverty Line in Hong Kong as Government Blames Rise on Ageing Population and City's Improving Economy*, SOUTH CHINA MORNING POST (Nov. 19, 2018), https://www.scmp.com/news/hong-kong/society/article/2174006/record-13-million-people-living-below-poverty-line-hong-kong.

17 *See* OXFAM, H.K., HONG KONG INEQUALITY REPORT, OXFAM HONG KONG, https://www.oxfam.org.hk/tc/f/news_and_publication/16372/Oxfam_inequality%20report_Eng_FINAL.pdf (last visited Apr. 5, 2019); H.K. COMM. ON CHILDREN'S RIGHTS, A CHILDREN'S COMMISSIONER FOR HONG KONG: SHAPING THE FUTURE, (2006), http://www.childrenrights.org.hk/v2/archive/06publications/20061200_ShapingTheFuture.pdf [hereinafter SHAPING THE FUTURE].

18 The study was conducted by Professor Chou Kee-lee at HKIED from December 2012 to May 2013 analyzing data collected during the Hong Kong 2011 Population Census. *See* SOC'Y FOR CMTY. ORG., NO TIME TABLE FOR DEMOCRACY OR ERADICATION OF POVERTY (2009), https://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0119cb2-693-1-e.pdf.

prived of basic needs, residing in substandard housing conditions that are crowded, unhygienic, and polluted.[19] Nearly 20,000 children live in cage homes, cubicles, or rooftop huts in Hong Kong, sharing toilets and kitchens with other tenants.[20] Unfortunately, the living conditions of children in poverty can also adversely impact their physical and psychological development.[21] While education can help existing poverty, Hong Kong's education system requires not only formal schooling and textbooks, but also internet and technology access and participation in extracurricular activities.[22] Nearly half of children living in poverty cannot afford to join extracurricular activities and almost 40% had failed to complete or submit their homework on time due to lack of required resources such as a computer.[23] Deprived and stressful living conditions also put children living in poverty at risk of domestic violence and child abuse.[24] Children who are trapped in a cycle of poverty cannot realize their potential and are deprived of their right to development, participation and survival.[25]

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19 Nine out of ten primary school children from families on welfare live in a state of deprivation—more than 200,000 children in Hong Kong. *See Child Deprivation Research Report*, *supra* note 17.

20 *See also* SOCO, Soc'y for Cmty Org., *Research Report on the Relationship between Housing Conditions and Spine Health of Children in Poverty* (Mar. 2016); Sze Lai-shan, *supra* note 18. *See also* H.K. Comm. on Children's Rights, NGO Report of the *HKSAR* Hong Kong Special Administrative Region Under the Convention on the Rights of the Child (2012) [hereinafter *NGO Report of the HKSAR*].

21 A Boys' and Girls' Association of Hong Kong survey showed nearly 20% of children from low income families suffered food poisoning, stomach and intestinal diseases compared with 14% of children from average families. SOCO research indicates 79.6% of children living in poverty had spinal problems from poor living conditions and reporting high levels of suicidal thoughts. *See* Soc'y for Cmty Org., *supra* note 22; Agnes Lam, *Group Seeks Improvement in Support for Poor Children*, South China Morning Post (Oct. 17, 2005.). *See also* Shaping the Future, *supra* note 19.

22 *See* Chenhong Peng & Paul Yip, *How to Break the Cycle of Child Poverty in Hong Kong, Where One in Five Children are Poor*, South China Morning Post (May 23, 2017, 5:42 PM), https://www.scmp.com/comment/insight-opinion/article/2095321/how-break-cycle-child-poverty-hong-kong-where-one-five.

23 The amount of financial assistance provided to children living in poverty does not cover the costs of books with new editions being published frequently and costs rising each year. Although the Government's Child Development Fund and the Community Care Fund provide subsidies and support long-term development of children from poor families, these resources often only reach a small proportion of children living in poverty. *See Child Deprivation Research Report*, *supra* note 17; Sze Lai-shan, *supra* note 17.

24 Overall, children living in poverty face many socio-economic disadvantages and material hardships early in life that greatly increase their risk of developing adjustment problems later. *See* Sze Lai-shan, *supra* note 17.

25 *See* Kwai Yau Wong, *Poverty and Child Resilience*, Symposium on Social Work Practice and Policy: Poverty and Poverty Alleviation 2017; Grenville Cross, *News of a chil-*

B. *Rising Incidence of Child Abuse—Lack of Adequate Protection*

Hong Kong's Social Welfare Department statistics indicate increasing rates of reported child abuse from 947 cases in 2017 to 1,064 cases in 2018.[26] The most reported type of abuse is physical abuse (39.5%), followed by sexual abuse (33.3%), and neglect (24.2%).[27] Local NGO "Against Child Abuse" recorded a 20 percent increase in child sexual abuse cases in 2017, although many sexual abuse cases likely go unreported.[28] Hong Kong's present child protection system is inadequate, as it is essentially voluntary and non-legal, with tragic consequences.[29] Seven-year-old Suki Ling Yun-Lam died after suffering extreme long-term cruelty and abuse. She was admitted to the hospital in 2015 after going into cardiac arrest, and suffering severe malnutrition, with multiple injuries all over her body. Lack of investigation, reporting, and inter-

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dren's commission will bring good Children's Commission Will Bring Good Cheer to Hong Kong, SOUTH CHINA MORNING POST (Dec. 23, 2013, 6:30 PM), https://www.scmp.com/print/comment/insight-opinion/article/1668213/hong-kongs-children-needbetter-protection-their-rights.

26 The Social Welfare Department's Child Protection Registry records show an overall increase in reported child abuse cases. *See* SOC. WELFARE DEP'T, PROCEDURAL GUIDE FOR HANDLING CHILD ABUSE CASES REVISED 2015 (2015); *Statistics on Child Abuse, Spouse / Cohabitant Battering and Sexual Violence Cases, Newly Reported Child Abuse Cases*, SOC. WELFARE DEP'T, https://www.swd.gov.hk/vs/english/stat.html (last updated Sept. 3, 2019).

27 Sadly, the abusers in most child abuse cases are the parents or caregivers, with single parent, low income, new migrants and families of children with special needs most at risk for child abuse. A 2015 survey by NGO Against Child Abuse found that 54% of 1,562 children aged 6 to 13 years old had experienced corporal punishment by their parents, and although parents were aware of the adverse impact of corporal punishment on their parent-child relationship, they did not know other appropriate means of teaching. *See* Peace Chiu*, In Hong Kong, most child abuse victims Most Child Abuse Victims Suffer at Hands of Parents*, SOUTH CHINA MORNING POST (Jan. 15, 2018, 9:31 AM), https://www.scmp.com/news/hong-kong/law-crime/article/2128210/when-care-turns-cruelty-hong-kong-most-child-abuse-victims; Yupina Ng, *Violence is not Is Not Parenting, Hong Kong child advocate says amid Child Advocate Says Amid Rise in physical abuse Physical Abuse Cases*, SOUTH CHINA MORNING POST (Feb. 24, 2018, 6:03 PM) https://www.scmp.com/news/hong-kong/community/article/2134163/violence-not-parenting-hong-kong-child-advocate-says-amid. *See also* Against Child Abuse, *supra* note 9.

28 *Child Sex Abuse Case s Jump by a Fifth*, AGAINST CHILD ABUSE (Nov. 16, 2017), https://www.aca.org.hk/media-report/20171116_RTHK_ENG.pdf. The End Child Sexual Abuse Foundation's counseling service received a total of 231 calls in 2017 and recorded 29% suspected child sexual abuse cases. *See* Annie Ho, *2016–2017 Statistics of Hugline*, END CHILD SEXUAL ABUSE FOUNDATION, http://www.ecsaf.org.hk/images/upload_images/file/Hugline%20Stat%202016-2017%20English.pdf (last visited Apr. 5, 2019).

29 PRISCILLA LUI TSANG SUN KAI, H.K. Comm. on Children's Rights, Update on Child Protection in Hong Kong (2018), http://www.paediatrician.org.hk/index.php?option=com_docman&task=doc_view&gid=1540&Itemid=66.

vention to stop Suki's abuse resulted in her horrific death.[30] Five-year-old Chan Siu-lam stopped going to school in October 2017, and died from physical abuse in January 2018, despite the school documenting the extent of her injuries and abuse.[31]

These distressing child abuse cases illustrate the deficiencies in the existing child protection system, including the lack of comprehensive child protection legislation and the absence of mandatory child abuse reporting mechanisms for teachers, social workers, and medical professionals. A lack of child care workers and a shortage of experienced personnel and dedicated resources in schools and hospitals to assess, report, and handle child abuse cases or follow up with timely intervention also poses a huge problem.[32] While Hong Kong has enacted legislation banning corporal punishment in schools, the use of corporal punishment is still widely accepted in the community.[33] A survey of young children between 8 to 13 years old found that 62.5% had experienced corporal punishment in the past year, with half of them reporting punishment categorized as physical abuse, including beating with a belt, a stick, or other hard object.[34] There have been repeated calls to ban paren-

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30 The Court described Suki's abuse as "a grotesquely shocking case of child neglect" and her mother was sentenced to 15 years imprisonment. *Hong Kong v. Wong Wing-Man, Mandy alias Wang Xuexin and another*, [2018] HKCFI 1484; HCCC 76/2017.

31 Sadly, under the current child protection regime, there was no duty to investigate or assess the risk Siu-lam faced, nor any mandatory duty to help her.

32 *See* Peace Chiu, *Number of child abuse Child Abuse Cases in Hong Kong Hits 14-year Year High, as activists urge Activists Urge Action from Commission on Children*, South China Morning Post (Feb. 24, 2019, 10:46 PM) https://www.scmp.com/news/hong-kong/society/article/2187505/number-child-abuse-cases-hong-kong-hits-14-year-high. *See also* JOINT STATEMENT TO PANEL ON WELFARE SERVICES, SPECIAL MEETING ON JANUARY 19, 2018, LC PAPER NO. CB(2)1123/17-18 (JAN. 19, 2018). A 2017 Government review of the "Multi-disciplinary Case Conference on Protection of Child with Suspected Abuse" is on-going.

33 Many parents consider corporal punishment "good parenting" despite its detrimental impact on a child's physical health, mental well-being, and self-esteem. Parents may use physical punishment as discipline, but the deterrent effects are short-lived and physical punishment can escalate into child abuse. *See* Scully-Hill, *supra* note 10; Ng, *supra* note 29; *There are better ways to discipline children than using physical violence*, SOUTH CHINA MORNING POST (May 18, 2014, 3:35 PM), https://www.scmp.com/comment/insight-opinion/article/1514394/there-are-better-ways-discipline-children-using-physical.

34 The study also found that more than 54% of parents surveyed used physical punishment on their children for reasons such as unsatisfactory academic performance and refusal to obey parents. *See* CARITAS YOUTH AND COMMUNITY SERVICE AND THE DEPARTMENT OF APPLIED SOCIAL STUDIES, CITY UNIVERSITY OF HONG, RESEARCH REPORT ON FACTORS OF CHILD ABUSE AND ITS IMPACT ON CHILD DEVELOPMENT (Feb. 2015), http://www6.cityu.edu.hk/ss_posed/ui/Publications/factors%20child%20abuse.pdf.

tal corporal punishment through legislation in Hong Kong, but to no avail.[35]

C. *Mental Health Concerns—High Rates of Youth Suicide*

A growing number of Hong Kong children suffer mental health problems. A 2018 research study indicates a third of Hong Kong children between 10 to 14 years of age are a potential risk for suicide.[36] Youth suicides and self-harm are of heightened concern in Hong Kong following a spate of student suicides.[37] The Third Child Fatality Review Panel in 2017 noted multiple causes of suicide, including schoolwork problems, relationship and social problems, and concerns about the future.[38] Although the Review Panel made several recommendations on preventive strategies and system improvement for child fatality cases, these are non-binding and there is no statutory mechanism to monitor implementation of the recommendation.[39]

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[35] *See* Elizabeth Cheung, *Hong Kong Child Rights Group Calls for Total Ban on corporal Corporal Punishment*, SOUTH CHINA MORNING POST (Apr. 28, 2015, 3:53 PM), https://www.scmp.com/news/hong-kong/law-crime/article/1778175/hong-kong-child-rights-group-calls-total-ban-corporal. Despite UN calls to ban corporal punishment, in July 2018 the Government re-affirmed that it would not ban corporal punishment but would "step up its publicity to remind parents not to use corporal punishment against children." *See* LEGISLATIVE COUNCIL SUBCOMMITTEE ON CHILDREN'S RIGHTS, MINUTES OF THE SEVENTEENTH MEETING ON WEDNESDAY, 4 APRIL, AT 2:30PM, LC PAPER NO CB(4)1414/17-18 (July 26, 2018).

[36] *See* Kwok, *supra* note 6; Karen Zhang, *Third of Hong Kong Pupils Aged 10-14 Identified as possible suicide Possible Suicide Risk*, SOUTH CHINA MORNING POST (Mar. 26, 2019, 7:30 AM) https://www.scmp.com/news/hong-kong/society/article/3003206/third-hong-kong-pupils-aged-10-14-identified-potential. *See also* H.K. SPECIAL ADMIN. REGION GOV'T, FOOD AND HEALTH BUREAU, MENTAL HEALTH REV. REPORT (2017).

[37] Between 2006–2013 a total of 105 children committed suicide. The Hong Kong Jockey Club, Caritas NGO and volunteer agency Samaritan Befrienders established three suicide prevention programs. *See* COMMITTEE PAUL YIP, SUI-FAI, COMM. ON PREVENTION OF STUDENT SUICIDES, FINAL REPORT (2016); Press Release Working Together to Prevent Suicide, UNIV. OF H.K. (Sept. 10, 2018).), https://www.hku.hk/press/press-releases/detail/18364.html.

[38] Press Release, Third Report for child death cases in Hong Kong in 2012 and 2013., Child Fatality Review Panel. *See* Anne Scully-Hill, *The Latest Report on Child & Youth Suicide in Hong Kong and the Upcoming HKCCR Roundtable,* CHILDREN'S ISSUE FORUM (Sept. 20, 2017), https://www.cifhk.org/cif-voices/the-latest-report-on-child-youth-suicide-in-hong-kong-and-the-upcoming-hkccr-roundtable.

[39] *See* H.K. COMM. ON CHILDREN'S RIGHTS, *supra* note 10. The Review Panel reported that some children would express their suicidal intention but they were either not heard or their views were not given weight. *See* Scully-Hill, supra note 40; Paul Yip, *Preventing Suicide Among Hong Kong's youth will Youth Will Take a Collective Effort, in School and Beyond*, SOUTH CHINA MORNING POST (Sept. 8, 2018, 3:03 PM) https://www.scmp.com/comment/insight-opinion/hong-kong/article/2163087/preventing-suicide-among-hong-kongs-youth-will.

D. *School Challenges—Academic Pressure and Bullying*

Hong Kong's education system tends to emphasize rote learning and academic achievement with the curriculum more focused on written examinations and acquiring examination skills than on enhancing personal growth and development.[40] Parents frequently regard academic excellence as a measure of a child's success and alarmingly, research indicates a spike in child abuse cases coinciding with school exams.[41] LegCo's Subcommittee on Children's Rights urged the Government's Education Bureau to review and revise current school curriculum to embrace a more holistic balanced approach centered on students' well-being and mental health.[42] School bullying is on the rise, as well. A 2015 OECD survey ranks Hong Kong first among 53 countries in terms of the percentage of children reporting school bullying at least a few times a month—the rate of 32.3% exceeds Singapore (25.1%), Britain (23.9%), and the US (18.9%).[43] A local survey in 2018 indicates that one in three students experienced school bullying in the past six months.[44]

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40 The competitive environment creates great pressure for many Hong Kong students and the exam-oriented learning environment does not promote emphasis on students' mental wellness. *See* SHAPING THE FUTURE, *supra* note 19. *See also* Yip, *supra* note 41; *Children Need Preparation for a tough Tough World*, SOUTH CHINA MORNING POST (May 27, 2006) https://www.scmp.com/comment/insight-opinion/article/2182859/tsunami-past-shows-need-prepare-future.

41 Alan Yu, *Spike Child Abuse Cases in Hong Kong Coincides with Exam Time, Research Shows,* SOUTH CHINA MORNING POST (Aug. 8, 2016), https://www.scmp.com/lifestyle/families/article/1999591/spike-child-abuse-cases-hong-kong-coincides-exam-time-research.

42 Focused on student-centered assessment for learning, a "quality over quantity" homework policy and supporting students' mental health. *See* LEGISLATIVE COUNCIL HOUSE COMMITTEE SUBCOMMITTEE ON CHILDREN'S RIGHTS, RIGHTS OF CHILDREN AMID EXAMINATION AND SCHOOLWORK STRESS, LC PAPER NO CB(4)248/17-18(01) (Nov. 25, 2017) and LEGISLATIVE COUNCIL SUBCOMMITTEE ON CHILDREN'S RIGHTS, RESPONSE TO MOTIONS OF THE MEETING ON 25 NOVEMBER 2017, LC PAPER NO CB(4)548/17-18(01) (Jan. 2018).

43 *See* OECD, *supra* note 5.

44 An online survey reported similar figures with 37% of youth indicating that they have been bullied. Press Release, Jockey Club Online Youth Emotional Support "Open Up" Official Launch Ceremony and 2018 Hong Kong Youth Mental Health and Internet Usage Survey Press Announcement, Open Up (Oct. 7, 2018), https://csrp.hku.hk/wp-content/uploads/2018/10/PressRelease_20181007_en.pdf.

E. *Children with Disabilities and Special Needs—Lack of Adequate Support*

Approximately 30% of Hong Kong children have special education needs but many of these children lack access to early intervention due to inadequate support services.[45] Some parents pay for private assistance but many families of special needs children cannot afford private healthcare and training.[46] The requirements of special needs children and those with disabilities are often not consulted nor given priority in policy formulation, although these children are at significant risk of bullying and abuse.[47] Unfortunately, the Government does not have a comprehensive data bank on special needs or disabled children, hampering adequate planning of support services and programs.[48]

F. *Vulnerability of Children Born to Migrant Workers*

Foreign domestic workers are an integral part of Hong Kong, with increasing numbers expected to rise to 600,000 by 2049.[49] Local NGO PathFinders helps pregnant migrant women in distress, successfully documenting 226 children born to such mothers in 2016.[50] While migrant workers are covered by statutory employment protection, many of them are unlawfully fired, causing them to lose their visas, access to public healthcare, and social welfare

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45 *See* Stephanie Tsui, *A Third of Hong Kong Children Have Special Educational Needs—And the City is Failing Them*, SOUTH CHINA MORNING POST (Nov. 2, 2018, 10:15 AM), https://www.scmp.com/news/hong-kong/education/article/2171293/lack-institutional-support-has-failed-hong-kongs-special.

46 *See* H.K. COMM. ON CHILDREN'S RIGHTS, *supra* note 10.

47 Peace Chiu, *Hong Kong wants Bullies to Learn Their Lesson*, SOUTH CHINA MORNING POST (Nov. 13, 2018, 9:30 AM), https://www.scmp.com/news/hong-kong/education/article/2172787/least-third-15-year-olds-falling-victim-it-time-anti.

48 In October 2018 the Government committed to increasing support for special needs and disabled children. *See* Press Release, Third Term Commission on Poverty Convenes Second Meeting, Gov't of the H.K. Special Admin. Region (Oct. 18, 2018), https://www.info.gov.hk/gia/general/201810/18/P2018101800542.htm.

49 *See also* Press Release, Foreign Domestic Helpers and Evolving Care Duties in Hong Kong, Legislative Council Secretariat 2016 – 2017 (July 2017); Press Release, Speech by Secretary for Labour and Welfare at Annual General Meeting of International Social Service—Hong Kong Branch, Gov't of the H.K. Special Admin. Region (Dec. 5, 2017), https://www.info.gov.hk/gia/general/201712/05/P2017120500410.htm.

50 *See* PATHFINDERS INT'L, GOING WHERE THE NEED IS GREATEST 2016 ANNUAL REPORT (2016); Luna Chan & Jenny McAlpine, *Improving Access to Justice for Children Born to Migrant Workers in Hong Kong*, in Scully-Hill, *supra* note 17.

support. Such women are left without any legal, social, or medical safety net. Many of their children are born in Hong Kong but unregistered, without birth certificates, passports, or access to healthcare and education.[51] Hong Kong's inadequate child protection legislation often fails to protect and safeguard the best interests of these vulnerable children.[52]

G. *Lack of Children's Voice and Participation in Society*

Children have little voice in Hong Kong's political processes and children's views are not often heard in policies directly affecting them (e.g. education and healthcare reforms).[53] Although the Government has committed to improving children's ability to voice their opinion on policy matters, they often lack power to follow up on and pursue complaints.[54] Also, the legal system does not provide adequate channels for consultation of and participation by children.[55] Although current judicial practice improved the ways that children's views can expressed and heard (e.g. judicial interviews of children), these often lack statutory force.[56]

III. Rationale For Children's Commissioners: Good Governance Mechanism

The challenges facing Hong Kong children highlight the multiple cross-cutting reasons supporting appointment of a Children's Commissioner or Ombudsman to monitor and assist in the domes-

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51 They are also at significant risk of abuse and neglect.

52 *See* Chan & McAlpine, *supra* note 52; *Written Submission to the HKSAR's Legislative Council's Subcommittee on Children's Rights in Advance of a Meeting on 4 November 2017 Regarding Human Rights of Children Under Poverty*, Pathfinders (Nov. 3, 2017), http://www.pathfinders.org.hk/public/wp-content/uploads/PF-Submission-to-SubCm-Childrens-Rights-children-under-poverty-FINAL.pdf.

53 *See* Shaping the Future, *supra* note 19.

54 The Chief Executive has committed to encouraging more public participation by younger people in government policy development. *See 2018 Policy Address*, *supra* note 11, and Chief Executive, The Chief Executive's 2017 Policy Address (Oct. 11, 2017) (transcript available at https://www.policyaddress.gov.hk/2017/eng/speech.html).

55 For example, in family proceedings concerning divorce, custody, and childcare arrangements.

56 Many children remain unaware of their right to express their views in proceedings. *See* Scully-Hill, *supra* note 17. *See* also *NGO Report of the HKSAR*, *supra* note 22.

tic implementation of children's rights under the UNCRC.[57] Good governance can encompass different qualities including: participation in decision-making; the rule of law; transparent and responsive institutions and processes; consensus orientation; equity, effectiveness and efficiency; and accountability and strategic vision.[58] The Children's Commissioner acts as an external accountability mechanism of good governance, ensuring that governments uphold children's rights under the UNCRC, investigate alleged breaches of children's rights, and recommend changes of law, policy and practice.[59]

A. *Promote and Monitor Respect for Children's Human Rights*

The primary role for Children's Commissioner is promoting and monitoring respect for the broad range of children's rights under the UNCRC including: rights to education; healthcare; living standards, housing, and development; freedom of expression; freedom from cruel, inhumane or degrading treatment, or punishment; protection from violence, abuse, or neglect; protection from harm and exploitation; and protection from economic and sexual exploitation.[60] A Children's Commissioner can foster well-being of children within schools and the community, organize publicity, training, and workshops on children's rights, and monitor children in alternative care to ensure respect for their rights and that quality care is provided. Children's Commissioner can also promote children's rights on an international level. In 2011, the UN General Assembly adopted a third Optional Protocol to the UNCRC, al-

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[57] This includes ensuring that governments meet their international obligations under the UNCRC and promoting awareness of the human rights of children within society. Article 4 of the UNCRC requires states to take all available measures to make sure children's rights are respected, protected, and fulfilled. The creation of a Children's Commissioner or other national human rights institution helps states in fulfilling Article 4 obligations, although this is not a mandatory provision. *See* LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 295 (2004).

[58] A clear principle endorsed by the current Chief Executive. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, Governance for Sustainable Human Development (1997).

[59] *See* VANESSA SEDLETZKI, UNICEF OFFICE OF RESEARCH CHAMPIONING CHILDREN'S RIGHTS: A GLOBAL STUDY OF INDEPENDENT HUMAN RIGHTS INSTITUTIONS FOR CHILDREN (2012), https://www.unicef-irc.org/publications/pdf/championing2_eng.pdf; REIF, *supra* note 59, at 330–31.

[60] This can be achieved by advocating state obligations to provide families with assistance and by advocating policies that support families' capacity to care for their children. *See id.*; SEDLETZKI, *supra* note 61.

lowing the UN Committee to receive and review cases alleging violation of children's rights.[61]

B. *Ensure Government Law and Policy Making Considers Impact on Children*

A Children's Commissioner can ensure that children and their best interests are visible in both law and government policy and decision-making.[62] They can enhance legitimacy of government functions relating to children and assist in formulating and enacting law, policy, and practice on children. The Commissioner can initiate and improve child-related policies and initiatives across different bureaus and departments. For example, they can adopt a systematic approach using methodology for carrying out children's rights impact assessments of proposed policy.[63]

C. *Provide Advocacy for all Children and Promote Fair Treatment of Marginalized Children*

A Children's Commissioner can act as an independent champion, watchdog, and spokesman for all children promoting equitable approaches for the most marginalized children. They can advocate policies to address exclusion and correct the disadvantages experienced by some children.[64] This can help address issues surrounding access to education, health and welfare in relation to children belonging to minority groups (e.g. migrant worker and refugee children), and can also help to ensure the accessibility of special needs children and children with disabilities to all service, support and inclusion in society.[65]

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61 Children's Commissioners can provide a domestic link for children and communities informing and supporting access to this international remedial procedure. *Id.* at 29.

62 A Commissioner may be involved in drafting legislation through their submission of advice to government, and they may participate in the drafting meeting and the taking of public positions.

63 For example, Scotland's Commissioner for Children and Young People formalized a "children rights impact assessment" procedure. *See* further discussion below.

64 *See* SEDLETZKI, *supra* note 61, at 11; *European Network of Ombudperson for Children list eleven common functions of Children Commissioners*, www.ombudsnet.org.

65 SEDLETZKI, *supra* note 61, at 22.

D. *Address Individual and Collective Complaints Regarding Children's Rights*

A Children's Commissioner can operate as a complaint mechanism to remedy individual and collective children's rights violations. They can review children's access to and effectiveness of advocacy and complaint systems. A Commissioner should be able to receive individual complaints and petitions on specific children's rights violations and proactively respond to them in a timely manner.[66] Such a complaint mechanism not only furthers children's rights but is also an opportunity to strengthen the independence of a Children's Commissioner. Two groups of children are particularly vulnerable to rights violations: "those in contact with the justice system and those in alternative care, [which] require child-sensitive complaint mechanism."[67]

E. *Promote Broader Participation of Children Within Community and Society*

A Children's Commissioner can promote child participation in society, through its different powers of advocacy, monitoring, handling complaints, carrying out investigations, conducting research, and advising.[68] They can support processes aimed at involving children in school life and promote expansion of children's political voice and more direct inclusion and participation in judicial and government policy and law-making processes.

IV. Characteristics of Effective and Credible Children's Commissioners

Independent children's human rights institutions take many forms—Children's Ombudspersons or Commissioners, Human Rights Commissioners, or Children's Advocates—but they all share the unique role of facilitating governance processes for chil-

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[66] A legislative mandate allowing anyone, particularly children and young adults, to file a complaint provides better protection. *Id.* at 23.

[67] As such, a Children's Commissioner must have access to children, especially to those most marginalized. *Id.* at 22.

[68] They can undertake research and collect and publish data on the situation of children and provide a channel for the expression of children's views. *Id.* at 12.

dren under important institutions for implementing the UNCRC.[69] Their degree of influence in part depends upon their surrounding socio-political environment.[70] The government's willingness to cooperate with the Children's Commissioner as an external control mechanism for good governance is key, whether or not the government respects and responds to its recommendations.[71] Other variables impact the effectiveness of Children's Commissioners, including the institution's independence, jurisdiction and powers, financial resources, and accessibility. The UN Committee's Paris Principles ("Principles Relating to the Status of National Human Rights Institutions") also provide guidance on minimum standards required by Children's Commissioners as national human rights institutions to operate effectively and be considered credible. Six criteria are relevant: clearly defined broad human rights mandate, autonomy and independence from government legislatively guaranteed, pluralist and inclusive, sufficient resources, and adequate powers of investigation.[72]

A. *Statutory Independence and Legal Mandate*

To be most effective, a Children's Commissioner must be an independent statutory body separate from the executive and administrative branches of government and free from government influence or interference.[73] It should have a clear legal mandate, preferably supported by authorizing statute rooted in the

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69 A range of children's commissioners/ombudsman/advocate for children have been established—some lack sufficient independence, some do not have any or would unrestricted power to investigate complaints, some do not have expressed direction to work in light of the UNCRC and most do not have the power to bring court actions. However, many of the Children Commissioners in Europe have relatively strong mandate and powers including express CRC rules and some of jurisdiction over both public and private sectors. *See* REIF, *supra* note 59, at 302–30 for review of different state approaches.

70 *See* Chan & Wong, *supra* note 15 (discussing the development of the Hong Kong Ombudsman within the Hong Kong's socio-political context).

71 Governments must recognize and value the importance of such an external control mechanism for the legitimacy of the government. *See* Danzsic, *supra* note 13.

72 Children's Commissioners should be established according to the Paris Principles. *See* discussion in Reif, *supra* note 59, at 295–302, 330–31. *See Paris Principles: 20 Years Guiding the Work of National Human Rights Institutions*, UNITED NATIONS HUM. RTS, OFFICE., OFF. OF THE HIGH COMMISSIONER (May 30, 2013), https://www.ohchr.org/en/newsevents/pages/parisprinciples20yearsguidingtheworkofnhri.aspx.

73 "The degree of independence is pivotal in the Commissioner's success." *See* SEDLETZKI, *supra* note 61, at 16.

UNCRC.[74] Broad jurisdiction should be granted over both public and private spheres with powers of investigation, monitoring, review, and reporting to support its work. The independence of Children's Commissioners will be influenced by politics and the strength of civil society—this will impact the appointment of Children's Commissioners, strength of its mandate, and level of resourcing.[75] Those Commissioners with legal statutory status enjoy a high degree of legitimacy, and those with more independence and sustainability have greater impact on laws, policy law, and practices.[76]

B. *Financial Autonomy and Accountability*

Financial autonomy for Children's Commissioners is vital to independence. Commissioners need sufficient and sustainable funding, but at the same time such funding must respect the legitimacy and independence of the institution.[77] Financial dependence on the state may compromise independence where funds are restricted or unduly controlled, but state funding provides legitimacy to an institution as an important public and regulatory agency.[78] As with other public bodies, a Children's Commissioner must be accountable for its actions and performance in a way that preserves independence and reinforces legitimacy.[79] Accountability mechanisms include providing regular written reports and bulletins to the public, increased use of websites and social media, and monitoring by NGOs and international monitoring bodies (e.g. UN Committees).[80]

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74 Express mention "of independence in the foundating legislation is an additional guarantee of actual independence. . .within the national governance system." *See* SEDLETZKI, *supra* note 61, at 16.

75 There is, of course, inherent tension relating to the institution's independence and its existence as a public party.

76 *See* REIF, *supra* note 59, at 330–31; SEDLETZKI, *supra* note 61, at 30; Danzsic, *supra* note 13, at 331.

77 The UN Committee frequently notes that state funding of child-related institutions is insufficient.

78 *See* REIF, *supra* note 59 and SEDLETZKI, *supra* note 61.

79 Preserving independence may be achieved by adopting an accountability mechanism providing ongoing feedback (e.g. annual reports) regarding the Commissioner institution.

80 For example, the Australian NGO Coalition Report 2018 demonstrates how strategic engagement with international organizations, such as the Asia-Pacific Association of Children's Commissioners and the European Network of Children's Ombudsman, can help build capacity and enhance advocacy. *See* SEDLETZKI, *supra* note 61, at 26–27.

C. *Receive Complaints on Specific Child Rights Violations*

Ideally, Children's Commissioners will have the capacity to identify and directly investigate children rights violations and provide children with accessible complaint mechanisms, although this depends on the breadth of children's rights issues covered, and the limitations of the Commissioner's legislative mandate. Providing Commissioners with a broad mandate that makes express reference to the UNCRC and other international instruments, relies upon strong domestic legislation in line with international standards and children's rights.

D. *Direct Child Participation Required*

It is crucial for Children's Commissioners to provide permanent mechanisms and structures, allowing for them to have direct consultation and interaction with children, especially those most marginalized.[81] Building links for child participation in the Commissioners' work and promotion of broader child participation in society are connected. Different strategies can be used to increase children's awareness of the existence of the Children's Commissioner (e.g. distributing material to children partnering with media and using Internet and social networks).[82]

E. *International Best Practice: Children's Commissioner Institutions*

More than 200 Children's Commissioners have been established in 70 states around the world, including several countries in Asia (e.g., Pakistan, Japan and China), to facilitate domestic implementation of the UNCRC and to provide advocacy and protection for children.[83] Countries have adopted different models, catering

[81] Requiring child participation is the work of the institution. This may also involve ad hoc consultations, hearings and interviews with children on specific topics. *See* SEDLETZKI, *supra* note 61, at 20.

[82] *See* REIF, *supra* note 59.

[83] The European Network of Ombudspersons for Children (ENOC) established in 1997 links 42 independent offices for children from 34 countries in Europe aiming to: encourage the fullest possible implementation of the UNCRC; support collective lobbying for children's rights; share information, approaches and strategies; and promote the development of effective independent offices for children.

to their own particular socio-political needs in structure, relationship between the Commissioner and government, and provision of resources and funding.[84] What is notable is that many states have recently introduced reforms enhancing the independence and powers of their Children's Commissioners to provide more effective advocacy for children's issues and policies, timely intervention in relation to children's issues, and comprehensive research.[85] The approaches of three countries are particularly worth review: Norway, the UK and Australia.

1. Norway—Statutory Independence and Direct Appointment by Cabinet

Norway was the first country to establish an independent, nonpartisan, and politically neutral Children's Commissioner, a "Children's Ombudsman" that possesses statutory rights to protect children within a progressive legal framework for children's protection.[86] The Ombudsman falls under the Ministry for Children and Family Affairs' jurisdiction, and neither the Norwegian Parliament nor the Government have any power to instruct the Ombudsman.[87] The duties of the Norwegian Ombudsman are to promote children's interests under the UNCRC with broad powers to investigate and review conditions under which children grow up.[88] The Ombudsman monitors the UNCRC implementation by submitting bills for legislative changes to the Government and promoting the application of the UNCRC in the work of government

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84 There are various forms of children's rights institutions reflecting national political and institutional context and financial and societal support for children's rights. *See* SEDLETZKI, *supra* note 61, at 29.

85 H.K. COMM. ON CHILDREN'S RIGHTS, STATEMENT TO SUPPORT THE ESTABLISHMENT OF A COMMISSION FOR CHILDREN IN HONG KONG, http://www.childrenrights.org.hk/v2/archive/04concerns/ChildrenCommission_StatementToSupport_en.pdf (last visited July 26, 2018).

86 The Nordic countries (i.e., Sweden, Finland, Norway and Denmark) were in the vanguard of promoting and protecting children's rights with the Norwegian "Children's Ombudsman" first established in 1981. The Norwegian Act establishes the Commissioner for Children (Barneombudet) (Act No.5 of March 1981), https://www.childinthecity.org/2018/06/21/norway-tops-child-rights-ranking-index.

87 *See* Marian Adnanes, *Norway*, in CHILD AND ADOLESCENT MENTAL HEALTH IN EUROPE: INFRASTRUCTURES, POLICY AND PROGRAMMES 125, 129 (2009). The selection process of the Norwegian Ombudsman for Children first starts with open application. After screening the candidates, one is nominated and presented to the King (i.e. the Cabinet). The Cabinet then appoints the Ombudsman for a four-year period that can be renewed once.

88 The Ombudsman office takes on the role of a politician on behalf of the children, the role of an activist when a special case needs attention from the authorities and the media, and the role of an adviser for children, parents, professionals and organizations regarding children's interests.

agencies, municipalities and county councils.[89] However, despite extensive powers, the Ombudsman cannot reverse or revoke administrative actions or decisions. Norway lacks an effective national complaints procedure for children, as its Parliament voted against ratifying the UNCRC's Third Optional Protocol on an individual complaints procedure.[90] This issue is currently under review with the Ombudsman advocating for a more accessible and child-friendly complaint mechanism at the national level given school bullying which, as in Hong Kong, is on the rise.[91]

2. United Kingdom—Reforms Provide Statutory Independence and Broader Powers

The Children's Commissioner in England was criticized for lacking statutory basis in monitoring, protecting, and promoting children's rights under the UNCRC, and for its limited mandate and powers under the 2004 legislation.[92] In July 2010, the government commissioned an independent review (the Dunford Review) to consider: the Commissioner's powers, remit, and functions; its relationship with other government functions; and the value for money of the post of Children's Commissioner.[93] The Review emphasized the value of retaining the office of Children's Commissioner, but stressed that the legislative framework prevented the Commissioner from having sufficient impact on children's lives.[94] The reforms introduced in the Children and Families Act 2014

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89 *See* Målfrid Grude Flekkøy, *The Children's Ombudsman as an Implementer of Children's Rights*, 6 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 353, 356 (1996). In 2017 the Norwegian Ombudsman published its Supplementary Report on the Implementation of the UNCRC in Norway. OMBUDSMAN FOR CHILDREN IN NOR., THE UN CONVENTION ON THE RIGHTS OF THE CHILD: SUPPLEMENTARY REPORT—NORWAY (May 2017), http://barne-ombudet.no/wp-content/uploads/2018/02/The-Ombudsman-for Children-in-Norway Supplementary-Report-to-UN-2017.pdf.

90 It does not supervise other government authorities, rather, the Ombudsman must refer legal cases to Norway's Parliamentary Ombudsman. *See* REIF, *supra* note 59, at 317.

91 *See supra* note 80.

92 JOHN DUNFORD, REVIEW OF THE OFFICE OF THE CHILDREN'S COMMISSIONER (ENGLAND) (Dec. 6, 2010), https://www.gov.uk/government/publications/review-of-the-office-of-the-childrens-commissioner-england.

93 CHILDREN AND FAMILIES ACT 2014: EXPLANATORY NOTES (Mar. 13, 2014), https://www.legislation.gov.uk/ukpga/2014/6/notes/data.xht?view=snippet&wrap=true; CHILDREN AND FAMILIES BILL 2013: CONTEXTUAL INFORMATION AND RESPONSES TO PRE-LEGISLATIVE SCRUTINY (Feb. 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219658/Children_20and_20Families_20Bill_202013.pdf.

94 HUMAN RIGHTS JOINT COMMITTEE – SIXTH REPORT, REFORM OF THE OFFICE OF THE CHILDREN'S COMMISSIONER: DRAFT LEGISLATION (Dec. 7, 2012), https://publications.parliament.uk/pa/jt201213/jtselect/jtrights/83/8302.htm.

strengthened the remit, powers, and independence of the Commissioner. In particular, it introduced reforms to give the Commissioner a statutory remit to "promote and protect children's rights," to compel the Commissioner to have regard to the UNCRC, and to increase the range of powers for the Children's Commissioner, including the ability to carry out investigations and assess the impact of policy on children's rights.[95]

The reforms also grant future Commissioners a single, six-year term of office, and combine the functions of the existing Office of the Children's Commissioner and the Office of the Children's Rights Director (with a remit to advise on the rights and interests of children living away from home or receiving social care), within the Office of the Children's Commissioner. Moreover, the reforms give the Commissioner extended power to enter premises where children are accommodated or cared for, to interview children.[96] To improve accountability, the Commissioner is required to produce an annual report on its activities and impact to be laid before both Houses of Parliament, rather than the Secretary of State, as previously directed.[97] These reforms make significant improvements to the independence and powers of the UK Children's Commissioner.[98]

3. Australia—Independent Statutory Power for Human Rights of Children

The Australian framework highlights how important the independence of Children's Commissioners is for providing children with a representative body whose sole concern is to protect and promote children's rights and interests without political influences. Each Australian state or territory has a Children's Commissioner—known as a "Commissioner for Children and Young People"—working with an independent statutory body known as a Children's

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95 OFFICE OF THE CHILDREN'S COMMISSIONER FOR ENGLAND, STANDARD NOTE: SN/SP/6347 (Mar. 27, 2014), researchbriefings.files.parliament.uk/documents/SN06347/SN06347.pdf.

96 This power does not extend to private dwellings. The Act also creates a duty for people exercising public functions to provide information to the Commissioner as long as that request is lawful and reasonable.

97 The U.K. government also imposed a new requirement on the Commissioner to appoint an advisory board to advise and assist the Commissioner and to consult on and publish a business plan.

98 HUMAN RIGHTS JOINT COMMITTEE—EIGHTH REPORT, THE UK'S COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD (Mar. 24, 2015), https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/14402.htm.

Commission.[99] Their broad mandate is to advocate for children's rights and examine and review legislation, policy, and practices affecting health, welfare, care, protection, and development of children.[100] Commissioners also report and make recommendations to their state parliament or legislative assembly about issues that are of concern to children and young people. As of 2013, Australia also has a National Children's Commissioner appointed directly by the Governor General pursuant to governing legislation, an important outcome of the National Framework for Protecting Australia's Children from 2009 - 2020.[101] The National Children's Commissioner sits within the Australian Human Rights Commission, an independent statutory body for human rights.[102] This Commissioner complements the existing state and territory commissioners and plays a key role in promoting the rights of Australian children in government policy and practice.[103]

V. Establishment of Hong Kong's New "Commission on Children"

Within Hong Kong's socio-political environment, children's issues have historically had low political priority as reflected in high rates of child poverty, inadequate policy and legislation for child protection, and lack of a comprehensive child health policy.[104] Moreover, Government efforts to protect children's rights are frag-

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99 *See*, for example, the New South Wales Advocate for Children and Young People appointed pursuant to the Advocate for Children and Young People Act 2014. The Advocate is an independent statutory office reporting directly to the New South Wales Parliament.

100 *See* Australian Institute of Family Studies, available at https://aifs.gov.au.

101 *See* Council of Australian Government, 2009.

102 Australian Human Rights Commission Amendment (National Children's Commissioners) Act 2012.

103 Twice a year, the national and state/territory commissioners meet together as the Australian Children's Commissioner and Guardians whose aim is to promote and protect children's rights, ensure children's voice in public policy and program development and drive systematic improvement in areas impacting children.

104 Previously Hong Kong policymakers tended to focus more on economic development, with less attention paid to the rights of children as a vulnerable group in society. *See* Natalie Leung et al., *Rich city, Poor Children*, The Young Reporter, May 5, 2014; *see also* The Hong Kong Committee on Children's Rights, *supra* note 7; Alice Wu, *Children's Rights Are Human Rights, and Hong Kong Needs to Enforce Them*, South China Morning Post (Nov. 19, 2017), http://www.scmp.com/comment/insight-opinion/article/2120288/childrens-rights-are-human-rights-and-hong-kong-needs.

mented across many different government departments and bureaus with limited inter-agency coordination.[105]

A. *Government's Resistance to an Independent Statutory "Children's Commissioner"*

The UN Committee repeatedly urged the Government to reform its policies regarding children's rights and establish an independent mechanism to monitor policy implementation on children's rights.[106] The Government resisted these recommendations referring to its Commission on Youth and two other platforms: the Children's Rights Forum and the Family Council.[107] None of these advisory platforms, however, have independent capacity to investigate or monitor Government action and policy formulation on children's affairs.[108] Established by the Constitutional and Mainland Affairs Bureau in 2005, the Children's Rights Forum is advisory only, merely providing for exchanges of views between Government representatives and children's representatives. The Family Council's main focus is applying family perspectives in pol-

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105 *See* Dr. Sandra Tsang's comments in DEMOCRATIC ALLIANCE FOR THE BETTERMENT AND PROGRESS OF HONG KONG, ROUNDTABLE MEETING ON CHILDREN'S RIGHTS (June 5, 2017), http://www.eng.dab.org.hk/roundtable-meeting-on-childrens-rights.

106 In 2005 the UN Committee noted that it "regrets the absence of an independent national human rights institution with a specific mandate for child rights on the mainland and the Hong Kong and Macau SARs." *See also* THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD, CONCLUDING OBSERVATIONS ON THE COMBINED THIRD AND FOURTH PERIODIC REPORTS OF CHINA, ADOPTED BY THE COMMITTEE AT ITS SIXTY-FOURTH SESSION (16 SEPT.–4 OCT. 2013) (Oct. 29, 2013), http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Concluding(eng).pdf.

107 In 2012, the Government submitted its Second Periodic Report to the UNCRC, repeating its refusal to establish a Children's Commissioner because an existing high-level mechanism already coordinated between different bureaus, and noting the Children's Rights Forum and Family Council. THE HKSAR GOVERNMENT, SECOND REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD, COMBINED THIRD AND FOURTH REPORTS OF THE PEOPLE'S REPUBLIC OF CHINA UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD – PART TWO: HONG KONG SPECIAL ADMINISTRATIVE REGION 23-28 (Legislative Council, 2012), http://www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca0618-rpt20120525-e.pdf (last visited July 10, 2018).

108 THE PROPOSED ESTABLISHMENT OF A CHILDREN'S COMMISSION IN HONG KONG BULLETPOINTS SUBMISSION, LC PAPER NO. CB(4)872/16-17(02) 3323835; Scully-Hill, *supra* note 10 (these platforms cannot provide autonomous, proactive and independent oversight and investigation of government action and policy formulation).

icy formulation, however, not specifically on children's perspectives in policy discussions.[109]

In 2006 a coalition of all major stakeholders in Hong Kong, including judges, lawyers, social workers, medical professionals, and NGOs, established a formal "Alliance for Children's Commission" to press the Government to appoint an independent "Children's Commissioner"–not simply another advisory "commission" focused on children–but an independent Ombudsman and Commissioner with statutory authority and legal mandate to advocate for and protect children.[110] Thereafter, LegCo passed a 2007 motion urging the Government to set up an independent Children's Commissioner "to fulfill the obligations under the UNCRC, safeguard the well-being of children, and ensure that children's perspectives are fully taken into account into the process of formulating government policies."[111] The Constitutional & Affairs Panel also passed a 2009 motion criticizing the Government's refusal to set up a Children's Commissioner. In 2013 LegCo members repeated their dissatisfaction with the lack of action on establishing an independent Children's Commission.[112] That same year the UN Committee again critiqued the Government's allocation of resources to education and social welfare as inadequate and ineffective in targeting the most vulnerable groups such as children living in poverty and those with disabilities.[113]

Frustrated by the Government's lack of action, the "1.1 Million Children's Campaign"[114] was launched by the Hong Kong

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109 The Family Council was reconstituted in April 2013 with a view to strengthening its advisory role on "collaborating with various sectors in the community to enhance the functions of families and create a pro-family environment." However, the Family Council cannot press the Government to act on and implement its views and recommendations on family related issues, let alone children's matters. *See* LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES, WORK PROGRESS OF THE FAMILY COUNCIL, LC PAPER NO CB(2)1526/17-18(05) (June 11, 2018).

110 *See* ALLIANCE FOR CHILDREN'S COMMISSION, ABOUT THE ALLIANCE FOR CHILDREN'S COMMISSION, CHILD RIGHTS INTERNATIONAL NETWORK, (January 2010), http://www.crin.org/en/docs/FileManager/AboutAlliance_Jan2010.pdf.

111 In view of the fractious relationship between the legislative branch and the executive branch, however, the motion had little impact on the Government.

112 *See* LEGISLATIVE COUNCIL, PANEL ON CONSTITUTIONAL AFFAIRS, UPDATED BACKGROUND BRIEF PREPARED BY LEGISLATIVE COUNCIL SECRETARIAT FOR THE MEETING ON 18 NOVEMBER 2013, SECOND REPORT OF HONG KONG SPECIAL ADMINISTRATIVE REGION UNDER CONVENTION ON THE RIGHTS OF THE CHILD, LC PAPER NO. CB(2)268/13-14(05) (Nov 14, 2013).

113 The UN Committee also found a lack of procedures to identify and support child victims of sexual exploitation and trafficking among others.

114 *1.1 Million Children's Campaign*, http://1.1mchildren.hk/?page=sign&lang=en (last visited 5 April 2019). The name of the campaign derives from the fact that there are 1.1 million children under the age of 18 not represented in policy discussions. The campaign aimed to gather com-

Committee on Children's Rights to formally lobby for a Children's Commissioner, especially in light of five-year-old Yeung Chi-wai with Down syndrome who died in 2013 after ingesting crystal methamphetamine found in his home. Chi-wai's mother was acquitted of child neglect and his death ruled as a "misadventure."[115] This campaign stressed that an independent monitoring mechanism as proposed by the UN Committee—a "Children's Commissioner"—should be established with independent statutory power and responsibility of examining policies, funding allocations, and enacting legislation to assess their impact on children's well-being.[116]

B. *Establishment of "Commission on Children" Rather Than "Children's Commissioner"*

The establishment of the "Commission on Children" while welcomed, was also disappointing. It was clear the Government still resisted setting up an independent statutory human rights commission for children. Instead the Government established a large 32-member advisory Commission, led by two senior Government ministers: the Chairman is Hong Kong' top civil servant, the Chief Secretary of Government Administration, and the Vice-Chairman is the Secretary for Labour and Welfare.[117] The new Commission's Chairman stated:

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munity support for setting up a Children's Commission and consisted of two parts—a Web platform (www.l.lMchild ren.hk), and a Signature Campaign. *See also* THE HONG KONG COMMITTEE ON CHILDREN'S RIGHTS, SPECIAL MEETING OF LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES, DISCUSSIONS ON MECHANISM FOR HANDLING ABUSE CASES RELATING TO CHILDREN FROM HIGH RISK FAMILIES AND FOLLOW-UP TO THE CHILD FATALITY REVIEW REPORT (May 28, 2016), http://library.legco.gov.hk:1080/articles/1189078.280832/1.PDF.

115 *See* Jennifer Ngo, *Neglect of the neglected: Hong Kong boy's death exposes a child protection system riddled with holes*, SOUTH CHINA MORNING POST (May 30, 2016).

116 In 2016 LegCo's new Subcommittee on Children's Rights also advocated for the urgent need to establish an independent Children's Commissioner to champion children's rights. The Subcommittee was set up "to study and review the existing child policy, including the respective services and policies for children with different disadvantages, encourage children to participate and express for themselves, analyze and study international policies, discuss relevant policies with the Administration and make timely recommendations." *See* LEGISLATIVE COUNCIL OF THE HKSAR, SUBCOMMITTEE ON CHILDREN'S RIGHTS REPORT (May 2018), https://www.legco.gov.hk/yr17-18/english/hc/papers/hc20180525cb4-1118-a-e.pdf (last visited Apr. 5, 2019).

117 The Commission was established following a 3-month public engagement process. HKSAR GOVERNMENT, *supra* note 12.

> children's growth and development is one of the priority policy areas of the current-term Government. The Commission will be **an ongoing, action-oriented, responsive and high-level body that will drive the work for the benefit of children through policy formulation as well as co-ordination and follow-up on the implementation of measures**. The Commission will listen to children's views, and will enhance its transparency by issuing information through its website and to the media.[118] (Emphasis added)

The Commission appointed nine ex officio members and 21 non-official members for a term of two years, from June 1st, 2018 to May 31st, 2020.[119] These members represent various community sectors, including: education, healthcare, academia, child concern groups, legal, arts and sports, community service, public relations/media, parents, non-Chinese speaking/ethnic minorities, and children/youths.[120] The Commission's broad "Terms of Reference" include: promoting and promulgating children's rights under the UNCRC and engaging with children on matters that affect them; developing and monitoring implementation of policies, strategies and priorities relating to the development and advancement of children; and enhancing and monitoring integration and rationalization of children-related policies and initiatives under different bureaus/departments and with advisory bodies.[121]

The Commission appears to be taking a soft approach in its first two-year term limiting itself to identifying the physical, emotional, cognitive, and social needs of children, and deriving collaborative and cross-sector plans and measures to meet children's needs.[122] The Commission stated that it also would "review and monitor" a broad range of children's rights matters in Hong Kong, including: "population policy, child fatality, children's adoption,

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118 HKSAR GOVERNMENT, *supra* note 12.

119 None of the members of the current Commission on Children are permanent. They are part-time appointments that may be sidetracked with other job responsibilities.

120 HKSAR GOVERNMENT, *supra* note 12.

121 Other terms of reference include: review children-related services by the Government and NGOs, foster cross-sector collaboration, and identify areas for better integration and improvement; initiate surveys and research studies on children's issues; manage funding schemes for promotional and public educational projects which should have children's and stakeholders' participation, and organize other promotional activities; and develop a framework with indicators to monitor and evaluate achievement of the vision.

122 The following categories of issues were identified: (a) issues that are more specific to children at different age groups (say, infants and toddlers (0-2); kindergarten (3-5); primary school (6-11); and junior secondary school (12-14)); (b) issues that may straddle different stages of growth of children and should be dealt with holistically, and (c) issues that are specific to particular groups of children arising from their family backgrounds, biological characteristics or other individual circumstances.

children's commission and children's policy, children in hospital, and children in poverty, child pornography, Family Commission, guardianship and custody, inclusive education, and juvenile justice."[123] The funding for the Commission is surprisingly low—only $12 million has been allocated for the creation of three civil service posts: secretarial work, publicity and educational work, and research projects.[124] Beyond these statements, not much has been heard from the Commission since it was established last year.[125]

VI. Evaluation of Commission: Substantive Reform Needed

Given its current framework and organizational structure, can the Commission act as an effective advocate for children's rights under the UNCRC, and provide independent oversight and investigation of government action and policy formulation on children's rights and interests? There is real danger that the Commission's stated Terms of Reference may become rhetoric unless its structure is reformed and its jurisdiction and powers are sufficiently expanded.[126] Hong Kong needs to have a robust, high-level "Children's Commissioner" institution—one that is truly action-oriented and focused on upholding children's human rights pursuant to the UNCRC rather than a consultative body of limited term lacking

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123 The Commission's immediate focus is indicated by the two working groups established. The Working Group on Research will conduct research on children-related issues and reviewing children-related policies and services. The Working Group on Public Engagement, Education and Publicity will manage funding schemes for publicity projects, promote children's rights, and facilitate communication with children so the Government and Commission may understand their opinions and consider their views when making policy decisions.

124 Secretary for Labour and Welfare, Replies to Initial Written Questions Raised By Finance Committee Members in Examining the Estimates of Expenditure 2018-19 (LWB(WW)399, 2018). It is questionable whether current staffing levels are sufficient to support the Commission's broad Terms of Reference.

125 *See* Grenville Cross, *2019 is the Year the HK Commission on Children Must Show its Worth*, South China Morning Post (Dec. 22, 2018, 4:45 PM), http://scmp.com/comment/insight-opinion/hong-Kong/article/2179216/2019-year-hong-kongs-commission-children-must-show.

126 Executive secretary of the Hong Kong Committee on Children's Rights, Billy Wong Wai-yuk, said she had been "waiting [for today] for some 20 years," but that "it is not the commission that [we] expected." *See* Danny Mok, *Hong Kong Gets a New Children's Commission*, South China Morning Post (June 1, 2018, 9:00 AM), http://www.scmp.com/news/hong-kong/community/article/2148725/hong-kong-gets-new-childrens-commission.

independence, sufficient investigation, and review powers.[127] As the Commission is still quite new, its internal operations and future plans are still to emerge. However, its ability to effectively protect children's rights in Hong Kong is of concern. It is imperative that the Commission adopts a holistic, rights-based approach rather than a welfare-based approach to ensure full protection of children.[128]

A. *"Commission on Children" Should Evolve Into a "Children's Commissioner" Institution*

The Commission's Terms of Reference expressly require the Commission to promote and promulgate children's rights in the UNCRC, but make no mention of monitoring and investigating alleged breaches of Convention. The Commission is required to "develop and monitor" implementation of children's policies, strategies, and priorities, but it is only a part-time body lacking statutory independence and led by senior government officials who, while committed and well-meaning, are inherently conflicted.[129] Given its current structure, it is doubtful the Commission has capacity to "drive the work for the benefit of children through policy formulation, as well as coordinate and follow-up on the implementation of measures." To be effective and credible, the existing Commission should evolve into a robust, full-time, independent "Children's Ombudsman" or "Commissioner."[130] This is particularly important given that Hong Kong lacks a human rights

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127 Including the Commission on Youth, Family Council and Children's Rights Forum. *See* The Hong Kong Committee on Children's Rights, *Why Hong Kong Needs a Child Commission?*, (Mar. 15, 2005), http://www.childrenrights.org.hk/v2/archive/04concerns/ChildrenCommission_200503_WhyHKNeeds.pdf. *See* Cross, *supra* note 27; Leung and Cheng, *supra* note 106.

128 A vital term of reference for the Commission is monitoring Hong Kong's respect for children's rights enshrined in its international obligations under the UNCRC. The Commission has stated that issues need to be dealt with holistically but has not clarified a "systems rights based approach." *See* Scully-Hill, *supra* note 17, and Priscilla Lui, *New Hong Kong Children's Commission Must Engage All Sections of Society*, SOUTH CHINA MORNING POST (Nov. 13, 2014, 4:53 PM), https://www.scmp.com/comment/letters/article/2119672/new-hong-kong-childrens-commission-must-engage-all-sections-society.

129 The Commission's Chairperson is the Chief Secretary for Administration and the Vice-Chairperson is the Secretary for Labour and nine ex officio members are heads of the Education, Food and Health, Home Affairs, Constitutional and Mainland Affairs, Social Welfare, Health, Family Council and Women's Commission. The Secretary is the Principal Assistant Secretary for Labour and Welfare.

130 The Executive Secretary of the Hong Kong Committee on Children's Rights "noted that the commission was not independent from the government and had no legal mandate, which

institution—a separate body such as a Children's Commissioner or Ombudsman—to advocate for and monitor children's rights under the UNCRC.

Comparative experiences in the UK, Australia, and Norway show the necessary reform the Commission needs to undergo in order to become an effective external accounting mechanism for children's human rights in Hong Kong.[131] They are good models for the evolutionary path forward that the Government should follow. UK reforms consolidated the functions of both the existing Office of the Children's Commissioner and the Office of the Children's Rights Director within the Office of the Children's Commissioner, who was then appointed for a single, six-year term of office.[132] Alternatively, the Australian model may be followed: the current Commission would evolve into a human rights commission for children, and thereafter appoint an independent Children's Commissioner to fulfill the obligations under the UNCRC. An independent Children's Commissioner could also be directly appointed by the Chief Executive with a clear independent legal mandate, similar to the appointment of the Norwegian Ombudsman.

Sensitivity to Hong Kong's political realities is relevant. While there is limited democracy under the One Country, Two System model that may not prioritize transparency and accountability of government, the Chief Executive has made a solid commitment to transparency and good governance over the past two years. One viable option is for the Chief Executive to create an independent statutory Children's Commissioner institution in perpetuity, and thereafter appoint a Children's Commissioner for a five-year term with direct accountability.[133] It is vital to have a full-time Children's Commissioner providing proactive and independent oversight and investigation of government action and policy formulation on children's rights and interests in Hong Kong.

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meant that it could not monitor the administration on child-related issues and investigate violations." *See* Mok, *supra* note 128.

131 Both the Australian National Children's Commissioner and a former Norwegian Ombudsman have called upon Hong Kong to establish an independent Children's Commissioner. *See* Jeffie Lam, *Hong Kong's Children's Commission Must Be Given a Mandate, Foreign Experts Say*, SOUTH CHINA MORNING POST (Sept. 24, 2017, 8:01 AM), https://scmp.com/news/hong-Kong/education-community/article/2112557/hong-kongs-childrens-commission-must-be-given.

132 Unlike other Children's Commissioner appointees who often serve for 4 years or more, the current Chairperson and Commission members are only appointed for 2 years.

133 The appointment process is crucial to the independence of Children's Commissioner.

B. *Clear Legal Mandate Needed—Statutory Independence Required*

The Commission is currently embedded within the local government and led on a part-time basis by two of the government's top civil servants. This creates an apparent conflict of interest and compromises independence.[134] The Commission lacks a clear legal mandate based in statute and does not have sufficient investigation, monitoring, or reviewing powers. The Commission must evolve from merely promoting children's rights and interests to protecting those rights through independent monitoring and review of the UNCRC's implementation in Hong Kong and investigating of alleged infringements of children's human rights.[135] The independence of Hong Kong's Ombudsman, underpinned by the Ombudsman Ordinance, provides a good model: it creates a statutory body with perpetual succession.[136] The same development model can be used for the Children's Commissioner; its independence can be secured through foundational legislation, expressly providing that it is neither a servant nor an agent of the government, and monitoring obligations can be provided by conferring extensive investigation powers by local statute.[137]

The importance of an independent statutory Children's Commissioner cannot be underscored—only a Commissioner with real statutory power can review and improve the existing legislation

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134 It is important to ensure no political influence or outside interference. The Chairman of the Law Society's Family Law Committee, Dennis Ho Chi-kuen, suggests that a Commission without independent powers "would be just another arm of government" and that it would not be what the UNCSC had asked for. *See* Jeffie Lam, *Long-Awaited Children's Rights Body for Hong Kong May End Up Toothless*, SOUTH CHINA MORNING POST (Oct. 10, 2017 8:00 AM), http://www.scmp.com/news/hong-kong/community/article/2114604/long-awaited-childrens-rights-body-hong-kong-may-end.

135 With no clear legal mandate or independent powers to investigate individual cases of children abuse or other children-related issues, the current Commission is unfortunately another advisory consultative committee. Similar reform is needed as happened in the UK and Australia.

136 *See* Anthony B. L. Cheung, *Evaluating the Ombudsman System of Hong Kong: Towards Good Governance and Citizenship Enhancement*, 17 ASIA PACIFIC L. REV. 73 (2016).

137 Akin to the Hong Kong Ombudsman under the Ombudsman Ordinance or the Equal Opportunities Commission under the Sex Discrimination Ordinance. Barrister Azan Marwah stressed, "only an independent commission will be able to ask the necessary questions that a particular department might not want to ask." The Commission's target group is children under the age of 14 as stipulated in the UNCRC . *See* The HKSAR Government, Labour and Welfare Bureau, *The Establishment of a Commission on Children: Public Engagement* (Mar. 27, 2018), http://www.lwb.gov.hk/childrencommission_public_engagement/index_e.html#s3.

and policies on children's welfare.[138] The Commissioner should work in partnership with the government and governmental bodies, but have independence so as to present honest, objective, and productive views, free from government influence or interference.[139] Moreover, the perception of independence, particularly by children, is important for Children's Commissioners to carry out their mandate with legitimacy and high levels of public trust.[140]

C. *Independent Review & Monitoring Powers*

Given its current structure, can the Commission "promote and promulgate children's rights" under the UNCRC in a meaningful way? It is crucial for the Commission to have independent investigative powers with a legislative mandate; "the kind you need to really get to the heart of the issue," noted Australia's first National Children's Commissioner.[141] The Commission must be capable of independent monitoring and investigation of children's rights violations, and be empowered to track and monitor compliance with recommendations made.[142] The same barriers identified by the UK Dunford Review will occur in Hong Kong unless the framework and structure of the Commission are reformed. The Commission must be empowered to receive individual complaints and investigate suspected breaches of children's rights. Ideally, a Children's Commissioner should have the ability to inquire into complaints from the public and allegations of abuse from children,[143] question witnesses, take cases to court, and make sure that those

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138 Only a commission that is statutorily vested with the interests of children in Hong Kong, not with any third-party interests, can ensure that its work in policy formulation can be done without undue influence. *See* Hong Kong Family Law Association, *The Establishment of a Commission on Children* (Apr. 8, 2017), http://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120170420cb4-850-3-e.pdf.

139 For example, in providing advice to government on policies and programmes and drafting legislation. *See* SEDLETZKI, *supra* note 65.

140 This influences the willingness of members of the public to file complaints, ability to engage with children and vulnerable groups, the trust of political groups, and the ability to collaborate with NGOs. *See* SEDLETZKI, *supra* note 61, at 16.

141 *See supra* note 84; Lam, *supra* note 133.

142 Does the Commission have sufficient powers to monitor the implementation of UNCRC obligations and to advise, collaborate, and liaise with the government?

143 Kay McArdle, *Proposal for Establishing a Commission on Children,* LC Paper No. CB(4) 850/16-17(03), PATHFINDERS (Apr. 19, 2017), http://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120170420cb4-884-2-e.pdf.

children receive remedies for any breaches of their rights.[144] Thus, an accessible children's complaints mechanism is important, as are direct investigations providing an important means to address systemic issues that could not be addressed in a single individual complaint.[145] The Commissioner should also undertake supervision in compliance with the UNCRC, and submit regular reports to the United Nations on the latest progress of children's rights in Hong Kong.[146]

D. *Mandate for Coordination & Implementation of Child Policies*

Enhancing inter-agency cooperation to coordinate work between the many different bureaus and departments dealing with child-related matters is important.[147] An independent Children's Commissioner can help provide overall coordination and implementation of child-related law and policies in Hong Kong, as well as a comprehensive assessment of the impact of these laws and policies to ensure the best interests of all children.[148] Certainly comparative experience from other Children's Commissioners indicates they can be effective in streamlining fragmented policies concerning children.[149]

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144 The Hong Kong Committee on Children's Rights, *Wish List for Children's Commission in Hong Kong*, CHILDREN'S RIGHTS (July 1, 2017), http://www.childrenrights.org.hk/v2/archive/04concerns/ChildrenCommission_20170701_WishList_en.pdf.

145 Just as the Hong Kong Ombudsman is empowered to receive direct complaints and make investigations. Admittedly, this type of reform must consider Hong Kong's political sensitivities to government transparency and accountability and human rights. *See* discussion in Chan and Wong, *supra* note 15, at 111.

146 This can help enhance the legitimacy of government functions and actions and promote good governance.

147 Including the following: Constitutional and Mainland Affairs Bureau, Home Affairs Bureau (implementing the UNCRC), Education and Manpower Bureau (education and career development), Development Bureau (public infrastructure and facilities related to children), Food, Environment and Health Bureau (medical, health and welfare policies for children), Transport and Housing Bureau (housing policy and road safety of children), and Security Bureau (child refugees, migrant children). Previously the Government claimed high-level coordination between bureaus, but it is unclear how the "high-level mechanism" operates.

148 *See 2018 Policy Address*, *supra* note 11, ¶ 26 (committing to enhancing Inter-departmental collaboration and efficiency). The Commission's Term of Reference is to enhance and monitor integration and rationalization of children-related policies and initiatives under different bureaus/departments and with advisory bodies.

149 *See* Legislative Council Subcommittee on Children's Rights meeting April 20, 2017 and comments of Hercules Lai, Chairman of the 1.1 Million Campaign, *supra* note 116.

The new Commission stated it will take on this role—which is good—but can it do this? Does it have sufficient legal mandate and the necessary powers to "enhance and monitor integration and rationalization" of children-related policies and initiatives under different bureaus/departments and with advisory bodies?[150] The Commission must be a high level and central mechanism to monitor the implementation of the UNCRC—particularly since the UNCRC covers various areas that are the responsibility of several departments and bureaus.[151] A "Children Rights Impact Assessment" initiative has been developed by child rights advocates and NGOs in Hong Kong for child-related assessments in government law, policy-making, and implementation.[152] A Children's Commissioner can undertake such Children's Rights Assessments, although this should not be a substitute to the government carrying out such assessments on its own across all departments, particularly for policies or decisions that are cross-departmental.

E. *Identify Clear Policy and Research Priorities—Central Database for Children*

The Commission must conduct research to assist the Government in engaging in evidence-based decision-making and policy-formulation for children's rights and interests.[153] Despite the Com-

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[150] Does it have powers of "*review*" over children-related services by the Government and NGOs; can it "*foster cross-sector collaboration*," and identify areas for better integration and improvement?

[151] *Supra* note 149. The existing institutional arrangement, with each policy bureau being responsible for assessing the impact of its policy decisions on children, is not effective in fostering children's rights.

[152] A Children's Commissioner may have to rely on policymakers to inform them of a policy initiative early enough so that it can have the opportunity to influence its outcome, e.g., by application of Children's Rights Impact Assessment. *See* Puja Kapai, *Applying Article 3 of the UNCRC in Practice: Child Rights Impact Assessment (CRIA) and Lessons from International Best Practice*, THE UNIVERSITY OF HONG KONG, https://www.law.hku.hk/ccpl/childrens-rights-impact-conference/wp-content/uploads/2018/12/Plenary%20Presentation%202_Applying%20Article%203%20of%20the%20UNCRC%20in%20Practice_%20Child%20Rights%20Impact%20Assessment%20(CRIA)%20and%20Lessons%20from%20International%20Best%20Practice.pdf (last visited Oct. 15, 2019) (which developed a Children's Rights Impact Assessment Framework).

[153] The Commission stated on February 22, 2019 that it set out the "discussion priority and time frame for a number of issues concerning children" but disclosed no further public information. *See Commission on Children convenes third meeting*, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (Feb. 22, 2019), https://www.info.gov.hk/gia/general/201902/22/P2019022200679.htm.

mission's best intentions, it has not provided any more detailed information (other than providing a list of issues affecting children), nor has it identified any specific detailed research plan or priorities or provided any identifiable work targets or timetable. This needs the Commission's immediate attention. In addition, various Government bureaus/departments collect data relating to children with regard to their respective policy and service areas, as well as legislation provisions.[154] There is no central data bank for children and no central and independent body analyzing and disseminating such information.[155] This is a problem. Hong Kong needs evidence-based children's rights studies and a coherent and regularly updated children's central data system to incorporate children's perspectives in laws, policies, practices, and programs.[156] At its first June 2018 meeting, the Commission discussed the need to develop a central children's database, but no separate working group has yet been established to consider data collection and coordination.[157] This is urgently needed. There should be multi-sector participation developing this central data bank for children ensuring that it is well coordinated and comprehensive.[158] If reformed, the Commission could help coordinate and be a central mechanism for

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154 In Hong Kong, no specific government department is currently responsible for handling child data. Child data is scattered among government departments and some data is not open for public use. *See* Legislative Council Subcommittee on Children's Rights, *Opinions Concerning a Central Data bank for Children*, LC Paper No. CB(4)830/17-18(02), LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 4, 2018).

155 In February 2019 the Commission announced a consultancy study for developing centralized children's data collection, something advocated for more than 20 years. It is only with verifiable data that long-term planning for the best interests of Hong Kong children, as stipulated in Article 3 of the UNCRC, can be completed. *See* Hong Kong Committee on Children's Rights, *Central Data Bank for Children,* LC Paper No CB (4)855/17-18 (01), LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 28, 2018), and concluding observations of the UN Committee in October 2005 and 2015 There are multiple UN Committee reports in October 2005 and 2015, could not discern which specific ones were cited. Here is a link to a database: https://www.refworld.org/type,CONCOBSERVATIONS,CRC,,,,0.html.

156 *See* Maggie Lau, *S*ubmission to the Subcommittee on Children's Rights of the Legislative Council, Proposal for establishing a central database for children, LC Paper No CB(4)855/17-18(02), LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 2018).

157 The Chief Executive's 2017 Policy Address announced the government plans for establishing a central database for children. *Commission on Children convenes first meeting*, LABOUR AND WELFARE BUREAU THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (June 28, 2018), http://www.lwb.gov.hk/eng/press/28062018.htm.

158 Having a central data bank for children will serve as the foundation for the development of child impact assessment systems and child consultation systems, as both need the clear data for a thorough and genuine consultation on children's views.

data collection in conjunction with the Census and Statistics Department.[159]

F. *Adequate Financing and Resources Required for Commission*

It is important that the Commission be independent of government intervention and adhere to the Paris Principles.[160] The Commission requires adequate funding, its own staff and premises, and should not be restricted by any financial control affecting its independence. Inadequate finances and manpower resources and an unnecessarily restricted two-year time frame will limit the Commission's ability to deal with the broad range of complex issues affecting children and achieve lasting impact and outcomes.[161] The sum of $12 million has been allocated to support the Commission, but this is miniscule compared to Hong Kong's HK$92 billion dollar budget surplus and projected fiscal surplus reserves of HK$1161 billion dollars.[162] Financial dependence on the government may compromise independence where funds are restricted or unduly controlled, but adequate government funding provides credibility to an institution as an important public and regulatory agency.[163]

To have legitimacy and build high levels of public trust, a Children's Commissioner must assert and display independence from the government, e.g., the Commissioner should establish a non-governmental website and locate their office outside government premises (rather than having their quarterly meetings within Government offices). Preserving independence may also be achieved by adopting an accountability mechanism providing ongoing feedback on the strengths and weaknesses of the Commission institution. Such feedback may come in the form of written reports of activities and impact to government, informing the general public,

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159 The Commission can also help develop an annual publication of a "Thematic Report on Children" as provided in the UNCRC.

160 *See supra* note 74.

161 The Commission needs to increase its budget and resources to ensure its sustainability and productivity.

162 *See* Paul Chan, Financial Secretary, Presentation by the Financial Secretary on the 2019-20 Hong Kong Budget Feb. 27, 2019, *reprinted in* THE 2019-20 BUDGET, https://www.budget.gov.hk/2019/eng/pdf/e_budget_speech_2019-20.pdf.

163 Diversification of funding sources may help. Funding from private and foreign donors might solve resource shortages but may affect long-term independence. *See* REIF, *supra* note 59; Dzanic, *supra* note 13.

and monitoring by civil society and NGOs.[164] It is important for the Commission to be transparent in its work and reporting.[165] We are already one quarter of the way through the Commission's term of office and very little public information is available about its work. Better transparency, openness, and accountability would enhance its credibility and increase public trust.[166]

G. *Commission Needs to Ensure Direct Child Participation*

The Government's establishment of a Working Group to facilitate communication with children to understand their opinions and consider their views when making policy decisions is a positive step.[167] To be influential and develop legitimacy and public trust, however, the Commission needs to develop a child-friendly consultation system, facilitating meaningful, direct participation by children within the Commission.[168] It must also ensure pluralistic multi-disciplinary representation on the Commission and its two Working Groups, with children's voices and opinions heard, considered, and incorporated in government decision-making and policy formulation.[169] It is important that the marginalized and the most vulnerable groups of children in Hong Kong be involved in these discussions. It is important that these voices be expressed, otherwise the Commission will not be able to adequately list its priorities.[170] Children should also directly participate in the selection of the Children's Commissioner—just as children interview

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164 *See* SEDLETZKI, *supra* note 83; HUMAN RIGHTS JOINT COMM.—EIGHT REPORT, *supra* note 100. The Commission should provide annual reports to Government and Supplementary Reports to the UN Committee. *See* OFF. OF STANDARDS IN EDUC., CHILD'S SERVICES AND SKILLS, ANN. REPORT AND ACCTS. 2017-18 (2018).

165 Actions and decisions of the Children's Commissioner must be transparent to maintain credibility and community respect.

166 Particularly as transparency is a key goal of the current Government. *See 2018 Policy Address*, *supra* note 11, ¶ 19.

167 *See supra* note 125.

168 Ideally providing a legal basis for cultivating child participation in the work of Children's Commissioner. *See* SEDLETZKI, *supra* note 70; SEDLETZKI, *supra* note 83.

169 Children should be given information needed to contribute and express themselves and express their views. The consultation process must be structured and permanent for the Commission's work to be effective.

170 The Commission should draw on overseas experiences in children's commission in developing guidelines and training programs to ensure children's genuine participation in the work of children's commissions.

short-listed candidates for the children's ombudsman position in Norway and Australia.[171]

VII. Conclusion

Hong Kong's Commission on Children will face similar barriers experienced in the UK and Australia unless reforms to the Commission's mandate, structure, jurisdiction, and powers are introduced. Independence is the defining feature of children's human rights institutions; it is their main strength and their source of legitimacy and authority.[172] The Commission must evolve into an independent statutory body with a legal mandate to review and improve the existing laws and policies on children's matters, and ensure that children's human rights, as enshrined within the UNCRC, are upheld.[173] In the absence of a human rights commission, it is desirable and practical for the Commission to evolve into a Children's Ombudsman or Commissioner to fill this gap in relation to children's human rights.[174] To do so effectively requires the Commissioner to act independently of government, free from outside interference or undue influence. It must be endowed with adequate resources and sufficient investigation and review powers to effectively monitor government actions and decisions impacting children's rights and interests and help develop child-centered laws and policies.[175]

Serious complex issues face Hong Kong children. While a Children's Commissioner cannot solve all these problems, they can actively cooperate with Government to develop and implement a comprehensive child poverty reduction plan and address issues related to proper nutrition, affordable housing, and accessible education for children.[176] The Commissioner could help the Government set targets of 50% reduction in child poverty within 5

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171 *See* Adnanes, *supra* note 89.

172 *See* Sedletzki, *supra* note 61, at 16.

173 The Commission must be empowered to investigate complaints about possible breaches of children's rights and monitor implementation of the UNCRC in Hong Kong.

174 Just as the Hong Kong Ombudsman has evolved within Hong Kong's shifting political landscape. *See* Chan & Wong, *supra* note 15.

175 This can only happen with the willingness and cooperation of the Government. They have shown this willingness with the Hong Kong Ombudsman so there is a model to follow for the evolution of a truly independent Children's Commissioner.

176 Child poverty and social exclusion should be addressed from a child rights perspective in line with the UNCRC and include integrated strategies and the participation of all stakeholders.

years, lifting 150,000 Hong Kong children out of poverty with better nutrition, safer housing, and improved education.[177] If established as an independent statutory institution, the Commissioner can be a catalyst for reform of Hong Kong's inadequate child protection legislation (e.g. establish a mandatory reporting system) and help alleviate child abuse and neglect.[178] A Children's Commissioner could also help develop and implement policies to reduce school bullying and ban corporal punishment[179] and work with the Government to formulate a comprehensive child-health policy for the physical and mental wellbeing of children.[180] While recognizing the challenges of Hong Kong's political system, reform is required for the Commission to evolve into a truly independent statutory Children's Commissioner that is viewed as credible with high levels of public trust. This can serve as a vital external accountability mechanism supporting the Chief Executive's on-going commitment to transparency and good governance in Hong Kong.[181]

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177 *See* Hong Kong Institute of Education, *Multi-pronged approach needed to address child poverty*, SOUTH CHINA MORNING POST (Dec. 13, 2012); Gonzalo Fanjul, UNICEF, *Child. of the Recession*: *The Impact of the Economic Crisis on Child Well-Being in Rich Countries* (2014), https://www.unicef-irc.org/publications/733-children-of-the-recession-the-impact-of-the-economic-crisis-on-child-well-being-in.html. Such measures include guaranteeing basic incomes for families and protecting vulnerable children from financial and social exclusion.

178 Hong Kong is not alone in needing to reform its child protection system. *See* Manitoba Advocate for Child. & Youth, *A Place Where it Feels Like Home: The Story of Tina Fontaine* (Mar. 2019) (demanding action for reform of the government's child and social welfare system); *Children are going to die*, VANCOUVER SUN, (Mar. 12, 2019).

179 The Commission could advise the government on enacting legislation banning corporal punishment following the 32 states that have legally banned all forms of corporal punishment. The Commission could also help with parental education ensuring that parents are better informed about good parenting skills.

180 "Children Wellbeing Indicators" can track the development of Hong Kong children. *See* STEERING GROUP FOR CHILD HEALTH POL'Y IN HONG KONG, Child Health in Hong Kong: A Pol'y Dev. Brief (Apr. 2013).

181 This depends on the willingness of the Government to cooperate with the Children's Commissioner and to be responsive to its recommendations. *See* DZANIC, *supra* note 13; Alice Wu, *Children's rights are human rights, and Hong Kong needs to enforce them*, SOUTH CHINA MORNING POST, (Nov. 19, 2017).

ELDER *RESTORATIVE* JUSTICE

Mary Helen McNeal and Maria Brown***

I. Introduction

As populations age throughout the world and older people face the challenges of declining health and independence, opportunists frequently exploit seniors' vulnerabilities. This exploitation may take the form of financial, emotional, physical, and sexual abuse, and even neglect,[1] and it occurs with alarming frequency.[2] It happens in a climate where older people endeavor to maintain their independence, and advocates and service providers face the challenge of helping seniors to remain autonomous while simultaneously preventing and addressing harm when it occurs.

Most elder abuse and exploitation occurs at the hands of family members and caregivers[3]—usually the same people seniors rely on for assistance to live independently. Too often, options to address harms caused by elder abuse and exploitation are limited. Although seniors may be encouraged to report abuse to law enforcement and other service providers, civil and criminal remedies are often ineffective.[4]

This dynamic confluence of factors further complicates a serious problem that currently lacks effective solutions and begs for alternative options. "Elder *restorative* justice" presents such alternatives. The process promotes repair and reconciliation of the underlying relationships.[5] In a restorative process, the person harmed has the opportunity to obtain reparation and closure, while the person committing the harm has the opportunity to understand the effects of his behavior and take responsibility, and the community

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1 *See infra* Part II.

2 *See infra* Part II.

3 *See infra* Part II.

4 *See infra* Part III.

5 Elizabeth Beck et al., *Restorative Justice with Older Adults: Mediating Trauma and Conflict Later in Life*, 21 Traumatology 219, 220 (2015).

can promote well-being and prevent future crime.[6] Restorative principles currently are utilized in a variety of conflict resolution contexts, such as addressing behavioral issues and disputes between students in schools,[7] addressing juvenile offenses,[8] resolving custody issues,[9] and most recently, in situations of domestic violence.[10] Some proponents of restorative principles also are exploring their application in addressing problems in workplaces, community groups, apartment complexes, agencies, and in other community-based contexts.[11] However, restorative principles have rarely been adapted to address elder abuse.[12]

This article explores the viability of utilizing restorative principles to address elder abuse and recommends the continuing implementation of an "elder *restorative* justice" paradigm. Part I describes the widespread problem of elder exploitation and possible reasons for it, and Part II outlines current strategies to address it. Part III offers an overview of restorative principles, with a description of selected models. In Part IV, this paper reviews restorative approaches currently addressing elder abuse, and their benefits and challenges. Part V analyzes the applicability of the restorative models outlined above to the elder abuse context, assessing the most effective options for addressing this rapidly ex-

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6 *Id*. at 219.

7 *See*, *e.g.*, Jill Davidson, *Restorative Justice: Putting the Responsibility on the Shoulders of Students to Correct Mistakes When They Happen*, 80 EDUC. DIG. 19, 19 (Nov. 2014).

8 *See*, *e.g.*, William Bradshaw & Mark S. Umbreit, *Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue*, 49 JUV. & FAM. CT. J. 17, 18 (1998).

9 *See*, *e.g.*, Robert Koehler, *Get a Rock and Talk*, HUFFINGTON POST (Sept. 13, 2012, 11:27 AM), http://www.huffingtonpost.com/robert-koehler/get-a-rock-and-talk_b_1880900.html; *see also* Susan Daicoff, *Families in Circle Process: Restorative Justice in Family Law*, 53 FAM. CT. REV. 427, 433 (2015).

10 *See*, *e.g.*, Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 573 (2010) (citing Amanda Dissel, *Restoring Harmony: A Report on a Victim Offender Conferencing Pilot Project*, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION (Oct. 2000), http://www.csvr.org.za/docs/crime/restoringtheharmony.pdf).

11 *Restorative Justice and Practice: Emergence of a Social Movement*, VICTORIA U. OF WELLINGTON, N.Z., https://www.edx.org/course/restorative-justice-and-practice-emergence-of-a-social-movement (last visited Jan. 31, 2019). Some institutions seek to be "restorative organizations." *Restorative Justice and Practice: Emergence of a Social Movement*, VICTORIA U. OF WELLINGTON, N.Z., https://courses.edx.org/courses/course-v1:VictoriaX+RJ101x+2T2018/courseware/94c38b8d2f22486c95b6e71db105496a/34b3ed091e43429b9eed5b18de2631fa/?child=first (last visited August 13, 2018) [hereinafter EdX, Online Course] (A restorative community is "one that is intentionally conditioned by the principles, values, practices and priorities of a restorative justice framework.").

12 *But see infra* Part III.

panding societal problem. Finally, the article concludes with recommendations for specific pilot projects. Although restorative processes are not a panacea, they do provide viable alternatives in certain elder abuse contexts. The goal of this article is to examine past and present projects using restorative justice principles to assess the potential for broader adoption of these models. This analysis is a step towards identifying alternative remedies to assist older people confronted with elder abuse, enabling them to repair the underlying relationships, and enhancing their ability to continue their aging processes in safer and genuinely supportive environments.[13]

II. The Basics of Elder Abuse

The World Health Organization ("WHO") defines elder abuse as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person,"[14] although terminology and definitions vary.[15] The harm may be financial, physi-

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[13] Because of the negative connotations and stigma associated with the words "victim," "offender," and "perpetrator," this article will refrain from using those terms, and instead refer to "the person harmed" and "the person committing the harm." *See* Alan Clarke et al., *Access to Justice for Victims/Survivors of Elder Abuse: A Qualitative Study*, 15 Soc. Pol'y & Soc'y 207, 208 (2016) (noting that "it has also been suggested that older adults are less likely to engage with interventions if they have to identify themselves as being 'abused' rather then [sic] 'mistreated'" (citing Gemma Smyth, *Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services*, 30 Windsor Rev. of Legal & Social Issues 121, 125 (2011)). For clarity, feminine pronouns are used throughout when referring to the older person and male pronouns when referring to the person who committed the harm. While not intended to be rigid stereotypes, this is consistent with research findings. *See* Shelly L. Jackson, *All Elder Abuse Perpetrators Are Not Alike: The Heterogeneity of Elder Abuse Perpetrators and Implications for Intervention*, 60 Int'l J. of Offender Therapy and Comp. Criminology 265, 272 (2016)).

[14] *Ageing and Life-Course: Elder Abuse*, World Health Org., https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019). This article addresses only abuse caused by people known to the senior. Although financial exploitation perpetrated on seniors generally in the form of scams, fraud, and identity theft, is rampant, these issues are beyond the scope of this article. *See, e.g., Money Smart for Older Adults Resource Guide*, Consumer Protection Finance Bureau (Sept. 2018), https://files.consumerfinance.gov/f/documents/201703_cfpb_money-smart-for-older-adults-resource-guide.pdf.

[15] *See* Clarke et al., *supra* note 13 ("A broader view, within the policy context of the protection of vulnerable adults, describes abuse as 'a violation of an individual's civil or human rights by any other person or persons.' However, the definition of elder abuse remains problematic. The very term is seen as failing to reflect the diversity of the phenomenon and the 'mistreatment of older adults' is preferred. It has also been suggested that older adults are less likely to engage with interventions if they have to identify themselves as being 'abused' rather [than] 'mis-

cal, psychological, and sexual, or some combination of these types, and it may be the result of intentional or unintentional neglect.[16]

The prevalence of elder abuse is well-documented. The WHO estimates that 17% of all people aged 60 and older have been subjected to some form of abuse[17]—roughly 141 million people.[18] Due to the difficulty of collecting accurate data and the reluctance of many who have been harmed to report the abuse, most experts believe the figure to be much higher.[19] In the United States, it is estimated that 10% of those over age 65 have been subject to physical, sexual, psychological, verbal, or financial abuse, or to neglect.[20] It is estimated that only 1 in 24 cases of elder abuse comes to the attention of authorities, while only 1 in 44 cases of *financial* abuse is actually reported to authorities.[21]

Despite growing awareness and attention to prevention and effective responses, elder abuse is expected to affect an increasingly large number of people. A comprehensive systematic study of international elder abuse reports found that the global prevalence rate of elder abuse was 15.7%, or about one in six older adults.[22] Worldwide populations continue to age, with a projected worldwide population of 2 billion people over age 60 by 2050.[23] Assuming the prevalence rate remains constant, there will be an

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treated'"); *see also* SHELLY L. JACKSON, UNDERSTANDING ELDER ABUSE: A CLINICIAN'S GUIDE 11 (2018) (noting that comparing international studies is difficult due to differences in definitions, methodologies, and instruments).

16 *Ageing and Life-Course: Elder Abuse*, WORLD HEALTH ORG., https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019).

17 *Abuse of Older People, on the Rise—1 in 6 Affected*, WORLD HEALTH ORG. (June 14, 2017), http://www.who.int/news-room/detail/14-06-2017-abuse-of-older-people-on-the-rise-1-in-6-affected. [hereinafter *Abuse Of Older People on the Rise*, WHO].

18 Yongjie Yon et al., *Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-analysis*, 5 THE LANCET GLOBAL HEALTH 147, 147 (2017).

19 *Abuse Of Older People on the Rise*, *supra* note 17.

20 *Statistics/Data*, NAT'L CTR. ON ELDER ABUSE, https://ncea.acl.gov/whatwedo/research/statistics.html#prevalenceprevalence (last visited Feb. 2, 2019).

21 LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MEDICAL CENTER OF CORNELL UNIVERSITY & NEW YORK CITY DEP'T FOR AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY (May 2011), https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf; *see also Abuse Of Older People on the Rise*, WHO, supra note 17; Arlene Groh & Rick Linden, *Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse*, 23 J. OF ELDER ABUSE & NEGLECT 127, 128 (2011) (Possible reasons for failure to report abuse include dependence on the one committing the harm, shame, fear of suffering additional harm or being confined to a facility, and fear of losing the familial relationship.).

22 Yon et al., *supra* note 18, at 152.

23 *Abuse Of Older People on the Rise*, *supra* note 17.

estimated 330 million victims of elder abuse worldwide by 2050.[24] Only as the aging population has grown to such extreme levels have policy makers, researchers, and other professionals actually begun to grasp the magnitude of the problem, and to consider more effective ways to address and prevent it. In the last ten years, new efforts have been initiated to better understand this phenomenon. Surveys of the problem continue to proliferate, and large datasets are now available to analyze prevention and intervention strategies,[25] the fiscal impact,[26] and the public health consequences of elder abuse.[27]

Elder abuse significantly impacts those involved and the surrounding communities. For example, psychological abuse, the type of abuse most frequently reported, harms a person's well-being and self-worth.[28] Financial abuse may leave the senior without food, shelter, medication, and other basic necessities.[29] Neglect, by defi-

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24 Yon et al., *supra* note 18, at 155.

25 *See, e.g.,* Zach Gassoumis, *Elder Mistreatment Data From Survey to Surveillance*, JUDITH D. TAMKIN SYMPOSIUM ON ELDER ABUSE (Mar. 2, 2018), http://eldermistreatment.usc.edu/wp-content/uploads/2018/03/Elder-Mistreatment-Data.-From-Science-to-Surveillance_Zach-Gassoumis.pdf.

26 *See, e.g.,* THE METLIFE MATURE MKT. INST. ET AL., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* 6 (June 2011), https://vtechworks.lib.vt.edu/bitstream/handle/10919/24184/mmi_elder_financial_abuse_2011.pdf?sequence=1&isAllowed=y.

27 *See, e.g.*, *id*. Simultaneously, new entities are devoted to the study of this phenomenon, including the University of Southern California's Center on Elder Mistreatment and the National Center on Elder Abuse, funded by the federal Administration on Aging. *See* U. of S. Cal., *National Center On Elder Abuse*, U.S.C. CTR. ON ELDER MISTREATMENT, https://eldermistreatment.usc.edu/national-center-on-elder-abuse-ncea-usc/ (last visited Jan 31, 2019); *see also Prevention of Elder Abuse, Neglect & Exploitation*, ADMIN. FOR CMTY. LIVING, https://www.acl.gov/programs/elder-justice/prevention-elder-abuse-neglect-and-exploitation (last visited Feb. 1, 2019). The Administration on Community Living funds the National Indigenous Elder Justice Initiative, dedicated to addressing "the lack of culturally appropriate information and community education materials on elder abuse, neglect, and exploitation in Indian Country." *National Indigenous Elder Justice Initiative*, NAT'L INDIGENOUS ELDER JUSTICE INITIATIVE, https://www.nieji.org/ (last visited Feb. 1, 2019). The U.S. Department of Justice has established an Elder Justice Initiative (EJI) with the goal of supporting the Department's enforcement and programmatic efforts. *Elder Justice Initiative (EJI)*, U.S. Dep't of Just., https://www.justice.gov/elderjustice (last visited Feb. 1, 2019); *Elder Abuse Resource Roadmap–Financial*, THE U.S. DEP'T OF JUST., https://www.justice.gov/elderjustice/roadmap (last visited Feb. 1, 2019). Similar entities are proliferating at the state and local levels. *See, e.g., A Statewide Elder Abuse Prevention Effort*, N.Y. ST. COALITION ON ELDER ABUSE, https://www.nyselderabuse.org/ (last visited August 31, 2018); *see also Elder Justice Coalition*, VERA HOUSE, INC., https://www.verahouse.org/elder-justice-coalition (last visited Feb. 1, 2019).

28 *Abuse Of Older People on the Rise*, *supra* note 17.

29 *Ageing and Life-Course: Elder Abuse*, *supra* note 16, https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019) ("Elder abuse has serious consequences for individuals and society including . . . hospitalization and death.")

nition, is the failure to meet the seniors' needs, and therefore has similar consequences.[30] Physical abuse can cause serious injuries, which can result in expanded use of emergency services, increased hospitalizations, and potentially death.[31] All types of abuse can result in depression, stress, and anxiety, and increased risk of placement in long term care,[32] an issue of grave concern to many seniors. These health consequences require expenditure of scarce resources on treatment and care, resulting in high societal costs.

Characteristics of those being harmed and of those committing harm are relevant when considering effective solutions to elder abuse. Research indicates which populations of older adults are most at risk of elder abuse, with risk being described generally as "vulnerability plus exposure."[33] Older adults with poor physical health and other risks of impairment are at greater risk of abuse,[34] as are those who have poor social support systems.[35] It is estimated that approximately 50% of elders who have dementia have experienced abuse.[36] Other factors increasing the likelihood of abuse include living with a large number of family members[37] and lower income or poverty.[38] Factors increasing the likelihood of financial abuse specifically include non-use of social services, needing assistance with activities of daily living, not having a spouse or partner, being female,[39] and being African-American.[40] One study

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30 XinQi Dong & Melissa A. Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173 JAMA INTERNAL MED. 911, 911 (2013) ("Elders who have experienced abuse are three times more likely to require hospitalization").

31 NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Dong & Simon, *supra* note 30 ("Elders who have experienced abuse are three times more likely to require hospitalization")).

32 *Abuse Of Older People on the Rise*, *supra* note 17.

33 True Link Financial, *The True Link Report on Elder Financial Abuse 2015* at, 1 (Jan. 2015), https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf

34 *Statistics/Data*, NATIONAL CENTER ON ELDER ABUSE, *supra* note 27; NAT'L CTR. ON ELDER ABUSE, *supra* note 22 (citing Claudia Cooper & Gill Livingston, *Intervening to Reduce Elder Abuse: Challenges for Research*, 45 AGE AND AGEING 184, 184–85 (2016)).

35 NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Bruce Friedman, et al., *Longitudinal Prevalence and Correlates of Elder Mistreatment Among Older Adults Receiving Home Visiting Nursing*, 27 J. OF ELDER ABUSE AND NEGLECT 34 (2015)).

36 NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Kathleen Quinn & William Benson, *The States' Elder Abuse Victim Services: A System in Search of Support*, 36 GENERATIONS 66, 66 (2012)).

37 NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Bruce Friedman, et al., *Longitudinal Prevalence and Correlates of Elder Mistreatment Among Older Adults Receiving Home Visiting Nursing*, 27 J. OF ELDER ABUSE AND NEGLECT 34 (2015)).

38 NAT'L CTR. ON ELDER ABUSE, *supra* note 27.

39 Charles P. Sabatino, *Legal Basics: Elder Financial Exploitation*, NAT. CTR. ON L. & ELDER RIGHTS 3 (2018), https://ncler.acl.gov/pdf/Legal%20Basics-Elder_Financial_Exploita

found that those who are "extremely friendly" experience financial losses at a rate four times greater than those with a more average degree of friendliness.[41]

Burgeoning research also offers insight into those who commit the harm, most of whom are adult children or spouses.[42] They are more likely to have a criminal history, to have a former or current substance abuse problem, to have health problems of their own, to be socially isolated, and to be unemployed or facing financial challenges.[43] Other than family members, those most likely to financially exploit seniors are friends, neighbors, and home health aides.[44] Research is limited regarding the demographics and situations of those committing specific kinds of harm, but there is increasing awareness that they are a heterogeneous group with notable patterns, associating characteristics of the person committing the harm with the specific type of abuse.[45]

Research efforts are currently underway to further develop theories explaining the causes of elder abuse. Current theoretical explanations include: 1) caregiver stress; 2) ecological theory;[46] 3)

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tion_Chapter_Summary.pdf (citing RUIJIA CHEN & XINQI DONG, ELDER ABUSE: RESEARCH, PRAC. AND POL'Y 93 (2017)); *but see*, True Link Financial, *supra* note 33, at 21 (stating that it "found no correlation between gender and exploitation").

40 NAT'L CTR. ON ELDER ABUSE, *supra* note 20; NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Janey C. Peterson, et al., *Financial Exploitation of Older Adults: A Population-based Prevalence Study*, 29 J. OF GEN. INTERNAL MED.1615 (2014)).

41 True Link Financial, *supra* note 33 ("A possible explanation is that seniors facing cognitive changes do not experience lack of trustworthiness the same way as others").

42 NAT'L CTR. ON ELDER ABUSE, *supra* note 20 (citing Karl A. Pillemer & Mark S. Lachs, *Elder Abuse*, *373* NEW ENG. J. OF MED. 1947 (2015)); *see also* Clarke et al., *supra* note 13 (finding that most perpetrators are adult children).

43 NAT'L CTR. ON ELDER ABUSE, *supra* note 20 (citing Karl A. Pillemer & Mark S. Lachs, *Elder Abuse*, *373* NEW ENG. J. OF MED. 1947 (2015)); *see also* Clarke et al., *supra* note 13 (finding that most perpetrators are adult children).

44 *Id*. (citing Janey C. Peterson, et. al., *Financial Exploitation of Older Adults: A Population-based Prevalence Study*, *29* J. OF GEN. INTERNAL MED.1615 (2014)). One study found that 44% of those committing harm against older people either witnessed or experienced childhood family violence and between 20–50% of those committing harm had substance abuse problems. *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 272–73.

45 *See, e.g.*, Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 266 (concluding that, for example, neglect is most frequently committed by adult children while physical and psychological abuse are most frequently at the hands of a partner or spouse).

46 Ecological theory adopts the view that individuals are "embedded in a series of environmental systems that interact with one another and with the individual to influence personal development and life experiences;" Karen A. Roberto & Pamela B. Teaster, *Theorizing Elder Abuse*, ELDER ABUSE: RESEARCH, PRACTICE AND POLICY 21, 25 (XinQi Dong ed., 2017). *See also* Nancy Darling, *Ecological Systems Theory: The Person in the Center of the Circles*, 4 RESEARCH IN HUM. DEV. 203, 204 (2007).

the life course perspective;[47] 4) feminist perspectives; 5) the National Academies of Science ("NAS") "Elder Mistreatment Framework;"[48] and 6) a human rights perspective.[49] Given the heterogeneity of those committing the abuse, some argue that the theory, and intervention, should target the motivation of the abuser and the context.[50]

III. Current Strategies to Address Elder Abuse

The complexities of elder abuse and exploitation present challenges for identifying successful potential interventions. Traditional legal remedies are law enforcement, prosecution, and civil action. However, many seniors do not want to pursue these options. This is understandable when considering that a large percentage of perpetrators are family members. For example, a grandmother, may not want to feel responsible for her grandson going to prison.[51] Additionally, she may be reluctant to participate due to the trauma *she* may experience through the prosecution process. Some older people may experience guilt about their need to depend on others for their care and daily needs, or feel shame that one of their own adult children or a family member would treat them with such disrespect. As mentioned above, many older people are dependent on the very people who are committing the

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47 The life course perspective focuses on periods of stability and transition and the many factors that affect them. *See* Darling *supra* note 46 at 26.

48 This theory focuses on elders in relationship to others, acknowledging that the elder and the person committing the harm are embedded in a social context. *See* Darling, *supra* note 46 at 27–28.

49 These rights include "dignity, respect for persons, and equality of social status." Darling *supra* note 47 at 28; *see also* Sidney M. Stahl, *A General Field Theory of Elder Abuse: It's Not Rocket Science, It's Harder*, Judith D. Tamkin Symposium on Elder Abuse (March 1, 2018), http://eldermistreatment.usc.edu/wp-content/uploads/2018/03/A-General-Field-Theory-of-Elder-Abuse.-Its-not-Rocket-Science-Its-Harder_Sid-Stahl.pdf.

50 *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 276.

51 *See* Cythnia Moore & Colette Browne, *Emerging Innovations, Best Practices, and Evidence-Based Practices in Elder Abuse and Neglect: A Review of Recent Developments in the Field*, 32 J. Family Violence 383, 389 (2017) (citing Mara Schecter & Donna Dougherty, *Combating Elder Abuse Through a Lawyer/Social Worker Collaborative Team Approach: JASA Legal/Social Work Elder Abuse Prevention Program (LEAP)*, 10 Care Mgmt. J. 71, 71 (2009) (noting that many vulnerable elders feel shame and do not want to pursue action against family members who are committing harm)); *see also* Lori A. Stiegel, *Elder Abuse Victims' Access to Justice: Roles of the Civil, Criminal and Judicial Systems in Preventing, Detecting, and Remedying Elder Abuse*, *in* Elder Abuse: Research, Practice & Policy 343, 344 (XinQi Dong ed., 2017) (listing an array of factors for why elders do not report abuse).

harm.[52] The older person may be grateful for the assistance these family members provide because it enables her to live independently and she may not want to risk damaging that relationship. This abuse may be seen as a relatively small price to pay for the ability to live independently, and although fully aware of the exploitation and other abuse occurring, she may reasonably choose to ignore it. These are just some of the considerations for an older person when deciding whether to utilize a traditional remedy for the abuse.

A. *Law Enforcement and Prosecution*

Historically, perpetrators of elder abuse were characterized as overwhelmed caregivers needing support.[53] As a result, protective services programs became the leading interveners.[54] Research in the 1980s and 1990s concluded that while abuse *may* be the result of caregiver stress, often it is due to "abuser psychopathology."[55] Consequently, interventions transitioned from a child protective model to one based upon domestic violence, resulting in more frequent criminal justice responses.[56]

In the past, prosecution was limited. Few cases were referred for prosecution, and even fewer were prosecuted.[57] The cases were difficult,[58] and included criminal offenses or legal issues which prosecutors and law enforcement were not trained to address, required expert testimony, and demanded analysis of extensive financial records.[59] Additionally, the nature of the offense often allowed the abuse to go undetected for a significant amount of

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52 *See* Stiegel, *supra* note 51. *But see* Clarke et al., *supra* note 13, at 214 (describing the relationship between senior and perpetrator as interdependent).

53 *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 267.

54 *See id*.

55 *See id*.

56 *See id*.

57 *See id*. (noting that historically, elder abuse has not been considered criminal)

58 *See id*. at 276.

59 *See* Page Ulrey, *Confusion on the Front Lines: The Response of Law Enforcement and Prosecutors to Cases of Elder Abuse* (2016), https://www.acl.gov/sites/default/files/programs/2016-09/Ulrey_White_Paper.pdf (last viewed Mar. 27, 2019); *see also* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 268 (finding that certain categories of cases, including physical abuse cases and cases involving physical abuse and financial exploitation, are more likely to be prosecuted).

time, and securing reliable testimony became more difficult when the older person exhibited diminishing capacity.[60]

In recent years, efforts have been made to address these prosecutorial limitations. The Elder Abuse Prevention and Prosecution Act of 2017 requires that training be provided at the federal level to assist in the investigation and prosecution of elder abuse cases.[61] Among other things, it requires enhanced support for prosecutors handling these cases, data collection, and a multi-pronged approach to prevention, protection of seniors, and prosecution of those doing the harm.[62] Additionally, training materials for prosecutors have proliferated,[63] particularly as federal grant monies have become available for this purpose. As one scholar comments, "the historical denial of elder abuse as a crime has fueled the current enthusiasm for prosecution [and] [c]alls for increasing rates of prosecution abound."[64] These training and advocacy efforts are augmented by successes in several high-profile cases.[65] Today, district attorneys' offices are more willing to pursue cases of elder exploitation and abuse,[66] and some advocates argue for yet more aggressive prosecution.[67]

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60 *See*, *e.g.*, MARY JOY QUINN & SUSAN K. TOMITA, ELDER ABUSE & NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTIONAL STRATEGIES 286 (2d ed. 1997); *The Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*, 30 STETSON L. REV. 1273, 1273 (2001).

61 *See* 34 U.S.C. § 21711(a)(1) (2018) (for a full summary of the legislation, *see* https://www.congress.gov/bill/115th-congress/senate-bill/178 (last visited Feb. 4, 2019)).

62 *See* 34 U.S.C. § 21711(a)(2) (2018). It charges the United States Department of Justice ("DOJ") with providing information, training and technical assistance to state and local law enforcement agencies, and periodic reporting of efforts to address the problem. *See* 34 U.S.C. § 21711(b) (2018).

63 *See, e.g.,* NATIONAL CENTER FOR STATE COURTS, PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES, https://www.bja.gov/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf (last visited Feb. 4, 2019); *Prosecutors*, U.S DEP'T OF JUST., ELDER JUSTICE INITIATIVE, https://www.justice.gov/elderjustice/prosecutors (last visited Feb. 4, 2019) (includes training videos, sample pleadings and other documents, research, and selected statutes); AEQUITAS, THE PROSECUTORS' RESOURCE: ELDER ABUSE (2017), https://aequitasresource.org/wp-content/uploads/2018/09/Prosecutors-Resource-on-Elder-Abuse.pdf; *How to Overcome Barriers to Successful Investigation and Prosecution of Elder Abuse Cases: Webinar Notes*, JUSTICE CLEARINGHOUSE (June 22, 2017), https://justiceclearinghouse.com/resource/overcome-barriers-successful-investigation-prosecution-elder-abuse-cases-webinar-notes/ (last visited Feb. 4, 2019).

64 Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 276.

65 *See e.g.*, *People v. Marshall*, 961 N.Y.S.2d 447 (App. Div. 2013); *see also Pub. Adm'r v. Beth Israel Med. Ctr.* (*In re Clark*), 2017 N.Y. LEXIS 1305, at *1 (N.Y. May 9, 2017).

66 *See* Arlene D. Luu & Bryan A. Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 CORNELL J. L. & PUB. POL'Y 165, 180–81 (2005) (illustrating California's increased willingness to pursue elder abuse prosecution).

67 *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 276.

However, prosecution is of limited usefulness. First, a large percentage of elder abuse cases are unreported.[68] Additionally, not all elder abuse cases rise to the level of a criminal offense.[69] Also, because the perpetrator is often a family member or caregiver, some seniors do not want to see those same people face the threat of incarceration,[70] and a successful prosecution usually requires participation of the person harmed.[71] Some seniors, because of denial, disbelief, fear, or lack of understanding that the abuse is occurring, may not want to address the problem at all. Finally, some of those who have been harmed by elder abuse have diminishing capacity, rendering prosecution more challenging.[72]

The threat of prosecution has minimal impact as a deterrent because even convicted abusers often return to the person they harmed.[73] Scholars argue that criminal justice interventions have not been effective in reducing recidivism in the intimate partner violence context and therefore are unlikely to be effective in addressing elder abuse.[74] Another concern is the revictimization of persons harmed, and the disempowering impact of prosecution.[75]

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68 *See supra* note 21; *see also Abuse Of Older People on the Rise*, WHO, supra note 17.

69 *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 276.

70 Shelly L. Jackson & Carrie F. Mulford, *The Complexity of Responding to Elder Abuse Demands the Use of Multidisciplinary Teams,* NCCD BLOG (Oct. 30, 2013), https://www.nccdglobal.org/newsroom/nccd-blog/complexity-responding-elder-abuse-demands-use-multidisciplinary-teams (Noting the complexity of the relationship between the person committing the harm and the person harmed, researchers have acknowledgedthat often the cases "typically involve long-standing, co-dependent relationships in which the dyad has no desire to be separated").

71 *See* Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L. J. 305, 322 (2003); *see also* Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 32 (2002).

72 Barry Kozak, *The Forgotten Rule of Professional Conduct–Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827, 857 (2016); *see also* AM. BAR ASS'N COMM'N ON L. & AGING & AM. PSYCH. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHING CAPACITY: A HANDBOOK FOR LAWYERS (2005)) https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf (last visited Feb. 4, 2019).

73 *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 276.

74 *See id*.

75 *See id*.

B. *Civil Remedies*

Theoretically, traditional civil remedies are also available to those who have been harmed. These remedies include pursuing litigation against the perpetrator by alleging undue influence, unjust enrichment, breach of contract, breach of fiduciary duty, rescission, or fraud, and by pursuing actions seeking orders of protection, restitution, injunctive relief, damages, or declaratory relief.[76] In recent years, resources for advocates, such as training and resource materials, have proliferated, and include those offered by the National Center on Elder Abuse[77] and the National Clearinghouse on Abuse in Later Life.[78]

Civil suits against those abusing and exploiting seniors carry some of the same challenges as criminal prosecutions. First, it may take many months, even years, to identify that the abuse is happening or has occurred, resulting in diminished memories and insufficient documentation. The senior may be reluctant to pursue litigation, despite acknowledging that it does not involve jail time. Gathering evidence remains difficult, particularly in matters of financial exploitation that may involve securing and examining large volumes of documents.[79] Often the stolen money is spent or the property is sold long before the litigation begins,[80] limiting the amount of compensation a senior may recover if her claim is successful. Finally, litigation is a famously slow process, a problem further aggravated by the inevitable aging of the person harmed.

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76 *See* Sabatino, *supra* note 39, at 6–7; *see also* Lori A. Stiegel, *Legal Basics: Elder Abuse*, NAT'L CTR. ON L. & ELDER RTS. 4 (2017), https://ncler.acl.gov/pdf/Legal-Basics-Elder-Abuse.pdf.

77 *Legal Training*, NAT'L CTR. ON L. & ELDER RTS., https://ncler.acl.gov/Legal-Training.aspx (last visited Feb. 4, 2019).

78 *For Trainers*, THE NAT'L CLEARINGHOUSE ON ABUSE IN LATER LIFE, https://www.ncall.us/for-trainers// (last visited on Jul. 31, 2019).

79 *See* Sabatino, *supra* note 39, at 6–7. This problem is aggravated by the lack of subpoena power until after the lawsuit is filed.

80 The challenge of obtaining any lost resources is even more difficult when the person who committed the harm has a substance abuse and/or mental health problem. The National Elder Mistreatment Study concluded that 21–51% of known perpetrators had a drug or alcohol problem and 19–28% had a history of receiving mental health treatment. *See* Travis Labrum & Phyllis L. Solomon, *Elder Mistreatment Perpetrators with Substance Abuse and/or Mental Health Conditions: Results from the National Elder Mistreatment Study*, 89 PSYCHIATRIC Q. 117, 121–22 (2018); Jackson, *All Elder Abuse Perpetrators Are Not Alike, supra* note 13, at 272–73; *see also supra* note 20.

C. *Multi-Disciplinary Teams*

Given the need for "collaboration, cooperation, and communication" among the professionals involved in elder abuse cases,[81] one modern approach is the use of Multidisciplinary Teams ("MDTs"). MDTs are groups of professionals who collaborate to review incidents of elder abuse and pool their collective resources to develop a plan of action.[82] They provide consultations to service providers, identify service gaps, advocate for change, offer trainings, and facilitate coordinated investigations.[83] Team members typically include aging services personnel, adult protective services representatives, civil attorneys, criminal justice participants, health care representatives, and victim advocates.[84]

The DOJ's Multidisciplinary Team Technical Assistance Center provides consultation and training on the establishment of MDTs, and produces materials.[85] It describes the predominant characteristics of MDTs as: 1) shared decision-making; 2) partnership; 3) interdependency; 4) balanced power; and 5) process.[86] Advantages of MDTs include enhanced evidence gathering, support for the person who has been harmed, and collaboration to encourage that person's participation in the investigation and potential prosecution.[87] Although MDTs report successful interdisciplinary collaborations, more evaluation is needed to assess their effectiveness and develop a consensus of appropriate goals and outcomes for this approach.[88] Despite these limited improvements, traditional criminal and civil remedies remain largely inadequate to address the complex nature of elder abuse.[89]

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81 *See How to Overcome Barriers to Successful Investigation and Prosecution of Elder Abuse Cases: Webinar Notes*, JUSTICE CLEARINGHOUSE (June 22, 2017), https://justiceclearinghouse.com/resource/overcome-barriers-successful-investigation-prosecution-elder-abuse-cases-webinar-notes/ (last visited Feb. 4, 2019).

82 *See About the MDT TAC*, U.S. DEP'T OF JUST., ELDER JUSTICE INITIATIVE, https://www.justice.gov/elderjustice/mdt-tac. (last visited Feb. 4, 2019).

83 *See* Georgia J. Anetzberger, *Elder Abuse Multidisciplinary Teams*, *in* ELDER ABUSE: RESEARCH, PRACTICE AND POLICY 417, 423–24 (XinQi Dong ed., 2017).

84 *See id*.

85 *About the MDT TAC*, *supra* note 82.

86 *Introduction to Multidisciplinary Teams*, U.S. DEP'T OF JUST., ELDER JUST. INITIATIVE, https://www.justice.gov/elderjustice/1-introduction-multidisciplinary-teams (last visited Feb. 4, 2019) (For descriptions of other MDT models, *see* Moore & Browne, *supra* note 51, at 391–93).

87 Jackson & Mulford, *supra* note 70. One study found a relationship between multi-disciplinary services and a reduction in mistreatment risk. Moore & Browne, *supra* note 51.

88 *See* Anetzberger, *supra* note 83, at 427; *see also* Moore & Browne, *supra* note 51, at 392.

89 Finally, there is some evidence that "traditional" legal options are not even explored with some seniors who have been harmed. *See generally* Clarke et al., *supra* note 13 (finding that

IV. Overview of Restorative Principles and Selected Models

This Part offers a foundational discussion of basic restorative principles before considering their application to elder abuse. The literature in this field has expanded exponentially in recent years, particularly as policymakers consider alternatives to the current criminal justice system and the large number of incarcerated offenders in the United States.[90] However, the application of restorative principles expands far beyond the criminal justice system, as scholars and practitioners consider their application in diverse contexts that include even the development of restorative institutions and communities.[91] Advocates, policy-makers, and funders should initiate and implement projects applying restorative principles to elder abuse.

A. *Restorative Justice Generally*

Definitions of restorative justice abound. Howard Zehr, referred to as "the grandfather of restorative justice"[92] and author of *The Little Book of Restorative Justice*, one of the early texts in the field, defines it as "an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible."[93] Re-

decisions regarding how to address elder abuse were made *for* seniors, not *by* seniors, and that the harmed seniors frequently were not informed about the process, likelihood of success, and consequences). In Part V, this article will outline alternative remedies, acknowledging that the theoretical framework will inform approaches and criteria for identifying which remedies may be useful in which situations.

90 *See generally* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587 (2012) (examining the proliferation of specialized criminal courts and their effect on increasing rates of incarceration); *see also* Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. Dep't of Just. 1, https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

91 *See, e.g.,* Center for Justice Reform Conferences, *International Restorative Justice Conference: Global Unity and Healing, Building Communities with a Restorative Approach*, Vt. L. Sch. (June 28–30, 2018), https://www.vermontlaw.edu/academics/centers-and-programs/center-for-justice-reform/conference/international-restorative-justice-conference (focusing on three themes—environmental justice; building safe, healthy and inclusive communities; and addressing harm and conflict).

92 Howard Zehr et al., *The Little Book of Restorative Justice: Revised and Updated* 108, 108 (Good Books, 2nd ed. 2015).

93 *Id*. at 50.

storative justice is based upon three principles: 1) "Wrongdoing is a violation of people and of interpersonal relationships;" 2) "Violations create obligations;" and 3) "The central obligation is to put right the wrongs, i.e. to repairs the harms caused by wrongdoing."[94] Acknowledging that restorative justice practices have proliferated, he writes that "[r]estorative justice is not a map . . . . but can be seen as a compass offering direction. At a minimum, it is an invitation for dialogue and exploration."[95] It expands stakeholders to include the community, which is inevitably harmed as well, and focuses on the needs of the person harmed, the person who committed the harm, and the community.[96]

More specifically, restorative justice includes a dialogue that focuses on facts and emotions, and addresses what happened in the past, what things are like now as a result of that experience, and what participants want for the future.[97] Essential components of the process include voluntariness, respect, honest communication, a desire to repair harms, and accountability for the harms.[98] It is "a process that has empathy at its heart,"[99] with a primary goal being to "reduce the social distance or 'gap' that results from crime."[100]

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94 *Id*. at 30–31.

95 *Id*. at 19.

96 *Id*. at 23. Zehr suggests that the following six questions must be asked when a wrong occurs, and thus they form the essence of restorative justice: 1) Who has been harmed? 2) What are their needs? 3) Whose obligations are these? 4) Who has a stake in this situation? 5) What are the causes? and 6) What is the appropriate process to involve stakeholders in an effort to put things right and address underlying causes? *Id*. at 51.

97 *See* Andrea Păroşanu, *Elder Harm and Restorative Practices: A Literature Review*, 6 Occasional Papers in Restorative Just. Prac. 1, 13 (2017), https://www.wgtn.ac.nz/__data/assets/pdf_file/0003/1311870/Occasional-papers-restorative-justice-elder-harm.pdf.

98 *See id*. at 19–20.

99 Pete Wallis, Understanding Restorative Justice: How Empathy Can Close the Gap Created by Crime 6 (Policy Press 2014).

100 *Id*. at 2. Wallis also identifies different forms of the restorative processes in the criminal context, including "pure restorative justice," where the parties organically resolve the issues independently; "street restorative justice interventions," where the police utilize restorative processes in the immediate aftermath of a crime; and pre-court restorative justice, offered as an alternative to the criminal justice system. *Id*. at 42–44. As the application of restorative justice has expanded, so has the language used to describe the activities and models. Today, the term "restorative practice" is used to describe "a process that be used anywhere to prevent conflict, build relationships and repair harm by enabling people to communicate effectively and positively." *What is restorative justice?*, Restorative Justice Council, https://restorativejustice.org.uk/what-restorative-justice (last visited Feb. 14, 2019).

It can "involve both a proactive approach to preventing harm and conflict and activities that repair harm where conflicts have already arisen." *Id*.

Consistent among all definitions and descriptions of a restorative approach is its emphasis on relationships.[101] The goal is to foster relationships based upon respect, concern, and dignity, and to facilitate those relationships to function in a positive way.[102] However, practitioners and scholars alike express frustration with the focus on descriptive definitions.[103] Scholar Jennifer Llewellyn focuses instead on restorative justice's underlying "relational theory of justice" and emphasizes that restorative justice's strength "lies with its relational approach and the understandings it offers about needs and capacities of human beings, the institutions, systems, practices, processes and policies in and through which we can flourish."[104]

While a complete history of the evolution and development of restorative justice principles is beyond the scope of this discussion, it is important to acknowledge their roots in indigenous communities,[105] most notably among the Navajo and Maori.[106] Although the Navajo people were not the only Native American tribe to utilize restorative processes,[107] their peacemaking process has been

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101 *See* Jennifer J. Llewellyn et al., *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 36 DALHOUSIE L. J. 281, 296–97 (2013).

102 *See* Jennifer J. Llewellyn, *Restorative Justice: Thinking Relationally About Justice*, BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW AND POLICY 89 (Jocelyn Downie & Jennifer J. Llewellyn eds., 2011).

103 Zehr, *supra* note 92, at 49; *see also* Llewellyn et al., *supra* note 101 (suggesting that most discussions of restorative justice focus on descriptions of the processes, and not on the underlying theory and articulating a "relationship theory of justice").

104 Llewellyn, *supra* note 102. With this as a backdrop, she describes the essential principles of restorative approaches as relationship focused, participatory, inclusive, comprehensive and holistic, and forward looking. *See* Llewellyn et al., supra note 101, at 282 (Other descriptive terms include "community-based, informal, dialogical . . . and egalitarian." *Id*. at 283). *See also* Restorative Justice Council, *Principles of Restorative Practice*, https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%20of%20restorative%20practice%20-%20FINAL%2012.11.15.pdf (last visited Oct. 11, 2019) (describing the principles of restorative practice—restoration, voluntarism, neutrality, safety, accessibility, and respect). *But also* Zehr, *supra* note 92, at 14–15 (writing that although he acknowledges the term "justice" can be limiting, he chooses to use it so as not to "lose awareness of the justice dimension").

105 Jon'a F. Meyer, *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. OF CONTEMPORARY CRIM. JUST. 42, 43 (1998).

106 *Id*.

107 *See id*. at 44–45 (noting the practices of the Iroquois, Karok, and Ojibway tribes among others); *see also*, Robert V. Wolf, *Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?*, CTR. FOR CT. INNOVATION 3 (2012), https://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf (citing Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUMAN RIGHTS L. REV. 235 (1997) (noting the use of peacemaking among tribes in the U.S. Southwest, but also in the Pacific Northwest, the Plains, the Southeast, Alaska, and Hawaii)).

broadly adapted.[108] Instead of judging the participants, the process addresses the "consequences of such actions and substitutes healing in place of coercion."[109] In 1992, the Navajo formally established the Peacemaker Court which incorporates traditional Navajo law into its tribal court system.[110] Other tribes similarly have begun reconstructing their traditional justice systems, all with problem-solving as a core component with a focus on future, not past, events.[111] Beginning in the 1990s, prominent judges and scholars began suggesting the adaptation of native justice models to the U.S. justice system.[112] At most, these peacekeeping models used in state court and other dispute resolution contexts are described as "inspired" by Navajo traditions, but not "considered replications of Native peacemaking."[113]

Somewhat akin to the Navajo, the Maori people's legal system is based on relationships and "on mutual expectations and collective responsibility with the goal of avoiding dispute."[114] This unwritten "customary law" derives its essence from spiritual, economic, political, and social principles which enables it to be flexibly applied to a variety of disputes.[115] Although all Maori communities utilize restorative principles to resolve disputes, specific practices may vary from community to community.

Today, New Zealand law incorporates restorative practices and some of the values fundamental to indigenous communities.[116] This process began after a study of New Zealand's child protection system concluded that current governmental practices had elimi-

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108 Meyer, *supra* note 105, at 44–45 (noting the practices of the Iroquois, Karok, and Ojibway tribes).

109 Jud. Branch of the Navajo Nation, *Peacemaking: A Guide to the Peacemaking Program of the Navajo Nation*, 1 (Sept. 2004), http://www.navajocourts.org/Peacemaking/peaceguide.pdf (explaining that by solving their own problems in peacemaking, people replace coercive decisions such as punishment to correct behavior).

110 Wolf, *supra* note 107, at 1.

111 *Id*. at 1–3.

112 *Id*. at 1–2 (noting support from then-Attorney General Janet Reno, then-U.S. Supreme Court Justice Sandra Day O'Connor, and leaders at the U.S. Justice Department).

113 Erika Sasson & Nora Sydow, *Inspired by Peacemaking: Creating Community-Based Restorative Programs in State Courts*, CTR. FOR CT. INNOVATION vi (2017), https://www.courtinnovation.org/sites/default/files/documents/Inspired_by_Peacemaking.pdf.

114 Stephanie Vieille, *Maori Customary Law: A Relational Approach to Justice*, 3 THE INT'L INDIGENOUS POL'Y J. 1, 2 (2012).

115 *Id*. at 3–4. *Tikanga Maori*, "the Maori way of doing things," is about relationships and kinship, central to the culture, which results in seeing crime as a breakdown in relationships, for which there is a collective responsibility. *Id*. at 6.

116 *See id*. at 2.

nated Maori self-determination.[117] In response to this finding, New Zealand created a new child protection system. It adopted a Family Group Conferencing Model adapted from Maori tradition that provided for native communities to have a voice in this process; however, the process was not *developed* by the Maori people.[118] As the New Zealand government adapted these native practices, it exerted control over how and when they were used, resulting in criticisms that it had reduced the Maori's complex, customary law to codes and fixed practices.[119]

Following the incorporation of family group conferencing into New Zealand's youth justice system, New Zealand later adapted the model to address school disciplinary issues and adult offenders.[120] Since then, the use of restorative principles has continued and expanded throughout the world. For example, peacemaking circles are used in the United States, most notably in local courts to address juvenile offender issues, as a diversion program to prevent youth offenders from entering the criminal justice system, and to address parenting issues.[121] Restorative principles are now applied to disputes in residential settings and in nursing facilities; in campus abuse situations; among sports teams; regarding corporate reg-

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117 EdX, Online Course, *supra* note 11; Allan Cooke, State Responsibility for Children in Care 204–205 (Dec. 17, 2013) (unpublished Ph. D. thesis, University of Otago) (on file at https://ourarchive.otago.ac.nz/bitstream/handle/10523/4796/CookeAllanJ2014PhD.pdf?sequence=1&isAllowed=y)]. This transformation occurred following a 1986 examination of social issues impacting Maori children and the government's removal of children from their families and homes, and placing them in foster care and institutions. In response to this study, which included a listening component with members of Maori communities, the New Zealand government acknowledged the lack of Maori self-determination.

118 EdX, Online Course, *supra* note 11; *see also* Vieille, *supra* note 114.

119 Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology and Critical Appraisal*, 23 WILLAMETTE J. INT'L L. & DISP. RESOL. 335, 347 (2016) (citing Matt Hakiaha, What is the State's Role in Indigenous Justice Process?, *Critical Issues in Restorative Justice* 355 (Howard Zehr & Barb Toews eds., 2004)). *See also* Donna Coker, *Restorative Justice: Navajo Peacemaking and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67, 71–72 (2006) (quoting Robert Yazzie, *Navajo Peacemaking and Intercultural Dispute Resolution*, INTERCULTURAL DISP. RESOL. IN ABORIGINAL CONTEXTS 104–15 (Catherine Bell & David Kahane eds., 2004)). Some criticize the efforts to tie New Zealand's use of restorative principles to Maori customary law, noting that current restorative practices "reveal[ ] a lack of understanding of the cultural, social, and spiritual principles that underpin Maori society and its approach to justice." Vielle, *supra* note 114, at 11 (citing Matt Hakiaha, What is the State's Role in Indigenous Justice Process?, *Critical Issues in Restorative Justice* 358 (Howard Zehr & Barb Toews eds., 2004)).

120 EdX, Online Course, *supra* note 11; *see also* Vieille, *supra* note 114.

121 *See* Sasson & Sydow, *supra* note 113, at 19.

ulatory compliance, staffing conflicts and employment grievances; and among communities and neighborhoods.[122]

B. *Descriptions of Selected Restorative Practice Models*

Numerous conflict resolution models incorporate restorative principles, all based on the fundamental importance of dialogue.[123] There are three main dialogue-based models: 1) Circle processes; 2) Family Group Conferences; and 3) Victim-Offender Mediation.[124] All models include preparation of the parties, attention to interconnecting relationships, third party participation, facilitator guidance, an emphasis on story-telling, listening and being heard, and practical agreements.[125] Because Victim-Offender Mediation focuses on those already convicted,[126] it is less likely to be a viable remedy for elder abuse.[127]

Beyond having these basic characteristics, restorative practice models are difficult to categorize; programs have unique features appropriate to particular situations and communities, "making clear distinctions between them difficult."[128] As Zehr writes, the "restorative justice field is becoming too diverse to capture it in any simple classification," an issue further compounded by blended models.[129] The outline below describes selected restorative models and then considers their use in the elder abuse context, where they

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122 The principles are also utilized to resolve environmental problems and social issues. See e.g., International Restorative Justice Conference, *supra* note 91. A well-known example of a restorative process in the political realm is in the South African Truth and Reconciliation Commission. *Id*.

123 Mark S. Umbreit & Ted Lewis, *Victim Offender Mediation Training Manual: A Composite Collection of Training Resource Materials*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 19 (2015), http://rjp.umn.edu/sites/g/files/pua5026/f/media/victim-offender-mediation-manual.pdf.

124 Zehr, *supra* note 92, at 58. *See also* Umbreit & Lewis, *supra* note 123.

125 Umbreit & Lewis, *supra* note 123, at 20. Other components include voluntariness, safety, acceptance of all, and respect. *Id*. at 19.

126 *See generally*, Lorraine Stutzman Amstutz, *The Little Book of Victim Offender Conferencing: Bringing Victims and Offenders Together in Dialogue*, THE BIG BOOK OF RESTORATIVE JUSTICE 117 (2015).

127 Therefore, it will not be addressed further in this article. For more information on Victim Offender Mediation, *see* Bradshaw & Umbreit, *supra* note 8 at 17; Umbreit & Lewis, *supra* note 123, at 40. *See* Amanda Dissel & Kindiza Ngubeni, *Giving Women Their Voice: Domestic Violence and Restorative Justice in South Africa*, CTR. FOR THE STUD. OF VIOLENCE & RECONCILIATION 1 (2003), http://www.csvr.org.za/docs/crime/givingwomenvoice.pdf. (discussing specific projects); *see also* Bradshaw & Umbreit, *supra* note 8, at 19.

128 Zehr, *supra* note 92, at 57.

129 *Id.*

may be particularly useful for repairing relationships, with the assistance of relevant support persons and community interventions.[130]

1. Peacemaking

The restorative practice holding the most promise for addressing elder abuse is peacemaking. Peacemaking involves not only the person harmed and the person who committed the harm, but also potentially includes family, friends and the larger community, signifying that disputes between two people negatively impact the entire community.[131] Typically, the peacemaking process offers all participants opportunities to speak, often with a "talking piece" or similar instrument designating the person authorized to speak at a given time.[132] Peacemaking circles typically involve four stages: 1) screening for appropriateness; 2) meetings with the involved parties and others to prepare for the session; 3) the circle process itself, hopefully leading to a resolution; and 4) implementation of the resolution plan.[133] There is no search for truth.[134] Instead, the goal is "a consensus decision that focuses on healing and restitution, not punishment."[135]

As is true with other restorative models, peacemaking circles are being implemented in a variety of non-Native settings, addressing, for example, adult and juvenile criminal matters, school disciplinary matters and related disputes, family law issues,[136] child protective cases, and guardianships.[137] In recent years, the New York State Center for Court Innovation has championed peacemaking as an alternative to the adversarial justice system, and sup-

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130 Because of the considerable debate regarding characterizing mediation as a restorative practice, it will be addressed separately.

131 *Peacemaking Program: Plan of Operations* 1,11 (2013), http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf.

132 Beck et al., *supra* note 5, at 224.

133 For more details on the peacemaking process, *see* Yvon Dandurand & Curt T. Griffiths, Handbook on Restorative Justice Programmes, U.N. Off. on Drugs & Crimes 1, 23 (2006), https://rm.coe.int/16806f4722.

134 Beck et al., *supra* note 5, at 224.

135 Wolf, *supra* note 107, at 7. In the Native tradition, the peacemaker is a community elder, respected and knowledgeable, whose "leadership depends on respect and persuasion." *Id*. at 3. The native peacemaker has also been described as a combination of "leader, teacher, and healer." Judicial Branch of the Navajo Nation, *Peacemaking Program: Plan of Operations* 1, 9 (2013), http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf.

136 *See* Daicoff, *supra* note 9, at 429.

137 *See* Deborah Thompson Eisenberg, *White Paper: What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 254–55 (2016).

ported the development of programs through funding and technical expertise.[138]

One example of the peacemaking process was developed in the Cook County, Illinois family court, which used it to address parenting issues, and found it particularly useful for resolving issues between unmarried parents.[139] Among the positive attributes of the process were its ability to incorporate the voices of supportive extended family members, its ability to foster positive communication between the parties following the resolution of the immediate issue, and the emphasis on self-enforced accountability.[140] In describing its use in family law, Susan Daicoff writes that the "Circle process can reduce anxiety, slow down the participants' interactions, reduce hostility, create a community within the participants, communicate mutual respect for all present, and unify them in common values and goals."[141]

2. Family Group Conferencing

Another restorative model used in a variety of contexts is family group conferencing, which also involves the individuals as well support people, extended family, and community members.[142] Often used in the child welfare context, it has been described as a "decision-making model that focuses on the family and its social network, and which aims to gather all parties with an interest in the wellbeing of a child and his or her family to make a family group

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138 *See* Sasson & Sydow, *supra* note 113, at 1. A specific example of the circle process is sentencing circles, which bring together both parties, participants from the criminal justice system, and members of the community. *See* Dandurand & Griffiths, *supra* note 133, at 22–23 (noting that processes will vary in different locales, and that this model continues to operate within the context of the criminal justice system); *see also* Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, INT'L INST. FOR RESTORATIVE PRACTICES (Aug. 9, 2002), https://www.iirp.edu/eforum-archive/circle-sentencing-part-of-the-restorative-justice-continuum. The goal is to gain consensus on a sentencing plan, while balancing the needs of the victim and offender. Umbreit & Lewis, *supra* note 123, at 16.

139 Sasson & Sydow, *supra* note 113, at 15; *see* Daicoff, *supra* note 9, at 434.

140 *See* Daicoff, *supra* note 9, at 430.

141 *Id*. at 435. This pilot program ended when the participating judge retired. Email from Heather Dorsey, Program Manager- Courts, Children and Family Unit, Administrative Office of Illinois Court, August 8, 2019 (on file with author).

142 *See* Mark Umbreit et al., *Restorative Justice Dialogue: Evidence-Based Practice*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 1 (2006), http://rjp.umn.edu/sites/g/files/pua5026/f/media/rj_dialogue_evidence-based_practice_1-06.pdf. The terms Family Group Conferencing, community group conferencing, and restorative group conferencing are synonymous. Family Group Conferencing is used in a myriad of contexts, including to develop support plans for those needing services. *See also* Rosalie Metze et al., *Family Group Conferencing: A Theoretical Underpinning*, 23 HEALTH CARE ANALYSIS 165, 166–67 (2015).

plan that teaches and supports active responsibility."[143] The process is based on the assumption that "the family knows best what they need and are indeed experts,"[144] and parents are more likely to be invested in, and successful with, a plan the family devises.[145]

Similar to other restorative models, a trained professional facilitates the conference process.[146] The model includes three parts: 1) A preparatory meeting with family members to identify participants' concerns and resource needs and prepare family members for the conference; 2) the conference process itself, which may have its own stages—an initial meeting involving the referring social worker and the restorative coordinator, private family time, and then a review of the family's plan with the social worker and practitioner; and 3) an implementation stage, during which the professionals assist the family in following the plan.[147] A specific feature of family group conferencing, and one that distinguishes this model from the peacemaking model, is that the family meets alone to devise its plan.[148] Once the plan has been determined, other participants rejoin the family, may offer input, and describe how they can assist in its implementation.[149]

After being adopted in New Zealand to address the burgeoning youth crime problem,[150] this statutorily enacted model was subsequently applied to adult crimes[151] and is now utilized in the

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143 Sharon Dijkstra et al., *The Effectiveness of Family Group Conferencing in Youth Care: A Meta-Analysis*, 62 CHILD ABUSE & NEGLECT 100, 101 (2016).

144 Beck et al., *supra* note 5, at 223.

145 *See* Dijkstra et al., *supra* note 143.

146 *See* Dandurand & Griffiths, *supra* note 134, at 20.

147 *See* Dijkstra et al., *supra* note 143. *See also* Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019).

148 *See* Dandurand & Griffiths, *supra* note 134, at 20–21; *see also What is a family group conference? (Also known as a family group meeting)*, FAM. RTS. GROUP 3, https://www.frg.org.uk/images/Advice_Sheets/3-what-is-a-family-group-conference.pdf (last visited Feb. 18, 2019); *see also* Beck et al., *supra* note 5, at 223; Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019). In some models, the family meeting may not be private. *See* Dijkstra et al., *supra* note 143.

149 Family group conferencing can be particularly effective at monitoring compliance with the participants' agreed-upon resolution. *See* Dandurand & Griffiths, *supra* note 134, at 21

150 *See* Dijkstra et al., *supra* note 144. *See also* Children, Young Persons, and their Families Act 1989 (N.Z.).

151 For a contemporary analysis of the implementation of this statute, *see generally* Judge Andrew Becroft, *Family Group Conferences: Still New Zealand's Gift to the World?*, https://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf (last visited August 8, 2019) (arguing that the legislative vision did not become the reality due to insufficient resources and the failure to prioritize meaningful Maori involvement). *See also* Murray Levine, *The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation*, 18 BEHAV. SCI. & THE L. 517, 517–56 (2000).

school system.[152] Following family group conferencing's implementation in New Zealand, by 2016 it had spread throughout the world and was present in more than twenty countries.[153]

Strengths of the family group conferencing model include providing families a voice in addressing their problems,[154] to share their problems with others, to accept help, and to be respected by others.[155] Conferences purportedly can be designed in a culturally appropriate manner,[156] although some scholars dispute this claim.[157] While some conferences have been found to yield positive results,[158] a meta-analysis of existing studies of family group conferencing in child welfare cases suggests little evidence of improved outcomes for the involved children.[159]

3. Mediation: A Restorative Model?

There is considerable debate about whether or not mediation (distinguished from Victim-Offender Mediation) is a restorative model. Some scholars argue that distinctions between the two are beginning to blur,[160] while others go to considerable lengths to distinguish mediation from restorative processes.[161] This section will provide an overview of how mediation has been used in working with the elderly, and then briefly summarize the debate regarding the relationship between mediation and restorative practices.

Mediation is defined as "a process by which an impartial third party meets with the parties to a dispute in order to help them settle their differences."[162] Although types of mediation vary, the goal is "to assist people to reach a voluntary resolution of a dis-

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152 Vieille, *supra* note 115.

153 Dijkstra et al., *supra* note 142.

154 *Id*.

155 Metze et al., *supra* note 143, at 177.

156 *See* Beck et al., *supra* note 5, at 224.

157 *See* Paora Moyle & Juan Marcellus Tauri, *Mâori, Family Group Conferencing and the Mystifications of Restorative Justice,* 11 VICTIMS & OFFENDERS 87, 97 (2016) (arguing that New Zealand's family group conferencing model fails to be culturally responsive, practitioners are insufficiently knowledgeable about Maori cultural perspectives, and that restorative justice generally is mischaracterized as based on indigenous principles).

158 *See* Beck et al., *supra* note 5, at 224.

159 *See* Dijkstra et al., *supra* note 143, at 108.

160 Mark Umbreit et al.,, *supra* note 142.

161 *See, e.g.*, Mark Umbreit et al., *supra* note 142. Bradshaw & Umbreit, *supra* note 8; *see* Sasson & Sydow, *supra* note 113, at 1; *see also* Zehr, *supra* note 92, at 17–18.

162 Canadian Ctr. for Elder Law, *Elder and Guardianship Mediation* 11 (2012), http://www.bcli.org/sites/default/files/EGM_Report_Jan_30_2012.pdf.

pute."[163] Elder mediation, pioneered in Canada,[164] is a growing field that uses "a person-centred [sic] approach" that "aims to enhance the wellbeing . . . of the elderly and promote communication between everyone involved."[165] Practitioners are expected to be knowledgeable about age-related issues, the aging process, and capacity assessment,[166] and to adapt the model to the specific needs of seniors.[167] Issues addressed include disputes over caregiving responsibilities, financial issues, housing concerns, inheritances issues, alternative living arrangements, safety issues, and health and medical care issues as well as elder abuse.[168]

Among the recommended practices in elder mediation are pre-mediation interviews with the parties; co-mediators when multiple family members are involved; and mediators with specialized training, who are neutral but not passive, and who are capable of assessing the parties' capacity to participate.[169] Other suggestions include using an evaluative model[170] and having the referring social

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163 *Id.* at 12. For a brief explanation of the mediation process, *see* Alexandra Crampton, *Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project*, 56 J. OF GERONTOLOGICAL SOC. WORK 423, 424 (2013).

164 *See* Păroşanu, *supra* note 97, at 15.

165 *Id.* (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*: *Final Report*, DEP'T OF JUST., CAN. 1, 1 (2010)); *see also* Dale Bagshaw et al., *Elder Mediation and the Financial Abuse of Older People by a Family Member*, 32 CONFLICT RESOL. Q. 443, 448 (2015) ("Older-person-centered family mediation is a voluntary, collaborative, con?dential, informal process in which members of a family come together, face-to-face or separately (e.g. by telephone or with the mediator going between), with the assistance of an impartial mediator who helps them to communicate respectfully, listen to others, share concerns, clarify issues, create options, consider consequences and plan for the future").

166 *See id.* at 15–16 (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*: *Final Report*, DEP'T OF JUST., CAN. 1, 1 (2010)).

167 *See id*. at 16–17 (citing Lise Barry, *Elder Mediation,* 24 AUSTL. DISP. RESOL. J. 251, 251–58 (2013)).

168 *See id.* at 15 (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*: *Final Report*, DEP'T OF JUST., CAN. 1, 2–3 (2010)); *see also* Canadian Ctr. for Elder Law, *supra* note 162; *see also* Crampton, *supra* note 163, at 426; Bagshaw et al., *supra* note 165, at 446–47.

169 *See* Canadian Ctr. for Elder Law, *supra* note 162 (describing the success of a program using senior volunteers as mediators, following a basic mediation training).

170 There are three general styles of mediation: 1) facilitative; 2) transformative; and 3) evaluative. A facilitative style involves a mediator assisting parties in reconciling a conflict, encouraging them to reach a voluntary solution, with the mediator being "in charge of the process, while the parties are in charge of the outcome." In evaluative mediation, the mediator may make recommendations and suggestions, focusing on a fair result and the legal merits of the situation. In this context, the mediator is responsible for the process but also influences the outcome. Finally, in transformative mediation, the goal is to empower "disputants to resolve their own conflict . . . . and to recognize each other's needs and interests." The mediator follows the parties' lead; the parties structure both the process and the result. *See* Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, HARV. L. SCH.: PROGRAM ON NEGOTI-

worker participate as the older person's advocate.[171] Although research addresses several critiques,[172] one study concluded that with a specially trained mediator, the process could enhance the rights and wishes of older people, increase communication in the family, enhance accountability, and reduce family conflict overall.[173]

Elder mediation is commonly used in the guardianship context,[174] with older people who have limitations and may be frail, dependent, and vulnerable.[175] In some courts, mediation is required before guardianship proceedings,[176] reportedly with mixed results.[177]

While there are similarities between mediation and restorative practices, both being based on dialogue and the parties deciding the outcome,[178] there are also significant differences. In the restorative model, the peacemaker assumes a proactive role, and supports people and community members actively participating.

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ation Daily Blog (Dec. 3, 2018), https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/; *see also* Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Mediate, https://www.mediate.com/articles/zumeta.cfm (last visited Feb. 20, 2019).

171 Crampton, *supra* note 163, at 426. For a slightly modified approach, *see, e.g.,* Jack C. Wall & Marcia K. Spira, *A Conceptual Framework for Differential Use of Mediation and Family Therapy Interventions With Older Adults and Their Familie*s, 55 J. of Gerontological Soc. Work 282, 287 (2012) (advocating the combined use of a family therapy perspective, to resolve emotional and communication issues, and mediation to develop a care plan).

172 Critiques include that the process cannot protect against power imbalances and conflict occurring after the mediation and ageist assumptions, resulting in older people being subjected to techniques that feel "intrusive and coercive," Crampton, *supra* note 163, at 430–32;), and concerns about securing the families' participation and their willingness to discuss financial matters. Bagshaw et al., *supra* note 165, at 466–67.

173 *See* Bagshaw et al., *supra* note 165, at 465–66.

174 *See* Canadian Ctr. for Elder Law, *supra* note 162; *see also* Mary Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 Stetson L. Rev. 611, 617 (2002), https://www.stetson.edu/law/lawreview/media/is-the-use-of-mediation-appriopriate-in-adult-guardianship-cases.pdf.

175 Crampton, *supra* note 163, at 426.

176 *See id.* at 424.

177 In one study, mediators thought the court-imposed requirement helped to empower the person who was the subject of the guardianship if special procedures were implemented to assess capacity. *See* Crampton, *supra* note 163, at 431. Those procedures included mediator training on aging issues, a capacity assessment of the older person, and including an elder advocate in the process to assure the elder's needs are protected. *Id.* A different study found that mediation often proceeded despite the older adult being unable to participate meaningfully due to diminished capacity. *Id.* at 431–32. To address these shortcomings, programs should increase the involvement of geriatric social workers, require more thorough mediator and party preparation, including attention to family dynamics, and provide more mediator training on aging, family dynamics, caregiving, and guardianship decision-making. *Id*.

178 Sasson & Sydow, *supra* note 113, at 3.

Additionally, restorative processes include community members, while mediation rarely includes accompanying support people in the decision-making process.[179] A final distinguishing feature of restorative processes is the goal sought to be accomplished, which is "healing relationships and restoring the participant's place in the community."[180] Mediation, on the other hand, seeks to resolve a dispute. Studies of restorative practices and mediation demonstrate that there are no pure models, but instead "degrees of restorativeness," with the benefit of all models being their flexibility.

C. *Past and Existing Applications of Restorative Principles to Elder Abuse*

Despite the growing popularity of restorative principles, they have been applied to address elder abuse infrequently. Worldwide, a small number of international projects explicitly do incorporate restorative principles in addressing elder abuse.

One early model, the Waterloo Restorative Justice Approach to Elder Abuse, was developed in Ontario in 2000.[181] The project's goals were to increase the reporting of elder abuse, "to develop and to implement a restorative approach to elder abuse that encourages personal responsibility, permits healing, and promotes healthier relationships," and to assist individuals experiencing abuse.[182] The Waterloo project included a community education component and implemented the use of circles, guided by the principles of "safety, confidentiality, dignity and respect, autonomy, access to information, and the least restrictive interventions."[183] It excluded cases where the senior was at risk of imminent harm, and determined that the most appropriate cases were those in their earliest stages.[184]

The program successfully changed attitudes about elder abuse, strengthened partnerships among the participants, and was useful for those who completed the circles.[185] However, it did not attract

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[179] *Id.* at 5.

[180] *Id. at* 3.

[181] *See* Groh & Linden, *supra* note 21.

[182] *Id.* at 129.

[183] *Id.* at 130.

[184] *Id.* at 130–31.

[185] *Id.* at 139. Assessments concluded that the process gave voice to the seniors participating, those seniors who participated were satisfied with the results, and the circles addressed the needs of the persons who committed the harms. *Id.* at 137–38.

a large number of referrals, despite a reinvigorated effort midstream, because the issue "was just too sensitive and too private for people to come forward."[186] Other challenges included heavy reliance on volunteers, the resource-intensive preparation for the circles, explaining the process to family members, securing family participation, and the declining cognitive abilities of some participants.[187]

Ultimately, the program was modified to create a comprehensive model integrating the health care and criminal justice systems.[188] Today's Elder Abuse Response Team ("EART") is integrated into the police department's Domestic Violence Investigations Unit, with a mandate to provide community education and training as well as direct interventions, including investigations, referrals to resources, and case management.[189] Still guided by restorative principles, the EART offers broader, more holistic supports to those in abusive situations.[190]

The Caring for Native American Elders project, a community-based participatory research project in one northwestern Native American community, implemented a family conferencing model in the 2000s.[191] It was developed following concerns that demonstration projects designed to address elder abuse did not reflect tribal traditions and values.[192] In response, the tribe created an "elder-focused, family-centered, community-based intervention for the prevention and mitigation of elder abuse."[193] Family members, a spiritual leader, and service providers came together to address concerns about the elder, with trained and respected professionals facilitating the meetings.[194] Following an initial discussion, family members had the option of meeting alone to develop a plan, and then inviting service providers to participate in its implementation.[195]

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186 *Id*. at 138.

187 *Id.* at 138–39.

188 *Id*. at 140.

189 *Id*. at 141.

190 *Id*.

191 *See* Patricia A. Holkup et al., *Drawing on the Wisdom from the Past: An Elder Abuse Intervention With Tribal Communities*, 47 THE GERONTOLOGIST 248, 254 (2007).

192 *See id*. at 249.

193 *Id*.

194 *See id*. at 251.

195 *See id*. at 254. As with other restorative practices, this model consisted of various stages, including referral, screening, engaging the family, logistical preparation, the family meeting and follow-up. *Id*.

Early assessment of this family group conferencing model demonstrated that families accepted the model and intervention.[196] It provided a forum to be heard and understood, drew upon "the values of interdependence and reciprocity among Native American kin," and provided "a culturally anchored and individualized way to identify a frail elder's care needs and to find solutions . . . ."[197] Other strengths included empowering seniors to share their life stories and to be valued as members of society, promoting their autonomy and independence, illuminating the challenges of caregiving and fostering the involvement of additional family members, and building social supports.[198]

The Jamestown S'Klallam Family Group Conferencing Project, sponsored by the United States Administration on Aging,[199] used family group conferences to address family conflict related to issues such as end of life planning, sibling rivalry, caregiver burnout, and confronting anger and guilt.[200] Advantages identified with this model were that the family determined the solution independently, the service was "culturally anchored," and it relied on community and family resources.[201]

The Choice Project, established at the University of Aberstwyth, Wales, was originally founded on restorative principles, with the goals of raising public awareness about the problem of elder abuse and effective responses, and designing new approaches to justice based upon restorative principles. It includes the creation of a "Well Being" service as an alternative to civil and criminal remedies. Focused on those determined to be low risk, the staff include a "Choice Support Worker," who identifies options with the senior, and a "Choice Practitioner," who provides support for up to 18 months. Different entities provide necessary support services.[202]

The Nova Scotia "Restorative Approach with Seniors Network," a collaboration that includes representatives of the departments of Justice and Aging, legal counsel, government and

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196 *Id*.

197 *Id*.

198 Beck et al., *supra* note 5, at 224. Research revealed no further information about this project; it appears to no longer exist.

199 LISA NERENBERG, ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING STRATEGIES 136 (2008).

200 *See* Păroşanu, *supra* note 97, at 16.

201 *Id*. at 15.

202 *See The Dewis Choice Service*, DEWIS CHOICE, https://choice.aber.ac.uk/choice-initiative/ (last visited Feb. 28, 2019).

community stakeholders, the police, and safety officers,[203] is designed to address seniors' needs to be heard, have their questions answered, feel safe, provide input throughout the process, and experience meaningful accountability.[204] Each restorative process involves preparation, voluntary participation of the victim and person committing the harm, a safe environment, a facilitator, community members and other support people, and a talking instrument.[205] The project is designed for both simple and complex cases, and is also being used to prevent problems before situations escalate.[206]

In 2017, a new project, Kôrero Tahi: Using Restorative Circles for Addressing Harms Experienced by Older Persons, began in Wellington, New Zealand.[207] The goals of this pilot project are to develop a model that is "victim sensitive, empowers older people to have a voice, strengthens positive family relationships and promotes justice and accountability."[208] An objective is to create "a safe space for repairing the harm and to develop a community of care around older people."[209] The ensuing research will study the success of the circles, and in particular, their impact on "the older person's sense of wellbeing, safety and connectedness to others."[210]

Several elder abuse programs utilize family group conferencing. Project Daybreak Bluebird, in southern England, provides family group conferences to "extended families where decisions have to be made with and for an adult member of the family . . . ."[211] Issues may include "domestic violence; physical, emotional or financial abuse; or where a vulnerable adult wants to live."[212] Following the initial coordination and support of a restor-

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203 *See* Jocelyn Yerxa et al*., Restorative Approaches to Senior Safety: The Nova Scotia Experience*, CAN. NETWORK FOR THE PREVENTION OF ELDER ABUSE 1, 20 (2015), https://cnpea.ca/images/webinar_restorativeapproaches_may2015.pdf.

204 *See id*. at 43.

205 *See id*. at 45.

206 *See id*. at 47.

207 *See Kôrero Tahi: Using Restorative Circles for Addressing Harms Experienced by Older Persons*, VICTORIA U. OF WELLINGTON, https://www.victoria.ac.nz/sog/researchcentres/chair-in-restorative-justice/research/elder-harm (last visited Feb. 28, 2019).

208 *Id*.

209 *Id*.

210 *Id*.

211 *FGCs for Vulnerable Adults*, DAYBREAK FAM. GRP. CONF., http://www.daybreakfgc.org.uk/adult-safeguarding (last visited Feb. 26, 2019).

212 *Id*.

ative practitioner, the family develops a resolution and plan independently.[213] One scholar notes that

> families will discuss problems more openly when there are no "outsiders" present, and will be able to find solutions that take into account their own culture(s) . . . . It also has the effect of empowering the family as a unit, to think about problems and develop their own solutions . . . .[214]

Depending on the nature of the abuse, safety risks, and desires of the senior, the person committing the harm may or may not participate.[215] Project leaders report that the model works well for those seniors able to make their own decisions, and they have found family group conferences effective in addressing elder abuse.[216]

Finally, a small number of projects have adapted mediation to address elder abuse issues.[217] A community-based model in Israel incorporates family mediation with counseling and group work.[218] Other interventions include public awareness workshops and training for the public and professionals. Among the identified successes of this project are the development of coping strategies and empowerment of those who have been harmed, an improved awareness of possible responses, and better identification of elder abuse cases.[219]

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213 *See id*.; *see also* Moore & Browne, *supra* note 51, at 392.

214 Linda Tapper, *Using Family Group Conferencing in Safeguarding Adults*, 12 J. OF ADULT PROTECTION, 27, 30 (2010).

215 *See id*.

216 *See id*.; *see also* Daybreak, *Family Group Conferences for Adults, Pilot Project for Elder Abuse, Evaluation Report 2007–2010* 1, 15 (2010), http://www.daybreakfgc.org.uk/wp-content/uploads/2012/02/Adult-Safeguarding-Evaluation-report-2007.pdf (acknowledging that measurements of success vary depending on the viewpoint from which success is evaluated). The use of family group conferencing in the elder abuse context, particularly if it includes the family meeting alone, runs the risk of replicating existing power imbalances within the family. For a critique of restorative justice as mirroring power imbalances in the broader community, *see* MIKHAIL LYUBANSKY & ELAINE SHPUNGIN, THE PSYCHOLOGY OF RESTORATIVE JUSTICE 183 (Theo Gavrielides ed., 2015). In response to this concern, Daybreak CEO Chalmers stated his belief that this potential problem can be counterbalanced by trained and highly skilled restorative coordinators who address these issues at the outset. Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019).

217 The Canadian Department of Justice reported that a Google web search returned 8,800 results for "elder mediation" and 1,860 results for "elder mediation + elder abuse," noting the growing interest in the use of mediation to address elder abuse. *See* Government of Canada, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*, DEP'T. OF JUST., http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/p1.html (last visited Feb. 26, 2019).

218 *See* Sarah Alon & Ayelet Berg-Warman, *Treatment & Prevention of Elder Abuse & Neglect: Where Knowledge & Practice Meet—A Model for Intervention to Prevent & Treat Elder Abuse in Israel*, 26 J. OF ELDER ABUSE & NEGLECT 150, 155 (2014).

219 *See id*. at 161, 163–64.

"Relationships Australia" offers therapeutic family counseling and mediation services designed to prevent and resolve family conflict and to prepare for future medical, financial, health, or living arrangements.[220] The goal is to assist the family in improving relationships and protecting "the interests, rights, and safety of all family members."[221]

With the exception of the Waterloo project, which was heavily evaluated,[222] and the Jamestown S'Klallam Family Group Conferencing Project, which no longer exists, most of these programs are too new to have been studied comprehensively. However, they do exhibit commonalities that may be essential for successful interventions. One is interdisciplinary collaborations, as exhibited in the Waterloo project as redesigned,[223] the Nova Scotia program, and the Choice Project. Recommended members of an interdisciplinary team include health care providers, law enforcement, social service providers, conflict resolution entities, mediators, and those with expertise in restorative approaches. Today, restorative-based models are being *developed* collaboratively, potentially resulting in more effective teams.[224]

Many existing programs offer comprehensive approaches with an array of options, often including educational programs and training initiatives. Following an evaluation, the Waterloo project implemented a more holistic approach, evolving into a "comprehensive conflict management programme [sic] guided by restorative principles."[225] Researchers in New Zealand recommend offering diverse interventions that are tailored to the individual who has been harmed.[226] The developing project in Maine intends to modify existing models as needed to best address seniors' individualized needs.[227]

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220 *See Elder Relationship Services*, RELATIONSHIPS AUSTRALIA, https://www.relationships.org.au/what-we-do/services/elder-relationship-services (last visited Feb. 26, 2019).

221 *Id*.

222 *See generally* Groh & Linden, *supra* note 21, at 127.

223 The redesigned Waterloo project created the "Inter-Agency Elder Abuse Working Group" involving case managers and law enforcement, specifically developedto facilitate an interdisciplinary response. *See* Groh & Linden, *supra* note 21, at 140. As a result, the project *did* reach more seniors. *Id*. at 140–41.

224 *See, e.g.*, the CAPSTONE (Community and Adult Protective Services Trial of Novel Enhanced Services), a collaboration between the Elder Abuse Institute of Maine and Adult Protection Services. (Project Description on file with authors).

225 *See* Groh & Linden, *supra* note 21, at 143.

226 Păroşanu, *supra* note 97, at 29.

227 Interview with Patty Kimball, Executive Director, Elder Abuse Institute of Maine, January 11, 2019.

Another essential component of a successful restorative project is specialized training for the restorative practitioners. In addition to providing training in the restorative models themselves, the training should incorporate issues specific to elder abuse, including training on the aging process; indicators of, and risk factors for, abuse; family dynamics and family systems; principles of senior autonomy and empowerment; information on community resources; and an overview of relevant legal issues. Perhaps most importantly, restorative facilitators must be trained in utilizing trauma-informed techniques.[228] Successful models also further educate service providers and community members about both elder abuse and restorative models and options. These have been found effective in enhancing communities' capacities to address the problem.[229]

V. Lessons from Existing Projects and Research

Both traditional and innovative elder abuse intervention models reveal key lessons relevant when assessing the viability of restorative practice models. Existing literature summarizes the critical components of a successful intervention system. There is a growing consensus that "[a]ddressing elder abuse requires multiple and co-ordinated [sic] approaches, which involve increasing public awareness, addressing cultural norms and effective multi-disciplinary collaboration in areas such as health, policing, law and social care."[230] Multi-disciplinary teams have proven successful, and can assist with articulating strategic responses, case planning, and decision-making.[231]

Increasingly, researchers are identifying the importance of involving both the person harmed and the person who committed the harm in successful resolutions. Scholar Shelly Jackson offers four principles critical to effective elder abuse interventions: (1) treatment must be focused on both parties; (2) no unitary solution will be effective in all situations; (3) variations in culpability among those committing the harm must be acknowledged; and (4) cases

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228 Beck et al., *supra* note 5, at 221. *See* also Păroşanu, *supra* note 97, at 29–30.

229 *See* Groh & Linden, *supra* note 21, at 142; *See* Păroşanu, *supra* note 97, at 13–17.

230 Deirdre O'Donnell et al., *Interventions and Services with Address Elder Abuse: An Integrated Review*, Nat'l Ctr. for the Prot. of Older People (NCPOP), U. Coll. Dublin 1, 52 (2015), http://www.ncpop.ie/userfiles/file/ncpop%20reports/Interventions_Services_WEB.pdf (last visited Mar. 28, 2019).

231 *See* Păroşanu, *supra* note 97, at 23; *see also* O'Donnell et al., *supra* note 230 at 18.

exist on a continuum of complexity.[232] Without addressing these factors, "intervention and prevention efforts will be futile if not harmful."[233]

The literature describes varying characteristics of the person committing the harm based on type of abuse[234] and based on varying degrees of culpability.[235] Jackson describes five different levels of culpability: (1) bad-actors whose abuse is knowing and deliberate; (2) those who readily exploit opportunities; (3) those who reluctantly exploit opportunities (i.e. due to caregiver stress); (4) those who act according to the seniors' wishes, although inappropriately; and (5) those who lack understanding that their actions constitute abuse or neglect.[236] Cases are increasingly complex when they involve familial relationships and co-occurring forms of elder abuse.[237]Restorative models are ideally suited for addressing some types of elder abuse. They give a voice to seniors, and may empower them to develop personalized, creative, and feasible solutions that can be implemented with adequate support.[238] The flexibility of restorative practices also enables the processes to be adapted to culturally appropriate interventions.[239] This is critical because not only do cultures define elder abuse differently, but their willingness to discuss elder abuse and identify appropriate interventions varies as well.[240] For these reasons, if implemented properly, restorative processes show tremendous potential.

Despite these benefits, restorative practices also present challenges when used to address elder abuse. One challenge is determining for which types of abuse these models are most

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232 *See* Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, *supra* note 13, at 277–78.

233 *Id*. at 279.

234 *See id.* at 270–71 (Even within a particular type of abuse, such as financial exploitation, perpetrator characteristics vary depending on the nature of the financial abuse. . . .).

235 *See id*. at 271–75.

236 *See id*. at 275.

237 *See id*.

238 *See e.g.*, O'Donnell et al., *supra* note 230 at 20 (noting the effectiveness of using an empowerment model to address psychological abuse). Another advantage of such models is that they may "equip older people to develop coping strategies and resilience to abusive behaviors." O'Donnell et al., *supra* note 230 at 54.

239 *See infra*.

240 *See* Laura Mosqueda et al., *The Abuse Intervention Model: A Pragmatic Approach for Intervention for Elder Mistreatment*, 64 J. Am. Geriatrics Soc'y 1879, 1883 (2016) (noting that different cultures have different norms as to what constitutes elder abuse); *See also* Marshall B. Kapp, *Future Directions in Public Policy Relating to Elder Abuse*, *in* Elder Abuse: Research, Practice and Policy 693, 704 (XinQi Dong ed., 2017) (citing International Perspectives on Elder Abuse (Amanda Phelan ed., 2013)).

appropriate. Other difficulties include defining the category of persons committing the harm for which these models would be most successfully implemented; identifying strategies to encourage participation by the person committing the harm; the possible diminished capacity of the older person; and finally, defining the meaning of a successful intervention.

A. *Using Restorative Processes for Different Types of Harm*

A major challenge is to determine which types of elder abuse are most effectively addressed through the use of the restorative processes. This challenge is intensified by the prevalence of complex family relationships and co-occurring types of abuse.[241] Cases need to be examined individually, taking the type of abuse and other factors into account. Although the analysis below relies on generalizations, it categorizes abuse generally to assess where restorative principles may be most appropriately implemented.

1. Financial Abuse

Financial abuse may be the type of abuse best-suited for a restorative intervention. While proof may be complicated and cases often require extensive investigation, the abuse is verifiable and the monetary losses are tangible.[242] Restorative processes may be particularly useful when the person committing the harm either inadvertently or negligently mismanaged a senior's money or reluctantly took advantage of an unexpected opportunity.[243] A restorative model would permit the financially irresponsible person to explain his situation and perspective to the elder, and to take responsibility for his conduct. Also, the process may empower the participants to resolve the situation without the threat of criminal or civil punishments by developing a plan to reimburse the senior or provide an alternative remedy, and by identifying and implementing creative alternatives, such as selecting a different person to assist with the senior's financial management.

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241 *See* Action on Elder Abuse, *Elder Abuse Advocacy Toolkit* 1, 1010, https://lx.iriss.org.uk/sites/default/files/resources/Elder%20abuse.pdf, (last visited on Mar. 30, 2019).

242 *See id*. (Although physical and sexual abuse may result in physical conditions that are either visible or able to be proven clinically, those harmed may go to considerable trouble to camouflage their injuries).

243 *See* Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 275.

2. Neglect

Neglect, whether intentional or unintentional, is another category of elder abuse that can be resolved using a restorative process. Unintentional neglect can be addressed through education and traditional interventions. A restorative process offers the additional benefit of enabling support people and members of the community to identify and provide suitable alternative caregivers or resources needed by the person committing the harm.

Intentional neglect could similarly be addressed using a restorative process, enabling the involved parties to each share their perspectives. With the active participation of family members and other support people, the individual committing the neglect may fully realize the consequences of his conduct. All parties can use restorative dialogues to agree on ways to repair the effects of prior conduct and to prevent future abuse.

3. Psychological and Emotional Abuse

Elder abuse is a multi-dimensional phenomenon, with older adults often experiencing psychological or emotional abuse in conjunction with other types of abuse.[244] Older adults with dementia are particularly at risk, and as many as 88.5% of older adults with dementia experience some type of psychological abuse.[245] Too often, this type of abuse may not be reported. Victims may not consider emotional or psychological abuse severe enough to merit seeking help, and although psychological and emotional abuse can often be a marker for other types of abuse,[246] providers may prioritize physical or sexual abuse over emotional abuse. The ability of a restorative process to address psychological and emotional abuse may depend more on the characteristics of the person committing the harm than of the person being harmed. If the person committing psychological or emotional harm is genuinely unaware of the effect of his behavior and is willing to accept assistance to reform his behavior, a restorative process may be appropriate. Restorative justice provides the opportunity for the person causing the harm, upon hearing the older person's perspective, to change his behavior and take steps to repair his relationship with the older person.

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244 *See* Ana Joao Santos et al., *Elder Abuse Victimization Patterns: Latent Class Analysis Using Perpetrators and Abusive Behaviors,* BMC GERIATRICS, April 23, 2019, at 1, 11.

245 *Statistics/Data*, NATIONAL CENTER ON ELDER ABUSE, *supra* note 20.

246 Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947, 1956 (2015).

4. Physical and sexual abuse

To evaluate whether restorative principles may be applicable to physical and sexual abuse, the debate about using restorative principles in intimate partner violence cases provides some insight. Historically, alternative dispute resolution techniques, such as mediation, were deemed inappropriate for addressing complex domestic violence situations.[247] Critics argued that the severity of battering was reduced to a mere "dispute," "victimizing events [were] deemphasized" with the process favoring the batterer,[248] reconciliation often became the goal rather than repairing the harm, and the victim's voice was silenced in the language of disagreement and misunderstanding.[249] Many critics viewed mediation techniques as inappropriate when the abuse stemmed from underlying issues of power and control.[250]

However, as interest in restorative justice increases, advocates are reexamining its usefulness in the context of intimate partner violence. This focus is, at least in part, due to frustration with traditional criminal justice models. Restorative practices offer survivors an opportunity to participate by telling their story, to have their experiences and perspectives validated by the community and the batterer, and to hear their batterer take responsibility for his conduct.[251] They also allow for flexible resolutions and may have the effect of repairing the damaged relationship.[252] In the context of intimate partner violence, the harmed party seeks individualized justice, which includes survivor autonomy, self-determination, voice, validation, and vindication.[253] Restorative processes seek to achieve these same objectives.[254]

However, critics are concerned that the power dynamics present in the intimate partner violence context may continue within the restorative process itself. Specifically, concerns exist regarding the safety of the survivor; offenders manipulating the process

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247 *See* Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175, 175 (2000).

248 *Id*. at 180.

249 *Id*. at 179–80; *see also* Leigh Goodmark, *Law and Justice Are Not Always the Same: Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 718 (2015) ("when prosecutors have their own goals, victims' voices can be silenced").

250 *See* Presser & Gaarder, *supra* note 246 at 181.

251 *See* Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 18 (2006).

252 *See id*.

253 *See* Goodmark, *supra* note 248, at 726–31. *See also* Coker, *supra* note 119, at 67–68.

254 *See* Goodmark, *supra* note 248, at 731.

through insincere acknowledgments of responsibility or half-hearted attempts to repair the relationship; ineffective participation from the survivor due to the power dynamics; an absence of supportive family and community members; the minimal impact on offenders; the conveyance of the message that the abuse is not serious or criminal in nature; and the presence of community norms that reinforce the abusive relationship.[255] Feminist critiques argue that practitioners fail to appreciate the challenges and dangers of intimate partner violence, that offenders may not be held accountable, and that the criminal nature of the conduct is diminished.[256]

Proponents of applying restorative principles to intimate partner violence cases argue that community participation in restorative justice models provides vindication to the abused.[257] Restorative processes facilitate implementing innovative and creative remedies to solve problems, and ongoing accountability that is more likely to result in reformed behavior than is likely in the criminal justice context.[258] Other advantages of restorative models include moral and community support for confrontation of the batterer, alternatives to the binary "staying or leaving" options available to the person harmed, and discussion of oppression in the batterer's life.[259] Advocates of using restorative processes in the intimate partner violence context recommend their use if processes: (1) prioritize victim safety; (2) offer material and social supports; (3) are incorporated into a coordinated community response; (4) resist gendered domination; and (5) do not require the goal of forgiveness.[260]

In elder abuse cases, restorative approaches may be ineffective in repairing relationships since the power dynamics often mirror those present in intimate violence cases. For example, the "Duluth

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255 *See* Daly & Stubbs, *supra* note 250, at 17–18.

256 *See* Goodmark, *supra* note 248, at 723.

257 Leigh Goodmark, *Responsive Alternatives to the Criminal Legal System in Cases of Intimate Partner Violence*, *in* RESTORATIVE AND RESPONSIVE HUM. SERVS. 165, 169 (Gale Burford et al. eds., 2019).

258 *Id*.

259 *See* Coker, *supra* note 119, at 68.

260 *See id.*; Erika Sasson, *Can Restorative Practices Address Intimate Partner Violence?*, INNOVATIONS (2016), https://www.courtinnovation.org/sites/default/files/documents/Monograph_December2016_BriefingPaperByErika.pdf. *See*, *e.g.*, Kohn, *supra* note 10, at 522 (for further support of using restorative justice to address domestic violence); *but cf*. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (emphasizing that Navajo peacemaking as implemented at the time fell short of adequately addressing battering).

Power and Control Wheel,"[261] a popular conceptual model used to analyze domestic violence, has been adapted for the elder abuse context.[262] The dynamics of power and control, physical and sexual violence, and emotional and psychological abuse exist in both contexts.[263] The principle distinction is how the abuse is manifested.

Although using restorative models to address physical and sexual abuse among seniors would offer some of the advantages noted above, particularly when the person committing the harm is a family member, the risks outweigh the potential advantages. Both intimate partner violence and elder abuse involve complex interpersonal dynamics. However, those dynamics are often more complex in the elder abuse context because the people committing the harm are often adult children and the abuse may be motivated by life-long conflict, abuse within the family, rivalries between siblings, and perceptions of parental favoritism. These family dynamics and communication patterns have often become entrenched over time. Persons committing the harm may involve other family members in support of their conduct, and other family members may rally in support of the older person, creating additional tensions and intrafamily conflict, weakening the senior's support system. This dynamic further exacerbates the isolation many seniors already experience.[264]

Although survivors of partner violence also are often dependent on their abusers, they typically have the physical ability to access help. Many seniors do not. Many older people are dependent on those committing the harm for their most basic needs—the

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261 *See Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS,18, (2019); *see also* Chris Griffith, *The Power and Control Wheel: Everything You Need to Know*, https://www.ardfky.org/sites/ardfky.org/files/Chris%20Griffith%20-%20PPT%20%28Everything%20you%20need%20to%20know%20wheel%202017%29.pdf (last visited Mar. 18, 2019) (provides further explanation of the Duluth Power and Control Wheel). https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/ (last visited Mar. 18, 2019).

262 *See* National Clearinghouse on Abuse in Later Life, *Abuse in Later Life Wheel*, NAT'L. CTR. ON DOMESTIC & SEXUAL VIOLENCE (2006), http://www.ncdsv.org/images/NCALL_abuse%20later%20in%20life%20power%20and%20control%20wheel%20final_2006.pdf (last visited Mar. 18, 2019).

263 *See* Griffith, *supra* note 261.

264 *See Statistics & Data*, *supra* note 245. Additional factors contributing to isolation in include friends aging and moving or passing away. Seniors often move to a smaller, more accessible home, or to a structured living situation. Some seniors relocate to be closer to adult children. While helpful on a practical level, these changes distance elders from their customary social contacts. Physical limitations may constrain a seniors' ability to socialize and interact. Hearing or visual impairments that often accompany aging further limit social interactions, as does lack of transportation.

ability to get out of bed, eat, bathe, secure medical care, interact, and communicate. These issues of family dynamics, social isolation, and greater dependence on the person harming them can place elders at greater risks for additional harm when using restorative processes to address physical and sexual abuse.[265]

B. *Using Restorative Processes for Different Types of People Committing the Harm*

Recent research has begun to closely examine who commits elder abuse and their relevant characteristics.[266] It correlates particular characteristics of people and particular types of harm committed, and suggests that interventions should vary with these characteristics in mind.[267] Returning to Jackson's degrees of culpability, a restorative process would be most effective with those "least culpable."[268] This includes those who act out of ignorance, unaware that their behavior constitutes abuse or even neglect, and those whose behavior is inappropriate and contrary to the senior's desires.[269] In these instances, those committing the harm may have the older person's best interests at heart, but that person's vision of the older person's best interests may differ from the older person's own desires. Those committing the harm are likely to have empathy, "the driver for the restorative process."[270] Equipped with this mindset, they may be receptive to the "restorative inquiry" and willing to explore their own needs and potential paths forward.

Similarly, a person who commits harm by "reluctantly exploiting opportunities" may be a good candidate for participating in a restorative process.[271] Restorative processes could be particularly valuable for a person in this category because their reluctance to exploit the senior suggests that their own unmet needs may be con-

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265 To date, there is no meaningful research evaluating the success of restorative processes in addressing intimate partner violence. *See* Daye Gang et al., *A Call for Evaluation of Restorative Justice Programs*, TRAUMA, VIOLENCE, & ABUSE, 2019, at 1, 2 (noting the dearth of empirical research and recommending study as a matter of urgency). Future studies in this area could be mined for insights regarding its usefulness in addressing elder abuse and exploitation.

266 *See* Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 266.

267 *See id*. at 277–78.

268 *See id*. at 277.

269 *See id*. *id.* at 277–78.

270 Wallis, *supra* note 99, at 6–7 (defining empathy as having three components: (1) identifying with another person's feelings; (2) assessing the reasons for that person's feelings; and (3) responding with action).

271 *See* Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 275.

tributing to their behavior. The restorative process could successfully identify and address those needs as well as the emotional fallout of the abuse.

Restorative processes are not recommended for harms committed by those with the greatest degrees of culpability—those consciously exploiting opportunities and those acting in a deliberate, knowledgeable and premeditated way.[272] However, a detailed assessment could identify select cases that might be appropriate depending on the person's level of empathy, his ability and willingness to participate in a restorative process, and ultimately his motivation to change his behavior.[273] Most importantly, it would determine whether initiating a restorative process could cause any future harm between the parties, particularly if their relationship is restored.

Another category of those committing harm is those with a substance abuse problem.[274] Because restorative processes require honest communication and a sincere desire to repair the relationship, they are not appropriate for individuals currently suffering from addiction. In contrast, a person receiving treatment and progressing toward a stable lifestyle may be a suitable candidate. A critical factor will be the degree of personal and professional support available to assist both parties. Similarly, severely mentally ill individuals who commit harms against seniors may not be able to meaningfully participate in a restorative process unless they also participate in treatment and receive support. A detailed assessment can determine whether restorative processes are viable options in both of these scenarios.

C. *Capacity Issues: Ability of the Older Person to Participate in Restorative Processes*

Addressing the problems of elder abuse and exploitation is further complicated when the older person is experiencing diminishing capacity. The initial assumption should be one of capacity and respect for self-determination.[275] However, as the prevalence

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272 *See id*.

273 *See* Wallis, *supra* note 99, at 76.

274 *See* Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 273. Rates of substance abuse among those committing elder abuse are estimated to be between 20–50%.

275 A HANDBOOK FOR LAWYERS, *supra* note 72, at 5. . *See also* SUSAN D. HARTMAN, CTR. FOR SOC. GERONTOLOGY, ADULT GUARDIANSHIP MEDIATION MANUAL 83 (2003).

of Alzheimer's, other forms of dementia, and other medical conditions that cause cognitive challenges[276] are increasingly diagnosed, all participants in a restorative process must be aware of this dynamic. In a restorative setting, critical questions must be addressed. Who is best situated to evaluate an older person's capacity when necessary? What should the standard be for determining adequate capacity to participate? And what supportive mechanisms can be adopted to enhance an older person's ability to participate?

Legal and medical assessments of capacity differ, and a clinical assessment tool may be of limited usefulness in this context. Such evaluations often assess the older person at a *particular* moment in time. However, the question is whether the senior has the capacity to make necessary decisions *throughout* the duration of the restorative process. Given that capacity may vary depending on location of the meeting, time of day, stress levels, and various other factors,[277] using an instrument that is fixed in time is not optimal.[278] Second, a clinical assessment is expensive. The older person may not have the ability to pay for it, especially if the harm is financial exploitation. Finally, clinical assessments typically do not allow for the accommodations and supported decision making that can maximize the older person's ability to participate.[279]

A legal assessment of capacity is contextual, and asks whether the senior has the capacity to engage in the particular task,[280] with the required degree of capacity depending "largely on the type of transaction or decision under consideration."[281] Given that the restorative process is an alternative to a legal resolution, the legal assessment approach, although not necessarily conducted by a law-

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276 A HANDBOOK FOR LAWYERS, *supra* note 72. For example, conditions such as dehydration, vitamin deficiencies, persistent pain, and even grief may result in symptoms of cognitive decline. *See, e.g.*, *id*. at 16–17. *See also* Am. Bar Ass'n, *Practical Tool for Lawyers: Steps in Supported Decision-Making* 11–12 (2016), https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf.

277 A HANDBOOK FOR LAWYERS, *supra* note 72, at 16–18.

278 *See id*. at 22 (noting that "cognitive screening alone has been found lacking sensitivity or specificity to many decisional tasks, such as medical decision making").

279 *See id*. at 9–12; *See also* Jonathan G. Martinis & Jason P. Harris, NAT'L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, *ABLE Accounts and Supported Decision-Making: Building a Pathway to Independence, Inclusion, and a "Decent Quality of Life"* 10 (2019), http://www.supporteddecisionmaking.org/sites/default/files/martinis-harris-2019-able-accounts-sdm-pathways-independence.pdf.

280 A HANDBOOK FOR LAWYERS, *supra* note 72.

281 *Id*. at 5. *See also*, Candice A. Garcia-Rodrigo, *Tips for Representing a Client With Diminished Capacity*, ABA (Jan. 29, 2016), https://www.americanbar.org/groups/litigation/committees/solo-small-firm/practice/2016/tips-representing-client-diminished-capacity/.

yer, is most appropriate in this context. The legal assessment approach would evaluate whether the older person has an understanding of the restorative process and an appreciation for the consequences of her decisions.[282] If there is a central screening and referring entity, ideally that service provider would perform an informal capacity assessment before exploring options with the older person.[283] That provider would make the assessment, with the legal standard in mind, of whether the older person understands each option, its consequences, and its potential results.[284] The assessment would be conducted on an ongoing basis throughout the referral, screening, preparation, and restorative process itself.[285]

Most importantly, the question is whether the older person has the ability to participate *with support*.[286] That support could include necessary accommodations to address physical limitations, which may include "changing the place or time of the session . . . keeping the sessions short, or using techniques and strategies helpful for communication with persons with memory loss or confu-

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282 A HANDBOOK FOR LAWYERS, *supra* note 72, at 3. Lawyers are guided by the relevant ethical standards for representing clients with diminished capacity. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt (Am. Bar Ass'n 2016) (1983). Model Rule 1.14, a version of which exists in almost every state, guides the lawyer to maintain a normal attorney-client relationship to the extent possible, and to seek guidance only when the client is at risk of "substantial physical, financial, or other harm unless action is taken and [the client] cannot adequately act in the client's own best interest." MODEL RULES OF PROF'L CONDUCT r. 1.14 & cmt. (Am. Bar Ass'n 2016). *See also* Erica Wood, *Addressing Capacity: What Is the Role of the Mediator?,* MEDIATE.COM, (July 2003), https://www.mediate.com/articles/woodE1.cfm.

283 *See* Wood, *supra* note 282. Those options could include criminal prosecution, civil litigation, mediation, or restorative practices.

284 *Id.* These are not, in fact, binary options. One could opt for using restorative principles, and if that is not successful in accomplishing the client's goals, shift to a more confrontational approach. One would need to be mindful, however, of any relevant statutes of limitation that could require these legal claims to be brought within a fixed period of time or be lost forever. *See, e.g.*, HARTMAN, *supra* note 275, at 81–84.

285 HARTMAN, *supra* note 275, at 83, ((g)uidelines established in the mediation context are instructive here, where appropriate considerations include an understanding of who the parties are, the issues at hand, the role of the mediator, and the various options being explored, as well as the ability to understand and make an agreement.) *See also* The Kukin Program for Conflict Resol. at Benjamin N. Cardozo Sch. of L. & The Cardozo J. of Conflict Resol., *ADA Mediation Guidelines*, 1, 6 (2003), https://cardozojcr.com/ADA%20Mediation%20Guide.pdf. The assessment should not rely exclusively on a medical diagnosis, and even a participant adjudicated legally incapacitated is not necessarily lacking capacity to mediate. *Id.*

286 HARTMAN, *supra* note 275 at 83. *See also* Am. Bar Ass'n Comm'n, A HANDBOOK FOR LAWYERS, *supra* note 72 at 1–3; Susan H. Crawford et al., *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 20 CONFLICT RESOL. Q. 385, 393 (2003) (although skeptical of mediators assessing capacity, describes the process as "facilitating competencies").

sion."[287] Equally important is providing personal support by utilizing "supported decision making," which "generally occurs when people use one or more trusted friends, family members, professionals, or advocates to help them understand the situations and choices they face so they may make their own informed decisions."[288] In a supported decision making model, the older person may rely on a support person to help her understand the options, answer questions, and communicate her choices to others.[289] Such a process could be useful in assisting an older person to evaluate possible elder abuse interventions, including restorative processes. However, caution must be exercised when identifying the support person because the older person's family, "friends," or support people may be the very ones perpetuating the abuse.

The greatest challenge arises when an individual's capacity declines during the process of selecting the most appropriate remedy and addressing the abuse problem. This situation presents several options. One could conclude that the view the senior expressed previously remains her choice, absent information to the contrary. Another option is to involve a surrogate decision maker, as recommended in the supported decision-making models.[290] That person would honor the wishes of the senior based upon the wishes and values she expressed in the past.[291] While involving another person is cumbersome, this process will enable the senior's preferences to be honored. Although this requires a highly trained practitioner

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287 Wood, *supra* note 282.

288 Peter Blanck & Jonathan M. Martinis, *"The Right to Make Choices": The National Resource Center for Supported Decision-Making*, 3 INCLUSION 24 (2015). http://supporteddecisionmaking.org/sites/default/files/inclusion_blanck_maritinis_2015.pdf.http://supporteddecisionmaking.org/sites/default/files/inclusion_blanck_maritinis_2015.pdf. This concept, recognized in the United Nations Convention on the Rights of Persons with Disabilities, acknowledges that each person has the right to self-determination, and appropriate supports should be provided to maximize her ability to make her own decisions. United Nations Convention on the Rights of Persons with Disabilities & Optional Protocol, U.N. Doc. A/RES/61/106, at 10–11 (2006), https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

289 Morgan K. Whitlatch, *Supported Decision-Making: Practical Tips for Implementation,* NAT'L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING (2017) http://www.supporteddecisionmaking.org/sites/default/files/event_files/NRC-SDM%20NGA%20Presentation.pdf.

290 *See e.g.*, Morgan K. Whitlatch & David Godfrey, NAT'L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, *Supported Decision-Making Basics* 13 (2017), http://www.supporteddecisionmaking.org/sites/default/files/event_files/ABA%202017%20SDM%20Basics%20Presentation%20%282017.10.25%29.pdf.; *see also* Lisa Nerenberg, *Elder Abuse: Policy and Procedures, in* 1 WILEY ENCYCLOPEDIA OF FORENSIC SCIENCE (Allan Jamieson & Andre Moenssens eds., SCI. 2013) (recommending reliance on surrogate decision makers).

291 *See e.g.*, Whitlatch, *supra* note 289, at 25. *See e.g.,* WHITLATCH & GODFREY, *supra* note 289, at 25.

aware of potentially ongoing capacity issues, restorative models' flexibility allows the practitioner to adapt recommendations and procedures to account for any changes in capacity throughout the restorative process.

D. *Encouraging the Person Committing the Harm to Participate*

An additional challenge of using restorative processes to address elder abuse is encouraging the person who committed the harm to participate. Unlike in the criminal or civil litigation contexts, the person committing the harm faces no penalty or other repercussion if he refuses to participate.[292] A restorative process may be useful precisely *because* the person who has been harmed does not *want* to pursue criminal action or other punitive action.

Among restorative justice practitioners and scholars, there is debate about the need for "voluntary" participation by the person committing the harm. Ideally, that person would participate willingly.[293] However, some argue that to insist on completely voluntary participation would consign restorative models to the margins.[294] Others argue that effective restorative justice relies on coercion, given that it is often proposed as an alternative to the criminal process.[295] Pete Wallis suggests a "continuum of voluntariness," with different ways of proposing the process, ranging from coercion to encouragement to a neutral offer.[296]

The restorative justice practitioner should assess the person's sincerity, wary of self-serving motives.[297] The practitioner may offer incentives to encourage the person who committed the harm to participate, which might include opportunities to: (1) tell their story and confess to the person they hurt; (2) show themselves in a better light; (3) explain what happened and why, and answer questions; (4) offer help; (5) atone and find redemption; and (6) learn how the other person is doing.[298]

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292 This is true unless the older person ultimately pursues civil or criminal action.

293 *See* Wallis, *supra* note 99, at 101.

294 *See id*. (citing LODE WALGRAVE, *Integrating Criminal Justice and Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE 560 (Gerry Johnstone & D. Van Ness eds., 2007)).

295 *See id*. at 101–02.

296 *See id*. at 102–03 (Wallis also acknowledges the risks involved of engaging in a restorative process with a reluctant participant).

297 *See id*. at 106.

298 *See id*. at 105.

Whether or not the person doing the harm is willing to participate in the process may be very circumstantial. For example, if the cause of financial exploitation is a lack of resources, additional social services support could enable the person doing the harm to live more securely and minimize the chances she would take the senior's property in the future. If the cause is an inability to meet the senior's needs or not knowing what constitutes abuse, education and support could be valuable incentives to participate. For those whose culpability is more deliberate, persuading them to participate may not be possible or advisable. The same could be true for those suffering from severe, untreated mental illness or active substance abuse.[299]

An additional consideration here is the *process* of engaging the parties' participation. The most significant challenge may be facilitating the initial conversation and the "restorative inquiry," and may begin with a gentle approach that encourages the person who committed the harm to participate while simultaneously assessing his empathy level.[300] Identifying underlying needs that could lead to a desire for a restorative solution requires a skillful practitioner, patience, a trusting relationship with the person who committed the harm, and engagement at a deep level. However, bringing together a vulnerable senior and an unwilling or reluctant person who committed the harm risks enflaming their relationship and could result in future harm.

E. *Measuring Success*

A major challenge to the use of restorative models is accurately measuring their success. Most often, measures of success replicate those used in the criminal justice field.[301] However, restorative justice scholars critique these approaches for being too narrowly focused on procedures and descriptive indicia of restorative justice, and for failing to define the underlying notions of justice being measured.[302] Llewellyn and her colleagues reject traditional indices of measurement used in the criminal justice context, and recommend a "reimagining of success" in the restorative

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299 *See* Labrum & Solomon, *supra* note 80.

300 *See* Wallis, *supra* note 99, at 76.

301 *See* Llewellyn, supra note 101, at 308–09.

302 *See id*. at 294–97.

justice context.[303] As a foundation for measuring success, they offer a relational theory of justice:

> Restorative justice takes the relational nature of human beings as a conceptual starting point for understanding the meaning and requirements of justice. From this starting point justice must take account of our connectedness to one another. Attention to the multiple and intersecting relationships in which we live makes clear the ways in which wrongdoing causes harm not only to the individuals involved but also to the connections and relationships in and through which individuals live. . . . A relational approach reveals that harms related to wrongdoing extend from the individual victim(s) and wrongdoer(s) to affect those connected with them, including their immediate communities of care and support, broader communities to which they belong, and ultimately the social fabric of their society.[304]

One component of that relational theory is "equality of respect, dignity, and mutual care and concern for one another."[305] These concepts expand beyond liberal notions of equality and dignity, "tak[ing] equality of *relationships* as its goal."[306] In this relational theory of justice, process and outcomes are integrally connected, and any measure of success must take account of both.[307]

Llewellyn and her colleagues argue that measures of success must consider whether the processes and outcomes further this alternative theory of justice. Therefore, they recommend alternative indicia of success, such as the restorative process's impact on "social relationships, community-building, and skills that generate enhanced positive social attitudes and behaviours [sic]" and highlighting "the creation of a stronger, positive sense of community."[308] Noting the limitations of evidence-based research, they suggest evaluation models include "observational research, before

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303 *See id*. at 309.

304 *Id*. at 297.

305 *Id*. at 298 (citing JENNIFER J. LLEWELLYN, *Restorative Justice: Thinking Relationally about Justice*, in BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY & HEALTH LAW AND POLICY 89 (2012)).

306 *Id*. at 299.

307 Llewellyn, *supra* note 101, at 300. (This relational theory of justice embodies seven principles: (1) relationship-focused; (2) holistic; (3) contextual and flexible; (4) inclusive and participatory; (5) dialogical and communicative; (6) democratic and deliberative; and (7) forward-focused and solution-focused.) *Id*. at 301–05.

308 *Id*. at 308.

and after measures of relationships, and 'community' studies,"[309] evaluating the process' impact on the larger community. With this framework in mind, the first relevant question relates to "success according to whom?" The older person, the person doing the harm, other family members, and service agencies may all have different definitions of success.

Focusing first on the older person, while she may be interested in being "made whole," she may also desire an apology, an acknowledgement that abuse occurred, a restored relationship with the person who committed the harm, or harmony within the family. If a close family member commits the harm, improving that relationship and the overall family dynamic may be most important to the senior. If a friend or caregiver commits the harm, a mere acknowledgment may be sufficient. Other components of "success" might include whether the person harmed felt a reduced fear of revictimization and reduction in anger toward the other person.[310] Another aspect of the senior's perspective relates to her reactions to the intervention itself, and whether or not it resulted in empowerment, greater resilience, or enhanced feelings of self-worth.[311] Qualitative and observational research methods would obtain the seniors' perspectives on such tangible and intangible outcomes.

Success from the perspective of the person who committed the harm could include that person's acknowledgement of remorse or shame for his conduct.[312] Other possible measures of success depend on the underlying situation that gave rise to the abuse. For example, in instances of financial abuse, if the person's actions were due to that person's legitimate inability to make ends meet, securing additional social and employment services as a result of this process would be a "success." Success for a caregiver might

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309 *Id*. at 310. *See also* KAREN STEIN, *Elder Abuse Prevention Initiatives*, *in* ELDER ABUSE: RESEARCH, PRACTICE AND POLICY 433, 452 (XinQi Dong ed., 2017) (recommending an emphasis on developing methodologies that recognize individualized change, acknowledging that no one intervention can be applied to every case).

310 *See* LEENA KURKI, *Evaluating Restorative Justice Practices*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 293, 295 (Andrew von Hirsch et al. eds., 2003) (describing measures of success in the context of victim-offender mediation). *See also* Eur. Forum for Restorative Just, VICTIMS AND RESTORATIVE JUSTICE: AN EMPIRICAL STUDY OF THE NEEDS, EXPERIENCE, AND POSITION OF THE VICTIM WITHIN RESTORATIVE JUSTICE PRACTICES 140–41 (Inge VanFraechem et al. eds., 2015), http://www.euforumrj.org/wp-content/uploads/2015/05/report_victimsandRJ-2.pdf (finding, in studies of victim-offender mediation, that victims were typically satisfied with the restorative process and sincerity of offenders' apologies, but less optimistic about long term effects on the offender and themselves).

311 *See* Păroşanu, *supra* note 97, at 23.

312 *See* Kurki, *supra* note 310.

mean additional resources to relieve the stress of caregiving, resources that benefit both the senior and the person who committed the harm.

Evaluations should also track the impact of the process on other participants, including community volunteers and others present in support of the person harmed or the person committing the harm.[313] They should assess the impact of interventions on community members' development of conflict resolution skills and their sense of responsibility toward those in crisis.[314]

While the "relational theory of justice" approach provides a deeper vision of the potential for restorative justice, more traditional measures of success would complement this approach. For example, examining whether the person committed harm again, the number of future contacts with law enforcement, frequency of requests for services or interventions, and whether the older person feels safer are all additional indicia of "success."[315] Both quantitative and qualitative data will assist in evaluating the models' success.[316]

Another question related to defining success is the length of the time horizon measured. Determining if restorative models result in lasting change requires longitudinal studies.[317] For intangible measures such as the feelings of either the person harmed or the one doing the harm, the duration of positive emotional changes will be significant.[318]

A related challenge is the ongoing availability of the person who was harmed. Since older seniors are exploited more frequently than younger ones, some will pass away before meaningful

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313 Sasson & Sydow, *supra* note 113, at 22.

314 *Id*. at 23.

315 For discussion of approaches for evaluating success in the restorative context, see, e.g., James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. REV. 319, 326; *see also* Kurki, *supra* note 310; MINISTRY OF JUST., RESTORATIVE JUSTICE VICTIM SATISFACTION SURVEY: RESEARCH REPORT 9 (2016); Llewellyn, *supra* note 101, at 306; Mark Umbreit & William Bradshaw, *Assessing Victim Satisfaction with Victim Offender Mediation and Dialogue Services: The Development and Use of the Victim Satisfaction with Offender Dialogue Scale (VSODS)*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 0, 1 (2000), http://rjp.umn.edu/sites/g/files/pua5026/f/media/assessing_victim_satisfaction.pdf (an example of one tool used in the context of victim-offender mediation noting that the failure to utilize consistent mechanisms to collect this data makes comparisons difficult).

316 JEFFREY SONIA, *Survivor Studies: The Importance of Evaluating the Effects of Truth Commissions on Survivors of Human Rights Violations*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 197 (Hugo van der Merwe et al. eds., 2009).

317 *Id*. at 198 (describing the need for a longitudinal study if evaluating impact on those harmed).

318 *Id*.

data can be collected. Similarly, people with dementia are more likely to be exploited, and some may lose the capacity to articulate their perspectives on the restorative process.[319] The shorter the time horizon, the more likely these participants will be available, resulting in a persistent tension in determining the duration of the study period.

The challenges noted above are not insurmountable, but they reflect necessary considerations for designing an effective restorative program most able to meet the needs of older people, those who committed harm, and the communities impacted by this problem.

VI. Conclusions and Recommendations

Existing approaches for addressing elder abuse are inadequate to meet the needs of older people and fail to address the underlying relationships between those harmed and those who committed the harm. Restorative justice models undoubtedly provide a much-needed alternative mechanism for addressing and rectifying this harm. Below are recommendations for incorporating restorative processes into existing strategies, and for identifying the particular types of cases and situations in which these practices can be most advantageous.

A. *Expanded Interventions, Including Restorative Practices, Should be Piloted and Evaluated*

Existing civil and criminal remedies are inadequate responses to elder abuse and exploitation, and fail to meet the needs of older people who have been harmed. Additionally, they provide virtually no assistance to the person committing the harm and are slow and costly. Bluntly, we need more creative options. No single solution will be appropriate for every senior and every situation, so we should embark on an agenda of inquiry, flexibility, and inclusivity as we evaluate less traditional responses.

Restorative practices should be included among these new and creative responses. They are responsive to the needs of those

[319] The perspective of others in their lives on the "success" of the model will be informative, however.

harmed, those committing the harm, and communities. Because the objective is to repair relationships, the resulting solutions have the capacity to be transformative. The inclusive nature of the processes, allowing for the participation of other family members and social supports, provides accountability and resources to assist through that repair process. Finally, restorative practice models allow for flexibility that enables them to be tailored to the unique needs of the individuals and communities involved.

B. *Restorative Practices are Appropriate for Some Elder Abuse Cases but Not All*

Existing research on restorative practices offers guidance for when these processes are likely to be most effective. Success often relies on the willingness of the person who committed the harm to participate, honestly examining his role and relationship with the person harmed and working with the support of others to change his behavior. The senior must also be able to express her goals and be willing to work with the person who committed the harm and members of the community to develop a creative resolution. Participants in appropriate cases will require community support and adequate resources to enable them to transition to a new relationship.

In some situations, restorative practice will not be effective. Cases in which those committing the harm acted in premeditated and gross disregard for the needs of the senior are highly unlikely to be successful restorative practice cases. Additionally, a restorative process would not be appropriate for cases where the person who committed the harm is an active addict or has a serious, untreated mental illness. Except in rare circumstances, cases involving physical and sexual abuse also are not suitable due to the enhanced vulnerability of the older person and the situations' complexity.

C. *Practitioners Must be Skilled and Specially Trained in Working with Older Adults*

Older adults who have been harmed present unique and complex needs. Relative to those harmed in other settings, seniors are more likely to have physical and cognitive limitations, increased

dependence on the person who committed the harm, and fear of changed living situations, including institutionalization. Restorative justice practitioners addressing elder abuse should have specialized training in working with the elderly, and be knowledgeable about capacity issues, the many facets of the aging process, the dynamics of elder abuse, and available resources.

D. *Practitioners Must Engage in Careful Screening Processes*

Because restorative practice will not be appropriate for all elder abuse situations, participants need to be carefully screened. This is particularly important given that the visible abuse may be masking additional forms of abuse. Although restorative processes typically entail individual meetings with each participant in advance of the practice, these sessions should be more comprehensive and exploratory than in other restorative contexts.

E. *Restorative Models Most Appropriate for Addressing Elder Abuse*

Although this article only examined selected restorative practice models, some are better suited for addressing elder abuse than others. Peacemaking may be one of the most suitable models. Given the complex family dynamics often involved in situations of elder abuse, peacemaking is particularly helpful because it provides opportunities for all family members to participate and includes support people and community members. Family group conferencing, while potentially appropriate in some situations, runs the risk of perpetuating control issues and rivalries already negatively impacting the senior. Only in rare circumstances could most older adults resolve problems of elder abuse without the presence of a support person. Mediation's application in this context will depend on the type of mediation, the specific issues to be resolved, and the characteristics of the participants.

F. *Miscellaneous Other Recommendations*

Words matter. The terms "perpetrator," "offender," and "victim" have negative connotations that may dissuade the critical par-

ties from participating.[320] Older adults may not want to be viewed as victims, particularly at the hands of family members or friends. Additionally, this labeling could impede progress at creating or re-creating healthy relationships.

Another consideration is time constraints. Restorative models, designed to address the root cause of problems, can be time consuming and protracted. Peacekeeping circles, for example, are designed to reach consensus and take as long as is necessary to achieve that goal.[321] Factors in any situation of elder abuse are the age and health of the senior. A successful process must balance a procedure that facilitates the development of a repaired relationship and recognizes of the older person's age and potential longevity, or lack thereof. Practitioners must be aware of both sets of factors throughout the process.

Adequate resources are necessary for restorative practices to achieve success. The most critical resources are those that enable the family member who committed the harm to access services that ensure he can honor commitments he made during the process. The person who was harmed also may need ongoing resources. Although restorative models may require more resources than a brief judicial proceeding, it is unlikely that restorative processes cost more than the combined efforts of law enforcement, the court system, and the penal system.

Restorative models of justice are not a panacea to elder abuse and exploitation. However, they represent an alternative to existing remedies. They are flexible. They are focused on the needs of the person who was harmed and offer a solution more palatable for those understandably reluctant to prosecute or even bring a civil action against a family member, friend or neighbor. They also address the needs of the person who committed the harm, and potentially provide resources not otherwise available to assist that person. Finally, they incorporate invaluable community members who can provide support, tangible and intangible, for all parties to reestablish a healthy relationship.

The new paradigm of "elder *restorative* justice" offers a potential solution to complex situations that have traditionally been diffi-

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320 Zehr, *supra* note 92, at 14–15 (noting that labels are judgmental, and they oversimplify and stereotype).

321 *See, e.g.*, KAY PRANIS, *The Little Book of Circle Processes*, *in* THE BIG BOOK OF RESTORATIVE JUSTICE 321 (2015). *See also* Sasson & Sydow, *supra* note 113 (noting in a comparison of Washtenaw County's peacemaking program with mediation that peacemaking may involve multiple sessions and follow-up circles).

cult to resolve. New restorative projects should be designed, implemented, and evaluated. The status quo is unacceptable, and current approaches are inadequate to address this cataclysmic problem. There is nothing to lose, and potentially much to gain.

NINETEENTH ANNUAL INTERNATIONAL ADVOCATE FOR PEACE AWARD

2019 INTERNATIONAL ADVOCATE FOR PEACE AWARD

Sir James Paul McCartney
The International Advocate for Peace Award Recipient

On May 28, 2019, the Cardozo Journal of Conflict Resolution presented the Nineteenth Annual International Advocate for Peace Award to Sir James Paul McCartney at Cardozo Law School's forty-first Commencement Ceremony. What follows is a transcription of the award ceremony, including Sir McCartney's acceptance speech.

DEAN MELANIE LESLIE: It is now my honor to introduce Nicholas Gliagias, Editor-in-Chief of the Cardozo Journal of Conflict Resolution, and Professor Lela Love, the Director of the Kukin Program for Conflict Resolution, to present the International Advocate for Peace Award. [Applause].

NICHOLAS GLIAGIAS: Good afternoon everyone. My name is Nicholas Gliagias and I am the Editor-in-Chief of the *Cardozo Journal of Conflict Resolution*.

Every year, the International Advocate for Peace Award is given by Cardozo Law students to an internationally recognized person who has significantly advanced the cause of peace through both conventional and non-conventional means. Past recipients have included world leaders who advanced peace agendas internationally, including President Bill Clinton, President Jimmy Carter, and Senator George Mitchell. Recipients have also included music artists, journalists, and writers for their powerful use of the arts in the cause of peace and reconciliation, including filmmaker Abigail Disney and folksingers Peter, Paul and Mary. Other award recipients have been involved in efforts to restore peace in war-torn communities, such as Archbishop Desmond Tutu in South Africa and General and Mediator Amira Dotan in the Middle East. This year, we are honored to give the Award to Sir James Paul McCartney. [Applause].

Sir McCartney, your lifetime of work through music has been a healing force worldwide for over five decades. Your songs celebrate love and understanding, empathy and connection—the foundations of peace. Throughout your career, you have continued to inspire all with messages of peace that have imbued generations with more sensitivity, more tolerance, and more recognition that love and understanding are at the heart of the human struggle. In addition, you have supported peace efforts through a wide array of benefit concerts and generous donations to humanitarian causes that have helped people without means all over the world.

Throughout history, it has often been artists who lead the way towards a more peaceful world by creating visions of positivity. And no songwriter or singer has surpassed you in bringing together people from every country in celebration of life—transcending the boundaries of language, culture, religion, and race through the universal power of music.

Thank you for accepting this award and thank you for making our graduation that much more special. [Applause].

SIR PAUL MCCARTNEY: Thank you. Probably easier to play to 40,000 people in a stadium. [Laughter]. Thank you for this huge honor. I am very happy to receive the International Advocate for Peace Award from such a cool school. [Laughter].

When I was growing up in Liverpool in the years after World War II, I asked my dad, "Do people want peace?" He, who had been a fireman during the bombings endured by Liverpool, said "Yes, people want peace. It's the politicians who mess it up." And in my travels around the world, with the Beatles, Wings, and my new group, I've always found that to be the case. People's greatest desire is to raise their families in peace.

I'm especially proud to receive this award from Cardozo, which for many years has been known for its work on behalf of peace and justice, helping people who have been wrongfully convicted and assisting immigrants seeking asylum from violence and poverty.

When we started writing songs and making music, we were just kids out to make a living. But as time went on, I realized that people's lives were being affected by what we were saying. People often come up to me and say, "Your music changed my life"—even people like Bruce Springsteen, David Letterman, and Jerry Seinfeld. [Laughter]. My reply is it was my pleasure. I enjoy what I do, and to think it has a positive effect is a massive bonus. "All

My Loving," "I Want to Hold your Hand," "Hey Jude," "Give Peace a Chance," all come from the same place—a love for humanity, and the warm relationships we all crave.

I am especially proud to be here with my wife Nancy when my handsome and lovely stepson, Arlen Blakeman, is graduating. [Applause]. His family and I are all so proud of the hard work he has put in over the past years. And by the way, if you have any sports-related questions that need answering, ask him. He's a virtual encyclopedia of knowledge. We call him the "Arlo-pedia." [Laughter].

So I would like to thank Dean Melanie Leslie and Nick Gliagias—I've been practicing that name [Laughter]—for this great honor, and end by remembering that when my mate, John Lennon, wanted to become an American citizen, he had an immigration fight on his hands with President Nixon. It was a Cardozo professor that won that fight for him—Leon Wildes. [Applause].

Congratulations to the students of the 2019 graduating class. You did it! [Applause].

NOTES

THE UNIVERSAL PERIODIC REVIEW AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION: STRENGTHS & SHORTCOMINGS

*Sara Alvarez**

I. INTRODUCTION

International Human Rights, as legally enforceable rights, were developed and enunciated in 1948, following the adoption of the Universal Declaration of Human Rights ("UDHR").[1] This document was one of the results that flowed from the international community's response to the atrocities of World War II.[2] As the Declaration is not legally binding on States, legal enforceability followed from the adoption of the International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social, and Cultural Rights ("ICESCR")—both international treaties designed to implement the aspirations of the UDHR.[3] The UDHR, and the adoption of treaties that followed, reflect the international recognition "that basic human rights and fundamental freedoms are inherent in all beings, inalienable and equally applicable to everyone . . . ."[4]

To ensure that the obligations assumed by States and imposed on the international community were adhered to, the United Na-

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

2 *Fact Sheet: International Human Rights Law and Sexual Orientation & Gender Identity*, UNITED NATIONS FREE & EQUAL, https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf (last visited Nov. 20, 2019) ("Human rights were developed and articulated in the Universal Declaration of Human Rights (1948) as a response to the atrocities of World War II.").

3 *Human Rights Law*, UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/human-rights-law/ (last visited Nov. 20, 2019) (". . . International Covenant on Civil and Political Rights – which built on the achievement of the Universal Declaration of Human Rights, using it as its foundation.").

4 *Id.* ("It also acted as a forum where countries large and small, non-governmental groups and human rights defenders from around the world voiced their concerns").

tions Commission on Human Rights was established in 1946.[5] The Commission provided a forum where countries, non-governmental organizations, and human rights defenders were able to voice concerns.[6] This forum proved highly controversial; while certain states were consistently targeted, others were consistently immune from scrutiny and criticism. In response to these concerns, the 2006 General Assembly Resolution 60/251[7] was passed, replacing the Commission on Human Rights with the Human Rights Council ("HRC"), an "inter-governmental body within the United Nations system . . . ."[8] Among other goals, the HRC set out "to promote 'universal respect for the protection of all human rights and fundamental freedoms for all[,] . . . address situations of violations of human rights, . . . and make recommendations thereon.'"[9]

In order to support the HRC in carrying out this mandate, Kofi Annan, former Secretary-General of the United Nations, proposed a "peer review" mechanism to monitor the human rights situation of every UN Member State. The Resolution that established the HRC[10] also outlines the foundation of this "peer review" mechanism: the Universal Periodic Review ("UPR").[11] The UPR allows for an international body to periodically review the human rights records of all 193 UN Member States.[12]

The approach of the UPR reflects that of alternative dispute resolution ("ADR"), a variety of processes used to help parties resolve disputes without litigation. Through approaches and techniques directed toward non-confrontational dispute resolution,[13] parties can bypass the undesirable costs and effects of litigation. Common forms of ADR include negotiation, mediation, and arbitration.[14] As a means of resolving disputes, ADR appreciates the

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5 *Introduction*, UNITED NATIONS HUM. RTS COUNCIL, https://www.ohchr.org/en/hrbodies/chr/pages/commissiononhumanrights.aspx (last visited Nov. 20, 2019).

6 *Id*.

7 G.A. Res. 60/251 (Mar. 15, 2006).

8 *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS COUNCIL, https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx (last visited Nov. 20, 2019).

9 *UN Human Rights Council*, INT'L JUST. RESOURCE CTR., https://ijrcenter.org/un-human-rights-council/ (last visited Nov. 20, 2019).

10 G.A. Res. 60/251, *supra* note 7, at 2.

11 *Universal Periodic Review*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (last visited Jan. 20, 2020).

12 *Id.*

13 *Mediation and Dispute Resolution Mechanisms*, UNITED NATIONS DEP'T OF ECON. AND SOC. AFF., https://www.un.org/waterforlifedecade/water_cooperation_2013/mediation_and_dispute_resolution.shtml (last visited Jan. 20, 2020).

14 *Id.*

reality that conflict inevitably arises between parties who hold interests that diverge in a given area. The ever-increasing use of this approach reflects the need to minimize the costs and negative effects that stem from confrontational resolution of these divergent interests.[15] While resorting to litigation may be deemed essential when dealing with certain conflicts, the sensitivities that accompany assessment of a given State's human rights situation require a different approach. The UPR provides a system that allows for States to engage in intergovernmental dialogue while refraining from infringing upon a given state's sovereignty.

Throughout each cycle (a four-and-a-half year period within which all UN Member States are reviewed), the Human Rights Council facilitates the UPR through three key stages.[16] First, reports are submitted by the State under Review ("SuR") and the Office of the UN High Commissioner for Human Rights ("OHCHR"). Next, the Working Group on the UPR, composed of the 47 Member States of the HRC, reviews the SuR.[17] Both the HRC Member States and other UN Member States have the opportunity to partake in discussion and dialogue with the reviewed States.[18]

Once the review has concluded, the "troika of rapporteurs"[19] and a member of the OHCR collaborate to produce a report of the review. This report includes the recommendations that have been issued to the SuR during its review, as well as a summary of the proceedings.[20] Once the SuR has informed the troika of its decision to either accept or decline the recommendations, the report is presented to the Working Group for adoption. The final "Outcome Report" is debated and subsequently adopted in the following plenary session of the HRC. Last, the SuR sets out to implement the recommendations it has accepted and must follow up with the HRC accordingly.[21]

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15 *Id.*

16 *UPR Review Process*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/Documents/HRBodies/UPR/UPR-Review-banner2.pdf (last visited Jan. 20, 2020).

17 *Basic Facts About the UPR*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx (last visited Jan. 20, 2020).

18 *Id.* ("The reviews are conducted by the UPR Working Group which consists of the 47 members of the Council; however any UN Member State can take part in the discussion/dialogue with the reviewed States.").

19 *Universal Periodic Review Process*, U.S. DEPARTMENT OF STATE, https://www.state.gov/universal-periodic-review-process/ (Jan. 20, 2020) (the "troika of rapporteurs" is a group of three Human Rights Council members selected at random).

20 *Id.*

21 *Id.*

Through analysis of the Universal Periodic Review—specifically the means that it employs, the responses that it solicits, and the degree of resulting implementation, or lack thereof—I will assess the efficacy of the UPR as a form of ADR, in furthering the object and purpose of the HRC, specifically with reference to the rights of individuals belonging to the LGBTI community. First, I will address the concept of LGBTI rights as human rights deserving of protection. Second, I will provide context with respect to the modes of confrontational approaches available to the international community. Next, I will expand on the history and purpose of the UPR and describe the procedures through which it is carried out. Then, I will analyze the efficacy of the UPR by looking to the concrete influence it has had on reviewed States. Last, I will set forth proposals for strengthening UPR machinery to more effectively promote human rights on the ground.

II. BACKGROUND

A. *LGBTI Rights as International Human Rights*

The UN Charter encourages "respect for human rights and for fundamental freedoms for all without distinction . . . ."[22] Likewise, the UDHR expresses that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . . ."[23] While there is no separate human rights instrument that deals explicitly with LGBTI rights,[24] all human beings are entitled to human rights by virtue of their humanity. Treaty bodies have progressively added discrimination based on sexual orientation and gender identity to the list of grounds for human rights violations. Charged with interpretation of human rights agreements, treaty bodies have construed these instruments as applicable to individuals of all sexual orientations.[25] For example, the International Covenant on Civil and Political Rights ("ICCPR") sets out the principle of non-discrimination in Article 2(1):

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22 U.N. Charter art. 1, ¶ 3.

23 G.A. Res. 217 (III) A, *supra* note 1, at 72 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

24 AUSTRALIAN HUMAN RIGHTS COMM'N., ADDRESSING SEXUAL ORIENTATION AND SEX AND/OR GENDER IDENTITY DISCRIMINATION 7 (2011).

25 *Id.*

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[26]

Additionally, the ICCPR sets out the right to equality in Article 26, as well as the right to privacy in Article 17—all relevant to the state's obligation to respect, protect, and fulfill human rights.[27] Apart from the ICCPR, "United Nations Committees have recognized the right to non-discrimination on the basis of sexual orientation" under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.[28] Further, several United Nations statements support the view that international human rights are applicable to people of all sexual orientations.[29] For example, in 2011, the HRC issued a Joint Statement on Sexual Orientation and Gender Identity that received the support of 85 countries.[30] Notably, in 2006 a group of human rights experts developed a set of provisions called the Yogyakarta Principles.[31] Although not "hard law,"[32] these provisions constitute a comprehensive articulation of the human rights of LGBTI individuals as well as measures that states should undertake to protect those rights.

Despite the support for LGBTI rights as enforceable human rights, many UN Member States continue to criminalize same-sex relationships, and a significant number of States continue to exhibit discrimination against the LGBTI community.[33] In some states,

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26 International Covenant on Civil and Political Rights, art. 2, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 172.

27 *See id.* at art 17, 26.

28 AUSTRALIAN HUMAN RIGHTS COMM'N, *supra* note 24, at 8.

29 *Id.*

30 *Ground-Breaking Statement on Sexual Orientation and Gender Identity by Record Number of 85 States*, INT'L SERV. FOR HUM. RTS., (Mar. 23, 2011), https://www.ishr.ch/news/ground-breaking-statement-sexual-orientation-and-gender-identity-record-number-85-states.

31 THE YOGYAKARTA PRINCIPLES, THE YOGYAKARTA PRINCIPLES PLUS 10 (2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

32 *Term: Hard Law/Soft Law*, THE EUR. CTR. FOR CONST. AND HUM. RTS., https://www.ecchr.eu/en/glossary/hard-law-soft-law/ (2019) (last visited Nov. 20, 2019) ("Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.").

33 Juneau Gary & Neal S. Rubin, *Are LGBTI Rights Human Rights? Recent Developments at the United Nations*, AM. PSYCHOL. ASS'N: PSYCHOL. INT'L (June 2012), https://www.apa.org/international/pi/2012/06/un-matters.

the laws that criminalize same-sex relationships are not enforced—however, the mere retention of such provisions implies that the state does not recognize the identities of LGBTI individuals.[34] At a Human Rights Council meeting in March of 2012, the then-Secretary General of the UN, Ban Ki-moon, referred to a OHCHR report that documented "disturbing abuses in all regions."[35] Ki-moon acknowledged a "pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transgender."[36] In this statement, the Secretary General criticized the "widespread bias at jobs, schools and hospitals, and appalling violent attacks."[37] He stated that, "People have been imprisoned, tortured, even killed. This is a monumental tragedy for those affected – and a stain on our collective conscience. It is also a violation of international law."[38]

The recognition and acceptance of LGBTI rights has been slower than that of other rights due to the strength of political, religious, and cultural opposition flowing from many States. For example, Uganda's treatment of LGBTI rights was addressed during the First Cycle of the Universal Periodic Review, on October 11, 2011.[39] During the presentation by Uganda, the delegation stated that the Constitution of Uganda (art. 31, para. 2(a)) prohibits marriage between persons of the same sex.[40] Additionally, §§ 145 and 146 of Uganda's Penal Code criminalize same-sex relations.[41] The delegation further indicated that, "While the Constitution, under chapter four, guaranteed the rights of all persons, the promotion and protection of human rights must be carried out within the social and cultural context."[42] Uganda is one of many UN Member States that has refused to recognize how the criminalization of same-sex relationships, and the inevitable implications that flow therefrom, violate the rights of those belonging to the LGBTI community. While many states do recognize LGBTI rights as human rights, Uganda's position demonstrates how confrontational approaches are likely to prove futile when controversial or culturally

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34 Frederick Cowell & Angelina Milton, *Decriminalisation of Sexual Orientation Through the Universal Periodic Review*, 12 HUM. RTS. L. REV. 341, 341-42 (2012).

35 Gary & Rubin, *supra* note 33.

36 *Id.*

37 *Id.*

38 *Id.*

39 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Uganda*, at 3, U.N. Doc. A/HRC/19/16 (Dec. 22, 2011) [hereinafter U.N. Doc. A/HRC/19/16].

40 *Id.* at 5.

41 *Id.* at 5.

42 *Id.* at 5.

sensitive topics are at issue. Instead, mechanisms such as the Universal Periodic Review may provide an alternative way to address these topics in a manner that emphasizes cooperation, rather than confrontation.

B. *The Role of State Sovereignty*

Domestic and International Law are viewed and enforced differently, primarily due to the obstacles that sovereignty presents on the international plane. In the early 19th century, international law was deemed to be what enabled international coexistence between sovereign States; international law dealt with both external and internal sovereignty. From border regulation to dispute settlement, international law addressed all areas pertaining to the organization of States' external sovereignty. By prohibiting intervention in another sovereign State and requiring restraint, international law protected internal sovereignty as well.

The second part of the 20th century corresponded to a new conception of international law as a means of cooperation between sovereign States.[43] The United Nations ("UN") was created in 1945; since then, the UN as well as other international organizations and institutions have proliferated at the regional and global levels to enhance international cooperation. With increased interdependence and cooperation among States, international law has come to apply to areas that were previously within the province of the domestic sphere. One of these areas is International Human Rights Law. Further, international law has seen the emergence of new forms of "relative normativity," through which States can be bound by legal norms they have not consented to. Relative normativity concerns "the nature, structure, and content of the international legal system[,]" and "involves issues of hierarchy and implicates the rules of recognition by which law is distinguished from norms that are not legally binding."[44] Thus, "peremptory norms," fundamental principles of international law that are accepted by the international community of States, will override

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[43] Samantha Besson, *Sovereignty*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472 (last updated Apr. 2011).

[44] Dinah Shelton, *International Law and 'Relative Normativity,' in* INTERNATIONAL LAW, 137, 137 (Malcolm D. Evans ed., 4th ed. 2014).

other norms and bind all States.[45] Examples of peremptory norms include prohibitions against both genocide and crimes against humanity. Further, States may not derogate (i.e. suspend or restrict certain obligations under the State's Human Rights Convention in times of crisis) from peremptory norms.[46]

International law is not the law of a global State or political community, but of many national and regional institutions.[47] Through the creation of international organizations, the subject-matter that international law has come to encompass, and its relative normativity, sovereignty is often said to have been circumscribed in the second half of the 20th century. For example, many limitations to sovereignty are no longer consent-based, instead, these limitations may stem from customary norms or general principles. These norms are the result of the accretion of gradual recognition of such norms at the domestic level by modern democracies. Understood as a reflection of the "minimal common denominator to the practice of all democratic sovereign States,"[48]47 once internationalized, those norms may contribute to the development of international standards themselves. Another way in which State sovereignty has been limited is through the rise of material and economic interdependence between States. In turn, this has meant increased institutional cooperation and the creation of corresponding international organizations. In delegating sovereign power to these organizations, increased integration in international organizations has given rise to new channels of political decision-making as well as new mediums of human rights protection beyond the State. A paradigm example is the gradual democratization of decision-making processes by the European Union.

Notions of political and legal sovereignty are intrinsically connected. Whether at the national or international level, the law is a political creation and remains a political instrument. Although political and legal sovereignty are conceptually distinct and can exist separately, these notions are not logically separable in the long run and each legitimizes the other in many ways. Political sovereignty

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45 Anne Lagerwall, *Jus cogens*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml (last reviewed Nov. 7, 2017).

46 Natasha Holcroft-Emmess, *Derogation from the Human Rights Convention—in Plain English*, HUM. RTS. NEWS, VIEWS & INFO (June 13, 2017), https://rightsinfo.org/derogation-human-rights-convention-plain-english/.

47 Besson, *supra* note 43.

48 *Id*.

is difficult to conceive without rules to exercise and constrain the exercise of that sovereignty, while legal sovereignty is hard to fathom without a political power to establish legal rules in the first place. Sovereignty being at once political and legal, the interrelation between these dimensions could be wielded as a tool for enforcing human rights. Despite the limits imposed on State sovereignty throughout the 20th century, sovereignty remains a major consideration, and at times a major obstacle, to enforcing international law.

C. *Confrontational Mechanisms in the International Human Rights Realm*

In order to hold States responsible for human rights violations, confrontational mechanisms including criminal prosecutions, civil lawsuits, and sanctions, may be used in the international rights realm.

1. Litigation in Connection with International Human Rights Law

The notion of litigation in connection with international human rights law operates as more of a means for punishment or redress than as a means for enforcing human rights obligations.

Criminal prosecutions can take place in domestic courts, ad hoc tribunals, or the International Criminal Court (ICC). Although States are charged with the obligation to prosecute human rights abuses within their jurisdictions, there are many reasons why this obligation is often not carried out. The Geneva Conventions require that States implement domestic laws protecting human rights and punishing violations. While most States have complied with these international obligations, some have not. Without domestic legislation addressing the human rights violation, victims in those States may have no cause of action on which to sue. If a State has complied and legislation has been enacted, victims may be able to seek redress in the civil courts of their State. However, even where legal protections have been implemented into domestic law, a State may nevertheless fail to bring a perpetrator to justice. Courts may be weak or corrupt, or prosecutors could refuse to pursue a case. This is especially so when the perpetrator is a government official. Moreover, even if ultimately prosecuted, domestic

amnesty or immunity laws could allow the perpetrator to escape accountability.

Although regional human rights courts and systems, both civil and criminal, have been established by intergovernmental organizations as well, the jurisdiction of these courts is narrow in scope. For example, the European Court of Human Rights,[49] established by the European Convention on Human Rights,[50] began operating in 1959 under the auspices of the Council of Europe.[51] The European Court has jurisdiction to decide only those complaints submitted by States and individuals that "concern violations of the Convention allegedly committed by a State party to the Convention and that directly and significantly affect[ ] the applicant."[52] A "substantial majority" of applications submitted to the Court are disregarded for failure to meet one or more of the stringent admissibility requirements,[53] including exhaustion of domestic remedies.[54]

Moreover, the International Criminal Court (ICC),[55] governed by the Rome Statute,[56] is the world's first permanent international criminal court.[57] The ICC is a "court of last resort,"[58] and entertains only those cases concerning the most serious human rights violations[59]—its jurisdiction is extremely narrow and rarely asserted. The Rome Statute authorizes the ICC to exercise jurisdiction over four main crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.[60] Even if the crimes alleged are of "sufficient gravity," the ICC will only prosecute a case if doing

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49 John G. Merrills, *European Court of Human Rights*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/European-Court-of-Human-Rights (last updated Mar. 14, 2016).

50 Council of Europe, *European Convention*, EUROPEAN CT. OF HUM. RTS., (1950), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

51 *The European Court of Human Rights*, INT'L JUST. RESOURCE CTR., https://ijrcenter.org/european-court-of-human-rights/ (last visited Sept. 20, 2019).

52 *Id.*

53 *European Court of Human Rights to Begin Implementing Stricter Requirements for Individual Applications in 2014*, INT'L JUST. RESOURCE CTR. (Dec. 16, 2013), https://ijrcenter.org/2013/12/16/european-court-of-human-rights-to-begin-implementing-stricter-requirements-for-individual-applications-in-2014/.

54 INT'L JUST. RESOURCE CTR., *supra* note 51, at 21.

55 *About*, INT'L CRIM. CT., https://www.icc-cpi.int/about (last visited Nov. 20, 2019).

56 INTERNATIONAL CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2011).

57 *About*, *supra* note 55.

58 *Id.*

59 *Id.*

60 *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 20, 2019).

so is consistent with the principle of complementarity. According to this principle, "the ICC has secondary jurisdiction after national courts, and can only act in a given situation if the relevant States are unwilling or unable to prosecute the crimes within their jurisdiction."[61] Thus, the ICC will assume jurisdiction only if all domestic options have been exhausted; it is not intended to replace national criminal systems.[62]

Additionally, the International Court of Justice (ICJ), the principal judicial body of the UN, facilitates settlements of legal disputes submitted by States and issues advisory opinions.[63] The ICJ does not have jurisdiction over complaints brought by individuals—only States may be parties to contentious cases brought before this Court.[64] Further, a U.N. Member State may compel another State to appear before the ICJ only if, the State compelled is also a member of the UN and has consented to being subject to the ICJ's jurisdiction.[65]

Civil lawsuits may be an option if a victim (or group of victims) is seeking compensation and the State has the appropriate machinery in place to provide redress. Of concern, however, is the potential for an unfavorable precedent that lawsuits concerning contentious issues risk setting. Even more concerning, litigants could be subject to danger for bringing an action.

2. Other Confrontational Approaches

Sanctioning States that violate their human rights obligations is another confrontational approach increasingly used to further political goals in a non-violent way.[66] In restricting trade and travel for human rights violators, sanctions allow States to engage in economic combat.[67] However, sanctions are controversial and criticized as detrimental to citizens of the sanctioned State as well as the wider world economy[68]—the "enforcement of countermeasures

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61 *Complementarity Principle,* European Center for Constitutional and Human Rights, https://www.ecchr.eu/en/glossary/complementarity-principle/.

62 *How the Court Works*, *supra* note 60.

63 *The Court*, Int'l Ct. of Just., https://www.icj-cij.org/en/court.

64 *How the Court Works*, *supra* note 60.

65 Louis Henkin et al., Human Rights (2d ed. 2009).

66 *Sanctions*, Gov't of the Neth., https://www.government.nl/topics/international-peace-and security/compliance-with-international-sanctions.

67 *Id.*

68 Elvira Dominguez-Redondo, *The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?*, 4 New Zealand L. Rev. 673 (2012).

tends to inflict further suffering on those who . . . [were] intend[ed] to [be] protect[ed]."[69]

Other confrontational approaches are similarly unlikely to prove effective. The UN Charter explicitly proscribes the use of force between Member States, unless such use of force is in self-defense.[70] This is so even when the intervention would serve the purpose of ending a mass atrocity. Rather, the UN Charter authorizes the Security Council of the UN to compel action as may be necessary to maintain or restore international peace and security.[71] Despite the significant authority conferred upon the Security Council, such authority extends only to threats to "international peace and security,"[72] a threshold that most human rights abuses will not meet.

Given the paradoxical relationship between the international community's stance on human rights and the constraints imposed by the notion of state sovereignty, confrontational approaches are often inadequate or ineffective. While confrontational mechanisms may be available to prosecute or seek redress for human rights violations, enforcing human rights obligations presents an even greater challenge. As there is no international police force, and confrontational means are not available to address enforcement of human rights obligations, the utility of the non-confrontational Universal Periodic Review is enhanced. The Universal Periodic Review has the potential to target the structure of systems in place that allows human rights abuses to occur with a view toward improving human rights conditions all over the world.

D. *The Universal Periodic Review*

The Universal Periodic Review undertakes to analyze and address the human rights situation in each of the 193 UN Member States during each cycle, or approximately every five years.[73] The first cycle of the UPR took place between 2008 and 2011, the second cycle took place between 2012-2016, and the third began in 2017 and will be completed in 2021. The second and subsequent

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69 *Id.* at 697.

70 *See* U.N. Charter art. 2; *see also* U.N. Charter art. 51.

71 U.N. Charter art. 39.

72 *Id.*

73 *What is the UPR?*, UPR INFO, https://www.upr-info.org/en/upr-process/what-is-it (last visited Feb. 10, 2020).

cycles of the UPR focus on "the implementation of accepted recommendations and the development of [the] human rights situation[ ] in the State under review[.]"[74] As such, a State that accepts a recommendation is implicitly agreeing to be evaluated as to the implementation of such recommendations during subsequent cycles of the UPR.

1. The Development of the Universal Periodic Review

Human rights are legal rights—the violation of human rights constitutes a breach of law. For a legal right to carry weight, remedies for infringement upon that right must be available. Generally, a breach of the law is deemed subject to redress through adjudication of responsibility. Difficulties may arise when States with historical, socio-cultural, and religious norms that conflict with certain international human rights standards are obligated to adhere to those standards. In this context, the disputes stem from conflict between those international standards and the standards that a given State may deem appropriate, as opposed to conflict between the States themselves. Despite the significant interest that the international community has in safeguarding human rights, another fundamental interest exists—that of State Sovereignty.[75]

While the concept of human rights has been around for centuries,[76] the international regime of human rights law, established after the Second World War, is relatively new. Traditionally, the highest form of legal authority has been that of the State—not the community of states or international mechanisms. Before international human rights law was established, States maintained the position that no one from State A could tell State B how to conduct its internal affairs, a critical limitation. In attempting to universalize adherence to human rights, this regime of international law represents a shift from the notion that international law concerns only the relationship *between* States, to the idea that an individual is a rights holder who is able to assert rights and claim remedies within and against the State.[77] The development of a scheme of international legal regulation is evidence of the gradual chipping away of the prerogatives of sovereignty. Still, sovereignty remains a rele-

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74 Human Rights Council, U.N. Doc. A/HRC/DEC/17/119, at 1 (Jul. 17, 2011).

75 HENKIN ET AL., *supra* note 65.

76 *A Brief History of Human Rights*, UNITED FOR HUM. RTS., https://www.humanrights.com/what-are-human-rights/brief-history/ (last visited Nov. 20, 2019) (explaining that the first king of ancient Persia, Cyrus the Great, conquered Babylon in 539 B.C. He freed the slaves, declared that all people had the right to choose their own religion, and established racial equality.).

77 HENKIN ET AL., *supra* note 65.

vant consideration when addressing a given state's conduct, and controversy remains surrounding the willingness and capacity of certain UN Member States to comply with certain obligations imposed by human rights law. As such, the Human Rights Council—charged with "preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities through the United Nations, and strengthening and streamlining the United Nations system in the field of human rights"[78]—has no simple task. The HRC must attempt to strike a balance between respect for the sovereignty of a SuR and adherence to its ultimate goal: improvement of the human rights situation in each of the UN Member States.[79]

Before the Human Rights Council and Universal Periodic Review were established, the Commission on Human Rights was criticized for its politicization and selectivity. Ultimately, the HRC replaced the Commission in an effort to reform the practices that led to the Commission's demise. In order to facilitate this objective, the then-Secretary General, Kofi Annan, proposed a "peer review" mechanism based on intergovernmental dialogue, along with the participation of other stakeholders. The Universal Periodic Review was established and began operating in March 2008. Positive changes to domestic legislation and policy, stemming from recommendations made during the Universal Periodic Review, demonstrate the potential efficacy of this approach. However, the cooperative and "dialogic nature" of the UPR[80] implies that this process is necessarily slow. Particularly, the reform of LGBTI rights has been characterized by more limited development. While this reality is undesirable, the cooperative approach exemplified by the UPR makes this unsurprising. The controversial nature of LGBTI rights in many parts of the world, coupled with the inherently non-confrontational character of the UPR process, assumes that reform to LGBTI human rights will not be immediately realized. Instead, anticipated progress must account for the sensitivity surrounding this topic and changes must occur incrementally, over time.

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78 *Who We Are*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, https://www.ohchr.org/EN/ABOUTUS/Pages/Mandate.aspx.

79 *What is the UPR?*, *supra* note 73.

80 Cowell & Milton, *supra* note 34, at 352.

2. The Three Stages of the Universal Periodic Review

The human rights obligations of each State under Review are assessed based on the extent to which said State complies with the obligation set forth in: (1) the UN Charter; (2) the Universal Declaration of Human Rights (UDHR); (3) any human rights treaties to which the SuR is a State Party; (4) any voluntary pledges undertaken and/or policies implemented by the SuR; and (5) applicable international humanitarian law.[81]

i. Stage 1: Preparation for Universal Periodic Review

Three documents guide the review of any given Member State:[82] (1) a report submitted by the SuR; (2) a report by the OHCHR, based on a compilation of information contained in the reports of treaty bodies as well as other relevant UN documents; and (3) a compilation of additional credible and reliable information provided by other relevant stakeholders, for example, non-governmental organizations[83] and national human rights institutions.[84]

ii. Stage 2: The Review of the Working Group

Throughout a given cycle, 42 UN Member States are reviewed per year during three Working Group sessions—and each session is dedicated to reviewing the human rights situations of 14 UN Member States.[85] Further, each Working Group is comprised of all members of the HRC. During each Working Group Session, time is allocated to allow the delegation for the SuR to present the current state of their human rights situation to the Working Group. The remainder of the Session involves interactive dialogue between the SuR and any UN Member State or Organization that wishes to ask questions and voice its concerns.[86] Next, three members of the HRC (i.e. the "troika of rapporteurs")[87] and a member of the OHCHR collaborate to produce a report based on an accurate and objective assessment of the Working Group Session, along with any recommendations provided to the SuR.[88] The SuR may

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81 *Basic Facts About the UPR, supra* note 17.
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Basic Facts About the UPR*, *supra* note 17.
87 *Id.*
88 *Id.*

accept or decline to implement the recommendations set forth, and must inform the HRC of its decisions. Finally, in the following plenary session of the HRC, the outcome report of each SuR is debated for one hour.[89] During this hour, the SuR, UN Member States, and certain human rights organizations, are each afforded 20 minutes to express their views and concerns.[90] It is at this time that the SuR has the opportunity to "reply to questions and issues that were not sufficiently addressed during the Working Group and respond to recommendations that were raised by States during the review."[91] The final Outcome Report is then adopted.

iii. Stage 3: Implementation of Recommendations & Follow-Up

Following the acceptance of recommendations by the SuR, the State has the "primary responsibility to implement the recommendations contained in the final outcome."[92] When each UN Member State is subsequently reviewed during the next UPR Cycle, that State must present information concerning the steps that have been taken in implementing and enforcing these recommendations. With reference to States that fail to adhere to these recommendations, the OHCHR has stated that "the Council will address cases where States are not cooperating."[93]

3. The Legal Effects of the Universal Periodic Review

While the UPR is deemed a primarily political, rather than legal, process, legal implications of the review exist and are often overlooked. Rights imply entitlement to remedies, and the provision of remedies require mechanisms for accountability. Rather than examination of cases by judges, the UPR is conducted by States as "peers." As such, the cooperative nature of the UPR has been criticized as a deficient mechanism that is "wholly dependent upon the good will of the State under review[,]" thereby having little impact on "those who are not really willing to participate . . . ."[94] While true that the success of the UPR depends largely on the extent to which a given State is willing to cooperate, these criticisms overlook the less obvious legal effects of this mechanism.

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89 *Id.*

90 *Id.*

91 *Id.*

92 *Basic Facts About the UPR*, *supra* note 17.

93 *Id.*

94 Olivier de Frouville, *Building a Universal System for the Protection of Human Rights: The Way Forward*, *in* NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY 241, 253 (M. Cherif Bassiouni & William A. Schabas eds., 2011).

While treaties represent "hard law,"[95] in that a State Party to a given treaty is legally bound by the obligations imposed by that treaty, the UPR mechanism can be viewed as a form of "soft law,"[96] in that it does not have a directly binding effect on the states that are reviewed.[97] Despite this distinction between "hard" and "soft" law, scholars have advocated the view that these two forms of law should be seen as existing along a continuum, rather than as binary choices.[98] In other words, a recommendation that a SuR accepts does not create a new legal obligation that is binding on that state. Instead, these recommendations may attain legal status in two ways.

First, the subject-matter of some recommendations may provide evidence of an emerging consensus among states as to "the scope and application" concerning an existing legal right.[99] The UPR produces normative effects by encouraging states to adopt new political and legal obligations. While this mechanism is not viewed as an international law-making process, the influence it may have on State behavior has the potential to define the scope and application of legal obligations over time. In addition to treaties that States agree to be legally bound by, obligations may come from international customary law.[100] For example, if a State has not signed or ratified a treaty prohibiting torture, that State is nevertheless prohibited from engaging in torture as a matter of customary law. Legally binding obligations are recognized as a matter of customary law when "both the emergence of a state practice and also the presence of *opinio juris*" are established.[101] The second element required in order to give customary legal effect to a rule, *opinio juris*, refers to the requirement that States obey a given rule out of a sense of obligation—i.e. States adhere to the rule because they consider themselves legally bound rather than because of tradition or convenience.[102] If a recommendation regarding the scope and application of a given law is met with a pattern of acceptance,

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95 Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, INT'L ORG., (Summer 2000), at 421–22.

96 *Id.* ("The term soft law is used to denote agreements, principles and declarations that are not legally binding").

97 Cowell & Milton, *supra* note 34.

98 Kenneth W. Abbot & Duncan Snidal, *supra* note 95.

99 Frederick Cowell, *Understanding the Legal Status of the Universal Periodic Review Recommendations*, 7 CAMBRIDGE INT'L. L.J. 164, 167 (2018) [hereinafter Cowell, *Understanding*].

100 *What is Customary International Law?*, AUSTL.'s MAGNA CARTA INST. (Mar. 14, 2017), https://www.ruleoflaw.org.au/customary-international-law/.

101 Cowell & Milton, *supra* note 34.

102 *What is Customary International Law?*, *supra* note 100.

this emerging trend could represent evidence of a new interpretive norm, or "state practice," concerning the law in question.[103] When this state practice is accompanied by the presence of *opinio juris*, a new legally binding norm may emerge as customary international law. Rather than creating a right, recommendations accepted through the UPR, and ultimately adhered to, could potentially shape the scope of an existing commitment by establishing this legally binding norm.[104]

The second way in which recommendations may obtain legal status is through their function as an enforcement mechanism for existing international obligations and norms.[105] Through participation in the UPR process, a SuR is consenting to the function of the review as an enforcement mechanism for that State's existing legal obligations.[106] Many of the recommendations that are made to States throughout any given cycle of the UPR concern existing obligations which States are not complying with. While the UPR is not a law-making process, these recommendations serve to encourage compliance with existing human rights law. Through publicizing the ways in which a SuR is failing to comply with an obligation, these recommendations perform the function of "naming and shaming"—public criticism "that serves to attract attention to actions perceived as wrongful"—in order to pressure that State to change its behavior.[107]

Further, by highlighting the lack of compliance with an existing obligation of a SuR, a recommendation forces the State "to account for its non-compliance."[108] An example of this function can be seen when a recommendation is made concerning the failure of a SuR to submit reports to human rights treaty bodies, as required by membership to that treaty. Failure to report is a form of non-compliance—this lack of cooperation effectively weakens a

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103 Cowell & Milton, *supra* note 34.

104 Detlev Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 EUR. J. INT. L. 1031 (2004) (". . . the awareness that a pattern of state behavior has settled into a rule of law introduces a new element into the situation, tending to make the pattern more stable and reliable. Custom lives.").

105 Cowell & Milton, *supra* note 34.

106 Heather Collister, *Rituals and Implementation in the Universal Periodic Review and the Human Rights Treaty Bodies*, *in* HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 109 (Hilary Charlesworth and Emma Larking eds., 2014).

107 Katrin Kinzelbach & Julian Lehmann, *Can Shaming Promote Human Rights? Publicity in Human Rights Foreign Policy*, EUROPEAN LIBERAL FORUM (2015) ("Shaming seeks to increase the costs for offenders and thus acts as a deterrence mechanism. . . It can also serve as one of several mechanisms of human rights change. . .").

108 Cowell, *Understanding*, *supra* note 99.

treaty body.[109] Another significant function of the UPR in enforcing existing obligations comes into play by virtue of acceptance of a recommendation by a SuR. In effect, the State is agreeing to be scrutinized as to the implementation of that recommendation during the subsequent UPR. In situations of non-compliance, recommendations by other States encouraging compliance implicate the reputation of the SuR. Such recommendations portray the SuR as incapable and unreliable in the context of future international activity.[110] Although the UPR does not create law, the function of the review as an enforcement mechanism plays a legal role in enforcing existing obligations.

Several theories concerning compliance of international human rights obligations lend support to the indirect legal effects that the UPR may produce. Constructivist theorists, who argue that "repeated interactions, argumentation, and exposure to norms characterize and construct state practice,"[111] have examined how the socialization of States within organizations can improve the States' compliance with that organization. This serves to encourage norm adherence which effectively stimulates the development of legalism—in turn, the organization itself can be viewed as a source of law.[112]

Another noteworthy theory concerning compliance is the interactional account of international law.[113] This theory looks to how legal commitments "arise in the context of social norms based on shared understandings," and asserts that these commitments are preserved through enduring practices.[114] The UPR is a mechanism that stimulates interaction through its "peer review" approach. Proponents of interactional theory stipulate that the organization's practice has a legitimizing or delegitimizing effect on a State's actions—thereby creating "a feedback loop . . . whereby actors within

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109 NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 132 (2002).

110 Andrew Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

111 Elizabeth Stubbins Bates, *Sophisticated Constructivism in Human Rights Compliance Theory*, 25 EUR. J. INT'L L. 1169 (2014).

112 Cowell, *Understanding*, *supra* note 99; Jutta Brunnée & Stephen Toope, *Constructivism and International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 119 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012).

113 JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010).

114 *Id.* at 15.

global society can learn collectively to value the rule of law more highly[.]"[115]

Assessing the efficacy of the UPR requires the understanding that the mechanism is primarily political and its legal effects serve to complement, rather than replace already-existing human rights machinery. The reality that enforcement tools of international law are imperfect,[116] and that States remain the principal actors in the enforcement of international laws, must be recognized in order to appreciate the legal value of the Universal Periodic Review.

Despite the positive ways in which the UPR process allows for monitoring and assessing State compliance with human rights obligations, this mechanism is not without flaws. The necessarily slow pace at which the UPR can bring about change can make this approach futile for a State where flagrant human rights violations require an immediate solution. Any resulting legal effects will take time to realize.

Additionally, States often make broad recommendations, allowing the State under review to assert that it is in compliance. Vague recommendations can be impossible to monitor with accuracy and can inhibit the international community from holding that State accountable. For example, there is no clear difference between recommendations concerning commitments that the SuR has already made, and those relating to new commitments. Upon reviewing the legal effect of the UPR in 2009, Nadia Bernaz noted that the primary problem with the mechanism was the fact that the UPR treated binding and non-binding norms equally in accomplishing the review.[117] Further, UN Member States often make recommendations that concern "what" issues warrant reform, rather than "how" States can actually implement reform. Even when a State demonstrates its support for a given recommendation, the implementation of a State's accepted recommendations remains one of the UPR's greatest challenges.

Due to the political nature of the Universal Periodic Review, neither of its constituent instruments[118] set out mechanisms for enforcement. There is currently no formal process in place to consist-

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115 *Id.* at 10.

116 Frederic L. Kirgis, *Enforcing International Law*, AM. SOC'Y OF INT'L L. (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law.

117 Nadia Bernaz, *Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism, in* NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION 75, 77 (Kevin Boyle ed., 2009).

118 G.A. Res. 60/251 (Mar. 15, 2006); Human Rights Council Res. 5/1, U.N. Doc. A/HRC/5/1 (June 18, 2007).

ently measure the level of implementation by a State under review. While civil society organizations, including non-governmental organizations, play important roles in this respect, the UPR in itself has the potential to take greater measures to facilitate implementation and accountability.

III. Discussion

A. *UPR Recommendations & Responses*

The UN resolution, through which the Human Rights Council was created, instructed the HRC to "[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments *in a manner which ensures universality of coverage and equal treatment with respect to all States*[.]"[119] In the area of LGBTI rights, compliance with the mandate to ensure universality and equal treatment, while desirable, has proven difficult in practice.

In order to identify the UPR's concrete effects with respect to LGBTI rights in reviewed States, I will look to UPR recommendations that pertain to legislation; however, note that most human rights violations involve practices and policies that States engage in, absent legislation as a justification. Due to differences in history, culture, and value systems, Member States diverge in the degree of legal protections and obligations concerning the rights of those who identify with the LGBTI community. Accordingly, recommendations about discriminatory laws concerning the LGBTI community have received a wide range of responses from States under review. While some States have welcomed the commitment to repeal discriminatory laws, others have been reluctant to commit, but have left the possibility open; still, others remain entirely unwilling to repeal legislation that discriminates against the LGBTI community. Through my analysis of recommendations pertaining to legislation, I will identify the strengths and shortcomings characteristic of the Universal Periodic Review and propose means by which the UPR can better serve its stated purpose.

States' responses to the recommendations received during the course of its review may be separated into three categories: recom-

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[119] G.A. Res. 60/251, *supra* note 118, at 3.

mendations that are accepted; recommendations that are "noted;" and recommendations that are resisted. The distinctions between these categories are often subtle—however, they are conducive to assessing the relative effect of the UPR's recommendations.

1. States that Accept Recommendations

The term "acceptance" is used where a state has given clear indication of acceptance of a recommendation.[120] Although it may take time to implement a recommendation to repeal discriminatory laws domestically, acceptance reflects a commitment to ultimately accomplish that goal. Accepting such a recommendation is significant: "when a State has formally accepted UPR recommendations, it has committed to implement them before its next review when it will have to report on the measures it has undertaken to implement the accepted recommendations."[121] Thus, the reviewed State implicitly accepts to be subject to the UPR's scrutiny concerning its adherence to that commitment, as well as to the subject-matter of the recommendation itself.

There are several ways in which a SuR may indicate its acceptance of a given recommendation. In 2011, following its first review, Sao Tome and Principe was the only State to procure its "full support" for the recommendation that it repeal all laws criminalizing sexual orientation.[122] "Full support" for a recommendation is the most desirable and most rare response from a State. Generally, countries that respond with "full support" or make similar commitments are those where such penal provisions have remained in place as a matter of historical legacy, rather than as a reflection of the current government's policy.

Alternatively, while Mozambique's Penal Code did not explicitly criminalize LGBTI conduct, concern centered around the potential interpretation of a provision in the Code. That provision criminalized "unnatural vices" and ordered security measures against those who practice such "vices against nature."[123] The delegate from Mozambique plainly stated that "homosexuality is

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120 PURNA SEN, UNIVERSAL PERIODIC REVIEW: LESSONS, HOPES AND EXPECTATIONS 81 (Wayzgoose ed., 2011).

121 *Universal Periodic Review*, CHILD RTS. CONNECT, https://www.childrightsconnect.org/connect-with-the-un-2/universal-periodic-review (last visited Sep. 24, 2019).

122 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Sao Tome and Principe*, at 44, U.N. Doc. A/HRC/17/13 (2011).

123 Emmerson Lopes, *The Legal Status of Sexual Minorities in Mozambique*, *in* PROTECTING THE HUMAN RIGHTS OF SEXUAL MINORITIES IN CONTEMPORARY AFRICA 183, 184, (Sylvie Namwase & Adrian Jjuuko eds., 2017).

not criminalized [in Mozambique], as there is no such definition in the Criminal Code, so that no one can be sanctioned for homosexuality."[124] Although the delegation did not commit to repeal such laws, it stated a serious commitment to address the issue of discrimination on those grounds.

In 2012, Sao Tome and Principe adopted a new penal code. Although it is unclear whether the new code is actually in force, Sao Tome and Principe appear to have legalized and removed punishment previously in place for homosexual activity.[125] In 2015, Mozambique's new Penal Code explicitly removed the provision concerning "vices against nature," thereby leaving no ground for the criminalization of homosexuality.[126]

2. States that "Note" Recommendations

All recommendations that are not clearly identified as "accepted" are considered "noted."[127] This includes circumstances when States have not offered a clear position on their response to recommendations, or the response that is provided is ambiguous.[128] Additionally, a recommendation that is accepted *in principle* is considered "noted."[129] This response does not operate as an acceptance or rejection—instead, the State is deemed to have reserved judgment as to a "noted" recommendation.

A "noted" recommendation can imply both the ultimate desire to repeal discriminatory laws, as well as resistance toward decriminalization. For example, when Chile recommended that Uganda take measures to "combat and prevent all forms of discrimination. . .including on the grounds of sexual orientation and gender identity," Uganda agreed to examine the recommendation and provide a response in due time.[130] During the same cycle,

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124 Refugee Documentation Ctr. of Ir., *Is Homosexuality Legal in Mozambique? How are Homosexuals Treated in Mozambique? Do the Police Offer Protection to Homosexuals in Mozambique?*, REFWORLD (June 8, 2012), https://www.refworld.org/docid/5061adb42.html.

125 *LGBT Rights in Sao Tome and Principe*, EQUALDEX, https://www.equaldex.com/region/sao-tome-and-principe (last visited Sep. 24, 2019).

126 *LGBT Rights in Mozambique*, EQUALDEX, https://www.equaldex.com/region/mozambique (last visited Sep. 24, 2019).

127 UPR INFO, UPR INFO'S DATABASE: METHODOLOGY RESPONSES TO RECOMMENDATIONS (2014), https://www.uprinfo.org/database/files/Database_Methodology_Responses_to_recommendations.pdf.

128 SEN, *supra* note 120.

129 UPR INFO, *supra* note 127.

130 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Uganda*, U.N. Doc. A/HRC/34/10/Add.1 (Mar. 15, 2017) [hereinafter U.N. Doc. A/HRC/34/10/Add.1].

however, Uganda did not support Mexico's recommendation that the State "repeal the law against homosexuality, which facilitates discrimination against lesbian, gay, bisexual and transgender people. . . and imposes sentences of life imprisonment for the offenses of homosexuality, same-sex marriage and 'aggravated homosexuality.'"[131]

3. States that Resist Recommendations

A State cannot technically "reject" a recommendation. Instead, the State will resist the recommendation or stipulate that a given recommendation does not enjoy its support.[132] In effect, such a statement functions as a rejection of that recommendation—however, abstaining from categorizing it as such allows the matter to come up again in subsequent review cycles.[133]

In large part, the States that resist decriminalization of homosexual conduct cite their national culture and tradition as a way to "legitimise [sic] the existence of provisions[.]"[134] The difficulty in promoting LGBTI rights in States that assert their domestic culture as a "barrier" to achieving further progress is evidenced by provisions of Uganda's Penal Code.[135] During the first cycle of the UPR, the delegation from Uganda did not support recommendations that the State amend its Penal Code to allow for the rights of the LGBTI community to be realized. Recommendations set forth by Canada, Slovenia, Belgium, Switzerland, Australia, Brazil, Spain, Sweden, and The Netherlands all called for Uganda to repeal any discriminatory legislation against consensual same-sex relationships, and asked that it abstain from passing legislation of such a discriminatory nature.[136] The delegation demonstrated resistance against these proposals. The review of Uganda during the second cycle of the UPR took place approximately five years later. The delegation indicated that the Anti-Homosexuality Act had been declared unconstitutional and annulled by the Supreme Court of Uganda in 2014.[137] The delegation stated, "[a]ll Ugandans [are] treated equally, without discrimination. [LGBTI] persons who

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131 *Id*.

132 UPR INFO, *supra* note 127.

133 Cowell, *Understanding*, *supra* note 99.

134 *UPR of Uganda: Allegations of Torture by Security Forces, and Criminalisation of Same-Sex Relations*, INT'L SERV. FOR HUM. RTS. (Oct. 19, 2011), https://www.ishr.ch/news/upr-uganda-allegations-torture-security-forces-and-criminalisation-same-sex-relations.

135 *Id.*

136 U.N. Doc. A/HRC/19/16, *supra* note 39.

137 U.N. Doc. A/HRC/34/10/Add.1, *supra* note 130.

[are] discriminated against in accessing services or in the enjoyment of certain rights [can] petition the [Equal Opportunities] Commission for redress."[138] The delegation then qualified its statement when it said that the country "could not accept activism or the promotion and public display of what people did in private[,]" as doing so would be "inconsistent with Ugandan culture, morals, and customs."[139] While many recommendations that the delegation supported indicated a commitment to ensure that Uganda's domestic laws were consistent with international human rights standards,[140] none of the recommendations that explicitly referred to the rights of LGBTI persons received the delegation's support. Instead, recommendations set forth by 17 UN Member States concerning LGBTI rights were not supported. Similar to recommendations resisted during the delegation's first review, the majority of recommendations [concerning the LGBTI community] that did not receive support from Uganda were those that called for the SuR to decriminalize consensual same-sex conduct.[141]

The Russian Federation similarly opposed recommendations that called on the State to repeal laws criminalizing sexual orientation. During the first cycle of the UPR, many countries raised particular concerns with respect to a federal bill proposed by Russia that outlawed "the so-called 'propaganda of homosexuality' among minors."[142] Denmark recommended that Russia "[t]ake effective steps to prevent arbitrary use of existing regulations to discriminate against LGBT[I] people . . . ."[143] In "accepting" this recommendation, the delegation stated, "[t]he law does not discriminate against LGBTI persons and does not allow for the arbitrary application of the relevant regulations."[144] The delegation expressly resisted a recommendation from The Netherlands that Russia repeal legislation that enabled discrimination based on sexual orientation. In response, the delegation stated, "[t]he law does not discriminate against lesbian, gay, bisexual and transgender (LGBT) persons . . . [t]he law contains no measures whatsoever aimed at prohibiting or

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138 *Id*.

139 *Id.* ¶ 57.

140 *Id.*

141 *Id.*

142 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation*, at ¶ 128, U.N. Doc. A/HRC/24/14 (July 8, 2013) [hereinafter U.N. Doc. A/HRC/24/14].

143 *Id.* at ¶ 140.93.

144 *Id.*

officially censuring homosexuality[.]"[145] Similar recommendations made by Canada, Belgium, Denmark, Slovenia, Sweden, and Spain were resisted as well.[146] The Russian "gay propaganda" law was passed on June 11, 2013 and enacted 19 days later. The "propaganda of homosexuality" bill essentially prohibits the mention of homosexuality in public.[147] Approximately five years later, Russia was reviewed during the third cycle of the UPR. During the portion of the session allocated to interactive dialogue, Denmark, Montenegro, and The Netherlands expressed concern regarding discrimination "based on sexual orientation and gender . . . ."[148] The delegation responded by pointing to the lack of evidence set forth to substantiate the claims and concerns that were raised. Russia declared that "investigations had revealed that there had been no incidents of discrimination against those persons."[149] At the conclusion of its review, Italy recommended that Russia take concrete measures "to combat all forms of discrimination, including when based on religion or belief and on sexual orientation, in compliance with international obligations."[150] In purportedly supporting Italy's recommendation, the delegation for Russia stated that the current legislation prohibits any form of restrictions on the rights of citizens on social, racial, gender, ethnic, linguistic, religious or any other grounds.[151] Recommendations from Ireland, Honduras, and Norway, urging the Russian Federation to adopt legislation prohibiting discrimination against LGBTI persons and their supporters, were not accepted. Instead, the delegation explained that "Russian legislation prohibits any form of restriction on the rights of citizens . . . [a]ny discriminatory act . . . is duly acted upon by the law enforcement agencies. The existing legal framework in the field under consideration is sufficient and needs no expansion at this point."[152] Russia similarly opposed Denmark's recommendation that the State repeal "Federal Law No. 135-FZ by means of which 'propaganda of non-traditional sexual

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145 U.N. Doc. A/HRC/24/14 ¶140.86.

146 *Id.*

147 Sewell Chan, *Russia's 'Gay Propaganda' Laws Are Illegal, European Court Rules*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/world/europe/russia-gay-propaganda.html.

148 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation*, at ¶ 147.96, U.N. Doc. A/HRC/39/13, (July 12, 2018) [hereinafter U.N. Doc. A/HRC/39/13/AnnexE].

149 *Id.* ¶ 139.

150 *Id.* ¶ 147.90.

151 *Id.*

152 *Id.* ¶ 147.68.

relationships' is a criminal offence."[153] The delegation asserted that this recommendation was "factually inaccurate" as the "law in question introduced administrative liability . . . rather than a criminal one."[154] It further submitted that the law in question did not contradict Russia's international obligations and "needs no abolition."[155]

In resisting recommendations concerning the rights of the LGBTI community, other reasons cited by States include a lack of financial resources as well as the risk of potential backlash.[156] For example, Togo stipulated that the issue was "too controversial for a fragile nation[,]"[157] and Singapore retained its discriminatory legislation, reasoning that societal attitudes "could not be changed by legislation alone."[158] Still, other States met similar recommendations with stronger opposition. For example, Gambia maintained that it had "cultural values, norms and practices. . ." distinctive from those of other countries, and "sexual orientation as a universal human right[ ]" was not a human right that the country recognized.[159] Many of the justifications provided by resisting States reflect a denial of the prevalence of human rights abuses aimed at the LGBTI community. Further, many of these states deny the existence of a national LGBTI community altogether.

B. *The Universal Periodic Review as a Form of Alternative Dispute Resolution*

1. A Case Study: Save the Children

A case study, "Universal Periodic Review: Successful examples of child rights advocacy,"[160] was published by Child Rights

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153 *Id.* ¶ 147.70.

154 U.N. Doc. A/HRC/39/13/AnnexE, *supra* note 146 ¶ 147.70.

155 *Id.*

156 Cowell, *Understanding*, *supra* note 99.

157 *UPR of Togo: Willingness to Improve but "no" to Decriminalisation of Same-sex Relations*, INT'L SERV. FOR HUM. RTS. (Oct. 13, 2011), https://www.ishr.ch/news/upr-togo-willingness-improve-no-decriminalisation-same-sex-relations.

158 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Singapore*, at ¶ 82, U.N. Doc. A/HRC/18/11, (July 11, 2011) [hereinafter U.N. Doc. A/HRC/18/11].

159 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Gambia*, at 63, U.N. Doc. A/HRC/14/6 (March 24, 2010).

160 Diarra Diop, *Universal Periodic Review: Successful examples of child rights advocacy*, SAVE THE CHILDREN (2014), https://resourcecentre.savethechildren.net/library/universal-periodic-review-successful-examples-child-rights-advocacy.

Governance Global Initiative in January of 2014. The case study centers around Save the Children ("STC"), a non-profit organization that fights for the realization of children's rights and documents the concrete influence that the Universal Periodic Review can have on discriminatory legislation. STC seeks to strengthen government systems and Civil Society Organizations (CSO) to ensure that States effectively implement the UN Convention on Rights of the Child (UNCRC).[161] This organization first engaged in the UPR during the first cycle in 2008, seizing "the opportunity of the UPR from the outset to raise the profile of children's rights, by engaging directly in reporting and advocacy or supporting child rights coalitions."[162]

In its participation of Pakistan's review,[163] Save the Children demonstrated how the UPR can act as a catalyst in speeding up national policy and legislative initiatives that have been pending for years. STC's active engagement in the UPR of Pakistan resulted in the passage of three bills between 2012 and 2013 that protect children's rights.[164] The positive effects of these laws include prohibiting child corporal punishment, raising child protection standards in juvenile justice, and guaranteeing free education to all children aged five to sixteen.[165] By engaging with the media and influencing the issues that were raised during Pakistan's review, STC was able to ensure that children's issues were at the center of discussions.[166] The UPR is an integral part of STC's child rights monitoring strategy, and a "powerful tool to hold States to account on their human rights record."[167] By successfully wielding this tool, STC has achieved concrete results in changing legislation regarding children's rights.

The Universal Periodic Review also provides a platform where a broader range of actors can engage with one another. In doing so, the UPR lays the foundation for strong relationships between embassies, human rights organizations, and the communities facing

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161 *About Us*, SAVE THE CHILDREN, https://www.savethechildren.org/us/what-we-do/global-programs (last visited Nov. 20, 2019).

162 DIARRA DIOP, CHILD RIGHTS GOVERNANCE GLOBAL INITIATIVE, UNIVERSAL PERIODIC REVIEW: SUCCESSFUL EXAMPLES OF CHILD RIGHTS ADVOCACY (Jan. 2014) [hereinafter Diop, *UPR: Successful Examples of Child Rights Advocacy*].

163 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Pakistan*, U.N. Doc. A/HRC/22/12, (Dec. 26, 2012).

164 Diop, *UPR: Successful Examples of Child Rights Advocacy*, *supra* note 162.

165 *Id*.

166 *Id*.

167 *Id*.

human rights violations. In Nepal, Save the Children trained 138 CSOs on how to use the UPR to hold the government to account on commitments to children.[168] Through coordinated advocacy at national and international levels, including meetings with embassies and trips to Geneva to ensure concerns would be raised during the UPR process, STC facilitated the adoption of the Child Rights Bill and National Child Policy and Comprehensive Standards for Child Care Homes in 2012. During the second UPR of Republic of Korea,[169] Save the Children along with two national organizations formed the coalition, "UPR Child Rights Network." STC's coordinated approach and concerted efforts with respect to reporting and advocating "brought a higher profile and greater visibility to children's rights in the Republic of Korea," indicating to many States involved in the UPR that these concerns required increased attention from national authorities.[170] Ross Oke, Coordinator for the UPR Child Rights Network, acknowledged that "[t]he UPR was a highly positive experience in terms of raising issues internationally and solidifying relationships while also forging new connections with other CSOs and government officials. The UPR recommendations can serve as a future advocacy tool with embassies on issues where they may not normally be involved."[171]

2. The Strengths of the Universal Periodic Review

As stated above, the effects of the Universal Periodic Review have the potential to extend into the legal ream and operate as advocacy tools to create real change. The Universal Periodic Review provides a framework for dialogue and collaborative action at national and international levels between a broad range of actors. The limited availability of confrontational approaches to ensure that UN Member States adhere to their human rights obligations enhances the value in the UPR as a form of alternative dispute resolution. Through the non-confrontational nature of the UPR process, all UN Member States have the opportunity to both listen to and be heard by other States and interested organizations. The UPR process implicitly recognizes the sensitivity required to address the divergent views of States. This sensitivity is particularly evident when the sensitivities that correspond to LGBTI rights are

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168 *Id*.

169 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of Korea*, U.N. Doc. A/HRC/22/10, (Dec. 12, 2012).

170 Diop, *UPR: Successful Examples of Child Rights Advocacy*, *supra* note 162.

171 *Id*.

at issue. In operating as a form of alternative dispute resolution, the UPR maintains a cooperative, rather than confrontational, approach to addressing human rights conditions on a global scale.

With regard to more controversial topics, such as the treatment of LGBTI rights in the international community, the political (as opposed to legal) nature of the UPR facilitates open and constructive dialogue. The Universal Periodic Review puts States in the spotlight to answer LGBTI-related questions. Even if a given State is unwilling to commit to addressing human rights violations, the UPR creates a forum where States, otherwise unwilling to even acknowledge these issues, are compelled to engage. The UPR may also serve its purpose by laying the foundation for change. For example, when confronted with criticism as to discriminatory legislation, States that criminalize LGBTI conduct may dismiss recommendations to decriminalize by asserting that the laws in question are not enforced. Even if that State is unwilling to repeal, a State declaration of non-enforcement may plant the seed for future arguments for repeal.

With respect to sovereignty, the UPR "reinforces through repetition not only the normality of being a sovereign state, but also the idea that it is the state, and its policies, which are responsible for both violations and the realization of human rights" on the ground.[172]

IV. PROPOSAL

The Universal Periodic Review has been in practice since 2008[173] and, as with any new institution, its weaknesses will take time to realize and even more time to effectively address. While many States have embraced LGBTI rights as human rights, some have refused to entertain this notion. Fortunately, the need to end human rights violations, including those based on sexual orienta-

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172 Jane K. Cowan, *The Universal Periodic Review as a Public Audit Ritual: An Anthropological Perspective on Emerging Practices in the Global Governance of Human Rights*, *in* HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 42, 61 (Hilary Charlesworth and Emma Larking eds., 2014) [hereinafter Cowan, *The UPR as a Public Audit Ritual*].

173 *Universal Periodic Review*, *supra* note 11 (information can be found at https://www.ohchr.org/Documents/HRBodies/UPR/UPR_timeline.pdf).

tion, has been increasingly recognized.[174] UPR recommendations have the potential to operate as advocacy tools to reinforce ongoing national efforts aimed at securing legal and policy change for the LGBTI community. In order to realize that potential and effectively serve the object and purpose of the Human Rights Council, there are several ways in which the UPR machinery could be strengthened. Among other considerations, States and interested stakeholders must have a reasonable period of time to express their positions, States must make specific recommendations in order to obtain concrete commitments, and transparency throughout the process must be prioritized. Further, collaboration is essential; the UPR can assist in building strong and unified civil societies with the capacity to collect evidence, monitor progress and influence policy and practice. Moreover, any steps taken to strengthen the UPR machinery must focus primarily on enhancing its impact on human rights on the ground.

A. *Timing and Specificity*

1. Time Allotted

In the name of efficiency and equality, a fixed quantity of time is allotted and a strict maximum page limit for formal documents is required. During the first cycle of the UPR, all reviews lasted three hours.[175] Of that time, one hour is designated to the delegation to respond to questions, comments, and concerns from the Human Rights Council, the delegations of 193 Member States, and other interested stakeholders.[176] When the number of speakers was high, the time was further-subdivided rather than extended.[177] In effect, the more people interested in addressing human rights issues in a given State, the less time each speaker was allotted. Further, time constrains of this nature frustrate a SuR's ability to respond to recommendations. Following the first cycle of the UPR, one South Asian diplomat complained that the time limits imposed by the UPR left the SuR with "not enough time to explain the rights issue at hand," and that some SuRs resorted to "cultural ar-

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174 *Born Free and Equal*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, https://www.ohchr.org/EN/NewsEvents/Pages/BornFreeAndEqual.aspx (last visited Nov. 20, 2019).

175 Cowan, *The UPR as a Public Audit Ritual*, *supra* note 172 at 60.

176 *Member States*, UNITED NATIONS, https://www.un.org/en/member-states/. *Born Free and Equal*, *supra* note 174.

177 Cowan, *The UPR as a Public Audit Ritual*, *supra* note 172.

guments as an unavoidable shorthand for issues with complicated historical, political, social and economic, as well as cultural, dimensions."[178] With time constraints as strict as these, human rights issues are viewed in isolation and recommendations are made without necessary context. Moreover, one hour is hardly sufficient to address one human rights issue, let alone all the issues potentially prevalent in a single State. Allowing more time for States to voice their concerns would further allow states to bypass the selectivity in identifying pressing issues that often results in superficiality. When issues demanding more attention arise, an Alternative Dispute Resolution mechanism, such as negotiation, should be available to facilitate compromise. While the HRC would likely need to create more time to allow for negotiation, doing so could facilitate compromises on recommendations and the realization of human rights on the ground.

2. "SMART" Recommendations

UPR Info, a non-governmental organization with the stated mission "to utilise [*sic*] the United Nations Universal Periodic Review (UPR) to ensure cooperation among all actors. . .,"[179] suggests that recommending States should make "SMART (i.e. specific, measurable, achievable, relevant, and time-bound) recommendations. . .,"[180] bearing in mind the reality and background of every country. In this respect, the recommending States must play a greater role. In order to use the UPR to hold a SuR's government to account on an accepted recommendation, States must make recommendations that are targeted and specific. In turn, a reviewed State's concrete actions may be evaluated in relation to specific commitments that the SuR has made. In addition to facilitating accountability for implementation, making "SMART" recommendations would deter States from accepting recommendations that they have no intention of adhering to. Further, even when recommendations to repeal discriminatory laws are accepted and the laws are successfully repealed, an end to discriminatory practices does not necessarily follow. Thus, the need to implement protective

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178 HILARY CHARLESWORTH & EMMA LARKING, HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW (Cambridge Univ. Press 2014).

179 *Vision & Mission*, UPR INFO, https://www.upr-info.org/en/about/vision-and-mission (last visited Nov. 20, 2019).

180 UPR INFO, BEYOND PROMISES (2014), https://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf.

measures, and the need for States to recommend those measures, must be recognized as well.

B. *Transparency*

1. Resolving Ambiguities

Often times, a delegation confronted with a call to address violations, allegedly occurring in its State, will dismiss an allegation or recommendation by making an ambiguous statement to the contrary. When a law is ambiguous, as was the prohibition against "unnatural vices"[181] in Mozambique's Penal Code, the delegation should be required to resolve the ambiguity so that rights and obligations conferred by the law are properly understood and the explanation is on the record for future reference. When the text of the law is less repressive than the effect of implementation by courts, a limited interpretation of the scope and application of a discriminatory law can make a significant difference.

Additionally, as more acceptance does not necessarily reflect fewer human rights violations, proposals with a view toward increasing the prevalence of acceptance would be misguided. Rather than attempt to procure more acceptances by more States, the UPR should adapt its structure so that human rights machinery is in place and ready to assist the SuR in making reforms upon acceptance. The UPR was established to serve a political purpose, and much of its power lies in its political nature. However, once a State chooses to accept a recommendation, acceptance should be explicit and qualified only to the appropriate extent, if at all. If this is not so, acceptance may not operate as an acceptance in fact. If acceptance is qualified, experts in the field and individuals that are adept at mediation should facilitate negotiation between stakeholders and States. As previously stated, reasons cited by States that resist recommendations in the context of LGBTI rights include a lack of financial resources and risk of potential backlash.[182] Often, States with the most grave human rights conditions are also those least likely to have adequate resources, structurally or economically, to address those conditions.[183] If a State is willing to accept a recommendation and act accordingly, guide posts should

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[181] Lopes, *supra* note 123, at 184.

[182] Cowell, *Understanding*, *supra* note 99.

[183] *Background Information on Preventing Genocide*, UNITED NATIONS, https://tolerance.tavaana.org/en/content/background-information-preventing-genocide (2015).

be in place so that all willing States have adequate resources to set change in motion.

2. Fact-Checking and Accountability

The UPR could better serve its purpose by ensuring that assertions made by a delegation are factually correct. For example, when the Russian Federation was met with criticism concerning a proposed law prohibiting the "propaganda of homosexuality,"[184] the delegation accepted a recommendation that the State take steps to prevent arbitrary application of discriminatory laws. In accepting, the delegation asserted that "the law does not discriminate against LGBTI persons and does not allow for the arbitrary application of the relevant regulations."[185] However, approximately four years after the "gay propaganda" law passed, an article published by the Thomas Reuters Foundation stated that "hate crimes against [LGBT] people in Russia have doubled in five years."[186] According to Svetlana Zakharova, a Russian LGBT Network board member, "[offenders] have become more aggressive and less fearful[.]"[187] On December 12, 2018, an article concerning the "gay propaganda" law was published by Radio Free Europe/Radio Liberty (RFE/RL),[188] a news source that specifically targets countries where a "free press is banned by the government or not fully established."[189] RFE/RL journalists seek to provide "uncensored news, responsible discussion, and open debate."[190] The article, "'A Living Hell': Russia's 'Propaganda' Law Damaging LGBT Youth, HRW Finds,"[191] sheds light on a 92-page report issued by Human Rights Watch (HRW), titled "Russia: 'Gay Propaganda' Law Endangers Children"[192]. The report termed the law a "classic example of political homophobia,"[193] targeting vulnerable sexual

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184 Dmitry Belyakov, *No Support: Russia's "Gay Propaganda" Law Imperils LGBT Youth*, HUM. RTS. WATCH (Dec. 11, 2018), https://www.hrw.org/report/2018/12/11/no-support/russias-gay-propaganda-law-imperils-lgbt-youth.

185 U.N. Doc. A/HRC/24/14 ¶140.86.

186 Daria Litvinova, *LGBT Hate Crimes Double in Russia After Ban on 'Gay Propaganda,'* REUTERS (Nov. 21, 2017), https://www.reuters.com/article/us-russia-lgbt-crime/lgbt-hate-crimes-double-in-russia-after-ban-on-gay-propaganda-idUSKBN1DL2FM.

187 *Id*.

188 *About Us*, RADIO FREE EUR./RADIO LIBERTY, https://pressroom.rferl.org/about-us.

189 *Id*.

190 *Id*.

191 *"No Support: Russia's 'Gay Propaganda' Law Imperils LGBT Youth,"* HUMAN RIGHTS WATCH, https://www.hrw.org/news/2018/12/12/russia-gay-propaganda-law-endangers-children.

192 *Id.*

193 *Id.*

minorities for political gain.[194] While acceptance by all States is desirable, acceptance must be meaningful if it is to affect real reform. Acceptance is only meaningful if it is given in good faith with intent to act. If States are permitted to dismiss recommendations by making statements that directly conflict with well-documented evidence, as the Russian Federation did during its second review, the integrity of the UPR is greatly compromised. In order to maintain honesty and transparency, empty acceptances should not be entertained.

C. *Implementing and Enforcing Recommendations*

1. Collaborating with Existing UN Human Rights Machinery

In order to facilitate the implementation of accepted recommendations by a given State, collaboration with existing human rights machinery is essential. In addition to international treaty law, and domestic and regional mechanisms, the existing human rights machinery includes the principal organs of the United Nations, their subsidiary bodies, programs and funds, and related organizations. These UN bodies address a wide range of human rights issues, including the rights of LGBTI individuals and communities. Through non-adversarial approaches, these bodies extensively research and seek to identify the source of the human rights violation within their mandate. By working in conjunction with the existing human rights machinery, the Universal Periodic Review could better reform the structural deficiencies in States that enable these abuses to occur.

For example, the United Nations Development Programme[195] (UNDP) and the United Nations Population Fund (UNFPA)[196] are subsidiary bodies of the UN General Assembly. The work of both entities includes "combatting discrimination and violence based on sexual orientation, gender identity, sex characteristics and related work in support of [LGBTI] communities . . . ."[197] The UNDP

194 *Id.*

195 *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, UNITED NATIONS HUMAN RIGHTS OFF. OF THE HIGH COMMISSIONER (June 19, 2018), https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/UN_LGBTI_Summary.pdf.

196 *UNFPA in the UN System*, UNITED NATIONS POPULATION FUND, https://www.unfpa.org/unfpa-un-system (last visited Nov. 20, 2019).

197 *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

seeks to "help countries to develop policies, leadership skills, partnering abilities, institutional capabilities and build resilience in order to sustain development results."[198] The UNDP 2016-2021 Strategy Note[199] on HIV, Health and Development reflects data and analyses of the impacts of inequality and exclusion on LGBTI people, and recognizes that "[h]omophobia and other forms of stigma, violence and discrimination against [LGBTI] people contribute significantly to their exclusion from society, limit access to health and social services and hinder social and economic development."[200] Similarly, the UNFPA seeks to apply basic human rights principles to "some of the most sensitive and intimate spheres of human existence."[201] The UNFPA has recognized that achieving sustainable results with regard to these sensitive spheres entails "identifying the positive, as well as the challenging, cultural values, assets, expressions and power structures."[202] In doing so, particularly when a given initiative is threatening to community values, UNFPA often partners with community and faith-based networks in an effort to reach "some of the most vulnerable and marginalized communities. . .."[203] Additionally, the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialized agency within the Economic and Social Council,[204] seeks to develop educational tools and programs to "help people live as global citizens free of hate and intolerance."[205] Consistent with its mandate to ensure the right to quality education in safe learning environments, UNESCO works to prevent and address "homophobic and transphobic violence" in educational institutions.[206] In 2012, the agency released a publication containing a summary of its findings from the first-ever UN international con-

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198 *About Us*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/content/undp/en/home/about-us.html (last visited Nov. 20, 2019).

199 UNITED NATIONS DEV. PROGRAMME, HIV, HEALTH AND DEVELOPMENT STRATEGY 2016-2021 (2016), https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv—health-and-development-strategy-2016-2021.html.

200 *Id.*

201 *Culturally sensitive approaches*, UNITED NATIONS POPULATION FUND, https://www.unfpa.org/culture (last visited Nov. 20, 2019).

202 *Id.*

203 *Id.*

204 Eldon A. Winters, *UN Funds, Programmes, and Specialized Agencies: Making Sense of the Alphabet Soup*, AM. MODEL UNITED NATIONS (MAY 16, 2017), https://www.amun.org/specialized-agencies/.

205 *UNESCO in Brief – Mission and Mandate*, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., https://en.unesco.org/about-us/introducing-unesco (last visited Nov. 20, 2019).

206 *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

sultation, convened to address homophobic bullying in educational institutions[207]; "[i]n 2017, UNESCO chaired the expert working group on education for the development of an international LGBTI Inclusion Index."[208]

Similarly, other human rights organizations and institutions employ mechanisms with a view toward advancing favorable human rights conditions in the LGBTI community as well.[209] Following the review of a given State, the Human Rights Council should have a mechanism in place to mobilize stakeholders such as Civil Society Organizations, the National Human Rights Commission, embassies, individuals, and the media and create coalitions for reviewed States ("UPR Coalition"). The NHRC and CSOs could ensure that information with respect to the status of implementation of accepted recommendations is authoritative and reliable. A reviewed State's UPR Coalition should be invited to participate in forums with its government to disseminate recommendations and assist in creating a National Plan of Action. In addition, the UPR Coalition should disseminate UPR recommendations among LGBTI-led groups, and organize orientations about UPR mechanisms, raising awareness on a national level.

2. Implementing National Mechanisms for Reporting and Follow-Up

One measure that the Human Rights Council should do to assist States and their UPR Coalitions with implementation and enforcement would be the creation of a National Mechanism for Reporting and Follow-up (NMRF) for each UN Member State.[210] NMRFs serve to "enhance human rights expertise in a sustainable manner, stimulate national dialogue, facilitate communication within the Government, and allow for structured and formalized contacts with parliament, the judiciary, national human rights institutions and civil society."[211] The NMRF for a given State could

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207 United Nation Educ., Sci. and Cultural Org., Good Policy and Practice in HIV and Health Education, booklet 8: Education Sector Responses to Homophobic Bullying (2012).

208 *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

209 *Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians*, United Nations Development Programme (UNDP/PGA 2017).

210 United Nations Human Rights Office of the High Commissioner, National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanism (2016).

211 *Id.*

include a board of human rights experts, reflective of the social, cultural, ethnic, and linguistic makeup of that State. These individuals could work closely with the UPR Coalition as well as victims of the human rights violation at issue in creating a National Plan of Action. Further, the Human Rights Council could ensure that alternative dispute resolution tools are consistently available throughout. When more sensitive subjects arise, specifically those human rights deemed contrary to the values of that State (as is often the case with LGBTI rights), NMRF board members could consult with expert bodies already in existence within the human rights machinery.

V. Conclusion

The Universal Periodic Review was primarily intended as a political process, focused on cooperation rather than confrontation. In practice, this political process has demonstrated that legal standards can be implicated as well. Significantly, the UPR has the potential to interpret and shape the scope and application of existing legal obligations. Through the use of Alternative Dispute Resolution mechanisms, the Universal Periodic Review can operate as a forum where States are empowered to affect real change. This mechanism enables States to learn from each other—and newfound understanding could result in the acceptance and implementation of human rights for all. Above all else, human rights are inherent in all people by virtue of their status as a human being.[212] The words enshrined in the opening statement of the UDHR are unequivocal, "[a]ll human beings are born free and equal in dignity and rights."[213]

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212 Henkin et al., *supra* note 65.

213 *Fact Sheet: International Human Rights Law and Sexual Orientation & Gender Identity*, *supra* note 2.

NOVEL ADAPTATION TO STAGE AND SCREEN: RETHINKING THE CONTRACTUAL AND CREATIVE PROCESS

*Jennifer Rainville McCabe**

I. INTRODUCTION

"We want to option your novel." The words every author lives for. Or are they? Is the offer from a Hollywood studio executive to buy your novel a blessing or a curse? Depending on the vantage point of the author—whether the book is a self-published fan favorite or an international bestseller—the reaction could vary. But either way, the bottom line for both is the potential to increase their fan base and generate more money from their creative work, outcomes that are attractive to any artist.

It is no small task to take a creative work that can be anywhere from 200–500 pages, sometimes as large as 800 or more pages, and turn it into a stage or screenplay which often does not exceed 130 pages.[1] Not to mention the challenge of turning a literary medium into a visual one. Novels delve into what characters are thinking and feeling with rich, detailed descriptions. With screenplays, everything has to be shown through "visuals, behavior, actions and in dialogue."[2] The same goes for the theater, "A great novel does not necessarily make a great play. The two are very different beasts. A book offers private pleasure . . . [t]he joys of theatre are communal, dynamic and transient."[3] "The different narrative demands of the genres can chafe, leaving stage adaptations looking flat and linear."[4] Looming over the practical adaptation process is the larger issue of creative interpretation. Writing is

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1 Danny Manus, *Notes from the Margins: Adapting Books into Screenplays*, SCRIPT (Dec. 15, 2015), https://www.scriptmag.com/features/craft-features/adapting-a-book-into-a-screenplay.

2 *Id.*

3 Sarah Hemming, *Adapting Novels for the Theatre*, FIN. TIMES (Nov. 22, 2013), https://www.ft.com/content/30392f4c-5130-11e3-b499-00144feabdc0.

4 *Id.*

a solitary, individual, intimate—and some would even say sacred—process. Efforts to translate the intent of an author's mind into such exposed mediums as television, film, and stage can not only be wrought with challenges, but catastrophic. "The process of translating our favorite books into film is an inherently tricky conversion. Between casting central characters and fitting in (or cutting out) major plot points, so much can go wrong—or at least stray from the author's initial intentions."[5]

Many well-known, established authors have gone on the record expressing their disappointment in the film version of their novels. "The movie was not really based on my work. They used the names of the characters but they replaced original material with material they had written for them . . . [t]hey had the right as a studio to make that movie and there was nothing I could do," lamented Anne Rice regarding the film based on her novel *The Queen of the Damned*.[6] Some best-selling authors feel so strongly about the craft of writing that they believe books should remain solely in the hands of readers. "I was stupid enough, or it was vanity, that when *The Alchemist* was released . . . it was immediately sold to Hollywood. A book is not improved when it becomes a movie. A book is something that stimulates creativity in the reader. The movie— you have everything already," stated Author Paulo Coelho.[7] So much of the innate pleasure and sense of connection individuals find in reading is derived from the fact that a reader's mind becomes an extension of the author's creative imagination. With a novel, "you can still play it your own way, seeing the characters and their motivations exactly as you like."[8] In short, you create the image fantasy in your head, a film changes that experience. "We sit back and watch it play out, and we do so with a changed eye, having read the books. We're not going in as innocents but as experts."[9] The goal of filmmakers is to make a movie that appeals to the masses and in order to do so the content of the book needs to fit into specific boxes, among them: the "film-

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[5] Jessica Gentile, *10 Authors Who Despised the Movie Versions of Their Books*, PASTE (Nov. 15, 2013, 11:50 AM), https://www.pastemagazine.com/blogs/lists/2013/11/10-authors-who-despised-the-movie-versions-of-their-books.html.

[6] Anne Rice, *Opinion of the Movie The Queen of the Damned*, YOUTUBE (Dec. 23, 2009), https://www.youtube.com/watch?v=PCX7aD2Pn1k.

[7] Lucas Wittmann, *Why Best-Seller Paulo Coelho Thinks Books Should Never Be Made Into Movies*, TIME (Oct. 4, 2018), http://time.com/5415042/paulo-coelho-hippie/.

[8] Jen Doll, *The Trouble with Making Books We Love into Movies*, ATLANTIC (Mar. 23, 2012), https://www.theatlantic.com/entertainment/archive/2012/03/trouble-making-books-we-love-movies/330196/.

[9] *Id.*

makers' assumptions of what will be successful; not offend anyone; get a certain rating . . . come in within a certain budget; not be too short or too long; be made within a finite period of time. . . ."[10]

In addition to how far the final creative product deviates from their work, authors can also be shocked by their financial outcomes. Such was the case of Author Winston Groom, whose novel *Forrest Gump* became "the fastest grossing Paramount film to pass $100 million, $200 million, and $300 million in box office receipts (at the time of its release)."[11] In just over two months the film became one of the highest grossing movies of all time.[12] Groom was paid $350,000 and a three percent share of the film's net profits by Paramount.[13] After witnessing the success of the film, Groom reached out to Paramount to inquire into his share of the profits and was informed that his three percent share was based on "accounting profits" and that the studio was *losing* money based on *their* accounting.[14] When Groom and his lawyer sat down with studio executives and were informed of their accounting process they learned about a provision in the contract that allowed the movie company to set aside a portion of the film's revenue (up to $140 million) to make up for studio losses of future bad movies.[15] When Groom challenged Paramount in court, the judge dismissed the case, as the contract Groom signed clearly stated that he was to receive a share of the film's "accounting profits."[16]

While the financial incentive is certainly tempting on both ends, it is often the film studios that have their bottom line top-of-mind. Filmmakers are lured by a "pre-sold title" with "the expectation that respectability or popularity achieved in one medium might infect the work created in another," as best-selling books come with "ready-made material" that delivers "pre-tested stories and characters."[17] Book adaptations are said to bring in 53% more in global revenue than films developed from an original screen-

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10 *Id.*

11 *What Accounting Lesson Winston Groom Learned from the Movie Forrest Gump?*, KONVEXITY (Jan. 12, 2013), https://konvexity.wordpress.com/2013/01/12/what-accounting-lesson-winston-groom-learned-from-the-movie-forrest-gump/.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 BRIAN MCFARLANE, NOVEL TO FILM: AN INTRODUCTION TO THE THEORY OF ADAPTATION 7–8 (Oxford Univ. Press 1996).

play.[18] Similarly, TV adaptations are known for bringing in more than 50% more viewers than original programming and productions adapted for stage generate three times more in revenue than ticket sales for original plays.[19] "Relying on adapted material can help alleviate part of the risk in the creative production process."[20]

On the flip side, the emergence of "streaming platforms such as Amazon Video and Netflix has opened up new and profitable revenue streams for writers."[21] As such, the hunt for good, pre-existing creative material has become more competitive, with "more and more [screen businesses] . . . hiring dedicated scouts . . . to make sure they're at the front of the queue for exciting material."[22] Industry experts say the combination of the "[n]ew screening platforms, different formats and the resultant ever-expanding audience make this a really exciting time to be bringing books to the screen" and "[b]ooks that already have a proven audience are a logical place to turn to."[23] Literary agent Holly Frederick notes that, "Books are very desirable for the television marketplace now . . . [t]here are so many buyers out there. There's a new streaming platform that comes out everyday, a new cable channel that comes out everyday."[24]

However, the process of adaptation—from beginning to end—is often rife with legal conflict. Typically, disputes are resolved through time-consuming and expensive litigation, pitting two parties with a singular goal—but perhaps differing aims—against one another. Often the outcome of litigation results not in mutual resolution, but in a repudiation of the author's original intent to share their vision with a greater audience. Even established authors, as in the case of Anne Rice, run the risk of losing all bargaining power once the contracts are signed.

How, where, and why do adaptation deals go sour? Do authors need tougher contractual protections from the risks involved in the ride to releasing a creative work into the hands of other crea-

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18 Andrew Leicester, *Book Adaptations into Screen and Stage: A Powerful Two-Way Street*, BOOKSELLER (Nov. 29, 2018), https://www.thebookseller.com/blogs/book-adaptations-screen-and-stage-powerful-two-way-street-901421.

19 *Id.*

20 *Id.*

21 Heloise Wood, *Passing the Screen Test: Four Speakers Reveal What Makes a Hit TV Adaptation*, BOOKSELLER (Sept. 11, 2018), https://www.thebookseller.com/insight/passing-screen-test-four-speakers-reveal-what-makes-hit-tv-adaptation-858426.

22 *Id.*

23 *Id.*

24 Janet Nguyen, *How Do Books Get Adapted into Movies?*, MARKETPLACE (Dec. 13, 2018), https://www.marketplace.org/2018/12/13/business/how-do-books-get-adapted-movies.

tives? Or do authors need to release some of that control and recognize that film and stage hold space for a different aesthetic, and are imaginative projects with their own life force? Agreeing to an appointed mediator—with experience and expertise in both the writing and production worlds—could avoid litigation and potentially bring a much richer and well-received product to market. By activating this type of mediator at various trigger points in the adaptation process—such as contract drafting, scriptwriting, pre-production, filming or rehearsals, and post-production—the interests of authors will be well-represented, the chances of conflict regarding the creative process will be minimized, and disputes over adaptation can avoid the courtroom and make a faster and more positive entry onto stage or screen.

Part II of this Note will discuss the process of how an author typically sells their novel rights to a movie studio or production company. Part III will highlight a recent high-profile lawsuit which illuminates the issues of vague contractual terms and construction and examines disparities in bargaining power. Finally, Part IV will propose how an industry knowledgeable negotiator and/or meditator can serve to lay the foundation for and settle disputes of adaptation transactions.

II. BACKGROUND

Under the Copyright Clause of the U.S. Constitution, [The Congress shall have the power] "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[25] An author has the exclusive right to, and can authorize others to: reproduce the work; prepare derivative works; distribute copies; publicly perform and/or display the work.[26] An author is free to transfer their work through assignment, exclusive license, or non-exclusive license.[27] Under the first two the transfer must be in writing, non-exclusive license may be implied. Therefore, the process of novel adaptation is almost exclusively governed by contract law.

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25 U.S. Const. art. I, § 8, cl. 8.

26 17 U.S.C. § 106.

27 Christine Varad, *Copyright & IP Assignment Explained: What Copyright Transfer and Assignment of Rights Really Means*, KUNVAY (Sept. 9, 2018), http://blog.kunvay.com/copyright-ip-assignment-explained-copyright-transfer-assignment-rights-really-means/.

An "option," gives a production company or studio the exclusive right, for a specified length of time, to make an author's work into a film, TV show, or stage play, for a mutually agreed upon fee to the author.[28] After the novel has been optioned, producers and/or a studio work to secure funding to adapt the book and hire a scriptwriter, if the author has not been tapped to do the job herself, which is often the case.[29] During the option window and/or once the project is "greenlighted"—meaning the money has been secured to make the production—authors, often with the help of their literary agents or lawyers, begin contract negotiations regarding a purchase price to license the work and other contract particulars.[30] This transitions the project into the next phase of a purchase agreement, where the "rights in the creative work will then be transferred . . . usually, the purchase agreement will be negotiated in tandem with the option agreement."[31] Often, this negotiation does not involve giving many rights to the author.[32]

Typically, adaptation contracts outline two major issues: pricing and creative control. Pricing involves not just the purchase price paid to the author but clauses concerning a share in the film or play's profits.[33] As cited above in the case of Groom, these provisions can be tricky with phrases like "net profits," "gross profits," and "accounting profits," leaving a novice author baffled as to what "share" they will actually be receiving. As screenwriter Mark Sanderson puts it, "The studios would like you to believe these top moneymaking films end up with no profits and they can show that no film actually makes money . . . making sure the 'Net Profit' participants [who] do not see a dime."[34] In addition, more often than not, adaptation contracts require that the author give up all crea-

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28 *Selling Your Book's Movie and TV Rights – What You Need to Know*, WRITERS DIGEST (Sept. 25, 2012), http://www.writersdigest.com/whats-new/selling-your-books-movie-and-tv-rights-what-you-need-to-know.

29 *Id.* ("Hollywood prefers to use its own writers to adapt work.").

30 *Id.*

31 Matt Knight, *From Book to Screen – How Dramatic Rights Are Sold*, SIDEBAR SATURDAYS (Jan. 20, 2018), https://www.sidebarsaturdays.com/2018/01/20/from-book-to-screen-how-dramatic-rights-are-sold-you-know-you-want-it/.

32 *What You Need to Know About Selling Your Book's Movie Rights*, SPARK PRESS (July 12, 2016), https://gosparkpress.com/summer-blockbusters-need-know-selling-books-movie-rights/ ("unless you're a Big Name, you're probably not going to get much say in how the movie turns out. Some directors will let an author consult with casting or the adaptation process itself, but don't count on it. Once the book has been signed over, it's out of your hands.").

33 *Id.*

34 Mark Sanderson, *The Truth Behind the Net Profit Lie*, MY BLANK PAGE BLOG (May 28, 2012), https://scriptcat.wordpress.com/2012/05/28/the-truth-behind-the-net-profit-lie/.

tive control.[35] Hollywood has an aversion to using novelists, other than "big fish authors," and prefers to "stick with their own screenplay writers."[36] The tendency of studios to use their own screenwriters essentially cuts authors out of the picture as soon as the contract is signed.

Most recently, a high-profile adaptation case pitted the estate of one of the greatest American authors of the 20th century against one of modern Hollywood's star writers. On March 13, 2018, the estate of writer Harper Lee, author of the American classic *To Kill a Mockingbird,* filed suit against Rudinplay, Inc., the producer of the forthcoming Broadway stage adaptation of the novel.[37] The complaint, *Carter v. Rudinplay, Inc.,* filed in U.S. District Court for the Southern District of Alabama, argued that the contract signed between Ms. Lee and Rudinplay required "that the play not derogate or depart in any manner from the spirit of the Novel nor alter its characters" and that the production company did not have the final say in determining whether any derogation had occurred.[38] The case centered around comments made by Aaron Sorkin, hired by Rudinplay to write the stage adaptation of the novel. In multiple interviews[39], Sorkin admitted that the screenplay would put his own mark on Harper's novel: "As far as Atticus and his virtue goes, this is a different take on *Mockingbird* than Harper Lee's . . . he has a kind of running argument with Calpurnia, the housekeeper which is a much bigger role in the play I just wrote."[40] After reading the news reports and an initial draft of the play, Harper's estate personal representative expressed concern from the family that the play's portrayal of characters was not in line with the novel.[41] She was assured by Rudinplay that the contractual agreement would be honored and the play was still a "working draft."[42] Despite assurances, and after being excluded from seeing

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35 Knight, *supra* note 31 ("Do not be surprised if the author is required to give up creative control once the work has been purchased.").

36 *Id.*

37 Gordon Cox, *Broadway's 'To Kill a Mockingbird' Hit with Lawsuit by Harper Lee Estate*, VARIETY (Mar. 14, 2018, 2:39 PM), https://variety.com/2018/legit/news/to-kill-a-mockingbird-lawsuit-broadway-1202726993/.

38 *Carter v. Rudinplay, Inc.*, No. 18-CV-117, 2018 WL 2107608 (S.D. Ala. May 7, 2018) [hereinafter *Carter Complaint*].

39 *Id.* at 6-7.

40 Kyle Buchanan, *How Aaron Sorkin's To Kill A Mockingbird Will Surprise You*, VULTURE (Sept. 13, 2017), https://www.vulture.com/2017/09/how-aaron-sorkins-to-kill-a-mockingbird-will-surprise-you.html.

41 *Carter Complaint*, *supra* note 38, at 6.

42 *Id.*

an updated draft, the estate filed the suit cited above.[43] Scott Rudin, the owner of Rudinplay, then countersued in New York, seeking $10 million in damages from Lee's estate for challenging the Sorkin adaptation.[44] Rudin argued that by approving Sorkin, Ms. Lee and her representatives understood Sorkin would "put a unique spin on the material."[45] The complaint stated, "The approval of Mr. Sorkin as playwright . . . reflected the parties understanding that the play, while remaining true to the spirit of the novel, would not be a mere recitation of the novel from the stage of the theater."[46] Rudin claimed the wrangling with the estate over who controlled the script had clouded the potential production and "damaged the process" by making it difficult to secure the necessary financing from investors for the play's production.[47] Rudin even suggested putting on a performance for a jury so the factfinder could determine whether the production was true to the spirit of the novel, stating, "A play and a book are two different things. A book is meant to be read; a play is meant to be performed."[48] The case eventually settled in May 2018.[49] The terms of the settlement were not made public.[50]

III. Discussion

A. *Vague Contractual Terms and Construction*

The *To Kill A Mockingbird* (hereinafter "*Mockingbird*") conflict ended up in court primarily due to alleged violations of contract which centered around disagreements over whether the

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[43] *Id.*

[44] Michael Paulson & Alexandra Alter, *Courtroom Drama: Producer Offers to Stage Disputed 'Mockingbird' for Judge*, N.Y. Times (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/theater/mockingbird-harper-lee-scott-rudin-lawsuit.html.

[45] Michael Paulson & Alexandra Alter, *Broadway 'Mockingbird' Is Back on Track, as Court Dispute Ends*, N.Y. Times (May 10, 2018), https://www.nytimes.com/2018/05/10/theater/to-kill-a-mockingbird-broadway-harper-lee.html.

[46] *Id.*

[47] Paulson & Alter, *supra* note 44.

[48] *Id.*

[49] Erik Pedersen, *'To Kill a Mockingbird' Broadway Dispute Settled; Show Will Go On*, Deadline (May 10, 2018, 2:05 PM), https://deadline.com/2018/05/to-kill-a-mockingbird-broadway-lawsuit-settlement-scott-rudin-harper-lee-1202387754/.

[50] Eriq Gardner, *Scott Rudin Settles with Harper Lee Estate Over 'To Kill a Mockingbird' Adaptation*, Hollywood Rep. (May 10, 2018, 12:49 PM), https://www.hollywoodreporter.com/thr-esq/scott-rudin-settles-harper-lee-estate-kill-a-mockingbird-adaptation-1110808.

adaptation deviated too much from the novel.[51] The case raised two key issues in the evolution of novel adaptation to stage or screen and common subsequent legal disputes—vague contractual terms and construction and disparity in bargaining power.

In June 2015, Author Harper Lee entered into a contract with Rudinplay to produce the live stage performance of *Mockingbird*.[52] Under the contract, Rudinplay would pay Lee $100,000 to secure the exclusive rights to create a "dramatic adaptation" of Mockingbird and acquire the "sole and exclusive option to acquire exclusive worldwide live stage rights (with a specified limitation)."[53] In exchange, Lee agreed that "during the period when Rudinplay held live stage rights, she would not authorize the development, marketing, and/or production of any live stage production or other live show or audiovisual production that is based on the Novel or any portion thereof."[54] Under the agreement Lee would also get a billing credit, "certain royalties and certain net profits resulting from presentation of the Play" as well as "the absolute and unconditional right to approve the Playwright for the Play . . . the exercise of such right shall be within her sole and unfettered decision."[55] To that end, the producers procured Aaron Sorkin as playwright and Lee approved him in November 2015.[56]

The transactional provisions, cited above, caused no challenge from the estate. It was the provisions related to creative control and interpretation which were the genesis of the litigation. In the complaint, the personal representative of the Lee estate, Tonja B. Carter, alleged that Sorkin's adaptation was "not faithful to the spirit of the book, as the producers of the upcoming Broadway show had promised it would be."[57] The complaint states that "Atticus Finch, the central figure in *To Kill a Mockingbird*, is portrayed in the novel as a model of wisdom, integrity, and professionalism."[58] According to the complaint, the contract provided that Lee "shall have the right to review the script of the Play

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51 Alexandra Alter & Michael Paulson, *Harper Lee's Estate Sues Over Broadway Version of 'Mockingbird'*, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/theater/harper-lee-estate-lawsuit-broadway-mockingbird.html.

52 *Carter Complaint*, *supra* note 38, at 4.

53 *Id.*

54 *Id.* at 4–5.

55 *Id.* at 5.

56 *Id*. at 6.

57 Colin Moynihan, *Trial Date Set for Dispute Over Broadway 'Mockingbird,'* N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/theater/mockingbird-broadway-trial-date.html.

58 *Carter Complaint, supra* note 38, at 3.

and make comments which shall be considered in good faith by the Playwright."[59] More specifically, that "the Play shall not derogate or depart in any manner from the spirit of the Novel nor alter its characters."[60] Lee's estate argued the alteration of main characters, like Atticus Finch and Calpurnia, questioned the impact of two other characters added who were not in the original novel, stated that the setting was not consistent with the setting of 1930s small-town Alabama, and contended further alteration of the children characters Jem and Scout Finch.[61] Rudinplay disputed the accusations, its countersuit stating, "the character of Atticus in the draft script remained noble and idealistic, and true to the character as he appeared in 'To Kill a Mockingbird.'"[62] However, in an interview with the *New York Times* in March 2018, Producer Scott Rudin admitted that "he was unwilling to make changes to the script to adhere to some [of] the novel's racially outdated views," saying: "I can't and won't present a play that feels like it was written in the year the book was written in terms of racial politics. The world has changed since then."[63]

When Lee died in early 2016, the estate succeeded her as the author under the contract terms.[64] The controversy began in September of 2017 when Sorkin was interviewed by the media outlet *Vulture* at the Toronto Film Festival.[65] When asked "how the younger characters Jem, Scout, and Dill are going to speak Sorkin," Sorkin responded:

> I didn't write their language like they were children . . . as far as Atticus and his virtue goes, this is a different take on *Mockingbird* than Harper Lee's . . . he becomes Atticus Finch by the end of the play . . . he is in denial about his neighbors, and his friends and the world around him, that is as racist as it is . . . he becomes an apologist for these people.[66]

Sorkin continued: "That adjustment not only gives Atticus a character journey from naïveté to righteousness, it ties the 1930s-set *Mockingbird* to today's social climate."[67] In subsequent interviews with the publication *Playbill*, Sorkin stated that it "doesn't work at

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59 *Id.* at 5.
60 *Id* at 6.
61 *Id.* at 8-10.
62 *Paulson & Alter*, *supra* note 44.
63 *Alter & Paulson*, *supra* note 51.
64 *Carter Complaint*, *supr*a note 38, at 6.
65 *Buchanan*, *supra* note 40.
66 *Carter Complaint*, *supra* note 38, at 6-7.
67 *Id.* at 7.

all" to take the scenes that Lee wrote in the novel and dramatize them.[68]

In an email shortly thereafter, the estate's literary agent raised concerns about the sentiments raised in Sorkin's interviews.[69] The producer, Rudin, replied confirming that "[t]he Atticus of the book is the Atticus of the novel . . . I am never going to fall anywhere outside the agreement."[70] Rudin also placed a call to Carter, who was given an advance draft copy of the script during the same time, to assure her that despite her concerns regarding the alteration of characters, Atticus and housekeeper Calpurnia, and the addition of two characters not in the novel at all, that "he wanted to do the Play right."[71] Carter further stressed that in her estimation "the script was not consistent with the setting of 1930s small-town Alabama."[72] Rudin's only assurance was that "the estate would be satisfied with the final product."[73]

Following the Carter/Rudin conversation, the estate's literary agent sent a clarification email to confirm the understanding between all parties, stating: "We are all agreed that the Atticus in the play must remain the Atticus in the book."[74] Rudin responded with the evasive and generic answer of: "We're not looking to make any wholesale changes from what [Ms. Lee] did but simply to dramatize the book, which is sometimes very passive and more ruminative than dramatic."[75] However, when a new script was sent in September 2017, it only exacerbated Carter's concerns.[76]

Six months later, Carter and Rudin met face-to-face to iron out issues.[77] The exchange was described in the complaint as "heated," with Rudin resisting Carter's comments and adding only that the draft was a "working draft," and that her concerns would "be considered at a number of upcoming 'workshops'."[78] In the month that followed, the estate received no updated versions of the

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68 *Id.*

69 *Id.*

70 *Id.* at 8.

71 *Carter Complaint*, *supra* note 38, at 8.

72 *Id.*

73 *Id.*

74 *Id.* at 9.

75 *Id.* (Rudin went on to advise, "remember you are reading a first draft . . . the process of making a play happens in workshops and rehearsals and previews.").

76 *Id.* at 8.

77 *Carter Complaint, supra* note 38, at 9.

78 *Id.* at 10.

script or notification that there was "a willingness to make substantial revisions to the Play."[79]

In March 2018, Carter sent a letter to Rudin expressing "the Estate's position that the Play derogates or departs from the spirit of the Novel and . . . alters five of the Novel's characters."[80] An attorney for Rudin responded, referring to Paragraph 12 of the contract which states that "the Play shall not derogate or depart in any manner from the spirit of the Novel nor alter its characters," but asserted that "The Author is . . . not the final arbiter of what 'derogates or departs from the spirit of the Novel, or alters its characters."[81] In the letter, Rudin's lawyer also denied that the play derogated or departed from the spirit of the novel, or that any characters had been altered.[82] Eight days later, Carter filed suit.

The issues the above conflict raises are rooted not just in vague contract terms, such as "in the spirit of the novel," but the wide canyon that exists between parties in regard to both creative interpretation of the story as well as contractual interpretation. Disputes even arise years after the finished product has been delivered. In June 2016, author Homer Hickam filed a complaint against Universal Studios stemming from an agreement entered into between the parties in 1996, under which Hickam granted Universal his life story rights as reflected in the novel *Rocket Boys.* The story was then made into a film by Universal titled *October Sky*.[83] In 2006, Hickam developed, produced, and began staging the musical *Rocket Boys*.[84] Afterward, Universal developed its own musical based on *October Sky*, but as Hickam alleged in the suit, by copying "scene choices and sequences" and "language exclusively written for the *Rocket Boys* musical."[85] Hickam's claims included breach of contract, fraud, misappropriation of name and identity, intentional interference with contractual relations, and unfair competition.[86] The complaint argued that "Hickam [and family] . . . never granted Universal the right to portray them in

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79 *Id.*

80 *Id*. at 11.

81 *Id.*

82 *Id.*

83 Dominic Patten & Erik Pedersen, *Universal Faces $20M Lawsuit by Homer Hickam over 'October Sky' Musical*, DEADLINE (June 2, 2016, 7:32 PM), https://deadline.com/2016/06/october-sky-musical-lawsuit-homer-hickam-universal-pictures-1201766554/.

84 *Id.*

85 *Hickam v. Universal Pictures*, No. BC622436, 2018 WL 3144251 (Super. Ct. Cal. June 2, 2016) [hereinafter *Hickam Complaint*].

86 *Id.* at 1.

connection with any stage plays or musicals,"[87] and claimed that Universal did not "have any rights to his life story other than the right to make" *October Sky*.[88] Universal countered, arguing that Hickam optioned "all rights to Universal to make any and all motion pictures or live stage productions" and demanded that he "cease and desist in developing, producing and performing the *Rocket Boys* musical".[89]

The Hickam battle centered around conflicting interpretations of the April 1996 *Life Story Option/Purchase and Consulting Agreement* for *Rocket Boys.*[90] Under the agreement, Hickam granted Universal "all motion picture, television and ancillary rights in and to the Work," the Work was defined as "[t]he life story of Owner and the book to be written."[91] Life story was later defined in the agreement as "[t]he rights granted to Universal hereunder include all rights in and to the life story of Owner (Hickam) from birth through and including 1960."[92] Hickam's interpretation of the terms were that it only pertained to the period of 1943 (his birth) until 1960, and "then only as the Work encompassed those time periods."[93] Hickam argued that "Universal's interpretation of the Agreement at the time that it was executed was consistent with that of [himself]," and that Universal, later claimed that "said term granted it all rights to all of the characters in the story for all time, even before 1943 and after 1960 and to include stories separate and apart from the Story and the Work."[94] Further, Hickam contended that under the "Release to Portray" provision in the agreement he "only granted Universal the right to portray him in theatrical or television motion pictures and not in any live stage plays which are never mentioned anywhere in the Agreement."[95]

Even still, when approached in 2006 by a well-known Broadway musical production team, Hickam contacted Universal to ensure he could move ahead with his plans to develop *Rocket Boys*

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87 *Id.* at 3.

88 Ashley Cullins, *Author Sues Universal Over Musical Theater Adaptation of 'October Sky'*, HOLLYWOOD REP. (June 3, 2016, 3:34 PM), https://www.hollywoodreporter.com/thr-esq/author-sues-universal-musical-theater-899337.

89 *Id.*

90 *Hickam Complaint*, *supra* note 85, at 10.

91 *Id.* (Rocket Boys was still unpublished at the time).

92 *Id.* at 11.

93 *Id.* at 12.

94 *Id.*

95 *Id*. at 14.

into a musical.[96] In an amendment to the original agreement, Universal granted Hickam exclusive live stage rights for five years, in exchange for 50% of the revenue, after which the rights became non-exclusive.[97] In 2013, Universal informed Hickam of their intention to license non-exclusive stage rights to a musical based on *October Sky*.[98] At the time, according to Hickam, he was assured the two musicals could move forward simultaneously with no issues.[99] Two years later however, according to Hickam, Universal threatened to assert rights to Hickam's life story, outside of those as he understood them in the original agreement, if Hickam did not cease production on his *Rocket Boys* musical.[100] In his complaint, Hickam asked the court for reformation and rescission, stating:

> To the extent that the Court determines that the language . . . grants Hickam's life story rights before 1943 and after 1960 and any other story outside the Story and the Work during any year, any agreement from Hickam regarding same was agreed to by either unilateral mistake of Hickam, with the knowledge of Universal, or by mutual mistake.[101]

Hickam also sought a declaration by the court that Universal "only had the right to portray Hickam in a theatrical or television motion picture, and not in a live stage performance, and that such right is not assignable."[102] The case was voluntarily dismissed in September 2017, as the parties agreed to a settlement, the details of which were not made public.[103]

In both the *Mockingbird* and *Rocket Boys* disputes, conflict stemmed from issues of vague contract terms and poor construction as well as misalignment regarding the subjective intent and interpretation of the parties. In the matter of *Mockingbird*, Cheryl Davis, General Counsel of the Authors Guild, recognizes how easy it is to see both sides:

> [T]he play shall not derogate or depart in *any manner* from the spirit of the novel nor alter its' characters'—could be interpreted in a limiting manner in the Lee estate's favor, but the

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96 *Hickam Complaint*, *supra* note 85, at 16-17.

97 *Id.* at 17.

98 *Id.* at 18.

99 *Id*. at 20.

100 *Id*. at 24.

101 *Id.* at 37.

102 *Hickam Complaint, supra* note 85, at 38.

103 *Hickam v. Universal Pictures*, No. B277326 (Cal. Ct. App. dismissed Sept. 22, 2017).

> underlying concepts 'spirit of the novel' and what it means to 'alter' a character are themselves ambiguous.[104]

Davis argues that any discrepancy in interpretation of the provision would make it "quite possible that the parties had different understandings."[105]

Therefore, despite contracts being executed, one could argue that there truly is no meeting of the minds in regard to expectations and vision of the parties involved in these types of adaptation rights transfers, which eventually leads to conflict. However, interpretation, at least initially, should be objective. By providing interpretation terms that make expectations and rights explicit in the contract, inclusive of negotiation and meditation for any remaining disputes, the parties would be better positioned from the start. Inserting an interpretation clause—that includes a glossary of definitions—into these contracts would allow the parties to understand and agree to what the broad terms actually mean before embarking on the creative project. For example, the parties could choose to define the generic term "spirit of the novel," as anything related to the specific elements of the story, exactly as they are depicted—including the plot, setting, theme, point of view, and characters or it could have a much broader definition as being related solely to the conflict and resolution presented in the story. Another example would be defining what "altering a character" looks like. Does it mean changing surface elements like gender, ethnicity, age, accent, or hair color or something deeper like the ability to reshape the character's back story, personality, presence, and role in driving the plot?

Including an interpretation section and making negotiation and meditation mandatory early on in the adaptation process—as early as initial contract conversations and drafting—would allow discrepancies and disputes to rise to the surface, would address concerns from both parties, and reveal multiple conflict scenarios. Thus, a more thorough, richly detailed contract could be the result.

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104 Michael Paulson & Alexandra Alter, *We Asked 7 Lawyers to Untangle the Broadway Fight Over 'To Kill a Mockingbird'*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/theater/harper-lee-aaron-sorkin-broadway.html.

105 *Id.*

B. *Disparity in Bargaining Power*

Inequality of bargaining power involves situations where one party to a contract stands in a better position, with more options or better alternatives, than the other party.[106] "This results in one party having greater 'power' than the other to choose not to take the deal,"[107] and makes it more likely that the party with less bargaining power will be forced to accept unfavorable terms if they want to salvage the contract.

In relation to adapting novels to film or stage, the power imbalance is no secret. "My contract didn't award me any creative control over the script; most book authors don't get much leverage unless you're as successful as E.L. James or Stephen King,"[108] noted Author Caren Lissner regarding the deal she made to sell the film rights to her novel *Carrie Pilby*.[109] "The movie-making process is filled with U-turns, dead-ends, and uncertainty. It's why authors are told never to get their hopes up or to presume they'll have any control over the outcome."[110]

A well-known author is expected to have more bargaining rights in Hollywood since studios and streaming services can make the film or TV series faster with established source material, take on lower risk by using already popular books, and appeal to a built-in fan base.[111] In response to a question from a reporter as to what a major author deserves from Hollywood when they turn their book into a movie, Stephen King responded:

> They deserve a fair shake and, okay, I've always said to myself, I can't understand why any filmmaker wants to spend $1 million for a book and then do something that bears very little resem-

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106 *Inequality of Bargaining Power*, WIKIPEDIA (last visited Feb. 2, 2019), https://en.wikipedia.org/wiki/Inequality_of_bargaining_power.

107 *Id.*

108 *E.L. James*, WIKIPEDIA, (last visited July 20, 2019), https://en.wikipedia.org/wiki/E._L._James (E.L. James is a best-selling British Author who has sold over 125 million copies of her books worldwide.); *Stephen King*, WIKIPEDIA, (last visited July 20, 2019), https://en.wikipedia.org/wiki/Stephen_King (Stephen King is a best-selling American Author who has sold over 350 million copies of his books.).

109 Caren Lissner, *How My First Novel Became a Movie*, ATLANTIC (Sept. 17, 2017), https://www.theatlantic.com/entertainment/archive/2017/09/how-my-first-novel-became-a-movie/539430/.

110 Jane Friedman, *How a Book Becomes a Movie*, JANE FRIEDMAN (July 27, 2015), https://www.janefriedman.com/how-a-book-becomes-a-movie/.

111 Andrew Liptak, *Why Hollywood is Turning to Books for its Biggest Productions*, VERGE (Jan. 26, 2017, 2:53 PM), https://www.theverge.com/2017/1/26/14326356/hollywood-movie-book-adaptations-2017-expanse-game-of-thrones.

> blance to the book . . . the book deserves a fair shake . . . what the writer deserves is a fair accounting if the movie's a success.[112]

But King also admits he is in a unique position as one of the most popular and prolific American authors of all time: "I want approvals over the screenwriter, the director and the principal cast. We try to make these people understand, the people that are doing the deal, that I want to be part of the solution, not part of the problem."[113]

As we've seen in the *Mockingbird* case, disparity in bargaining power and ensuing conflicts can also depend on whether the author is alive or deceased, and the extent of the estate's control over rights to the author's work. Is it fair to say that the representatives for the estate know the true depth and scope of what the author would have wanted?

We know that all the parties to these negotiations and agreements want a deal, but at what cost? When interviewed, Author Fay Weldon was frank about the process of adapting her novel *She-Devil* into a film: "The Hollywood experience for a novelist is that they don't want to know you're alive: they'd rather you were dead. I only watched filming of the movie once . . . [i] could see they'd rather missed the point of the novel so I didn't have much faith in it after that."[114] Authors tend to see a lucrative funding stream to be able to give them more freedom to do what they love to do most—write. "[T]he film company had given me money and in return I had given my book to them. That was the deal," said Weldon.[115]

Writing is inherently about connection, and the appeal to connect and find an even greater audience for your work is incredibly attractive. Then there is simply the gorgeous dream of having a world you created in your mind projected into a symphony of visual images, in some ways a rebirth of the book. But the risk for authors is that they have little to no control of the finished product

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112 Mike Fleming, Jr., *Stephen King on What Hollywood Owes Authors When Their Books Become Films: Q&A*, DEADLINE (Feb. 2, 2016, 10:45 AM), https://deadline.com/2016/02/stephen-king-what-hollywood-owes-authors-when-their-books-become-films-q-a-the-dark-tower-the-shining-1201694691/.

113 *Id.*

114 Charlotte Philby, *Hollywood ate my Novel: Novelists Reveal What it's Like to Have their Book Turned Into a Movie*, INDEPENDENT (Feb. 18, 2012), https://www.independent.co.uk/arts-entertainment/books/features/hollywood-ate-my-novel-novelists-reveal-what-it-s-like-to-have-their-book-turned-into-a-movie-6940772.html.

115 *Id.*

and hide in horror at the misinterpretation or what they might consider a massacre of their creative work. "When I write a book, and someone decides to make it into a movie, I'm glad," stated Italian novelist Elena Ferrante, whose work has been adapted to film and most recently an HBO mini-series.[116] But, she added, "Then the work begins. My first impression is traumatic, as the literary cover is torn off my novel by the screenwriters. It's a terrible moment: I worked on that text for years, and now everything seems to become impoverished."[117]

Studios and production companies see dollar signs but have much more in their coffers than the typical author. Buying the rights to a novel is an everyday occurrence for studios, whereas for most authors it may be a once in a lifetime opportunity. "More than a few indie authors might be thinking, 'So what? To have my work shared with a broad audience? Bring it!'" notes Mercy Pilkington, the CEO and Founder of Author Options, a hybrid publishing and consulting company.[118] But she warns, "Barring a really great agent or contract attorney looking out for their author's interests . . . the absolute pillaging of a book destined for the screen can be brutal."[119] Often, the studios are only willing to purchase the work on their terms and have nothing to lose by walking away from a novelist whose demands are too great. The novelist, seeing this as their only shot, usually takes the unfavorable deal.

IV. PROPOSAL

Given that contracts to license creative works can be ambiguous and amorphous with regard to creative control and interpretation, and often involve great disparities in bargaining power, the disputes surrounding them are better suited for mindful, proactive resolution in the form of negotiation and mediation, rather than reactive litigation. Involving a skilled negotiator and/or meditator from start to finish—from initial conversations regarding an option

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116 Elena Ferrante, *Elena Ferrante on the Screen Adaptation of Her Book: 'I want to say, let's give up'*, GUARDIAN (Nov. 10, 2018), https://www.theguardian.com/lifeandstyle/2018/nov/10/elena-ferrante-on-screen-adaptations-of-her-novels; *Elena Ferrante*, WIKIPEDIA (last visited July 20, 2019), https://en.wikipedia.org/wiki/Elena_Ferrante.

117 *Ferrante, supra* note 116.

118 Mercy Pilkington, *Do Indies Need to Worry About Adaptations of Their Books?*, GOODREADER (Oct. 21, 2018), https://goodereader.com/blog/indie-author-news/do-indies-need-to-worry-about-adaptations-of-their-books.

119 *Id.*

contract all the way through to final cut or theater previews—would not only make for more solid adaptation contracts less prone to litigation, but level the playing field between authors and production companies.

Using the tools of negotiation and mediation as effective means of Alternative Dispute Resolution can greatly increase the chances that more books, both well-known and independent voices, meet an exciting new evolution of expression and a greater audience. Both negotiation and mediation are informal and productive alternatives to litigation.[120] While negotiation usually finds the parties working directly to resolve any disputes, mediation involves a mediator "trained in negotiations, who bring[s] opposing parties together and attempt[s] to work out a settlement or agreement that both parties accept or reject."[121]

In 2016, the Authors Guild challenged the U.S. publishing industry "to take a fresh look at the standard book contract" which "insulate[s] the publishers from any potential loss, placing all the risk on the author," with authors being asked to sign "standard agreements 'no questions asked,' and if they question author-unfriendly terms, they are often told the clauses are 'not negotiable.'"[122] The call to action of the Guild was to make "the publishing industry more fair and profitable for authors."[123]

Similarly, dedicated negotiators and meditators with experience in both writing and production could be the shot in the arm the entertainment world needs to ensure that novel adaptations to film, television, and stage become lucrative, fair, and positive experiences for all parties involved. Negotiation, known as the "preeminent mode of dispute resolution," is when the parties meet in an effort to settle a dispute, with the parties themselves staying in control of the process and solution.[124] However, it is clear that due to a disparity in bargaining power and perhaps a novice author unfamiliar with just what kind of protection they'll have under such vague contract terms, a skilled negotiator should be brought into the initial contract conversations. Given the unique nature of these creative conflicts, just having a neutral third-party present to settle disputes would likely not be enough. The negotiator and/or media-

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120 *Alternative Dispute Resolution*, LEGAL INFORMATION INSTITUTE (last visited July 20, 2019), https://www.law.cornell.edu/wex/alternative_dispute_resolution.

121 *Id.*

122 *Fair Contract Initiative*, AUTHORS GUILD (last visited July 20, 2019), https://www.authorsguild.org/where-we-stand/fair-contracts.

123 *Id.*

124 *Alternative Dispute Resolution*, *supra* note 120.

tor needs to be someone that has practical knowledge within the film industry and the experience of being a writer.

The Writers Guild of America is especially well-suited to identify and supply this type of individual. A negotiator, drawn from the pool of talented and experienced individuals at The Writers Guild of America, could serve as a neutral party that has both a thorough understanding and appreciation for the craft of writing, while having a keen awareness of the interests and needs of the entertainment industry. Writers Guild staff currently negotiate contracts for their members, so they are well-equipped and familiar with how to "negotiate and enforce fair contracts."[125] Secondly, a Writers Guild negotiator and/or meditator would have the right skills, know-how, and perspective needed to manage the dynamics between the parties and is also likely to be a trusted counsel who has the broad ability to not only understand industry specific concepts but present reasonable resolutions. Guild staff or an attorney who has experience working extensively on both sides of these deals—with authors and with studios—could serve as a trusted mediator once the process has moved further into screenwriting, preproduction, and filming or rehearsals.

The contract for a film also gives one party or the other "final say privilege" over the finished product.[126] "Well-established directors have the 'final cut privilege,' meaning that they have the final say on which edit of the film is released. For other directors, the studio can order further edits without the director's permission."[127] In short, final say is rarely ever the privilege of the original author of the work. Building mediation into the contract would eliminate the power of the 'final say' concept and clause in theory and practice. The mediator would work with the parties toward a mutually agreed upon finished product. If the parties still stayed in conflict, and couldn't arrive at agreement on the finished product, the contract would give the mediator the power to resolve the dispute based on industry expectations.

Known as "supercharged negotiation," in a mediation session a mediator can "assist the parties in their negotiations by identifying obstacles to settlement and developing strategies to overcom-

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125 *What is the Guild?*, WRITERS GUILD OF AM. EAST (last visited Nov. 29, 2019), https://www.wgaeast.org/what-is-the-guild/#What.

126 *Final Cut Privilege*, WIKIPEDIA (last visited July 20, 2019), https://en.wikipedia.org/wiki/Final_cut_privilege.

127 *Film Director*, WIKIPEDIA (last visited July 20, 2019), https://en.wikipedia.org/wiki/Film_director.

ing them."[128] The mediator would serve the true interests and desires of the author, while also recognizing the needs and demands of production companies. Given that mediation sessions are private and confidential, and no public record is made of the proceedings,[129] it is an attractive option for studios and high-powered Broadway producers to utilize in order to avoid the potential negative publicity resulting from an adaptation deal that turns sour. Likewise, this type of privacy allows authors to be able to shield themselves from any unfavorable portrayal by the opposition and not have to deal with navigating the entertainment media world, which they may be unequipped to handle.

Further, a mediator would take into consideration an often-overlooked aspect of the process—what benefit the finished product has to a loyal and eager fan base hoping to see a book that they loved transformed in a way that makes their heart dance as much as their initial reading of the novel. For example, a mediator may suggest that the source material in question not be turned into a film at all, and is better suited for television. British author Deborah Harkness, whose novel *Discovery of Witches* premiered as a TV series in the U.S. in January 2019 and was originally optioned to be a film, feels TV was the right way to go in the end: "TV's ability to linger on stories, to develop characters, to give you that sense that you're on the journey with them, it's just so much more feasible to tell a story . . . on a television series than it is on a 90-minute movie framework."[130] Harkness adds that she was even "impressed with the way the writers of the show expanded the scope of the story," since all the books in her series were written in the first person, but "the writers were able to brilliantly bring to life [the rest of the story]. If I could go back and do a do-over this is how I'd do the books, just so I could get all that juicy, fun intrigue into them."[131] The myriad of new streaming platforms requiring content gives the mediator another tool with which to potentially advise the author to choose something other than a big studio film deal being presented.

By inserting unique solutions and ideas, a mediator's role could end up being even more creative than practical. Given the

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128 Michael Roberts, *Why Mediation Works*, MEDIATE.COM (Aug. 2000), https://www.mediate.com/articles/roberts.cfm.

129 *Id.*

130 Rich Sands, *NYCC: A Discovery of Witches Author Deborah Harkness Talks Adapting the Books for TV*, SYFY WIRE (Oct. 5, 2018), https://www.syfy.com/syfywire/a-discovery-of-witches-author-deborah-harkness-talks-about-adapting-the-books-for-tv.

131 *Id*.

"confidential and non-binding nature of the proceedings,"[132] his/her presence would help to build trust among the parties and potentially foster a deeper collaborative relationship which could end up in a heretofore unrealized potential of the source material. "The mediation session normally provides each side with a more realistic view of the opposing position (not one filtered through lawyers) and often results in the consideration of settlement proposals that otherwise would have been rejected."[133] Italian author Ferrante admits that even after the initial horror of seeing her novels morph into somewhat unrecognizable skeletons in screenplay form, in working with screenwriters: "I often seem to be collaborating on 'remaking' my novel, with writing that I would never have used. And when it all seems in order'— the story and the dialogues flow; we've honed, eliminated—the work seems finished."[134]

"There are a lot of writers who are very, very sensitive to the idea, or they have somehow gotten the idea that movie people are full of sh*t," says Author Stephen King.[135] "That's not the truth. I've worked with an awful lot of movie people over the years that I think are very, very smart, very persistent and find ways to get things done," he adds.[136] "There was a time when I distrusted the process very much. But having been around the business with so many films, I have more of a tendency to trust good directors than I used to."[137] "The process was sort of animated, [though] nobody slammed any doors," admits critically acclaimed British Author Ian McEwan describing the adaptation of his novella *The Children Act.*[138] McEwan, who also served as the screenwriter for the adaptation, acknowledges that while producers may "come and raise questions and problems," the process of creative collaboration can help develop something even better than what the producers are suggesting or what the writer had originally conceived.[139] *New York Times* Best Selling Young Adult Author Nicola Yoon also had a positive experience in the adaptation of her novel *Every-*

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132 *Roberts*, *supra* note 128.

133 *Id*.

134 *Ferrante*, *supra* note 116.

135 *Fleming*, *supra* note 112.

136 *Id*.

137 *Id*.

138 Katie Kilkenny, *Ian McEwan on Adapting His Own Novels and Script Notes That Drive Him "Mad*," Hollywood Rep (Sept. 14, 2018, 6:15 AM), https://www.hollywoodreporter.com/news/ian-mcewan-adapting-his-novels-script-notes-drive-him-mad-1143252.

139 *Id.*

thing, Everything, saying about the process: "To give it to someone else, you have to trust that they match your vision . . . [and] bring the same sort of passion and commitment that you did."[140] She worked with producers who included her and welcomed her notes on the script, when she was invited to MGM to view the final screening she said it was surreal and wonderful. "[i]t's not the same as your book, right? It's a different piece of art. And that's nice. For me, it's nice that there's more art about these characters that I've loved for so long in the world."[141]

A mediator, who's able to speak both languages, could help bridge the gap and build these types of amicable, mutually beneficial relationships by "translating" the aims, desires, and creative interpretation of the work in progress, as well as forming a clearer, more aligned picture of the finished product. Through the dedicated and transparent work of a meditator, the author may see their work with fresh eyes. McEwan says that working with close friends in the business "in a kind of intimacy and extended negotiation," brings the best results as they, "just talked our way into a script that we were all happy with."[142] This was in stark contrast to his prior experience in Hollywood, typical of most film adaptations, where the notes producers gave where all "formed out of a pattern, as if they'd all taken Screenwriting 101 years ago . . . [i] didn't think there was any real thought behind it, these were just buttons that were being pressed."[143] Having written multiple screenplays for the TV and film adaptations of his work, McEwan is now keenly aware of the unanticipated, yet welcome, creative nuances that arise from the process of adaptation:

> [T]here's always that opportunity to go back and do things differently. . . you [also] get impelled to a greater accuracy in the movie. When you've actually got to see everything, when it's so literal as cinema is, you have to get things bang-on right . . . [t]hat's a kind of discovery in itself. Writing a screenplay is a way of really laying out the whole corpse and bringing it back to life in a different way.[144]

Likewise, a skilled meditator could serve as the necessary, neutral third party that can help to overcome the political posturing, power trips, and plain arrogance of bankable Hollywood

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140 *Nguyen*, *supra* note 24.

141 *Id.*

142 *Kilkenny*, *supra* note 138.

143 *Id.*

144 *Id.*

screenwriters, directors, producers, and even actors who continue to run roughshod over authors and have little respect for the principal creative work. In an interview, just weeks before opening night of *Mockingbird*, leading man Jeff Daniels who plays Atticus Finch had strong words for any prospective viewer, "So all these people who love this book . . . delete, delete, delete, delete, delete, delete. I'm originating the role as far as I'm concerned . . . [y]ou think we're supposed to go over here. Well we're going over here."[145] As for Sorkin, his final objective seemed to deny the notion that the source material he needed to create *Mockingbird*, even existed:

> For those who haven't read the book in 20 years . . . for those who read the book last week . . . my hope and belief is that 30 seconds after the curtain goes up you will have forgotten those expectations and you will be caught up in this new thing that you're seeing.[146]

A mediator in these situations is the right choice for a multitude of reasons, among them "a mediator's job is to keep the parties focused on exploring productive avenues to settlement, posturing and hard bargaining are often reduced or eliminated."[147] A skilled mediator drawn from the entertainment writing world would have the ability to present a dual-sided approach to common sticking points in regards to contractual terms, creative input and control, and issues surrounding disparity in bargaining power.

Second, mediation brings all parties to the table to resolve a problem.[148] High-level decision makers or little-known authors, who in the normal course of business may be discussing matters through lawyers or agents, are now forced to focus on the matters at hand directly. Perhaps most importantly, using a mediator presents an opportunity for "each party . . . to directly educate and influence their opponents. As a result, the mediation session normally provides each side with a more realistic view of the opposing position."[149] In novel adaptation disputes it is easy for the parties to dig in their heels in regards to plot, character, or narrative, a mediator can help communicate areas of commonality when it

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145 *60 Minutes* (CBS television broadcast Nov. 25, 2018), https://www.cbs.com/shows/60_minutes/video/YgchIHexvobJCHtm1DzqQhZurZV7_lJV/chaos-on-the-border-robots-to-the-rescue-to-kill-a-mockingbird/.

146 *Id.*

147 *Roberts*, *supra* note 128.

148 *Id.*

149 *Id.*

comes to the big picture of the story and from there zero in on how best to achieve that vision.

Further, a mediator is critical in allowing "each side to 'test market' a settlement proposal by privately conveying the proposal to the mediator."[150] This is particularly favorable to authors unfamiliar with the adaptation process who can run their desires and willing concessions by the mediator without fear of having it used against them in negotiations. Finally, a mediator is critical in assisting "the parties to clarify their real objective and to consider alternatives that might be overlooked by attorneys engaged in battle."[151] A mediator's sole intent is to reach a positive resolution and resolve potential, impending, or current disputes. In regard to novel adaptation, a mediator can get to the core of the relationship by ironing out vague contractual terms that seem to favor one party over another or honing in on areas of poor contract construction that cry out for clarification. Vague and opaque clauses in contracts—such as "spirit of the novel" in *Mockingbird*, "accounting profits" in *Groom*, and "life story" in *Hickam*—could be resolved at the outset were a skilled meditator involved in initial contract negotiations. A mediator could push the parties toward adopting clear and exacting language to contracts terms, for example clarifying whether "spirit of the novel," includes theme, tone, setting, language. A mediator could also ensure that definitions and interpretations clauses are added to the contract, inoculating later disputes on the manner or fashion in which the agreement is to be read.

A mediator can clarify specifics regarding what type of control the author retains, whether he/she will serve as a consultant, screenwriter or hands-on day-to-day advisor. A mediator can help stipulate plot structure and identify if and when it has been breached. A mediator has a keen awareness of the investment of all parties, both financial and creative, and can ensure parity while balancing the integrity of the source material with the real-world demands of visual storytelling and commercial success.

A true meeting of the minds involves clear expectations and a unified vision. In his/her ability to control communications between an author and producers, a mediator will appreciate that the differences in medium—the written word versus the visual world—serve only as opportunities and not obstacles to the birthing of the ultimate artistic product. Well-established sticking point matters

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150 *Id.*

151 *Id.*

like "final cut" of the project can be navigated by a mediator with greater fairness and insight than opposing counsel or in some cases even the parties themselves. "When you sell a book it is a gamble," said Author Lionel Shriver, whose novel *We Need to Talk About Kevin* was released as a film in 2011.[152] "[Y]ou take the risk that someone will take your work and turn it into something you are ashamed of. But something is generally more interesting than something not happening, so it's a risk worth taking," he adds. A mediator has the potential to ensure that the novel adaptation process is not only realistic and practical, and efficient and effective from start to finish, but delivers a richer product than the parties originally thought imaginable. "It's nice to be surprised by someone bringing something new to your material," said Shriver.[153]

In conclusion, as witnessed in the *Mockingbird* case, using Alternative Dispute Resolution is a wiser and more efficient solution since these cases waste time, money, and critical public relations capital in litigation. While *Mockingbird* did eventually make it to Broadway in December 2018, the taint of the lawsuit continued to surround the production. "Have you screwed it up?" asked CBS reporter Steve Kroft in a 60 minutes interview with Sorkin just weeks before opening day.[154] "I don't think I have, I – I think I did get out of it alive," Sorkin responded, adding: "There is no event in the play that doesn't occur in the book. I – I – I haven't added new things. But those events are simply – we're taking another look at them. It's going to be a new look at familiar material."[155] *Mockingbird* Director Bartlett Sher admitted, "the challenge is expectations. The challenge is swimming into the national memory between people who have a deep memory of the book . . . and people who are going to come into the theater and see it now."[156] Since the terms of the settlement remain confidential, we'll never know if the areas in which the play deviates from the book—including by replacing the child actors with adults, introducing the trial at the start of the story, and giving Calpurnia, the maid, a more prominent voice—were concessions of the estate made in fear of retaliatory litigation or amicable creatively conscious agreements.[157]

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152 *Philby*, *supra* note 114.

153 *Id.*

154 *60 Minutes*, *supra* note 145.

155 *Id.*

156 *Id.*

157 *Id.*

On the heels of the *Mockingbird* case, in November 2018, Author Jon Krakauer brought suit over the musical adaptation of his 1996 book *Into the Wild*.[158] According to the complaint, Krakauer found the script objectionable and then sought to exercise his alleged right under the contract to have his name and the title removed from the play.[159] In essence, the dispute revolved around contract interpretation and questions over rights to the title.[160] While this recent high-profile case winds its way through the judicial process in Colorado, one can surmise that perhaps its fate will also be that of the many other adaptation lawsuits that have gone before it. The majority of adaptation dispute cases end up in settlement, proving that these lawsuits—while often well-intentioned and full of merit—are essentially pointless. Along the way, both parties—some more than others—are likely to be harmed by the negative publicity and be forced to make unwanted concessions. Given the high-risk potential to harm their brand, bottom line, or established audience, authors and studios alike are well advised to choose the Alternative Dispute Resolution process.

V. CONCLUSION

In conclusion, with a mediator involved in initial novel adaptation contract discussions and subsequent stages of production, both the author and the producers would be better served. When a popular novel with an established fan base is turned into a flop at the box office, no one wins. When a new author just finding her audience has the opportunity to reach thousands more potential fans, the introduction should be a positive one.

There is always the chance that serendipity could spring from the start. "We wanted to preserve what we thought was so cool about the book, and that was our pitch when we were trying to get the rights . . . it was already so beautiful and horrifying that the pressure was just not to mess up William's very beautiful novel," commented Screenwriter Macon Blair who wrote the adaptation

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158 Mitchell Byars, *Boulder Author Jon Krakauer Sues Over "Into the Wild" Musical*, BOULDER DAILY CAMERA (Dec. 7, 2018, 2:59 PM), https://www.dailycamera.com/2018/12/07/boulder-author-jon-krakauer-sues-over-into-the-wild-musical/.

159 *Id.*

160 Stephanie Wild, *Author of 'Into the Wild' Novel Files Lawsuit Over Musical Adaptation*, BROADWAY WORLD (Dec. 9, 2018), https://www.broadwayworld.com/article/Author-of-Into-The-Wild-Novel-Files-Lawsuit-Over-Musical-Adaptation-20181209.

for William Giraldi's 2014 novel, *Hold the Dark*.[161] Jeremy Saulnier, the Director of the film felt a similar commitment when he read the novel, "I felt an intuitive connection to it, and I got it, so I could be the translator. To do that visually, Macon had done the heavy lifting along with William to create the story and the architecture. I just wanted to be true to the material."[162] Many say the key is to keep lines of communication open from the very beginning. When writing the 2018 released film of Patrick deWitt's 2011 novel *The Sisters Brothers*, screenwriter Thomas Bidegain said he met with deWitt early in the process to discuss "beefing up two characters" and "changing one character from male to female," and that deWitt agreed to the changes amicably.[163]

But if and when there is no chemistry between author and buyer from the start, a mediator could play the key role in honoring both the author's creation and the filmmakers' intent, while along the way potentially changing how all participating creatives think about the process. Instead of seeing the filmmaking process as something to protect themselves from, a mediator could help guide authors through this vulnerable time by stressing the importance of a truth writers know all too well—that the process of creation is never really over. As Ferrante put it, "the book, it will stay behind, imperturbable, while the film comes closer and closer to one of its possible incarnations."[164]

Further, a mediator can help soften a studio's stance on keeping authors at a distance and ensure that authors are treated on fairer footing. Contract remains the core of the adaptation process, so involving skilled negotiators and/or mediators from the start sets up a route to resolving conflict later in the production process. When the parties come in with a strong and clear contract from the start, having negotiated with open minds and agree to work within that structure, the chances for later conflict is greatly diminished. Additionally, by encouraging studios to bring authors into the fold at various stages of production, a mediator can highlight the ways in which screenwriters and filmmakers can rely on authors for access "behind the veil," with authors sharing the es-

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161 Jennifer Blair, *Novel Ideas: Moviemakers Jeremy Saulnier and Macon Blair on Adapting a Book for the Screen and Building Atmosphere*, MOVIEMAKER (Oct. 29, 2018), https://www.moviemaker.com/archives/moviemaking/hold-the-dark-jeremy-saulnier-macon-blair/.

162 *Id.*

163 Raju Mudhar, *Creators of Three Films Discuss the Challenges of Putting a Book on Screen*, STAR (Sept. 12, 2018), https://www.thestar.com/entertainment/tiff/2018/09/12/creators-of-three-films-discuss-the-challenges-of-putting-a-book-on-screen.html.

164 *Ferrante*, *supra* note 116.

sence or motive behind the words on the pages of the novel. This deeply intimate process could further stimulate new visual, audial, and dialogue ideas in the filmmakers' minds. Simultaneously, a mediator could help authors understand that film or television—being different mediums—offers authors an even more expansive way through which to express their work. As co-screenwriter and director of *The Sisters Brothers*, Jacques Audiard, put it: "Cinema is a collective effort, and we all look for gold in the same river."[165] His advice in short: "What makes an adaptation work? Adapt your source material, then adapt your adaptation. Then keep writing."[166]

More than six decades ago, George Bluestone, author and Professor Emeritus of film at Boston University, captured the essence of film adaptation in a sentiment that still rings true today:

> As long as the cinema remains as omnivorous as it is for story material, its dependence on literature will continue. The best one can hope for, then, is a minimal awareness of that metamorphic process which transforms pieces of fiction into new artistic entities. Once that process is understood, the alchemist's firing pit will surely yield less disappointing lead; it may even yield surprising deposits of gold.[167]

There is no precedent to having this type of neutral third party involved in book to screen, stage or television adaptations, however it is well past time that it occurs. In order to ensure that authors' rights and creative works continue to be respected and honored at every stage of their evolution, and that audiences have an ever-flowing chance to fall in love with characters and stories they only thought they knew, a mediator's role in bringing these two creative powerhouses together could make for a newfound love of once read or undiscovered novels and an even richer and more rewarding experience of television and film.

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165 Jacques Audiard, *Kindling Kinship: To Write an Adaptation, Build Bonds Between Your Creative Partners and Your Source Material*, MOVIEMAKER (Oct. 15, 2018), https://www.moviemaker.com/archives/moviemaking/screenwriting/the-sisters-brothers-jacques-audiard-screenwriting-adaptation/.

166 *Id.*

167 GEORGE BLUESTONE, NOVELS INTO FILM, 219 (Johns Hopkins Univ. Press 1957).

IS PRESIDENT TRUMP VIOLATING THE FIRST AMENDMENT WHEN BLOCKING CITIZENS ON TWITTER?: EXPLORING MULTI-PARTY NEGOTIATION AS A WAY TO PROTECT CITIZENS' RIGHTS IN THE WAKE OF THE NEW DIGITAL AGE

*Ashley B. Mongiello**

I. Introduction

As our society continues to immerse itself in the social media world, new legal issues arise regarding violation of private citizens' First Amendment rights on Twitter and the President of the United States. Regulation of private citizens' First Amendment rights on the Internet relies on a myriad of factors.[1] As will be discussed, courts use different standards depending on the type of speech and the medium. There have been instances where speech that would have been otherwise protected, is not because of certain surrounding circumstances.[2] In May 2018, Judge Buchwald issued a declaratory judgment in a class action brought against the President for his use of the block button on Twitter.[3] In pertinent part, Judge Buchwald deemed the President's blocking of private citizens on Twitter a violation of their First Amendment rights.[4] In July 2019, a three-judge panel on the United States Court of Appeals for the Second Circuit unanimously ruled that the President had been violating the Constitution by blocking citizens on Twitter.[5] Jennifer E. Rothman wrote for the Harvard Journal of Law and Public Policy, stated that the Second Circuit also weighed in, noting that there are genuine

* The author would like to thank her mom, Barbara for her unconditional love and support in every aspect of her life, most importantly, being her biggest motivation.

1 Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and The Communications Decency Act*, 10 Harv. J.L. & Tech. 113, 115 (1996).

2 *Id.*

3 Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, but Appeals Ruling*, N.Y. Times (June 5, 2018), https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html. [hereinafter Savage, *White House Unblocks Twitter Users*].

4 *Id.*

5 Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. Times (July 9, 2019), https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendment.html [hereinafter Savage, *Trump Can't Block Critics*].

instances in which private citizens' speech may not be protected.[6] Some of the unprotected speech displayed on the web may amount to criminal prosecution if found to be a genuine threat to the President; "To determine when speech is protected by the First Amendment, and therefore not punishable as a threat, most circuits have adopted either a reasonable speaker or a reasonable listener test."[7] The Journal also sets forth prongs of tests to show when speech should be protected.[8] In these tests, the government carries a heavy burden when trying to restrain speech that based on precedent.[9] The focus rests on the type of speech being restrained and the irreversible harm it would cause to private citizens.[10] The harm is depriving citizens of their free speech rights under the Constitution.[11] What constitutes a public platform for the purpose of protection under the First Amendment is imperative in determining what speech constitutes speech made on a truly public platform, that if suppressed, is unconstitutional.[12] The way in which the following questions are answered can be determinative in classifying the President's Twitter as a public platform. First, does the President utilize his social media platform in his official capacity? Second, does the President issue information to make it available to the public? Third, does the President invite comments on the platform? Lastly, is there any screening process imposed on the platform that limits comments? These considerations, if definitive, would present a strong argument for citizens claiming a violation of their First Amendment rights because the President blocked them on Twitter.[13] Additionally, it is important to be mindful of the ways the President maintains his Twitter account and the ways he exercises control over the platform.[14]

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6 Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y. 283, 287 (2001) ("The free speech clause of the Constitution has never been read to protect all speech. Speech such as obscenity, fighting words, child pornography, incitement, and 'true threats' are considered outside the protections of the First Amendment.").

7 *Id.* at 288.

8 *Id.* at 289.

9 *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

10 *Id.* at 724 (explaining that the harm to suppress political speech in a public forum is a violation of the First Amendment) (Douglas, J. concurring).

11 *Id.*

12 *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F.Supp. 3d 702 (E.D. Va. 2017).

13 *Id.* at 716-717 (where the court found that Defendant, acting in her capacity as a governmental official, "committed a cardinal sin under the First Amendment" by blocking Plaintiff from participating in her online Facebook forum in order to suppress Plaintiff's criticism of the County government). Note this is not Twitter, but a different social media platform.

14 *Melville v. Town of Adams*, 9 F.Supp. 3d 77 (D. Mass. 2014).

Categorizing elected officials' social media accounts as public platforms has led to many cases being brought, and ultimately, the determination regarding suppression of citizens' speech on such platforms.[15] Writing for the United State Court of Appeals for the Second Circuit, Judge Barrington D. Parker found that the President uses his Twitter to conduct government business and the government conduct is subject to a "wide-open, robust debate [that] generates a level of passion and intensity the likes of which have rarely been seen."[16] In essence, the ruling has not alluded to the limits of the President's Twitter use, but has classified the use of his Twitter as "clearly acting in a government capacity."[17]

This Note seeks to answer the following question: How Twitter, its users, and the President can participate in a multi-party negotiation to decide on terms to enact into a user agreement for Twitter for the purposes of ensuring citizens' First Amendment rights are not violated if the President blocks them on Twitter.[18] Part II of this Note discusses the role of the government when they suppress speech on public forums. It additionally addresses how Trump's actions of blocking citizens were declared a violation of their First Amendment rights.[19] Part III raises the issues citizens face when naming the President as a party to a lawsuit, and the viable defenses that can be raised. It further provides the basis for the first lawsuit in this matter and addresses why litigation will not solve this issue. Part IV provides how a multi-party negotiation between representatives of Twitter, its users, and the President would work, showing strategies and examples with a tweet by a citizen whose Twitter the President blocked. In addition, Part IV discusses potential concerns around having the President as a staple part of the negotiation, but ultimately discerning the arguments. Lastly, this Note aims to address how the proposed multi-party negotiation would combat issues for Twitter, its citizens, and the President without the need for litigation.

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15 *ACLU Warns Elected Officials*, *Government Agencies, Against Blocking Members of Public on Social Media*, ACLU (Mar. 1, 2018), https://www.aclu.org/news/aclu-warns-elected-officials-government-agencies-against-blocking-members-public-social-media.

16 Savage*, Trump Can't Block Critics*, *supra* note 5.

17 *Id.*

18 This Note does not speak to all social media platforms. The sole social media platform is Twitter.

19 Savage, *Trump Can't Block Critics*, *supra* note 5; *see also* Tristan Greene, *Federal Judge rules Trump Can't Block People on Twitter*, THE NEXT WEB (May 23, 2018), https://thenextweb.com/politics/2018/05/23/federal-judge-rules-trump-cant-block-people-on-twitter/.

II. BACKGROUND

A. *History of First Amendment Rights on a Public Forum*

The Internet is nearly 30 years old.[20] The Internet allows millions to be intricately connected, which in turn jeopardizes citizens' freedom and anonymity.[21] Since 1996, there have been constitutional issues relating to the use of the Internet.[22] These issues first came to light when courts were faced with assessing the constitutionality of the Communications Decency Act of 1996 ("CDA").[23] Each case had to be decided on a case-by-case basis, honing in on the specific facts with regard to the medium of communication, since the medium is what frames the legal question for the courts.[24] The courts' intuition about today's society is now presented as fact; "the novelty exemplified by the CDA litigation is the prospect of technology giving us change at such a rapid pace that questions about the point in time at which constitutionality is to be assessed come sharply into focus. Today's fictions may turn out to be tomorrow's facts."[25] The judges presiding over such novel cases were presented with tough lawsuits—"how can a court render an enduring judgment about the constitutionality of a statute when the very weights on the scales used in the constitutional balancing test are in rapid flux?"[26] These lawsuits can be better decided by the parties

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20 *See* Sam Cook, *The First Amendment and What it Means for Free Speech Online*, COMPARITECH (Feb. 10, 2017), https://www.comparitech.com/blog/vpn-privacy/the-first-amendment-what-it-means-free-speech-online/.

21 *Id.*

22 *See* Charles Nesson, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 115 (1996).

23 *See id.* Communications Decency Act of 1996 ("CDA") is dealing with regulation of indecency on the Internet.

24 *See id.* (explaining that calling in the constitutionality of the CDA were the first instances courts were faced with deciding constitutional rights of citizens on the Internet.).

25 *See id.* "Tomorrow's facts" are presented over a decade later now that Twitter is giving rise to constitutional issues. The time for constitutional issues to be addressed will be focused on the points in time when the President uses his Twitter to block citizens while holding office in his official capacity.

26 *See id.* The "rapid flux" of the Internet demonstrates the constitutional problem presented. The article, written in 1996, seems to have predicted the future. Twitter did not come into existence until a decade later in 2006; *see, e.g.*, Amanda MacArthur, *The Real History of Twitter, In Brief*, LIFEWIRE (Nov. 2, 2018), https://www.lifewire.com/history-of-twitter-3288854. The point is that the Internet has changed and will seemingly continue to. With that, more litigation and constitutional issues for the courts.

coming to the table and negotiating.[27] When constitutional issues are involved, as in this Note, it is the citizens' basic needs they want to be fulfilled. Negotiation can curtail future litigation issues that would arise as Twitter use continues to expand.

The Public Forum Doctrine has been used as the basis for lawsuits. The doctrine has been the subject of lawsuits involving Trump's Twitter use. The doctrine "is an analytical tool used in First Amendment jurisprudence to determine the constitutionality of speech restrictions implemented on government property."[28] That is, when a citizen is challenging a violation of their free-speech on a public forum, the place where they communicate can be a determinative factor in evaluating whether groups or individuals have access to engage in expressive activities on such property.[29] In *Perry Education Association v. Perry Local Educators' Association*, the Court created three categories of public forums: "traditional public forums, limited public forums and nonpublic forums."[30] These categories are determinative when classifying citizens' speech to determine if or how the government can restrict speech, and if the restriction is a violation of their rights. For the purposes of this Note, an alternative category is discussed. A limited public forum is "public property which the state has opened

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27 ROGER FISHER & WILLIAM URY, GETTING TO YES 13 (Bruce Patton eds., 2d ed. 1991). "In searching for the basic interests behind a declared position, look particularly for those bedrock concerns that motivate all people. If you can take care of such basic needs, you increase the chance both of reaching agreement and, if an agreement is reached, of the other side's keeping to it." This exemplifies the importance of coming to the table and deciding on a matter with the specific parties involved in order to protect their interests.

28 David L. Hudson Jr., *Public Forum Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA (2017), https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine.

29 *See id.* (Public forum doctrine states that, "The public has greater ability to exercise its free-speech rights in so-called traditional public forums, such as the city streets, than it does in nonpublic forums, such as a public school classroom."). The courts will have to determine the crux of the issue for each case it is presented with—Specifically for the issue in this Note, whether Twitter is a public forum. The challenges presented in the case are a mere indication of the problems that can arise in the future with the President using Twitter in a capacity the courts would have to collectively decide on the capacity the speech is used, based on the forum it is used on. If not, each time an issue is raised with the President's use of Twitter, the court faced with the case will have to decide (in their judgment based on precedent) the type of speech and classification of the forum it appears on. Even though Judge Parker ruled that it was a violation, there was no further discussion regarding measures to be taken to ensure that this violation would not continue to occur.

30 *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983), i.e., "The government can only restrict speech based on content in a traditional public forum, if it can show that its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest; that is, meet strict scrutiny."

for use by the public as a place for expressive activity."[31] When dealing in this category, the Court in *Perry* found that "a State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[32] This is another category courts will face when litigating issues of types of speech of Twitter, especially in regards to the President.

The government can restrict content if it acts in one of two ways: "(1) *directly* restricting expressive content by targeting particular topics or viewpoints, or (2) restricting content *indirectly* by punishing a speaker for the *reaction* produced by a controversial message (the 'hostile audience' cases)."[33] Courts have taken a "categorical" approach for seven other "low-level" categories of speech of "direct restrictions on expressive content, striking down such restrictions as presumptively unconstitutional."[34] The medium of the speech, the government's ability to suppress it, and the way in which it does will be factors in determining whether citizens' First Amendment rights were violated. Even though these categories provide a basis for courts to look at for precedent, the question remains open: does the President's use of and actions on Twitter, in conjunction with the speech he displays, constitute violations of citizens' rights? Judge Parker answered yes, concluding "evidence of the official nature of the account is overwhelming . . . once the

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[31] *Id.* at 948, 956. Judge Parker did in fact consider the President's Twitter a public forum, but the Trump administration appealed this decision, ensuing more litigation.

[32] *Perry Education Ass'n. v. Perry Local Educators' Ass'n.,* 460 U.S. 37, 38, 103 S. Ct. 948, 951 (1983); *See infra* Section III for a further discussion of this notion, exemplifying the types of speech Trump has suppressed by blocking users.

[33] Kevin F. O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. Rev. 223, 228 (2000). In either context, a court will subject the restriction to heightened scrutiny. The *direct* regulation of expressive content is exemplified by restrictions that prohibit the expression of certain political views (criticizing a foreign government near its embassy, for example, or expressing opposition to organized government), or restrictions that target particular types or topics of speech (singling out hate speech for example, or labor speech). The *indirect* regulation of expressive content is usually accomplished by enforcing general prohibitions against undesirable conduct. These are the famous "hostile audience" cases. They hold that the expression of a controversial viewpoint may not be criminalized merely because it prompts a violent reaction among onlookers enraged by the ideas expressed.

[34] *Id* at 251. These "low-level" categories of speech are denied full First Amendment protection because "such utterances are no essential part of any exposition of ideas." The less-than-fully-protected categories are: (1) defamatory statements, (2) commercial speech, and (3) lewd, profane, or indecent expression. The protected category is generally vulnerable to content-based regulation. But content-based restrictions are not necessarily valid when applied to the less-than-fully-protected categories.

president has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with."[35] The Justice Department does not agree with the Judge's classification of the President's Twitter account, instead labeling it as "his personal Twitter account."[36]

B. *Twitter, the President, and citizens' First Amendment Rights*

In 2006, a side project turned into one of the biggest communication technologies to date.[37] The side project is known as Twitter. Since he officially took office, President Trump has sent about 11,887 tweets.[38] As of November 17, 2019, 66.8 million people are following his account.[39] Under his name, his bio states "45th President of the United States of America".[40] His predecessor, Barack Obama, was the first president to use Twitter in his official capacity, using @POTUS as his official handle and forming "mass communication between government and citizens."[41] With the relatively new digital age of Twitter in conjunction with its use by

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35 Savage, *Trump Can't Block Critics*, *supra* note 5.

36 *Id.*

37 *See* Amanda MacArthur, *The Real History of Twitter, in Brief,* LIFEWIRE (Nov. 2, 2018), https://www.lifewire.com/history-of-twitter-3288854.

38 *See* Michael D. Shear, et.al., *How Trump Reshaped the Presidency in Over 11,000 Tweets,* N.Y. TIMES (Nov. 2, 2019), https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html. The context of the President's tweets can be a factor in determining the type of capacity in which he is using it. This is significant when deciding if the tweets were used under his official capacity as President reaching the public at large. This number is based off of statistics from when the President was inaugurated on January 20, 2017 up until October 15, 2019.

39 *See* Donald Trump (@TheRealDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

40 *Id.* The fact that this label is under his bio can be a strong indication of determining in what capacity he is using his Twitter. But, arguably only 11,887 tweets were during his official presidency, while the remaining 34,313 tweets were before.

41 Nicol Lee, *How the President's Twitter Account Affects Civil Society*, BROOKINGS (Feb. 16, 2017), https://www.brookings.edu/blog/techtank/2017/02/16/how-the-presidents-twitter-account-affects-civil-society/. Obama used the Twitter handle @POTUS—President of the United States, but POTUS is not on Trump's Twitter. Thus, the issue becomes whether Trump's Twitter bio discussed in footnote 40 is enough for courts to classify his Twitter and his tweets as acting in his official capacity. The comparison between the types of speech displayed on the former and current President's Twitter goes toward the issue of the Note.

the President, new constitutional issues are at the forefront of litigation.[42]

The issue of suppressing citizens' speech on Twitter became paramount in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, when the Knight First Amendment Institute filed a lawsuit against Donald Trump on behalf of seven Plaintiffs who were blocked by the President from his Twitter.[43] The Plaintiffs' claims were based on violations of their First Amendment rights on a public forum.[44] The injured Plaintiffs were seeking an injunction to be imposed on the President.[45] U.S. District Judge Naomi Reice Buchwald of New York was presented with the issue of whether the Plaintiffs had standing to sue the President, and if they did, whether the President's action of blocking them on Twitter constituted a violation of their First Amendment rights.[46] Judge Buchwald denied the injunctive relief the Plaintiffs sought and only granted them partial relief. She did not find it necessary to grant an injunction due to the assumption that the President and other officials will follow the law she declared. The Judge reasoned, "no government official — including the President — is above the law, and all government officials are presumed to follow the law as has been declared."[47] By classifying Trump's acts as unconstitutional, Judge Buchwald explicitly sent out a warning, but stopped short of issuing injunctive relief.[48] She based her decision on the basis that the President, like every other before him, should follow and abide by the law.[49] In rendering her decision, Judge Buchwald declared the President's Twitter a public forum, "and that blocking people

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42 Rothman, *supra* note 6 at 37. Discussed in Part I, there is indication that the President is using his Twitter in an official capacity. If his Twitter is considered a public limited forum, then the President is still susceptible to millions of claims.

43 *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541, (S.D.N.Y. 2018).

44 *Id.*

45 *Id.*

46 *Id.* This lawsuit was not tried until the judge decided the Plaintiffs had standing. This is a common barrier to lawsuits, and it is even harder when suing the President. Section III will contain more discussion about standing.

47 *Id.*

48 Phil Helsel, *Unblocked: Politicians on Notice After Trump Twitter Ruling*, NBC NEWS (May 25, 2018), https://www.nbcnews.com/tech/tech-news/unblocked-politicians-notice-after-trump-twitter-ruling-n877191.

49 Cristian Farias, *How a Federal Judge Is Laying Down the Law on Trump's Twitter Habits*, N.Y. MAG. (May 23, 2018), http://nymag.com/intelligencer/2018/05/donald-trump-twitter-block-judge-test.html?gtm=top. Judge Buchwald, in short, presumed that Trump is a normal president who believes in the rule of law. She concluded that "there is simply no reason to depart from this assumption at this time."

based on their political speech 'constitutes viewpoint discrimination that violates the First Amendment.'"[50] In an opinion written by Judge Parker, a unanimous three-judge Second Circuit panel upheld this decision.[51]

A spokeswoman for the Department of Justice announced that the President did not agree with the decision made by the judge.[52] Initially, Twitter had not made any statements and had not taken any action to suspend the President's account since he is a world leader and the information he presents is novel.[53] But, as will be discussed in Section III, Jack Dorsey, the CEO of Twitter, has commented on the President's Twitter use and has met with him.[54] As of now, there is no binding rule set forth on what Twitter must do next in order to ensure the President is not violating citizens' First Amendment rights on its platform.[55] Lawsuits do not seem to be the appropriate avenue for blocked citizens to pursue. There are hurdles to overcome when having the President as a party to a lawsuit, shifting a heavy burden onto citizens.[56] Even though Judge Buchwald provided declaratory relief, she did not issue an injunction to require the President to unblock the accounts.[57] Courts may be hesitant to issue injunctive relief ordering the President to unblock citizens because of the separation of pow-

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50 *See id*. "Buchwald wrote in the ruling that parts of Trump's Twitter account – the 'interactive space' where Twitter users may directly engage with the content of the President's tweets" – is a public forum."

51 Savage, *Trump Can't Block Critics*, *supra* note 5.

52 Helsel, *Unblocked, supra* note 48.

53 Savage, *Trump Can't Block Critics*, *supra* note 5 at 48. Discussed in Part I, what *type* of information is available to the public (on Twitter) helps judges classify the medium of the speech.

54 Tony Romm, *Trump met with Twitter CEO Jack Dorsey – and Complained About His Follower Count*, WASH. POST (Apr. 23, 2019), https://www.washingtonpost.com/technology/2019/04/23/trump-meets-with-twitter-ceo-jack-dorsey-white-house/?utm_term=.7be80b6f3223.

55 Savage, *Trump Can't Block Critics*, *supra* note 5. This is the first judge to decide an issue in which the President's actions on Twitter raised constitutional concerns. Even though she did provide declaratory judgment, there was no official remedy imposed on the President to conform how he must use his Twitter account.

56 Glenn Fleishman, *The People vs. Donald Trump: Every Major Lawsuit and Investigation the President Faces*, FORTUNE (Sep. 21, 2018), http://fortune.com/2018/09/21/donald-trump-lawsuit-investigation-charges-news-update/.

> A sitting president cannot be sued as an individual for official actions taken while in office, courts have decided. But a federally filed lawsuit that relates only to unofficial or personal behavior could proceed, ruled the U.S. Supreme Court in 1994's Jones v. Clinton lawsuit. In that decision, the Supreme Court didn't determine whether a state lawsuit might proceed, and indicated that different constitutional issues, including federalism, would have to be decided.

see also Clinton v. Jones, 520 U.S. 681 (1997).

57 Savage, *Trump Can't Block Critics*, *supra* note 5.

ers [issue(s)] lurking in the background.[58] If the President blocking citizens is going to be a continuing issue, then each judge presiding over the bench will have to either reverse the judgment before or add additions to the previous ruling.[59] In essence, every time the President is being sued for blocking a citizen on Twitter, a judge will have to make a decision that can have a chilling effect on future lawsuits.[60] Real life conflicts arise among the court system when the district court decides such issues and the appeals court will then be faced with affirming or overturning the lower court's decisions.[61] In addition, due to the Justice Department's dissatisfaction with the 2019 ruling, an appeal may be forthcoming to the full appeals court or to the Supreme Court.[62] That is, if an injured plaintiff alleging the injury can prove standing against the President.[63] Even though the Courts' ruled that the President blocking citizens on Twitter is unconstitutional, there has not been a discussion regarding injunctions or future action if the President were to continue to block citizens.[64] Without a governing rule set forth of what type of speech the President is and is not allowed to block on

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58 *See generally*, Dan Froomkin, *For Brett Kavanaugh, the Separation of Powers Is a One-Way Street*, AM. CONST. SOC'Y (July 26, 2018), https://www.acslaw.org/acsblog/for-brett-kavanaugh-the-separation-of-powers-is-a-one-way-street/. This is an example of how a political figure does not have a blank check in the separation of powers to over-step on other powers. By issuing an injunction against the President, this could insinuate that the judiciary is casting doubt on the executive.

59 Randy Kozel, *The Problem of Precedent*, WASH. POST (July 10, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/10/the-problem-of-precedent/?utm_term=.936b6ef10cd2. Stating:

> A perennial question at the Supreme Court is how today's justices should deal with yesterday's decisions. The court has been issuing opinions for centuries, so when new justices take their seats on the bench, they have plenty of material to work with. Then again, it's all but certain that a newly appointed justice will find some decisions she disagrees with.

(showing that even though precedent exists, new justices may form different opinions on rulings).

60 *See, e.g.*, Cheyenne Haslett, *Judge Expected to Rule Whether White House Must Immediately Restore CNN Reporter Jim Acosta's Press Pass*, ABC NEWS (Nov. 15, 2018), https://abcnews.go.com/Politics/emergency-court-hearing-looms-white-house-defends-revoking/story?id=59191520. The notion is that if a judge provides a specific remedy for the actions that must be taken while the President uses his Twitter account, there may be a chilling effect for the future.

61 *See, e.g.*, Margaret N. Kniffen, *Overruling Supreme Court Precedents: Anticipatory Actions By United States Court of Appeals*, 51 FORDHAM L. REV. 53 (1982) (on the assumption that the appeals judge will overturn a judgment in favor of the blocked citizens).

62 Savage, *Trump Can't Block Critics*, *supra* note 5.

63 *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d (discussing the difficulties associated with suing the President and the citizens bearing the burden to prove standing).

64 Savage, *Trump Can't Block Critics*, *supra* note 5.

Twitter and when he may do so, the President may continue to block citizens and use Twitter as a "megaphone to amplify personal grievances against those that dare to deviate from the administration's priorities."[65] Although the 2019 ruling prohibits the President from excluding people from an "otherwise open online dialogue because they say things that the official finds objectionable," this still leaves open the possibility of the President arguing valid reasons for why he may block a citizen for speech other than ones he finds objectionable.[66]

III. Discussion

A. *Barriers posed by naming the President as a party to a lawsuit*

1. Immunity

When a president is named a party to litigation, he may raise the defense of immunity.[67] However, President Trump may be open to this type of litigation if it means that he can continue to block citizens as he wishes just because they are in disagreement with him if no black-letter law is set forth guiding the President's use on Twitter when suppressing speech. But, with no court order directing the President to appear, no litigation can be certain.[68] The President may even pick and choose when he wants to raise this defense, which would result in unfair opportunity to citizens. Though, as discussed below, the President may be willing to engage

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[65] Lee, *supra* note 41. Just because the President wants to block a private citizen for not agreeing with him, he can. There is no basis or sound reason needed. All that really is required is his subjective belief, and the press of the block button.

[66] Savage, *Trump Can't Block Critics*, *supra* note 5.

[67] *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997) (each case explains different instances where sitting presidents were sued and raised the immunity defense).

[68] Michael Kranish & Ann E. Marimow, *Supreme Court Nominee Has Argued Presidents Should Not Be Distracted by Investigations and Lawsuits*, Wash. Post (July 9, 2018), https://www.washingtonpost.com/politics/top-supreme-court-prospect-has-argued-presidents-should-not-be-distracted-by-investigations-and-lawsuits/2018/06/29/2dd9c1cc-7baa-11e8-80be-6d32e182a3bc_story.html?utm_term=.9b61d4c25c58. "Earlier this month, New York's highest court rejected Trump's attempt to halt discovery in the suit, paving the way for the president to be deposed." From the article it is shown that when a judge steps in, the President may be ordered to partake in civil suits and follow the court's order. It favors negotiation where the President would be in control of the decisions being made and future actions taken that he would have agreed to.

in multi-party negotiation if it means the negotiation will be the first of its kind that a president in the past has never participated in.[69] Thus, litigation is a grey area for citizens wishing to sue the President for blocking them on Twitter and protecting their First Amendment rights.

The problems courts were faced with when discussing the Internet and constitutional rights were paramount and novel over a decade ago; but because the complexity, they were decided on a case by case basis.[70] The courts only recently declared Trump's Twitter a public forum.[71] The limiting guidelines set forth by the 2019 decision are bound to be tested by the Justice Department, leading to inevitable litigation.[72] If these matters continue to be litigated, courts will have the impossible task of classifying every citizen's social media account and every outlet on cyber space under a specific forum.[73] Essentially, this would be burdensome for the courts to be tasked with setting forth bright-line rules for instances where the President may actually be constitutionally allowed to suppress speech by blocking a citizen on the Internet. There is a strong presumption in favor of certain officials being immune from litigation, unless their actions can be classified as acting within their official duties.[74] Since Trump sends out Tweets pursuant to his official capacity as President, but also for personal reasons, the distinction may be too difficult to draw a hard line,

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69 *See, e.g.*, Nick Tabor, *55 Ways Donald Trump Structurally Changed America in 2017*, N.Y. MAG, http://nymag.com/intelligencer/2017/12/55-ways-donald-trump-structurally-changed-america-in-2017.html (last visited Jul., 2019) (showing the "first" and changes made by Trump that other presidents have not done).

70 Savage, *White House Unblocks Twitter Users*, *supra* note 3.

71 Clay Calvert, *Federal Judge Rules Trump's Twitter Account Is a Public Forum*, THE CONVERSATION (May 24, 2018), http://theconversation.com/federal-judge-rules-trumps-twitter-account-is-a-public-forum-97159. Twitter, however, is not a real-world space—And it's run by a private company. The judge's ruling found, however, that the company has less control over the @realDonaldTrump account than Trump himself and White House social media director Dan Scavino—also a public official. Their power includes the ability to block people from seeing the account's tweets, and "from participating in the interactive space associated with the tweets," in the form of replies and comments on Twitter's platform. Also key was the fact that the @realDonaldTrump account is used for governmental purposes. Specifically, the judge found that "the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President"—such as announcing the appointments and terminations of government officials.

72 Savage, *Trump Can't Block Critics*, *supra* note 5.

73 Hudson, *Public Forum Doctrine, supra* note 28.

74 *Halperin v. Kissinger*, 606 F.2d. 1192 (1979). (Parker, J.) (deeming the President as having been acting in his official capacity while using his Twitter). In turn, however, the President's administration disagrees and is taking the next steps to pursue possible future ligation.

revoking his *entire immunity* from civil suits.[75] As recently seen, Judge Parker did draw a hard vast line declaring the President's Twitter a public forum, but to his dissatisfaction, it is inevitable that these matters are going to continue to be brought in front of the courts when speech appears in different forms.[76] If the President's Twitter is used in a "personal capacity," then he can raise absolute immunity.[77] An argument can be made that maintaining a Twitter account and distributing information via this account about political affairs is what the President is responsible for, and the distribution of the information is similar to a press conference.[78] Some of the information distributed is to inform the public at large.[79] But, the Department of Justice has attempted to counter this argument declaring that Trump is immune from being obligated to engage with the public.[80] The Departments' muddled arguments have not

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75 *See* Donald Trump, (@TheRealDonaldTrump), TWITTER, (last visited Feb. 8, 2018), https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (where the president used his Twitter Account to tweet: "[t]he pathetic and dishonest Weekly Standard, run by failed prognosticator Bill Kristol [who, like many others, never had a clue], is flat broke and out of business. Too bad. May it rest in peace!" Emphasizing the President using his Twitter for personal reasons and beliefs).

76 Savage, *Trump Can't Block Critics*, *supra* note 5.

77 Mike Pearl, *An Expert Explains Why It Would Be So Hard To Sue President Donald Trump*, VICE (Nov. 11, 2016), https://www.vice.com/en_us/article/qbn3b7/an-expert-explains-how-to-sue-the-president (explaining "absolute immunity" which means he cannot be sued [for] anything he does in a personal capacity while he's president. [Defining] "in a personal capacity," meaning that a citizen wouldn't be suing him personally. They'd be suing the United States.).

78 *See* Andrew Buncombe, *Donald Trump One Year On: How The Twitter President Changed Social Media and the Country's Top Office*, INDEPENDENT (Jan. 17, 2018), https://www.independent.co.uk/news/world/americas/us-politics/the-twitter-president-how-potus-changed-social-media-and-the-presidency-a8164161.html (setting forth an argument for declaring Trump's Twitter as an official capacity):

> He often says it is the most effective way to connect with the country, without the filter of a traditional media he claims not to trust. The White House was obliged to clarify that his tweets also represent presidential statements, and should carry the same imprimatur as a comment issued by his press office.

79 Calvert, *supra* note 71. The importance of the President using his Twitter to distribute information to the public at large is a factor to determine the capacity and use of his Twitter. This categorization will likely be a factor in a court deciding the issue of Trump's violation and his use on Twitter if there is a set forum his Twitter is designated as. By doing this, courts will be faced with a hard task of drawing a line that would set forth a rule that other presidents will have to abide by.

80 David Choi, *Justice Department Argues Trump Could Block Anyone He Wants On Twitter, Not Obliged To Let People "Piggyback" On His Tweets*, BUSINESS INSIDER (Aug. 7, 2018), https://www.businessinsider.com/can-donald-trump-block-people-on-twitter-argument-2018-8. The Justice Department asserted that Trump's account belongs to him "in his personal capacity," and "not the control of the government," and thereby affords him immunity from obligations to engage with the public. The argument continued by saying Trump could not be compelled as a government official on a personal account to include all "people from his own property. And

been given great weight since citizens' whose speech were suppressed by Trump were raising violations of free speech because they were blocked for stating their opinions on Twitter.[81] Judge Parker strongly concurrs in the citizens' arguments because of the categorization of declaring the President's Twitter a public forum.[82]

2. Standing

When naming the President as a party, citizens must overcome the hurdle of showing that they have standing to sue.[83] According to *Lujan v. Defenders of Wildlife,* a plaintiff has standing when they have "a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."[84] This is because a problem arises when a court rules on important constitutional issues in the abstract that would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing 'government by injunction.'"[85] The threshold for the injury and relief available for citizens blocked on Twitter by the President may be harder to overcome since there must be a showing that the injury is particularized and relief requested can redress the injury.[86] In turn, citizens can argue that this is not a reasonable likelihood of the injury occurring, but rather an actual occurrence where they were blocked by the President and stripped of their First Amendment rights.[87] If this argument is not compelling enough, when "[f]uture injury [is] certainly impending, rel[ying] on the history of prior enforcement of the law [sic], coupled with the facts that 'any person' could file a complaint

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when he exercises the power enjoyed by all Twitter users to block other users from their own accounts, he is not using any authority belonging to or conferred on him by the federal government."

81 *See* Dan Mangan, *Read the Tweets That Got These People Blocked on Twitter by President Donald Trump*, CNBC, (May 23, 2018), https://www.cnbc.com/2018/05/23/read-the-tweets-that-got-these-people-blocked-on-twitter-by-president-donald-trump.html.

82 Savage, *Trump Can't Block Critics*, *supra* note 5.

83 *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d (2018).

84 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2136 (1992).

85 *Schlesinger v. Reservists Committee*, 418 U.S. 208 (1974).

86 *See Lujan*, 504 U.S. 555. A citizen trying to sue Trump must show that the injury is not shared amongst a general population. This may not be a problem for the citizens who have been blocked since it has only been 86. The problem will arise for future blocked citizens who wish to sue the President.

87 *See Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) (Reaffirming the notion that when courts analyze injury, they make sure the alleged injury is concrete and particularized).

under the law, and any threat of enforcement of the law could burden political speech."[88] This magnifies the problem for citizens bringing lawsuits against the President since some citizens may be bound by a court decision, but as of now are not blocked so "threatened enforcement [is not] sufficiently imminent."[89] But again, this puts courts in a tough position by having to decide against the Executive branch and, in turn, issuing an order with which the President must comply.[90] The question remains open during the Trump presidency of how much of a check the Judiciary will need to have on the President, who has little to no regard for legal rules and constraints.[91] If the court does redress the injury,

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[88] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). A year after *Amnesty International*, the Court in *Susan B. Anthony* reaffirmed that pre-enforcement challenges to a statute can occur

> under circumstances that render the threatened enforcement sufficiently imminent . . . [A]n organization planning to disseminate a political advertisement, which was previously the source of an administrative complaint under an Ohio law prohibiting making false statements about a candidate or a candidate's record during a political campaign, challenged the prospective enforcement of that law. The Court, in finding that the plaintiff's future injury was certainly impending, relied on the history of prior enforcement of the law with respect to the advertisement, coupled with the facts that 'any person' could file a complaint under the law, and any threat of enforcement of the law could burden political speech.

see also U.S. Const. art. III, §2, cl. 1.

[89] *Susan B. Anthony*, 573 U.S. The problem would be the citizens who have not yet been blocked by Trump but may in the future and will want to file a lawsuit against him for a different speech issue on Twitter that has not been the type presented, may be turned away because there has already been a judgment made by the class of citizens' who have been blocked for other types of speeches which they are bound to; *see* Legal Terms Glossary, OFFICE OF THE U.S. ATTORNEY, https://www.justice.gov/usao/justice-101/glossary (last visited Oct. 9, 2019). Defining binding precedent as:

> [a] prior decision by a court that must be followed without a compelling reason or significantly different facts or issues. Courts are often bound by the decisions of appellate courts with authority to review their decisions. For example, district courts are bound by the decisions of the court of appeals that can review their cases, and all courts – both state and federal – are bound by the decisions of the Supreme Court of the United States.

[90] *Every Time The Supreme Court Ruled Against A United States President*, RANKER NEWS, https://www.ranker.com/list/president-supreme-court-clashes/ranker-news (last visited Oct. 9, 2019) [hereinafter *SCOTUS Rulings Against a President*]. The United States has a system of checks and balances. This means no single person has complete power over laws and rulings within the country, not even the president.

[91] Farias, *supra* note 49 Stating,

> We've already seen, time and again, how judges react to some of [Trump's] administration's policies. But when it comes to his private mendacity, like the tweets he sends out in the dead of night, we've yet to see much judicial intervention, and with good reason: not everything Trump does is subject to judicial review.

the President may not follow orders.[92] That is, Trump unblocking or not being allowed to block citizens for their speech made on Twitter. Trump can simply not follow the order, which would make him the subject of continued lawsuits.[93] Recently though, the seven plaintiffs who were the faces of the *Knight First Amendment Institute v. Trump* case were unblocked.[94] Notably, only the citizens who were named were unblocked, not all citizens who had been blocked.[95] But, the catch-22 is that the lawsuit is not done. The Trump administration is exploring next steps after disagreeing with the 2019 ruling.[96] Trump is still the subject of an ongoing lawsuit.[97] Since the administration did not agree with the decision of Judge Buchwald or Judge Parker, it is fair to assume the President and the Department of Justice are going to raise defenses of why the President should be allowed to block citizens.[98] The decision of the issue on appeal, if found to be inconsistent with the lower courts, exemplifies the potential chilling effect with this type of litigation.[99]

As mentioned previously in this Note, the President's defense of immunity may prevail.[100] Under the holding in *Clinton v. Jones*, "Mr. Trump is *not immune* from lawsuits that *do not* relate to his

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92 *SCOTUS Rulings Against a President*, *supra* note 90. Presidents who lost to the Supreme Court reacted in different ways. While some rulings were quietly accepted, others were challenged or outright ignored.

93 *Id.*

94 NCC Staff, *Trump Appeals Twitter Ruling, Unblocks Plaintiffs*, CONST. DAILY (June 5, 2018), https://constitutioncenter.org/blog/trump-appeals-twitter-ruling-unblocks-plaintiffs. Last year, the Justice Department argued that a ruling for Knight and the plaintiffs would raise clear constitutional questions. Attorney Michael Baer said

> It would send the First Amendment deep into uncharted waters to hold that a President's choices about whom to follow, and whom to block, on Twitter – a privately run website that, as a central feature of its social-media platform, enables all users to block particular individuals from viewing posts – violate the Constitution.

95 Savage, *Trump Can't Block Critics*, *supra* note 5.

96 *Id*. This is the big umbrella issue, the litigation, even when brought by the seven plaintiffs and a declaratory judgment was awarded, has not stopped. In the future, the litigation process is likely to become more burdensome for the courts and new challenges are sure to arise naming the President as the face of these lawsuits, especially since he is known to not like to back down.

97 NCC Staff, *supra* note 94.

98 Ramsey Touchberry, *Donald Trump's Right to Block Critics on Twitter May Have Just Been Dealt a Major Blow By New Court Ruling*, NEWSWEEK (Jan. 7, 2019), https://www.newsweek.com/court-ruling-donald-trump-blocking-twitter-critics-1282900. Trump's attorneys have said "the 'block function' is 'merely an exercise of his personal, not governmental, authority to exclude individuals from that private account.'"

99 *See, e.g.*, Haslett, *supra* note 60.

100 Kranish & Marimow, *Supreme Court Nominee, supra* note 68.

activities in office (emphasis added)."[101] As shown in the first case, the court in *Knight v. Trump* classified the President's use of Twitter as relating to his official role in office.[102] The concern is that in interpreting the reading under *Clinton v. Jones*, it seems that because the President *was not* immune from lawsuits, that his Twitter is *not* considered related to his activities in office. It appears to be contradictory in *Knight v. Trump* since the President *was* a party to litigation and "the ruling also rejected the government's claim that Mr. Trump operates the account merely in a personal capacity, concluding that he 'uses the account to take actions that can be taken only by the president as president.'"[103] The discrepancy in interpretation highlights the problems and concerns that litigation can cause surrounding the President's use of Twitter. Most importantly, the highlighting factor is that the President, even after two decisions, is still not done in court due to dissatisfaction with the rulings.[104]

B. *Multi-party negotiation as a solution*

Negotiation has been defined as "joint decision making between interdependent individuals with divergence of interests."[105] A multi-party negotiation "consists of a group of three or more individuals, each representing his or her own interests, who attempt to resolve perceived differences of interest or work together to achieve a collective objective."[106] The resolution process "occurs on cognitive (perception), emotional (feeling), and behavioral

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101 Drew York, *Presidential Privilege? Why Presidents Can't Escape Litigation in Office*, GRAY REED (Nov. 28, 2016), https://www.tiltingthescales.com/2016/11/28/presidential-privilege-why-presidents-cant-escape-litigation-in-office/ ("[t]he United States Supreme Court ruled in *Clinton v. Jones* that a sitting president is not immune from litigation for acts that occurred before he became president. This means presidents may be forced to go to trial and engage in discovery, such as a deposition, during the presidency"; *see generally Clinton*, 520 U.S).

102 Josh Herrman, *Trump's Blocking of Twitter Users is Unconstitutional, Judge Says*, N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html.

103 *Id.* "In her ruling, Judge Buchwald said Mr. Trump and Dan Scavino, the White House social media director, 'exert governmental control over certain aspects of the @realDonaldTrump account.'"

104 Savage, *Trump Can't Block Critics*, *supra* note 5.

105 Gerben A. Van Kleef et al., *The Interpersonal Effects of Emotions in Negotiations: A Motivated Information Processing Approach*, J. PERSONALITY & SOC. PSYCHOL. 510, 510 (2004).

106 *Multiparty Negotiations*, BUS. INSIDER, https://thebusinessprofessor.com/knowledge-base/multiparty-negotiations (last visited Nov. 17, 2019).

(action) dimensions."[107] The common definition of negotiation rests on "back-and-forth communication[s] designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different."[108] The benchmark of success for a particular negotiation is when "a wise outcome [is] reached efficiently and amicably."[109] A multi-party negotiation better suits the President, Twitter, and its users, because each would not need to maintain a "constant position," which in the most general cases involves "negotiations [that] include trade-offs between multiple issues, [ ] multiple parties, each with their own agendas, rather than dynamically vary their goals, strategies to achieve those goals, and agenda for carrying out those strategies as the negotiation proceeds."[110] Negotiation in this way would not put the President directly adverse to citizens and Twitter. Highlighted in the issues above, multi-party negotiation would be a more effective method for the parties to "dynamically vary their goals, strategies to achieve those goals, and agenda for carrying out those strategies as the negotiation proceeds."[111]

One negotiation approach considered in analyzing an agreement where the government is a party is a traditional method of negotiation referred to as "positional bargaining."[112] In this approach, each party to the negotiation "takes a position, argues for it, and makes concessions to reach a compromise."[113] Under this methodology, a position is defined as "a proposed outcome that represents merely one way among many that issues might be resolved and interests met."[114] Since this Note is focusing on the President as a party, it can be argued that he will take a position on

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107 BERNARD MAYER, THE DYNAMICS OF CONFLICT: A GUIDE TO ENGAGEMENT AND INTERVENTION 124 (2d ed. 2012).

108 BRUCE PATTON, THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2007).

109 Johnathan G. Odom, *A Modern-day Pentagon Paper In a Post-Pentagon Papers World: A Case Study of Negotiations Between the Washington Post and The U.S. Government Regarding Publication of the 2009 Afghanistan Assessment*, 23 HARV. NEGOT. L. REV. 216, (2018) (citing ROGER FISHER & WILLIAM URY, GETTING TO YES 13 (Bruce Patton eds., 2d ed. 1991) ("*negotiation* says the goal of a successful negotiation is to meet each party's interests and for the agreement to be better than, or at least as good as, each of their respective best alternative.").

110 Jonathan Gratch et al., *Multi-party Multi-issue, Multi-strategy Negotiation for Multi-modal Virtual Agents*, S. CAL INST. 1, http://ict.usc.edu/pubs/Multi-party,%20Multi-issue,%20Multi-strategy%20Negotiation.pdf. Negotiating in this way would help, rather than hinder, the experience of resolving disputes with multiple parties.

111 *Id.*

112 Odom, *supra* note 109.

113 FISHER & URY, *supra* note 27.

114 *Id.*

being able to continue to block citizens on Twitter.[115] But, this may be overcome by the multi-party negotiation where the proposed terms are agreed upon by all parties, and technically the power would be vested in each party to the negotiation.[116] Even if the President decides not to be in the negotiation, he can have a government official act as his agent or appoint and attorney.[117] With multi-party negotiation as an alternative dispute resolution technique, Twitter, its users, and the President can sit at the table and negotiate terms that will not violate citizens' First Amendment rights.

IV. PROPOSAL

Since two judges issued a warning to the President, I believe that lawsuits of this nature are going to open the floodgates to further litigation.[118] The rise of Twitter in conjunction with its use by the President is almost certain to create more constitutional issues for the courts.[119] In a recent press conference, President Trump threatened the potential regulation of social media and that "the government may have to do something about it.'"[120] The process

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115 Touchberry, s*upra* note 98.

116 Odom, *supra* note 109, at 217, 228.

> The simplest and most common approach is haggling, or positional bargaining. One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. Then a series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue their respective BATNAs.

This would be a different case for the President because there is no 'demand' to be positioned on. Rather, there are terms that must be discussed that the parties can have opinions on, but those opinions are going to be different than offers of take it or leave it as in a positional bargaining sense. If it were to be that that the President may feel a term belongs in the rules and the citizen and Twitter do not, this is where the 'middle ground' would come in and they would work through the multiple ones. The proposed multi-party negotiation about rules and terms is not high/low offer, but a way where the respective parties can discuss; *See also* Patton, *supra* note 108.

117 Matt Ford, *Who is Marc Kasowitz?*, ATLANTIC (May 25, 2017), https://www.theatlantic.com/politics/archive/2017/05/marc-kasowitz-trump-russia/528147/.

118 Cook, *supra* note 20. It is quite obvious that the President is going to continue to appeal the rulings until he is satisfied.

119 Andy Kiersz, *13 Charts Reveal Donald Trump's Twitter Habits – From His Favorite Topics to Time of Day*, BUS. INSIDER (July 14, 2017), https://www.businessinsider.com/president-trump-twitter-by-subject-2017-7. Since inauguration in January 2017, the President has tweeted 920 times. This statistic is based on a seven-month period. This shows the President's increased use of Twitter.

120 Romm*, supra* note 54.

for lawsuits poses a myriad of conflicts by having the President named as a party as is discussed in Section III(A) of this Note. Now with Trump alluding to appealing the 2019 decision, the litigation continues, and depending on the judge's decision, may raise conflict between the Judiciary and Executive branches.[121] In the past, the U.S. Court of Appeals for the Fourth Circuit found that a County Board of Supervisors violated a citizen's First Amendment right by blocking him on a public Facebook page.[122] Judge Barbara Milano Keenan concurred in the opinion, but "she asked the court to 'exercise great caution' and to 'await further guidance' from the Supreme Court when it comes to uncharted territories involving the 'First Amendment's reach into social media.'"[123] A prime issue is lurking in the background—waiting for the Supreme Court to make a decision that will end up being the guiding factor for judges in the future. The problem of having different results in litigation can be solved by having uniformity in terms on social media that are understood and made by the parties whose interests need protecting. The aim of this Note is just that—to enter the "uncharted territories" by having all interests accounted for in multi-party negotiation.[124]

The main purpose of the immunity defense has been to keep the president out of court to keep the focus on their presidential duties; though in the modern age, the complete opposite is happening.[125] With that being said, a realistic solution can be met by using multi-party negotiation. There have been alternative avenues suggested that may pose potential threats of lawsuits because if the President is not immune, he can be sued indefinitely for his actions

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121 *President Trump Unblocks Twitter Critics and Files Notice of Appeal in Knight Institute Lawsuit*, KNIGHT FIRST AMENDMENT INSTITUTE (June 4, 2018), https://knightcolumbia.org/content/president-trump-unblocks-twitter-critics-files-notice-of-appeal-in-knight-institute-v-trump. The litigation is going to continue, and this is just a small look in to the future of what the litigation process will look like while having the President as a face of lawsuits, *especially* when they are not in his favor.

122 Touchberry, *supra* note 98.

123 Touchberry, *supra* note 98 (emphasizing the point that courts are now for the first time being presented with issues of First Amendment rights on elected officials' social media accounts).

124 *Id.* A multi-party negotiation can safeguard future potential parties to such lawsuits by having a representative at the table to protect citizens' interests.

125 Michael Rios, *Are Presidents Immune From Civil Lawsuits in State Court Over Their Private Conduct?*, PBS NEWS HOUR (Apr. 13, 2017), https://www.pbs.org/newshour/politics/presidents-immune-civil-lawsuits-state-court-private-conduct ("Under current law, President Donald Trump is immune from civil lawsuits in federal court, when it comes to his official acts as president. But a legal battle playing out in New York could determine if Mr. Trump and future presidents are subject to civil suits in state court over their private conduct.").

on Twitter. One suggestion was the constitutional use of the "mute" button on Twitter.[126] Another suggestion has been for the President's social media director to go on the President's Twitter and unblock the users.[127] None of these alternatives result in a universal solution to an ongoing problem.[128]

I propose that having multi-party negotiations between selected representatives from Twitter (or the CEO, Jack Dorsey, if he chooses)[129], a potential plaintiff, and the President (or who he elects to represent him to protect his interests) meet to negotiate terms of potential clauses to put in the "Twitter Rules, which concern "tweets, adding content to your tweet, search and trends, following and unfollowing, blocking and muting, direct messages,""[130] The multi-party negotiation would involve having each party look at "The Twitter Rules" and identify the issue(s), either avoid and/or attack the issue(s), negotiate and advocate.[131] If these strategies

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126 Scott Bomboy, *Can Politicians Block Negative Comments On Their Social Media Accounts?*, CONST. DAILY (Apr. 5, 2018), https://constitutioncenter.org/blog/can-politicians-block-negative-comments-on-their-social-media-accounts (This was a case heard in early March in New York City, where a judge urged both sides to reach a compromise solution).

127 Herrman, *supra* note 102.

128 Each of the proposed solutions can be seen as taking away some power from the President, or having power over the President. This is inconsistent with our history; *see, e.g.*, Andrew Prokop, *The 25th Amendment, Explained: How a President Can Be Declared Unfit to Serve*, VOX (Sept. 21, 2018), https://www.vox.com/policy-and-politics/2017/2/9/14488980/25th-amendment-trump-pence.

129 *See* Gabrielle Canon, *Twitter and Salesforce CEOs bicker over who is helping the homeless more*, GUARDIAN (Oct. 12, 2018), https://www.theguardian.com/us-news/2018/oct/12/jack-dorsey-marc-benioff-homelessness-twitter-san-francisco. Jack Dorsey tweets about his opposite views on a proposed tax, going back and forth with another user, but does not answer some of the tweets that publicly call his character into question. This may signify that Dorsey understands what the platform should be used for and is best suited to protect the interests of Twitter and its users.

130 *See, e.g.*, *The Twitter Rules*, https://help.twitter.com/en/rules-and-policies/twitter-rules (exemplifying the "rules" governing Twitter users).

131 Gratch, *supra* note 110. The strategies further explained in pertinent part.

> Factor: The possible moves include requesting a topic of negotiation from another agent [sic], proposing a topic, or proposing constraints on topic selection. Avoid: This strategy is appropriate in the case when there is no topical issue or the focused issue is undesirable but seen as avoidable. The moves include talking off-topic, e.g. small talk, trying to leave the meeting or the topic, or switching the topic to another issue. Attack: This strategy is appropriate in the case where the topic is seen as not avoidable and having negative utility, with little potential for improving the utility. It is an assumed bad outcome. Negotiate: This strategy is appropriate in the case where it is not clear what the outcome of adopting the issue will be – there is a potential for either negative, neutral or positive results, depending on how the plan is carried out, and whether all individuals involved will do their parts. Here, the agent is not necessarily for or against the issue, but willing to consider whether it can be made to work or not. Advocate: This strategy is appropriate when one has good reason to believe

can be properly implemented and the parties can mutually agree on the post-negotiation "Twitter Rules," the courts will have a guide to decide future matters that may appear before them. In turn, the post-negotiation "Twitter Rules" will provide an accurate roadmap for constitutional claims raised by citizens to determine if being blocked by the President was a violation of their First Amendment rights.[132]

Twitter long maintained that different standards applied to prominent public figures "given that their comments[,] even offensive ones[,] remain in the public interest."[133] In turn, in March, Twitter announced it would adopt a new approach, "labeling offensive tweets so users know why such content hasn't been removed."[134] The labeling of offensive tweets is exactly the type of subject matter that the multi-party negotiation would involve.[135] Twitter's Head of Legal stated that they are figuring out a way to "put some context around it so people are aware that content is actually a violation of our rules and it is serving a particular purpose in remaining on the platform."[136] This type of process is exactly what the multi-party negotiation would be developing; a way for all parties to understand and be aware of a violation on Twitter while protecting each parties' interests.

The post-negotiation "Twitter Rules" would require the President and government officials to act in accordance with the terms agreed upon by the parties.[137] This would limit the instances in which citizens would have to sue for violation of their First

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that the outcome of the issue will have positive utility. The moves involved include proposing plans to bring about the outcome, proposing solutions or ameliorations to flaws that have been introduced, and offering commitment to the issue or its component parts. Success: This strategy involves the follow-through of a successful mutual commitment to an issue – it may involve formalizing remaining details of how to carry it out, as well as friendly disengagement from the meeting.

132 *The Twitter Rules*, *supra* note 130. The conditions, or lack of, constituting permissible blocking would be the topic of negotiation that ultimately Twitter can display and users can look to in order to see if blocking was permissible under the negotiated terms.

133 Romm, *supra* note 54.

134 *Id.*

135 *Id.*

136 *Id.*

137 *See ACLU Warns Elected Official*, *Government Agencies, Against Blocking Members of Public on Social Media*, ACLU (Mar. 1, 2018), https://www.aclu.org/news/aclu-warns-elected-officials-government-agencies-against-blocking-members-public-social-media. Government officials were issued letters about blocking citizens on social media platforms before turning to litigation. The problem goes further than just President Trump, this is a governmental problem. Even if courts hold the President to a different standard than government officials, the courts can still use the negotiation as precedent with the highest power official.

Amendment rights, and would protect government officials and the President from the threat of lawsuits. The citizen would have the ability to access the "Twitter Rules" to determine if their constitutional right was violated.[138] In effect, the citizen will not need to use the resources of the courts to determine if a violation occurred.[139]

In an attempt to make sense of the proposed multi-party negotiation, it is best to present a tweet that was blocked by Trump and go through the proposed negotiation methods.[140] The relevant part of the "Twitter Rules" currently states, "In order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice."[141]

Assuming Twitter, an injured Plaintiff (in this example, Nick), and the President are all properly represented at the multi-party negotiation, the issue (or 'factor') is displayed in the "Twitter

138 *See Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F.Supp.3d 702 (E.D. Va. 2017) (where a government official was sued because the citizen did not have access to view the official's Facebook page).

139 It is of the upmost importance that the post-negotiation "Twitter Rules" address types of speech that can be constitutionally suppressed.

140 *See* Dan Mangan, *Read the Tweets That Got These People Blocked on Twitter by President Donald Trump*, CNBC, (May 23, 2018), https://www.cnbc.com/2018/05/23/read-the-tweets-that-got-these-people-blocked-on-twitter-by-president-donald-trump.html. The image was taken directly from the site about a comic and writer from New York who was blocked by President Trump on Twitter.

141 *The Twitter Rules*, *supra* note 130. The Twitter Rule as it appears on the website provides:

> We believe in freedom of expression and open dialogue, but that means little as an underlying philosophy if voices are silenced because people are afraid to speak up. In order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice. Context matters when evaluating for abusive behavior and determining appropriate enforcement actions. Factors we may take into consideration include, but are not limited to whether: the behavior is targeted at an individual or group of people; the report has been filed by the target of the abuse or a bystander; the behavior is newsworthy and in the legitimate public interest.

Rule." What would the parties would want to 'avoid' is discussing the viewpoints of the actual tweet? The President (or his representative) would not bring emotions to the table. For example, the President (or his representative) should not argue the validity of whether Jared Kushner is corrupt and/or stating the reasons for hiring him. If emotions become so severe, that is when "you step outside to the balcony."[142] The other strategy the President (or his representative) would use is to "attack."[143] The topic of the President having blocked this citizen is an unavoidable topic and the reason for the negotiation in the first place. So it follows, that the topic is going to come up and it is fairly imaginable that the President would want to justify his reasoning as feeling "harassed"[144] by the citizen. This is where Twitter would "attack" the unavoidable "Twitter Rules" which the President raised as a defense. Twitter (or its representative) would be put in a position in which it would have to state the meaning behind its rules and the interpretation. The citizen would "attack" and argue that this does not amount to the level of harassment the "Rules" seek to suppress. As identified, this strategy may help to see where the parties are "positioned,"[145] but it does not seem to further this negotiation. The next two strategies would be the ones this Note seeks to advocate for, "negotiate and advocate."[146] This strategy would put the three parties in a position in which they assess the "Twitter Rules" that apply to the tweet and the reason for blocking to formulate common ground terms. While negotiating, it is almost inevitable that the parties will advocate for their proposal. For example, the President may advocate that the "Twitter Rules" use of the word "harassment" be supplemented with "attacking ones' family causing public uproar." The President will negotiate the terms with Twitter and the citizen to see if his supplemental phrase helps clarify that in these specific cases, speech is considered harassment and is constitutionally allowed to be blocked. It is clear to see how a multiparty negotiation will be a difficult conversation because of the subjective nature of the interests. But, by coming to the table, the parties have a better chance of success by each having their interests protected, and by negotiating for common purposes rather than appearing before an impartial tribunal that essentially de-

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142 FISHER & URY, *supra* note 27. Emotions hinder the negotiation and may result in judgment becoming clouded.

143 Gratch, *supra* note 110 at 4.

144 Odom, *supra* note 109.

145 Gratch, *supra* note 110 at 1.

146 *Id.* at 5.

clares a judgment in favor of one side. By having a multi-party negotiation, success is on the table.

Twitter has reserved the right to modify or change "The Twitter Rules."[147] On Twitter's page regarding blocking, there are criteria to help understand if the user is blocked and how they may report it, but no mention of valid reasons why a user may block on this forum.[148] The citizens who have sued Trump did not report him, but sued him, resulting in the problem of naming the President in lawsuits. Multi-party negotiation would help combat this by having certain types of speech or situations that have been agreed upon by the parties selected for negotiation (as displayed on the webpage that warrants valid blocking).[149] Instead of citizens turning to lawsuits and the courts, Twitter will be in the position to see the speech of the citizen who was blocked by Trump and under the agreed-upon terms, decide if the blocking was warranted. A citizen who looks to the post-negotiation "Twitter Rules" and is still unsure if their speech was protected can then reach out to Twitter to determine if the speech was considered a "constitutional block." Twitter's representative who was present in deciding on the post-negotiation "Rules" would be better situated to aid users instead of the courts. By having this system implemented, citizens will not need to file lawsuits every time they have a doubt as to the validity of their constitutional right on Twitter.

In addition, the President (or his elected officials) would have agreed upon these terms to protect his interests, so he would be more likely to abide by the "Rules" set forth for blocking. This would diminish the claims for violation of First Amendment Rights for citizens since their interests will be represented at the negotiation as well, by deciding on the proposed terms for the "Twitter Rules."[150] The parties sitting at the negotiation table must bear in mind that when negotiating on the terms, they must only propose constitutional ones, to combat the conflict at hand.[151] Since the

147 TWITTER.COM, *supra* note 130. Twitter reserved itself the right to modify or change its' terms. So, there should be no obstacle with regard to Twitter modifying its' terms based on negotiations with citizens and the President.

148 TWITTER.COM, *supra* note 130. "Twitter gives people a variety of tools to control their experience, including blocking." There is the option to block users, but no mention of when it is constitutional.

149 TWITTER.COM, *supra* note 130.

150 When speaking about citizens' First Amendment claims, the claims in relation to Twitter use, and the President—not all First Amendment claims universally.

151 *See Principles and Tactics of Negotiation*, PMC (Mar. 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2793751/. The proposed terms in this case would have to be constitutionally protected terms that citizens are entitled to when using Twitter.

above referenced three parties will be represented at the table, it is important that representatives who are going to negotiate are familiar with the conflict and negotiate ". . . Keep[ing] that longer term in mind to be sure that everyone [sic] gets what's best for them."[152] This problem is eliminated by having each party who has a "stake in the game" represented.[153]

The "Twitter Rules" apply to all of its users on the platform. Twitter has the power to shut off an account for disobeying the rules.[154] This turns on the argument that Twitter can be classified as a public forum, and provides a defense for the ability to suppress certain speech on such a forum.[155] The reason negotiation of the above terms should be strongly urged is because the President can argue that these are the types of speech he is allowed to constitutionally block as a government entity.[156] But, with new technology and the President using Twitter as a platform, the terms should be negotiated to include a rule section for citizens' speech on Twitter that is directed toward the President (arguably in his official capacity), to allow for constitutional blocking. This section can be incorporated into the "Twitter Rules."

The final phase of the multi-party negotiation would be to decide what the remedy would be if the President blocks a citizen that did not violate the post-negotiation "Twitter Rules." One solution would be to allow Twitter to unblock users, who under the negotiated terms, the President was not allowed to block. Twitter already has this power under its current rules, but this would be regarded as a remedy provided to the blocked citizen, which would be one of the negotiated factors.[157] By negotiating a remedy, instead of Twitter executing on its own, each party may feel this "represents the opportunity to capitalize on all of the work done in the earlier phases [of the negotiation]."[158] To make sure that all parties uphold the negotiation terms, a writing with what they agreed to must be signed.[159] As mentioned earlier, when courts rule a cer-

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152 *Id.*

153 *See Id.*

154 TWITTER.COM, *supra* note 130. *Our Range of Enforcement Options,* TWITTER.COM, HTTPS://HELP.TWITTER.COM/EN/RULES-AND-POLICIES/ENFORCEMENT-OPTIONS.

155 *See* Hudson, *supra* note 28.

156 *See* Section II (A).

157 TWITTER.COM, *supra* note 130 (dictating the rules governing Twitter and its users).

158 Sonia Kukreja, *Characteristics of Negotiation*, MGMT. STUDY HQ, https://www.managementstudyhq.com/characteristics-and-steps-of-negotiation-process.html (referencing "Stage 4: Closure Phase").

159 *Best Negotiating Practices*, WATERSHED ASSOCIATES, https://www.watershedassociates.com/learning-center-item/negotiation-stages-introduction.html (explaining Stage 5 of negotia-

tain way against Presidents, they are not always followed or implemented. By having the terms set forth and agreed to by the President (or his representatives), the writing and signature amount to his duty to follow the rules.[160]

V. Conclusion

A multi-party negotiation should be strongly encouraged in order to protect citizens' First Amendment Rights, Twitter, and the President. By taking this route instead of litigation, there is no need to have courts classify Twitter into a public forum category which it would be bound to in the future.[161] In a multi-party negotiation, citizens will not be faced with the burden of proving standing. The Twitter representative will have the class of persons protected, thus lawsuits from citizens who are blocked in the future already have their interests accounted for by the negotiation. Further, since Trump (or his representative) would be a party to this negotiation, he cannot raise immunity since this is not a lawsuit.[162] There would be no reason for him to raise it because the proposed multi-party negotiation would have provided for all of the issues. The agreement will appear on Twitter's official website so all users are aware of the terms and can reference the site if they become blocked by the President.

A multi-party negotiation between the three interested parties will be a stepping stone for challenges to First Amendment rights on Twitter. There have been instances, and will continue to be with the rapid expansion of the Internet, where citizens' constitutional rights are jeopardized by government officials on social media. Using the proposed multi-party negotiation as the dispute resolution

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tion: "Stage 5 is implementation of the agreement. This stage may also be viewed as preparation for the next negotiation opportunity. You must ensure that you follow through on promises made in order to strengthen the relationship and to build trust.").

160 *Id*. "The research that has been done in the preparation phase, combined with all of the information that has been gained is useful in the closing phase. It also involves the sealing of the agreement in which both parties formalize the agreement in a written contract or letter of intent. Reviewing the negotiation is as important as the negotiation process itself." The emphasis on having the signatures on the "Twitter Rules" would be just as paramount as the negotiation itself.

161 The point that Twitter will not have to be limited to a classification of a public forum does not mean that it will not when other instances arise. Specifically, the courts will not be held to classifying Twitter as a public forum for the President's use when blocking citizens and then in the future (in a set of completely unrelated facts and parties) hold the categorization the same.

162 *See generally supra* note 67.

method, the President can continue to do what he was elected for, execute his presidential duties. This form of dispute resolution will not violate citizens' rights, but negotiate to protect them.

The proposed multi-party negotiation will have many steps for the parties to go through. But, without the President (or a representative to protect his interests), none of the proposed negotiation can occur. It is no secret that the President has many roles and tasks.[163] Getting the President (or a representative) to appear at the proposed negotiation of such a novel kind may not be easy. But, President Trump may agree to such a negotiation because it would be the first one of its kind that a president would have partook in with Twitter and injured plaintiffs.[164] President Trump has said, "We have done [sic] about as much as anybody ever in a short period of time for the presidency. . . ." The proposed negotiation would be another thing the President could add to his 'firsts' while holding office.[165] President Trump has met with Twitter CEO Jack Dorsey, not about blocking people, but about his follower accounts.[166] The President was the one who invited Jack Dorsey to the White House to discuss this issue.[167] This supports the proposed negotiation by exemplifying the ability and willingness of both the President and the CEO of Twitter to meet and discuss issues regarding the platform. The meeting appeared to go smoothly, as can be presumed from Jack Dorsey tweeting in response to the President, "Thank you for your time. Twitter is here to serve the entire public conversation, and we intend to make it healthier and more civil. Thanks for the discussion about that."[168] This strengthens the position that the discussion regarding the climate of Twitter and the President's use can be an amicable and a

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163 *See, e.g.*, Robert Dallek, *Power and the Presidency, From Kennedy to Obama*, SMITHSONIAN (Jan. 2011), https://www.smithsonianmag.com/history/power-and-the-presidency-from-kennedy-to-obama-75335897/ (explaining the President's roles and enumerated powers under Article II of the Constitution, as well as the pressing issues he must deal with daily).

164 *See* Jeremy B. White, *Trump's Extraordinary First White House Year in Quotes*, INDEP. (Jan. 20, 2018), https://www.independent.co.uk/news/world/americas/us-politics/trump-quotes-first-year-charlottesville-fbi-immigration-quotes-a8170056.html. Exemplifying the views of Trump doing things during his presidency that other presidents have not. At the first full cabinet meeting on June 12, 2017, Trump stated, "When I ran it was 'make America great again' and that's what we're doing, believe me, we're doing it and we're doing it at a much faster pace than anyone thought. I will say that never has there been a president – with few exceptions, case of FDR, he had a major depression to handle – who's passed more legislation, who's done more things than what we've done. . ."

165 *Id.*

166 Romm*, supra* note 54.

167 *Id.*

168 *Id.*

successful one when the President and the CEO come to the table rather than a court room. The President likes to set new standards and has tweeted about past Presidents not doing what he has done.[169] By having Twitter, a citizen, and the President at the table, every party will have their interests protected while appearing in a representative capacity, for the negotiation of its kind.[170]

On January 9th, 2019, the President partook in negotiations involving the government shutdown.[171] The referenced negotiation clearly identifies a potential issue of the President not agreeing on "Twitter Rules" and the possibility of him walking out.[172] This would leave open the question of whether the President violates citizens' First Amendment rights if he continues to block them on Twitter. To this end, it is different than the type of negotiation on January 9th because the President was not taking away the livelihood from citizens.[173] The negotiation on January 9th could have resulted in blocking people from this country.[174] In the proposed multi-party negotiation, the President is dealing with the blocking of citizens from Twitter—losing access to his tweets (in a digital sphere).[175] To compare the levels of negotiations is beyond the scope of this Note. However, the grave weight the President can

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169 *The Trump Administration, in Its Own Words*, WASH. POST (Jan. 18, 10:51), https://www.washingtonpost.com/graphics/2018/opinions/the-year-in-trump quotes/?noredirect=on&utm_term=.B7d7b0566907. The President would be enticed to negotiate since no other president has before in a three-way negotiation essentially making rules for Twitter. The President would likely to mark another "first" while holding office.

170 *See* JAY FOLBERG, ET. AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 540-44 (2d ed. 2010) ("claiming that the advantages [sic] include efficiency, speed, low cost, avoidance of precedent, expertise of the decision maker, informality, flexibility and finality."). Negotiations between the three said parties will only foster this type of dispute resolution in the future, rather than hinder conflicts with litigation.

171 Erica Werner, *Trump Walks Out Of Shutdown Negotiations After Democrats Reject Wall Money, Calling Meeting 'Total Waste Of Time,'* THE WASH. POST (Jan. 9 2019), https://www.washingtonpost.com/business/economy/shutdown-day-19-trump-comes-to-congress-as-gop-faces-unity-test-over-wall-funding/2019/01/09/8f3bfab8-1423-11e9-b6ad-9cfd62dbb0a8_story.html?noredirect=on&utm_term=.34c5b02d9286.

172 *Id.* "Talks between President Trump and congressional Democrats aimed at ending the partial government shutdown collapsed in acrimony and disarray Wednesday, with the President walking out of the White House meeting and calling it "a total waste of time" after Democrats rejected his demand for border-wall funding."

173 *Id.* ". . . as they continue to negotiate over his border wall demands. With the shutdown nearing the three-week mark, some 800,000 workers are about to miss their first paycheck."

174 *Id.* The negotiation on January 9th was one the President *had to* be a part of. It is a power vested in him to deal with these issues.

175 Calvert, *supra* note 71. "Trump's attorneys have said the 'block function' is 'merely an exercise of his personal, not governmental, authority to exclude individuals from that private account.'"

have by engaging in a multi-party negotiation would make a great impact on constitutional rights in the new digital age, notably, on Twitter.

First Amendment rights have been around since way before social media. But, with the new digital age, these constitutional rights are more paramount than ever. The way President Trump is using Twitter as a platform may compromise his role in carrying out official duties, and instead of ensuring constitutional rights—violate them. The President deals with issues that are subjectively more serious than a Tweet or a post; but when the issue amounts to the violation of private citizens' rights, it becomes just as serious. The recent 2019 decision written by Judge Parker sheds light on the widespread issues, showing how an unfavorable decision leads to more litigation, not resolution.[176]

The long-standing notion was that public officials were immune from suits so they can carry out their official duties without the fear of being sued.[177] With the Internet only being 30 years old and Twitter only a decade, new constitutional issues are arising in the digital sphere.[178] By proposing that a multi-party negotiation take place to resolve constitutional issues on Twitter, the President can use an evolving platform without entering the murky waters of litigation every time he presses send on Twitter. This solution would resonate closely with the mission of immunity. By agreeing with the terms of the multi-party negotiation, the President will understand what he is responsible for, while having his interests accounted for. The proposed terms that would be agreed upon by all parties would combat lawsuits that stem from issues in the past, present, and likely future. A multi-party negotiation between representatives of respective parties would ensure that the President can use a platform that reaches millions of citizens while protecting their First Amendment rights. Resolving this issue with a multi-party negotiation would place the President on the opposite end of the table rather than the courtroom.

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176 Pointing out that Trump's administration is discussing next steps to bring this lawsuit in front of another court. Coming full circle to the issue that this Note is seeking to address, seeing the President at a table for multiple negotiations would be preferable to seeing his name on multiple lawsuits.

177 *See generally supra* note 67.

178 MacArthur, *Real History of Twitter, supra* note 37.

A SOLUTION TO THE SILENCING AND DENIAL: HOW ADR CAN HARMONIZE CATHOLIC LAW WITH THE INTERNATIONAL COMMUNITIES DEMAND TO END THE SEXUAL VICTIMIZATION OF CHILDREN IN THE CATHOLIC CHURCH

*Danielle Shayne Shapero**

I. Introduction

Instances of sexual malfeasance[1] within the Catholic Church can be traced back to the formal recognition of ecclesiastics[2] in the 4th century.[3] With this acknowledgment, Catholic ecclesiology[4] took shape under the theological teaching of apostolic succession,[5] in effect exulting priesthood over the laity.[6] The newly recognized

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* This note is dedicated to my mother, Lori Shapero, whose constant encouragement, infinite support, and constructive feedback fostered my curiosity and greatly assisted me through this note writing process.

1 *Malfeasance*, Black's Law Dictionary (9th ed. 2009). "A wrongful or unlawful act; esp. wrongdoing or misconduct by a public official."

2 *Ecclesiastics*, Merriam Webster's International Dictionary (3rd ed. 1961). "A Christian priest of minister."

3 *See* Rev. Thomas Doyle, *A Very Short History of Clergy Sexual Abuse in the Catholic Church*, Crusade Against Clergy Abuse, www.crusadeagainstclergyabuse.com/htm/AShortHistory.htm (last visited Oct. 20, 2019) (For a discussion on the history of legislation passed through the Christian world, dating back to the 4th century, illustrating the vast number of individual councils and synods who felt it necessary to draft laws regarding sexual violations prior to the centralization of power in a time where communication between diocese was almost obsolete). *See also Id.*, (referencing St. Peter Damian, Book of Gomorrah (1051).,"[t]the most dramatic and explicit condemnation of forbidden clergy sexual activity" in condemning superiors who admitted abusive men to the clergy, those who "defile" boys coming to them for confession and the canonical sources used by abusive clerics. Written by Cardinal Peter Damian during his time as Archbishop in a society whether "clerical decadence was not only widespread and publicly known, but generally accepted as the norm.").

4 *What is the Theological Study of Ecclesiology?*, Compelling Truth, www.compellingtruth.org/ecclesiology.html (last visited Feb. 6, 2019).

5 *See How Did the Priesthood Arise?*, What Is So Bad About Christianity?, www.badnewsaboutchristianity.com/bf0_priesthood.htm (last visited Feb. 1, 2019) (Apostolic Succession is the notion that members of the Christian Church ministry derive from the apostles, through a continuous succession leading back to Jesus himself. This forms the theoretical links which vests in the ministry their divine spiritual authority.).

6 *Laity*, Merriam Webster's Int'l Dictionary (3rd ed. 1961) ("the people of a religious faith as distinguished from its clergy").

clergy "were soon pointing out that disobedience to them amounted to disobedience to God."[7] With the evolution of the monarchial clergy, based on the power and rule of the Lord, master and father, a system of domination and capitulation over innocently vulnerable children was created. In 2014 the United Nations Children's Fund estimated that over 120 million children between the ages of 2 and 17 had been sexually abused by members of the Catholic clergy.[8]

Historically, victims of clerical abuse sought help from their religious leaders, believing that canon law, the Church's internal legal system, secured a fair process enabling them to obtain justice while remaining faithful to the religious order.[9] However, in confronting their parochial leaders, victims were met with a network of intimidation, manipulation, stonewalling, threats, and deception, designed by the Church's top officials to obtain victim silence and uphold the Church's reputation.[10] After years of being denied relief, victims began to turn to secular authorities; however, it was not until the 20th century that civil authorities began to notice an influx of cases alleging child abuse by the Catholic clergy. The public exposure forced the Church into a new era of public scrutiny and global scandal.[11]

With revelations of sexual abuse by the clergy beginning to rock the Catholic Church, the institution's hierarchy maintained this to be "a phenomenon new to the late 20th century."[12] As more victims became empowered to join the kairos movement[13] the true scope of the issue was revealed. Not only were children being sexually abused by low-level officials, but the highest-level officials also played a role in silencing, ignoring, and denying these victims relief, as well as demanding bishops and priests cover up their allegations.

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7 *Id.*

8 *A look at child abuse on the global level*, THE PROTECTION OF MINORS IN THE CHURCH, https://www.pbc2019.org/protection-of-minors/child-abuse-on-the-global-level (last visited Dec. 20, 2019). Although agencies such as UNICEF, have worked to collect statistics on this matter, the true number of child abuse cases remains largely unknown. One out of every three minors who have endued sexual abuse do not report it.

9 Doyle, *supra* note 3.

10 *Id.*

11 *Id.*

12 Doyle, *supra* note 3.

13 Harry Bruinius, *Churches Struggle with Their #MeToo Movement*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment (defining Kairos as a "theological term referring to a crucial moment to take action").

The prevailing opinion asserts that the foundation of this egregious phenomenon stems from the organizational structure of the Catholic Church.[14] Operating under a structure of administrative control, the Catholic Church is referred to as the last absolute monarchy in the modern world.[15] At the very top of the episcopal structure is the Pope, who is considered the successor of the Apostle.[16] Under the Pope are cardinals, archbishops, bishops, priests, and deacons, respectively.[17] At the local level, Bishops oversee dioceses[18] and priests, giving them unqualified authority subject only to the Pope, whose power is absolute.[19] Understanding the hierarchal system and how the institution has become increasingly clericalized[20] is critical to recognizing how the leadership has used its governmental structure to protect its own positions and executive authority—the "central focus has always been the 'good of the church' which in reality has often meant the good of the hierarchy."[21]

The causal connection between clericalism and sexual abuse is evident, "namely the tendency of the hierarchy to protect priests, the tendency to cover reports in deep secrecy and the massive denial about the seriousness of the problem."[22] In order to truly combat the global crisis of child abuse permeating the religious order, alternative dispute resolution strategies between the Holy See and the global community should be considered as a means of promulgating new ecclesiastical laws for the successful manage-

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14 Tom Roberts, *Thomas Doyle traces the disintegration of clerical/hierarchical culture*, NAT'L. CATH. REP. (Nov. 27, 2019), https://www.ncronline.org/news/accountability/ncr-connections/thomas-doyle-traces-disintegration-clericalhierarchical-culture.

15 Jason Breslow, *Tom Doyle: "Vatican is the World's Last Absolute Monarchy,"* PBS (Feb. 25, 2014), www.pbs.org/wgbh/frontline/article/tom-doyle-vatican-is-the-worlds-last-absolute-monarchy/ ("The pope, when he is elected, is answerable to no human power. He has absolute authority over the entire Roman Catholic Church, direct authority that reaches down to individual members.").

16 *Structure Of The Church*, ENCYL. BRITANNICA, (last visited Jan 12, 2020), https://www.britannica.com/topic/Roman-Catholicism/Structure-of-the-church.

17 *Roman Catholic Church Hierarchy*, HIERARCHYSTRUCTURE (last visited Jan 13, 2020), https://www.hierarchystructure.com/roman-catholic-church-hierarchy/.

18 *Diocese*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/diocese (last visited Oct. 2, 2018) (defining diocese as "the territorial jurisdiction of a bishop").

19 Breslow, *supra* note 15.

20 *Clericalism*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/clericalism (last visited Oct. 2, 2018) (defining clericalism as "a policy of maintaining or increasing the power of a religious hierarchy").

21 Thomas P. Doyle, *Clericalism: Enabler of Clergy Sexual Abuse*, 54 PASTORAL PSYCHOL. 189, 194 (2006).

22 *Id.* at 190.

ment of institutionalized sexual misconduct. In Part II, this Note will discuss the history of exposure leading to the public's knowledge and outrage of clerical abuse, explaining the inadequacies of the Institution's response. Part III discusses the international status and internal structure of the Church and the mechanisms utilized to establish the legal barriers preventing the world from rectifying this issue. Finally, Part IV proposes that mediation, under the paradigm of interest-based negotiations, is the best mechanism to reconcile the interest of the Church and the International Community. Additionally, this Note proposes the establishment of a comprehensive network of regional mediation and arbitration tribunals, overseen by a new subsidiary organ of the United Nations Security Council, created for the purpose of equilibrizing the current abuse of ecclesiastical power within the Church's judicial process and allow for a system of transparency and accountability.

II. BACKGROUND

The global community became aware of clergy sexual misconduct in 1984 when the family of a 10-year-old boy sued the Lafayette, Louisiana diocese in the secular court system.[23] Reverend Gilbert Gauthe (hereinafter "Gauthe") became the first Catholic priest in U.S. history to face criminal charges in the secular system for multiple cases of child molestation.[24] While under oath, Gauthe admitted to "sexually molesting 37 youngsters in hundreds of incidents while a priest"[25] in various parishes.[26] News surfaced of a systematic cover-up by the parish's bishop Gerard Frey, who had not only suppressed these sexual misconduct allegations, but also facilitated such molestation by moving Gauthe to different parishes once a report was made.[27] Prior to the filing of criminal charges against Gauthe, the Lafayette diocese had settled 13 lawsuits with families alleging abuse by Gauthe, offering a reported 5.5

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23 Madeleine Baran, *Betrayed by Silence: A Story in Four Chapters*, MINN. PUB. RADIO (July 21, 2014), http://minnesota.publicradio.org/collections/catholic-church/betrayed-by-silence/ch1/.

24 *Id.*

25 Breslow, *supra* note 15.

26 Baran, *supra* note 23. Gauthe subsequently confided to a psychologist, admitting to abusing over 300 children over the course of decades.

27 *Id.*

million dollars[28] in confidential settlement agreements.[29] As the scandal unfolded, more victims came forward[30] sparking additional public outrage.

Gauthe's admission made national news and the domino effect the Vatican feared[31] became a reality.[32] In the wake of rising allegations and newfound developments in the Gauthe case, reporters began vigorously investigating clergy misconduct within the Church. It was uncovered that clergy sexual misconduct stretched across numerous United States' dioceses[33] and sexual abuse permeated the walls of the institutional Church through a systemic cover-up by its leadership.[34] For decades, the leadership of the monarchy successfully concealed allegations of sexual abuse, settling claims outside of court, transferring those accused to other dioceses, and handling problems internally in order to preserve the prestige, faith, and sanctity of the Catholic Church.[35]

While the media coverage surrounding Gauthe in Lafayette was a "major catalyst for the legal and cultural explosions that rocked the Catholic Church,"[36] it was not until 1992 that the international community became aware of the breath of sexual malfea-

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28 Associated Press, *Boy, 11, Tells Court of Seduction by Priest*, L.A. TIMES (Feb. 6, 1986), https://www.latimes.com/archives/la-xpm-1986-02-06-mn-4682-story.html.

29 Jason Berry, *The Tragedy of Gilbert Gauthe: Part II*, THE TIMES OF ACADIANA (May 30, 1985), http://www.bishop-accountability.org/news/1985_05_30_Berry_TheTragedy.htm (quoting Channel 10 news director Jim Baronet, "'We knew something was going on, but we were cut off. Neither party would talk, the Church for liability reasons, and Hebert because he was bargaining an out-of-court, secret settlement.'").

30 *Id.* At this time, 11 additional children have come forward alleging that they had been sexual abused by clergy men. Actions were filed in court for claims totaling approximately $114 million.

31 Baran, *supra* note 23 (quoting Reverend Thomas Doyle, "The Vatican 'feared a domino effect,'. . . 'The risk was the loss of prestige, the loss of power, the loss of respect,' and the loss of money.").

32 *See* Berry, *supra* note 29. Gauthe was indicted and charged with "11 counts of aggravated crimes against nature, 11 counts of committing sexually immoral acts with minors, 1 count of aggravated rape (sodomizing a boy under the age of 12) and 11 counts of crimes of pornography involving juveniles, through pornographic photo sessions," in 1985 Reverend Gauthe plead guilty to 34 criminal counts and was sentenced to 20 years for molesting 11 boys.

33 *Id.*

34 Thomas P. Doyle, *Cardinal Law's Complex Role in the Contemporary History of Clergy Sexual Abuse*, NAT'L CATH. REP. (Dec. 28, 2017), https://www.ncronline.org/news/accountability/cardinal-laws-complex-role-contemporary-history-clergy-sexual-abuse.

35 Jon Henley, *How the Boston Globe Exposed the Abuse Scandal that Rocked the Catholic Church*, GUARDIAN (Apr. 21, 2010), https://www.theguardian.com/world/2010/apr/21/boston-globe-abuse-scandal-catholic.

36 Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 554 (2004).

sance by clergymen within the walls of the holy institutions.[37] In the years that followed, several major revelations surfaced[38] and despite the media coverage surrounding this issue, "the bishops remained in control, giving the expected lip-service followed by continued lying, stone-walling and cover up."[39]

In 2002, it was revealed that the veil of silence surrounding the Church hid a larger managerial scheme of cover-up and corruption—all made possible by the governmental structure of the institution itself.[40] Cardinal Law, one of the most respected and influential Cardinals of his time, disclosed his participation in the Church's historical practice of reassigning clergymen who had molested children to different parishes across the country to protect the Church's reputation.[41] With this disclosure, there was now proof that not only was clergy abuse a significant problem, but that top officials throughout the Church hierarchy were also conspiring, to cover up this problem. With increasing media coverage and endless public scrutiny, Cardinal Law resigned.

To address this issue, Pope Francis founded *The Pontifical Commission for the Protection of Minors* in 2014, which developed guidelines and proposed initiatives to protect children from clergy sexual abuse.[42] Pope Francis also established a church tribunal charged with holding bishops accountable for their failure to act on cases of abuse brought to their attention.[43]

In the face of cover-ups, corruption, and injustices by the Church, it has been shown that the Vatican cannot be said to be an impartial adjudicator and will protect its officials, in the name of the Church, over its children members. What the outside world at first believed to be a problem of clergy perpetrators using their spiritual authority to manipulate vulnerable children has proven to exist at the top level of the episcopate. The existence of canon law

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37 *Id.*

38 *See* Doyle, *supra* note 34 ("Between 1985 and 2002, there were several major eruptions, including the Jim Porter trial, the Rudy Kos trial and the exposure of multiple perpetrators among the faculties at two seminaries — St. Anthony's in Santa Barbara, California, run by the Franciscans, and St. Lawrence Seminary near Fond du Lac, Wisconsin, run by the Capuchins.").

39 *Id.*

40 *Id.*

41 Henley, *supra* note 35. Although Cardinal Law was aware that Father Geoghan had been accused of molesting seven boys, he subsequently assigned him to a parish in Boston even though sexual abuse allegations were outstanding.

42 Adrian Walker, *Keeping the Spotlight on the Catholic Church*, BOSTON GLOBE (Nov. 1, 2015), www.bostonglobe.com/metro/2015/11/02/the-clergy-abuse-scandal-changed-catholic-church-but-has-church-changed-enough/RQidk9tC28Nk7jyprisGQO/story.html.

43 *Id.*

governing the procedures implemented to deal with clergy abuse, is no longer sufficient. The combination of the Church's uniquely complex organizational structure, in effect enabling clergy sexual malfeasance, strengthened by external canonical provisions, has resulted in an end-run around canonical policies denouncing sexual abuse and has prompted dioceses across the world to disregard local legislation. Collectively, this structure provides the requisite foundation justifying the need to strip the Church of its authority to independently combat clergy abuse, and to finally allow the international community to protect its citizens through jointly promulgated canonical legislation.

III. Discussion

To understand why child abuse within the Church has continued without repercussion and why individual states within the international community have been unable to battle this issue through legislation or judicial intervention, it is important to address the difference in the legal characterization between the Vatican City State and the Holy See. This legal characterization forms the basis of each entity's jurisdictional reach, international influence, and legal responsibility to the world community.[44] As such, this character differential is germane to understanding why solving the problem of sexual abuse within the Catholic Church must be addressed at the international rather than local level.

The cumulative effect of the Church's hierarchal structure and the construction of its governing laws has created unbreakable barriers between the outside world and the Church, in turn, contributing to its ability to "cover-up" the problem. This Note proposes that without the use of a neutral intermediary to facilitate the conscription of new and jointly created canonical laws and directives between the Church and the secular world, the Church will continue to follow inadequate practices of internally dealing with this issue, leaving States powerless to protect and defend its citizens.

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[44] Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 Cath. U.L. Rev. 291 (2001).

A. *The Difference Between Vatican City State and the Holy See*

The Church is made up of two distinct entities—The Vatican City State and the Holy See. At the head of these two distinct entities is the absolute monarch—the Pope.[45] As follows, the Pope is considered to speak faultlessly and absolutely.

1. Vatican City State

Vatican City is comprised of the Vatican building and its surrounding territory. Pursuant to the 1929 Lateran Treaties, Italy recognized "papal sovereignty[46] over the Vatican City[47]. . . and secured full independence over the Pope."[48] The Vatican City State is the last standing absolute monarchy in Europe and one of the few left in the world. "Vatican City State is governed as an absolute monarchy, the Head of State is the Pope who holds full legislative, executive and judicial powers."[49] Vatican City provides the necessary physical territorial base for the Church as well as its administrative agencies.

Under international law,[50] the Vatican does not differ from the status of any province or subdivision of a state, as it meets the requirements of statehood set forth under the *Montevideo* criteria.[51] The Montevideo Convention stipulated that in order to be deemed an equally sovereign state under international law, the qualifications of (1) defined territorial boundaries, (2) a permanent population, (3) a government, and (4) the ability to enter into agreements

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45 *See Matthew* 16:18 (the successor of the Apostle Peter, about whom Christ said, "You are Peter and on this rock I will build my church.").

46 *See* Daniel Philpott, *Sovereignty*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 14, 2018), https://plato.stanford.edu/entries/sovereignty/ (Defining the core meaning of sovereignty as the "supreme authority within a territory.") (noting that "[h]istorical variations can be understood along three dimensions – the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty.").

47 *Lantern Treaty,* ENCYCLOPEDIA BRITANNICA (Oct. 14, 2018), www.britannica.com/event/Lateran-Treaty.

48 Philpott, *supra* note 46.

49 *State Department*, VATICAN CITY STATE, www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html (last visited Oct. 1, 2018).

50 *See Uphold International Law*, UNITED NATIONS, www.un.org/en/sections/what-we-do/uphold-international-law/index.html (last visited Feb. 3, 2019) ("International law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries." Thus, the criteria for statehood is particularly relevant when determining the primary subjects of international law.).

51 Cedric Ryngaert, *The Legal Status of the Holy See*, GOJIL 3 (2011).

with other states, must be met.[52] Unlike the Holy See, the Vatican City State meets the criteria of statehood. Notably, the "Vatican City is the only state that is generally recognized by the international community that is not a member of the United Nations."[53] Why is that? One view reconciles this question with the Vatican's history of dealing only with the "internal-political" domain and policies of the Church.[54] Commonly viewed as a "vassal" territory of the Holy See[55] its sole purpose is to provide the central administration of the Roman Catholic Church.[56] Others believe the Vatican has avoided being viewed internationally as a state because the Catholic Church is unwilling to assent to the obligations that accompany a designation of statehood, namely acknowledging responsibility for wrongful acts committed by or attributable to the state.[57]

2. The Holy See

The Holy See is the "ecclesiastical, governmental, and administrative capitol of the Roman Catholic Church."[58] The Holy See's governance, authority, and jurisdiction are based on global spiritual sovereignty with the Pope, designated as the head of the Code of Canon Law, possessing plenary power over the judicial, legislative, and executive functions of the Church.[59] The Holy See handles all external political and religious matters for the Church "functioning as a global network of territorial jurisdictions (dio-

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52 ENCYCLOPEDIA BRITANNICA, www.britannica.com/event/Montevideo-Convention (last visited Oct. 2, 2018) ("Montevideo Convention on the Rights and Duties of States agreement signed . . . on December 26, 1933 . . . established [a] standard definition of a state under international law.").

53 DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 99 (6th ed. 2004).

54 Jodok Troy, *The Catholic Church and International Relation*, OXFORD HANDBOOKS ONLINE (Apr. 2016), www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-2.

55 *Church or State? The Holy See at the United Nations*, CTR. FOR RES. ON POPULATION AND SECURITY, www.population-security.org/crlp-94-07.htm (last visited Oct. 14, 2018).

56 *Id.* (explaining the distinction between modern nations around the world that exist in order to support their citizens, and the Holy See which exists in order to provide the central administration of the Catholic Church).

57 JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 77 (2002).

58 Cedric Ryngaert, *The Legal Status of the Holy See*, 3 GOETTINGEN J. INT'L. L. 830, 837 (2011) (citing *Doe v. Holy See*, 434 F. Supp. 3d D.Or. 2009).

59 *State Department*, VATICAN CITY STATE, www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html (last visited Oct. 1, 2018).

ceses) which serve the spiritual and material needs of the world's estimated 1.2 billion Catholics."[60]

Conferred with universal spiritual sovereignty,[61] the jurisdiction of the Holy See reaches over "all things and rules over all things."[62] Viewing the jurisdiction of the Church as one of universal spiritual sovereignty, the Holy See is in a unique position to exude influence over the international community. Historically, the Church has interpreted this vast jurisdictional grant as sufficient authority to implement its own laws, procedures, and practices internationally through its network of local dioceses.[63] This designation is the basis for the Church's belief that it has plenary authority to govern over the epidemic of child abuse occurring within its walls.

The power of the Holy See descends from one of two views regarding its legal characterization. The first view designates the Holy See as a state. This view equates the Vatican City State and the Holy See as one legal entity, leading to the belief that the Holy See, as an institution, is a sovereignly immune state actor. Conversely, the second possible designation of the Holy See, views the body as a *sui generis* entity[64] with a far-reaching international personality, standing not as its own state, but as a separate entity to the Vatican City State.[65] The issue that arises given the lack of an established legal characterization of the Holy See, is the great amount of undefined power given the Holy See. Consequently, states are left with an unspecified system of control over the Catholic Church within its own territorial boundaries, and in turn, have no clear pathway to implement legislation or regulatory authority, or sanction abusers.

B. *Status of the Holy See*

1. The Status of the Holy See in the United States

Historically the United States has classified the Holy See and the Vatican as one legal entity, together making up the Catholic

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60 Troy, *supra* note 54 (citing KATHERINE MARSHALL, GLOBAL INSTITUTIONS OF RELIGION: ANCIENT MOVERS, MODERN SHAKERS, (Routledge Global Institutions Series 2013)).

61 Ryngaert, *supra* note 58, at 838.

62 *Matthew* 28:18-20.

63 *See* Ryngaert, *supra* note 58.

64 *Id.* at 838; *see also Sui Generis*, BLACK'S LAW DICTIONARY (9th ed. 2009) "[defining the Latin work *Sui Generis* as 'of its own kind'],"of its own kind or class; unique or peculiar."

65 *Id.*

Church as viewed under the Constitution and the laws of the United States.[66] In the seminal case, *O'Bryan v. Holy See* (2009), the 6th Circuit defined the legal characterization of the Holy See as "a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church."[67] Noting that the United States has recognized the Holy See as a foreign sovereign since 1984, the Court rejected O'Bryan's argument that "the Holy See [could] be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization."[68] The Holy See's designation, under the Foreign Sovereign Immunities Act of 1976 ("hereinafter FSIA")[69] is extremely significant in that the Supreme Court interpreted "the text and structure of the FSIA [to] demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."[70] Notably, the act applies exclusively to foreign states and their political subdivisions, agents and instrumentalities.[71] Treating the Holy See as a sovereign for FSIA purposes affirms the idea that the United States and its courts view the Holy See and the Vatican as interchangeable, parallel sovereign entities.[72]

2. International Status of the Holy See

Whether viewed as a sovereign state or a *sui generis* international personality, one thing is certain, the Holy See has established itself as a substantial international power with the ability to act under its own laws throughout the world.[73] Even though the international legal status of the Holy See has been subject to much debate, the Holy See has enjoyed status under international law

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66 *Id.*

67 *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009).

68 *Id.* at 373.

69 28 U.S.C. § 1602 (2008).

70 *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

71 28 U.S.C § 1603(a)–(b).

72 *See O'Bryan v. Holy See*, 556 F.3d at 373 (explaining the proposition that U.S. courts generally treat the Holy See and Vatican City State as interchangeable entities for purposes of the FSIA—"Courts have generally treated the Holy See as a foreign state for purposes of the FSIA"); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 832 (S.D. Miss 2004) (treating the Vatican as a foreign state for purposes of the FSIA); *English v, Thorne*, 671 F. Supp.2d 825, 764 (S.D.Miss. 1987) (concluding that the Vatican is a foreign state for the purposes of the FSIA); *Doe v. Holy See*, 434 F. Supp. 2d 925, 933 (D. Or. 2006) (applying FSIA's foreign state status to the Holy See).

73 Araujo, *supra* note 44, at 322.

since the 5th century.[74] This international status, absent the requisite state designation, has not only prevented the Holy See from being subject to the International Court of Justice,[75] but has permitted the Holy See to reject the responsibilities that accompany state identification. Conversely, the rights and powers that flow from statehood—i.e. the capacity to enter into diplomatic relations and foreign recognition of the State's "dignity, the retention of its independence, of its territorial and its personal supremacy"[76]—are qualities the Holy See has chosen to retain in its position as the "preeminent episcopal see of the Catholic Church."[77]

Under international law, for a state to be considered a sovereign entity within the territorial boundaries of another state, that state alone must accept the sovereignty of the entity in question.[78] "Often the best evidence of such acceptance is the establishment of diplomatic relations."[79] Another indication being "the invitation of the entity to diplomatic conferences and treaty negotiations as an equal."[80] The international power of the Holy See is well established.[81] As communicated by Archbishop Jean-Louis Tauran, "[t]here is no doubt about the Holy See's full belonging to the international community."[82] A single statistic is enough: in 1978, Pope John Paul II was elected Supreme Pontiff, the Holy See had diplomatic relations with 84 countries; today, this number has risen to 172."[83] The "Holy See represents both the Vatican City State *and* the Holy See, [while] formally maintain[ing] diplomatic relations in the name of the Holy See and not in the name of the Vatican."[84] The autonomous character of the Holy See is further illustrated in its treaty making capacity, its ability to enter into multilateral conventions, and its permanent observer status at the

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74 *Id.*

75 *See* Statute of the International Court of Justice, art. 34 (San Francisco, 26 June 1945), 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993, *entered into force* 24 Oct. 1945) ("Only States may be parties in cases before the Court.").

76 *See* 1 L. OPPENHEIM, *I*nternational Law: A Treatise § 113. (2d ed. 1912).

77 *Holy See*, UNITED STATES CONFERENCE OF BISHOPS, www.usccb.org/about/leadership/holy-see/ (last visited Feb. 1, 2019) ("Although it is often referred to by the term 'the Vatican,' the Holy See is not the same entity as the Vatican City State.").

78 Araujo, *supra* note 44 at 322 (2001).

79 *Id.*

80 *Id.* at 323.

81 *Id.*

82 Archbishop Jean-Louis Tauran, *The Presence of the Holy See in the International Organizations*, LA SANTA SEDE (Apr. 22, 2002), http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20020422_tauran_en.html.

83 *Id.*

84 *See* Ryngaert, *supra* note 58, at 836.

United Nations (hereinafter "UN").[85] In holding permanent observer status at the UN, a right traditionally reserved for non-member states,[86] the Holy See has continuously participated in the international forum in a state-like manner while simultaneously asserting otherwise.

As a self-designated universal and spiritual sovereign, the Holy See believes its sovereignty not to be "created by the states through their recognition of it, but exists independently from the recognition of the states".[87] Additionally, the Holy See claims to take part in international relations as a "*sovereign and independent moral authority.*"[88] These two assertions illustrate that while the Holy See may be recognized as a subject of international law, it has taken the position of a sovereign entity under its authority.[89] Notably, as demonstrated in part IV of this Note, the UN and its member States have denounced the Holy See's position, calling on the Holy See to comply with the 1969 Vienna Convention on the Law of Treaties;[90] declaring that the Holy See, which exists apart from the Vatican City State, must be subject to international law and must observe these obligations, as signatories of multiple treaties, regardless of the nomenclature in use.[91]

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85 *See Participation of the Holy See in The Work of the United Nations*, PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE U.N. (July 16, 2004), https://holyseemission.org/contents/mission/mission-55e373817eecc8.37288214.php (acknowledging "the Holy See, in its capacity as an Observer State, [shall be accorded] the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspicious of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex.").

86 CTR. FOR RES. ON POPULATION AND SECURITY, *supra* note 55 ("An applicant to the United Nations must: (1) be a State; (2) be peace-loving; (3) accept the obligations of the United Nations Charter; (4) be able to carry out these obligations; and (5) be willing to do so.").

87 Arajuo, *supra* note 44 at 323 (citing G. LaPiana, 25 AM. J. INT'L. L. 405, 406 (1931) (reviewing Louis Lefor, LESAINT-SIEGE ET LE DROIT DES GENS (1929)).

88 Tauran, *supra* note 82.

89 Araujo, *supra* note 44 at 323 (nothing that the Holy See has a sovereignty that is recognized under international law. "However, its personality as a subject of international law and the sovereignty it exercises are not precisely those of other subjects of international law.").

90 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

91 Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

C. *Canon Law*

Canon law is the legal order of ecclesiastical laws governing the Catholic Church at the global level.[92] Promulgated by the Pope, canon law is said to guide the actions of bishops, outline their responsibilities, and to assure their rights.[93] The Code of Canon Law encompasses the entire legal system of the Church, and includes provisions related to procedural law, penal law, governmental structure, and the rights and duties of office holders.[94] Canon law, whether criminal or penal, "exists not only to protect individuals from infringements upon their rights, but also to protect the integrity of the Church as a community of faith, service and hope."[95] As explained by Father McKenna, a Pastor and canon law expert, "[w]hen an allegation such as abuse occurs – such as sexual abuse – the church handles cases much the same way as a criminal case proceeds in a civil court."[96] Canon law provides an individual with the right to bring an allegation to the attention of church authorities "for the express purpose of initiating a process that will lead to healing, reconciliation, a just resolution of the harm which has been suffered, and to prevent any further harm from occurring."[97] Given that canon law contains these specific provisions, it has been argued that failure to solve the problem of clergy sexual abuse is not due to the absence of a legal structure relating to child abuse within the Church, but rather the failure of leadership to adhere to the procedures canon law has established to combat this issue.[98] Contrary to this argument is the view that canon law also contains provisions requiring clergymen to cover up sexual abuse within the Church and as a result, those provisions act as a limita-

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92 *Canon Law*, U.S. CONF. CATH. BISHOPS, http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/index.cfm (last visited Oct. 10, 2018).

93 *Canon Law Guides Church's Response to Clergy Sexual Abuse*, CATH. REV. (Jan. 19, 2012), www.archbalt.org/canon-law-guides-churchs-response-to-clergy-sexual-abuse.

94 Doyle & Rubino, *supra* note 36, at 555.

95 *Trials According to the Canon Law of the Roman Catholic* Church, ARCHDIOCESE OF MILWAUKEE (2016), https://www.archmil.org/ArchMil/Resources/TRIB/Tribunalbrochure.pdf; *see also* 1983 Code c. 277 § 2 ("Clerics are to behave with due prudence towards persons whose company can endanger their obligation to observe continence or give rise to scandal among the faithful").

96 CATH. REV., *supra* note 93.

97 ARCHDIOCESE OF MILWAUKEE, *supra* note 95.; *see also* 1983 Code c. 277 § 2 ("Clerics are to behave with due prudence towards persons whose company can endanger their obligation to observe continence or give rise to scandal among the faithful").

98 Doyle & Rubino, *supra* 36, at 555 (noting that Canon Law 1395.2 deals with sexual abuse within the Church).

tion, legally permitting church officials to disregard the procedures relating to the issue of child abuse in their adherence to external canonical provisions.[99] This latter view is substantiated by the fact that Pope Francis has the authority under the Holy See to promulgate new canonical provisions and retract current provisions.[100] However, provisions requiring Church officials to cover up child abuse are "still there in black and white . . . Pope Francis has been asked to change it and he's refused."[101] Others argue the process itself was inadequate from its very inception, fostering an imbalance of power between members of the Church who report allegations and the Church authorities they are reporting to.[102]

1. Canon Law Policies Relating to Sexual Abuse

Canon 1395.2 is the canonical provision addressing child abuse.[103] Canon 1395 § 2 states:

> A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.[104]

As stated in canon 227, clergymen are "bound to celibacy" thus, any sexual act with a minor violates this clergy obligation.[105] Notably, § 3 of this canon gives authority to "[t]he diocesan bishop . . . to establish more specific norms concerning this matter and to pass judgment in particular cases concerning the observance of this obligation."[106] Under canon 1389 § 1 a sexual act with a minor can be deemed an abuse of an "ecclesiastical power or function" which

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99 *Id.*

100 *See* infra page 24.

101 Charlotte King, *Vatican Requires Bishops 'to Cover up Child Sex Abuse' in Absence of Reporting Laws, Expert Says*, ABC NEWS AU (Aug. 2, 2018), www.abc.net.au/news/2018-08-02/vatican-law-requires-catholic-bishops-cover-up-abuse-expert-says/10057532.

102 Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 561 (2004).

103 1983 CODE c.1395.

104 1983 CODE c.1395, § 2.

105 *See* 1983 CODE, c.277, § 1. "Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are bound to celibacy which is a special gift of God by which sacred ministers can adhere more easily to Christ with an undivided heart and are able to dedicate themselves more freely to the service of God and humanity."

106 *See id.*, § 3.

is to be punished "according to the gravity of the act or omission."[107]

Part IV of the Code of Canon Law outlines the penal process for investigating allegations of clergy sexual abuse.[108] Under canon 1717 § 1, "whenever an Ordinary[109] has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and immutability, unless such an inquiry seems entirely superfluous."[110] Particularly interesting is the assertion made directly following this directive: "[c]are must be taken so that the good name of anyone is not endangered from this investigation."[111]

Once the initial investigation is complete, the evidence gathered by those appointed to conduct the investigation is presented to the bishop who has the discretionary authority to determine whether to proceed with further action.[112] Hearsay, including information gathered from anonymous sources, or circulated rumors, is admitted as credible evidence.[113] If witnesses are presented, there is no defined procedure for aggressive cross-examination in order to ascertain all the facts regarding the abuse allegation.[114] Rather, a witness may be asked to provide a deposition, usually attended by only one presiding member of the Tribunal, or to fill out a questionnaire regarding his knowledge of the circumstances.[115]

If the bishop deems the victim's allegations to be credible, he has three choices: a full judicial process, an administrative process, or a "pastoral" admonition.[116] Canon 1719 provides that the inves-

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107 *See* 1983 CODE c.1395, § 1 ("A person who abuses an ecclesiastical power or function is to be punished according to the gravity of the act or omission, not excluding privation of office, unless a law or precept has already established the penalty for this abuse.").

108 1983 CODE c. 1717–1731.

109 *Ordinary*, NEW ADVENT CATHOLIC ENCYCLOPEDIA ONLINE, http://www.newadvent.org / cathen/11284b.htm (last visited Nov. 11, 2004) (Defining Ordinary as "a cleric, such as a bishop, that has jurisdiction over an area, such as a parish or diocese.").

110 *See* 1983 CODE c. 1717, § 1.

111 *See id*., c. 1717, § 2.

112 *See* 1983 CODE c. 1718, § 1 ("When it seems that sufficient evidence has been collected, the ordinary is to decide: 1. whether a process to inflict or declare a penalty can be initiated; 2. whether, attentive to canon 1341, this is expedient; 3. whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.").

113 Doyle & Rubino, *supra* note 36, at 557.

114 *Cross Examination Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/ c/cross-examination/ (last visited Feb. 1, 2019).

115 ARCHDIOCESE OF MILWAUKEE, *supra* note 95.

116 *See* 1983 CODE c. 1341 ("The Ordinary is to state a judicial or an administrative procedure for the imposition or the declaration of penalties only when he perceives that neither by frater-

tigation will be closed if not found to be "necessary for the penal process."[117] Canon 1722 also permits the Ordinary to restrict an accused cleric's activities or movements if necessary "[t]o prevent scandals, to protect freedom of witnesses, and to safeguard the course of justice."[118] This entire process is carefully documented and all records surrounding the case are kept in the secret archives of the dioceses.[119]

Where formal charges are filed against the accused, the judicial process proceeds in front of a "collegiate tribunal" consisting of three ecclesiastical judges, appointed by the Archbishop, no juries are provided.[120] The burden of proof rests on the Promoter of Justice,[121] who must corroborate the charges to a degree of "moral certitude."[122]

If an affirmative decision is made, the judges move on to the penalty phase of the judicial process, where one of three penalties can be imposed on the accused.[123] The most common censures canon law envisages are: excommunication,[124] interdict,[125] and sus-

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nal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed.").

117 *See* 1983 CODE c. 1719.

118 *See id.* c. 1722.

119 *See id.* c. 1719 (stating "[t]he acts of the investigation, the decrees of the ordinary which initiated and concluded the investigation, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process." This instruction has caused much debate regarding the lack of information available to the public and to secular authorities); *see* Doyle and Rubino, *supra* note 36 (estimating from a compilation of private reports by attorneys and press reports that since 1984 several hundred criminal prosecutions of clergymen have been initiated in the United States); *see also id.* at 550 n.8 (stating that "[t]here is no official list of clergy-abusers who have been charged, tried and sentenced. Information about the variety of charges is based on various media accounts and the author's experience.").

120 *Compare* 1983 CODE, *supra* note 81, c. 1425 §1 (where the process is conducted by three to give judge panel since there are no juries in the Canon Law system) *with* U.S CONST. amend. VII (which guarantees parties to an action the right to a jury trial, unless expressly waived by both sides. Failing to offer a jury trial is another instance in which the Canon process contradicts important principles in American jurisprudence that ensures fairness.).

121 *See* ARCHDIOCESE OF MILWAUKEE, *supra* note 95 (explaining the role of the Promoter of Justice as one who acts similar to that of a District Attorney in the secular and criminal court system. Having been delegated the responsibility of safeguarding the public good, in this role, the Promoter of Justice relies on the victims' testimony in order to establish a case against the accused clerk. Yet in their official capacity the Promoter of Justice does not act solely as an advocate for the alleged victim).

122 *Id.* at 12 (defining moral certitude as, "the firm and unwavering assent of the mind").

123 1983 CODE c.1718, § 1.

124 *See* 1983 CODE c. 1331.

125 *See id.* c. 1332. Interdict prohibits a person from participating in the ministry and reception of the sacraments and sacramentals.

pension.[126] Additionally, abusers can be punished with expiatory penalties.[127] The most severe penalty imposed, other than excommunication, results in the offender being dismissed from the clerical states.[128] Although he maintains his title, the priest is stripped of the duties, responsibilities and privileges that correlate with his position.[129] When an initial decision has been entered, and a penalty imposed, the case is then transmitted to the Congregation of the Doctrine of the Faith in Rome.[130] Only after this body affirms and accepts the penalty, can the penalty be applied and the case be considered closed.

2. Limitation Tactics: Hiding Behind Secret Directives for Protection

In 1922, Pope Pius XI issued a confidential memo known as *Crimen Sollicitationis* or "*The Crime of Solicitation.*"[131] This document, reissued in 1962, codified the procedures to be employed when a member of the clergy was accused of using the confessional as a means of soliciting sex from Church members.[132] *Crimen Sollicitationis* was to be used as an instructional handbook, a guide for administrative procedures in these types of cases.[133] Title V, "*De crimine pessimo*" or "*The Worst Crimes,*" directly addresses the sexual acts of clergymen with same sex partners, minors, and bestiality.[134] Clearly recognizing the disastrous effect these crimes, if known, could have on the Church, the document demanded matters be treated with the "utmost confidentiality," requiring "permanent silence" of all those involved, or with any knowledge regarding such matters "under pain of incurring automatic excommunication."[135] While the directive clearly shows that the highest-

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126 *See id.* c. 1333. Suspension is a penalty that can only be imposed upon members of the clergy. The sanctions under suspension, vary depending on the crime, circumstances and degrees.

127 *See id.* c. 1336, § 1.

128 Doyle & Rubino, *supra* note 102.

129 *See* 1983 CODE c.291–93 (providing a comprehensive list of effects imposed upon a priest who has been dismissed from the clerical state).

130 Doyle & Rubino, *supra* note 102.

131 King, *supra* note 101.

132 John Allen, *1962 document orders secrecy in sex cases*, NAT'L. CATH. REP., (last visited Jan. 1, 2020), http://www.nationalcatholicreporter.org/update/bn080703.htm.

133 Brendan Daly, *The Instruction Crimen Sollicitations on the Crime of Solicitation: Confusion or Cover-up of Pedophilia*, 7 THE CANONIST 10 (2016).

134 *Id. (*defining the worst crime under section 73 as "obscene behavior with pre-adolescent children of either sex or with brute animals.").

135 The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

ranking Vatican officials had knowledge of sexual abuse taking place across the Catholic Church, it was not until Pope St. John XXIII's 1962 re-released instruction that the *Crimen Sollicitationis* was distributed to bishops worldwide.[136] Approved, confirmed, and ordered by the Holy Father, the instruction was to be observed to the "minutest detail."[137]

"[D]iligently stored in the secret archives of the Curia as strictly confidential,"[138] as per the document's explicit instructions posted on page one, evidence of the document's existence only came to light in 2002 when attorney and former Catholic Deacon, Dan Shea, noticed a reference to the document in a footnote within a letter sent to bishops around the world, from the head of the Vatican's doctrinal congregation, regarding new procedures for sex abuse cases.[139] Shea believed it "not just [to be] a smoking gun, but a nuclear bombshell . . . show[ing] that the Vatican has been providing instruction to all the bishops in the United States to obstruct justice."[140] Consistent with this position is that of Kireran Tapsell, an expert witness for the 2017 Royal Commission Panel on canon law, who maintains that the secrecy of that confidential instruction has been "confirmed."[141]

The *Crimen Sollicitationis* illuminates the long-standing policy of the Vatican regarding sexual offenses—"to control and maintain these situations" under a vail of absolute secrecy.[142] Notably, the instruction places the same requirement of secrecy on the victim as

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136 Thomas Doyle, *THE 1962 VATICAN INSTRUCTION "CRIMEN SOLLICITATIONIS," PROMULGATED ON MARCH 16, 1962*, ARCHIVES.WEIRDLOAD, (last visited Jan. 1, 2020), http://archives.weirdload.com/docs/doyle-crimen-4-10-8.pdf. Notably, Doyle addresses the "unofficial sources" claiming that the 1962 document was not issued to bishops worldwide, but rather was only sent to bishops upon their express request. Doyle argues that "there is no reason to believe such an assertion." However, Doyle does note that unlike most legal documents issued by the Holy See the 1962 document, like its 1922 predecessor was "not included in any of the collections, official or private."

137 The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

138 *Id.*

139 John L. Allen, *1962 Document Ordered Secrecy in Sex Cases*, NAT'L. CATH. REP. (Aug. 7, 2003), www.nationalcatholicreporter.org/update/bn080703.htm.

140 Alan Cooperman, *Vatican Memo Cited In Sex Abuse Cases*, WASH. POST (Aug. 25, 2003), www.washingtonpost.com/archive/politics/2003/08/25/vatican-memo-cited-in-sex-abuse-cases/de496188-bc95-4c7d-913e-b7845f6cc2db/?utm_term=.86a2b7927b11.

141 King, *supra* note 101.

142 Father Thomas Doyle, *Crimen Sollicitationis: An Interpretation*, BBC NEWS (Sept. 29, 2006), www.news.bbc.co.uk/2/hi/programmes/panorama/5392338.stm.

it does on the accused.[143] Doyle suggests that the "almost paranoid insistence on secrecy throughout the document is probably related to two issues: the first is a scandal that would arise were the public to hear stories of priests committing such terrible crimes.[144] The second reason is the protection of the inviolability of the sacrament of penance."[145] Defenders of the Article condemn the majority view, believing that the public has misinterpreted the instruction.[146] Nicholas Cafardi, Dean Emeritus for the Duquesne University School of Law, claims that the document solely requires secrecy regarding the Church's internal legal process and not the crime itself.[147] Cafardi further argues that nothing within the directive prevents victims or Church officials from "reporting a civil crime to the civil authorities or to the media."[148]

The practice of secrecy perpetuated by the Catholic Church and its highest-ranking officials disregarded the rights of victims in an attempt to avoid scandal and maintain the holy aura surrounding the institution.[149] This notion is advanced by the fact that the 39-page document fails to mention any form of support or relief for the victim.[150] However, as Doyle notes an equitably informed interpretation requires analyzing the 1922 and 1962 instructions from an originalist perspective, viewing the intention of its drafters in conjunction with the time period in which it was written.[151] The "highly confidential and even secretive attitude with regard to internal church matters" was common during the period in which *Crimen Sollicitationis* was written.[152] Still, critics believe its exis-

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143 The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962) ¶ 13 ("The oath of keeping the secret must be given in these cases also by the accusers or those denouncing [the priest] and the witnesses.").

144 Doyle, *supra* note 102. Thomas Doyle, *The 1992 Instruction and the 1962 Instruction "Crimen Solicitations," Promulgated by the Vatican* (Oct. 3, 2008), www.awrsipe.com/doyle/2008/2008-10-03-Commentary-on-1922-and-1962-documents.pdf.

145 *Id.*

146 Dave Sutor, *'Confidential Archives': Experts Divided on Impact of Canon Law in Diocese of Altoona-Johnstown Child Abuse Scandal*, TRIBUNE-DEMOCRAT (Apr. 3, 2016), www.tribdem.com/news/local_news/confidential-archives-experts-divided-on-impact-of-canon-law-in/article_c9e8aa53-ff6e-52dc-951a-337844c84ef8.html.

147 *See Id.*

148 *Id.*

149 Thomas Doyle, *The 1992 Instruction and the 1962 Instruction "Crimen Solicitations," Promulgated by the Vatican* (Oct. 3, 2008), www.awrsipe.com/doyle/2008/2008-10-03-Commentary-on-1922-and-1962-documents.pdf.

150 *See* The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

151 *See* Doyle, *supra* note 149.

152 *Id.*

tence alone is evidence of a systematic scheme of cover-up perpetrated by the Church because at the time of its creation procedures for handling such an issue were already codified within the Code of Canon Law.[153] To this point, Doyle emphasizes the common Vatican practice of issuing directives to implement particular procedures for the handling of specific and sensitive crimes.[154] Thus, Doyle argues that "we cannot accurately interpret and criticize this document solely by out contemporary standards based on the institutional church's handling of clergy sexual abuse cases over the past few years."[155] Nonetheless, whether the secrecy of this document is viewed as proof of a conspiracy, orchestrated by the Vatican, to perpetuate a worldwide cover-up of clergy sexual abuse[156] or as merely requiring secrecy of only the churches internal legal process,[157] viewed under the totality of the circumstances two things are evident: secrecy is deeply rooted in Catholic culture and for decades the Church has been aware of the sexual abuse permeating its walls.[158] Although it may be impossible to ascertain the true intentions of the Church in analyzing the 1922 and 1962 documents in an isolated manner, Tapsell claims that these secret instructions have been ratified by every Pope since Pope Pius XI, including the current Pope, Pope Francis.[159]

Updated again in 1974, Pope Paul VI issued the *Secreta Continere*, a canonical directive demanding that those bound by the pontifical secret take an oath before being sworn into the Curia or diplomatic Corps in which they promise to "in no way, under any pretext, whether of greater good, or of very urgent and very grave reason," break the pontifical secret.[160] This directive, commonly

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153 *Id. See* 1917 CODE c. 2359, § 2 (discussing sexual contact with minors and bestiality); *see also id.* 2368 § 1 (discussing solicitation).

154 *See* Doyle, *supra* note 149.

155 *Id.*

156 Nicholas Cafardi, *The Scandal of Secrecy*, COMMONWEAL (July 21, 2010), https://www.commonwealmagazine.org/scandal-secrecy.

157 Dave Sutor, *'Confidential archives': Experts divided on impact of Canon Law in Diocese of Altoona—Johnston child sexual abuse scandal*, THE TRIBUNE DEMOCRAT (Apr. 3, 2016), https://www.tribdem.com/news/local_news/confidential-archives-experts-divided-on-impact-of-canon-law-in/article_c9e8aa53-ff6e-52dc-951a-337844c84ef8.html (In defense of his stance that the pontifical secret does not reflect a systematic cover up of clergy child abuse Cafardi notes that "Canon law doesn't say take it to law enforcement, but it also doesn't say that you can't.").

158 *See* Doyle, *supra* note 149.

159 *See* King, *supra* note 101. *See also* Doyle, *supra* note 149 ("Under ordinary circumstances *Crimen Sollicitationis* would have ceased to have legal force with the promulgation of the 1983 Code of Canon Law. [However,] [t]his was not the case.").

160 Hannah Brockhaus, *What Is the Pontifical Secret?*, CATHOLIC NEWS. AGENCY, www.catholicnewsagency.com/news/what-is-the-pontifical-secret-78234 (last visited Oct. 1, 2018).

known as the *pontifical secret*, was published in the official acts of the Holy See as a "legislative document with the force of the law" and still remains in place today.[161] Issued by Pope Paul VI, the *pontifical secret* was considered the "Church's highest form of secrecy outside the confessional and extended [the obligation of mandatory silence] . . . to cover the allegations of child abuse itself, and not just the information obtained in the Church's internal inquiries and trials."[162] Contrary to this assertion, Monsignor Lawrence A. DiNardo, claims that the "practice of secrecy was not established because the church wanted to hide its shortcomings"[163] but rather as an incumbent practice compulsory to the protection of both the privacy and rights of the alleged victim and the accused official.[164]

This directive unequivocally contradicts secular law in jurisdictions that require church officials to report abuse to local law enforcement and has directly led to the continuation of clergy sexual malfeasance.[165] Not only has the United Nation's Committee on the Rights of the Child, the Australian Royal Commission, and various other international organizations asserted the need for its abolishment, but the commission Pope Francis created to help combat child abuse within the Church, has done so as well. Nonetheless, the Pope refuses to amend canon law and repeal the directive.[166] Thus, regardless of the Church's initial intentions in implementing the *pontifical secret*, or the *Crimen Sollicitationis*, its continued use in clerical sex abuse cases illustrates the Church's modern intentions—to continue with the "playbook for concealing the truth."[167]

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161 King, *supra* note 101.

162 Kieran Tapsell, *Canon Law On Child Abuse Thru The Ages*, GLOB. CATHOLIC NETWORK, https://www.catholicsforrenewal.org/Documents%202016/CanonLawOnChildAbuseThruTheAges.pdf (last visited Oct. 01, 2018).

163 Dennis Sadowski, *Canon Law Guides Church's Response to Clergy Sexual Abuse*, CATHOLIC NEWS SERV. (May 26, 2010), www.catholicnews.com/services/englishnews/2010/canon-law-guides-church-s-response-to-clergy-sexual-abuse.cfm.

164 *Id.*

165 Christopher Knaus, *Catholic church's 'pontifical secret' stops disclosure of sex abuse allegations, expert says*, THE GUARDIAN (Feb. 9, 2017), https://www.theguardian.com/australia-news/2017/feb/09/catholic-churchs-pontifical-secret-stops-disclosure-of-sex-abuse-allegations-expert-says.

166 Carol Glatz, *'Pontifical secret' in abuse cases needs review, advisors tell pope*, CRUX (Sep. 22, 2017), https://cruxnow.com/vatican/2017/09/pontifical-secret-abuse-cases-needs-review-advisers-tell-pope/.

167 Scott Dodd, *Pennsylvania Grand Jury Says Church Had A Playbook For Concealing the Truth*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/pennsylvania-child-abuse-catholic-church.html.

3. The Principal of Confidentiality within Canon Law

Promulgated from the ancient understanding that everyone is entitled to a good reputation, canon law also establishes the principle of confidentiality as crucial to affirming and protecting the reputation of all parties involved in a dispute.[168] An essential element to ensuring an individual's reputation remains unblemished is that the identity of victims and survivors are kept confidential.[169] This principle, while affording protection to a victim, has clear roots in aiding the Church in its decades-long practice of secrecy.[170] Additionally, contrary to secular laws which mandate church officials report all instances of abuse to the civil authorities, under the Church's confidentiality practices, those involved in the investigation are forbidden from speaking to any unauthorized person regarding the case.[171]

Many believe that the seal of confession is an adequate justification for a priest's failure to report instances of child abuse to secular officials, regardless of whether he resides in a jurisdiction possessing mandatory reporting statutes.[172] The authority for this inaction is found in Catechism[173] 2490 which declares: "The secret of the sacrament of reconciliation is sacred, and cannot be violated

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168 *See* 1983 CODE, cc. 220 ("No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy").

169 John Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 989 (2003); *see* John P. Beal, *Doing What One Can: Canon Law and Clerical Sexual Misconduct*, 52 JURIST 642, 653 (1992) (noting that "[w]hen an accusation of sexual misconduct is made public, [a] cleric's career in ministry may be destroyed whether he is guilty or not.").

170 Amy Hereford, *Book II – Part III: People of God [Canon Law]*, RELIGIOUS LAW AND CONSULTATION (last visited Jan. 2, 2020) http://www.ahereford.org/canonlaw/doku.php?id=book 2.3#book_ii_-_part_iii. ("In accordance with Canon Law 667 § 1, "there is to be in all houses an enclosure appropriate to the character and mission of the institute." Thus, "[c]loister establishes zone or privacy [. . .] restricting the right of ingress of nonmembers and the right of egress of members.").

171 ARCHDIOCESE OF MILWAUKEE, *supra* note 95.

172 Joe Harman, '*The Power of Confession: Mandatory Reporting, Confession and the Evidence Act,*' 38 ALTERNATIVE L. J. 239, 243 (2013).

> [d]ifferent protections for perpetrators and victims are arguably problematic given what we now know of clergy abuse and the difficulties, to date, of prosecution for offences or civil suit for compensation. Notwithstanding that the actions confessed have been morally (sin) and legally (crime) wrong (both on the basis of canon and secular law) no action or disclosure by clergy has been compellable. The effect has been to conceal and allow the ongoing perpetration of abuse

See 1983 CODE c. 983 making it absolutely forbidden to use knowledge acquired from confession when it might harm the penitent.

173 Santiago Cortes-Sjoberg, U.S. Catholic (last visited Jan 1, 2020), https://www.uscatholic.org/church/2011/05/what-catechism-catholic-church (defining Catechism of the Catholic Church as a "compendium of all Catholic doctrine regarding both faith and morals" promulgated bish-

under any pretext;"[174] bearing in mind canon law 983 §1 which deeming "[t]he sacramental seal [ ] inviolable; [and] therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason."[175] Although the Church claims to have taken the position, at the recommendation of the 2017 Royal Commission, that priests residing in jurisdictions with mandatory reporting laws are under an obligation to report instances of child abuse, they have stood in strong opposition to extending the obligation to include information revealed in the sanctity of the confessional.[176] Thus, while the Catechism expressly states that "[t]he right to the communication of the truth is not unconditional"[177] it is the clergy, rather than a legislature who is to "judge whether or not it is appropriate to reveal the truth to someone who asks for it."[178] Further, Catechism 2492 states that "[t]hose in charge of communications should maintain a fair balance between the requirements of the common good and respect for individual's rights."[179]

D. *The United Nations and the Holy See's Participation in the Organization*

1. The United Nations

The United Nations (hereinafter "UN") is an international organization made up of 193 member states, with the power to act in order to maintain international peace and security.[180] The UN's key objective is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[181] In relation to non-member states, this objective is carried out by the use of multilat-

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ops, theologians and other experts "in the light of the Second Vatican Council and the whole of the Church's tradition.").

174 *CCC*, 2490 1983 CODE c. 983 §1.

175 1983 CODE c. 983 §1.

176 King, *supra* note 101.

177 *CCC*, 2488.

178 *Id.*

179 *CCC*, 2492.

180 *See What We Do*, UNITED NATIONS, www.un.org/en/sections/what-we-do/ (last visited Feb. 1, 2019) (noting that the United Nations has "one central mission: the maintenance of international peace and security.").

181 U.N. Charter. Pmbl. (vesting the organization with considerable power to uphold international law).

eral treaties of which the Security Council may impose various sanctions in the event that such treaties are violated.[182]

As a non-member state with permanent observer status, the Holy See actively participates in deliberations, organizations, and conferences at the UN, in addition to being a signatory to various international treaties.[183] Under the "non-member state" designation, the Holy See enjoys state status and is provided with the same privileges granted to member states at international conferences sponsored by the UN.[184] The "Permanent Observer" designation entitles the Holy See to various privileges within the UN and its subsidiary bodies.[185] The considerable role the Holy See plays at the UN was enumerated by passage of resolution 58/314—titled "Participation of the Holy See in the Work of the United Nations"—where the General Assembly re-affirmed and strengthened the role and participation of the Holy See in the work of the UN.[186]

2. The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (hereinafter "Convention") is a human rights treaty that delineates the civil, procedural, economic, social, and cultural rights of every child.[187] Under the Convention, ratifying nations agree to be bound by international law and to act in the best interests of each child.[188] Since its adoption in 1989, 194 countries have agreed to be bound by the Convention.[189] Similar to many other multilateral conventions the Convention established a monitoring body, the United Nations Committee on the Rights of the Child (hereinafter

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182 U.N. Charter art. 2, ¶ 6 ("The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.").

183 Josef Klee, *The Role of the Holy See and Catholic Organizations at the United Nations*, SCHOOL OF DIPLOMACY AND INTERNATIONAL RELATIONS SETON HALL UNIV. (Oct. 31, 2017), https://blogs.shu.edu/unstudies/2017/10/31/the-role-of-the-holy-see-and-catholic-organizations-at-the-united-nations/.

184 R.G. SYBESMA-KNOL, THE STATUS OF OBSERVERS IN THE UNITED NATION 24 (1981).

185 *Id.*

186 G.A. Res. 58/314, (July 1, 2003) (acknowledging, "that the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex to the present resolution.").

187 G.A. Res. 44/25 Convention on the Rights of the Child (Nov. 20, 1989).

188 *Id.*

189 *Id.*

"CRC" or "Committee"), to oversee the implementation and compliance of the agreement.[190]

Implicit in the Convention's 54 articles is the notion that every child has basic, fundamental rights which explicitly include the right to be protected from violence and abuse. Under its terms, parties are obliged to amend and create laws and policies that will fully implement the Convention. In 1990, the Holy See acceded to the Convention[191] in its capacity as a state.[192] By acceding to the convention, the Holy See agreed to undertake several initiatives to protect children from abuse within the Church. However, the Holy See asserted its compliance was subject to numerous reservations[193] deemed necessary based on its status as a religious institution.[194] In submitting these reservations, the Holy See found a way to contravene the Convention by interpreting relevant provisions in its favor and against its original understanding.[195] By adopting procedures that facially appear to produce the Convention's intended results, yet in practice prove to be trivial and irrelevant, the Holy See has thus far succeeded in circumventing the Convention's required implementation.[196] Of particular relevance is the Holy See's continuous claim that its compliance with the Convention is limited solely to the territory within Vatican City.[197]

Twenty years after ratification and with mounting pressure from the international community, the CRC rejected the Holy See's actions in limiting the Convention's territorial reach to

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190 *See id.*; *see also Treaty Research - UN Documentation: International Law*, UNITED NATIONS, http://research.un.org/en/docs/law/treaties (last visited Jan. 12, 2019).

191 G.A. Res. 44/25, *supra* note 187.

192 U.N. Comm. on the Rights of the Child, *State Party Report: Holy See*, U.N. Doc. CRC/C/3/Add.27 (1994). [hereinafter *State Party Report*].

193 *See* Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 (defining "reservation" as: "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.").

194 *State Party Report*, *supra* note 192.

195 *See State Party Report, supra* note 192. In relying on its dual nature, the Holy See has chosen to restrict its commitment to comply with the CRC to activities taking place squarely within the geographical territory of the Vatican City.

196 Sue Cox, *Submission to the U.N. Committee Against Torture*, Survivors Voice Europe (May 4, 2014), http://survivorsvoice-europe.org/?p=6841.

197 *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN (last visited May 12, 2019), http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html.

strictly within the walls of Vatican City.[198] The Committee has officially called on the Church to comply with the Convention irrespective of the "dual nature of the Holy See's ratification," or its designation as a "sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction."[199] Cleverly, in accepting the Holy See's argument that "bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff,"[200] the Committee demanded the Holy See comply with canons 331 and 590, which provide that subordinate members of the Catholic Church be bound to the Supreme Pontiff who shall directly call upon Catholics in the religious order to abide by the Convention.[201] After considering multiple periodic reports submitted to the Committee by the Holy See, in addition to reviewing letters from outside organizations, and analyzing appropriate canon law sections and the Convention's articles, the Committee condemned the restriction of these practices, "remind[ing] the Holy See that in ratifying the Convention it made a commitment to implement it not only within the territory of Vatican City State, but also, as the supreme power of the Catholic Church, worldwide through individuals and institutions under its authority."[202]

E. *Mediation and the Parties' Desire to Find a Resolution*

Mediation is the voluntary process by which two parties come to a consensus, and therefore a mutually acceptable agreement, through the help of a neutral third party.[203] The role of the neutral (the mediator), is to facilitate communication between the parties by exploring and encouraging them to find creative resolutions. If

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198 Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 ¶ 8 (Feb. 24, 2004) [hereinafter C.R.C Observations].

199 *Id.*

200 *Id.* ¶ 8.

201 G.A. Res 44/25, *supra* note 187; *See generally, Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

202 *Id.*

203 *See* Katie Shonk, *What is Alternative Dispute Resolution*, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL (July 1, 2019), www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/ (defining alternative dispute resolution as "a process in which a neutral third party [ ]assists parties who are embroiled in a dispute to come to an agreement.").

done effectively the opposing parties can promulgate a resolution that is sustainable, mutually beneficial, and voluntarily agreed upon.

In the context of the Catholic Church the voluntary nature of mediation is essential. As discussed above, for any resolution to be binding on the Catholic Church as a whole, the Pope must voluntarily amend canon law to reflect the terms of the agreement. Therefore, an alternative dispute resolution process such as arbitration, where the neutral is vested with the authority to render and impose a binding decision on the parties,[204] will have no more success in implementing change than the CRC has already had. Thus, it is proffered that entering into voluntary mediation would be more successful.

1. The Religious Command of Mediating Disputes Arising Within the Church

The Roman Catholic Church has a long history of promoting the use of various alternative dispute resolution (hereinafter "ADR") techniques to settle sexual and nonsexual abuse allegations outside of formal litigation.[205] The long history of religious authority promoting ADR and the Church's frequent use of Papal mediation can arguably be traced back to biblical times; as the Bible tells us[206] under the rules of "our Lord" Christians must settle disputes amongst themselves.[207] This command has intensified with the promulgation of new canonical provisions in the 1983 Code of Canon Law.

> Thus: In the early stages of litigation, and indeed at any other time as often as he discerns any hope of a successful outcome, the Judge is not to fail to exhort and assist the parties to seek an equitable solution to their controversy in discussions with one

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204 *See Arbitration*, A.B.A., www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ (last visited Oct. 11, 2018).

205 *See* F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695, 1695 (2000) (tracking the Church's use of ADR back to the thirteenth century, where St. Francis of Assisi mediated a dispute between the Bishop of Assisi and the town Mayor to restore order in the community.).

206 *Matthew* 18:15–17.

207 *Id.* "if your brother sins against you, go and confront him privately. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that 'every matter may be established by the testimony of two or three witnesses."; *see also,* Lee Tarte, *Clergy Arbitrator Liability: A Potential Pitfall of Alternative Dispute Resolution in the Church*, 32 CATHOLIC J. CATH. LAW 310 (2017) (arguing "in the Bible, the Apostle Paul exhorts Christians to choose from among their number a 'wise man' who can 'judge' and 'decide between his brethren'" (quoting *I Corinthians* 6:1-7 (New American Standard Version)).

> another. He is to indicate to them suitable means to this end and avail himself of serious-minded persons to mediate.[208]

Perceivably, the expansion of the 1983 Code of Canon Law came at a time of heightened parochial conflicts, "clergy strife and restiveness, controversies arising from ordinary and extra-ordinary Church administration and alienation."[209]

2. The Positive Attributes of Alternative Dispute Resolution

In analyzing the Church's response to victims of clergy abuse, along with the institution's internal policies and governing structure, the Church has strategically used ADR to avoid public accountability and transparency.[210] However, due to the nature of ADR, the positive effects this process can have on abuse victims cannot be ignored. Importantly, the ADR process offers far more flexibility than litigation by encouraging victims to raise emotional issues and enabling the creation of unique solutions custom-tailored to the needs of individual parties.[211] "This underlines a key element of ADR—that it has the potential to enhance the empowerment of those involved in its processes" due to its therapeutic design.[212] Survivors of abuse have been through a traumatic experience, which in many instances is both emotionally and psychologically incapacitating.[213] The litigation process, which can take years to reach a verdict, causes victims to relive traumatic events during the extensive pre-trial process and again throughout adversarial litigation.[214] The ADR process, on the other hand, focuses on solving problems rather than exacerbating them and can be far less intrusive and emotionally damaging to victims.[215] Many survivors of clerical sexual abuse feel embarrassed and ashamed and are reti-

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208 1983 CODE c.1395 c. 1446, § 2.

209 Don Nnagha, *The Use Of Alternative Dispute Resolution In The Church (ADR): The Need For Ecclesiastical Paradigm Shift(2)*, THE LEADER, FOR GOD AND NIGERIA (Apr. 20, 2014), https://theleaderassumpta.com/2014/04/20/the-use-of-alternative-dispute-resolution-in-the-church-adr-the-need-for-ecclesiastical-paradigm-shift2/.

210 THE INVESTIGATIVE STAFF AT THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 5 (2002) (noting that "the church had engaged in largely successful damage control, taking advantage of the widespread deference toward it.").

211 Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 5, 115 (2004).

212 ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND CONCILIATION 3 (LCR 98-2010) (Ir.).

213 Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 5, 115 (2004).

214 *Id.*

215 *Id.*

cent to come forward.[216] This may be the result of feeling a deep sense of betrayal having been abused by someone who was a trusted leader and intimate spiritual advisor. Reluctant to suffer the harsh effects of public exposure inherent in the litigation process, ADR quietly addresses the abuse and offers victims the privacy they may need to come forward with their grievances.[217]

3. What are the Church's Actual Intentions in Settling Disputes Outside of Court?

While the Church claims to have good intentions in insisting on using ADR to settle these disputes, its behavior has shown that negotiations are often imbalanced and conducted in bad faith.[218] Given the Church's control over the abuser, discovery material, and witnesses, coupled with its desire to avoid accountability and transparency, it is not unreasonable to conclude that only through the use of newly promulgated ADR guidelines, where intermediates are independent from the Church, will all parties—the victim, the Church, and the international community—benefit from the process.

Upholding the veil of secrecy in the context of sexual abuse allegations against its clergymen is still, today, of paramount importance to the Church. This is demonstrated by the institution's attempts to evade litigation by settling cases outside of court and away from the public eye.[219] Since 2018, out-of-court settlements and civil damages paid by the Church to victims of clergy abuse have reached the astonishing amount of $3.8 billion.[220] After mak-

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216 *Id.*

217 Jeffery Pruzan, *Abuse, Mediation and the Catholic Church: How Enforcing and Improving Existing Statutes Will Held Victims Recover*, 13 CARDOZO J. CONFLICT RESOL. 593, 596 (2012); *see also* Dianne Post, *Mediation Can Make Bad Worse*, 14 NAT'L L.J 19, 19 (1992) (noting that "mediation is based on a therapeutic theory" with its focus on communication and private resolutions that are specifically custom-tailored to the needs of the individual parties).

218 *Id.*

219 *See Confidentiality in Settlement Agreements Is a Virtual Necessary*, AMERICAN BAR ASSOCIATION (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity/ (arguing "[i]ncluding a confidentiality provision in a settlement agreement is generally not only good practice for both sides, but for a defendant, it's a virtual necessity." Including a confidentiality clause goes hand in hand with the reason for settling cases—"shut down the litigation quickly" and explaining that "This is why most potential public relations litigation nightmares are kept under wraps by means of settlements with well-drafted confidentiality agreements.").

220 Bernadette Deron, *The Catholic Church Reportedly Spent $3.8 Billion In Abuse Pay-Offs*, ALL THAT'S INTERESTING (Aug. 27, 2018), https://allthatsinteresting.com/catholic-church-abuse (stating that the Catholic Church has been paying out sexual abuse victims since the 1980's and

ing large settlement payments to victims of abuse, approximately 20 dioceses and religious orders have subsequently filed for bankruptcy.[221]

Over the years, the Church has attempted to lower the amount awarded to victims during negotiations by arguing that the staggering number of additional claims asserted by victims coupled with the Church's desire to award fair compensation to all, poses too great a financial burden on the Church.[222] To counter this position, Doyle, a consultant in 200 cases of this nature, has argued, "the archdiocese should start being a church and stop being a kingdom and divest itself of some of its property, if that's what it needs to do."[223] Critics also fear that if the Church is allowed to settle sexual abuse cases for less compensation it will establish harmful precedent for what is considered to be the benchmark for fair damages in future cases.[224]

Despite the claimed impact the financial burden has placed on the Church, the Church has continued to partake in negotiations and mediations to prevent secular courts from delving into private Church practices. Its continued participation in mediation arguably undermines the claim that the Church's reluctance to properly address the issue of clergy sexual abuse is strictly motivated by its financial limitations given the $30 billion in wealth the Church has accumulated throughout generations.[225] This advances the idea that the driving force demanding use of ADR is imbedded in the

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"the out-of-court settlements and civil suits cases have cost the church a staggering $3.8 billion.").

221 Elizabeth Llorente, *Clergy Sex Abuse Has Cost Catholic Church $3 Billion in Settlements*, FOX NEWS (Aug. 19, 2018), https://www.foxnews.com/us/clergy-sex-abuse-has-cost-catholic-church-3-billion-in-settlements.

222 Michael Rezendes, *$10m Geoghan Deal Is Dwarfed by Others*, BOSTON GLOBE (Sept. 8, 2002), archive.boston.com/globe/spotlight/abuse/stories3/090802_geoghan.htm.

223 *Id.*

224 *Id.* In Boston, 86 victims came forward accusing priest John J. Geoghan of sexual abuse. As discussed above, this situation was one of the most widely broadcasted scandals involving clergy sexual abuse at a time when the public was only beginning to comprehend the scope of this catastrophic issue. In negotiations, the Church made an initial offer of $10 million to be distributed among all 86 victims. Church spokesman Reverend Christopher Coyne attempted to justify this number stating, "In the Archdiocese of Boston we're dealing with a large number of victims in comparison to some other areas, while the funds that are available through insurance and through archdiocesan funds and disposable property are limited." Jeffrey Anderson countered the Church's argument, expressing concern that "the $10 million figure is so low that, if it is approved, [not only will] other dioceses . . . attempt to use it as a standard," but the figure itself does not provide full reparations to the 86 victims in this case.

225 Ben Schneiders ET AL., *With $30b in Wealth, Why is the Catholic Church Struggling to Pay for Justice?*, SYDNEY MORNING HERALD (Feb. 11, 2018), www.smh.com.au/national/with-30b-in-wealth-why-is-the-catholic-church-struggling-to-pay-for-justice-20180208-p4yzra.html.

very cultural fabric deemed to be of the utmost importance within the seminary system—to remain highly valued in the eyes of society and free from state intervention into internal affairs, in turn, keeping the Church answerable to itself.

F. *The Church Can No Longer Sustain its Current System—It Needs Help!*

The Church favors mediation and negotiation because the process allows the Church to conceal the true scope of criminal behavior within its walls.[226] Settling disputes outside of court also shields the Church from substantial embarrassment and liability that may arise during the discovery process as damaging information has the potential to expose the Church's system of cover-up by highlighting its practice of protecting abusive clergymen at the cost of victimized children.[227] Despite the fact that the Church has used mediation's confidential nature as means of shielding itself from public accountability and preventing access to the secrete archives, the global campaign to uncover the spiritual manipulation and sexual coercion within its walls has greatly stigmatized these efforts.[228] Widespread investigations into sexual misconduct occurring within the institution has revealed a "playbook for concealing the truth"[229] and the international community is demanding change. If the Church wishes to uphold its current cachet, it must do so by affirmatively promulgating new rules and regulations in the framework of the Convention.[230] Considering the long-awaited response for a conclusive declaration regarding the sexual abuse crisis and the diminished hope the international community has expressed in the Church's commitment to taking concrete steps in protecting children from sexual brutality, this Note asserts that a joint effort between the Church and the UN is not only necessary, but also the only reliable solution.

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226 Pruzan, *supra* note 217 at 596; *see also* Post *supra* note 217 at 19.

227 *Id.*

228 Beth Backes, #*ChurchToo*, INFLUENCE (May 30, 2018), https://influencemagazine.com/practice/churchtoo.

229 Scott Dodd, *Pennsylvania Grand Jury Says Church Had a 'Playbook for Concealing the Truth,'* N.Y. TIMES, Aug. 14, 2018, www.nytimes.com/2018/08/14/us/pennsylvania-child-abuse-catholic-church.html.

230 *See, e.g.*, Bobette Wolski, *New Rules to Facilitate the Use of ADR in Resolving International Commercial Disputes*, 5 ADR BULLETIN 149, (2003).

IV. PROPOSAL

Despite the efforts of the UN, the Catholic Church, and secular officials to address the issue of clerical sexual misconduct, the scale of abuse world-wide has yet to waiver. As many have asserted, this is largely due to the Church's failure to accept liability and in turn, its refusal to amend its current laws, policies, and teachings.[231] On January 16, 2014, the United Nation's Committee of the Rights of the Child met in Geneva for its 65th session, during which time the Holy See was subject to its periodic review.[232] The Committee condemned the Holy See for failing to comply with the legal obligations bestowed upon them as signatories to the Convention.[233] In response the Holy See largely reiterated its previous assertions and chastised the Committee for going beyond its mandate, arguing they lacked any authority over the institution to make their recommendations and requests.[234] Notably, the Holy See expressly denied neglecting to implement the Convention properly, arguing that it contracted into the Convention with "reservations and interpretative declaration."[235] Central to the Committee's recommendations were the issues of transparency, failure to fully implement the Convention, the systematic cover-up perpetuated by church leaders, and the continued existence of laws and policies[236] contrary to combating abuse.

Despite the recommendations and its obligations under the Convention, the Holy See has yet to implement any of the CRC's suggestions, rather "in dealing with allegations of child sexual abuse, the Holy See has consistently placed the preservation of the reputation of the Church and the protection of the perpetrators above the child's best interests."[237] Consequently, in order to ef-

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231 Angelina Chapin, *The Catholic Church Ignores This Child Sexual Abuse Law*, HUFFINGTON POST (Aug. 16, 2018), https://www.huffpost.com/entry/catholic-church-mandatory-reporting-sex-abuse_n_5b74c725e4b02b415d752ed8.

232 *Committee on the Rights of the Child Holds Sixty-fifth Session in Geneva from 13 to 31 January 2014*, U.N. HUM. RIGHTS OFF. OF THE HIGH COMMISSIONER (Jan. 9, 2014), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14158&LangID=E.

233 Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

234 *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

235 *Id.*

236 Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

237 *Id.*

fectively address the issue of clergy abuse on a world-wide level and ensure the implementation of proper substantive rules and appropriate procedures into the Code of Canon Law this Note proposes that the use of a neutral mediator is necessary to promulgate legislation specifically for the Catholic Church, rather than continuing to succumb to Church-imposed obstacles and tediously wait for the Holy See to have a change of heart. However, as the Holy See continues to affirm its "commitment to mak[ing] protection of the child a priority"[238] the institution has made clear that measures will only be employed "according to the moral and religious values offered by Catholic doctrine".[239] Notably, the Holy See plans to continue this commitment, without adopting the Committee's recommendations, as they constitute an unacceptable "attempt to interfere with Catholic Church teaching on the dignity of human person and in the exercise of religious freedom."[240] Although this rhetoric indicates that the Holy See will never fully comply with the current terms of the Convention, it is encouraging in that a mediator may be able to assist in creating a joint resolution within the framework of the Convention and viewed as acceptable to the Church if developed in accord with Catholic Doctrine.

This Note proposes that the United Nations Committee on the Rights of the Child enter into mediation with the Holy See, through a paradigm of interest-based negotiations, in order to (1) promulgate new and specifically tailored legislation, which the Supreme Pontiff shall implement into canon law; (2) negotiate which canonical provisions and internal directives to amend and repeal; (3) create a committee charged with overseeing the implementation and regulation of the newly enacted laws and practices across their designated jurisdictions; and (4) establish a comprehensive network of dispute resolution tribunals throughout the diocesan network responsible for mediating or arbitrating future disputes.

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238 *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

239 *Id.* ¶ 21.

240 *Id.* ¶ 19.

A. *Mediating Negotiations between the Holy See and the United Nations Committee on the Rights of the Child*

As mentioned above, "mediation is an assisted and facilitated negotiation carried out by a third party."[241] Based on the current tumultuous relationship between the Committee and the Holy See, this Note proposes that mediation is the best method to devise an agreement the Holy See will embrace in conformity with Catholic law and the CRC will view as acceptable under the principles of the Convention. Here, the presence of the mediator is essential due to the current impasse resulting from each party's staunch position on the Convention.

There are two negotiation paradigms that can be used in mediation: position-based and interest-based.[242] Interest-based negotiation is a method of negotiation where the parties focus on developing mutually acceptable solutions by concentrating on the their common interests rather than their respective positions or individual powers.[243] Currently, the Holy See and the CRC are in stark disagreement regarding how to combat the issue of clerical abuse spreading throughout the religious order. The CRC continues to claim the power to compel the Church to implement the Convention into canon law, amend relevant provisions and remove those it deems incompatible with the Convention's purpose.[244] Conversely, the Holy See continues to reject the CRC's authority and refuses to conform its practices to the Convention's mandate.[245] This tension illustrates the parties' unworkable negotiation paradigm—positional negotiations. Positional negotiations, which in contrast to interest-based negotiations, focuses on the party's narrow stance on a specific subject.[246] This adversarial technique forgoes the notion of transparency and collaboration which is cen-

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241 Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, UNESCO (2003) (quoting GOLDBERG, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES (2d ed. 1992)).

242 Neil Katz & Kevin McNulty, *Interest-Based Negotiation*, MAXWELL (1995), https://www.maxwell.syr.edu/uploadedFiles/parcc/cmc/Interested-Based%20Negotiation%20NK.pdf.

243 Brad Spangler, *Integrative or Interest-Based Bargaining*, BEYOND INTRACTABILITY (June 2003), https://www.beyondintractability.org/essay/interest-based_bargaining.

244 UN Committee on the Rights of the Child (CRC), *Concluding observations on the second periodic report of the Holy See*, Jan. 31, 2014, CRC/C/VAT/CO/2.

245 *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

246 Mark Geiger, *Interest Based Bargaining*, https://www.blaney.com/files/Interest-Based-Bargaining.pdf (last visited Nov. 18, 2018).

tral to interest-based negotiations and focuses on objective criteria independent of the other parties' interests.[247]

The premise behind entering into interest-based negotiation is simple; both parties have something to gain from the negotiation. By centering the discussion on the individual interests underlying each parties position, this negotiation style opens the door to a variety of possible solutions that can be used in crafting creative legislation, custom-tailored to the needs and fundamental interests of both sides.[248]

Given the Holy See's long-standing and uncompromising position of maintaining absolute sovereignty, in conjunction with its unwavering dedication to secrecy,[249] one might ask why the Holy See would agree to participate in mediation, the process and result of which would open the doors of the Church to the outside world? The answer is simple. The Holy See's failure to affirmatively act, in a manner the CRC deems proper, is slowly causing the institution to lose its ability to assert unwavering dominance over the international community. Neither the CRC nor the international community is willing to continuously sit back in deference to the Catholic Church because of its divine nature and claim of absolute spiritual sovereignty. Additionally, as noted above, as a non-member state with permanent observer status and as a signatory of the Convention, the Holy See has placed itself squarely within the confines of UN jurisdiction and as such is subject to UN sanctions.[250] The Holy See has a strong interest in maintaining its status and relationship with the UN and its members.[251] After being reprimanded in Geneva it is evident that the UN has taken the position that it is

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247 *Id.*

248 Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, UNESCO (2003).

249 Michelle Boorstein & Paul Farhi, *Why Juicy Vatican Secrets are Getting Harder to Keep, Even Under Pope Francis*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/11/06/why-juicy-vatican-secrets-are-getting-harder-to-keep-even-under-pope-francis/?utm_term=.Aa3d42418177.https://www.washingtonpost.com/news/acts-of-faith/wp/2015/11/06/why-juicy-vatican-secrets-are-getting-harder-to-keep-even-under-pope-francis/?utm_term=.aa3d42418177.

250 U.N. Charter, *supra* note 182, at art. 2, ¶ 6 ("The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.").

251 *See generally* The Catholic Church at the United Nations, Catholics for choice (last visited Nov. 1, 2020), http://www.catholicsforchoice.org/wp-content/uploads/2014/08/2013-See-Change.pdf.

ready and willing to intervene in the matter.[252] Therefore, this Note argues it is in the best interest of the Holy See to voluntarily agree to mediation in order to ensure its interests are accounted for before the UN either imposes the full Convention upon the Holy See or revokes its observer status.

Due to the complex nature of the disputes arising in the international arena, reaching an amicable resolution while simultaneously maintaining relationships and strengthening partnerships is critical to forming a mutually acceptable and lasting agreement. As such, the UN has expanded its use of mediation; launching numerous initiatives to enhance its capacity to mediate disputes in the name of human rights.[253] This Note suggests that the UN Secretary-General employ his High-Level Advisory Board on Mediation (hereinafter "Panel") to mediate this resolution.[254] Further, this Note proposes that each party choose one member from the 18 member Panel to jointly facilitate the mediation. Sitting on the Panel are "current and former global leaders, [religious leaders], senior officials, and renowned experts – bring[ing] together an unparalleled range of experience, skills [and] knowledge."[255]

There are many advantages in using members of the Panel as the mediators. First, employing credible figures to mediate the dispute fosters trust in the process, and enables constructive dialogue. Additionally, the parties are more likely to be transparent with the mediators, and in turn each other, if the mediators are viewed as competent in handling disputes of a sensitive nature.

Whereas the cornerstone of interest-based negotiations is transparency, the utilization of Panel members as the mediator will offer the Holy See a dimension of security and assurance vital to promoting unfettered communication and useful dialogue. This is essential in order to overcome the Holy See's staunch commitment to confidentiality. If the parties agree to be transparent with their "needs, concerns, fears, [and] desires . . . it is likely that they will be

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252 Lizzy Davies & Henry McDonald*, UN denounces Vatican over child abuse and demands immediate action*, THE GUARDIAN (Feb. 5, 2014), https://www.theguardian.com/world/2014/feb/05/un-denounces-vatican-child-abuse.

253 U.N. Secretary-General, *United Nations Activities in Support of Mediation*, U.N. Doc. A/72/115 (June 27, 2017).

254 *See Secretary-General's High-Level Advisory Board on Mediation,* UNITED NATIONS, (Sept. 13, 2017), https://www.un.org/sg/en/content/sg/personnel-appointments/2017-09-13/secretary-general's-high-level-advisory-board-mediation.

255 *See id.*

easier to meet."[256] Whether the interests align or sharply contrast, when successfully negotiated, each party will walk away with his or her interests protected and advanced. Further, by creating an environment of confidence, competence, and credibility, the Panel will be able to leverage its relationship with the parties and in turn, influence the trajectory of the conflict in a constructive fashion.

By agreeing to mediate, using an interest-based negotiation approach, the parties can come to an agreement specifically designed to fall within the framework of Catholic Law and teachings while simultaneously upholding the central commandments of the Convention. For example, when the Holy See stood before the CRC in Geneva, the Committee interrogated the Holy See on its failure to turn over internal documents potentially useful in holding abusers accountable.[257] In response, the Holy See simply reiterated its policy of secrecy and has yet to turn over these documents.[258] In an interest-based meditation the mediator would be able to extract from the Holy See the true reasons behind its refusal to turn over the requested documents. Whether it be the fear of the public obtaining them or the CRC using the information garnered from the documents to further impose obligations on the Church, once the interest underlying the position has been disclosed the parties can find a solution that best conforms to that specific interest.

Further, allowing the Holy See to participate in designing and shaping the legislation to be adopted into canon law performs the important function of fulfilling the religious order's identity based needs.[259] The Holy See has maintained the position that it will only consider implementing the Convention's norms that are in line with Catholic Doctrine and Catholic Teachings.[260] In response to the CRC's recommendations, the Holy See "reserve[ed] to itself

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256 Jean-François Tremblay, *From Principled Negotiation to Interest-based Bargaining*, 4 UNIVERSAL J. INDUS. AND BUS. MGMT. 71, www.hrpub.org/download/20160630/UJIBM5-11606991.pdf.

257 *United Nations Recommendations for Vatican Accountability for Sexual Violence in the Church,* CTR. FOR CONST. RTS. (Sept. 22, 2015), https://ccrjustice.org/UnitedNationsRecommendsVaticanAccountability.

258 *Id.*

259 *See* Douglas Noll, *A Theory of Mediation*, DISPUTE RESOL. J. (Feb. 2001) www.mediationtools.com/articles/ART%20Noll%20A%20Theory%20of%20Mediation. (Defining identity-based needs "concern self-esteem, face, impression management, and social identity.").

260 *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

the exclusive competence to interpret" Canon Law.[261] These proclamations, viewed in light of the Holy See's righteous superiority, advances the significance of the Holy See feeling as though it has kept its identity in the new laws that the CRC demands it implement. The Catholic Church is an absolute monarchy that maintains internal order through its stringent controls and its non-negotiable requirement of papal allegiance.[262] If the Holy See is concerned with "maintaining a perception of control, confidence, and independence from the outside world, then yielding to predetermined rules and process" fails to serve the Holy See's interest in maintaining its identity.[263] By participating in a process undertaken for the sole purpose of conforming the laws to the identity of the Church, mediation can foster communication, participation and compliance in a manner the Convention has failed to do. Additionally, this process will promote the legitimacy of these laws. Perceptions which will directly impact the Church's willingness to comply with the agreement and implement them into canon law.[264]

B. *New Mediation and Arbitration Tribunals Under the Agreement*

To fully combat the issue of clerical child sexual abuse the problem must not only be addressed through a change in the substantive laws governing the institution, but the procedural process provided to each individual victim seeking redress. As previously argued, the current canonical procedure is considerably tainted by the institution's hierarchical structure and the monarch's unrestricted authority to preempt any facially equitable procedure by employing subsequent laws and policies. This scheme, lacking any system of separation of powers or checks and balances, arguably has caused two major issues: (1) a deep-rooted system of cover-up and corruption; and (2) a judicial system the Catholic laity cannot rely on, as its main focus is on exonerating the institution rather than the plight of the victims harmed in the arms of their spiritual leaders. To rid the system of its current improprieties this Note

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261 *Id.*

262 *How the Church Dominated Life in the Middle Ages*, HISTORY HIT (Nov. 11, 2018), www.historyhit.com/how-the-church-dominated-life-in-the-middle-ages/.

263 Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 CARDOZO J. CONFLICT RESOL. 807, 815 (2009).

264 *Id.*

proposes the establishment of a new ADR program which would enable victims and accusers to assert their claims and defenses in a truly neutral forum.

1. Proposed Plan: Comprehensive Network of Regional Mediation & Arbitration Tribunals

The proposal below seeks to establish a comprehensive network of mediation and arbitration tribunals, positioned across the catholic diocese network, in order to provide victims of clergy abuse a fair process when asserting sexual abuse grievances, as well as allow for greater transparency and accountability. This goal will be accomplished by removing the judicial process from the Church and placing it under the authority of a fully independent UN subsidiary organ: the Dispute Resolution Commission on the Malfeasance of the Child (hereinafter "CMC").

The CMC would operate as a new subsidiary organ of the UN Security Council,[265] comprised of "18 independent experts who are persons of high moral character and recognized competence in the field of" ADR and human rights.[266] The CMC's first task would be developing a roster of acceptable arbitrators and mediators located across the various diocese in each member state.[267] The neutrals on this roster would consist of individuals who are familiar with the rights of the child and/or religious doctrine and are neither affiliated with the Church, nor currently associated with the secular courts or the criminal justice system.[268] Once compiled, these lists would be distributed to the President of each state's respective episcopal conference,[269] who shall assemble the bishops for review and distribution of the roster. Upon review, the bishops may remove from the list any arbitrators or mediators they believe unqualified to conduct these proceedings. This review process is essential, as it will illustrate to church officials that a legitimate and

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265 *See* U.N. Charter, *supra* note 182, art. 29 ("The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."); *Security Council & Mediation*, UNITED NATIONS PEACEMAKER, https://peacemaker.un.org/peacemaking-mandate/security-council (last visited Feb. 1, 2019) ("[The Security Council] has used this power to establish subsidiary organs to carry out mediation.").

266 *Committee on the Rights of the* Child, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER, ohchr.org/en/hrbodies/crc/pages/membership.aspx (last visited Feb. 1, 2019).

267 The United Nations representatives from each member state shall assist the CMC in undertaking this task.

268 For example: teachers, professors, law guardians, retired family court judges, religious experts, etc.

269 Christus Dominus Art. 38 (An Episcopal Conference is a formal assembly of every bishop in a given territory. Every bishop within the Catholic Church belongs to a conference.).

impartial system is being created for both victims and clergyman. The approved neutrals will make up the Agency of Neutrals on the Malfeasance of the Child (hereinafter "Agency"), a worldwide network of arbitrators and mediators that will operate throughout and within their respective regions.[270] Further, the CMC shall hire administrative officials to work in each region's dioecian offices.

When a dispute arises, three Agency members shall preside over the dispute: one chosen by the offender, one by the victim, and one assigned by the respective administrative office. Having each party to the dispute choose a third-party neutral empowers both parties to speak up and have their voices heard and accounted for during the dispute process. This system will ensure integrity, fairness and impartiality throughout the entire process.

Under this framework, the victim has one of two dispute resolution options—Mediation or Arbitration. The mechanism chosen will largely depend on what the victim's goal is for entering into the dispute resolution process and what outcome they are seeking to obtain. Notably, in order for this new process to work, three provisions must be enacted into the CMC's charter as they differ from the traditional elements of each processes. First, in both processes the victim and offender will agree to sign a confidentiality agreement, however; the Panel's obligation to confidentiality is limited.[271] Second, the alleged offender is required to participate in the victim's chosen dispute resolution method. Lastly, any verdict and/or award rendered by the Panel is binding upon the parties.

Due to the circumstances, it is extremely important that the process be conducted in a victim-sensitive manner while simultaneously attending to the needs of the offender. Victim-offender mediation (hereinafter "VOM"), is a restorative justice approach that provides victims the opportunity to confront their offender directly.[272] VOM rests on the notion that by utilizing specific techniques the mediator can produce a safe and comfortable environment conducive to meaningful dialogue. This process is mainly for victims who wish to directly express to their offender

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[270] *See* AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org (last visited July 5, 2019). The American Arbitration Association ("AAA") is the world's largest private global provider of ADR services and uses a similar business model to that described in this Note. The AAA has developed a national roster of arbitrators and mediators who possess the knowledge, prowess, and proficiency in particular fields. Once an arbitration or mediation is initiated the parties select a panel of arbitrators from the roster to administer the dispute.

[271] *See infra* Part IV. C.

[272] *Victim/Offender Mediation*, COURTS.CA, www.courts.ca.gov/documents/VictimOffenderMediation.pdf (last visited Feb. 7, 2019).

the full impact his actions had on their lives, need answers to important questions, and who ultimately wish to repair their relationship with the Catholic Church.[273] Notably, the desired results produced by this system are harmonious with the restorative justice approach historically maintained by the Church to urge personal responsibility and reconciliation with God through its confessional system.[274] VOM is primarily dialogue driven, which has proven to be "central to both the empowerment of the victims and the development of victim empathy in the offenders, which can help to prevent criminal behavior in the future."[275]

Under this Note's proposal, if victims chose to participate in VOM, the only restitution offered will be Church funded therapy if the victim so desires.[276] This is largely due to studies providing that the least restorative impact is rendered when financial restitution is a focus in the discussions.[277] By removing the threat of monetary penalties against the accused victims gain the benefit of engaging in truthful, open, and unrestricted dialogue with their offenders in a structured amiable environment.

However, if a victim is seeking restitution, the arbitration process is more likely suited to their needs. Under this Note's proposal, arbitration will proceed in a trial-like manner. The victim will file a complaint with their regional Agency, who will immediately notify the accused and a date to file an answer will be provided. Within 30 days of the offender being notified, a conference call will take place between the parties' counsel and a member of the Agency office. During this call each side will choose their arbitrator,[278] discovery demands will be made, and an exchange date and hearing date will be scheduled. Witness lists and discovery demands will also be provided to the Agency who will notify wit-

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273 *Victim-Offender Mediation: A National Perspective*, OFFICE FOR VICTIMS OF CRIME (Apr. 2000), www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

274 Diana L. Grimes, *Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases,* 63 WASH. & LEE. L. REV. 1693, 1702 (2006).

275 *Victim-Offender Mediation: A National Perspective*, OFFICE FOR VICTIMS OF CRIME (Apr. 2000), www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

276 Although mediation is generally not a binding process, when accepting the terms of the CMC a provision shall be incorporated making all judgements providing for Church funded therapy binding on the offender's diocese. Details regarding the time frame of these payments will be determined by the Panel and will be binding.

277 *Victim-Offender Mediation: A National Perspective*, NCJRS (Apr. 2000), https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

278 The arbitrator chosen by the CMC will remain anonymous until the hearing. Additionally, each party shall provide the Agency with a list of three suitable arbitrators, in the parties' preferential order. The agency will handle scheduling.

nesses of their obligation and maintain records of all documents requested. At the hearing, each side will have the opportunity to present their case to the Panel, who will render a decision within 30 days. All awards are final and binding.

For a victim who wishes to seek justice through an adversarial system that produces winners and losers, arbitration provides them with that opportunity.[279] Under this plan the presence of an arbitration panel provides multiple perspectives in the analysis of each case and minimizes the risk a final decision will be biased, uninformed or inequitable. Additionally, the risk either side is exploited in the media is greatly minimized by employment of a private process.

C. *Transparency and Accountability Under this New System*

It is evident that the main goal of the Church is secrecy and the avoidance of liability, as conceding guilt would damage its imperial and apostolic status. In order to ensure the Church will be held accountable and its practices made more transparent, this Note proposes that the regional administrative offices keep records of all Church officials who have been accused of sexual abuse, other officials mentioned during proceedings, and their role in the alleged abuse, as well as all judgements rendered. Additionally, the administrative offices will keep records of all discovery materials provided during each arbitration or mediation proceeding and conduct thorough analyses regarding additional practices, customs and internal laws, and directives uncovered in the documents provided.

Once every two years the CMC shall hold a conference at the UN where the Agency president from each diocesan region shall present a report to the CMC, the other Agency presidents, the CRC, and the Holy See delineating their region's annual findings. After all reports are made the CMC shall make conclusive findings regarding the Church's level of compliance with its new laws, the progress the Church has made, if any, in combating the issue of sexual abuse, reservations the CMC may have, new recommendations, and the success/failure rate of the program. The CMC's conclusions shall be made known to the public in a written report distributed through the CMC's webpage, along with a list of all of-

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279 Lawrence A. Cunningham, *So Much for Your Day in Court*, BALT. SUN (Mar. 21, 2012), www.baltimoresun.com/news/opinion/oped/bs-ed-arbitration-20120321-story.html.

ficials who have been found guilty in the arbitration process. This will provide the public with the transparency they need, while at the same time creating the largely private and highly regulated process the Holy See would require in signing the mediated agreement.

V. Conclusion

The public revelation of the scope of systematic abuse that has long infiltrated the Church has presented the international community with an unprecedented crisis. As a result, the international community has forgone its subservience and the Catholic Church, which was once viewed as an untouchable spiritual sovereign, is facing a social movement that is demanding change in the institution's ancient policies and practices. In an effort to maintain its provincial status, all amicable negotiations between the Church and the international community have been exhausted. My proposal to utilize the professional competence of the United Nations to mediate new ecclesiastical laws while still in harmony with Catholic doctrine and the spirit of the Convention will likely facilitate a long-awaited solution. Additionally, the framework set forth in this proposal, for the promulgation of diocesan regional mediation and arbitration tribunals, tackles many of the problems perpetrated by the Church's current judicial process, properly shifting the balance of power from the hands of the abused into the hands of the laity.