



The Capstone Journal
of LAW and PUBLIC POLICY

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Michael Regnier

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MASTHEAD

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Letter from the President

On behalf of the editorial staff, authors, and the Legal Research Club, I am proud to present the Sixth Volume of *The Capstone Journal of Law and Public Policy*. I am extremely proud of all those that came together to produce this year's journal. This journal encapsulates the mission of the Legal Research Club: to educate undergraduates in the legal research skills needed for law school. I stand in gratitude of all 320 members of the Legal Research Club who are dedicated to this mission.

In the six years since the founding of the Legal Research Club, this organization has thrived in creating an environment of education for those interested in the legal profession. This is in no small part due to our advisor, Dr. Lawrence Cappello. He has shown extreme dedication to the Legal Research Club and the legal history concentration. He has created an atmosphere in which pre-law students can thrive. For his tolerance of my endless emails, I am personally grateful.

My thanks also go to David Ware and Olivia Ricche, our tireless Editor in Chief and Managing Editor. They have taken the journal to the next level in countless ways. They each took on the responsibility at the encouragement (and badgering) of myself, Anna Kate Manchester, and Katie Kroft. They have excelled in these roles, at no surprise to anyone. Under their leadership, the editorial staff has thrived in the production of the journal.

On behalf of the Legal Research Club, I thank each and every one of our predecessors who made this organization what it is today. To Spencer Pennington and Asia Hayes, whom I have never met but whose dedication I benefit from each and every day in this organization. To Sophia Warner, whom I had the honor of meeting recently. To Mackenzie

Barrett and Anna Kate Manchester, who exemplified the role of President. To Katie Kroft, our fearless Editor in Chief Emeritus who, like Dr. Cappello, tolerates my endless emails with grace.

I am endlessly grateful to the readers of the Capstone Journal. I hope you find these pieces both interesting and informative, and I thank you for taking the time to read them.

Without further ado, *The Capstone Journal of Law and Public Policy*.

Sincerely,
Kara Hutchinson
President, Legal Research Club
2022-23

Letter from the Editor

Dear Reader,

On behalf of the 2022-2023 Editorial Board, I am proud to present the Sixth Volume of *The Capstone Journal of Law and Public Policy*.

The past year has brought about significant changes and events regarding women and the law. June 23, 2022, marked the fiftieth anniversary of Title IX, a breakthrough for gender equality in the United States. In the same year, the decision for *Dobbs v. Jackson Women's Health Organization* was handed down from the Supreme Court overturning the long-standing precedent of *Roe v. Wade*. This year's authors explored these issues as well as provided novel analysis on a variety of topics. I cannot thank these incredibly accomplished individuals for their hard work and dedication throughout the editing and publication process.

I would also like to thank some specific individuals who made the publication of *The Capstone Journal* possible: Olivia Ricche, for her tireless and unwavering dedication serving as the journal's Managing Editor; Kara Hutchinson, for her service as LRC President; Katie Kroft, my incredibly accomplished predecessor, who grew our publication and staff to where it is today; Dr. Lawrence Cappello, for his continued support and guidance as our faculty advisor; and last, but certainly not least, our staff that worked tirelessly to evaluate, edit, and polish every last piece being published.

And finally, to you the reader, I cannot say thank you enough. Without your continued support of undergraduate legal research, both here at The Capstone and beyond, our publication would not be possible. So, to you the reader, I

am proud to present to you the Sixth Volume of *The Capstone Journal of Public Policy*.

Sincerely,

David Ware

Editor in Chief, *The Capstone Journal of Law and Public Policy*

2022-2023

**THE FIGHT TO PROTECT LATIN
AMERICAN JOURNALISTS: A
BOTTOM-UP APPROACH TO THE
INTERNATIONAL HUMAN RIGHTS
REGIME**

Angelina Ramirez^{*}

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INTRODUCTION

For the past decade, Latin America has been classified as the most dangerous region for members of the press by Reporters Without Borders (RSF). Historically, this area has the largest number of journalists killed for their profession in the world, and 2022 was no exception.¹ By February 2022, Honduran journalist Pablo Isabel Hernández Rivera and Brazilian reporter Givanildo Oliveira were assassinated.² Additionally, Mexico faced the deaths of eight reporters including Armando Linares López, Heber López Vásquez, José Luis Gamboa Arenas, Juan Carlos Muñoz, Lourdes Maldonado López, Margarito Martínez, Michelle Perez Tadeo, and Roberto Toledo.³ The murders of these ten journalists within a short ten-week span brought attention to

¹ *2011-2020: A Study of Journalist Murders in Latin America Confirms the Importance of Strengthening Protection Policies*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/2011-2020-study-journalist-murders-latin-america-confirms-importance-strengthening-protection>.

² *UNESCO observatory of killed journalists – Honduras*, THE UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., <https://en.unesco.org/themes/safety-journalists/observatory/country/223721>; *UNESCO observatory of killed journalists – Brazil*, THE UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., <https://en.unesco.org/themes/safety-journalists/observatory/country/223721>.

³ *Mexican Journalist Heber López Shot and Killed in Oaxaca, Suspects Arrested*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/2022/02/mexican-journalist-heber-lopez-shot-and-killed-in-oaxaca-suspects-arrested/>; *Mexico: Eighth journalist murdered in 2022*, INT’L PRESS INSTITUTE <https://ipi.media/programmes/death-watch/>.

the weaknesses and origins of protection mechanisms for Latin American journalists.

Understanding the relationship between these Latin American protection mechanisms and the international human rights regime is crucial. Human rights theorists have offered explanations as to how the regime has simultaneously contributed to the advancement of human rights as a whole while failing to effectively enforce them on a global scale, as in the case of protecting Latin American journalists. Beth Simmons, in particular, explains this discrepancy in *Mobilizing for Human Rights: International Law in Domestic Politics* by suggesting that the power of the international human rights regime is not due to governments enforcing human rights from above, but from domestic communities utilizing human rights commitments to exert pressure from below.⁴

To explore Simmons' theory on the power of international human rights through the lens of Latin American journalism, a few questions must be considered: Do local Latin American actors that defend the rights of journalists use international human rights commitments to exert pressure from below for better protections for journalists? More specifically, what role did these community actors or civil society organizations play in the creation of some Latin American protection mechanisms for journalists, and did they incorporate the international human rights regime?

These questions will be examined through a series of case studies conducted on Mexico, Honduras, Brazil, and Colombia that analyze how community-based groups utilized international human rights agreements to secure

⁴ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

national journalist protection mechanisms. This project will highlight these four nations for several key reasons. For one, these four countries all share the existence of a national protection mechanism for journalists, a measure that has still not been implemented in every Latin American country. Additionally, these four nations continue to be responsible for 90% of the murders of journalists in Latin America from 2012 to 2021.⁵ This contradiction has made it clear that today's protection mechanisms are failing to adequately protect journalists. This is also the case in Figure 1, which depicts how only ten of the 139 murdered Latin American journalists between 2011 and 2020 were offered safety under the existing protection mechanisms. Nearly 93% of these threatened reporters lacked access to measures like security details, cameras, satellite phones, police patrols, panic buttons, relocations, and early warning systems that intercept and assess threats.⁶

⁵ REPORTERS WITHOUT BORDERS, *supra* note 1.

⁶ "MEXICO'S MECHANISM TO PROTECT HUM. RTS. DEFENDERS AND JOURNALISTS Progress and Continued Challenges, ADVOCACY FOR HUM. RTS. IN THE AMERICAS; MAKING SPACE FOR PEACE, " <https://www.wola.org/wp-content/uploads/2016/05/WOLA-PBI-Mexicos-Mechanism-to-Protect-Human-Rights-Defenders-and-Journalists.pdf>.

Figure 1. Infographic depicting number of murdered journalists who received protection.

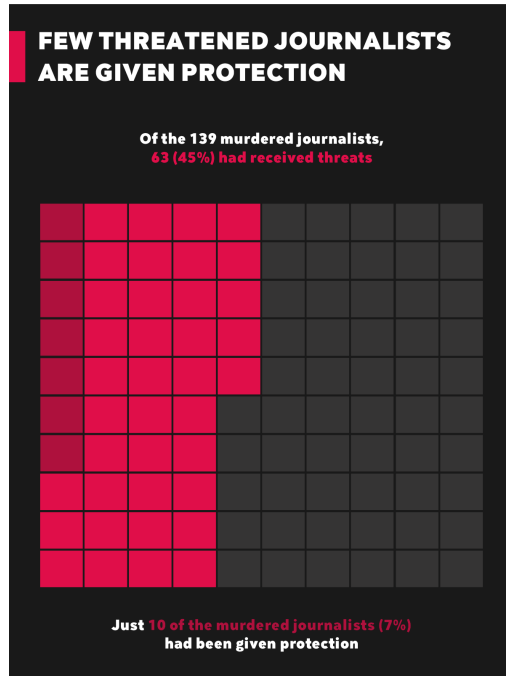


Figure 1 Source: Data from *In Danger: Analysis of Journalist Protection Programs in Latin America*, a UNESCO-supported project conducted by Reporters Without Borders.

The current dialogue on the rights of Latin American journalists already has vast amounts of literature on these four nations, demonstrated by *In Danger: Analysis of Journalist Protection Programs in Latin America* and *Protection Paradigm*, providing “unprecedented comparative analyses of the protective mechanisms” in Mexico, Honduras, Brazil, and Colombia.⁷ The RSF has

⁷ *Protection paradigm—RSF’s unprecedented rep. on protective mechanisms for journalists in Latin America*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/protection-paradigm-rsf-s-unprecedented->

consistently highlighted these four nations because of the perplexing amount of violence against journalists, as seen in Figure 2 below where the number of murdered journalists is documented in each state despite the existence of their respective journalist protection mechanisms.

Figure 2. Infographic depicting the number of murdered journalists between 2011-2020.

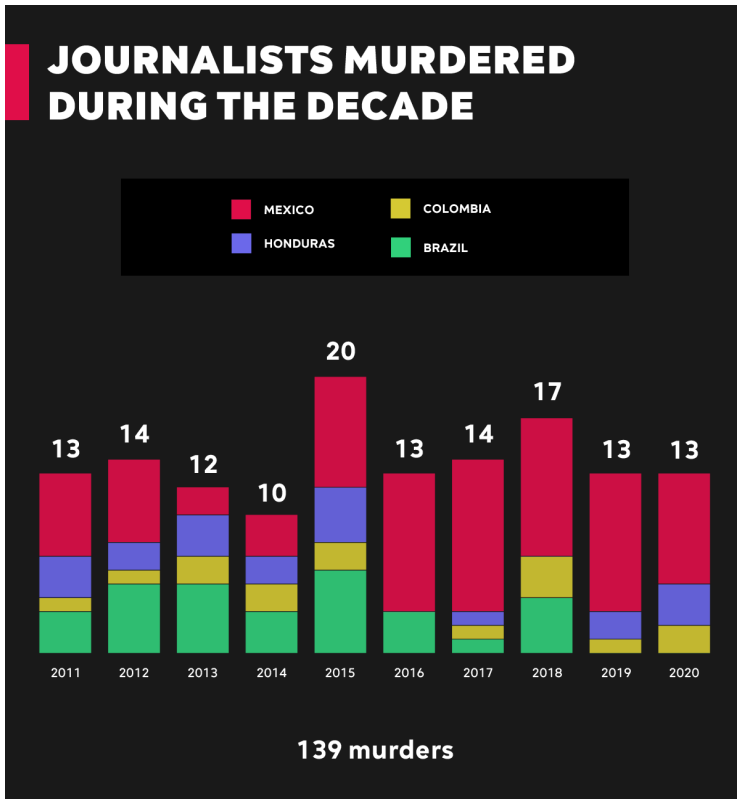


Figure 2 Source: Data from *In Danger: Analysis of Journalist Protection Programs in Latin America*, a UNESCO-supported project conducted by Reporters Without Borders. Infographic depicting the number of journalists murdered

between 2011-2020 in Mexico, Honduras, Colombia, and Brazil.

Ultimately, human rights scholars, activists, and journalists have reached a consensus that protection mechanisms in Mexico, Honduras, Brazil, and Colombia are failing. Contribution to the conversation can be made by stepping back, exploring the foundations of these protection mechanisms, and assessing the role of domestic actors. Analyzing primary and secondary sources, government archives, NGO databases, and documentation from civil society organizations and activists will be key components of the research on this topic. Providing context on the involvement of civil society and the use of international human rights obligations may offer implications as to what other Latin American nations can do to create journalist protection mechanisms, as well as what trends can point to the weak implementation of these systems.

A. Establishing Definitions

To understand the dialogue surrounding the rights of journalists in Latin America, it is important to elaborate on the role of the international human rights regime and the non-governmental actors who participate in it. The international human rights system involves the “International and Regional Human Rights Legal Instruments as well as Human Rights Mechanisms such as the UN Human Rights System,” which relies on the nine core international human rights instruments.⁸ However, this international system is not limited to legal tools and commitments. Instead, this regime

⁸ Ali Amiri, *Development of International Human Rights Regime: An Overview* 2 AALCO J. OF INT’L L. 117 (2013).

often also encompasses “the double role of developing international human rights norms and standards, as well as monitoring and protecting their application.”⁹ This double role is aided through orchestration, which “entails mobilizing and working with private actors and institutions to achieve regulatory goals.”¹⁰ For instance, civil society organizations work within this regime to fill the gaps left behind by governments by calling attention to human rights abuses, conducting research, providing policy recommendations, and more. Thus, the international human rights system not only includes the logistics of a legal human rights structure, but also provides a platform for human rights groups to contribute to the establishment and enforcement of these human rights norms.

This regime is especially instrumental for many human rights defenders, known as domestic community actors or civil society organizations that work at a national or local level to ensure respect for human rights through several methods. These strategies can include but are not limited to: monitoring regional human rights issues, spreading information, supporting victims, ending impunity, offering education, advocating for more comprehensive policies, and contributing to human rights treaties.¹¹ Domestic community actors can be organizations, individuals, coalitions, movements, or part of any other form of activism.

⁹ BIRGITTE FEIRING & SAIONARA KÖNIG-REIS, INDICATORS AND DATA FOR HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT: A PRACTICAL APPROACH TO LEAVING NO ONE BEHIND (2019).

¹⁰ Kenneth W. Abbott & Duncan Snidal, *Int’l Regul. without International Government: Improving IO Performance through Orchestration*, 5 REV. OF INT’L ORG. 317 (2010).

¹¹ *Human rights defenders*, OFF. OF THE UNITED NATIONS HIGH COMM’R FOR HUM. RIGHTS, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders>

Journalist protection mechanisms are critical as they are coordinated inter-agency systems that manage all concerns related to journalist safety.¹² These mechanisms require close collaboration between several actors because they are “more than prevention (where measures rely mostly on journalists) or prosecution (that depends on governmental action).”¹³ Journalist protection mechanisms vary by state and the needs of each journalist. The relationships between the government, community actors, and media also influence such mechanisms. Most protection mechanisms have first responder teams that receive threats against journalists and then implement the necessary safety precautions.¹⁴ The first responder teams are tasked with ensuring that there is a national-level system to combat the pervasive violence against reporters.

B. The Discourse on the International Human Rights Regime

The discourse on human rights issues has long been focused on the efficacy of the international human rights regime itself. The regime is often noted for its contradictory nature as it has been able to pave the way for some human rights issues but has simultaneously failed to eradicate

¹² *UN Plan of Action on the Safety of Journalists and the Issue of Impunity*, UNESCO, <https://en.unesco.org/un-plan-action-safety-journalists>.

¹³ Javier Garza Ramos, *More Latin Am. Countries Consider Protection Mechanisms for Journalists; Not Every Effort Succeeds*, LATAM JOURNALISM REV., <https://latamjournalismreview.org/articles/more-latin-american-countries-consider-protection-mechanisms-for-journalists-not-every-effort-succeeds/>.

¹⁴ Jan-Albert Hootsen, *When It Comes to Protecting Journalists, Mexico's Safety Mechanism Comes up Short*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/2019/12/mexico-journalist-safety-protection-fail-killed-attacked/>.

injustices like the world had hoped in 1948 when the Universal Declaration of Human Rights (UDHR) was adopted. While some scholars praise the international human rights regime as revolutionary, others push back against this perspective. One clear example is Eric Posner, international human rights law scholar and Kirkland & Ellis Distinguished Service Professor at the University of Chicago Law School. Posner emphasizes that the international human rights system has failed to improve the well-being of people globally.¹⁵ He justifies this statement by explaining that “the human rights movement shares something in common with the hubris of development economics, which in previous decades tried (and failed) to alleviate poverty by imposing top-down solutions.”¹⁶

However, Beth Simmons, the Andrea Mitchell Professor of Law, Political Science, and Business Ethics at the University of Pennsylvania and a notable international relations scholar, counters this critique. Simmons does not dispute the fact that the international human rights system can be flawed or limited. However, she rejects the idea that the adoption of international human rights commitments allows improvements to trickle down to the domestic level, a phenomenon that human rights scholars (like Posner) often use to measure a treaty's efficacy. Simmons instead explains that the international human rights system has the potential to liberate people, but differently than previously thought.

Simmons claims that, in the proper conditions, the international human rights regime can often be more powerful on a domestic level rather than on an international

¹⁵ Eric Posner, *The case against human rights*, THE GUARDIAN, <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-Hum.-rights>.

¹⁶ *Id.*

one. She elaborates that the international system can alter domestic politics because it paves the way for group demands.¹⁷ In this bottom-up perspective, domestic groups can demand that their respective nations fulfill their international human rights obligations. Civil society can exert this pressure because the international human rights treaties and obligations pre-commit the government to be receptive to change, create litigation opportunities for advocates to challenge human rights violations, legitimize the rights being demanded, and prompt a broader coalition of people to unite in support of the cause.¹⁸ Simmons suggests that people look to the international human rights system as a tool for local human rights defenders as opposed to a manual for top-down change on behalf of governments.

It is also important to note that the vast discourse on the international human rights regime covers other significant criticism and theories on its efficacy. For instance, in *Human Rights: A Political and Cultural Critique*, Makau Mutua notes that the international human rights regime can be Eurocentric, hierarchical, and assert a parent-child relationship, where an “enlightened” West leads the way, and the remaining “savage states” ought to follow.¹⁹

Additionally, in *Human Rights and the Politics of Contestation*, Michael Goodhart notes that the international human rights regime is far from an apolitical structure that possesses an objective moral truth.²⁰ Instead, Goodhart describes the regime as a tool that can be used for oppression or liberation as it provides the language and structure for a

¹⁷ SIMMONS, *supra* note 4.

¹⁸ *Id.* at 72.

¹⁹ MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 154 (2013).

²⁰ MICHAEL GOODHART, *Human Rights and the Politics of Contestation*, in HUMAN RIGHTS AT THE CROSSROADS 42 (Mark Goodale ed., 2015).

wide range of political demands.²¹ While it is important to highlight other pieces of the larger conversation on the international human rights regime, this paper will center on Simmons' bottom-up theory and its implications on Latin American journalism. Analyzing the protection mechanisms in four Latin American states will offer insight into how this bottom-up approach is being reflected in the efforts of human rights defenders and activists.

I. THE CASE OF MEXICO

The year 2022 marked the tenth anniversary of the Mexican government creating the 2012 Protection Mechanism for Human Rights Defenders and Journalists, which offered more widespread and organized security measures for these vulnerable groups. To understand the bottom-up role that civil society actors played in the origin of this Protection Mechanism, it is important to elaborate on the state of Mexican journalism at the time and what issues urgently needed to be addressed. Before the implementation of this Protection Mechanism, Mexican reporters lacked a system to combat rampant violence, impunity for crimes against journalists, corruption, and self-censorship.

A. The State of Mexican Journalism Before the 2012 Protection Mechanism

The unprecedented murder of Manuel Buendía Téllez Girón, a well-respected investigative journalist, signaled a dangerous transition in Mexican journalism. Considered one of the most influential reporters of his time, Buendía exposed

²¹ *Id.*

inflammatory issues like corruption, narco-trafficking, and the secret role the CIA played in Mexican politics.²² His death in 1984 meant Mexico City, once a city where other persecuted Latin American journalists fled to, was no longer one of the safest cities in the region to be a reporter.²³ Buendía's assassination, however, was only the beginning.

By the turn of the 21st century, the declining state of Mexican journalism continued to attract attention. The Comisión Nacional de Los Derechos Humanos (CCNDH) raised alarm bells when it reported that between 2000 and 2010, twelve Mexican journalists were disappeared, and sixty-six Mexican journalists were murdered.²⁴ Outrage over the murder of Buendía and the journalists contributed to the creation of Mexico's first prosecutor tasked with investigating crimes against journalists in 2006.²⁵ In 2010, the powers of this office expanded when crimes against journalists fell under federal jurisdiction and, thus, the Special Prosecutor for Attention for Crimes Against Freedom of Expression (FEADLE) became an independent unit in the Attorney General's office.²⁶ However, this office is considered weak as it scarcely secures convictions and "lacks staff (both investigators and prosecutors), resources, technical capacity, and high-level support for its efforts."²⁷ Civil society has criticized the office for its failure to

²² Vanessa Freije, *Exposing Scandals, Guarding Secrets: Manuel Buendía, Columnismo, and the Unraveling of One-Party Rule in Mexico, 1965-1984*, 72 THE AMS. 377, 409 (2015).

²³ *Id.*

²⁴ 2010 Country Reports on Hum. Rts. Practices - Mexico, U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., <https://2009-2017.state.gov/j/drl/rls/hrrpt/2010/wha/154512.htm>.

²⁵ CLARE RIBANDO SEELKE, CONGRESSIONAL RESEARCH SERVICE, VIOLENCE AGAINST JOURNALISTS IN MEX.: IN BRIEF (MAY 17, 2018).

²⁶ *Id.*

²⁷ *Id.*

implement change and combat impunity.

The 2010 Country Reports on Human Rights Practices, released by the U.S. Department of State, affirmed these criticisms; the report showed a strong increase in violence, harassment, and threats targeted toward Mexican journalists and their families.²⁸ The international and domestic calls to better protect Mexican journalists were amplified in 2011 when nine journalists were killed and four disappeared, leading Mexico to be classified as the world's most dangerous country for journalists.²⁹ Additionally, the 2011 Freedom in the World Report pointed to Mexico's drop from Free to Partly Free status as one of the most worrisome changes, in part caused by the rapidly deteriorating security environment for reporters.³⁰

While violence was one of the most pressing concerns for Mexican journalists, the high levels of impunity sent out a message that such crimes would go unchecked. Between 1992 and 2010, 89% of crimes against journalists were executed with full impunity.³¹ Not only did journalists fear violence based on their profession, but it was likely they would never receive justice. Further analyzing cases between 1999 and 2008 showed that the Committee to Protect Journalists (CPJ) ranked Mexico 9th in the Impunity Index, worrying many journalists and activists as the poor ranking

²⁸ U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUM. RTS, AND LAB. *supra* note 24.

²⁹ Arch Puddington, *Freedom in the World 2011: The Annual Survey of Political Rights and Civil Liberties*, FREEDOM HOUSE, https://freedomhouse.org/sites/default/files/2020-02/FIW_2011_Report_PDF.pdf

³⁰ *Id.*

³¹ Dolia Estévez, *Protecting Press Freedom in an Env't of Violence and Impunity*, WOODROW WILSON INT'L CTR. FOR SCHOLARS MEX. INST., https://www.casade.org/BibliotecaCasade/Protecting_Press_Freedom%20_Estevez.pdf.

was similar to those of authoritarian countries such as Afghanistan (6th), Russia (8th), and Pakistan (10th).³²

Another significant hardship that Mexican journalists encountered was extreme corruption. The CPJ noted astonishing levels of corruption when the government attempted to address violent crimes against journalists in 2010.³³ The 2010 Corruption Perception Index (CPI) reflected these concerns, as Mexico scored an extremely low 3.1 out of ten.³⁴

The combination of violence, impunity, and corruption prompted more self-censorship from journalists. The UN and Organization of American States' *Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression* (now known as the Special Rapporteur on Freedom of Expression) described several Mexican states as "completely silent" because of the drastic levels of self-censorship.³⁵ Mexican journalists emphasized that "to survive, we must publish the bare minimum." This statement was echoed again throughout the 2010 Country Reports on Human Rights Practices and the 2011 Freedom in the World Report.³⁶

B. Presence of the International Human Rights Regime

To better understand how community actors utilized the international human rights regime, it is important to

³²*Id.*

³³*Id.*

³⁴ *The 2010 Corruption Perceptions Index Measures the Perceived Levels of Public Sector Corruption in 178 Countries around the World*, TRANSPARENCY INT'L, <https://www.transparency.org/en/cpi/2010>.

³⁵ *2010 Country Reports on Hum. Rts. Practices - Mexico*, U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., <https://2009-2017.state.gov/j/drl/rls/hrrpt/2010/wha/154512.htm>.

³⁶ Estévez, *supra* note 31.

examine the presence the regime had in the advancement of protection measures for Mexican journalists. International outrage and concern for Mexican reporters prompted strong reactions from agents of the international regime. Between 2006 and 2013, Mexico received over thirty-eight recommendations from international human rights bodies on how to better defend reporters.³⁷ Additionally, with increasing allegations of violence and impunity, the Inter-American Commission on Human Rights, along with the UN, sent their respective Special Rapporteurs on Freedom of Expression on a joint trip to Mexico in 2010. During this time, both Special Rapporteurs confirmed the threats to reporters and emphasized “the urgent need to make this process a reality and put [the] protection mechanism into operation as soon as possible.”³⁸ While these pressing recommendations were not legally binding, they helped push Mexico into an international commitment. This is apparent in the 2010 *Coordination Agreement for the implementation of preventive and protective actions for journalists*, signed by the Foreign Ministry, the Ministry of the Interior, and the Public Security Ministry.³⁹ This agreement was passed to comply with the Special Rapporteurs’ recommendations and to take the first steps, on behalf of the Mexican government, to achieve such a mechanism.

³⁷Daniel Joloy, *Mexico's National Protection Mechanism for Human Rights Defenders: Challenges and Good Practices*, 5 no. 3 J. OF HUM. RTS. PRAC. 491 (2013).

³⁸ 2010 *Special Report on Freedom of Expression in Mexico*, doc. 5, INTER-AM. COMM’N ON HUM. RTS. (2011),

https://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf.

³⁹ *Id.*

C. Civil Society Efforts to Create a Protection Mechanism for Mexican Journalists

Civil society not only took an active role in the creation of the Mexican Protection Mechanism but spearheaded the process. These community actors were able to succeed, in part, because of how they utilized the international human rights regime to advance their causes. An analysis of civil society efforts will reveal how these domestic groups took advantage of Mexico's international obligations and the opportunities to mobilize, legislate, and legitimize journalist protections.

Despite the excitement around the 2010 Coordination Agreement, it was not effectively implemented. The first proposed protection mechanism under this agreement was heavily criticized for being financially straining, failing to earn the trust of journalists, and lacking governmental commitment.⁴⁰ After over a year of delays, it became clear that Mexico had no intention of furthering this agreement. Thus, civil society stepped in with the goal of filling the gap through several strategies, including mobilization.

According to Simmons, mobilization opportunities follow international human rights commitments as community actors are empowered to work together and demand their governments fulfill the obligations from which they would all benefit.⁴¹ This seemed to be the case in Mexico as a coalition of over 200 Mexican civil society organizations banded together to work towards the establishment of a protection mechanism.⁴² These groups had already been collaborating to some extent since 2008, but they all officially came together after the Coordination

⁴⁰ Joloy, *supra* note 37, at 493.

⁴¹ SIMMONS, *supra* note 4, at 150.

⁴² Joloy, *supra* note 37, at 494.

Agreement was signed. This unified group formed under the Espacio de Organizaciones de la Sociedad Civil para la Protección de Personas Defensoras de Derechos Humanos y Periodistas, better known as Espacio OSC.⁴³ Together, Espacio OSC decided that the best course of action would be to pass a law that would require Mexico to fulfill its international promises. Espacio OSC successfully wrote, presented, and lobbied for the approval of the Law for the Protection of Human Rights Defenders and Journalists before the Mexican Congress.⁴⁴ Mexico's international human rights obligations presented an opportunity to mobilize 200 community actors, providing the raw power, bargaining, and political will necessary to codify journalist protections in the law.

Simmons also clarifies that the bottom-up approach can take place when civil society organizations incorporate international human rights commitments into national litigation or legislative demands. For example, Espacio OSC's draft of the Law for the Protection of Human Rights Defenders and Journalists was heavily influenced by the recommendations of several international human rights bodies and the promises of the Coordination Agreement.⁴⁵

⁴³*Una década acompañando al Espacio OSC y observando los avances y desaciertos del Mecanismo de Protección mexicano.* [A decade accompanying the CSO Space and observing the advances and mistakes of the Mexican Protection Mechanism.] PEACE BRIGADES INTER-MEX. (2020), <https://pbi-mexico.org/es/news/2020-03/una-d%C3%A9cada-acompa%C3%B1ando-al-espacio-osc-y-observando-los-avances-y-desaciertos-del>.

⁴⁴*Id.*

⁴⁵*Bajo riesgo: cómo superar las deficiencias de los programas de protección de periodistas en América Latina*, REPORTERS WITHOUT BORDERS 79 (2022), https://rsf.org/sites/default/files/relatorio_esp_final.pdf.

Espacio OSC also worked directly with the OHCHR while creating this law to incorporate strong international human rights standards.⁴⁶ The exact language of these international human rights commitments and recommendations proved to be an important tool for Mexican community actors. Espacio OSC opted to take the definitions and details of their demands from the comprehensive statements released by the UN and the Organization of American States.⁴⁷

Finally, Simmons proposes the idea that community actors can make headway from international human rights obligations because they legitimize the groups' demands. This is certainly the case for Mexico. Before Mexico's explicit commitment to a journalist protection mechanism, spokespersons for the government downplayed the severity of the issue. One well-known Minister summarized the defensive sentiments among Mexican leadership when he said, "by using the banner of human rights, they [civil society organizations] seek to damage the image of our institutions, with the evil purpose of obstructing the government's anti-crime actions..."⁴⁸ However, following Mexico's international obligations, the climate surrounding journalist protections shifted from finger-pointing among government actors to national outrage against an egregious human rights abuse. Civil society organizations recognized this and began engaging with Congresspeople from the three main political parties to receive feedback and insight on their draft, continuing the non-partisan perception of these efforts.⁴⁹ This endorsement proved to be critical, and sent the message that there was an urgent need for change regardless of

⁴⁶ Joloy, *supra* note 37, at 494.

⁴⁷ REPORTERS WITHOUT BORDERS, *supra* note 45, at 79.

⁴⁸ Joloy, *supra* note 37, at 493.

⁴⁹ *Id.* at 494.

affiliations. Eventually, the tone of Mexican officials changed, and “representatives from all political parties made important statements acknowledging the increasing risks” that journalists face and used this moment in time to “recognize HRDs [Human Rights Defenders] and journalists who had been killed during recent years.”⁵⁰

Mexico is a prominent example of how civil society implemented a bottom-up approach and enforced international obligations on a domestic level. Once Mexico demonstrated a commitment with the 2010 Coordination Agreement, community actors found strength in numbers, incorporated the language of the human rights regime, and took advantage of how journalist rights were legitimized on a national stage.

II. THE CASE OF HONDURAS

A. *The State of Honduran Journalism Before the 2015 Protection Mechanism*

The 2009 military coup ushered in significant threats for Honduran reporters as the political and media environment grew unstable. Between 2009 and 2013, thirty-two reporters were murdered, leading Honduras to be classified as one of the most dangerous countries in the world for journalists by Freedom House.⁵¹ One of these reporters was Alfredo Villatoro, a prominent radio journalist murdered in 2012. Villatoro’s death attracted international scrutiny as

⁵⁰*Id.*

⁵¹ Arch Puddington et al, *Freedom in the World 2014: The Annual Survey of Political Rights and Civil Liberties*, FREEDOM HOUSE (2014) [https://freedomhouse.org/sites/default/files/2020-02/Freedom in the World 2014 complete book.pdf](https://freedomhouse.org/sites/default/files/2020-02/Freedom%20in%20the%20World%202014%20complete%20book.pdf)

the UN special freedom of expression rapporteur and the Director-General of UNESCO denounced the killing and demanded more thorough protections.⁵² This violent attack was one of many that placed significant pressure on the Honduran government to introduce reform, such as creating the 2015 Protection Mechanism for Human Rights Defenders, Journalists, Social Communicators and Justice Operators.⁵³ In 2013, this need was emphasized when Honduras became the country with the highest rate of journalists killed per capita.⁵⁴ Additionally, the Truth and Reconciliation Commission of Honduras noted that many reporters experienced “harassment, threats, intimidation, illegal detentions, ill-treatment, torture, media closures, attacks, and illegal seizures of their property.”⁵⁵

A prominent example is Félix Molina, a renowned journalist and coup critic, who survived two assassination attempts in 2016.⁵⁶ Several international human rights

⁵² *Director-General alarmed by wave of journalist assassinations in Hond. after murder of Alfredo Villatoro*, UNESCO (Apr. 21, 2022) <https://www.unesco.org/en/articles/director-general-alarmed-wave-journalist-assassinations-honduras-after-murder-alfredo-villatoro>;

Gustavo Palencia, *U.N. Envoy tells Hond. to better protect its journalists*, REUTERS (Aug. 14, 2012, 6:47 PM)

<https://www.reuters.com/article/honduras-journalists/u-n-envoy-tells-honduras-to-better-protect-its-journalists-idINL2E8JEI4X20120814>.

⁵³ REPORTERS WITHOUT BORDERS, *supra* note 45, at 60.

⁵⁴ FRANK LA RUE, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION 8 (2013), [United Nations \(ohchr.org\)](https://www.unhcr.org/refugees/49494949).

⁵⁵ CATALINA BOTERO MARINO, VIOLENCE AGAINST JOURNALISTS AND MEDIA WORKERS: INTER-AMERICAN STANDARDS AND NATIONAL PRACTICES ON PREVENTION, PROTECTION AND PROSECUTION OF PERPETRATORS 6 (2013), [Haití \(oas.org\)](https://www.oas.org/en/lr/doc/20130601).

⁵⁶ Alejandro Velasco, *NACLA Condemns Attack on 2012 Chavkin Award Winner Felix Molina*, N. AM. CONG. ON LATAM (May 7, 2016), <https://nacla.org/news/2016/05/07/nacla-condemns-attack-2012-chavkin-award-winner-felix-molina>.

organizations stood in solidarity with Molina and called for justice.⁵⁷ This momentum led to the establishment of the Special Prosecutor for the Protection of Human Rights Defenders, Journalists, Communicators and Justice Workers (FEPRODDHH), the only Honduran office dedicated to the investigation of crimes against journalists.⁵⁸ However, the FEPRODDHH has been heavily criticized by civil society as it rarely investigates murders, only has five prosecutors, lacks any assigned investigators, does not communicate with other government agencies, and has failed to address impunity – a particularly pressing concern for journalists.⁵⁹

Honduras had a 95% impunity rate for crimes against reporters between 2003 and 2013.⁶⁰ International organizations pointed to the incompetent investigations of murders and the failure to prosecute suspects as some of the primary causes. However, corruption was another key factor. The Special Rapporteur on Freedom of Expression noted widespread corruption in Honduras, particularly within the police force.⁶¹ This concern was affirmed in the first five months of 2013 when over 400 cases of police corruption, misconduct, abuse, and murder were opened by the Special Prosecutor for Human Rights.⁶² Honduras also scored a low

⁵⁷ *Id.*

⁵⁸ Leonardo Aguilar, *Honduran Journalist Protection Prosecutor Office Left Unable to Investigate Murders or Achieve Justice for Victims*, CONTRA CORRIENTE (July 4, 2022), <https://contracorriente.red/en/2022/07/04/honduran-journalist-protection-prosecutor-office-left-unable-to-investigate-murders-or-achieve-justice-for-victims/>.

⁵⁹ *Id.*

⁶⁰ Kaitlin Owens, *Honduras - Periodismo a la Sombra de la Impunidad*, PEN INT'L <https://pen-international.org/app/uploads/Honduras-report-ESP.pdf>.

⁶¹ LA RUE, *supra* note 54, at 11.

⁶² Owens, *supra* note 60, at 31.

2.6 out of ten in the 2013 CPI.⁶³ Finally, the strong trends of violence, impunity, and corruption led to the environment of self-censorship that became the norm in Honduras.⁶⁴

B. Presence of the International Human Rights Regime

Prior to the establishment of the protection mechanism, the international human rights regime had strongly advocated for a system that adequately addressed the failures to defend Honduran journalists. This is especially notable in 2010, the first year that Honduras participated in the Universal Periodic Review (UPR) conducted by the UN Human Rights Council. In the 2010 UPR, one of the strongest and most specific demands of the Honduran government was the creation of a journalist protection mechanism.⁶⁵ Additionally, in a 2013 report, the Special Rapporteur on Freedom of Expression recommended the implementation of a mechanism with clear suggestions on protocols, funding, penalties, and organizational structure.⁶⁶ The Special Rapporteur on the situation of human rights defenders presented similar findings and expressed urgency for these protective measures.⁶⁷ Later that same year, the Inter-American Court of Human Rights condemned how the Honduran government handled the cases of journalists and instructed the government to form a public protection mechanism for journalists.⁶⁸

⁶³ 2013 *Corruption Perceptions Index*, TRANSPARENCY INT'L (2013), <https://www.transparency.org/en/cpi/2013/index/hnd>.

⁶⁴ Puddington et al., *supra* note 51, at 311.

⁶⁵ REPORTERS WITHOUT BORDERS, *supra* note 45, at 60.

⁶⁶ LA RUE, *supra* note 54, at 18.

⁶⁷ MARGARET SEKAGGYA, REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, 21 (2012), [United Nations \(ohchr.org\)](http://www.ohchr.org).

⁶⁸ REPORTERS WITHOUT BORDERS, *supra* note 45, at 60.

C. *Civil Society Efforts to Create a Protection Mechanism for Honduran Journalists*

Community actors utilized Honduras' international commitments through Plataforma EPU, a coalition of fifty-two civil society organizations with a divide and conquer approach. These fifty-two civil society organizations were then divided into teams. Each team oversaw lobbying for the implementation of a specific recommendation from the 2010 UPR.⁶⁹ One of these efforts included applying pressure on the state to create a protection mechanism; group organizing is a key example of the mobilizing strategy that Simmons suggests.⁷⁰

However, in 2013, while civil society attempted to collaborate on the creation of a protection mechanism, the Honduran government proposed the *Law on Protection for Human Rights Defenders, Journalists, and Justice Workers* to the National Congress, independent of any input from community actors.⁷¹ This approach garnered disapproval from several groups. For example, the Special Rapporteur on Freedom of Expression commended the Honduran government for being proactive but cautioned against approving their proposed legislation because “representatives of civil society, including journalists and social communicators, have not played a significant and informed role.”⁷² Additionally, Protection International

⁶⁹ PHIL LYNCH ET AL., HOW TO CREATE AND MAINTAIN THE SPACE FOR CIVIL SOCIETY: WHAT WORKS? SUBMISSION TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 37 (2015), https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/ReportHC/16_ISHR021015.pdf

⁷⁰ *Id.*

⁷¹ *Submission to the 22nd session of the Universal Periodic Review Working Group of the Human Rights Council*, PROT. INT'L.

⁷² LA RUE, *supra* note 54, at 10.

reached out to the National Congress and the Human Rights Council to express discontent with the exclusion of civil society in the creation of the mechanism and the limited role that civil society would have under the proposal.⁷³

Prior to the 2015 law, civil society did take advantage of opportunities to voice their concerns through international human rights regime platforms. During a public hearing before the Inter-American Court of Human Rights, Honduran community actors expressed their criticisms of the proposed mechanism and the lack of transparency.⁷⁴ Additionally, as several drafts were introduced to Congress, civil society groups received support from international human rights bodies to protest the proposals' weaknesses, resulting in a productive consultation between the government and community actors. The result of this consultation process was a "revised draft which incorporated international standards and known best practices related to HRDs protection."⁷⁵

The lack of input from community actors, especially in comparison to Mexico, may stem from difficulty in organizing. The Special Rapporteur overseeing human rights defenders witnessed this phenomenon during her visit and "regrettably noted a lack of cooperation among [civil society], a lack of networks for the protection of victims and a lack of knowledge of United Nations mechanisms."⁷⁶ However, civil society also faced barriers outside of its control. During the same visit, the Special Rapporteur critiqued intentional "legislation aimed at restricting the work of civil society organizations" such as laws relating to

⁷³ PROT. INT'L, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ LA RUE, *supra* note 54, at 13.

strict registration requirements and communication methods.⁷⁷

In this case study, domestic actors were able to use the international human rights regime to voice their concerns over Honduras' fulfillment of international obligations. However, contrary to the Mexican case study, civil society did not actively lead the efforts through the human rights regime. This difference helps demonstrate an important caveat that Simmons provides. She explains "there is nothing inevitable about the triumph of commitments over domestic practices."⁷⁸ This bottom-up theory can be a tool for nations that have a strong and willing civil society who are included in the construction of legal systems, which may not be the case for Honduras.

III. THE CASE OF COLOMBIA

A. *The State of Colombian Journalism Before a Journalist-Specific Protection Mechanism*

As the first Latin American country to create and implement a protection mechanism, Colombia often served as the example for other nations in the region. However, prior to this mechanism's establishment, Colombian journalists faced severe threats. Between 1990 and 2000, over 120 Colombian journalists were murdered, many because they reported on corruption, drug trafficking, or para-military conflict.⁷⁹ This impediment to successful Colombian journalism contributed to Colombia's Partly Free rating in the

⁷⁷ LA RUE, *supra* note 54, at 19.

⁷⁸ SIMMONS, *supra* note 4.

⁷⁹ ADRIAN KARATNYCKY, *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* (2000).

1999-2000 Freedom House Report.⁸⁰

The dangers of reporting were especially true for Jaime Garzón, famous political satirist and news show host, who was murdered in 1999 by rightwing paramilitaries. Beloved by many for his activism and humorous coverage of Colombian politics, news outlets emphasized, “when they kill someone like Jaime Garzón, they kill half of the country, they kill our way of laughing and communicating.”⁸¹ In response to growing calls for protection, the Attorney General's office created a special unit to investigate the murder of journalists.⁸² Similarly, in 2000, investigative journalist Jineth Bedoya Lima was brutally kidnapped, tortured, and sexually assaulted while covering paramilitary armed conflict.⁸³ Bedoya continued to face gender discrimination from legal authorities, and was left to conduct her own investigation. Her case was eventually elevated to the Inter-American Court of Human Rights (IACHR) in search of justice. For the past two decades, she has retold her story, bringing attention to the use of sexual violence as a weapon of war. Additionally, the 2021 IACHR decision required that the government of Colombia, “implement effective measures for the protection of women journalists, create a memorial center to raise awareness on violence

⁸⁰ *Id.*

⁸¹ Silvia Higuera, *Colombia Remembers Journalist and Humorist Jaime Garzón 20 Years after His Death, Which Remains in Impunity*, KNIGHT CTR. LATAM JOURNALISM REV. (Aug. 13, 2019), <https://latamjournalismreview.org/articles/colombia-remembers-journalist-and-humorist-jaime-garzon-20-years-after-his-death-which-remains-in-impunity/>

⁸² United Nations High Commissioner for Refugees, *Attacks on the Press in 2000 - Colombia*, REFWORLD (Feb. 2001), <https://www.refworld.org/docid/47c565ddc.html>.

⁸³ *Bedoya Lima v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 431, (Aug. 26, 2021).

against women and investigative journalism, and issue a monthly program based on Bedoya's campaign against sexual violence."⁸⁴ Mounting pressure from Garzón's, Bedoya's, and many other journalists' violent experiences eventually contributed to the government establishing the 2000 Program for the Protection of Journalists and Social Communicators.⁸⁵

Concerns about self-censorship and how to responsibly report on an issue were also at the forefront of media-related discussions at this time. The continuous violence prompted journalists to not only stop investigating issues but to flee the country. By the end of 1999, thirteen journalists fled Colombia and many more hoped to follow in their footsteps.⁸⁶ However, even journalists who fled continued to be followed and harassed in their new home countries.⁸⁷ Another key element to the struggle of journalists at this time was unchecked corruption. Not only did Colombia score a 2.2 out of ten in the 1997 CPI, but the nation scored a 36.56 out of 100 in the control of corruption category in the 1996 Worldwide Governance Indicators.⁸⁸ Reporters also encountered chronic impunity as the norm.

⁸⁴ *Id.*

⁸⁵ United Nations High Commissioner for Refugees, *supra* note 82.

⁸⁶ *Attacks on the Press 1999: Colombia*, COMM. TO PROTECT JOURNALISTS. (March 22, 2000, 12:08 PM).

<https://cpj.org/2000/03/attacks-on-the-press-1999-colombia/>.

⁸⁷ *Id.*

⁸⁸ *The 1997 Corruption Perceptions Index Measures the Perceived Levels of Public Sector Corruption in 178 Countries around the World*, TRANSPARENCY INT'L, <https://www.transparency.org/en/press/ti-1997-corruption-perceptions-index>

Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *1997 Worldwide Governance Indicators*, THE WORLDWIDE GOVERNANCE INDICATORS (Sep. 2010), <http://info.worldbank.org/governance/wgi/Home/Reports>.

Overall, Colombian journalists faced constant uncertainty in the war between their government, guerillas, narco-traffickers, and paramilitary groups.

B. Presence of the International Human Rights Regime

While the input of the international human rights regime is not as well-documented in Columbia as in countries with newer protection mechanisms, there is still evidence to suggest that the regime protested the conditions that Colombian journalists worked under. In a 1997 visit, the Inter-American Court of Human Rights expressed great concern over the deaths of reporters and recommended “serious, impartial, and effective investigations.”⁸⁹ The Special Rapporteur for Freedom of Expression had similar worries and described the constant threats that Colombian journalists experience as a grave concern.⁹⁰

C. Civil Society Efforts to Create a Protection Mechanism for Colombian Journalists

Civil society efforts to help establish the Colombian protection mechanism are also not as well documented as the Mexican and Honduran case studies. However, RSF emphasizes that civil society organizations and trade unions were the main groups to demand protections for vulnerable leaders, prompting the establishment of Law 418 of 1997 - known as the 1997 Public Order Act.⁹¹ This Public Order Act

⁸⁹ *Third Report on the Human Rights Situation in Colombia*, INTER-AMERICAN COMM’N ON HUM. RTS. (February 26, 1999), <http://www.cidh.org/countryrep/colom99en/chapter-8.htm>.

⁹⁰ U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - COLOMBIA (2000).

⁹¹ REPORTERS WITHOUT BORDERS, *supra* note 45, at 39.

laid an important foundation as continuous decrees would be added to expand the protections of the law until the eventual creation of a protection mechanism. For example, it was community actors who advocated for journalists to be included as a protected class. These demands were partially realized in 2000 when the Program to Protect Journalists and Social Communicators was created under the leadership of the General Directorate of Human Rights of the Ministry of the Interior.⁹² Then, in 2011, Colombia created the Unidad Nacional de Protección, a journalist-centered defense structure that is much closer to the structure of protection mechanisms recognized today.⁹³

Despite these efforts, Colombian civil society was not highly involved in the creation or implementation of the UNP. The Colombian government “did not listen directly to civil society” and ignored its input on how to effectively restructure the mechanism.⁹⁴ RSF noted a distinct lack of dialogue between civil society and the UNP. Since community actors were not considered active allies who contributed to the mechanism, the protections were often reactive rather than proactive, one-track-minded, and police-centered.⁹⁵

In this Colombian case study, the bottom-up theory that Simmons proposes is not very visible. It is important to note, however, that this was the first time a structure to protect journalists was ever proposed in Latin America; perhaps civil society had not yet taken an active role in its creation as there was no example to follow. Subsequent group efforts were able to learn from the mistakes and

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 45.

⁹⁵ *Id.* at 51.

successes of Colombia's protection mechanism.

IV. THE CASE OF BRAZIL

A. The State of Brazilian Journalism Before a Journalist-Specific Protection Mechanism

While the basis of the Brazilian protection mechanism was established in 2004, it was not until 2018 that the Program for the Protection of Human Rights Defenders extended to media professionals.⁹⁶ Before 2018, Brazilian journalists faced fears of harassment, threats, violence, obstruction, and death.⁹⁷ According to the CPJ, twenty-five Brazilian reporters were murdered between 2010 and 2018, with those covering sensitive issues like crime and corruption assuming the most risk.⁹⁸

This violence far predates 2010. Vladimir Herzog, a Brazilian journalist and activist, was tortured and murdered in 1975 by military police. The police attempted to disguise his murder as a suicide.⁹⁹ The public, however, refused to

⁹⁶ Carolina De Assis, 'Structural flaws' hamper the effectiveness of mechanisms to protect journalists in Brazil, Colombia, Honduras, and Mexico, points out RSF, *LATAM JOURNALISM REV.*, <https://latamjournalismreview.org/articles/structural-flaws-hamper-the-effectiveness-of-mechanisms-to-protect-journalists-in-brazil-colombia-honduras-and-mexico-points-out-rsf/>

⁹⁷ Arch Puddington et al, *Freedom in the World 2018: The Annual Survey of Political Rights and Civil Liberties*, 141 (2019)

⁹⁸ *25 Journalists Killed in Brazil between 2010 and 2018 / Motive Confirmed*, COMM. TO PROTECT JOURNALISTS (2023), cpj.org

⁹⁹ Ian R. Lamond, *Remembrance of Things Present: Vladimir Herzog and Democracy in Contemporary Brazil*, *OPENDEMOCRACY* (Nov. 23, 2018),

<https://www.opendemocracy.net/en/democraciaabierta/remembrance-of-things-present-vladimir-herzog-and-democracy-in-contemporary-brazil/>.

accept this excuse and suspicions were eventually confirmed that the police executed Herzog, most likely for his work in the illegal Brazilian Communist Party.¹⁰⁰ This realization sparked “national and international outcry against the repressive military regime” and people demanded more journalist safeguards.¹⁰¹

Additionally, Tim Lopes, an award-winning investigative journalist, was brutally tortured and murdered in 2002 by drug traffickers as he was reporting on organized crime.¹⁰² His death “rocked the nation” and brought international scrutiny as Reporters Without Borders expressed continued concern over the quality of the investigation and the presence of corruption.¹⁰³ Lopes’ violent death marked the beginning of a new age of Brazilian journalism, where reporters now considered bulletproof vests, helmets, and armored cars as necessities.¹⁰⁴

These difficulties have also been historically compounded by widespread corruption. In 2017, politics was dominated by ongoing corruption investigations following Operation Car Wash, the largest corruption scandal in

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² United Nations High Commissioner for Refugees, *Attacks on the Press in 2002 -Brazil*, REFWORLD (Feb. 2003), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=47c5665723&skip=0&publsher=CPJ&coi=BRA&querysi=lopes&searchin=fulltext&sort=date>.

¹⁰³ *Id.*; RSF Increasingly Concerned about Tim Lopes Murder Investigation after Death of Two Suspects, IFEX, (Aug. 20, 2002), <https://ifex.org/rsf-increasingly-concerned-about-tim-lopes-murder-investigation-after-death-of-two-suspects/>.

¹⁰⁴ Júlio Lubianco, *Twenty Years after Tim Lopes’ Death: Brazilian Journalists Lament the Fragility of the Profession*, KNIGHT CENTER LATAM JOURNALISM REV., (June 2, 2022), <https://latamjournalismreview.org/articles/twenty-years-after-tim-lopes-death-journalists-lament-the-fragility-of-the-profession/>

Brazil's history that implicated powerful officials in over eleven other Latin American countries.¹⁰⁵ Brazil's score on the CPI dropped to 3.5 out of ten in this period.¹⁰⁶ Brazilian journalists also struggled with large-scale impunity for crimes against journalists. In 2017, the Impunity Index ranked Brazil eighth in terms of the most unsolved cases against journalists in the world.¹⁰⁷

B. Presence of the International Human Rights Regime

The International Human Rights Regime has a very strong presence in Brazil and has been active in encouraging more journalist protection. The Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression urged the government to “strengthen the protection mechanisms for communicators in all the regions in Brazil.”¹⁰⁸ The Special Rapporteur also made sure to emphasize the role that Brazil had to defend reporters and why the current mechanism was inadequate. Additionally, in the 1990s, increasing pressure was placed on Latin American nations to comply with the UN Declaration on Human Rights Defenders, which Brazil ratified in 1998.¹⁰⁹ This ratification

¹⁰⁵ Puddington, *supra* note 97, at 141.

¹⁰⁶ 2018 *Corruption Perceptions Index*, TRANSPARENCY INT'L, <https://www.transparency.org/en/cpi/2018>

¹⁰⁷ *CPJ's 2020 Global Impunity Index Spotlights Countries Where Journalists Are Slain and Their Killers Go Free.*, COMM. TO PROTECT JOURNALISTS (2020), <https://cpj.org/reports/2020/10/global-impunity-index-journalist-murders/>.

¹⁰⁸ *Office of the Special Rapporteur Condemns Murder of Journalist in Brazil and Urges the State to Adequate the Protection Mechanism to Media Worker's Needs*, INTER-AMERICAN COMM'N ON HUM. RTS., (July 28, 2016), <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1035&ID=1>

¹⁰⁹ REPORTERS WITHOUT BORDERS, *supra* note 45, at 18.

helped set the stage for future demands. The IACHR continued to provide recommendations, a mechanism framework, and support for Brazil through the Unit for Human Rights Defenders.¹¹⁰ This is only one instance of Brazilian commitment to the international human rights regime as “Brazil is just one example of a state that has not only signed almost all the international human rights treaties but also passed them into law and created institutions to implement them.”¹¹¹

C. Civil Society Efforts to Create a Protection Mechanism for Brazilian Journalists

Civil society was influential in not only demanding change, but creating the original protection mechanism.¹¹² The Comité Brasileño de Defensores y Defensores de Derechos Humanos (CBDDH), a coalition of over twenty-five civil society organizations, worked together to make their demands known.¹¹³ These community actors were able to utilize landmark commitments, such as the UN Declaration on Human Rights Defenders, to call for better protection by raising awareness, engaging with the government, and presenting challenges on the Congressional floor.¹¹⁴ However, in this case study it was not just domestic mobilization that occurred. Community actors also established alliances with international groups to place pressure from several different angles. In *Protecting Human Rights Defenders in Latin America*, Ulisses Terto Neto

¹¹⁰ *Id.*

¹¹¹ ULISSES TERTO NETO, *PROTECTING HUMAN RIGHTS DEFENDERS IN LATIN AMERICA: A LEGAL AND SOCIO-POLITICAL ANALYSIS OF BRAZIL*. (2018).

¹¹² REPORTERS WITHOUT BORDERS, *supra* note 45, at 18.

¹¹³ *Id.*

¹¹⁴ NETO *supra* note 111, at 141.

describes this phenomenon. He explains that “as a result of both external pressures... and internal pressures by domestic HR networks politically allied in the CBDDH (**from below**) ... the Brazilian state has been forced to respond.”¹¹⁵ Civil society also utilized the international human rights regime to ensure journalists are covered by the program. The CBDDH sent continuous open letters to the Brazilian government with assessments and recommendations, one of them being the inclusion of media professionals.¹¹⁶ Civil society took advantage of platforms provided by the international human rights regime and consistently collaborated with international groups to push for stronger protection measures.

However, the Brazilian protection mechanism certainly has room for improvement. In 2020, Patricia Campos Mello, a Brazilian reporter, was the target of a smear campaign and numerous threats.¹¹⁷ Campos reported on an illegal financial scheme in support of Jair Bolsonaro’s presidential candidacy and was met with unfounded and sexist accusations that she was lying and “willing to trade sex for information.”¹¹⁸ These claims, repeated by Bolsonaro and other politicians supporting him, led to an influx of online harassment and misinformation. This type of anti-journalist rhetoric prompts future questions on how protection mechanisms can adapt to an online platform that can spread hate speech in a more anonymous and efficient fashion,

¹¹⁵ *Id.* at 142.

¹¹⁶ MARIA MARTIN QUINTANA & ENRIQUE EGUREN FERNÁNDEZ, PROTECTION OF HUMAN RIGHTS DEFENDERS: BEST PRACTICES AND LESSONS LEARNT 22 (2011).

¹¹⁷ *Brazilian Journalist Patrícia Campos Mello Faces Online Harassment Campaign*, COMM. TO PROTECT JOURNALISTS, (Feb. 12, 2020), <https://cpj.org/2020/02/brazilian-journalist-patricia-campos-mello-faces-o/>.

¹¹⁸ *Id.*

particularly when it is condoned by state leadership.

DISCUSSION AND FINAL REMARKS

The findings of these case studies indicate that Simmons' bottom-up theory *can* be used to secure protection mechanisms for journalists, although it is not a viable solution for all Latin American countries. The success of the Mexican case study implies that critics, such as Posner, are incorrect in their assumptions that the international human rights regime is useless. The Mexican Espacio OSC found great strength in the regime, had a robust network, and participated in the process of orchestration. Additionally, CBDDH in Brazil and Plataforma EPU in Honduras also found strength in mobilizing under the international human rights regime, although to a lesser extent.

Each case study showed a variation in the degree to which the international human rights regime proved to be helpful, furthering the idea that this bottom-up theory is not a one size fits all prescription. Instead, this theory is a powerful tool for organizers. One of the most common prerequisites for this tool to function well was the existence of an established civil society. This is obvious when comparing the analysis of Mexico, which had a base of over 200 community actors and powerful usage of the bottom-up system, to the analysis of Colombia, which lacked any unifying body and had little use of the international human rights regime.

Another important pattern that appeared throughout these case studies was the relationship between civil society involvement in the creation of a mechanism and how established civil society is in the mechanism currently. According to RSF, when comparing these four nations today,

Mexico was found to have the best level of transparency and involvement with community actors. Mexico received a “green” rating and was commended for having a unique system where civil society is involved in case deliberation and has voting power within the protection mechanism.¹¹⁹ In comparison, Honduras and Brazil received a “yellow” rating for having a degree of civil society involvement but lacking any significant power or transparency.¹²⁰ Similarly, the case studies in this report found a level of civil society contributions and incorporation of the international human rights regime but not a very strong presence. Finally, Colombia received a “red” rating for the present-day exclusion of community actors, an extension of how civil society was ignored in the creation of the mechanism.¹²¹ These ratings reflect the findings of this report and may have implications as to why civil society must be a part of the advocacy process far before a protection mechanism is proposed. Perhaps the degree to which civil society is involved in the push for a journalist protection mechanism will greatly impact the degree to which civil society is involved in the execution of that mechanism.

These findings can add to the existing conversation by demonstrating examples of Simmons’ bottom-up theory being put into action and examples where the theory does not translate as well. Ideally, this will help other groups recognize bottom-up organizing as a viable political tool and incorporate the international human rights regime whenever possible. As violence against Latin American journalists only worsens, the nations who are in the process of creating a

¹¹⁹ REPORTERS WITHOUT BORDERS, *supra* note 45, at 119.

¹²⁰ *Id.*

¹²¹ *Id.*

mechanism may look at civil society involvement as a prerequisite to a thriving mechanism. Simmons proposed tools will provide empowerment for those community actors and help them know that significant change is possible through organizing on a domestic level.

**SEXUAL PRIVACY, HUMAN RIGHTS, AND A
POST-DOBBS WORLD**

*Ethan Worcester**

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INTRODUCTION

Currently high-school student athletes in Florida are being asked to report their periods and menstrual cycle history online. This has raised great alarm amongst the students themselves, their families, and even professional medical staff. For two decades, athletes have been asked to do this to track bone health and energy levels, but this was always done on physical copies, not stored online. Some school districts have switched to Aktivite, an online third-party, to now save and store this information. With the reversal of *Roe v. Wade*, many states, Florida being one, are beginning to crack down on catching illegal abortions, parents and their children are terrified this personal information will be used against them in secondary ways. Not only was a vital reproductive act, previously protected under a constitutionally recognized right to privacy taken

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away, but now their informational privacy appears next in line.¹

The right to sexual privacy has changed over time to include, either under its umbrella or as a stand alone right, the right to sexual autonomy. Whichever way one chooses to interpret these terms, these rights are fundamental to the everyday life of individuals and should be protected as such. Laws against these rights demonstrate an unjustifiable invasion into some of the most personal, intimate, and important situations a person experiences in their life. Due to this, all actions of sexual privacy or sexual autonomy must be protected under the Constitution's guaranteed protection of human rights, regardless of which term of justification a person agrees with, up until the point or situation in which the government has a viable reason to intervene.

Sexual privacy has been a topic of debate amongst scholars for decades, beginning after the landmark Supreme Court decision of *Griswold v. Connecticut* in 1965, and further increasing following the just as important decision of *Roe v. Wade* in 1973. There are many viewpoints surrounding various components of the topic due to its multiple important layers, ranging from constitutionally-based arguments to morally-based arguments. Support for the court's decisions also ranges from the overwhelmingly positive to the largely negative.

In his article, "Privacy and Autonomy," author Louis Henkin argues that the court has misidentified the effects of its decisions in cases of sexual privacy. Instead, they have given individuals a "zone of autonomy" through their

¹ Shira Li Bartov, *Florida Student-Athletes Are Now Being Asked To Report Their Periods Online*, *NEWSWEEK*, October 2022, (last accessed Dec. 5, 2022), <https://www.newsweek.com/florida-student-athletes-being-asked-report-periods-online-1749549>.

decisions of *Griswold*, *Eisenstadt*, and *Roe*.² In “Liberalism, Privacy, and Autonomy,” Professor Grant Mindle agrees there is a difference between privacy and autonomy. He claims an autonomous person “craves social acceptance” and “wants to be seen.”³

Daniel Solove, author of the book *Understanding Privacy*, disagrees with Henkin and Mindle on cases of sexual privacy mistakenly being protected by a right to privacy. He believes cases of this kind are protected under what he calls “invasions” of privacy, and more particularly, “decisional interference.”⁴ Legal scholar Gary Caplan, in his article, “Fourteenth Amendment – The Supreme Court Limits the Right to Privacy,” also believes the right to privacy extends to personal autonomy based on the cases of *Griswold*, *Eisenstadt*, and *Roe*, agreeing with Solove. The cases built off one another until the right to privacy expanded to include “a general right of personal autonomy regardless of marital status or procreative intention.”⁵

Deciding whether sexual privacy and sexual autonomy fall under the same umbrella, whether they are entirely different concepts, or whether one is viewed as a stepping stone to reaching the other’s full potential is prevalent amongst scholars’ discussion on the subject. The Supreme Court has had multiple opportunities to affirm its stance, but consistently chose not to concretely do so. Regardless of the terms of its justification, most scholars see the right of sexual privacy or autonomy as needing constitutional protection due to its fundamentality as a basic

² Louis Henkin, *Privacy and Autonomy*, 74, COLUM. L. REV., (1974).

³ Grant Mindle, *Liberalism, Privacy, and Autonomy*, 51, J. POLIT., (1989).

⁴ Daniel Solove, *Understanding Privacy*, (2010).

⁵ Gary Caplan, *Fourteenth Amendment – The Supreme Court Limits The Right To Privacy*, 77, J. CRIM. L. AND CRIMINOLOGY, (1986).

human right.

In his article, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution,” author David Richards argues that the right to sexual autonomy is constitutionally protected because it is a fundamental human right. Protecting basic human rights is the goal of what he calls the “unwritten constitution,” which he argues “gives a coherent meaning to the constitutional design.” At the end, he concludes that a constitutional right to privacy is needed to protect acts of individual autonomy, which is a vital component of having fundamental human rights.⁶

Jed Rubenfeld argues in *The Right of Privacy* that the right of privacy is in place to protect against one’s life being completely determined by the government. Laws restricting sexual actions, such as abortion, enforce a “social standardization” of people which goes against basic human rights.⁷ Researcher Daniel Hoffman agrees in his writing, “What makes a Right Fundamental,” saying that fundamental human rights should combat the reduction of individualization by a governing body.⁸ Legal scholar and professor Robin West believes abortion, along with other sexual rights, should be protected due to these rights being fundamental rights. He believes the Court’s rulings on matters have been positive, but improvement could still be found, possibly through the political or moral realm instead of the legal.⁹

⁶ David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30, HASTINGS L.J., (1979).

⁷ Jed Rubenfeld, *The Right of Privacy*, 102, HARV. L. REV., (1989).

⁸ Daniel Hoffman, What Makes a Right Fundamental, 49, Rev. Polit., (1987).

⁹ Robin West, *From Choice to Reproductive Justice: De-*

Fundamental human rights can justify their protection in many ways. A common aspect of justification for the protection of rights deemed fundamental to human life is that they encourage individuality and discourage social standardization. The ability to take part in autonomous actions and make decisions to dictate one's life is key to these rights. Sexual privacy is a key right that gives individuals control over important aspects of life that can impact the present and the far future. This is why these rights must be protected through the Constitution as basic human rights.

The Evolution of Sexual Privacy, Autonomy, and Expression

The right to privacy is never explicitly mentioned in the Constitution, nor is the word privacy itself. While this is obviously still the case today, the right to privacy would finally be acknowledged and upheld in 1965's *Griswold v. Connecticut*. In a 7-2 decision, the Supreme Court ruled that laws against married couples seeking and obtaining contraceptive devices were unconstitutional and should be invalidated. Justice William O. Douglas authored the majority, stating the right to privacy could be found within the penumbras of various amendments of the Constitution, including the First, Third, Fourth, Fifth, and Ninth. While the court's majority did rule in favor of the right to privacy, the concurring opinions contained two other interpretations of the legal justification of said right; it could be directly found in the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment.¹⁰

Within his majority opinion Justice Douglas wrote, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of

Constitutionalizing Abortion Rights, YALE L.J., (2009).

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” During his concurring opinion Justice Arthur Goldberg said, “To hold that a right so basic and fundamental and so deep-rooted in our society as a right of privacy in marriage may be infringed.... is to ignore the Ninth Amendment, and to give it no effect whatsoever.”¹¹

The decision reached in *Griswold* served as a major first step towards a future broadly encompassing right to privacy in reproductive choices, but the court’s initial justification showcased where its priorities could be found: in the marital unit. Privacy was not found within each individual person, but in the sanctity of marriage between man and woman.

Despite its focus on the privacy of the marital bedroom, *Griswold* laid the groundwork for the future decision of *Roe*, and its eventual evolution into the protection of decisional privacy, something the women’s movement would increasingly point to in their fight for true equality. It also implicitly recognized privacy as crucial to American democracy, serving as the first step to its later recognition on a broader constitutional level.¹²

Before these advancements in equality or a shift to include autonomy could be made, however, the right to privacy needed to evolve to be found within the individual instead of the marital unit. This would officially happen in 1972’s *Eisenstadt v. Baird*. The court ruled 6-1 in favor of extending the decision of *Griswold* to include unmarried individuals. No reasonable health or moral justification could be found for only recognizing the right to privacy in the

¹¹ *Griswold*, 381 U.S.

¹² Lawrence Cappello, NONE OF YOUR DAMN BUSINESS, 240-41, (2019).

marital unit, so the majority ruled under the Due Process Clause of the Fourteenth Amendment to expand its previously held right to privacy. The decision effectively marked the shift away from the court's previous belief that the marital unit was the only area where a right to privacy could be justified, due to its deeply embedded history in the nation. Unmarried individuals were just as entitled to the fundamental right of deciding whether to have children or not, entitling them to the same contraception rights as married couples.¹³

Justice Joseph Brennan, in his majority opinion said, "The Equal Protection Clause of that amendment, does, however, deny to States the power to legislate that different treatment be accorded to persons.... A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The majority recognized a right to privacy officially through the Fourteenth Amendment and justified its expansion through the due process clause. In the court's eyes, this grounded a right to privacy in the Fourteenth Amendment instead of inferring it through various separate amendments or through exclusively the Ninth Amendment.¹⁴

In his defense of why the case of *Bowers v. Hardwick* was incorrectly ruled upon by the Supreme Court, Caplan cites the *Eisenstadt* case as part of his justification for sodomy statutes being unconstitutional. Although the decision was based on the equal protection clause found in the Fourteenth Amendment, the case is viewed as indirectly extending the right to privacy to the individual, specifically

¹³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁴ *Eisenstadt*, 405 U.S.

in intimate situations. The government may not intrude upon the private sexual affairs of a person, married or not, and *Eisenstadt* is the defense for this.¹⁵

Even though *Griswold* was the first instance where a right to privacy was constitutionally recognized, the ruling of *Eisenstadt* should not be overlooked in terms of its importance. If privacy was found only within the marital sphere, it could not be expanded to include other important areas of daily life. Once the right to privacy was found within each person, this changed. For the first time in history, a man and a woman were not inherently connected to each other in all aspects of private life. When this right was only viewed in terms of marriage, this was not the case. Once the right to privacy was separated from marriage, this opened the door for the evolution of privacy to include acts of sexual autonomy including the right to same-sex marriage, the right to interracial marriage, the right to private sexual acts, and of course, the right to abortion. Without *Eisenstadt* correctly expanding the right to privacy, these advancements would not have happened and the right to sexual privacy would be much more limited.

A right to sexual autonomy was first recognized through the landmark case of *Roe v. Wade*. In a 7-2 decision, the Supreme Court recognized a right to abortion as being vital to a woman's right to privacy, so any statutes denying it outright or deeming it unreasonable were to be removed as unconstitutional. While the opinion, delivered by Justice Harry Andrew Blackmun, did recognize the right to privacy, he was unconcerned about identifying exactly where it could be found within the Constitution. Instead, the court focused on the establishment of the trimester framework to determine

¹⁵ Caplan, *supra* note 5, at 911.

if and when the State would have a reasonable interest in the protection of the fetus during a pregnancy.¹⁶

Justice Blackmun wrote for the majority, “We acknowledge our awareness of the sensitive and emotional nature of the abortion controversy.... The right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in regulation.”¹⁷ Justice Byron Raymond White wrote in dissent, “At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother.... I find nothing in the language or history of the Constitution to support the court’s judgment. The court simply fashions and announces a new constitutional right for pregnant women.”¹⁸

These quotes from both the majority opinion and dissent showcase just how opposite the views are regarding the argument. Justice Blackmun holds the effects on the woman in high regard, while Justice White values them significantly less, believing the court had no justification to increase the fundamental rights of a pregnant woman. Based on the wording of the majority opinion and the very loose recognition of privacy in the situation, one can easily infer that the court did not completely understand how to best justify its decision. Due to this vagueness from the court, questions have formed regarding privacy, autonomy, and the decisions put forth by the court in the cases of *Griswold*, *Eisenstadt*, and *Roe*, along with others of a similar nature.

One viewpoint is that the courts were correct in their rulings in cases having to do with privacy, as issues of autonomy should be protected under the larger field of

¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷ *Roe*, 410 U.S.

¹⁸ *Roe*, 410 U.S.

privacy. Professor Solove describes the cases of *Griswold*, *Eisenstadt*, and *Roe* as having to do with “decisional interference,” which he defines as protection from “governmental interference with people’s decisions regarding certain matters in their lives.” This justification extends primarily to issues of sexual autonomy, including “parents’ child-rearing decisions.” Cases of this kind can have a profound impact on separate issues of privacy, whether similar or quite different, such as informational privacy, disclosure, intrusion, and blackmail. When issues of autonomy are protected, similar issues of privacy that could be related receive an added layer of protection.¹⁹

Private, intimate, autonomous acts are protected by the right to privacy regardless of the intent of the action. These include acts of sexual autonomy, such as access to contraception and abortion. Autonomous acts include more than simply procreative matters, however, as demonstrated by the decision of *Eisenstadt*, they include any choice deemed intimate enough to be protected from government intervention or regulation. Sexual expression in its entirety is made up of acts of autonomous decision-making, and is, therefore, protected by a right to privacy.²⁰

Others believe the court was completely wrong in their justification for acts of sexual privacy, such as Professor Henkin, who believes privacy was never a correct defense, but instead autonomy alone should have been used. The court has given “an additional zone of autonomy, of presumptive immunity to governmental regulation.” During the cases of *Griswold*, *Eisenstadt*, *Roe*, and *Stanley*, the Supreme Court was never discussing situations having to do with privacy, as the government was not protecting against “intrusion,” but

¹⁹ Solove, *supra* note 4, at 165-70.

²⁰ Caplan, *supra* note 5, at 919-20.

instead, was discussing situations having to do with autonomy and protection against “regulation.” The court has interpreted them to be one and the same, but this is difficult to understand, as there are great differences in “philosophical, political, and social assumptions and consequences.” Viewing them in terms of the clashing of “the private right and public good” may help individuals further understand their immense differences.²¹

When Justice Louis D. Brandeis, in his dissent of *Olmstead v. United States*, expressed the idea that privacy was genuinely protected through the implicit understanding of the Constitution, he never intended for the definition of privacy to grow to the extent it has now. Legal scholar Laurence Tribe believes that an autonomy defense is superior in this legal context to one rooted in privacy claims. He says the usage of autonomy more effectively protects the entirety of a person, while privacy largely focuses on the protection of the inner self. An autonomous person wishes to be viewed publicly in an accepted, respected light, while a private person wishes to be secluded in their ideas, actions, thoughts, etc. deemed too personal for outward expression.²²

While many disagree on how these cases should be decided, as shown above, whether it be a widely encompassing right to privacy, a stricter right to privacy, a right to autonomy protected by a right to privacy, or just a right to autonomy on its own, these rights must be protected. Instead of attempting to differentiate between what is sexual privacy and what is sexual autonomy, acts of this kind should be protected as fundamental human rights, regardless of their categorical justification. However, doing this requires determining when the government has reason to place

²¹ Henkin, *supra* note 2, at 1411, 1424-25.

²² Mindle, *supra* note 3, at 584-97.

regulations or intervene, most notably in situations involving abortion.

When a broad view of sexual privacy is recognized as fundamental to human life, along with the individual acts of sexual autonomy found under its umbrella, individuals will immediately have increased protection and freedom to live their lives at their choosing. While the abortion question is more layered and requires further analysis than questions of the sexual autonomy of an individual or the sexual privacy between two adults, it is still a crucial right to protect up until the fetus can be viewed as an individual apart from the mother. This will be discussed in further detail later. Unfortunately, as previously discussed, the decision made in the case of *Dobbs v. Jackson Women's Health Organization* to place the abortion question back with each state has put many individuals at risk in both the short and long-term as some are enforcing abortion bans that intrude too far into a woman's right to sexual privacy and autonomy.

Sexual Privacy as a Fundamental Right

For individuals to live the best life of their choosing, certain rights are needed. These rights are held as fundamental to human life. The United Nations defines these as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status," with "the right to life and liberty, freedom from slavery or torture, freedom of opinion and expression.... and many more" as examples given.²³

Acts of sexual autonomy should be protected under the umbrella of sexual privacy as a fundamental human right. This can be found through something called the "unwritten constitution." This term represents the true meaning and

²³ *Human Rights*, UNITED NATIONS, (last accessed Dec. 5, 2022), <https://www.un.org/en/global-issues/human-rights>.

goals of the Founders when they originally drafted the Constitution, understanding they could not accurately plan at its creation for a society continuously evolving. To completely grasp the concept, “we must take seriously the radical vision of human rights that the Constitution was intended to express and in terms of which the written text of the Constitution was intended to be interpreted.”²⁴ This protects those rights essential to the fulfillment of life that cannot be found explicitly stated in the Constitution. The protection of the autonomous person and their privacy falls under this idea and must be protected as fundamental to human life. These acts are also intrinsically tied to the concept of liberty, meaning the argument that they are fundamental to human life can also be made through this legal avenue. Liberty is a concept the Constitution was intended to promote amongst the people from its creation; any act that promotes it, if there is no moral obligation from the state to interfere, is protected as a human right.²⁵

Human rights encourage the individuality of everyone. Acts of sexual autonomy allow for individuals to express their individualism. Interfering with an individual's right to express their individualism through the choosing of their partner violates their human rights, regardless of their sexual preference. This applies to already existing family units consisting of a husband and wife as well.

A married couple having the ability to control their sexual activities and possibility of a family is a basic right of sexual privacy. This is where the importance of contraception arises. Removing or regulating it intrudes on the married couple's right to control their individuality.²⁶

²⁴ Richards, *supra* note 6, at 957-64.

²⁵ Caplan, *supra* note 5, at 922.

²⁶ Mindle, *supra* note 3.

These thoughts and ideas are what express individualism. Burdening individuals of lower socioeconomic class with the prospect of a family can also reduce their individualism. Many in these positions already have fewer opportunities than those of higher social or economic status, so not allowing them to choose on matters of sexual autonomy would reduce their individuality even more. A key component of individualism is to promote the "self-worth" or self-respect" of each person.²⁷ If acts of sexual autonomy are removed, many may view themselves as not living the life they wish, thereby reducing their love or belief in themselves. Reducing the individuality of each person or not allowing them to practice it to the level they choose goes against the basic idea of fundamental human rights, so acts of sexual autonomy must be protected in this way until the government has a viable reason to interfere.²⁸

Following directly from the importance of individuality comes the protection against overbearing utilitarian or totalitarian governments. The restriction or removal of sexual autonomy rights will put into place social standardization if taken too far. A prime example of this are the rights to abortion and contraception. Going further than simply being vital to a woman's privacy and intimate life, these rights directly prevent a normalized standardization of motherhood. While motherhood does differ from case-to-case, it utilizes the "most biological and psychological impulses" a woman has, so any laws in place that enforce this in totality are in direct opposition to human rights. Rubinfeld believes the enforcing of mandatory childbirth involuntarily drafts a woman into working for the State, since it is a totalitarian intervention into a woman's life and forces her

²⁷ Richards, *supra* note 6.

²⁸ West, *supra* note 9.

commitment of both body and mind for years of her life. If sexual privacy rights are not protected, governments can manipulate them to enforce a complete social standardization of their citizens and completely wipe out individuality in areas they wish.²⁹

Fundamental human rights must be broad in scope to best ensure they protect the most people possible and can successfully adapt to an ever-changing society. The broader the right, the more likely it can be utilized by people from all walks of life, including those of different sexes, races, socioeconomic statuses, etc.³⁰ They should be available and offer protection to individuals equally. That way, they can be utilized by each person to help with everyday life. Abortion and contraception should be available to not just the rich, but also the poor. The choice of intimate partners and their acts together should include not just heterosexuals, but also homosexuals. As society evolves and the moral arguments change around these situations, their protection must remain strong and absolute. The best way to accomplish this is by nationally recognizing these acts as fundamental to human life, and therefore, protecting them as such.³¹

To accurately and effectively protect sexual privacy rights, there must be a finely struck balance between the rights of the individual and the rights of the state. This requires thorough research and discussion between scholars and lawmakers to ensure a satisfying conclusion is reached. This is especially important when discussing cases of abortion.

²⁹ Rubinfeld, *supra* note 7.

³⁰ Hoffman, *supra* note 8.

³¹ Richards, *supra* note 6.

I. THE DISCUSSION OF ABORTION

The topic of abortion is possibly the most discussed sub-section of sexual privacy and is more complex than other aspects of sexual privacy, particularly in terms of protecting individuality from possibly overbearing governments. Because the topic involves the unborn child, it cannot be viewed through the same lens as other acts of sexual privacy or autonomy. Understanding the science of viability and its relation to the stages of pregnancy is crucial for determining when an unborn child is entitled to their own individuality under human rights and should therefore be protected.

Viability is medically defined by the Merriam-Webster Dictionary as “the quality or state of being viable; the ability to live, grow, and develop.”³² The viability of a fetus means it has reached a state in which it could be capable of living under good conditions outside the uterus. In the United States, this is believed to occur at twenty-four weeks gestational age, when, according to The American College of Obstetricians and Gynecologists, the fetus has roughly anywhere between a 42% and 59% chance of survival. A baby born at this time would be considered a premature birth and have a much lower chance of survival than one born farther into the third trimester. In fact, according to the Centers for Disease Control and Prevention, premature babies are at a much higher risk of contracting disease and having developmental problems than babies born after the thirty-two-week mark.³³

The trimester framework laid out by the Supreme

³² Hoffman, *supra* note 8.

³³ Marygrace Taylor, *What Is the Age of Fetal Viability?*, WHAT TO EXPECT, (Aug, 2, 2021), <https://www.whattoexpect.com/first-year/preemies/fetal-viability>.

Court in the decision of *Roe* represented the court's attempt to equally weigh the protection of a woman's health with the possibility of life for the unborn fetus.³⁴ During the first trimester, which begins at conception and lasts through week thirteen, women had complete control over their decision to have an abortion or not. During the second trimester, which lasts through the end of week twenty-six, the state could only interfere when the woman's health was in danger. During the third trimester, which lasts until childbirth occurs, the state was allowed to implement abortion restriction laws to protect the unborn fetus. The only exception for this would be if the mother's life was in dire need of protection or saving.³⁵

Viewing the viability of the fetus in relation to the trimesters, it can be seen that the average age of viability falls right near the end of the second trimester. This would mean the previous trimester framework set by the Supreme Court and the twenty-four-week age of viability lined up rather closely in relation to one another. The court recognized this as the moment state interest in protecting the unborn child trumped the woman having absolute control over whether to have the child or not. While this was not a perfect system, it was the court's attempt to establish when in pregnancy abortion remained a woman's fundamental human right, and when the unborn child's possible life took priority as needing protection.

With the reversal of *Roe*, states have the complete ability to regulate abortion how they choose, which can lead

³⁴ Mark Kogan, *Roe v. Wade: A Simple Explanation Of the Most Important SCOTUS Decision in 40 Years*, MIC, (Jan, 22, 2013), <https://www.mic.com/articles/23822/roe-v-wade-a-simple-explanation-of-the-most-important-scotus-decision-in-40-years>.

³⁵ "Pregnancy; The Three Trimesters," UCSF HEALTH (last accessed Dec. 5, 2022), <https://www.ucsfhealth.org/conditions/pregnancy/trimesters>.

to laws that intrude too far into a woman's fundamental right to sexual privacy and autonomy. One example of this is the existence of heartbeat laws. Heartbeat laws are in place to ban abortions after the time a fetus' heartbeat can be detected by an ultrasound, which is most commonly found around six weeks of gestation. These laws recognize the heartbeat as a sign of life, entitling the fetus to individual protection. However, according to medical professionals, such as Dr. Nisha Verma, the recognition of a heartbeat at this stage of pregnancy is largely inaccurate and the term "heartbeat" is not actually a medically accurate term in the early stages of pregnancy. "When I use the stethoscope to listen to a patient's heart, that sound that I hear is that typical bum-bum-bum-bum that you hear as the heartbeat is created by the opening and closing of the cardiac valves. And at six weeks of gestation, those valves don't exist," says Verma. Many politicians use these laws in an effort to elicit emotional responses from their supporters but have little knowledge of the science behind them. Verma states, "Every patient sitting in front of us is different, which is part of why these one-size-fits-all laws can be really harmful." While these laws are great for political popularity, medical professionals tend to view them as inaccurate and harmful. Due to this, it is hard to see a reasonable justification for government restriction on abortion rights at this point of pregnancy.³⁶

Another issue with early abortion bans is that many women do not find out they are pregnant until well after these bans have prohibited this option. According to a study by Diana G. Foster, Heather Gould, and M. Antonia Biggs,

³⁶ Bethany Irvine, *Why the Heartbeat Bill is a Misleading Name for Texas' Near-Total Abortion Ban*, THE TEXAS TRIBUNE, (Sep. 2, 2021), <https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/>.

women who rely on contraception for pregnancy prevention and those who have no prior pregnancy experience are disproportionately affected by early abortion bans. They found that many women seeking abortion in the second trimester did not find out about their pregnancy until eight weeks after their last period. They also discovered that roughly one-in-five women did not learn of their pregnancy until after twenty weeks. This largely has to do with the fact that women experience pregnancy symptoms in different ways. If abnormal symptoms do not begin immediately, especially if a woman has no prior experience, there is a chance that knowledge of the pregnancy will not come until well after the time at which abortion is banned. This issue adds to the need for establishing what situations call for an abortion as a fundamental human right. These women are not given the time needed to safely plan after the time of discovery, possibly placing both their safety and individuality at risk.³⁷

II. THE DECISION OF *DOBBS*

The vague and insufficient way the court justified its decisions in sexual privacy cases played a role in the overturning of *Roe* in the recently decided case of *Dobbs v. Jackson Women's Health Organization*. The Supreme Court ruled 6-3 in favor of returning the abortion question to the states, ending the constitutional protection of abortion after fifty years of set precedent.³⁸

In his majority opinion, Justice Samuel Alito justified the court's decision by arguing abortion could not be

³⁷ Diana Greene Foster, et. Al., *Timing of Pregnancy Discovery Among Women Seeking Abortion*, 104, *Contraception J.*, (2021).

³⁸ *Dobbs v. Jackson Women's Health Organization*, 597 U.S (2022).

protected by a right to privacy as it was “not deeply rooted in the Nation’s history and traditions” or fundamental to liberty, so it could not be implicitly protected by the Fourteenth Amendment. He also said the justification in *Roe* was weak and caused increased division in the country as opposed to before its decision.³⁹

Justice Clarence Thomas expressed a desire for the Supreme Court to revisit past decisions based on the substantive due process clause in the Fourteenth Amendment, given this was the citing for the ruling in *Roe*. Some of these cases include *Griswold v. Connecticut* (the right to contraception), *Obergefell v. Hodges* (the right to same-sex marriage), and *Lawrence v. Texas* (the right to private sexual acts). He described these decisions as “demonstrably erroneous” and says that it is the court’s obligation to “correct the error” of precedent established by the past decisions.⁴⁰

Each of these cases cited by Justice Thomas protects acts of sexual autonomy that need to be protected by being included in the widely encompassing fundamental human right of sexual privacy. If the court does decide to revisit the decisions of these cases and continues to reach the same conclusions as they did with *Roe*, it is likely the government will eventually turn towards other forms of privacy. This is not a guarantee, but a very logical concern. As discussed earlier, the case in Florida high schools showcases a situation in which those fears are coming to fruition. The private matters of a young woman’s body are now much more available to the outside world and the threats and dangers resulting from this could extend far past the realm of sexual privacy.

³⁹ *Dobbs*, 597 U.S.

⁴⁰ *Dobbs*, 597 U.S.

Possible Future of Sexual Privacy and Beyond

With the reversal of *Roe* in the *Dobbs* case, many states have already banned abortions, placed new, strict laws in place regarding their availability, or have new laws in the government pipeline to be implemented soon. States such as Alabama, Arkansas, Kentucky, Louisiana, Missouri, Oklahoma, South Dakota, and Utah had trigger laws that took effect immediately following the reversal of *Roe*. Other states including Idaho, Mississippi, North Dakota, and Tennessee had laws in place to take effect within the first thirty days following the decision, while Texas had a law that took effect exactly thirty days after the ruling.⁴¹ However, last month's midterm elections saw some states strike down abortion bans on their ballots. Both Kentucky and Montana were notable states in which this occurred. Kentucky voters struck down a law which would have legally amended their state constitution to say there was absolutely no right to abortion, while Montana saw their voters reject an amendment which would have required medical assistance to save infants deemed "born-alive," something created in hopes of further reducing abortion rights.

There are states such as New York, Maine, California, Nevada, and others which decided to make no changes to their abortion laws. In fact, some states who chose to continue protecting abortion went as far as passing "laws enshrining abortion as a right and protecting individuals who seek or provide abortions." Just as midterms saw some states block abortion bans, they also saw others take further action in protecting abortion. The notable states in which this occurred include Vermont, California, and Michigan. The

⁴¹ Simone Shah and Emily Barone, *What the Supreme Court's Abortion Decision Means for Your State*, TIME, (Jun. 27, 2022), <https://time.com/6190283/abortion-access-in-my-state-supreme-court/>.

differences in laws, and likewise the differences in state government officials, will play a key role in people's decisions on where they wish to reside.⁴²

Previously secure private information could come under attack in a post-*Dobbs* United States. An example of a potential future privacy hazard is women's period-tracking apps. Millions of women use these apps to keep record of when their cycles start and stop, along with using them to find when the best chance to become pregnant would be along said cycle. This is among the most personal, intimate kinds of information a woman possesses, and any invasion into it could have damaging consequences. Evan Greer, director of Fight for the Future, a digital rights advocacy group, says, "Any app that is collecting sensitive information about your health or your body should be given an additional layer of security." If the information available from these apps is secondarily used to predatorily expose an individual, that would constitute an extreme invasion of privacy. Additionally, in states in which abortion is outright banned or strictly regulated, law enforcement may be able to use the information within these apps to aid in investigations. When it comes to the risk-versus-reward of using these apps in a post-*Dobbs* world, Andrea Ford, a research fellow at the University of Edinburgh, says, "If I lived in a state where abortion was actively being criminalized, I would not use a period tracker – that's for sure."⁴³ Currently, it appears

⁴² Allison McCann, et. Al., *Where the Midterms Mattered Most for Abortion Access*, THE NEW YORK TIMES, (Nov. 21, 2022), <https://www.nytimes.com/interactive/2022/11/09/us/politics/abortion-laws-midterm-election.html>.

⁴³ Rina Torchinsky, *How Period-Tracking Apps and Data Privacy Fit Into a Post-Roe v. Wade Climate*, NPR, (Jun. 24, 2022), <https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps>.

women are encouraged to do what they believe is best for them, but if things continue down the path they seem to be heading, do not be surprised if further warnings are given concerning the data privacy of these apps.

Cameron F. Kerry, an American attorney and member of the prominent Forbes family, believes the best path to reproductive privacy is through new comprehensive privacy legislation. He argues the American Data Protection and Privacy Act (ADPPA) would be the best option for quickly securing private information and giving it the protection it needs. In response to the period app privacy concerns, the policy would allow individuals “to get access to data linked or linkable to them and have it deleted.” Kerry concludes with “the risk to information about women’s health and health care adds urgency to the opportunity for a baseline of protection for the personal information of every man, woman, and child in America.” If the outright protection of sexual privacy as a fundamental right never happens, the ADPPA could be a feasible option for the extension of much-needed privacy guarantees in America.⁴⁴

Conclusion and Findings

The discussion about sexual privacy has been around since the mid-twentieth century and was finally recognized with the Supreme Court decision in *Griswold v. Connecticut*, although not concretely. Over the next ten years, the cases of *Eisenstadt* and *Roe* increased the scope of *Griswold*’s decision, but the vagueness from the court when justifying their ruling in *Roe* left many scholars wondering if it had done the correct thing. With that, the discussion of sexual

⁴⁴ Cameron F. Kerry, *How Comprehensive Privacy Legislation Can Guard Reproductive Privacy*, BROOKINGS, (Jul. 7 2022), <https://www.brookings.edu/blog/techtank/2022/07/07/how-comprehensive-privacy-legislation-can-guard-reproductive-privacy/>

privacy versus sexual autonomy had begun. More importantly, however, the court's refusal to more explicitly recognize a right to sexual privacy left it open to possible attack, which would finally come to fruition in the form of *Dobbs v. Jackson Women's Health Organization*. The constitutional right to abortion laid down fifty years ago was reversed, and the nation was immediately changed.

Sexual privacy is not simply the protection of sexual acts in private, as the court seemed to consistently imply in their decisions, but the protection of the right to actively pursue and express those acts in both private and public settings at an individual's choosing. A broad view of sexual privacy is needed for true sexual autonomy to be achieved. Sexual actions are fundamental to an individual's everyday life, so they need to be protected as basic human rights to ensure their maximum effectiveness. Because of the immense impact they can have in determining a person's direction in life, the government has no practical justification for intruding too far into decisions of this kind. While the issue of abortion differs from other aspects of sexual privacy, determining at what time in pregnancy abortion remains a fundamental right is still vital to sexual privacy. In this light, the court was incorrect in the *Dobbs* case, as what should be a basic human right is now being severely infringed upon in some states, while in others it is nearly being completely taken away.

Privacy experts and scholars are worried about how this will affect not just the future of sexual privacy, but also the future of other forms of privacy. The situation in Florida is a prime example which represents the direction the nation appears to be heading and why so many have this newfound fear. Warnings have already been expressed to those who may be affected by the decision and some states have already

taken alarming steps that go further than only the removal of abortion. The United States is currently at a crossroads. This may mark the end of court reversals or intrusions into privacy. However, it could also mark the beginning of a decrease in privacy rights that goes beyond simply the sexual realm. What happens in the near future will likely give more clarity to this question, but for now the future of privacy is unclear. Abortion has been removed from under the protection of privacy. What comes next?

JOE BIDEN’S 2022 VIOLENCE AGAINST WOMEN ACT REAUTHORIZATION: WHAT THIS COULD MEAN FOR ALASKAN INDIGENOUS WOMEN

*Taylor Carnley**

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INTRODUCTION

In March 2022, President Joe Biden reauthorized the Violence Against Women Act (VAWA), which is designed to provide grant programs and juridical resources to combat domestic violence against women. This substantive federal law intends to protect immigrant and indigenous women. However, Native women, particularly in Alaska, have struggled to receive the resources needed to fight the war on violence against women. Compared to the 2013

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reauthorization, VAWA 2022 shows a promising future for Native Alaskan women. This bill redefines formerly ambiguous terms, addresses ineffective policies, and implements pilot programs. However, serious questions remain about whether the disconnect between Native Alaskan culture and the legislation's requirements will allow the 2022 reauthorization to honorably uphold its pledges.

Comprehending VAWA's gravity and importance requires a deeper understanding of its origin and an analysis of recent reforms. Further, to effectively progress within VAWA, a dissection of the newest iteration, including new aspects and redefinitions, must be thoroughly described. Thereafter, an emphasis is placed specifically on Native Alaskan women and VAWA's exclusion of this minority group, with a specific focus on VAWA's initiation of pilot programs and how this conflicts with Native culture. To conclude, a concise list of reforms will be included concerning the next iteration of VAWA.

I. RELEVANCE OF VAWA

First, to understand why the Violence Against Women Act has gained extreme attention, constituents must know the severity of domestic violence against Native women. While the foundation of abuse created by colonization is highly relevant, the conciseness of this paper does not permit an adequate opportunity to leap so far back. Instead, I will begin with the General Allotment Act of 1887 (Dawes Act). This act stripped Native Americans of their public land and required that they obtain private property.¹

¹ Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 St. Louis U. L.J. (2017).

This act furthered the development of the Court of Indian Offenses, which undermined the capabilities of Native court systems.² Later, cases like *Oliphant v. Suquamish Indian Tribe* furthered the suggestion that the Native courts were incapable of trying non-Natives by refusing Native populations the authority to prosecute non-Natives who disobey tribal law within the tribe's land.³ This restriction on Indigenous communities allowed white men to create victims out of Indigenous women without facing appropriate consequences.

Further, the Murdered and Missing Indigenous Women Organization claims that Indigenous women experience murder ten times more than all other ethnicities.⁴ Further, more than half of Indigenous women have experienced sexual violence (56.1%) and Indigenous women are two times more likely to be raped than Anglo-American women.⁵ These statistics prove that the victimization of Native women is disproportionate compared to other ethnic and racial groups. For example, only roughly one-third of Native female victims received necessary services following a physical injury, despite reporting the incident.⁶ The Violence Against Women Act was established to combat these challenges. Enacted in 1994 by then-Senator Joe Biden, VAWA provides funding for preventative education and requires harsh criminal sanctions for domestic violence

² Id.

³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁴ "MMIW." Native Womens Wilderness, <https://www.nativewomenswilderness.org/mmiw>.

⁵ Id.

⁶ Rosay, André B., Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2016, NCJ 249736.

offenders.

Given the aforementioned legislative barriers and disheartening statistics, it is impossible for tribal sovereignty to survive. In the absence of tribal sovereignty, crime rises, specifically sexual violence-related offenses. Following the enactment of Title VII – 42 U.S.C § 2000e et seq., an attempt to protect employed minority women from discrimination, VAWA’s founders sought to mimic the structure and complete the mission of Title VII by protecting women from non-workplace violence through prevention and funding.⁷ The bill was first proposed in 1990 by former Colorado Representative Patricia Schroeder and Delaware Senator Joe Biden, serving as the icebreaker for a long-awaited conversation surrounding violence prevention and resources for minority women.⁸ However, the implications of VAWA are deeper than sexual violence, as private criminal offenses typically mirror a broader civil rights issue within a community.⁹ With growing attention to the victimization of Indigenous and immigrant women, partnered by concern for crime rate in marginalized communities, VAWA is a trailblazer in women’s rights activism. Passed in 1994 by President Clinton, VAWA took its place as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.¹⁰

⁷ Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & (and) Ignored*, 11 *Law and Inequality: A Journal of Theory and Practice* 1, 1-116 (1992)

⁸ “Legal Momentum.” *History of VAWA | Legal Momentum*, <https://www.legalmomentum.org/history-vawa>.

⁹ Brenneke, Andrea. "Civil Rights Remedies for Battered Women: Axiomatic & (and) Ignored." *Law and Inequality: A Journal of Theory and Practice*, vol. 11, no. 1, December 1992, pp. 1-116. HeinOnline.

¹⁰ Heger, David M. “The Violence Against Women Act of 1994.” *Current Federal Policy Menu*, National Violence Against Women Prevention Research Center, 7 Dec. 2000, <https://mainweb-v.musc.edu/vawprevention/policy/vawa.shtml>.

In its original iteration, VAWA included seven subsections, with contents ranging from civil rights to safe homes for abused women. Despite the original version's efforts, its subsections neglected rural communities by ignoring the lack of facilitation for resources (e.g. police enforcement, real estate for recovery homes, etc.). The initial barriers within this iteration prove the necessity to periodically reauthorize VAWA. Reauthorized in 2000, 2006, 2013, and 2022, VAWA has enacted robust policies to protect minority women but still has room to evolve.¹¹

II. WHY TRIBAL SOVEREIGNTY IS NECESSARY AND ITS POSITION IN VAWA 2013

In the 2013 reauthorization of VAWA, power was restored to Indian Country tribes to prosecute non-Native perpetrators if they have ties to Native women (husbands, partners, boyfriends) or live on Native land under Section 904.¹² However, this provision only applies to specific individuals, locations, tribes, and abuses. Proving a relationship with a Native member is tedious and deciding if an abuse is serious enough for trial is complicated. Further, Section 904 does not include sexual assault or child abuse. These jurisdictional gaps were especially severe in regions of Alaska, where there is minimal accessibility to equipped court systems. Located within the most rural parts of the state, Alaskan tribes are, by default, disconnected from the

¹¹ U.S. DEP'T OF JUSTICE OFFICE OF VIOLENCE AGAINST WOMEN, THE HISTORY OF THE VIOLENCE AGAINST WOMEN ACT 3, http://www.ncdsv.org/images/OVW_HistoryVAWA.pdf [<http://perma.cc/C2KQ-UEQJ>].

¹² VAWA § 904(b)(4)(B)(iii) (2013); Mary Hudetz, *supra* note 8. Tribal courts can still prosecute non-natives who live or are employed on tribal land for these acts of violence.

urban systems needed to facilitate fair and equal trials. When a tribe is federally recognized as sovereign, it qualifies them to be politically legitimized. In the absence of sovereignty, Indigenous groups are diminished to a cultural group with minimal protection, comparable to a sports team, union, or neighborhood.¹³

The effects of sovereignty are not exclusive to trials and litigation. Instead, sovereignty has shown success in the economic and cultural realms of tribes.¹⁴ Joseph Kalt and Joseph William Singer describe sovereignty's deeper implications as:

“... self-rule is creating more and more economic success stories in Indian Country – from the virtual elimination of tribal unemployment and the boom in non- Indian hirings in the factories and other operations of the Mississippi Choctaw, to the cutting of unemployment from 70% to 13% in six years via the non-gaming businesses of the Winnebago Tribe's (Nebraska) Ho-Chunk Inc. Gaming success itself is spurring self-sufficiency, as tribes such as Oneida (New York) and Mille Lacs (Minnesota) take the step of eschewing federal funding. And the success of self-determination is not solely economic – as when Mississippi Choctaw plows the fruits of economic development into dramatic improvements in public safety and health care delivery, Mille Lacs is able

¹³ “Importance of Sovereignty to Tribal Nations: Sosu Online.” *Southeastern Oklahoma State University*, 2 Oct. 2017, <https://online.se.edu/articles/nal/importance-sovereignty-tribal-nations.aspx>.

¹⁴ Kale, Joseph P, and Joseph William Singer. “Myths and Realities of Tribal Sovereignty - Harvard University.” *Scholar.harvard.edu*, Harvard University John F. Kennedy School of Government, Mar. 2004, https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf.

to invest in award-winning efforts to replenish Native language use, and Jicarilla Apache (New Mexico) and White Mountain Apache (New Mexico) are able to take control of wildlife and forest management with professionalism and results perhaps unmatched by any government anywhere.”

Given the multitude of positive effects, sovereignty provides more than a means to fix a judicial challenge. The right to self-govern promotes opportunity, which, in turn, promotes education, better housing, etc. within the community. Thus, while tribal sovereignty may appear as a form of political legitimacy for Native tribes, its implications are far deeper.

Section 904 was an attempt to implement tribal sovereignty, but ultimately contained language that was vague and exclusive. In hindsight, VAWA 2013 and its subparts lacked clarity in terminology and attempted to transform long-standing Native traditions into Anglo-Saxon-inspired judicial systems through its pilot programs. While these failures were detrimental to certain communities, VAWA 2013’s successor has proven to be slightly more promising.

III. VAWA 2022

In the 117th Congress 2D Session, United States Senator Dianne Feinstein introduced the reauthorization of the Violence Against Women Act of 1994 to the Committee, a bill that would eventually be enacted in March 2022. By redefining previously used words, the new authorization provides clarity. Among these terms are “abuse in later life,” “domestic violence,” “forced marriage,” “economic abuse,” “legal assistance,” “restorative practice,” “technological abuse,” and “female genital mutilation or cutting,” to name a

few.¹⁵ Redefining these ambiguous terms permits a more specified method of, not only creating awareness for victims, but also allowing space for intentional recovery methods that are situationally appropriate. To understand how including a term's definition into VAWA grants power to the phrase, examining the definition of restorative practice provisions proves this legislation's gravity. Restorative practices' new popularity can be attributed to the 2015 American Civil Liberties Union (ACLU) study: *Responses from the Field: Sexual Assault, Domestic Violence, and Policing*. In this nationwide survey, those working within the domestic violence field shared that survivors of domestic violence more often sought resources for themselves rather than punishment for their abusers.¹⁶

Additionally, survivors expressed distrust in the criminal justice system, fearing that their control would be compromised if they were to engage in legal action.¹⁷ Survivors also showed reluctance to utilize the criminal justice system from fear that its lengthy and complicated process would result in further trauma.¹⁸ When approaching the reauthorization bill, the Department of Justice shifted the legislative conversation to be survivor-centered and explored options for utilizing VAWA to provide non-carceral responses to domestic violence crimes upon the survivors'

¹⁵ Lisa Murkowski. "VAWA 2022 Reauthorization: Section-by-Section Summary." United States Senator for Alaska Lisa Murkowski, <https://www.murkowski.senate.gov/imo/media/doc/2.9.22%20VAWA%20Senate%202022%20Section%20by%20Section.pdf>.

¹⁶ American Civil Liberties Union. "October 2015 Responses from the Field - American Civil Liberties Union." https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf.

¹⁷ Id.

¹⁸ Id.

wish. Following the evaluation of the relevance of restorative practice, partisan questioning, and language review, a definition of restorative practice is finally included at the beginning of the VAWA bill. This definition reads as:

“(3) RESTORATIVE PRACTICE.— The term ‘restorative practice’ means a practice relating to a specific harm that— “(A) is community-based and unaffiliated with any civil or criminal legal process; “(B) is initiated by the victim of the harm; “(C) involves, on a voluntary basis and without any evidence of coercion or intimidation of any victim of the harm by any individual who committed the harm or anyone associated with any such individual— “(i) any individual who committed the harm; “(ii) any victim of the harm; and “(iii) the community affected by the harm through 1 or more representatives of the community; “(D) shall include and has the goal of — “(i) collectively seeking accountability from 1 or more individuals who committed the harm; “(ii) developing a written process whereby 1 or more individuals who committed the harm will take responsibility for the actions that caused harm to each victim of the harm; and “(iii) developing a written course of action plan— “(I) that is responsive to the needs of any victim of the harm; and “(II) upon which any victim, any individual who committed the harm, and the community can agree; and “(E) is conducted in a

victim services framework that protects the safety and supports the autonomy of 1 or more victims of the harm and the community.”¹⁹

The elaboration on restorative practice opens doors for domestic violence victims, especially those in marginalized minority communities or rural areas lacking consistently present law enforcement. Specifically, the Native Alaskan tribes and villages lack sufficient federally provided law enforcement services, with over 40% of villages having no full-time law enforcement and a ratio of one law enforcement officer per one million acres in rural Alaska.²⁰ The availability of restorative programs may not only help ease the burden of survivors but also reach minorities in remote places like Alaska.

IV. HOW AMBIGUOUS TERMS HARM ALASKAN NATIVE WOMEN

As mentioned, more terms needed to be clarified in VAWA 2013. Several terms were misused, leaving select tribes to see little to no impact from the bill. For example, “Indian Country” is largely misunderstood and is wildly wrong when the suggestion is made that all Native Alaskan

¹⁹ M. Leahy. “Th D Congress Session S. Ll - Judiciary.senate.gov.” [Www.judiciary.senate.gov, https://www.judiciary.senate.gov/imo/media/doc/E0B849C39D8A38B26A503509BD6824E8.vawa-reauthorization-act-of-2022.pdf](https://www.judiciary.senate.gov/imo/media/doc/E0B849C39D8A38B26A503509BD6824E8.vawa-reauthorization-act-of-2022.pdf).

²⁰ Alaska Native Women’s Resource Center. “VAWA 2022 AND ALASKA INDIAN TRIBES: NOW THAT VAWA IS REAUTHORIZED, WHAT NEXT?” 19 May 2022, <https://www.aknwr.org/wp-content/uploads/2022/06/VAWA-FactSheet-Final-Updated-May-2022.pdf>.

villages are included in “Indian Country.” To clarify, land in Alaska does not qualify as “Indian Country” (except for the Annette Islands Reserve) due to Native landholding being established through prior legislation.²¹ Thus, VAWA programs implemented in “Indian Country” following 2013 left Alaska desperate for policy change. Thankfully, Section 813 of the VAWA reauthorization (2022) establishes a pilot program for Alaskan tribes to exercise special Tribal criminal jurisdiction or the power to prosecute non-Natives within their villages.²² This pilot program empowers the Attorney General to select up to five Alaskan tribes to participate each year, emphasizing tribes with a predominantly Indian population and no permanent state law enforcement.²³ These pilot programs will grant funding to Alaskan tribes to assist in the formation of a legal infrastructure, which includes courts, police, prosecutors, and public defenders.²⁴ There are several tasks a tribe must complete to ensure that non-Natives’ constitutional rights are honored through the pilot programs’ initiatives. First, tribes must establish proper law enforcement, obtain prosecutors and attorneys, and form a court system. Further, a law-trained judge must handle cases in addition to having a formally written, public criminal

²¹ Environmental Protection Agency “Definition of Indian Country.” 14 Apr. 2022, <https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country>.

²² Murkowski, Lisa. “VAWA 2022 Reauthorization: Section-by-Section Summary.” United States Senator for Alaska Lisa Murkowski, <https://www.murkowski.senate.gov/imo/media/doc/2.9.22%20VAWA%20Senate%202022%20Section%20by%20Section.pdf>.

²³ Id.

²⁴ M. Leahy. “Th D Congress Session S. LI - Judiciary.senate.gov.” [www.judiciary.senate.gov](https://www.judiciary.senate.gov/imo/media/doc/E0B849C39D8A38B26A503509BD6824E8.vawa-reauthorization-act-of-2022.pdf), <https://www.judiciary.senate.gov/imo/media/doc/E0B849C39D8A38B26A503509BD6824E8.vawa-reauthorization-act-of-2022.pdf>.

code.²⁵ The predictions of the effects of this policy are beneficial. Policymakers assume that this will protect women and lessen the frightening statistics previously presented. However, a few barriers and questions stand in the way of wholehearted trust in these pilot programs.

V. WHY PILOT PROGRAMS IN ALASKA ARE UNREALISTIC AND OPPRESSIVE

First, the education system in Alaska conflicts with the higher education roles expected to be filled within tribes across the state. Based on state academic standards, charter schools, and other factors, Alaska was ranked forty-seventh out of fifty states and the District of Columbia.²⁶ Further, post-secondary education suffers similar numbers in Alaska, which only has a few public universities. Despite educational rights promised by the government to Alaskan Natives, enrollment in graduate-level programs (which are needed for pilot programs) has declined over time. While general undergraduate enrollment has increased, total graduate enrollment fell 10.3% among the Alaskan Native communities from 2009-2010.²⁷ Given this fact, it is unrealistic to expect that rural areas with poor secondary and post-secondary education systems could produce a trained

²⁵ Lisa Murkowski. “VAWA 2022 Reauthorization: Section-by-Section Summary.” United States Senator for Alaska Lisa Murkowski, <https://www.murkowski.senate.gov/imo/media/doc/2.9.22%20VAWA%20Senate%202022%20Section%20by%20Section.pdf>.

²⁶ American Legislative Exchange Council. “Alaska.” Report Card on American Education, 2017, <https://www.alecreportcard.org/state/ak/>.

²⁷ Bryan Mckinley Jones Brayboy, et al. *Indigenous Peoples in Higher Education*, 54, *J. Am. Indian Educ.* 154, 154-186 (2015). Jstor.org, University of Minnesota Press, 2015, <https://www.jstor.org/stable/pdf/10.5749/jamerindieduc.54.1.0154.pdf>.

and equipped judicial system within a few years.

Further, the question surrounding Native tradition and how it is incorporated into pilot programs is vital to ensure not only the safety of women but to honor the culture itself. Honoring tradition, theoretically, may make Native people more likely to aspire to these higher academic and educational goals. However, suppose the practices imposed by pilot plans do not show congruence with the morals and values of Native culture. In that case, policymakers cannot expect tribes to resort to the imperialism and marginalization that has ultimately placed Indigenous communities where they are today. Native rituals, practices, and traditions are sacred and secret, leading to a lack of reference for policymakers. Nonetheless, the lack of attentiveness to this aspect motivates citizens, specifically women, to question the intention of these programs. Is the intent to guard women in minority communities, or is it to impose a system that Washington approves?

Collectively, VAWA has made leaps and bounds for the safety of women. There is no room to discredit how this legislative piece's funding for advocacy and education among minorities has and will alter the lives of many Alaskan Native women. The diversity and inclusion within VAWA 2022 displays a step forward into a revolutionary time, one where even the most untapped communities in rural locations like Alaska are being considered. However, this does not go without questioning the future of Native culture once these practices are imposed. A conclusion surrounding what is next for American Native and Alaskan Native tradition will be determined through the reaction to this legislation and those alike. Through this bill, questions surrounding the relationship between modern Native culture and American policy arise, leading to powerful future

discussions. Nonetheless, I commend the Violence Against Women Act in its endeavors thus far, fighting the war of violence on women one day at a time.

VI. A POTENTIAL SOLUTION FOR AN AGREEMENT BETWEEN VAWA AND NATIVE CULTURE

Despite the remarkable efforts made by policymakers to protect Alaskan Native women, questions surrounding where culture fits into VAWA's pilot programs deserve to be answered. As it stands, pilot programs equipping tribes with judicial resources serve as a tradition-eraser, disregarding longstanding cultural systems. In VAWA's next iteration, there is an opportunity to revive the indigenous institutions that imperialism has diminished. This can be accomplished through fusing Native culture and American judicial requirements. This not only maintains Native culture, but may serve Alaskan tribal communities far beyond legal procedures.

So, what would an inclusive and culturally appropriate VAWA look like? To gain ground on this trek to change, reevaluations on the structural level of a variety of institutions must occur. Among these are combating the educational barriers that exist in Alaska by increasing the number of two and four-year Native-American-Serving Nontribal Institutions (NASNTIs). Following, the growth of NASNTIs could result in an increase in qualifications sought by VAWA 2022 pilot programs and facilitate a further sense of community and nurturing of tradition. Within these endeavors, Indigenous communities may receive an opportunity to revive their culture with the support of the Federal Government, rather than the oppressive

infrastructure the recent VAWA alterations seek to impose.

To advance in the endeavor of fusing culture and legality together, observing successful examples may help lay the foundation. NASNTIs serve as useful tools to Native groups across the country, with thirty-seven NASNTIs across ten states enrolling 13% of the nation's Alaskan Native and American Indian (AN/AI) students.²⁸ These institutions redefine inclusivity by prioritizing tribal relations, honoring Native leaders, elders, and families on campus, and showing attentiveness to AN/AI students and their success.²⁹ In the WICHE 2022 study *Supporting the Attainment of Native American Students in Higher Education: Approaches Taken by Five Native American-Serving Nontribal Institutions*, five NASNTIs were dissected to highlight the aspects that make them highly effective for AN/AI students. Among these factors were the prioritization of intimate relationships between institution and student, the constant education of administration and faculty concerning students' tribal affiliations, Presidential-level outreach to local tribes, and the use of data on AN/AI student success to guide institutional practices.³⁰ These methods have allowed NASNTIs to be effective in encouraging the success of AN/AI students. Promoting institutions that qualify as NASNTIs is not to discredit the thirty-two fully accredited

²⁸ Integrated Postsecondary Education Data System (IPEDS), *Fall Enrollment Survey*, 2018. WICHE calculations.

²⁹ Western Interstate Commission for Higher Education (WICHE), "Supporting the Attainment of Native American Students in Higher Education: Approaches Taken by Five Native American-Serving Nontribal Institutions." Wiche.edu, 11 July 2022,

<https://www.wiche.edu/resources/supporting-the-attainment-of-native-american-students-in-higher-education-approaches-taken-by-five-native-american-serving-nontribal-institutions/>.

³⁰ Id.

Tribal Colleges and Universities (TCUs), but rather to advocate for another more feasible method of equal education for all AN/AI students.³¹ Despite the classification of university, AN/AI students receiving a higher education serves not only their personal interests, but the interests of their communities. Exteriorly, increased education rates may appear monetarily motivated, but this is untrue for AI/AN students. Contrarily, these students strive to give back to their communities following their post-secondary education.³² Growing both NASNTIs and TCUs encourages not only accessible learning, but a replenishment of culture in younger generations.

Locations like Alaska have been deprived of the opportunity to blossom, as only one college campus in Alaska, the University of Alaska Fairbanks Bristol Bay Campus, has been granted federal funding to identify as a NASNTI institution.³³ If a federally-motivated increase in NASNTIs across the country occurred, tribe and village members would be legally recognized as better equipped to administer complex judicial systems. This harmonious agreement between English-inspired systems and Native culture would be portrayed to a new audience. A

³¹ U.S. Department of Education. "White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities." Sites.ed.gov, <https://sites.ed.gov/whiaiane/tribes-tcus/tribal-colleges-and-universities/>.

³² Ella Inglebret and Rose L. Krebill-Prather. "Views and perspectives of Native educational success: A national survey of American Indians, Alaska Natives, Native Hawaiians and others associated with Indian education." (2011).

³³ U.S. Department of Education. "White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities." Sites.ed.gov, <https://sites.ed.gov/whiaiane/tribes-tcus/tribal-colleges-and-universities/>.

representation of cooperation could serve as the first step toward a more mutual understanding between American policymakers and Native members, assisting in the creation of space for negotiating the culturally insensitive programs proposed in VAWA 2022.

After receiving post-secondary education, AN/AI college graduates can eventually fulfill the roles proposed in the pilot programs. Meanwhile, their dedication to pursuing and upholding Native tradition, encouraged by their esteemed university, can serve as a means to incorporate these aspects into judicial procedure. In theory, these students' qualifications would satisfy the need of judicial officials while remaining true to their cultural origins. While this is not the only method of forming a coalition between culture and policy, education proves to be a firm foundation on which progress is built.

One of the key components to a successful solution is an appreciation for longstanding cultural traditions. Due to exploitative prevention purposes, research on this subject does not exist. The U.S. Government must make advances in working collaboratively with tribal groups to navigate this agreement. Theoretically, this could look like court-approved systems that resemble ancient Native practices, including procedures, hierarchy, jury competition, etc. Formulating an equally appreciative plan is challenging for non-government actors due to a lack of information and regard for the sacredness of Native culture. It is in the hands of government officials to halt their colonial actions and steer toward a more equitable approach, ensuring Native American safety and justice.

VAWA has truly changed the lives of many immigrant/Native women and created a safe haven for several marginalized communities. However, this piece of

legislation lacks consideration for the diversity of its implications. Its ambiguity for various terms, exclusion of extremely untapped communities, and narrowly-considered solutions led constituents to wonder if the goal of VAWA is colonization rather than protection. Following the long-awaited 2022 reiteration, it is of utmost importance for women to criticize the legislation which disproportionately burdens them.

THE EFFECTS OF LEGAL SEVERITY ON HAZING DEATHS

*Lucas Brooks**

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INTRODUCTION

At 9:07 p.m., Tim Piazza arrived at Pennsylvania State University’s Beta Theta Pi fraternity house. Once inside, he was forced to consume at least eighteen drinks within an hour and a half as part of the hazing ritual known as “The Gauntlet.” With a blood alcohol content three times the legal limit, Piazza then fell headfirst down a flight of stairs in the fraternity house.¹ His supposed brothers then carried him up the stairs, after striking him in the abdomen, leaving him to lie on the floor. Tim Piazza laid on the floor

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¹ Samantha Verrelli, ‘*Why didn’t you call for help?*’ | *Parents of Timothy Piazza, Penn State community grapple with loss 5 years later*, THE DAILY COLLEGIAN (Feb. 6, 2022), https://www.collegian.psu.edu/news/campus/why-didn-t-you-call-for-help-parents-of-timothy-piazza-penn-state-community-grapple/article_680fc574-8562-11ec-b716-9be2589014b6.html.

for the next 12 hours before a member of the fraternity finally dialed for help at 10:48 the next morning. His spleen was shattered, his brain had swollen so much that eventually half of his skull had to be removed, and his abdomen was full of blood. Text records would later show that Piazza's erstwhile brothers seemed more concerned about the potential for a lawsuit than any chance of his survival.² He would be pronounced dead the next morning after the doctors realized that his injuries from hazing were far too grave and that medical help came hours too late.

Hazing is reckless and foolhardy, with consequences often extending far beyond a few roughed-up boys in the woods. For victims that do survive, they are traumatized. Many families, like the Piazzas, are left grieving from the repercussions of the most severe hazing incidents. In the past three decades, several states have either passed new anti-hazing laws or strengthened their existing ones. This ongoing progress is seen as a success by the coalition of advocacy organizations and victims' families that lobby for more stringent punishment. However, it is an unanswered question as to whether harsher sentencing leads to less hazing.

Determining whether increasing the severity of punishments deters hazing would have serious implications for the lives of many. The implications are not just limited to those who commit acts of hazing or their victims; the punishment of a crime extends far beyond who is sentenced. If a felony punishment does not meaningfully deter hazing any more than a misdemeanor punishment or no punishment at all, then the advocacy for strengthening such laws would be called into question.

² Caitlin Flanagan, *Death at a Penn State Fraternity*, THE ATLANTIC (Nov. 2017), <https://www.theatlantic.com/magazine/archive/2017/11/a-death-at-penn-state/540657/>.

If the best method for deterring hazing does not lie in the severity of punishment, it could be found in increasing educational requirements. These educational requirements would be for both collegiate institutions and Greek-letter organizations.³ The hope is that increased education can deter hazing before the actions progress to more serious incidents that individuals are more likely to disclose to authorities. If this analysis finds that harsher punishments do not deter hazing better than lenient ones, then the push for additional education could use this analysis as an additional argument in their favor. No one thinks of the consequences when committing a crime, but they may not go down the path that leads to hazing if they were required to learn about important warning signs. Harsher laws are not the way forward to end hazing, meaningful education is.⁴

There is a school of thought advocating for hazing laws that do not just punish the perpetrator, but also the sponsoring institution or organization. Such a mechanism would encourage the institutions and organizations to be more stringent with the behavior of their members and encourage the adoption of educational training on a state's hazing laws. An educational component, both for institutions and for organizations, is important to communicate the punishment for hazing to the population, rather than just putting the law on the books.⁵

Before discussing the key theories surrounding

³ Gregory Scott Parks, Shayne E. Jones & Matthew W. Hughey, *Hazing as Crime: An Empirical Analysis of Criminological Antecedents*, 39 LAW & PSYCH. REV. 1 (2015).

⁴ Michael L. Radelet & Traci L. Lacoek, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99 J. OF CRIM. L. AND CRIMINOLOGY 489 (2009).

⁵ Justin J. Swofford, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, 45 J. OF COLL. & UNIV. L. 296 (2020).

hazing legislation in depth, it is important for this article to define hazing and provide some background on the subject. While many advocacy organizations and states craft their own definitions, most share several key characteristics which will form the basis of the definition used in this analysis.

A. Definition of Hazing

Hazing as a rite of passage and initiation into an organization has been practiced as long as organizations have existed. In 387 B.C., Plato's Academy had trouble with hazing amongst its youngest students and Plato wrote criticisms of their actions. The earliest recorded hazing death in the United States dates back to 1838 when a young man at a Kentucky seminary died due to hazing from his classmates.⁶ As such, the definition of hazing and its associated punishments have varied throughout history. In the United States, hazing itself rarely had a legal consequence until the latter half of the 20th century. Prior to 1978, only three states had laws against hazing and associated punishments.⁷

An open secret in collegiate Greek-letter organizations is that many chapters engage in hazing. This is true regardless of the victim's race, gender, economic status, or academic status. However, acts of hazing and even deaths from hazing are not limited to fraternities and sororities. Hazing incidents have occurred in high school marching bands, military units, and office workplaces.⁸

⁶ HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* (1990).

⁷ Ben Gose, *Efforts To End Fraternity Hazing Have Largely Failed*, *Critics Charge*, 43 *CHRON. HIGHER EDUC.* 37 (1997).

⁸ Hank Nuwer, *U.S. Hazing Deaths Database Part 2: 2000-2023*, HANK NUWER UNOFFICIAL HAZING CLEARINGHOUSE (2022), <https://www.hanknuwer.com/hazing-destroying-young-lives/>.

Creating a concise definition of hazing has been a legal struggle. Legislators are loath to make the statute overly broad and accidentally include injuries that might result from regular physical competition, such as spraining an ankle in a basketball game. Anti-hazing advocates, however, do not want the law to be so limited as to only apply in very precise cases. In most states, the laws concerning hazing resemble the following language:

intentionally, knowingly, or recklessly engaging in or participating in acts, which endanger another for the purpose of initiation into, admission into, affiliation with, holding office in, or as a condition for membership in a school or school-sponsored team, organization, program, club, or event.⁹

This definition provides coverage for a wide range of potential activities while remaining within what a layperson might call the common bounds of hazing. It also provides coverage for mental health struggles as a result of hazing. Some states, such as Pennsylvania, forbade the use of consent, an action that was not hazing because the victim consented to it happening, as a legal defense.¹⁰ In addition, some have advocated for legal definitions to not be limited to covering school-related activities.¹¹ This is in recognition of the incidents of hazing within the military and other workplace environments.

Tylock's general definition is imperfect, both for the collected dataset used in this study and for broad applicability

⁹ Angela Tylock, *A 50-State Summary of Hazing Laws* (April 21, 2021) SUNY: STUDENT CONDUCT INST. <https://system.suny.edu/sci/news/4-21-21-hazing/index.html>.

¹⁰ Swofford, *supra* note 5.

¹¹ Justin M. Burns, *Covering up an Infection with a Bandage: A Call to Action to Address Flaws in Ohio's Anti-Hazing Legislation*, 48 AKRON L. REV. 91 (2015).

in hazing laws. StopHazing, an advocacy organization focused on researching violence prevention, uses the broader language of “any activity expected of someone joining or participating in a group that humiliates, degrades, abuses, or endangers them, regardless of a person’s willingness to participate.”¹² This definition, while inclusive of every entry in this study’s dataset, lacks the legal sophistication of Tylock’s definition. Unfortunately, Tylock’s definition does not preclude the consent defense and fails to recognize non-school-related hazing, but in other aspects is a suitable definition for the purposes of this paper. As such, a blend of StopHazing’s inclusive definition and Tylock’s legal one is best suited for the purposes of this study. Hazing shall be defined as intentionally, knowingly, or recklessly engaging in or participating in acts which endanger another for the purpose of initiation into, admission into, affiliation with, holding office in, or as a condition for membership in a group, regardless of a person’s willingness to participate. As is common with hazing definitions, the above should not be taken to include athletic injuries sustained during regular practice activities or regular competition.

I. KEY LITERATURE & THEORIES

As far as hazing legislation goes, there are three main schools of thought. The first, mostly espoused by advocacy groups and victims’ families, is that more stringent laws and punishments are necessary to deter future hazing incidents. The second is that hazing laws should include educational and reporting requirements for institutions and organizations. The third is that hazing laws should punish not only the

¹² StopHazing Research Lab, *Hazing: The Issue*, STOPHAZING CONSULTING (2020), <https://stophazing.org/issue/>.

individual perpetrator but also penalize the sponsoring institution or organization. These three schools of thought are not exclusive to one another. It is quite common to hear an advocate arguing for increased sanctions on individual perpetrators of hazing and requiring institutional officials to be trained in hazing prevention. All anti-hazing advocates agree that any kind of hazing legislation is going to be better than nothing at all. Legal statutes concerning hazing can provide clarity to institutions investigating allegations or drafting their own policies.¹³

Several anti-hazing advocates have discussed the gaps that exist in current legislation. Depending on the state, consent to hazing may be a viable legal defense; hazing could only be limited to school organizations, or resulting mental health issues may not be classified as being related to hazing.¹⁴ As it stands, several states' laws could be strengthened to meet the standards of their peers. This strengthening can come in a variety of ways. One method would be to adopt the assumption of care philosophy within hazing laws. If an individual was unable to care for themselves, then the duty of care for that individual would transfer to the group of individuals that they are with. For example, if a fraternity pledge was to drink too much alcohol and become unconscious, then the fraternity brothers with him would assume the responsibility to care for him.¹⁵ Another method relies on legislation committing prosecutors

¹³ Karrie Gurbacki, *Hazed and Confused: The Rohm Incident and the Necessity of Hazing Legislation*, 4 BERKELEY J. ENT. AND SPORTS L. 1 (2015).

¹⁴ Tylock, *supra* note 9.

¹⁵ Brandon W. Chamberlin, "Am I My Brother's Keeper?": *Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L. J. 925 (2014).

to seek harsh penalties for those charged with hazing.¹⁶ One method has argued that hazing should be treated similarly to hate crimes, in that hazing, while also committing a crime, enhances the punishment for the crime.¹⁷ There are many avenues for strengthening laws to punish perpetrators of hazing, but some would argue that harsher punishments are not the answer to curbing incidents of hazing.

Because many hazing behaviors and incidents are steeped in organization traditions, new members of organizations may be unaware that some behaviors break their institution's or state's policy in regard to hazing. Of course, some behaviors are common sense in their illegality – supplying alcohol to minors and forcing them to drink in excess is clearly illegal and immoral. However, since most hazing incidents occur in collegiate organizations with complete turnover in three to four years, it stands to reason that hazing can occur because perpetrators are not aware that their actions constitute hazing.¹⁸ Here lies the argument in favor of requiring hazing prevention education for at-risk institutions and organizations. A survey of over 1,357 members of Black Greek-letter organizations found that a “greater knowledge of rules and laws against hazing led to less hazing behavior.”¹⁹ Because of this, many advocates have argued in favor of a training requirement concerning hazing prevention for both educational institutions and any student organizations that they host. There have been increasing calls for stronger reporting requirements to be placed on institutions so that the societal problem of hazing

¹⁶ Gose, *supra* note 7.

¹⁷ Burns, *supra* note 11.

¹⁸ Gose, *supra* note 7.

¹⁹ Parks et al., *supra* note 3, at 49.

is more completely understood.²⁰

Beyond just requiring reporting and educational training from institutions and organizations, some argue that institutions and organizations where hazing occurs deserve criminal penalties as much as the individual perpetrator. Justin Swofford conceptualizes a “Hazing Triangle” for anti-hazing statutes; the triangle refers to criminal penalties and fines for individual perpetrators, liable organizations, and host institutions.²¹ Swofford argues that anti-hazing statutes need to include punishments for fraternities found guilty of “organizational hazing,” which is essentially fostering a culture of hazing in the organization or directly engaging in hazing behaviors as part of required rituals. For host institutions, he describes criminal fines for failing to report and investigate hazing allegations or failing to suspend organizations that are “found criminally liable for any hazing offense.”²² While these arguments are certainly not the norm among most anti-hazing advocates, they would push organizations and institutions to better police the behavior of their members and students

The previously mentioned theories assume that their course of action will have a deterrent effect on the number of hazing incidents and deaths. However, I would exercise caution when assuming that increased punishment directly leads to decreased incidents. For one, prosecutors must be willing to seek these harsher penalties, which is not always the case. Pennsylvania passed The Timothy J. Piazza

²⁰ Nathan L. Essex, *Hazing in Public Schools: A Liability Challenge for School Leaders*, 87 CLEARING HOUSE 236 (2014); Cristobal Salinas Jr., Michelle Boettcher & Jennifer Plagman-Galvin, *A Document Analysis of Anti-Hazing Policy*, 13 ORACLE: THE RSC. J. OF THE ASS’N OF FRATERNITY/SORORITY ADVISORS 32 (2018).

²¹ Swofford, *supra* note 5, at 314.

²² *Id.* at 327.

Antihazing Law which strengthened hazing to a felony offense. However, many local prosecutors felt the law did not give them enough discretion when handling minor incidents, and as such, rarely pursued hazing charges.²³ There is some concern that increasing the punishment for hazing will just drive the activity further underground. Instead of decreasing incidents, stronger laws could decrease reporting rates for an already under-reported crime.²⁴ Research into capital punishment, although not a one-to-one comparison with hazing crimes, has found that increased punishment does not deter capital crimes.²⁵

II. METHODS

The dataset used in this study is a record of each hazing death in the United States from 1978 through August 2022.²⁶ These records are updated by Hank Nuwer, an author and anti-hazing advocate. Nuwer's clearinghouse is often cited in academic research on hazing, in part due to the lack of a federal database for hazing deaths.²⁷ Although it is not a government database, Nuwer's research into hazing deaths is widely cited and reputable, especially for the latter decades of the twentieth century through present day.

Hazing deaths in Nuwer's clearinghouse are recorded in raw numbers by year and state. Since population varies by

²³ *Id.*

²⁴ Chamberlin, *supra* note 15.

²⁵ Lucas Brooks, *Furman v. Georgia at Fifty: How the Modern Imposition of Capital Punishment Fails to Satisfy the Court's Concurrences*, 5 CAPSTONE J. OF L. & PUB. POL'Y 69 (2022).

²⁶ Nuwer, *supra* note 8.

²⁷ Elizabeth J. Allan & Mary Madden, *The Nature and Extent of College Student Hazing*, in BULLYING: A PUBLIC HEALTH CONCERN. 103 (Jorge C. Srabstein & Joav Merrick eds., 2013); Burns, *supra* note 9; Salinas Jr. et al., *supra* note 18.

both time and location, hazing deaths for this study will be rendered per one million residents. This is to control population variation in the data sample. It would be improper to analyze these deaths and their associated policies without a control for population. Otherwise, the largest states by population would naturally see more hazing deaths regardless of their legal punishment. The population measurement is taken from the U.S. Census Bureau for each census from 1970 through 2020.

In terms of other control measures, this study uses both violent crimes per million and the number of higher education institutions per state. The violent crime rate by state metric is used because crime rates are not static throughout time and, to exclude any variation in violent crime leading to variation in the number of hazing deaths, this variable is controlled for in the analysis. Any act of hazing that results in death would clearly fall under the definition of violent crime. The rate per state is taken from the Federal Bureau of Investigation's Crime Data Explorer tool.²⁸

As for the number of higher education institutions per state, the original intention was to use the percentage of population enrolled at a higher education institution. The idea here is that although not all acts of hazing occur in colleges and universities, it is probable that the majority of hazing incidents do occur at this level. The vast majority of hazing deaths do happen in the collegiate setting, so it is fair to attempt to control out the variation between states in how many people attend higher education institutions.

²⁸ *Trend of Violent Crime from 1975 to 2021*, CRIME DATA EXPLORER (2022), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>.

Unfortunately, the population percentage for each state for each year is difficult to find. As such, this analysis uses the number of higher education institutions per state as a proxy variable.²⁹ Although not exact, states with more institutions of higher education should have a higher percentage of their populations enrolled at any one time.

Many states punish hazing only as a misdemeanor, but not all of them. A sliding scale of severity is common in some criminal statutes, including some anti-hazing laws from around the country. This analysis will classify states as punishing hazing as a felony if, at the very least, it is a felony to cause serious harm or death to a victim while hazing. This classification is based on the State University of New York's Student Conduct Institute and their work to collect each state's laws regarding hazing in one place.³⁰ If a state allows for prosecutorial discretion in whether the punishment pursued is a misdemeanor or a felony, the state's law will be categorized as a misdemeanor. The logic here is that, although states are loath to recognize all acts of hazing as felonies, they should be commended for punishing the most serious cases of hazing with severity.

The analysis performed for this study is two multiple linear regressions. The independent variable in the first regression is whether a state has a felony hazing law for severe cases. For the second, the independent variable changes to the existence of a misdemeanor law. The rest of the variables are consistent between the two regressions. The control variables are the number of higher education

²⁹ *Number of higher education institutions in the United States in the academic year of 2020/21, by state*, U.S. DEPARTMENT OF EDUCATION (2022), <https://www.statista.com/statistics/306880/us-higher-education-institutions-by-state/>.

³⁰ STUDENT CONDUCT INSTITUTE, *50 State Hazing Law Chart*, (2022).

institutions by state, and the violent crime rate per million by state and by year. The dependent variable is the number of hazing deaths per million. Two regressions were run to eliminate the possibility that misdemeanor laws have some effect on hazing deaths that felony laws do not, or vice versa. Such a contradiction is unlikely when reviewing the literature surrounding hazing laws, but there is no harm in confirming that belief.

III. ANALYSIS

Based on the above theories of action and reservations, there is one null hypothesis and one alternative hypothesis that can be applied to this study. The null hypothesis, which is true if the study has no statistical significance, is that stronger anti-hazing laws will not decrease hazing deaths, expressed as $H_0 =$ Stricter anti-hazing laws have a negligible effect on the number of hazing deaths. The alternative hypothesis, which requires some degree of statistical significance, is that stronger anti-hazing laws lead to fewer hazing deaths, expressed as $H_A =$ Stricter anti-hazing laws do reduce the number of hazing deaths. Based on the theories in key literature for the topic, this alternative hypothesis could be explained by two lines of reasoning. The first is that stricter laws result in harsher punishments which in turn dissuade any potential perpetrators. The second is that stricter laws typically mean increased penalties for institutions and organizations as well, which encourages stricter monitoring and increased educational efforts.

The multiple linear regression for felony hazing laws failed to reject the null hypothesis. This means that, based on this dataset, stronger anti-hazing laws do not decrease hazing deaths. Its p-value was 0.0502, which is close to the alpha

value of 0.05. However, the p-value is still higher than alpha. The p-value, or probability value, is a measure of significance to see if there is any correlation between the two factors, in this case being harsher hazing laws leading to fewer hazing deaths. The p-value is compared to a set alpha value, as a measuring stick. If the p-value is greater than alpha, which it is in this case, then the null hypothesis of no meaningful relationship must be true.

Both control variables for the multiple linear regression for felony hazing laws do have an effect while the study variable of hazing law severity does not. For each additional higher education institution in a state, the number of hazing deaths per million decreases by 0.00124, all else being equal. This has a p-value of 8.64E-11, far below the set alpha value meaning that there is a statistically significant relationship. The same is true for the violent crime rate variable, which has a p-value of 0.012 and a hazing deaths per million decrease of 0.000024 for every unit increase in the violent crime rate per million, all else being equal. Neither of these results with the control variables makes logical sense, which is an unfortunate reality with some statistical noise. The model overall has an R^2 value of 0.34 and an adjusted R^2 value of 0.32. This means that there is some statistical validity and significance to the model and its findings relating to hazing laws.

The multiple linear regression for misdemeanor hazing laws also failed to reject the null hypothesis. The meaning of the relevant statistical terms is unchanged, and neither is the major takeaway from this model: harsher punishment does not mean fewer deaths. Its p-value was 0.646, which is nowhere close to the alpha value. Again, both control variables do have an impact on the results. The p-value for institutions of higher education is 1.15806E-09

while the p-value for the violent crime rate per million is 0.0258. The coefficient for the number of higher education institutions is similar at -0.0012, while the coefficient for the violent crime rate per million is also similar to the other model at -0.000022. The R² value for the misdemeanor model is 0.32 while the adjusted R² value is 0.304.

Ultimately, increased severity is not the answer. Those who wish to end the practice of hazing will need to find a better solution than using harsher punishments as a deterrent.

IV. DISCUSSION

It is unclear why both control variables seem to have the opposite effect on hazing deaths than expected. Potential reasons for why there is an increase in hazing deaths per million with fewer institutions of higher education could be that this is not a perfect proxy variable. A state may have a multitude of small liberal arts colleges that enroll fewer students combined than one large flagship university. As for why the violent crime rate per million increases while the number of hazing deaths per million decreases, the explanation is less defined. It is incorrect to correlate hazing deaths with violent crime as many acts of hazing are non-physical and would not fit the definition of violent crime. In addition, the victims of violent crime are unknown to the perpetrators roughly 38% of the time, while hazing, by definition, requires the perpetrator to have some familiarity with the victim as they are both associated with a social group.³¹

³¹ ERIKA HARRELL VIOLENT VICTIMIZATION COMMITTED BY STRANGERS 1993-2010 (2012).

Based on either model, it is clear that increasing the legal severity in terms of punishment for hazing laws does not decrease the number of hazing deaths. The null hypothesis of this study is not rejected, which falls in line with the governing theory regarding strengthening legal severity: there is no deterrent effect. What this means for the anti-hazing advocacy movement is that the focus should be squarely on increasing educational requirements rather than increasing punishment after the fact. As the Parks survey of Black Greek-letter organizations found, education decreases hazing behavior.³² Logically, less hazing behavior means fewer hazing deaths. In addition, some consideration must be given to the fact that many hazing laws are enacted in the wake of a hazing death. If a felony hazing law is enacted and it prevents any future hazing deaths, then those results would not appear in either regression.

Seeking to use educational programs as a preventative measure for hazing is not a new concept. There are several program examples and case studies that collegiate institutions and Greek-letter organizations can draw upon when implementing their own prevention initiatives. Organizations like StopHazing have published several research-based toolkits and guides for college administrators to implement into or improve their prevention and education programs.³³

This preventive education must go beyond simply saying that hazing is not tolerated. A national survey of thousands of college students found that such an approach

³² Parks et al., *supra* note 3.

³³ StopHazing Research Lab, *Research-to-practice Insights in Response to a New Anti-hazing Law in Ohio*, STOPHAZING CONSULTING (2021), <https://stophazing.org/2021/10/07/research-to-practice-insights-in-response-to-a-new-anti-hazing-law-in-ohio/>.

constituted their entire education regarding hazing; clearly, such a method is ineffective.³⁴ Educational programs should be broad in reach as hazing exists beyond the bounds of Greek-letter organizations. Educating not only students but staff, administrators, faculty, family members, and alumni to recognize the signs of hazing increases reporting and intervention rates.³⁵ For specific remedies, Montgomery College in Maryland has staff monitor social media channels to intervene in any concerning behavior before it advances too far.³⁶ The Clery Center encourages institutions to promote activities geared toward creating group cohesion, the ostensible goal of hazing, without the violence and isolation common to hazing practices.³⁷

One of the larger struggles with studying hazing behavior and incidents of hazing is that less serious incidents go unreported and undetected in the vast majority of cases. Direct physical violence is easy to recognize from a bystander's perspective, but its frequency is low. However, acts of hazing that occur most frequently, such as deception and social isolation, are rarely reported, either to the hosting institution or to a police department.³⁸ Because of this low reporting rate, hosting institutions and advocacy organizations must develop new strategies and avenues for

³⁴ ELIZABETH J. ALLAN & MARY MADDEN, *Hazing in View: College Students at Risk*, (2008), at 31, http://www.stophazing.org/wp-content/uploads/2014/06/hazing_in_view_web1.pdf.

³⁵ *Id.* at 37-38.

³⁶ Reginald Stuart, *Anti-hazing Programs Focusing on Younger Students*, DIVERSE: ISSUES IN HIGHER EDUCATION, Dec. 2016, <https://www.diverseeducation.com/students/article/15099579/anti-hazing-programs-focusing-on-younger-students>.

³⁷ Melissa Lucchesi, *How to Prevent Hazing*, CAMPUS SAFETY, Sep. 2011, <https://www.campusafetymagazine.com/university/how-to-prevent-hazing/>.

³⁸ Allan & Madden, *supra* note 27.

victims and witnesses to report incidents of hazing. Until reporting rates rise for the less visible forms of hazing, it will be difficult to truly ascertain the effectiveness of policies meant to curb hazing. Investigating what increases reporting rates for other social-based crimes and molding those lessons to fit reporting for hazing is a valid avenue of new research that could benefit every member of a social organization.

CONCLUSION

Although further research is needed to better refine this model, the end result is clear, stricter punishments do not result in decreased deaths. Imprisoning someone for years if they cause a death by hazing, while perhaps the correct action in terms of seeking justice, is not the best method for preventing future tragedies. To do so, institutions and organizations must be more serious about addressing issues of hazing within their ranks. They must commit to educating every member and monitoring for concerning behavior. Education about hazing means more than online training modules that do little to ensure actual knowledge is imparted. From 1978 to 2021, 170 people died from hazing in the United States. The only way to end these senseless tragedies is for institutions and organizations to commit to eradicating these dangerous acts

**THE PERVERSIVE AND INSIDIOUS RISE OF MONEY
IN POLITICS: WITH SOLUTIONS TO STOP THIS
EROSION OF AMERICAN DEMOCRACY**

*Michael Regnier**

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INTRODUCTION

Former Senator Mark Hanna (R-OH) once said, “There are two things that are important in politics. The first is money, and I can’t remember what the second one is.” While he said this quote in 1895, it is even more relevant today. In every stage of the political arena, there has been a marked increase in money threatening to erode the very core of our democracy, taking power away from the citizens and handing it to those with wealth and connections. Until we change the incentives our politicians face, and dramatically reduce the sway of private money, no substantive action will be taken on other pressing issues facing the country. This

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article will focus on three areas of reform: campaign financing, lobbying, and the revolving door. Achievable, common-sense solutions will be presented that, if enacted, can halt this insidious rise of money that pervades our political system.

I. ON THE ROAD TO OFFICE: CAMPAIGN FINANCING

A. *Caselaw Background*

A week out from the United States' midterm elections this past November, an ignominious record was set as billionaire campaign contributions topped 880 million dollars and were projected to break the billion-dollar threshold by election day.¹ During this cycle, billionaire contributions made up 15% of all donations to federal campaigns, increasing from 3% prior to the *Citizens United v. FEC* decision in 2010.² The *Citizens United* decision is one of the most significant and consequential decisions in the history of the Court, not only because of the immediate legal repercussions, but also because of the precedent it set for the United States seeing exponential increases of private money in elections.

Decided in 2010, *Citizens United v. FEC* struck down a portion of the Bipartisan Campaign Reform Act

¹ Robert Frank, *American billionaires spent a record \$880 million on the U.S. midterm elections*, CNBC (Nov. 3, 2022), <https://www.cnbc.com/2022/11/03/american-billionaires-spent-a-record-880-million-on-the-us-midterm-elections-.html>.

² John McCrank, *Factbox: How Wall St and billionaires have donated to U.S. elections*, REUTERS (Nov. 8, 2022), <https://www.reuters.com/world/us/how-wall-st-billionaires-have-donated-us-elections-2022-11-08/>.

championed by John McCain and Diane Feingold.³ The opinion also overruled the previous Supreme Court decision of *Austin v. Michigan Chamber of Commerce* (1990) as well as portions of *McConnell v. FEC* (2003).⁴ *Citizens United v. FEC* was a 5-4 decision by the Roberts Court. The majority opinion, written by Justice Kennedy, argued that a corporation's speech, in this case their independent expenditures, is protected by the First Amendment.⁵ The minority opinion, written by Justice Stevens, argued that corporations are not members of society and can be influenced to act in certain ways by foreign powers.⁶ Additionally, the dissent stated that there is a compelling governmental interest to restrict corporations' ability to spend on local and national elections as their interests may conflict with those of citizens.⁷ Justice Stevens and the dissent predicted the rise of money infiltrating politics with this ominous quote, "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."⁸

The portion of the Bipartisan Campaign Reform Act struck down in the *Citizens United v. FEC* Supreme Court ruling was the provision on limiting corporations' independent expenditures.⁹ Independent expenditures are expenditures, or money spent, for a communication expressly advocating for the election or defeat of a clearly identified political candidate. The communication, however, cannot be made in coordination with a candidate or their

³ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

political party.¹⁰ *Citizens United v. FEC* was not the only Supreme Court ruling that drastically increased monetary influence in elections. Rulings prior to *Citizens United v. FEC*, including *Buckley v. Valeo* in 1976 and *FEC v. Wisconsin Right to Life* in 2007 also contributed to the weakening of campaign finance laws. *Buckley v. Valeo* was one of the first decisions to chip away at campaign finance regulations as the Supreme Court ruled that limitations on campaign expenditures, expenditures from the candidate's personal money, and independent expenditures from groups supporting the campaign violated the first amendment.¹¹ The key difference between *Buckley v. Valeo* and the *Citizens United* decision is that the unconstitutionality of restrictions on the independent expenditures of supporting groups was now extended to corporations post *Citizens United v. FEC*. In *FEC v. Wisconsin Right to Life*, the Supreme Court further weakened the restrictions on corporate speech before the *Citizens United* decision would sever them, ruling that corporations could not be restricted from paying for electioneering communications— in this case “issue ads” on television.¹² Prior to the *Citizens United* decision, regulations had been weakened enough that the United States was primed for a rapid increase of money in elections; the *Citizens United* decision simply lit the fuse on this ticking time bomb.

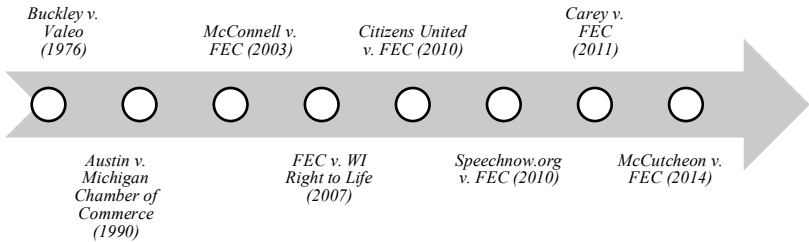
Ultimately, the court made the wrong decision in *Citizens United v. FEC*. In ruling that independent political spending by corporations and other groups is protected by the First Amendment, the court not only redefined political

¹⁰ *Understanding Independent Expenditures*, FEC (Jan. 4 2022), <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/understanding-independent-expenditures/>.

¹¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹² *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

speech but erased long-standing precedent. The repercussions of their decision have been both significant and extensive even in the short thirteen years since the ruling was made.



B. Impacts on Campaign Finance

The immediate legal repercussions of the *Citizens United* decision were subsequent decisions in *Speechnow.org v. FEC*, *Carey v. FEC*, and *McCutcheon v. FEC*. In *Speechnow.org v. FEC*, the United States Court of Appeals for the District of Columbia ruled in 2010 that, based on the precedent in *Citizens United v. FEC*, limits on what SpeechNOW could receive and what individuals could donate to them were unconstitutional.¹³ This led to the explosion of Super PACs, which are groups that make independent expenditures in federal races.¹⁴ The decision in *Carey v. FEC* allowed for the creation of hybrid PACs which can contribute limited amounts of money directly to political campaigns and parties while also being able to spend

¹³ *Speechnow.org v. FEC*, 599 F.3d 686, 389 U.S. App. D.C. 424 (2010).

¹⁴ *Registering as a Super PAC*, FEC (Jan. 4 2022), <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/>.

unlimited amounts on independent expenditures.¹⁵

McCutcheon v. FEC further weakened the Bipartisan Campaign Reform Act in 2014 when the Supreme Court ruled to remove an individual's aggregate limit on campaign contributions in an election cycle. This meant that while there is still a limit on the amount of money an individual can give to one committee, there is now no limit on the amount they can contribute in total to PACs and other committees.¹⁶ A direct consequence of this ruling is the outsized importance of wealthy donors. Since this decision, the ten most wealthy donors and their spouses have spent over 1.2 billion dollars on federal elections, making up 7% of all election donations in 2018.¹⁷ Previously, their influence hovered around 1% of all donations.¹⁸

Since the *Citizens United v. FEC* ruling was made, outside money has flooded into elections. In the last decade, spending on elections from non-party 'independent' groups has drastically increased to approximately 4.5 billion dollars. Twenty years prior to the decision, this same spending only totaled 750 million dollars.¹⁹ Candidates have been outspent by outside groups in 126 races post *Citizens United v. FEC*, whereas this only happened fifteen times in the five election cycles before the decision.²⁰

The *Citizens United* decision also led to a dramatic increase of dark money in politics. Dark money groups are

¹⁵ *Carey v. FEC*, 864 F.2d 57 (Sup. U.S. Dist. 2012).

¹⁶ *McCutcheon v. FEC*, 572 U.S. 185 (2014).

¹⁷ Karl Evers-Hillstrom et al., *More money, less transparency: A decade under Citizens United*, OPEN SECRETS (Jan. 4 2022) <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#dark-money>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

nonprofit organizations that do not have to disclose their donors.²¹ The influence of these groups has greatly increased as their spending totaled 963 million dollars in the last decade, as opposed to 129 million dollars in the decade prior to the Citizens United decision.²² Additionally, many of the largest dark money donors are large corporations, which in turn sometimes receive money from foreign companies.²³

C. Potential Solutions: Public Funding

Now, one may ask, why does money matter so much in politics? Historically, the candidate who spends the most money, or nowadays *has* the most money spent by outside groups supporting them, wins.²⁴ For example, the top spending candidate won 94.9% of the time in the House of Representatives and 90% of the time in the Senate during the 2022 midterms, a trend that has been consistent since 2000.²⁵ One could argue that money matters more than any other factor in determining the outcome of a given election.

Solutions to this situation are hard to come by. However, one potential solution may be found in public campaign financing.

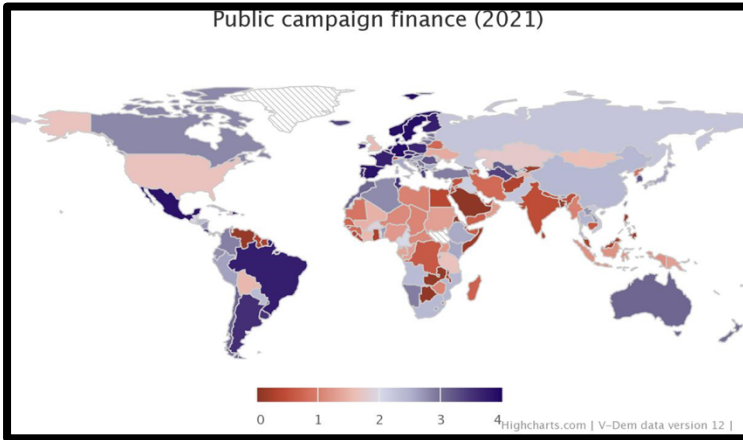
²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Did Money Win?*, OPEN SECRETS (Jan. 4 2022) <https://www.opensecrets.org/elections-overview/winning-vs-spending?cycle=2020>.

²⁵ *Id.*



Higher scores, and therefore a darker shade of blue, indicate that public campaign financing funds a larger share of parties' campaigns. Within public campaign financing, the United States is a clear outlier compared to all other democracies. Look no further than Europe, wherein on the graph most countries are a dark blue. The United States is shaded red which means that there is little to no public funding and that it does not play a significant role in election financing.

This lack of public funding and emphasis on private funding, is concerning as it means those with more money, for example, the billionaires and corporations referenced above, have greater influence on elections. Countries where public campaign financing is prevalent have had positive effects in the political process. Public financing in Brazil, in conjunction with spending limits, has led to less wealthy candidates and more political competition.²⁶ In Europe, public funding has restricted private influence over parties,

²⁶ Eric Avis, et al., *Money and Politics: The Effects of Campaign Spending Limits on Political Entry and Competition*, 14 AM. ECON. J. 167, 172-75 (2022).

allowing for the general public to have more power, bringing about more transparency in parties' monetary management, and allowing for some external monitoring groups.^{27,28} In the United States, some have taken note of these benefits and have pioneered public funding initiatives. The Clean Elections Program in Arizona and Maine and the Democracy Voucher Program in Seattle have increased competition and reduced incumbent success, all without attracting low-quality candidates.^{29,30}

In 2015, Seattle launched their Democracy Voucher Program, comparable to Andrew Yang's Democracy Dollars plan he touted in his 2020 run for President. Yang sought to use Democracy Dollars to 'wash out' corporate money by providing citizens with \$100 to spend towards their candidate of choice each year.³¹ In Seattle, for candidates to be eligible to receive Democracy Vouchers from citizens, they had to abide by specific spending limits.³² Critics, however, argued that this only increased outside spending and increased the

²⁷ DANIELA R. PICCIO, THE STATE OF POLITICAL FINANCE REGULATIONS IN WESTERN EUROPE 10 (2016), <https://www.idea.int/sites/default/files/publications/the-state-of-political-finance-regulations-in-western-europe.pdf>.

²⁸ Ingrid Van Biezen, *State Intervention in Party Politics: The Public Funding and Regulation of Political Parties*, 16 EUROPEAN REV. 337 (2008).

²⁹ Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POL. & POL'Y Q. 263 (2008).

³⁰ Alan Griffith & Thomas Noonan, *The Effects of Public Campaign Funding: Evidence from Seattle's Democracy Voucher Program*, 211 J. PUB. ECON. (2022).

³¹ Nikoel Hytrek, *Andrew Yang's Democracy Dollars Plan Aims to Empower Voters*, IOWA STARTING LINE (Nov. 25 2019), <https://iowastartingline.com/2019/11/25/andrew-yangs-democracy-dollars-plan-aims-to-empower-voters/>.

³² *Democracy Voucher Program*, SEATTLE <https://www.seattle.gov/democracvoucher/about-the-program>.

influence of PACs as the candidates had to abide by the spending limits while there were no such limitations on outside groups.³³ However, if implemented on a national level and scaled for the voting population of the United States, currently around 240 million people, a Democracy Dollars based plan would allot 24 billion dollars per election cycle, more than enough to drown out the dark and corporate spending.³⁴ Even if it is assumed only people who turned out to vote would care enough to donate their \$100, based on the 2020 election cycle turnout, that would still result in over 15 billion in spending, still enough to exceed corporate and dark money spending.³⁵ If enacted for federal elections, the benefits would exceed the minor costs to the taxpayers. In fact, Congress already has over 400 million dollars sitting unused in an account specifically for Presidential candidates.³⁶ Currently, no candidates want to claim the money because of the restrictions on spending and financing

³³ Danny Westneat, *Democracy Vouchers are Supposed to be an Answer, but Big Money is Swamping Seattle's Elections*, THE SEATTLE TIMES INSIDER (Sep. 25, 2019, 4:40 PM) <https://www.seattletimes.com/seattle-news/politics/wait-theyre-saying-seattles-a-model-of-democracy-big-money-pacs-are-swamping-our-elections-like-never-before/>.

³⁴ Jacob Fabina & Zachary Scherer, *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Jan. 2022) <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf>.

³⁵ *Census Bureau Releases 2020 Presidential Election Voting Report*, U.S. CENSUS BUREAU (Feb. 17, 2022) [https://www.census.gov/newsroom/press-releases/2022/2020-presidential-election-voting-report.html#:~:text=More%20voters%20\(154.6%20million\)%20turned,CPS%20voting%20supplement%20in%201964.](https://www.census.gov/newsroom/press-releases/2022/2020-presidential-election-voting-report.html#:~:text=More%20voters%20(154.6%20million)%20turned,CPS%20voting%20supplement%20in%201964.)

³⁶ Dave Levinthal, *How More Than \$404 Million in Taxpayer Money Got Locked Away in a Forgotten Government Fund — and Lawmakers Won't Spend it or Return it*, INSIDER (Dec. 20, 2022, 4:25 PM) [https://www.businessinsider.com/400-million-in-forgotten-government-account-presidential-election-campaign-fund-2021-7.](https://www.businessinsider.com/400-million-in-forgotten-government-account-presidential-election-campaign-fund-2021-7)

they would face if they accepted that money.³⁷ However, if this account were to be repurposed for a Democracy Dollars based program, it would provide a jumpstart in funding and prove that the system has precedent.

Beginning in the 2000 election cycle, Arizona and Maine instituted the Clean Elections Program.³⁸ The Program has two parts and participation is optional. If the candidate chooses to participate, they must first receive a predetermined amount of unique, individual donations worth five dollars or more, the amount of which varies depending on the office the candidate is seeking. Once the candidate achieves this, demonstrating they have support and are not frivolous candidates, the candidate then receives a set amount of funding for the primary, and more if they advance out of primaries.³⁹ Independent candidates are also eligible for receiving funding, provided they too meet the same unique donation requirements.⁴⁰ The second part of the program was a matched funds provision which gave additional funding to publicly funded candidates that matched spending by privately financed opponents or independent groups.⁴¹ However, around the same time as the Citizens United decision, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* the Supreme Court ruled that providing matched funds to candidates who accept public funding is unconstitutional.⁴² The Supreme Court ruled that the matching funds provision does not survive First

³⁷ *Id.*

³⁸ Malhotra, *supra* note 30.

³⁹ *How Clean Funding Works*, CITIZENS CLEAN ELECTIONS COMM'N, (2017), <https://www.azcleelections.gov/run-for-office/how-clean-funding-works>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S., 721 (2011).

Amendment scrutiny as it creates an undue burden on political speech. The court's reasoning was that opponents to the publicly financed candidates would have to spend less to avoid triggering the matching funds provision.⁴³ Nevertheless, even without the matched funds portion of the program, the Clean Elections Program has been a success in Arizona and Maine. It has proven to increase the number of effective candidates and enhanced competition, especially in districts with longstanding incumbents.⁴⁴ Beyond that, greater amounts of public money will decrease the significance of private money, therefore reducing the influence of large money donors and corporations. According to studies, it also will result in candidates being more likely to represent the median voter.⁴⁵

To combat the wave of private money in elections brought about by Citizens United, it is necessary for the United States to expand its public funding. Adopting a nation-wide solution based on the Democracy Voucher Program in Seattle or the Clean Elections Program in Arizona and Maine could provide relief, if not remedy to the crisis. In addition to closing dark money loopholes, Congress needs to pass legislation requiring all groups involved in political spending to disclose their donors for federal races. State legislatures should do the same for all state-wide races. Congress also needs to overhaul and re-empower the Federal Election Commission (FEC). Unbelievably, the FEC spent much of the 2020 election cycle unable to meet as it did not even have four of the six commissioners necessary for a quorum.⁴⁶ Even more ludicrous, of the three commissioners

⁴³ *Id.*

⁴⁴ Malhotra, *supra* note 30.

⁴⁵ David P. Baron, *Electoral Competition with Informed and Uninformed Voters*, 88 AM. POL. SCI. REV. 33, (1994).

⁴⁶ Kate Ackley, *Administration plans to nominate bipartisan pair to*

at the time, two were serving on expired terms.⁴⁷ The President must at the very least appoint a full staff to the FEC and then Congress should further empower the FEC, giving them more leeway to go after those who violate regulations.

Even with stricter legislation and regulations as well as a newly empowered FEC, some argue that a constitutional amendment targeting the *Citizens United* decision and private money is necessary to stem the tide of money in elections. However, this seems unlikely with how politicized and characterized by inaction our government is today, as does waiting for the Supreme Court to reverse its decision. The good news is that the American public is almost uniform in their dislike for the *Citizens United v. FEC* decision. This distaste has led more than twenty states and 800 local governments to pass resolutions calling for a constitutional amendment to overturn the decision and enact more stringent campaign finance regulations.⁴⁸ For a constitutional amendment to pass, the Supreme Court to revisit their decision, or even Congress to pass legislation expanding a program based on Democracy Dollars or the Clean Elections Program, there will need to be widespread support for campaign finance reform, starting at the local level and expanding to the state level. Only when the political pressure is overwhelming will Congress or the Supreme Court act.

hobbled FEC, ROLL CALL (Oct. 28, 2020), <https://rollcall.com/2020/10/28/fec-commissioners-trump/>.

⁴⁷ *Id.*

⁴⁸ Taylor Lincoln et al., *Ten Years After Citizens United*, PUB. CITIZEN (Jan. 15, 2020), https://www.citizen.org/article/ten-years-after-citizens-united/#_ftn35.

II. WHILE IN OFFICE: LOBBYING AND KICKBACKS

The influence of money in politics is not simply left behind once candidates win their elections, rather it permeates almost every decision they make while in office. One of the main forms this takes is lobbying. While the exact definitions vary from state to state, lobbying is generally defined as “attempting to influence government action through written or oral communication.”⁴⁹ In some eyes, the term lobbying has become synonymous with corruption, yet lobbying is a necessary tool for a democratic government. Enshrined in our Constitution within the First Amendment is the right to petition the government, which is the general basis of what lobbying entails.⁵⁰ Lobbying is what allows unions and other groups fighting for a group of citizens to make their case to the government. However, with an absence of strict regulations, as we have in the United States, the lobbying industry can run amok, and interests representing corporations and foreign entities can overpower those representing segments of the civilian population.

The most dangerous and persuasive form of lobbying is not the infamous \$10,000 a-plate dinners that politicians attend, invited by lobbyists. It instead comes in the form of campaign contributions. While corporations and unions are forbidden from directly donating to candidates, (as established above they are free to channel unlimited money to independent expenditure groups), lobbyists are not, which often results in something called bundled contributions. Bundling contributions is when lobbyists receive contributions from their clients, the corporations, or foreign

⁴⁹ *How States Define Lobbying and Lobbyist*, NCSL (Sept. 3, 2021) <https://www.ncsl.org/research/ethics/50-state-chart-lobby-definitions.aspx>.

⁵⁰ U.S. CONST. amend. I

entities, and then “bundle” them together into one large donation to a political candidate.⁵¹ With the exponential rise of money in elections since the Citizens United decision, politicians are increasingly beholden to campaign contributions to get re-elected. This results in almost a quid-pro-quo situation where politicians are more concerned with serving the interest of their lobbyists than the citizens they represent.

Since 2017, the amount of money spent on lobbying has steadily increased with 3.78 billion being spent in 2021.⁵² Topping the list of individuals who received money from lobbyists during the 2022 election cycle is Democrat Chuck Schumer who received just over \$715,000 from lobbyists, followed closely by Republican Kevin McCarthy who received \$505,000 from lobbyists.⁵³ Research has found that lobbying was at least partially responsible for the opioid crisis and for the lack of healthcare reform in the form of drug pricing and regulation.⁵⁴ Researchers discovered that when legislation lowering drug prices and increasing regulations was being considered, there were corresponding increases in lobbying spending in the places where this legislation was advancing.⁵⁵ Over the nineteen years this research covers, the pharmaceutical industry spent over 4.7 billion on lobbying

⁵¹ *Lobbyist bundling disclosure*, FEC, <https://www.fec.gov/help-candidates-and-committees/lobbyist-bundling-disclosure/#:~:text=A%20bundled%20contribution%20is%20any,or%20other%20means%20of%20recognizing.>

⁵² *Lobbying Data Summary*, OPEN SECRETS (Oct. 24, 2022), <https://www.opensecrets.org/federal-lobbying>.

⁵³ *Top Recipients of Contributions from Lobbyists, 2022 Cycle*, OPEN SECRETS (Mar. 22, 2021), <https://www.opensecrets.org/federal-lobbying/top-recipients>.

⁵⁴ Oliver J. Wouters, *Lobbying Expenditures and Campaign Contributions by the Pharmaceutical and Health Product Industry in the United States, 1999-2018*, JAMA INTERN MED. (2020).

⁵⁵ *Id.*

including an average of 233 million per year at the federal level.⁵⁶

In 2022, the Supreme Court made a ruling in *FEC v. Ted Cruz for Senate*, striking down another portion of the beleaguered Bipartisan Campaign Reform Act (BRCA).⁵⁷ Prior to the ruling, the BRCA prohibited campaigns from repaying more than \$250,000 worth of personal loans taken out by the candidate for the campaign using donations made after the conclusion of the election. The Supreme Court struck down the \$250,000 limit, ruling 6-3 on ideological lines.⁵⁸ Not only does this ruling benefit wealthy candidates, but it also impedes genuine competition. Wealthy candidates are more likely to have the funds to loan their campaign money, or the credit necessary to secure outside loans. Even more significant is that money donated by lobbyists after the election can legally make its way to the personal bank account of the politician in now unregulated amounts. This is an especially dangerous situation because, as Justice Kagan pointed out in the dissent, after the election a candidate has a special interest in recouping personal funds and is now able to do something in return for donations.⁵⁹

Lobbying is not unique to domestic groups and interests, in fact, foreign countries are able to lobby Congress, provided they register with FARA, or the Foreign Agents Registration Act. For the latest publicly available data, the sixth month period ending in August-December of 2020, Russia spent over \$800,000 at a variety of firms lobbying the US government for reconsideration of sanctions, and over twenty-four million for distribution of

⁵⁶ *Id.*

⁵⁷ *FEC v. Ted Cruz for Senate, et al.*, 596 U.S. (2022).

⁵⁸ *Id.*

⁵⁹ *Id.*

pro-Russian media.⁶⁰ China spends the most of any foreign government, spending fifty-six million in 2019, 61.5 million in 2020, and over sixty-eight million in 2021 lobbying US elected officials.⁶¹ Foreign government lobbying is incredibly dangerous as it usurps democracy, making diplomacy pay to play. It is also a threat to national security as our politicians cannot possibly have the best interest of the U.S. in mind when foreign governments are handing out checks and subsidizing the politicians' reelection accounts.

Regulation of lobbying is difficult due to its intrinsic nature to the political process as Congress needs to narrow down its options while drafting legislation. Additionally, it is a fundamental right of Americans to petition the government. However, there are still steps that can be taken to reduce its harmful effects. First, lobbyists and lobbying firms should not be allowed to have foreign governments on their payroll. If foreign governments wish to petition the United States, they should reach out through diplomatic channels instead of buying influence and access. Additionally, in the same way that FARA registration and disclosures are required for foreign lobbying, it should be required for domestic lobbyists and their clients. It should also be available to all citizens, searchable, and updatable in real-time. Public Citizen suggests a government agency fully independent of the lobbying industry be created to monitor registration and disclosures and investigate and prosecute violations of laws and ethics rules.⁶² Congressional staffers and interns, often the ones researching policy, are underpaid and overworked.

⁶⁰ Admin. of the Foreign Agents Registration Act of 1938, as amended, for the six months ending Dec. 31, 2020, Op. Att'y's Gen. (2020).

⁶¹ *China*, OPEN SECRETS (2022), <https://www.opensecrets.org/fara/countries/223?cycle=>.

⁶² *Lobbying Reform*, PUB. CITIZEN <https://www.citizen.org/article/lobbying-reform/>.

This creates an ideal situation for lobbyists to offer their own versions of facts, figures, and policy solutions to the staffers and their supervisors. Increasing the salary and number of staffers per member of Congress can go a long way toward reducing the influence of lobbyists. Congress could also choose to expand the role and funding for the U.S. Government Accountability Office, which provides non-partisan information to executive agencies, Congress, and the public.⁶³ Expanding the Office's role to specialize in providing information to Congress can be a way to reduce the influence of lobbyists peddling solutions.

While all these ideas address the problem, they do not reach the crux of the issue, the money flowing to politicians in the form of campaign contributions as well as contributions to "independent" outside groups that support them. To fully address this issue, there will need to be campaign finance reform in addition to the reforms mentioned above. By decreasing the influence of private money either by limiting it or increasing the amount of public money, not only will our elections be fairer and more competitive, but lobbyists will also have less influence over our politicians while in office.

II. AFTER OFFICE: THE REVOLVING DOOR

The revolving door between public officials and lucrative careers in lobbying after they leave public service is an often-criticized feature of government and public service. However, despite widespread criticism, nothing has been done to address this crisis. Most states have "cooldown" periods between public service and when you can begin

⁶³ *What GAO Does*, GAO <https://www.gao.gov/about/what-gao-does>

working as a lobbyist. However, these periods generally last only six months to two years.⁶⁴ Most notably, in Washington D.C., where the revolving door is most prevalent and has had the greatest impact, there is no such waiting period, stating you are only prohibited from working as a lobbyist while engaged in public service.⁶⁵ This is a travesty and enables public “servants” to abuse the revolving door while in the process of making democracy belong to the highest bidder.

The revolving door is dangerous not only because these newfound lobbyists have widespread connections in government, but also because of the message it sends to current officials in public service. To these officials, it conveys that if you vote the way we would like you to, or implement policies supporting our positions and benefiting us, you too can have a highly lucrative position with us post-public service, just like your former colleagues. However, the connections aspect is also concerning, as these former officials have access to lawmakers and staffers that are unavailable to most others and are now being sold to whoever wishes to hire them to lobby. Research shows that the more staff connections a revolving door lobbyist has, the greater increase in revenue associated with that lobbyist.⁶⁶ Incidentally, this access comes at a high enough price that these former officials can only be afforded by wealthy special interests, pricing out unions and other groups genuinely representing large groups of citizens.

From 1976 to 2012, 25% of all members who left the House of Representatives and 29% of all Senators who left

⁶⁴ *Revolving Door Prohibitions*, NCSL (Aug. 24 2021), <https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx>

⁶⁵ *Id.*

⁶⁶ Joshua McCrain, *Revolving Door Lobbyists and the Value of Congressional Staff Connections*, 80 J. POL. 1369, (2018).

would go on to register as lobbyists.⁶⁷ Within this data sample, the percentage of former House and Senate members registering as lobbyists has had a steep upward trend from 1976, when the percentage of departees registering as lobbyists was under ten.⁶⁸ In 2012, the latest year covered in the data sample, approximately 58% of Senate departees and 37% of House departees registered as lobbyists.⁶⁹ The 115th Congress alone, which ran from 2017 to January 3rd of 2019, had forty-four members who departed and found new jobs. Of those forty-four, twenty-six (59%) now work for lobbying firms or other groups working to influence the Federal Government.⁷⁰ Between 1998 and 2008, 56% of all revenue generated by private lobbying firms can be attributed to lobbyists with federal government experience.⁷¹ The connection also goes both ways, lobbyists connected to U.S. senators have on average a 24% drop in revenue when their previous employer in the Senate leaves office.⁷²

The revolving door is attractive for politicians and staffers due to the lucrative salaries available to them. For former staffers turned lobbyists, their median salary was over \$300,000 in 2012, over six times the median salary of a congressional staffer in 2012.⁷³ For former members of

⁶⁷ Jeffery Lazarus et al., *Who walks through the revolving door? Examining the lobbying activity of former members of Congress*, 5 INT. GRPS. & ADVOC. 82, (2016).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Alan Zibel, *Revolving Congress: The Revolving Door Class of 2019 Flocks to K Street*, PUB. CITIZEN (May 30, 2019), <https://www.citizen.org/article/revolving-congress/>.

⁷¹ Jordi Blanes I Vidal, et al., *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, (2012).

⁷² *Id.*

⁷³ R. ERIC PETERSON, *Staff Pay, Selected Positions in House Member Offices, 2001-2021*, CONGR. RSCH. SERV. (Sep 29, 2022).

congress, the salaries are even higher.⁷⁴ Few lobbyist organizations expose the salaries of their revolving door politicians on staff, however, a 2012 analysis following the twelve former members of Congress turned lobbyists whose salaries were publicly available, found that on average their salaries increased by 1,452% once leaving public service.⁷⁵ To put this staggering figure in context, the salary for a member of Congress in 2012 was (and still is today) \$174,000 per year.⁷⁶ With simple math, the average salary of a congressional politician turned lobbyist is over 2.5 million dollars per year.

One of the most egregious cases of a former member of Congress abusing the revolving door is former Congressman Billy Tauzin (R-LA). He served in the House of Representatives from 1980-2005 and played a prominent role in President Bush's passage of prescription drug expansion.⁷⁷ After he left Congress, he was hired by PhRMA, a lobbying association for top pharmaceutical companies, including Pfizer, from 2006-2010. In his short time at the lobbying group, he made nineteen million dollars and was instrumental in lobbying to block a proposal allowing Medicare to negotiate drug prices.⁷⁸ Allowing Medicare to negotiate drug prices would have saved the United States taxpayers over twenty-five billion just from 2018-2020.⁷⁹

⁷⁴ Niv M. Sultan, *Where are they now? Lucrative lobbying gigs, other jobs landed by newly-former lawmakers*, OPEN SECRETS (May 1, 2017) <https://www.opensecrets.org/news/2017/05/now-lucrative-lobbying-gigs-jobs-landed-newly-former-lawmakers/>.

⁷⁵ Lee Fang, *ANALYSIS: When a Congressman Becomes a Lobbyist, He Gets a 1,452% Raise (on Average)*, REPUBLIC REP. (March 14, 2012) <https://www.republicreport.org/2012/make-it-rain-revolving-door/>.

⁷⁶ Peterson, *supra* note 75.

⁷⁷ Fang, *supra* note 76.

⁷⁸ *Id.*

⁷⁹ Benjamin N. Rome et al., *Simulated Medicare Drug Price*

This is life-changing money, so it's no surprise that many lobbyists go into public service, and then quickly exit to enjoy their lucrative pay raise. In fact, many lobbyists take pay cuts of over six figures to take positions on Capitol Hill as the experience they gather will increase their earning potential drastically once they leave.⁸⁰

Lifetime bans on registering as a lobbyist for public officials of all branches of government would be effective, but not politically feasible. A more achievable solution would be a waiting period of five to ten years, enough time that many of their connections would have also ended their terms and left public service. Additionally, there is a loophole called "strategic consulting" that many officials take advantage of to avoid this waiting period.⁸¹ The legislation would need to be extended to include lobbying activities, which the consulting would fall under, not just lobbying contacts. This is a reform many states need as well.⁸² Previously mentioned reforms meant to curb lobbying would also have an impact in stopping the revolving door, as increasing the salaries of congressional staffers and non-legislative branch officials could decrease the likelihood of their being enticed by lobbying firms and their lucrative salaries.

Negotiation Under the Inflation Reduction Act of 2022, JAMA HEALTH F. (Jan 27, 2023) <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2800864>.

⁸⁰ Bogardus & Rachel Leven, *Lobbyists took \$100K cut in pay to work for members of Congress*, THE HILL (June 28, 2011), <https://thehill.com/business-a-lobbying/95032-lobbyists-took-100k-cut-in-pay-to-work-for-members-of-congress/>.

⁸¹ Craig Holman & Caralyn Esser, *Slowing the Federal Revolving Door*, PUB. CITIZEN (July 22, 2019), https://www.citizen.org/article/slowing-the-federal-revolving-door/#_ftn1.

⁸² *Id.*

CONCLUSION

There are many pressing issues in America today. A recent Gallup poll identifies inflation/high cost of living, the economy in general, immigration, abortion, crime, homelessness, climate change, and healthcare as some of the problems Americans believe are the most critically important issues facing us today.⁸³ However, without first eliminating or even reducing the influence of money in politics, no action that significantly benefits the average citizens of the United States will be taken. Since the turn of the century, the amount of money in American politics has skyrocketed, and to think that our elected officials and even unelected officials are unaffected by it would be naïve. In no way, shape, or form are politicians economically incentivized to work for their constituents. The private money from large donors, corporations, and foreign interests far outweighs the amount of money that can be grassroots fundraised from the politician's constituents – on the road to office, while in office, and once they leave office.

The *Citizens United v. FEC* Supreme Court decision paved the way for subsequent decisions to further deregulate election financing which ultimately benefits the wealthy and powerful special interests and corporations. Among other solutions, public campaign financing programs are a necessity to bring the United States in line with every other liberal and developed democracy.

While in office, lobbyists have an almost unfettered and unregulated monetary influence on our politicians and can even be used by foreign governments. Stricter oversight is needed, along with campaign finance reform to lessen

⁸³ *Most Important Problem*, GALLUP

<https://news.gallup.com/poll/1675/most-important-problem.aspx>.

politicians' dependence on donations to fund their re-election campaigns.

Finally, after office, there is a revolving door between public service and K-street or lobbyist groups. The message this sends to current politicians and the connections the ex-public officials now hold are incompatible with the elements of democracy. A waiting or cooling-off period of at least five years is necessary for federal public officials before they can register as a lobbyist or engage in lobbying activities.

By following a blueprint of common sense and achievable reforms, as outlined in this article, we can change the incentives for our government officials. Once officials are incentivized to again work for the citizens, not the monetary influences, then action can be taken on pressing issues affecting America. But until then, we will continue to have ineffective solutions to crises at the expense of the American citizens.