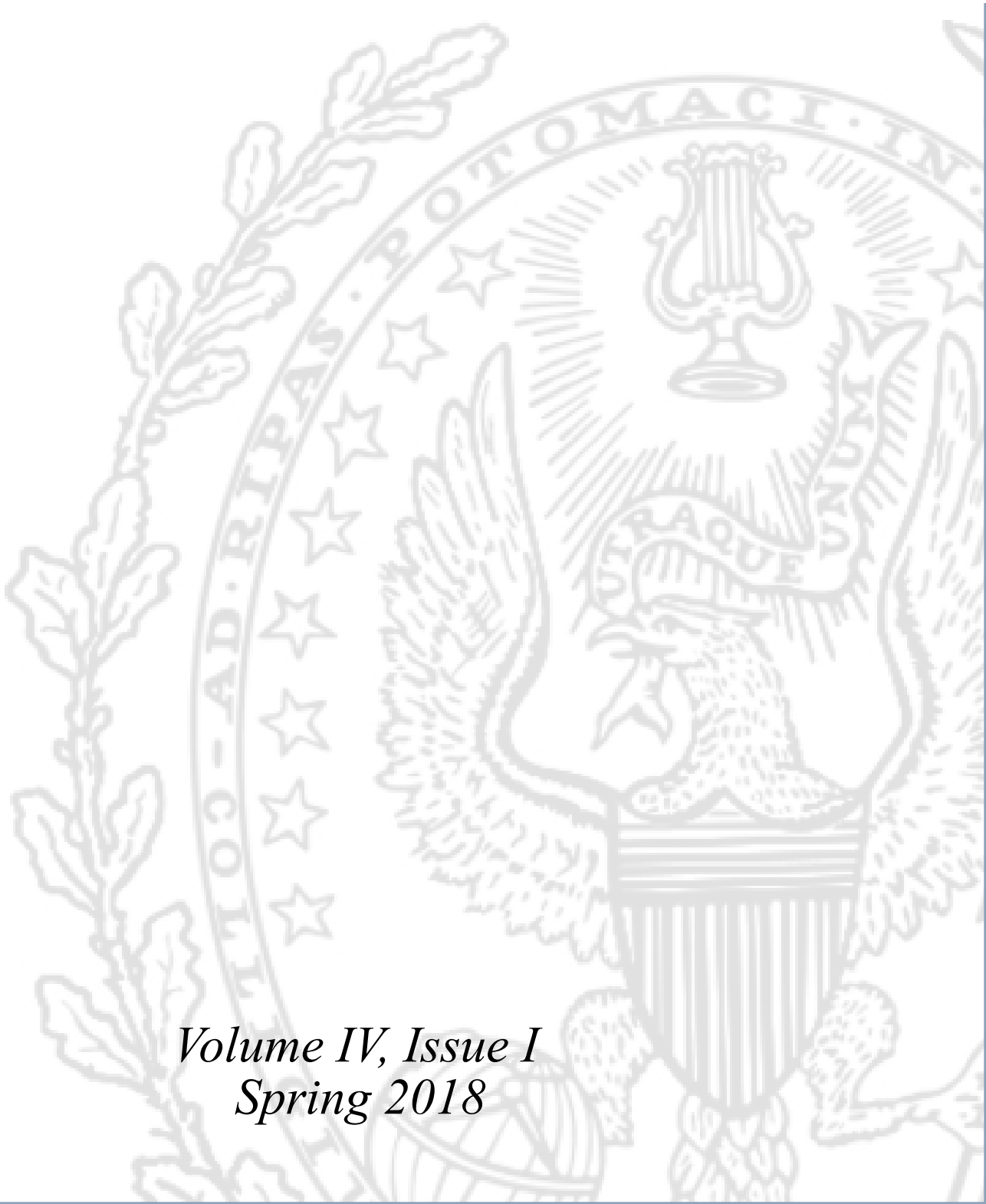
Georgetown University Undergraduate Law Review



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Georgetown University Undergraduate Law Review

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Letter from the Editor

April 16, 2018

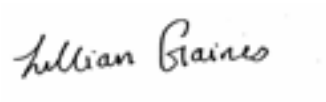
Dear Reader,

Welcome to the fourth issue of the Georgetown University Undergraduate Law Review. Unlike the previous issues, which dealt almost exclusively with domestic legal matters, this one takes up subjects currently before the courts and the court of public opinion, both here and abroad—from Brexit and the German plea-bargaining system to the criminal status of text messages in juvenile court and sexual harassment in the workplace.

Our mission from the beginning has been to address salient legal issues in the news and to inform our readers about issues the media has overlooked. The staff of the Undergraduate Law Review would like to thank all those who have helped us realize this ambition, including the authors of this collection of articles, the friends and family who support our work, and especially our colleagues at Georgetown, including the Georgetown Career Center, the Georgetown Law School and the Georgetown Pre-Law Society. We would also like to give a special thanks to our faculty advisor, Judge Thomas L. Ambro.

We hope you enjoy reading this publication as much as we enjoyed putting it together. We welcome your comments and feedback, so please do not hesitate to reach out to us at guundergraduatelawreview@gmail.com.

Sincerely,



Lillian Gaines
Editor-In-Chief

Table of Contents

Backtracking in Backrooms:
How Arbitration Hinders America's Ability to Combat Workplace Sexual Harassment

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Abstract

The use of arbitration clauses in employee contracts is becoming an increasingly prevalent phenomenon. Along with the promulgation of such clauses, comes the exacerbation of their effects: proceedings that favor employers, decreased employer accountability, limitations of workers' rights, and backroom dealings ending in non-disclosure agreements, to name a few consequences. Arbitration clauses boast a long controversial history, in part due to their support by the United States Supreme Court. While arbitration clauses have numerous nefarious implications, the combination of arbitration clauses and sexual harassment is detrimental to the proper carriage of justice. Due to the secretive nature of the process, victims of sexual assault are silenced and face injustices from the very legal system that was presumably designed to protect them. By foregoing a public trial process, arbitration clauses have forced survivors to remain silenced and have worked to stymie social progress on the basis of workplace sexual harassment. Therefore, it remains crucial that arbitration be eliminated as an acceptable way of handling workplace sexual harassment in order to promote a national dialogue, which steadfastly confronts sex-based discrimination.

Introduction

In 1991, Anita Hill brought sexual harassment to the forefront of national discourse with her testimony against Supreme Court Justice Clarence Thomas. In December of 2016, Hill was named as the chair of a commission tasked with combating sexual harassment in both the entertainment and media industries.[11] The year 2016 saw a flood of stories and allegations of experiences that had been kept in the dark for decades, breaking the paralyzing shackles of silence that Hill first bravely busted open nearly thirty years ago.[2] The realization and recognition of the rampant cases of sexual harassment that plague a developed country like the United States beg the question of *how* such behavior managed to thrive and endure America's movements towards equality and social progress. The answer to this question may not be a straightforward one; however, a recognition of the failings of the legal system to give a proper voice to victims, is a necessary step forward in any discussion of workplace sexual harassment.

In recent years, sexual harassment has degraded work environments in all industries, from sports, to film, to politics, and arbitration clauses have become increasingly prominent in employee contracts. These clauses, which often contain or result in some form of mandatory confidentiality, replace a public trial before a jury with a backroom deal before an arbitrator hired by the company or employer that is being accused. Arbitration clauses place significant burdens on victims of all workplace injustices, especially survivors of workplace sexual harassment.[3] The silence forced upon victims by a culture unwilling to have an open conversation about the reality of workplace sexual harassment is reinforced by an arbitration process that simultaneously erodes victims' rights and employers' accountability. Thanks to the fine print of employee contracts, victims are often times isolated by having to arbitrate any claims on an individual basis.[4] By keeping allegations of misconduct behind closed doors, , arbitration inhibits victims from obtaining justice and prevents society from establishing a legal foundation towards progressive change as it further marginalizes survivors.

This article has three main sections: Part I, Part II, and Part III. Part I has two main objectives. The first is to provide background on the arbitration process, arbitration clauses, and the history of the debate regarding arbitration as it pertains to the Supreme Court of the United States. The second is to introduce the history of workplace sexual harassment in the United States from a legal perspective, including various cases regarding sexual harassment, which were dealt with in the Supreme Court. In essence, the primary goal of Part I is to establish a sense of familiarity with the basic tenets underlying the greater argument posited by this article that the very nature of arbitration creates a major roadblock for victims to achieve due justice. Part II highlights the effects of arbitration, by first underscoring the broader effects of arbitration clauses and processes on all types of employees, and then focusing on the effects of arbitration as they pertain to victims of workplace sexual harassment. Part III demonstrates the greater implications of arbitration in regards to workplace sexual harassment by examining the social ramifi-

1 [1] BBC. "Anita Hill to chair Hollywood harassment commission." BBC. Last modified December 16, 2017. Accessed December 17, 2017. http://www.bbc.com/news/ world-us-canada-42382106.

2 *id.*

3 Meghan Leonhardt, *Getting Screwed at Work? The Sneaky Way You May Have Given Up Your Right to Sue*. TIME MONEY, September 27, 2017. http://time.com/money/4958168/ big-companies-mandatory-arbitration-cant-sue/. (Last visited December 17, 2017).

4 Gretchen Carlson, *Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment.* THE NEW YORK TIMES, October 10, 2017. https://www.nytimes.com/2017/10/10/opinion/ women-reporting-sexual-harassment.html. (Last visited December 17, 2017).

cations of using arbitration to settle claims of sexual harassment and delineates the current landscape of arbitration in America to examine possible solutions to increase justice for victims. The Conclusion of the article contextualizes the claim of the article and acknowledges that while legal reforms will not immediately disrupt the pervasive culture of discrimination, disrespect, and harassment in the workplace, they will act as the first steps towards inciting greater perpetrator accountability and a larger conversation about combatting sexual harassment in the workplace.

Background

What is Arbitration?

The American Bar Association defines arbitration as the private process by which two or more parties agree to settle a dispute by means of a neutral arbitrator.[5] Although this process functions similarly to a trial, in the sense that parties give opening statements and present evidence, arbitration differs from a traditional trial in a number of ways. Perhaps the most significant difference is that no jury or judge is present in an arbitration proceeding. Instead, a single arbitrator, hired to hear both sides of the disagreement, rules upon the dispute. After the hearing, the arbitrator has the responsibility to issue an award[6] or decision.[7] Parties in a dispute sometimes favor arbitration because it is considered to be a more efficient and less formal option than the traditional judicial process. Parties "do not have to follow state or deferral rules of evidence" and, in some cases, the arbitrator of a dispute is not required to, "apply the governing law."[8] An arbitration clause, the definition of which is laid out in *Perry v. Cobb, 88 Me. 435, 34 Atl. 278; 49 L. R. A. 3*9.*, is a clause of a contract that provides that any disputes between the parties of that contract are subject to compulsory arbitration. By signing a contract that includes an arbitration clause, parties, "agree to settle their disputes *inter sese*[9]."[10]

Arbitration clauses vary based on the nature of the given contract. The following are examples from the American Arbitration Association of two different possible arbitration clauses; the first is a possible arbitration clause from an employment contract and the second is one from a domestic commercial contract:

1. ***Employment*** – Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

   Commercial- "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by

5 *Arbitration.* AMERICAN BAR ASSOCIATION. (November 13, 2017) https://www.americanbar.org/groups/dispute_resolution/resources/ DisputeResolutionProcesses/arbitration.html.

6 This decision can either be issued with reasons (a reasoned award) or without reasons (a bare bones award).

7 ABA

8 *id.*

9 Latin Origin, meaning: among or between themselves
Black's Law Dictionary, ed. "What is INTER SE, INTER SESE?" Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Accessed November 13, 2017. http://thelawdictionary.org/inter-se-inter-sese/.

10 Rose, Walter Malins, and United States. Supreme Court. *Reports of Cases Argued and Decided in the Supreme Court of the United States*. Edited by Stephen Keyes Williams. Vol. 15. Lawyers' Co-operative Publishing Company, 1912. Accessed November 13, 2017. https://books.google.com/books?id=t4o0AQAAMAAJ&source=gbs_navlinks_s.

> the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[11]

In the case of arbitration the parties of the dispute decide: what qualifications the arbitrator must have, the locale provisions, remedies, confidentiality, and the duration of the arbitration proceedings.[12] The judicial parameters laid out in the 1925 Federal Arbitration Act (FAA) largely guide contractual arbitration clauses. According to §9,10 of the FAA, the decision made by an arbitrator is *not* subject to appeal; however, under extremely limited circumstances, a party can file a motion to vacate, or cancel, a decision.[13] Furthermore, in order to challenge a decision in federal court, a party must file a motion to vacate within three months of the decision being delivered.[14] Most arbitration clauses contain some form of assured confidentiality, such as a non-disclosure agreement, to ensure that proceedings remain private. Such agreements limit the amount and nature of information that is released to the public during and following an arbitration proceeding.[15]

Arbitration and the U.S. Supreme Court

Arbitration clauses can be non-binding or binding. A non-binding arbitration clause requires an arbitrator's decision to be accepted by both disputing parties in order for it to be considered final.[16] Conversely, a binding arbitration clause, which is far more common, means that the award or decision delivered by the arbitrator is final.[17] That is, by signing a contract with a binding clause, an individual is giving up his or her right to a trial by jury,[18] a right granted to all American citizens under Amendment VII of the U.S. Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.[19]

The Supreme Court has issued decisions in cases involving Amendment VII and an individual's constitutional right to a jury of his or her peers in several instances including: *Feltner v. Columbia Pictures Television, (1998); Tull v. United States (1987); Grimshaw v. Ford Motor Co. (1981)*.[20] Although arbitration allows for legal proceedings to occur in the absence of a judge or jury of one's peers, the question of arbitration as it pertains to Amendment VII has remained unaddressed by the Supreme Court of the United States.[21]

11 *Clauses*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/Clauses (2017)

12 id.

13 Federal Arbitration Act, 9 U.S.C. § 10 (1925)

14 Federal Arbitration Act, 9 C.F.R. § 12 (1925)

15 HAMILTON, KEVIN J., and HARRY H. SCHNEIDER, JR. "Confidential Arbitration Agreements for High-Profile Clients and Senior Executives." American Bar Association. Accessed December 6, 2017. https://www.americanbar.org/content/ dam/aba/publications/litigation_journal/fall2016/ confidential-arbitration.authcheckdam.pdf.

16 ABA

17 ABA

18 Alabama Center for Dispute Resolution. *Arbitration Agreements –the Consumer's Perspective*. ALABAMA STATE BAR, n.d. Accessed November 13, 2017. https://www.alabar.org/assets/uploads/2014/08/Arbitration-Agreements2012.pdf. https://www.alabar.org/assets/uploads/2014/08Arbitration-Agreements2012.pdf.

19 Cornell Law School, ed. "Seventh Amendment." Cornell Law School. Accessed November 13, 2017. https://www.law.cornell.edu/constitution/ seventh_amendment.

20 *Landmark Cases*, SAVE OUR JURIES, http://saveourjuries.org/index.cfm?pg=courtcases (2017).

21 Cory Tischbein, Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation:

However, United States Supreme Court has ruled on the constitutionality of arbitration clauses and the FAA on a number of different grounds in the past, and has demonstrated a trend towards favoring arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*. (1983), the Supreme Court decided that, "if [a] respondent obtains an arbitration order, [a] petitioner will be forced to resolve [a] dispute with [a] respondent" outside of any federal or state court, and upheld the "rapid and unobstructed enforcement of arbitration agreements.[22] The Court's furtherance of the "liberal federal policy favoring arbitration agreements"[23] resulted in the astonishing expansion of the FAA throughout history. The increasing scope of the FAA, as interpreted by the Supreme Court, was demonstrated in the Court's decisions in *Southland Corp. v. Keating* (1984) and *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985). In the former, the Supreme Court expanded the scope of FAA, ruling that it applied to cases in federal and state courts, as long as the case involved a dispute of interstate commerce.[24] In the latter, the Court ruled that the FAA did not only apply to contractual disputes, expanding the FAA's breadth to include statutory disputes.[25] In 1991, the Court ruled "statutory claims may be the subject of an arbitration agreement" and are thereby "enforceable pursuant to the FAA."[26] In *Gilmer v. Interstate/Johnson Lane Corp*. (1991), Gilmer, the petitioner, claimed that "Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of [a] claim to arbitration."[27] The Court set precedent, in terms of arbitrations dealing with discrimination and important social policies, by holding that "there is no inconsistency between" such policies, "and enforcing agreements to arbiter."[28] Additionally, in his majority decision, Justice White noted: "the unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[29]

More recently, the Supreme Court ruled on a number of cases involving the impact of arbitration on class action lawsuits and waivers. In 2010, the Supreme Court issued a decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*. determining that, "imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA."[30] Justice Alito, writing the majority opinion, affirmed that, "the arbitrator … should decide whether the contracts are … silent on the issue of class arbitration."[31] Furthermore, when contracts are "silent regarding class-wide arbitration," it means that there has "been no agreement that has been reached on the issue."[32] The Supreme Court, in 2010, upheld the power and scope of the FAA of *Rent-A-Center West, Inc. v. Jackson.* The Court, in the 5-4 decision, concluded that according to the FAA, a party's challenge of the enforceability of an agreement to arbitrate is a matter to be decided by an arbitrator. The following year, the Court issued a landmark opinion in *AT&T Mobility v. Concepcion*

The Rule, of the Exception?,16 U. Pa. J. Const. L., 233 (2013) Available at: https://www.law.upenn.edu/live/files/2737-tischbeinfinaljcl161pdf.

22 Moses H. Cone Memorial Hospital, Petitioner v. Mercury Construction Corporation, 460 US 1 (1983).

23 *id.*

24 Katherine V.W. Stone and Alexander J.S. Colvin, *The Arbitration Epidemic Mandatory Arbitration Deprives Workers and Consumers of their Rights*." ECONOMIC POLICY INSTITUTE, December 7, 2015, http://www.epi.org/publication/the-arbitration-epidemic/ (Last visited 2017).

25 *id.*

26 Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991).

27 *id.*

28 *id.*

29 *id.*

30 Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

31 *id.*

32 *id.*

(2011). The central issue of this case was whether or not the FAA preempts "states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures."[33] In a 5-4 decision, the Supreme Court reversed the decision of the U.S. Court of Appeals for the Ninth Circuit.[34] Writing for the majority, Justice Scalia stated that the FAA *does* preempt: "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[35] Justice Scalia went on to affirm that switching "from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[36] Furthermore, the Court noted "class arbitration greatly increases risks to defendants" due to "the absence of multilayered review makes it more likely that errors will go uncorrected."[37]

The Supreme Court issued another landmark decision in *American Express Co., et al. v. Italian Colors Restaurant,* where it decided to overturn the decision of the United States Court of Appeals for the Second Circuit. In a 5-3 decision,[38] the Court held that the "American Express Company's arbitration clause, prohibiting class action suits," is enforceable, "even though it would compel arbitration of antitrust claims."[39] This case involved a number of respondents, who maintained that American Express had violated federal antitrust laws. American Express "moved to compel individual arbitration" in accordance to the FAA 9 U.S.C. §1 *et seq.*[40] After assessing the high costs of the "expert analysis necessary to prove the antitrust claims" through binary arbitration, the respondents claimed that they would "incur prohibitive costs if compelled to arbitrate under the class action waiver;" therefore, the respondents asserted that the waiver was unenforceable and that "the arbitration could not proceed."[41] The decision in *American Express Co., et al. v. Italian Colors Restaurant (2013),* delivered by Justice Scalia, underlined that "even if non-class arbitration is prohibitively expensive, the plaintiff can still have the procedural ability to effectively vindicate a claim."[42] In 2015, the Court issued a decision in *DirectTV, Inc. v. Imburgia* in which it upheld its former decision in *AT&T Mobility v. Concepcion (2011).* In a 6-3 rule , the Court affirmed that the application of a state law that is cited within an arbitration clause is not required in arbitration proceedings due to the fact that the FAA preempts state law.[43]

Most recently, the Supreme Court has granted certiorari to three major cases with arbitration clauses. These three cases, *Epic Systems Corporation v. Lewis*, *Ernst & Young v. Morris* and *National Labor Relations Board v. Murphy Oil USA*, were heard in a consolidated one-hour oral argument on October 2, 2017. The question posed to the court by these cases was whether or not "the National Labor Relations Act (NLRA) prohibits [the] enforce-

33 AT&T Mobility LLC v. Concepcion, 563 US 333 (2011).

34 *id.*

35 AT&T Mobility LLC v. Concepion (No. 09-893) 584 F. 3d 849, reversed and remanded."CORNELL UNIVERSITY LAW SCHOOL (2011). Accessed November 13, 2017. https://www.law.cornell.edu/supct/html/09-893.ZS.html. (Last visited November 13, 2017).

36 *id.*

37 *id.*

38 Justice Sotomayor had required herself from this case.

39 American Express Co., et al. v. Italian Colors Restaurant, 570 US _ (2013).

40 American Express Co. v. Italian Colors Restaurant, LEGAL INFORMATION INSTITUTE (2013), https://www.law.cornell.edu/supremecourt/text/12-133 (2017).

41 *id.*.

42 American Express Co. v. Italian Colors Restaurant, LEGAL INFORMATION INSTITUTE (2013), https://www.law.cornell.edu/supremecourt/text/12-133 (2017).

43 DirecTV, Inc. v. Imburgia, 577 US _ (2015)

ment of an agreement requiring employees to resolve disputes with the employer through individual arbitration under the FAA;" therefore, the decision in these three cases will go directly to the crux of the matter of arbitration.[44]

Background on Sexual Harassment

According to the U.S. Equal Employment Opportunity Commission (EEOC), sexual harassment is defined as unlawful and unwelcomed "sexual advances, request for sexual favors, and other verbal or physical harassment of a sexual nature."[45] The EEOC notes that the, "harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee" (i.e. a client or customer).[46] Furthermore, "harassment is illegal when it is so frequent or severe that is creates a hostile or offensive work environment or…results in an adverse employment decision."[47] Under Title VII of the Civil Right Act of 1964, which "applies to employers with 15 or more employees," sexual harassment constitutes a form of sex discrimination.[48] Title VII was modified by Congress under the Civil Rights Act of 1991, which increased the number of legal protections against workplace discrimination by adding such provisions as allowing "harassment and discrimination plaintiffs the right to a jury trial in federal court."[49] Furthermore, the Civil Rights Act of 1991 also "gives plaintiffs the right to collect compensatory and punitive damages … subject to a cap based on the size of the employer."[50] Three years later, Congress passed the landmark Violence Against Women Act of 1994, limiting evidence from the plaintiff's "past sexual history" that can be presented to the court in a sexual harassment case.[51]

A number of groups have tackled the issue of sexual harassment throughout the history of the United States. Abolitionist worked to educate the public on how sexual harassment affected female slaves, and women's rights advocates, like Susan B. Anthony and Elizabeth Cady Stanton, fought for the rights of sexually harassed women following the Civil War. Furthermore, the late 19th and early 20th centuries saw the rise of groups like labor activists and the Women's Christian Temperance Movement that offered counseling and advice to women who had been sexually harassed in the workplace.[52] In the late 20th century, three major developments took place in the fight against sexual harassment in the workplace. The first of these developments was the immense cultural shift in America from the 1960s to the 1970s, which led to more women entering the workforce and the topic of sex becoming less taboo. This cultural metamorphosis made campaigns against sexual harassment, rape, and domestic violence possible and effective. Furthermore, the women's liberation movement began to challenge the failure of both the justice system and American culture to recognize the significance of consent in cases regarding claims of sexual violence.[53] The second development came

44 Epic Systems Corp. v. Lewis, OYEZ, Docket No. 16-285 (2017).

45 *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (Last visited 2017).

46 *id.*

47 *id.*.

48 *id.*

49 *The History of Sexual Harassment Law*, EMPLOYMENT LAW FIRMS, https://www.employmentlawfirms.com/resources/employment/workplace-safety-and-health/sexual-harassment-law.htm (Last visited 2017).

50 *id.*.

51 *id.*

52 *A Brief History of Sexual Harassment in the United States*, NATIONAL ORGANIZATION FOR WOMEN (2013), https://now.org/blog/a-brief-history-of-sexual-harassment-in-the-united-states/ (Last visited 2017).

53 Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill,* TIME, April 11,

from Cornell University Professor Lin Farley's coining of the term "sexual harassment" at a New York City Human Rights Commission meeting regarding women in the workplace. The phrase, which was subsequently cited in a *New York Times* article, gave victims a way to articulate and communicate their experiences. The violation of their rights as not only American citizens, but also as human beings, now had a name, and women could begin to share their stories and find a sense of solidarity.[54] The third paramount development was Anita Hill's testimony, accusing then U.S. Supreme Court nominee Clarence Thomas of sexual harassment in 1991. Hill testified that during her time working under now Justice Thomas at the Education Department, he "barraged her with discussions of sex acts, bestiality, and pornography."[55] While the issue at the crux of Anita Hill's testimony was not a new one, the level of national attention her accusation brought to the issue were unparalleled at the time. While in the past, women largely did not discuss the harassment they experienced from employers and co-workers, the number of "sexual harassment complaints filed with the EEOC doubled" in the wake of Hill's testimony.[56] These developments demonstrate the evolution of the discussion of workplace sexual harassment in America, moving the issue out of the darkness of shame and into the light of social progress and equality under the law.

Social movement towards a greater recognition and eradication of sexual harassment in the workplace was accompanied by a legal revolution. The following three cases define the legacy and history of sexual harassment in the Supreme Court: (1) *Meritor Savings Bank, FSB v. Vinson (1986); (2) Faragher v. City of Boca Raton (1998); and (3) Burlington Industries, Inc. v. Ellerth (1998).* The question before the Court in *Meritor Savings Bank, FSB v. Vinson* was whether the Civil Rights Act prohibited "the creation of a hostile environment" or if it was simply "limited to tangible economic" workplace discrimination.[57] In 1986, the Rehnquist Court held unanimously that Title VII of the Civil Rights Act was " not limited to economic or tangible discrimination." The Court further underlined that, "the guidelines issued by the EEOC specified that sexual harassment leading to non-economic injury" was, under Title VII, to be considered as sexual harassment.[58] The significance of this case lies in the resulting official recognition of sexual harassment as a form of sexual discrimination in federal law that it incited. In 1998, the Rehnquist Court made two significant decisions concerning sexual harassment. In one of these cases, *Faragher v. City of Boca Raton (1998)*, the Court decided that an employer could be held liable under Title VII for the actions of an employee (i.e. a supervisor) who had created a hostile work environment due to the sexual harassment of subordinates.[59] This case established the notion of corporate accountability in sexual harassment cases in violation of Title VII. The other, *Burlington Industries, Inc. v. Ellerth (1998),* posed question: "Can an employee who refused advances of sexual harassment by a supervisor, recover damages under Title VII against an employer without showing that that employer was responsible for the actions of the supervisor?" The Court

2016, http://time.com/4286575/sexual-harassment-before-anita-hill/ (Last visited 2017).

54 Lin Farley, *I Coined the Term 'Sexual Harassment' Corporations Stole It*, THE NEW YORK TIMES, October 18, 2017, https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html (Last visited 2017).

55 Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill,* TIME, April 11, 2016, http://time.com/4286575/sexual-harassment-before-anita-hill/ (Last visited 2017).

56 *id.*

57 Meritor Savings Bank, FSB v. Vinson, 477 US 57 (1986).

58 *Id.*

59 Faragher v. City of Boca Raton, 524 US 775 (1998).

decided, in a 7-2 decision, that employers *were* in fact liable for superiors who, by engaging in harassing conduct, created hostile working environments, regardless of whether or not the victim of harassment suffered job-related consequences.[60]

Although much of this development has focused on the harassment of women, men of all identities and sexualities do not remain immune to gross acts of harassment. Furthermore, workplace sexual harassment, despite recent shifts towards progress, still pervades the American workplace in explicit and implicit ways, especially in employment arenas like the music industry, Silicon Valley, academia, STEM fields,[61] and the movie industry. [62] It is therefore imperative that we remain cognizant of this important problem in American society and arrive at ways to eradicate and remedy it.

Effects

Arbitration and Employee Rights

Employers and proponents of arbitration argue that: "[it] provides all parties with fair, quicker, and more efficient resolution of disputes" compared to traditional forms of judicial procedures.[63] This argument, however, paints a rather rosy picture of an unfortunate reality. Arbitration clauses and processes pose a plethora of challenges for the employee bringing a claim against an employer. In her dissenting opinion in *DIRECTV, Inc. v. Imburgia, (2015),* Justice Ginsburg stated the Court's trend of deciding in favor of employers on cases involving arbitration "have predictably resulted in the deprivation of consumers' rights to seek redress for losses … and … have insulated powerful economic interests from liability."[64] These same effects have been recorded to impact employees forced into arbitration by employers.[65] Moreover, Justice Ginsburg emphasized that "by inserting individual arbitration clauses into … consumer and employment contracts, companies [had] devised a way to circumvent the courts" by removing the "only tool citizens have to fight illegal or deceitful business practices:" class-action lawsuits.[66] Although arbitration may save companies money, compared to the legal fees of trial, the same does not hold true for employees; arbitration often costs employees "more than taking a case to court." [67] After paying a huge fee "simply to initiate the arbitration process," employees "have to travel thousands of miles on their own dime" to take part in arbitration disputes.[68] Furthermore, Jeffery B. Wall, the deputy solicitor general who argued on behalf of Epic Systems Corp. in the recent Supreme Court oral arguments, recognized that it is often impossible for employees "to vindicate their claims" because of the manner in which arbitrations are timed.[69]

The growing prevalence of forced bilateral arbitration clauses and the prohibi-

60 Burlington Industries, Inc. v. Ellerth, 524 US 742 (1998).

61 *Id.*

62 Doug Criss, *The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein,* CNN, November 1, 2017, http://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html (2017).

63 Maria Castellucci, *U.S. Supreme Court upholds arbitration agreements for nursing homes,* MODERN HEALTHCARE, May 15, 2017, http://www.modernhealthcare.com/article/20170515/NEWS/170519902 (Last visited 2017).

64 "577 U. S. ____ (2015)." Accessed November 15, 2017. https://www.supremecourt.gov/opinions/15pdf/14-462_2co3.pdf.

65 Stone

66 577 U. S. ____ (2015).

67 *The Problem*, FAIR ARBITRATION NOW, http://www.fairarbitrationnow.org/problem/ (Last visited 2017).

68 *id.*

69 Adam Liptak, *Supreme Court Divided on Arbitration for Workplace Cases*, THE NEW YORK TIMES, October 2, 2017, https://www.nytimes.com/2017/10/02/us/politics/supreme-court-workplace-arbitration.html (Last visited 2017).

tion of class action suits destroy the ability of employees "to vindicate their right to be free from workplaces discrimination, and other core statutory tights."[70] The growing prevalence of arbitration clauses and "class action bans" have prompted some state judges to denounce arbitration as a "get out of jail free card," due to the fact that "it [makes it] nearly impossible for one individual to take on a corporation with vast resources."[71] Nonetheless, the use of class-action waivers in forced arbitration clauses represents simply one of the many problems posed to employees under forced arbitration. In addition to losing the ability to gain leverage and strength in numbers, employees are placed at a severe disadvantage before deliberations even begin, mainly because employment arbitration clauses often include provisions that allow the employer to choose the arbitrator. According to a 2011 research study conducted by the Economic Policy Institute (EPI),[72] the rates at which employees win arbitration cases remain, "much lower than in either federal court or state court" trials. [73] In fact, "employees in mandatory arbitration [win] only just about a fifth of the time."[74] This study also noted that "the median … award in mandatory arbitration [is] only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts."[75]

Additionally, "confidentiality is considered to be one of the crucial features of … arbitration," either "as part of the original arbitration clause or as a natural consequence of" it.[76] This is a major area of contention regarding arbitration clauses and the arbitration process in general. The element of confidentiality in arbitration clauses can be used "to keep investors and the public in the dark" about corporate misconduct. An example of such abuse is American Apparel's concealment of sexual harassment allegations against its CEO, Dov Charney.[77] Mr. Charney was fired ten years after Jane magazine printed an article in 2004 with quotes from Mr. Charney such as, "masturbating in front of women is underrated."[78] In 2011, Mr. Charney faced multiple accusations of sexual harassment; however, American Apparel was able to hide these accusations and the arbitration proceedings from the public as a result of the mandatory confidentially included in the arbitration clause of the company's employment contract. In fact, these allegations were only made public when four of the women who had accused Mr. Charney of sexual harassment filed suit in Los Angeles state court to free themselves from their contractual arbitration clauses.[79] Three years after the allegations, Mr. Charney was finally fired, and investors

70 *Amicus Brief-ACLU* at, Epic Systems Co. v. Lewis; Ernst & Young v. Morris; National Labor Relations Board v. Murphy Oil, No. 16-285 (7th Cir. Jan. 13, 2017).

71 Liptak

72 The Economic Policy Institute is a nonprofit, nonpartisan think tank, which focuses on economic research pertaining to the needs of low and middle income workers. The study conducted in 2011 compares overall trail outcomes in mandatory arbitration and litigation, and used data from outcomes of 1,213 mandatory arbitration cases over a five-year period. This data was provided by the American Arbitration Association, which is the largest arbitration service provider in America. This data was then compared with the outcomes of employment discrimination cases in federal courts, as well as non-civil rights employment cases in state courts.

73 Stone

74 *Id.*

75 *Id.*

76 *Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome*, NYU LAW CENTER FOR TRANSNATIONAL LITIGATION AND COMMERCIAL LAW, December 28, 2012, http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/ (Last visited 2017).

77 Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, THE NEW YORK TIMES, July 15, 2014, https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/ (Last visited 2017).

78 *Id.*

79 *Id.*

were able to learn of the misconduct.[80]

Arbitration and Victims of Sexual Harassment

The behavior of American Apparel in reaction to allegations against CEO Dov Charney is unfortunately not unusual. Earlier this year, hundreds of former employees of Sterling Jewelers, which owns Jared the Galleria of Jewelry and Kay Jewelers, filed sexual harassment claims against the company. Allegations included groping and being "urged to sexually cater to their bosses to stay employed."[81] In February 2017, there were approximately 250 total sexual harassment allegations against Sterling Jewelers. Victims accused the company's chief executive and other company leaders of not only allowing "rampant sexual harassment and discrimination," but also suppressing the ability of employees to disclose the company's behavior to the public.[82] The claims, which allege that top male employers scouted out "stores to find female employees they wanted to sleep with, laughed about women's bodies in the workplace, and pushed female subordinates into sex by [promising] better jobs, higher pay, or protection from punishment," still remain unresolved.[83] The abuse allegedly spread far beyond the behavior of top company executives. The manner in which Sterling Jewelers handled the allegations was also put in question. By forcing disputes into arbitration, the company exerted complete control over the process, presented its own paid experts, and claimed it had reviewed the allegations and "concluded that the company [devoted] adequate resources to [managing] complaints of unwanted sex-related behavior."[84]

The case of Sterling Jewelers underscores a number of key challenges and concerns presented by arbitration in cases of sexual harassment. For one, arbitration clauses usually give the company the power to choose the arbiter and the location where the arbitration process is to take place. Companies not only have greater access to monetary and other resources, but also are also better positioned before the proceedings even begin thanks to the powers they are given by the arbitration clauses. Furthermore, although arbitration proceedings claim to be more efficient than court hearings, it is important to note that the allegations against Sterling Jewelers remain unresolved. The claims against the company were first filled in 2008; however the "efficient" process of arbitration failed to produce quick results. In fact, one of the women who originally brought the case against Sterling Jewelers died in 2014 "as proceedings crawled on without [a] resolution."[85] Due to the confidential nature of these proceedings, it is difficult to establish why a resolution has taken so long to reach. This underscores another important problem of arbitration in cases of sexual harassment in the workplace: confidentiality. While the harassment of female employees "was done out in the open" by company employers,[86] the allegations of rampant sexual harassment were kept hidden from the public "through gag orders imposed in forced arbitra-

80 *Id.*

81 Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing,* NATIONAL WOMEN'S LAW CENTER, October 23, 2017, https://nwlc.org/blog/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing/ (Last visited 2017).

82 Drew Harrell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company,* THE WASHINGTON POST, February 27, 2017, https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html?utm_term=.09337e0c768c (Last visited 2017).

83 *Id.*

84 *Id.*

85 Harrell

86 *id.*

tion."[87] During this time, Sterling Jewelers continued to operate stores throughout the U.S., without any form of disciplinary action for the accused employers and executives. Because these accusations were secret, women who looked to join the Sterling Jewelers workforce were not privy to information about the alleged sexual harassment culture of the company, and therefore could not make an informed decision before applying to work there. Had the company not been able to use arbitration clauses to keep sexual harassment allegations secret, it would have been forced to take action and hold employers and executives accountable immediately. While these allegations sat in the dark, Sterling Jewelers hired more women and produced more victims of sexual harassment, who were subsequently forced into the margins of a society that remained unwilling to confront the failure of the law in workplace harassment.[88]

The effects of forced arbitration on victims of sexual harassment who are seeking justice became headline news when ex-Fox News anchor Gretchen Carlson sued then Fox News CEO Roger Ailes for sexual harassment in 2016. Although Carlson's Fox employment contract includes an arbitration clause that requires "workplace disputes to be resolved in a New York-based arbitration," Carlson argued to have her sexual harassment lawsuit tried publically with a jury trial in New Jersey.[89] Carlson's attorney, Nancy Erika Smith, was accused by Ailes' legal team of trying "to game the system so as to avoid the arbitration clause" in Carlson's contract with the news company.[90] It is important to ask, however, why Smith would even want to "game the system," if arbitration is such a great tool in settling employment disputes. Carlson believes her suit, which, among other allegations, "argues that she was fired from [Fox] for refusing to sleep with Ailes," belongs in court, in front of a jury.[91] Since Carlson took her allegations public, more women have accused Ailes of sexual harassment and inappropriate behavior. This illumination of the truth and emergence of victims' stories is exactly what Fox had been trying to avoid with arbitration.[92] While speaking at the 2017 Women in the World conference in New York, Carlson addressed the pervasive culture of sexual harassment in the American workplace. Carlson spoke out against forced arbitration clauses in employee contracts that not only hinder the ability of victims to bring harassers to justice in a court of law, before a jury of their peers, but also prevent victims from sharing their story and demanding public corporate accountability.[93] The secret nature of forced arbitration makes victims feel that "nobody will ever hear about what happened to [them]", according to Carlson.[94]

How forced arbitration perpetuates sexual harassment and solutions

How Arbitration Hinders Progress in the Workplace

The "secret star chamber proceeding" of arbitration negatively impacts the ability of society to change the very culture that allows for workplace sexual harassment.[95] It eradi-

87 Martin

88 Harrell

89 Katie Reilly, *Attorneys for Gretchen Carlson Seek Public Trial for Sexual Harassment Suit Against Fox CEO Roger Ailes*, TIME, July 16, 2016, http://time.com/4409289/fox-news-roger-ailes-gretchen-carlson-arbitration-public-trial/ (Last visited 2017).

90 *Id.*

91 *Id.*

92 *Id.*

93 Ahiza Garcia, *Gretchen Carlson: 'Every damn woman still has a story' about harassment',* CNNMoney, April 6, 2017, http://money.cnn.com/2017/04/06/media/gretchen-carlson-sexual-harassment/index.html (2017).

94 *Id.*

95 Gretchen Carlson, *Gretchen Carlson: How Arbitration Clauses Allow Sexual Harassment to Continue,* TIME, March 10, 2017, http://motto.time.com/4698538/gretchen-carlson-sexual-harassment-arbitration-clauses/

cates a victim's ability speak publicly against an alleged harasser and it, "shields abusers form true accountability."[96] Furthermore, it has been shown that victims of workplace sexual harassment are more likely to speak out against their attackers when other victims taking a stand publicly. A recent Takeaway-Harris Poll[97] found that 64 percent of women would feel more comfortable challenging a harasser or abuser because of the "recent outpouring of accusations."[98] Of that 64 percent, 73 percent of women report feeling more comfortable coming out of the darkness because the "recent outpouring of accusations" would help them to know that they are not alone, and 56 percent attributed the increased comfort to knowing that there is a possibility for abusers to be held accountable.[99] This demonstrates the power and potential impact of a victim speaking out against an accused harasser publically. By replacing a public trial by jury, arbitration proceedings cover up the misogynistic status quo of harassment in the American workplace and prevent survivors from coming out with their stories and inspiring others to feel safe and confident enough to do so as well.

Additionally, according to a 2011 study[100] conducted by Cornell University, employees only win about 21 percent of all employment arbitration cases.[101] This remains especially troubling considering that roughly one third of the non-union workforce (in 2010) was subject to mandatory arbitration for all and any workplace disputes, including claims of sexual harassment.[102] These statistics, in addition to the fact that most employers select who the arbitrators of a specific workplace dispute will be, demonstrate that arbitration hinders the ability for victims to truly be given a fair chance at bringing justice to their attackers through arbitration.[103] For victims who seek to expose their harassers and empower others to shine a light on the ubiquitous issue of workplace harassment in America, "arbitration is a dead end."[104] Proceedings isolate and heavily burden victims by forcing them to fight for justice against harassers starting from the very beginning, even if a particular employer or supervisor had been accused of harassment in the past. Furthermore, most arbitration clauses contain class-action waivers, depriving victims of the possibility to make a claim against a harasser in solidarity.[105] This means that victims cannot share information. In trial cases, this is not a problem, as anyone can have access to relevant information "in a discovery of a regular case."[106] Mandatory case-by-case arbi-

(Last visited 2017).

96 *Id.*

97 For this poll, 2,138 adults over the age of 18 were surveyed online between November 2 and November 6, 2017.

98 WNYC, and PRI, eds. *Poll: For Women at Work, Harassment Complaints Fall on Deaf Ears*. WNYC. November 15, 2017. http://www.wnyc.org/story/sexual-harassment-workplace-tips/. (Last visited November 19, 2017).

99 *Id.*

100 This study surveyed 3,945 arbitration cases that were resolved between January 1, 2003 and December 31, 2007.

101 Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes,* CORNELL UNIVERSITY ILR SCHOOL (2011), http://digitalcommons.ilr.cornell.edu/articles/577/ (Last visited 2017).

102 *Advocacy: Forced Arbitration*, NELA: ADVOCATES FOR EMPLOYEES RIGHTS, https://www.nela.org/index.cfm?pg=mandarbitration (Last visited 2017).

103 Carlson

104 Passman & Kaplan, P.C., Attorneys at Law. Do Nondisclosure Agreements Perpetuate a Toxic Workplace Culture? PASSMAN & KAPLAN ATTORNEYS AT LAW, November 3, 2017, https://www.passmanandkaplan.com/blog/2017/11/do-nondisclosure-agreements-perpetuate-a-toxic-workplace-culture.shtml. (Last visited Accessed November 19, 2017).

105 Joseph Sellers, *Is Mandatory Arbitration Harmful to Harassment Victims?*, CQ RESEARCHER, October 2017, https://www.cohenmilstein.com/sites/default/files/media.102717.pdf (Last visited 2017).

106 Yuki Noguchi, *Supreme Court Ruling Could Limit Workplace Harassment Claims, Advocates Say,* NPR, November 16, 2017, https://www.npr.

tration makes it almost impossible for sexual harassment victims to demonstrate a "pattern in practice," thereby creating a situation that eliminates accountability and allows for such "patterns and practices … to continue."[107]

Moreover, arbitration reinforces the notion that sexual harassment is not something that society can, or should, openly discuss. By burying the issue out of reach of the public forum, arbitration eliminates the possibility of an open discussion about the reality women in the workforce face and stymies the progress of the fight for gender equality. By creating a system that addresses issues of sexual harassment "out of the box [of private arbitration] instead of [bottled] up confidentially," the American justice system would be better adept to ensure that the behavior of harassers will not continue "to happen time and time again" without accountability.[108] The overdue conversation about the truth and pervasiveness of sexual harassment in workplaces remains undoubtedly delayed and silenced by arbitration clauses that keep accusations "away from court" and from public scrutiny. [109]

Current Claims and Possible Solutions

According to the National Women's Law Center, a legal network that works to protect and promote equality and opportunities for women, when companies try to shield corporate wrongdoings by using forced arbitration to impose secrecy and isolate victims; they make "it more difficult for [victims] to hold the wrongdoers [of sexual harassment] accountable."[110] Congress, in recognizing the gross problem of allowing companies to conceal misconduct behind arbitration, has recently referred the *Mandatory Arbitration Transparency Act of 2017* to the Senate Judiciary Committee. This Act would ban the possibility of forced confidentiality in arbitration that would "prohibit a party from … reporting or making a communication about tortious conduct, unlawful conduct, or issues of public policy or public concern."[111] Furthermore, the Consumer Financial Protection Bureau is taking steps to protect consumers from the effects of forced arbitration by issuing a rule that "permits class action lawsuits" and requires the "publishing [of] arbitration complaints and outcomes."[112] Unfortunately, despite this progress, Congress and the Trump administration have effectively "overturned rules that prohibited" federal employers from "forcing employees to arbitrate" sexual assault claims or claims of Title VII violations.[113]

This past term, the Supreme Court heard arguments for *Epic Systems Corporation v. Lewis*, No. 16-285, a case involving the rights of employees to sue their employers. During oral arguments, Justice Ginsburg compared arbitration clauses in employment contracts to "yellow-dog contracts,"[114] which had been banned about 90 years ago by New Deal legislation.[115] Justice Ginsburg also stated

org/2017/11/16/564387907/supreme-court-ruling-could-limit-workplace-harassment-claims-advocates-say (Last visited 2017).

107 *Id.*

108 *Id.*

109 Bryce Covert, *How Corporations Create a Culture of Impunity for Sexual Harassers*, NEW REPUBLIC, November 2, 2017, https://newrepublic.com/article/145606/corporations-create-culture-impunity-sexual-harassers (Last visited 2017).

110 Martin

111 Mandatory Arbitration Transparency Act of 2017, S. 647, 115th Cong.

112 163 Cong. Rec. E1077-E1079 (July 28, 2017) (statement of HON. KEITH ELLISON). Accessed November 17, 2017. https://www.congress.gov/congressional-record/ 2017/07/28/extensions-of-remarks-section/article/E1077-2.

113 Martin

114 Yellow Dog contracts were employment contracts that forced workers to sign away their right to unionize in order to work for a particular employer.

115 S.M., *The Supreme Court seems to favour companies in an arbitration case*, THE ECONOMIST, October 3, 2017, https://www.economist.com/blogs/de-

that the inclusion of arbitration clauses in employee contracts "involve[s] no true bargaining," noting that the extent of conversation regarding the matter is that "the employer says you want to work here, you sign this."[116] Although *Epic Systems Corporation v. Lewis* involves the question of class-action waivers in arbitration clauses, the decision of the case will be significant to the effect of arbitration on sexual harassment claims for two reasons. For one, it will demonstrate in which direction the Court is moving on the question of arbitration in employment contracts; "Will the Court abide by precedent favoring arbitration and bolstering employers, or will the Court change gears and decide in favor of protecting and preserving labor rights?" Secondly, if the Court chooses to uphold the constitutionality of class-action waivers in employment contracts, women who are forced into arbitration when filing a sexual harassment claim will not have the option of pooling together their voices, information, and resources against the same harasser. Instead, they will have to go about the grueling process alone. Furthermore, Uber is currently in the midst of a class-action lawsuit regarding allegations of sexual assault made against drivers. The class action involves over 1,000 victims (women and men) who are arguing that, under the Supreme Court of California decision in *McGill v. Citibank, N.A.* (2017),[117] "pre-dispute arbitration agreement[s]" cannot force consumers to waive their rights "to seek statutory remedy in any forum."[118] Although this class-action suit shows the constraints and disadvantages presented by arbitration to consumers who are victims of Title VII violations, it also works to demonstrate just how devastating arbitration can be for any victim of sexual harassment trying to find justice in a broken system.

The question set before lawmakers, lawyers, judges, and the public is what role arbitration has, if any, in settling disputes of sexual harassment in the workplace, as it is defined under Title VII of the Civil Rights Act of 1965. Some arbitration proponents claim that arbitration is a faster, more efficient, and less costly alternative to litigation.[119] Others argue that arbitration is essential for the protection of "trade secrets, patents, and other intellectual property."[120] On the other hand, opponents of arbitration, in discrediting this logic, not only find that arbitration does not offer any clear benefits over litigation, but also that the use of arbitration in employment contracts can have a number of significant disadvantages.[121] For one, arbitration can end up being "just as costly, adversarial, and time-consuming" as litigation."[122] Workers' rights advocates believe that the decisions of the Supreme Court in the three cases involving class-action waivers in arbitration clauses that were heard this past term could have detrimental impacts on the ability

mocracyinamerica/2017/10/class-inaction (Last visited 2017).

116 Oral Argument: Epic Systems Corp. v. Lewis. Supreme Court of the United States. October 2, 2017.

117 Ben Hancock, *Uber Faces Class Action Over Alleged Widespread Driver Sexual Assault,* LAW.COM, November 14, 2017, https://www.law.com/sites/therecorder/2017/11/14/uber-faces-class-action-over-alleged-widespread-driver-sexual-assault/ (Last visited 2017).

118 Sharon McGill v. Citibank, No. S224086 (Supreme Court of California, 2017).

119 Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims,* TEXAS A&M UNIVERSITY SCHOOL OF LAW (2000), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1211&context=facscholar.. (Last Visited 2017).

120 Michael Hiltzik, *Column Cisco loses a round on forcing an employee into arbitration*, LOS ANGELES TIMES, January 18, 2017. Accessed November 22, 2017. http://www.latimes.com/business/hiltzik/la-fi-cisco-arbitration-20170118-story.html.

121 Green

122 Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance*, 26 HARV. WOMEN'S L.J. 3-75 (2003).

of workers to engage in "collecti[ve] action on harassment and other issues in the workplace."[123] This is due to the fact that the process of private mandatory arbitration innately "isolates workers from each other" at a time when they would "most need the resources and informational sharing" that is "crucial to establishing patterns of misconduct."[124] Although the use of private and secretive mandatory arbitration may be justified in disputes involving intellectual property concerns, workplace sexual harassment is not and should not be considered a trade secret. In keeping sexual harassment claims and the stories of hundreds of victims behind closed doors, the American legal system's current arbitration regulations with regards to Title VII violations present society with a major roadblock in moving towards workplace and cultural progress for gender equality.

Conclusion

In 2016, *Time Magazine* made Gretchen Carlson's story—a story that many fought tooth and nail to get published—front-page news. In 2017, Time Magazine named all the women who spoke out against sexual harassment the "Person of the Year." While legal reforms that increase accountability may not eradicate sexual harassment in the workplace on their own, they will help to direct society towards progress. Education and culture will undoubtedly play pivotal roles in increasing the awareness of sexual harassment and its nefarious effects on victims and society as a whole; however, arbitration hinders any chance of progress by destroying the ability of victims to obtain justice. The silencing of victims, isolation of employees, refusal to have a public conversation and harassment, and culture of zero accountability must cease to exist if America wants to eradicate, or even mitigate, workplace sexual harassment. Reforms can be made to ensure that victims have unhindered access to vindication for their grievances that provide them with on open public forum to spread awareness, increase accountability, and erode the taboo nature of sexual harassment in the workplace. Such developments will lend themselves to a slow, but tangible, change in the perception of workplace sexual harassment, and will be a grand step towards achieving greater equality for women and all those disproportionately affected by workplace harassment due to their identity. By protecting the rights of women to a public trial and a jury of their peers, the law can act as "the iron fist… in the velvet glove of education."[125] On the path towards progress, no room exists for the backroom deals and secrecy of arbitration.

123 Noguchi

124 *id.*

125 Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?* 9, no. 1 OHIO ST. J. ON DISP. RESOL.27-53 (1993).

Brexit & International Criminal Law:
Entering Uncharted Waters

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Abstract

This paper analyzes the implications of the British withdrawal from the European Union, commonly referred to as "Brexit," on the function of international criminal law in the United Kingdom. While Brexit negotiations have largely focused on changes to immigration and trade policy, much of the United Kingdom's international criminal law enforcement and policy rely on European Union bodies and precedent. This paper analyzes the five largest areas of United Kingdom-European Union criminal law overlap: criminal justice agencies, cooperation agreements, mutual recognition agreements, harmony of law, and harmony of criminal procedure. Through case studies and analysis of international treaties, this paper explores each of these areas. While many of the precise functions of international law after Brexit have the potential to change based on the specificities of exit negotiations, the entrenched legal mechanisms described here could all be subject to a variety of transformations in the coming years. This paper seeks to understand the potential for such change more thoroughly.

1. Brexit: How Did We Get Here?

Britain joined the "European Economic Community"–an open market precursor to the European Union–in 1973 without a popular referendum on the issue.[1] In 1975, Britain voted to remain in the European Economic Community, which, at the time, was just a trading group of nine nations.[2] In the 41-year interstitial period between that vote and the tabling of the United Kingdom-European Union membership referendum during the summer of 2016, the British public had no direct voice in their nation's relationship with Europe.[3] During that time, the European Economic Community has evolved from an open trading group to a political union, exerting a wide range of influence over the policy and sovereignty of its member states.[4] Since the ratification of the Maastricht Treaty in 1993–which formally established the European Union and imposed new areas of governance (namely in the fields of common justice/home affairs and foreign/security affairs, in addition to extant trade agreements) on the member states–various politicians and laypeople have called for a popular vote to challenge the perceived transfer of power that these restrictions entail.[5]

In 2016, the matter of continued British membership in the European Union finally came to a head. The long period without a membership vote was only one factor that led to the public referendum. More immediately, David Cameron, the British Prime Minister at the time, wanted to resolve the European Union issue and reduce tensions within his own Conservative party.[6] When he became leader of the party, Cameron sought to end the party's "banging on about Europe," and eventually wanted to address the issue of membership in the European Union with a popular referendum.[7] As calls for a referendum on the issue became louder, Cameron initially rejected the vote in 2012, but later said that if the Conservative Party were re-elected, he would hold a referendum on continued EU membership.[8]

Many have argued that the impetus to exit the European Union, as with other Populist movements throughout the West, such as the election of Donald J. Trump in the United States, might have resulted from several sources.[9] Scholars claim that the pushback either reflects changes in the workforce and society of "post-industrial economies," which are not serving the needs of the working class, or reveals a cultural resistance to increasingly progressive cultural values by a once dominant, conservative part of the population.[10] These factors may have contributed to a growing tide of populist movements and isolationist foreign policy in Western nations.[11] Perhaps as

1 *A timeline of Britain's EU membership in Guardian reporting*, THE GUARDIAN (June 25, 2016), https://www.theguardian.com/politics/2016/jun/25/a-timeline-of-britains-eu-membership-in-guardian-reporting.

2 Oliver Wright and Charlie Cooper, *Brexit: What is it and why are we having an EU referendum?* THE INDEPENDENT(June 23, 2016), http://www.independent.co.uk/news/uk/politics/what-is-brexit-why-is-there-an-eu-referendum-a7042791.html.

3 Id. Wright and Cooper

4 Wright and Cooper, *supra* note 2.

5 *Ibid* Wright and Cooper*, supra note 2. Maastricht Treaty*, BBC NEWS, (April 30 April 2001), http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1216944.stm.

6 Rishi Iyengar, *These 3 Facts Explain Why the U.K. Held the 'Brexit' Referendum*, TIME (June 24, 2016), http://time.com/4381184/uk-brexit-europe-an-union-referendum-cameron/.
Rowena Mason, *How did UK end up voting to leave the European Union?* THE GUARDIAN, June 24, 2016), https://www.theguardian.com/politics/2016/jun/24/how-did-uk-end-up-voting-leave-european-union.

7 Mason, *supra* note 6.

8 Iyengar, *supra* note 6.

9 RONALD F. INGLEHART AND PIPPA NORRIS, *TRUMP, BREXIT, AND THE RISE OF POPULISM: ECONOMIC HAVE-NOTS AND CULTURAL BACKLASH*, pg. 1 (Harvard Kennedy School, 2016).

10 *I* Id.

11 Inglehart and Norris, *supra* note 9.

a result of these pressures, when David Cameron's 2016 EU Referendum went to a vote, a majority of voters decided to leave. Although the vote was intended to end divisions within the party and solidify Cameron's Government, the results led the Prime Minister to resign and began a long and uncertain process of secession.[12] Some scholars have debated the legitimacy of the popular vote on the exit from the European Union and its terms; clear precedent exists in Article 50 of the Lisbon Treaty, which reformed membership terms for European Union states.[13]

2. What Does "Exit" Really Mean?

As no precedent exists for the departure of a member state from the EU, Brexit continues to breed uncertainty. As such, the process of departure–the legitimacy of the popular vote, the speed at which Britain will leave the Union, the trade conditions the UK will maintain with the European Union, etc.–remains unresolved. As a result of the continued instability and debate surrounding the Brexit process, most of the ramifications of exit from the European Union remain entirely undiscussed. These overlooked implications include the effects of Brexit on criminal law. In fact, unlike many other comparable areas of EU membership, criminal justice and security were not explicitly discussed in the pre-referendum debate.[14] This is important because, as mentioned above, since the Maastricht Treaty was passed in 1993, the United Kingdom's status as an EU member state has determined aspects of its criminal justice policy.[15] Prior to that time, states were merely required to support judicial coordination in criminal affairs, which was considered the "third pillar" of European statehood.[16] However, the Lisbon Treaty, which came into effect in late 2009, abolished the separate pillars of EU jurisdiction and expanded EU influence in criminal matters.[17] Since the inception of the Lisbon Treaty, European Union organizations and courts have increasingly involved and incorporated themselves into local governance and law.[18]

3. EU Criminal Law Jurisdiction

European Union criminal law operates in five distinct areas. The first involves shared criminal justice agencies. A group of European Union agencies exist with the explicit objective of improving criminal justice issues within member states.[19] Secondly, member states are subject to cooperation agreements. These agreements were arranged to coordinate efforts between law enforcement agencies of different EU countries, enabling those nations to address criminal activity in a globalized age and on an international stage.[20] Third, states must abide by certain judicial agreements.[21] These agreements require courts and other governing agencies or authorities in EU member states to recognize judgments issued by similar organizations in other EU countries.[22] Fourth, judicial systems within the EU must establish harmony of substantive criminal law with other member states.[23] "Harmony" indicates a base-

12 Iyengar, *supra* note 6.

13 6KBW College Hill, *Brexit Briefing No. 1: What are the implications for criminal law?* (July 4, 2016), http://www.6kbw.com/wp-content/uploads/2016/07/6KBW20Brexit20Briefing20No201-2.pdf.

14 6KBW College Hill, *supra* note 13.

15 *Criminal Justice*, EUROPEAN COMMISSION (November 24, 2016), http://ec.europa.eu/justice/criminal/index_en.htm.

16 *Id.*

17 . *Criminal Justice, supra* note 15. *Q&A: The Lisbon Treaty*, BBC, (January 17, 2011), http://news.bbc.co.uk/1/hi/world/europe/6901353.stm.

18 *Criminal Justice, supra* note 15.

19 *6KBW College Hill*, supra note 13. J.R. Spencer, *What would Brexit mean for criminal justice?* FULL FACT, (June 8, 2016), https://fullfact.org/europe/what-would-brexit-mean-criminal-justice/.

20 *Id.*

21 Spencer, *supra* note 19.

22 Spencer, *supra* note 19.

23 Spencer, *supra* note 19.

line correlation between substantive criminal law across member states.[24] This requirement ensures that certain acts are punishable by appropriately punitive responses, regardless of the country in which they occur.[25] Finally, states within the European Union are required to harmonize their criminal procedure.[26] In short, the process of a trial, regardless of the member state in which it takes place, must abide by similar measures.[27] These may include the rights of defendants and the establishment of minimum protection standards for crime victims.[28] Of course, Britain's exit from the European Union will affect criminal justice through more channels than the five discussed here. For instance, if the policy of free movement between Britain and the rest of Europe no longer continues after withdrawal, new policy could completely alter immigration law or procedures for criminals resisting arrest. The vast majority of EU influence and jurisdiction in criminal affairs, however, falls within these five categories.

4. Criminal Justice Agencies: Eurojust Case Study

Several criminal justice agencies that operate within the United Kingdom are under European Union jurisdiction. When Britain exits the European Union, these groups may cease to operate within the country. Yet, the Government has not publicly discussed the future of these organizations and their role within Britain, or lack thereof, in the wake of the Brexit vote. These agencies have been increasingly involved in the European Union Area of Freedom, Security, and Justice (ASFJ).[29] The ASFJ was created as a result of European Union reform treaties both predating and subsequent to the Lisbon Treaty.[30] States within the area are meant to ensure the free movement of persons from one country to another and to offer a high level of protection (from internal and external legal and physical threats) to its citizens.[31] Towards that end, a range of organizations–from the European Police College, to the European Institute for Gender Equality, Europol, and the Fundamental Rights Agency–operate within the ASFJ as a Justice and Home Affairs (JHA) network.[32]

To examine the potential implications of Brexit on international criminal justice agencies, this paper will assess one such organization within the network: Eurojust. Eurojust is a body that improves the coordination of criminal investigations and prosecutions between different organizations in member states.[33] At the request of an EU member state, the organization can assist investigation and prosecution between two member states or a member state and a non-member state.[34] Their jurisdiction concerns the same types of offenses that concern Europol–terrorism, drug trafficking, human trafficking, cyber crime, etc., and they have a wide range of authority that acts in concordance with (and sometimes outside of or even superseding) efforts by local authorities.[35]

24 Spencer, *supra* note 19.

25 Spencer, *supra* note 19.

26 Spencer, *supra* note 19.

27 Spencer, *supra* note 19.

28 Spencer, *supra* note 19.

29 Michiel Luchtman & John Vervaele, European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office), 10, Issue 5, UTRECHT LAW REVIEW 132 (December 2014).

30 *Justice, freedom and security*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW, (November 29, 2016), http://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_CODED%3D23,SUM_2_CODED%3D2307&locale=en.

31 *Justice, freedom and security, supra* note 30.

32 Luchtman & Vervaele, supra note 29, at 132.

33 *Mission and tasks*, *EUROJUST: THE EUROPEAN UNION'S JUDICIAL COOPERATION UNIT* (November 30, 2016), http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx.

34 *Mission and tasks, supra* note 33..

35 *Mission and tasks, supra* note 33..

The decentralized structures of Eurojust and other JHA organizations have led to a mixture of applicable European and national law in various member states.[36] In particular, the operations of these agencies have altered judicial procedure in three key areas.[37] First, it affects substantive procedure in the form of applicable law for the scope of judicial powers (i.e. civil liberties and procedural rights of those involved in legal action).[38] Second, EU legislation determines institutional function in the form of the applicable law for judicial control (legislative authority of governing bodies such as Parliament).[39] Finally, EU law regulates court procedure in the form of applicable law for the admissibility of evidence.[40] These areas of influence were a deliberate outcome of the Lisbon Treaty. Title V of the AFSJ Charter, in Article 67(3), states the following:

> The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through *measures for coordination and cooperation between police and judicial authorities and other competent authorities* (Emphasis added).[41]

When the operations of the European Union were reformed in 2009, the alterations were designed with the explicit intent of increased cooperation between member states and further involvement of umbrella EU organizations in local governance. In Article 85 of the Treaty for the Function of the European Union (TFEU), Eurojust was given supranational powers to increase its ability to oversee and facilitate co-operations in criminal investigation and prosecution.[42] These powers go above and beyond the scope and influence of any individual state government.

Overall, Eurojust protects the safety of European Union member states by ensuring that a diverse range of policing and governing organizations can coordinate their investigations and prosecutions. Their efforts have streamlined the process of criminal prosecution of multinational crime organizations throughout Europe, reducing crime and improving governance. As Britain exits the European Union, it is likely in the nation's best interest to remain within the sphere of influence of supranational organizations similar to Eurojust, to continue to reap the benefits of membership. Those organizations, however, may no longer have any jurisdiction or grounds for operation within the United Kingdom.

In the case of Eurojust, the organization was originally designed as a purely co-operative agency. At its inception in 2000 (as Pro-Eurojust), all organization employees were still technically under the supervision and jurisdiction of their respective national authorities.[43] As such, Pro-Eurojust could be more accurately understood as a criminal justice network, whose local members conducted investigations and other business at the national level and cooperated to solve international disputes. If Eurojust still operated in this manner, then perhaps Eurojust members in the United Kingdom could continue their investigations as part of the multinational organization while no longer maintaining European Union member status. However, in 2013 the organization was reformed, which necessitated the expansion of the institutional European dimension of Eurojust by requiring that the European Union

36 Luchtman & Vervaele, supra note 29, at 132.

37 *Id*, at 133-134.

38 *Id*.

39 *Id*.

40 *Id*.

41 Title V: Area of Freedom, Security and Justice, OFFICIAL JOURNAL OF THE EUROPEAN UNION C 115, 73 (2008), http://www.statewatch.org/news/2009/nov/lisbon-treaty-jha.pdf.

42 *Luchtman & Vervaele*, supra note 29, at 134.

43 *Id, at* 134-135.

Commission manage the agency.[44] Furthermore, both European Parliament and national parliaments would evaluate Eurojust's activities, and activity within the organization is considered part of the operation expenditures of the multinational organization rather than of an individual member state.[45] This 2013 amendment necessitates the non-involvement of Britain with the Eurojust agency once the country exits the European Union. If Britain is not a member of the European Union, a European Union law enforcement agency whose employees work for that umbrella organization have no grounds for operations within the country.

Scaling the Eurojust case study out and examining its larger implications for European Union law enforcement agencies, it becomes clear the Brexit may hinder criminal law adjudication and prosecution in Britain. In instances where the agency's operations and employees fall under the jurisdiction of the European Union, organizations will no longer have any grounds upon which to legitimize their presence and continued authority in Britain.

5. Cooperation Agreements: Standardized Procedures for Transnational Prosecution

A series of law enforcement agency cooperation agreements comprise the second aspect of European Union influence on member state criminal law.[46] Law enforcement agency cooperation, in many ways, ties to the operation of agencies like Eurojust. As discussed above, these supranational organizations often facilitate and oversee the cooperation of investigations on the ground level. However, European Union member states have also adopted several measures that allow for ease of communication and collaboration between entirely separate and local authorities.

The European Union has the authority to enforce measures in five different areas of police cooperation.[47] These include standardized information procedure (collection, storage, processing, analysis, and exchange); shared training of staff and exchange of staff, equipment, and research into crime detection; shared investigative techniques when examining serious organized crime; operational cooperation between different national agencies; and common conditions and limitations under which EU member state authorities may operate in other EU member states.[48] These measures are designed to allow better communication and collaboration between different police agencies, and has allowed for the implementation of information-sharing policies that previously would have been almost impossible to implement.[49] These policies allow for police cooperation in the prosecution of major transnational areas of crime, such as human trafficking or drug smuggling, which can often span across multiple national jurisdictions and, without transnational standards, would be nearly impossible to investigate.[50] In surveys of official government groups, most respondents agreed with the practical value of these policies.[51]

Cooperation agreements between EU member states serve a tangible, practical benefit to the United Kingdom. Without common European standards for information-gathering and criminal procedure, fighting transnational organized crime in the region would become extremely difficult. Interestingly, however,

44 *Id*, at 135.

45 *Id*.

46 Spencer, *supra* note 19.

47 HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: Police and Criminal Justice (2014). Accessed 30 November, 2016. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388645/PCJBoCreport.pdf#page=47.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

Britain already negotiated opt-outs or, in fact, never opted-in to some EU criminal justice measures. Cooperation agreements comprise one such sort of measure. Take, for instance, the Prüm Convention. The Prüm Convention, signed by Belgium, Germany, Spain, France, Luxembourg, the Netherlands, and Austria in 2005, was designed to strengthen cross-border cooperation and exchange of information in a variety of criminal justice investigative endeavors.[52] These agreements were adopted before the Lisbon Treaty took effect, but when the treaty was established, the UK was given the option not to participate in the bounds of the Convention.[53] The Government took that option due to concerns about European Union infringement in national concerns.[54] The Prüm Convention is only one such instance of carefully negotiated legal opt-outs for Britain from EU criminal justice influence.

In the case of international police and investigation cooperation agreements, it seems unlikely that the British withdrawal from the European Union will effect any substantive change in Government policy. As discussed above, Government and criminal justice organizations recognize the importance of these agreements to international prosecutions and investigations. Even after leaving the European Union, Britain would be free to continue to maintain European standards in training and investigation. This continued compliance with EU standards would enable the continued success of transnational investigative efforts. As with the Prüm Convention, the UK could continue to maintain its role in the network of international investigation and comply by EU standards without total integration into the criminal justice conventions and framework. Brexit, however, may lead to Britain's exclusion from several of the more codified aspects of international law enforcement agency cooperation agreements, such as shared staff training and equipment exchange. Nevertheless, it seems that Brexit will have little impact, positive or negative, on this aspect of international criminal law.

6. Mutual Recognition Agreements: Blurring the Line between National and European Law

European criminal law still differs on a state-by-state basis.[55] In other words, no static, standard set of laws determines criminal procedure in each EU nation, but instead national courts apply their own set of legal standards to each case set before them, and those judgments determine law in those nations.[56] Nevertheless, concerted efforts have been made by EU governing bodies to harmonize criminal law across the states.[57] Mutual recognition agreements comprise one category of harmonization efforts. These agreements require courts and other legal authorities in member nations to consider and give effect to judgments by similar governing bodies in other EU countries.[58] These agreements primarily concern criminal decisions and warrants.[59] When another country convicts an individual of a crime or issues a warrant, the open-border policy and ease of transit within the European Union makes flight and resisting arrest much easier than would be the case in other areas. The mutual recognition agreements ensure that these decisions and warrants will be recognized and enforced

52 *Cross-border law enforcement cooperation – UK participation in Prüm,*", PARLIAMENT (November 30, 2016), http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-xii/34205.htm.

53 *Cross-border law, supra* note 52..

54 *Cross-border law, supra* note 52..

55 *Judicial co-operation in criminal matters: mutual recognition of final decisions in criminal matters*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW November 30, 2016), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33131.

56 *Judicial co-operation, supra* note 55. .

57 *Judicial co-operation, supra* note 55..

58 Spencer, *supra* note 19.

59 6KBW College Hill, *supra* note 13.

between states.[60]

The European Arrest Warrant (EAW) remains one of the most well known mutual recognition agreements in the European Union. The European Arrest Warrant is a piece of EU legislation designed to simplify the surrender of citizens for criminal prosecution or detention.[61] The EAW both facilitates the surrender of criminal suspects or convicts and disallows EU member states from refusing to surrender their own guilty citizens to the authority of another member state.[62] The EAW also guarantees a minimum standard of protections for the accused, similar to the American Bill of Rights, which includes the right to legal assistance and the presumption of innocence.[63] Ultimately, it is meant to provide a safe and efficient way to surrender suspects in the border-free European Union and to protect the basic rights of the accused.[64] The EAW was one of the optional measures established during the Lisbon Treaty, but unlike the Prüm Convention discussed above, the United Kingdom opted into the terms of the EAW.[65]

The EAW, designed to deal with the criminal implications of free movement of people, benefits UK criminal procedure in several key areas. It significantly reduces the amount of time required for extradition (from 10 months to 3 months), and the number of foreign criminals living and operating in Britain. As such, it also remains an effective method of addressing internationalized crime.[66] Downsides include the potential for false prosecution and cost of EAWs issued for trivial offenses; however, instances of false prosecution remain extremely rare, and international prosecution of trivial offenses could easily continue without the presence of this legislation.[67] In short, Britain, in its current status as an EU member state with free movement of people, derives myriad benefits from the presence and continued operation of this agreement.

As discussed above, the EAW was established to deal with the criminal ramifications of free movement within the European Union. The continued existence of free movement has been, of course, one of the most contentious aspects of Britain's exit from the European Union. In her first major speech after the exit vote, Prime Minister Theresa May clearly articulated that the Government intended to control and limit future immigration within the country.[68] Free movement within the European Union, many think, will not be a part of the government's agenda moving forward; instead, immigration restrictions may significantly increase in years to come.[69] In a nation with increased immigration restrictions that continues to separate itself from the European Union as a whole, the EAW and other mutual recognition agreements may no longer be applicable or desirable. In fact, one of the potential abuses of the EAW is the immense discretion it give EU member states in filing arrest warrants.[70] Many have argued that the

60 6KBW College Hill, *supra* note 13.

61 *European Arrest Warrant*, EUROPEAN COMMISSION, (November 24, 2016), http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm.

62 . *European Arrest Warrant, supra* note 61.

63 *European Arrest Warrant, supra* note 61..

64 *European Arrest Warrant, supra* note 61..

65 Luke Lythgoe, *European Arrest Warrant pros outweigh cons*, INFACTS, (November 30, 2016), https://infacts.org/briefings/european-arrest-warrant-pros-outweigh-cons/.

66 *Ibid*. Lythgoe, *supra* note 65.

67 *Ibid*. Lythgoe, *supra* note 65.

68 Jennifer Rankin, *Freedom of movement: the wedge that will split Britain from Europe*, THE GUARDIAN, (October 6, 2016), https://www.theguardian.com/politics/2016/oct/06/freedom-of-movement-eu-uk-brexit-negotiations-theresa-may.

69 Rankin, *supra* note 68. .

70 Constantino Grasso, *The European Arrest Warrant*, THE UK IN A CHANGING EUROPE(November 30, 2016), http://ukandeu.ac.uk/explainers/the-european-arrest-warrant-eaw/.

application of the EAW represents an abuse of judicial cooperation measures that gives the EU excessive influence in member states.[71] This contradicts the principle of proportionality and could be considered an abuse of rights for the affected individuals.[72] These concerns have been assuaged by the reciprocal trust between EU member states.[73] However, if Britain leaves the European Union and continues to operate under the EAW without that reciprocal trust, the likelihood of warrant abuse and potential risk to individual citizens will drastically increase. This shift represents a genuine potential for abuse of power by EU member states. Without the free movement of people, the conditions that necessitated the construction of the agreement will (hypothetically) cease to exist. Furthermore, in the case of growing separation between Britain and the European Union, the motivation for non-abuse of the EAW could significantly decrease and the policy could endanger individual liberties.

Generalizing from the example of the EAW, mutual recognition agreements develop in response to specific geopolitical events and conditions. The British exit from the European Union both marks a drastic departure from historical trends of governance within Europe and a significant change in legal and economic conditions in the country. As such, many of the mutual recognition agreements negotiated between Britain and the European Union must be reexamined to determine whether their continued existence is beneficial to the parties involved. It seems likely that many of these agreements, such as the European Arrest Warrant, will significantly change or cease to exist in Britain, in response to the changing conditions within the region. The exact agreements affected by the exit from the European Union remain undetermined, as the terms of Britain's exit from the body are currently incomplete. The fact remains, however, that mutual recognition agreements must be reconsidered and altered to reflect changes in governance and policy.

7. Harmonization of Criminal Law and Criminal Procedure: Potential for Departure

Organizations across the European Union have made concerted efforts to harmonize both criminal law and criminal procedure of member states. The harmonization of both laws and procedure aims to ensure that criminal penalties, future legislation, and the legal process remain consistent throughout Europe.[74] In legislature, EU competence aims to approximate criminal laws across national borders.[75] EU requirements establish minimum requirements in cases of "serious crime with a cross-border dimension" (for instance, corruption, cybercrime, terrorism, etc.), as well as potential approximation and sanction in areas "essential to ensure the effective implementation of a Union Policy in an area which has been subject to harmonization measures."[76] Regarding criminal procedure, European Union requirements aim to enable "mutual recognition" of courtroom processes.[77] The minimum rules apply to mutual admissibility of evidence between EU nations, individual rights in criminal procedure, and rights of crime victims.[78] In order to expand EU influence to other areas, the Council must vote unanimously to approve those measures.[79] This

71 Grasso, *supra* note 70..

72 Grasso, *supra* note 70..

73 Grasso, *supra* note 70.

74 6KBW College Hill, *supra* note 13. Spencer, *supra* note 19.

75 HM Government, supra note 47, at 59.

76 *Id.* *Consolidated version of the Treaty on the Functioning of the European Union*, *Article 83(1) and 83(2)*, EUR-LEX: ACCESS TO THE EUROPEAN UNION LAW November 30, 2016), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

77 HM Government, supra note 47, at 54.

78 *Id*.

79 *Id*.

policy deliberately limits the influence of EU influence on local criminal court procedure and makes that influence extremely difficult to expand. Harmonization, then, can be understood as an extremely limited phenomenon, wherein EU member states are held to certain bare minimum standards of criminal investigation and court procedure. The concept of mutual recognition, discussed in Section III.6 of this essay, provides justification for harmonization. In essence, if governing bodies must recognize and act on judgments from other nations, those courts must be satisfied in the legality, justice, and legitimacy of those judgments.[80] By providing fundamental levels of protection for defendants and uniform treatment of serious cases, European Union requirements reduce the potential for maltreatment of the accused and increase the likelihood that judgments will be seen as legitimate regardless of the nation in which they take place.[81]

The future of harmonization in the wake of the Brexit referendum remains extremely difficult to predict. Harmonious law, as it exists now within the European Union, remains hazily undefined. As with other criminal law requirements, local governments must opt-in to harmony efforts.[82] In several recent instances, the government has chosen not to opt-in to procedural directives for criminal law.[83] Legal and procedural harmony, it seems, has always occurred at the discretion and through the impetus of a local government. Although it serves the purpose of facilitating mutual recognition in criminal cases, the process of harmonization remained loose and unspecific in order to preserve national governance and sovereignty. As such, Britain remains at its own discretion in regards to harmonization efforts. If the government wishes to maintain mutual recognition, they must continue to harmonize law and procedure to a satisfactory degree. If mutual recognition is no longer a priority, then they may depart from European Union policy. However, the requirements of harmonious law and procedure remain incredibly sparse. As such, unless British law took a sharp departure from its current standards of protection for parties involved in a lawsuit and current policy, it seems unlikely that any legislation marking a significant departure from harmonization efforts would pass. Ultimately, continued abidance in harmonious laws remains the prerogative of the government, as it always has been.

8. Conclusions (i.e. What Does this all Mean?)

This paper approached the potential ramifications of Brexit on criminal law in the United Kingdom in four different areas: criminal justice agencies, cooperation agreements, mutual recognition agreements, and harmonization (both in terms of criminal law and procedure). In the case of criminal justice agencies, by examining the issues at stake with the continued operations of Eurojust in Britain, it became clear that exiting the European Union would pose problems for such agencies. The government could easily challenge their jurisdiction, continued operations and presence in the United Kingdom and, in the case of Eurojust, the status of personnel as employees of the European Union. In regards to cooperation agreements, continued compliance with these agreements remains in the best interest of the country. Apart from concrete personnel, training, and equipment provisions, continued EU membership does not seem a prerequisite for continued abidance with these policies. Indeed, cooperation agreements ensure the safety of British citizens by making international criminal prosecution easier. Now that these agreements have established procedure, the UK has no impetus to diverge from extant procedure. On the other hand, mutual recogni-

80 Spencer, *supra* note 19. .

81 HM Government, supra note 47, at 54.

82 *Id*, at 55.

83 *Id*.

tion agreements depend largely upon positive relationships between EU member states and reflect contemporary geopolitical events. As Brexit reshapes Britain's relationship with the rest of Europe and the world, many of these agreements must and will change to reflect the nation's new status. Finally, the Government may continue or halt criminal law and procedure harmonization at their discretion. Since many of these harmonization efforts are optional for EU member states and do not mark significant departure from British law, change in this area is unlikely.

Of course, the influence of Britain's exit from the European Union on criminal law cannot be fully understood at this time and expands far beyond the scope of the four categories analyzed in this essay. Changes in immigration, trade, transportation, and nearly any area of government affected by Brexit have the potential to influence and change criminal law policy. The variety and complexity of the ramifications explored in this paper speak to the increased involvement of the European Union in member state governance. With the Brexit vote, Britain moves into uncharted waters. Although European Union authorities expanded their influence and jurisdiction over member states in recent years, the close connections between member states and continued membership circumvented many of the potential ramifications of that relationship. Brexit brings many of these issues to a head. The decisions and negotiations that Britain will undertake in the coming months and years may determine not only the sphere of influence of EU criminal law and law enforcement organizations, but also the potential for continued international legal cooperation in Europe as a whole.

Are We All Plea Bargainers Now?

Comparing American and German Criminal Processes

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"An affluent society ought not be miserly in support of justice, for economy is not an objective of the system,"- Chief Justice Warren Burger.[1]

Abstract

For decades, critical differences between the United State's adversarial system of criminal justice and inquisitorial schemes like Germany's have limited prosecutorial discretion and the use of non-trial procedures that subvert the right to a trial in Western Europe. However, in recent years, as the scope of the criminal law has expanded and trials have grown more complex and costly, countries like Germany have adopted certain non-trial procedures that resemble the American practice of plea bargaining in order to manage their burgeoning caseloads. What are the consequences of these changes for the German criminal justice system? Has plea bargaining come to Germany? This essay argues that Germany's mode of criminal justice has not fundamentally converged with the American adversarial system. While German-style plea bargaining represents a "parallel system of justice" for a variety of crimes, it does not serve as a complete substitute for the trial or the assignment of criminal liability for the most heinous crimes, as it so often does in the United States.

1 Mayer v. City of Chicago, 404 S. Ct. 189 (Dec. 13, 1971).

In the United States, over 95% of state and federal criminal cases never make it to trial.[1] Instead, they end in non-trial agreements called plea bargains. Proponents of Germany's inquisitorial-style criminal justice system look aghast at this figure and the clandestine practice of plea bargaining that subverts the unvarnished search for truth and the just assignment of criminal liability. Now, however, plea bargaining has come to Germany through the rise of informal settlements, which have undermined the German rule of compulsory prosecution. Inquisitorial criminal justice systems, which elevate the investigatory powers of the judge, require faith that the state apparatus can effectively pursue the truth. As German criminal law has grown more complex and the costs of trials have risen, this has become a dubious proposition. Has the German system lost its inquisitorial features and come to resemble American criminal justice, where the trial is all but a myth? While Germany now utilizes a "parallel system of justice" through plea bargaining, the practice has not and cannot supplant the traditional German methods of justice. Germany has neither completely compromised its most central inquisitorial features nor faced the same exogenous pressures that felled the American criminal trial.

There are two principal phenomena that were responsible for the proliferation of plea bargaining in America. One is the increase in all types of crime (and especially violent crime) after 1870, which swelled prosecutors' caseloads and strained the ability of the justice system to grant every criminal defendant his or her Sixth Amendment right to a "speedy and public trial."[2] The other was the expansion of criminal procedure after 1913. Extending defendants' "rights against the truth" through mechanisms like the exclusionary rule and Miranda Rights has made trials expensive and complicated. Courts have become mired in debates over the admissibility of evidence and the treatment of defendants, deviating from their intended objective: assigning criminal liability. Increased crime and elaborate procedural rights have exposed aspects of America's adversarial system that make it especially susceptible to plea bargaining. In the U.S., there is no rule of compulsory prosecution and judges are tasked with acting as a referee between the prosecution and the defense as opposed to assuming a leading role in investigating the facts of the case.

Defendants can elect not to testify at trial and can plead guilty. As a result, prosecutors in the pre-trial stage enjoy tremendous discretionary power that allows them to "sentence bargain" with defendants who can accept pleas (often for lesser offenses) rather than risk incurring the harsher sentences they may face at trial (especially when mandatory minimums are involved).[3] As a reaction to the inefficiencies of the American justice system, its actors use plea bargaining as a tool for utility maximization: defendants trade their right to a trial for a sentencing discount and prosecutors accrue easy convictions and bypass potential complications that may arise from testing their cases at trial. The greater criminal justice system sustains itself by employing plea bargaining as a swift and cheap method to avoid the difficulty of imposing criminal liability on every defendant through a trial.

In the 20th century, Germany's inquisitorial criminal justice system functioned free of America's adversarial rules and defendants' rights against the truth. The country faced no comparable mid-century spike in violent

1 Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, The Atlantic, May 2, 2017, https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.

2 U.S. CONST. amend. VI § 1, cl. 1.

3 Richard Adelstein, *The Exchange Order: Property and Liability as an Economic System* **§ 10 (2017).**

crime.[4] John Langbein helpfully stressed the perils of "Americanizing" German non-trial procedures like "penal orders" and "prosecutorial diversion" by suggesting they secretly functioned in the German consciousness as *de facto* plea bargains. Penal orders are issued by prosecutors who specify a legal consequence that is agreed to by defendants and validated by a judge. Langbein argued that, unlike in the U.S., penal orders were only applied to non-imprisonable misdemeanor cases (*Vergehen*) where the evidence was clear and overwhelming.[5] Most importantly, penal orders lacked plea bargaining's coercive element: the imposition of sentencing differentials. The prohibition on differential sentencing for rejected penal orders is not statutorily inscribed in the German Code of Criminal Procedure. Langbein contended that preserving the independence of the court's process of evidence discovery was so critical to proper sentencing that German prosecutors refused to threaten defendants with elevated sentences if they took their case to trial.[6] Both the American and the German systems used non-trial policies of expediency to deal with petty crime. However, because German trials were far more efficient without America's adversarial barriers, the trial system handled all serious criminal cases while using penal orders as a "mode of prosecution, not a vehicle for selective prosecution" of defendants charged with petty crimes.[7]

Even in the 1970s, Germany was not a "land without plea bargaining," at least not by American standards. Langbein acknowledged that Section 153a, the German "conditional nonprosecution scheme", created in 1974 to deal with increased criminal regulation, was a "mild form of plea bargaining".[8] Section 153a allowed defendants to waive the right to trial and accept lesser sanctions by negotiating with prosecutors and agreeing to pay restitution or do charitable work. However, to describe 153a as "narrowly interpreted" and *Vergehen* cases as synonymous with a "ticket and fine for speeding" ignores important parallels that have always existed between American plea bargaining and German criminal procedure.[9] German *Vergehen* offenses included crimes that would be considered serious felonies in America, including battery, drug offenses, environmental crime, property crime, and forms of business crime.[10] Thus, American-style plea bargaining was well established in Germany by the 1970s; the Germans just did not classify some of the cases it processed through diversion as felonies. Still, the use of diversions was not widespread because the Germans did not prosecute section 153a crimes with great frequency. Most importantly, informal settlements were not used to process truly "timeless" crimes like homicide, murder, rape, assault, manslaughter, and other grave crimes like extortion and kidnapping.

Around the time that Langbein was writing, the pressures that had produced German plea bargaining, in a limited form, further accelerated. Endogenous changes to German substantive criminal law as opposed to the influence of American adversarial rules primarily exacerbated these burdens. As in the U.S., the German system became strained by the increased prosecution of drug crime starting in the 1980s.[11] But critically, the prosecution of

4 Manuel Eisner, *Long-Term Historical Trends in Violent Crime*, 30 CRIME AND JUSTICE. 99 (2003).

5 John Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICHIGAN LAW REVIEW. 215 (1979).

6 *Id.* at 216.

7 *Id.* at 222.

8 *Id.* at 224.

9 Langbein and Weinreb, *Continental Criminal Procedure: 'Myth' and Reality*, 87 YALE LAW JOURNAL. 1565 (1978).

10 Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STANFORD LAW REVIEW. 559 (1997).

11 Regina Rauxloh, *Formalisation of Plea Bargaining in Germany – Will the New Legislation Be Able*

other non-drug related offenses often resolved by 153a, especially white-collar crime, mushroomed, and legal regulation of this conduct was "developed, amended and most of all extended".[12] The Penal Code's tentacles have latched onto cases where the burden of proof related to *mens rea* claims and the replacement of *actus reus* with early-stage causation standards increases the total cost of trial.[13] A shift in the nature of substantive law has made German trials longer, more complicated affairs harder for prosecutors to win, and it has driven up investigatory costs.

As the nature of what is considered criminal has evolved in Germany, caseloads have grown, and informal agreements like the ones described above have become a more significant part of the German criminal process. Research demonstrates that judges favor informal settlements if the case has difficult legal issues or problems with evidence, 77% and 91% of the time, respectively.[14] Informal settlements promote an adversarial-style negotiation between prosecution and defense because they allow judges to relinquish their normal investigative role. America's adversarial rules were always ripe for exploitation through plea bargaining if crime levels rose. As complex crimes became more frequent in modern life and Germany incorporated them in its substantive criminal law, plea bargaining could metastasize as the costs of trial increased.

Informal settlements like diversions can often function as bargains, and, as of 2011, approximately 20-30% of all German criminal cases were resolved through bargaining.[15] By expanding the scope of substantive law, plea bargaining has become more pervasive as non-trial informal settlements have been used to resolve a growing percentage of the German caseload. At the same time, the use of informal settlements has begun to cross even the *Vergehen* line that the Germans established:

> For example in the state of Lower Saxony over 80 per cent of judgements in the area of organized crime are based on an informal agreement. Interestingly, informal proceedings have spread to middle serious crime too and today they can even be found in serious violent crimes such as rape, aggravated robbery and murder, although this is still exceptional.[16]

Informal settlements can even produce benefits for plaintiffs who make use of them in more serious criminal cases. Regina Rauxloh notes the particular appeal of informal settlements for victims of sexual crimes who may want to waive the process of evidence production or avoid a court appearance.[17] Other changes to German criminal procedure are also important to consider when assessing the German system's growing similarity to American-style justice. Penal orders are now used to process 35% of all German criminal cases and can be issued even after trials begin. Prosecutors who submit penal orders have also acquired an additional negotiation tool.[18] Instead of seeking only fines, prosecutors can now offer suspended one-year prison sentences and choose not to file a case in court that could result in imprisonment. Much like plea bargaining in America, prosecutors avoid a trial and defendants accept a sentencing discount (single judge courts carry a maximum sentence of four years).[19]

German criminal justice has come to resemble the American system through the proliferation

to Square the Circle? 34 FORDHAM INTERNATIONAL LAW JOURNAL. 2 (2011).

12 *Id.* at 4.

13 *Id.* at 5.

14 *Id.* at 8-9.

15 *Id.* at 6.

16 *Id.* at 4.

17 *Id.* at 11.

18 Dubber, *supra* note 11, at 559.

19 *Id.* at 560

of non-trial procedure and the expansion of prosecuturial discretion. The role of compulsory prosecution has been craftily subverted as *Vergehen* classifications have been redefined and expanded. Plea bargaining has come to Germany. As long as lawyers choose or are forced to prioritize efficiency considerations over Burgerian "justice," it will be here to stay. As Rauxloh effectively demonstrates, legislation that has tried to regulate bargains seems likely to fail given its inability to restrict non-trial negotiations. But even the critics of the "land without pleas" thesis cannot credibly claim that it governs the vast majority of criminal cases or often resolves the most heinous crimes as it does in America.[20] German criminal justice has not completely converged with the American adversarial system because plea bargaining represents a "parallel system of justice," not a total substitute for the trial. As discussed above, industrialization and the complexities of modern life have exacted costs to which neither American nor German justice was immune. As German criminal law has crowded out administrative resolutions, these costs have increased. But German legal and cultural norms have prevented a procedural revolution of defendants' rights at trial, the abolition of the rule against guilty pleas, and the possibility of draconian and inflexible mandatory minimum punishments. For these reasons, and because of lower violent crime rates in Germany, the inquisitorial-style center has held.

20 Jed S. Rakoff, *Why Innocent People Plead Guilty,* THE NEW YORK REVIEW OF BOOKS, , November 20, 2014, http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

Human Dignity in the Face of Human Security: Uncovering Canadian Anti-Terror Policies

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Abstract

The 9/11 attacks drastically transformed counter-terrorism policies around the world and Canadian law was not immune to that change. In the aftermath of 9/11, the United Nations Security Council adopted Resolution 1373, which called for all member states to "prevent and suppress the financing of terrorist acts"[1] and "deny safe haven to anyone who plans, finances, supports or commits terrorist acts."[2] There is no denying anti-terrorism legislation is necessary. However, when looking at modern anti-terror legislation, legal scholars often discuss the question of whether legislation conflicts with human rights.[3] Does Canadian law conform to fundamental principles of human rights and the *Canadian Charter of Rights and Freedoms*? Are anti-terror laws violating human rights under the banner of immigration law? In addressing these questions, I look at the development of anti-terrorism legislation in the Canadian context. Section I analyses the historical context of anti-terror laws in Canada, critiquing the motives behind legislation as well as the provisions in the *Anti-Terrorism Act, 2001* (*ATA*). Section II evaluates the *Anti-Terrorism Act, 2015 (Act)* from a human rights and constitutional perspective, drawing comparisons to the *ATA*. Finally, section III looks at immigration law as a source of anti-terrorism law. I argue that Canadian anti-terrorism policies, whether through formal anti-terror laws or immigration law, are and have historically been mainly unconstitutional and pose a threat to human rights.

1 S.C. Res.1373, s. 1a, U.N.Doc.S/RES/1373 (Sep. 28, 2001)

2 Id. at s. 2c.

3 Wesley K. Wark, *National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post-9/11 Environment*, Canadian Human Rights Commission, October 2006.

I. HISTORIC OVERVIEW OF CANADIAN ANTI-TERRORISM LAW

A. MOTIVES BEHIND ANTI-TERRORISM LEGISLATION IN CANADA

The attack on the World Trade Center brought about the enactment of Bill C-36, Canada's first *Anti-Terrorism Act* (*ATA*)[1] in December of 2001.[2] For the first time in Canadian law, terrorism was the sole focus of a part of the Canadian *Criminal Code*.[3] Although the *Criminal Code* did not contain specific crimes of terrorism prior to the enactment of the *ATA*, the *Code* did cover a wide array of offences capable of preventing, deterring and punishing terrorist activity.[4] For example, culpable homicide, hijacking a plane, kidnapping, forcible confinement and hostage taking[5] were all adequately covered in the *Criminal Code* as well as aiding, abetting, conspiring, counselling and being accessories after the fact.[6] The *Criminal Code* further prohibits a person from engaging in conduct with the intent to provoke a state of fear.[7] The preventive provisions such as those detailed in §810.01 and 810.02[8] of the *Criminal Code* could also apply in cases where there are reasonable grounds to fear violence from terrorist acts.[9] Kent Roach, who has done extensive research on counter-terrorism laws in Canada, argues that the breadth of existing laws in Canada dealing with attempted crimes was so broad that it was capable of preventing terror attacks and criminalizing apprehended acts of terrorist violence.[10] He notes:

> There is little reason to think that Canadian courts would not have sensibly interpreted existing Canadian criminal law to apply to apprehended acts of violent terrorism through the existing laws dealing with attempted crimes, counselling crimes, and conspiracy to commit crimes.[11]

While the *ATA* provided necessary legislation to fulfill Canada's commitment to fighting terrorism through strategic actions such as criminalizing the financing of terrorism,[12] Canadian law already had adequate legal instruments in place to arrest, convict and prevent most acts of terrorism. Human rights was at the forefront of this new debate as legislative overlap with existing policies was the least of Canada's concerns.

The emergence of specific counter-terrorism laws in Canada and their subsequent amendment in 2015 seems to be a strategic attempt to maintain Canada's presence in the world stage. Legislative response to terrorism, while necessary, must be dealt with caution. Civil liberties and human dignity concerns are often overlooked in the effort to conform to world pressures not only from Resolution 1373 and the implications of being a global citizen, but also from Washington. Roach further observes:

> Although directed at the United States, both events, [9/11 and the Cuban Missile Crisis], were trau-

1 Kent Roach, *Counter-Terrorism In and Outside Canada and In and Outside the Anti-Terrorism Act,* 2 REVIEW OF CONSTITUTIONAL STUDIES. 244 (2012).

2 Kent Roach, *Canada's New Anti Terrorism Law*, 1 SINGAPORE JOURNAL OF LEGAL STUDIES, 122 (2002).

3 *Id*.

4 *Id*. at 124.

5 *Criminal Code*, R.S.C. 1985, c. C46, s. 230, par. 76 (Hijacking), par. 279, subpar. 279.1

6 *Id*. at s. 21, 240.

7 *Id*. at s. 423.1.

8 *Id*. at s. 810.01, 810.02.

9 S*upra* note 5, at 124

10 *Id*.

11 *Id*. at 126.

12 Kent Roach, *The Three Year Review of Canada's Anti-Terrorism Act: The Need for greater restraint and fairness, Non-discrimination and Special Advocates*, 54 UNIVERSITY OF NEW BRUNSWICK LAW JOURNAL*,* 310 (2005).

> matic for Canadians, discredited a Canadian nationalism that appeared anti-American, and led to a shift in Canadian policy towards closer co-operation with the Americans.[13]

Due to increased economic integration with the United States, Canada was under immense pressure to co-operate with its southern neighbour.[14] Canada's willingness to please the United States has always been fixated on matters relating to criminal justice and foreign policy rather than the 'economic imperative of keeping the border open'.[15] The United States generated an 'us versus them' campaign to advance its political agenda, a campaign which Canada subserviently supported.[16] Clarkson observes:

> George Bush's declaration of a war against terrorism connected Canada to the state of global affairs that existed before the Berlin Wall came down, namely a war that rallied the forces of light against an evil, if invisible, empire.[17]

Based on the notion of othering in the name of preserving security, the campaign aimed to empower the already dominant United States. The implementation of counter-terrorism policies in Canada reinforced Canada's subordination and revealed the true extent of Canada's dependency on Uncle Sam. While legislative response to terrorism should have been an autonomous Canadian decision, it undoubtedly fit a pattern of behavior where Canada consistently complied with the United States to strengthen a 'CanAm' relationship.[18] Appropriately, concerns about civil liberties and human rights being neglected were legitimate and reasonable.

B. ANALYZING THE *ATA*: CONCERNS SURROUNDING BILL C-36

The *ATA* was introduced as an "[a]ct to amend the *Criminal Code*, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and other *Acts,"* which deals with "penal law, listing of terrorist entities, terrorism offences, investigative hearings, recognizance with conditions, surveillance, identification, hate crimes, financing of terrorism, security of information and security intelligence."[19] However, it is widely debated whether the *ATA* was actually able to deter terrorism while still respecting the values of a pluralist society.

The core problem with the *ATA* was its broad definition of terrorist activity, which ultimately leads to profiling. The definition of terrorist activity within the *ATA*, while arguably more restrained, reflects a definition of terrorism influenced by UK's *Terrorism Act 2000*.[20] While the definition was amended in 2006 and again in 2009, "terrorism" under UK's *Terrorism Act 2000* referred to the use or threat of action where the use or threat is designed to influence the government or to intimidate the public for the purpose of advancing a political, religious or ideological cause.[21] While the *ATA* did not define terrorism, it did describe 'terrorist activity', where terrorist activity included acts

13 Kent Roach, *Did September 11 Change Everything - Struggling to Preserve Canadian Values in the Face of Terrorism*, 47 MCGILL LAW JOURNAL 4, 935 (2002).

14 *Id*. at 893.

15 *Id*. at 935.

16 Stephen Clarkson, *Lockstep in the Continental Ranks: Redrawing the American Perimeter after September 11th*, OTTAWA: CANADIAN CENTRE FOR POLICY ALTERNATIVES 9, 13 (2002).

17 Id. at 9.

18 Id. at 9-10.

19 The Department of Justice, *About the Anti-Terrorism Act, THE GOVERNMENT OF CANADA* (June 20, 2017), http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html.

20 *supra* note 4, at 244.

21 Terrorism Act 2000 (U.K.), c. 11 s. 1

as well as the failure to act.[22] It should be noted, however, that the definition of terrorist activity under the *ATA* was lengthy, vague, and confusing.

The first part defined terrorist activity as acts or omissions considered terrorist activity under major international treaties, such as the *Convention for the Suppression of Unlawful Seizure of Aircraft,* the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* and the *International Convention for the Suppression of the Financing of Terrorism*.[23] Inspired by the UK, the second part of the definition took into account terrorist activity in and outside Canada carried out with "a political, religious or ideological purpose, objective or cause," intended to intimidate public security or to compel a person, a government or a domestic or international organization to do or to refrain from doing any act that intentionally causes one of the many listed forms of serious harm under 83.01 (1) B (ii).[24] Canada restrained its definition of terrorist activity in some aspects. For example, politically or religiously motivated property damage could only be recognized as terrorism if it endangered life, health, or safety. But it also broadened its definition in other aspects.[25] Roach points out:

> Canada broadened the British reference to disruption of electronic systems to include serious disruption of all public or private essential services. It also included attempts to compel persons, including corporations, to act and to intimidate the public with respect to its economic security. These neo-liberal provisions reflected Canada's economic vulnerability to American thickening of the border.[26]

The problem with vague and broad definitions of terrorism or terrorist activity, in part, is a result of an undefined global definition of these terms. These broad definitions can result in inconsistent applications of the law and deliberate misuse of the term, potentially leading to human rights abuses.[27] The Office of the United Nations High Commission of Human Rights (OHCHR) points out that urging the international community to combat terrorism without defining the term leaves individual states to unilaterally and subjectively outline the parameters of terrorism.[28] One concern of OHCHR is that states can deliberately create a broad definition of terrorism to limit peaceful acts of protest, minority rights, human rights, or any sort of political opposition.[29]

The principle of legality often arises in the debate surrounding the *ATA*, which requires all law to be expressed with precision and clarity. Underlying article 15 of the *International Covenant on Civil and Political Rights*, the principle of legality implies that while laws should be open to interpretation, especially in common laws systems such as Canada, legislation should also respect the principle of certainty to ensure that they are not subject to such interpretations which result in broadening the scope of the conduct in question.[30] The *ATA* hinders the principle of legality as the broad definition of terrorism paves way for legal inconsistency beyond the scope of reasonable interpretation.

The Canadian Council for Refugees also raises similar concerns. They point out, "in a context where the Federal Court has stated that 'terrorism' is largely in the eye of the beholder,

22 Criminal Code ATA section 1 (b)

23 The Criminal Code 83.01 (1) A

24 *supra* note 22.

25 *supra* note 4, at 246.

26 Id.

27 Office of the United Nations High Commission of Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet 32, (2008), 39.

28 *Id*.

29 *Id*. at 40.

30 *Id*. at 40.

it is not surprising to find that the application of the provisions is inconsistent and discriminatory."[31] The difficulty of defining terrorism is highlighted in *Suresh v. Canada (Minister of Citizenship and Immigration),* where the Court states:

> One searches in vain for an authoritative definition of 'terrorism.' The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, the term is open to politicized manipulation, conjecture, and polemical interpretation… 'The term [terrorism] is somewhat 'Humpty Dumpty' — anything we choose it to be.'[32]

R. v. Khawaja[33] established that Parliament did not intend to criminalize actions that create negligible risk of harm when passing Bill C-36.[34] However, this answer is still unsettling as Canadian concerns on anti-terrorism legislation came from the multicultural sensitivities of Canada's pluralist society, specifically the fear that the definition of terrorism would be politicized and Muslims would be targeted instead of protected.[35] Twenty-first century anti-terror legislation has been compared to the *War Measures Act* and its repressive nature.[36] The *War Measures Act* gave extensive emergency powers to the Canadian government during war or insurrection, suspending the freedom and civil liberties of Canadians. In October and November 1970, the *War Measures Act* was invoked for the first time in a domestic crisis in Quebec dealing with separatism, with scores of people being arrested, detained, and later released without any charges.[37]

Cotler, however, advances the argument that this analogy is inappropriate as the *Canadian Charter of Rights and Freedom* acts as a filter for constitutional accountability.[38] Contrary to Cotler, the "religious, political or ideological" motive requirement raises concerns that the *ATA* could infringe upon §2 and 15 of the *Canadian Charter of Rights and Freedoms*; namely the freedom of conscience, religion, thought, belief, expression, peaceful assembly and association, and the right to receive equal protection and benefit of the law without discrimination, based on race, nationality, ethnic origin, or religion.[39]

In response to growing concerns, the *ATA* included a provision which provided that the expression of political or religious opinions would not constitute terrorist activity unless it satisfies the definition of terrorist activity.[40]Roach notes, "The amendment may be legally meaningless, but it signaled some concern about criticisms that the *ATA* might be used to target Canada's growing and diverse Muslim population."[41] While the provision may have indicated the *ATA* should not be used to target a minority population, the provision was

31 *Comments on Bill C-36, Anti-Terrorism Act,* 2001, CANADIAN COUNCIL FOR REFUGEES, http://ccrweb.ca/en/comments-bill-c-36-anti-terrorism-act.

32 *Suresh v. Canada (Minister of Citizenship and Immigration*) [2002] 1 S.C.R. 3 at par. 94.

33 *R. v. Khawaja* [2012] 3 S.C.R. 555.

34 *Id*. at para 50.

35 *Supra* note 4, at 247.

36 Irwin Cotler, *Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy*, in THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 2001 113 (2005).

37 Patricia Peppin, *Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties*, 18 QUEEN'S L.J., 190 (1993).

38 *Id*.

39 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11. s. 2, s. 15.

40 *Supra* note 4, at 247.

41 *Id*.

meaningless and did nothing to prevent racial profiling. *R. v. Shepherd,* one of the Halifax Valentine's Day shooting plot cases, was not characterized as a terrorist plot and the defendant was not charged under the ATA. Instead, he was charged with conspiracy to commit murder.[42] As the Justice Minister Peter MacKay stated, the defendant could not be convicted under the *ATA* as there was an absence of a 'cultural element'; a term foreign to the *ATA*.[43] The test for terrorist activity under the *Criminal Code* has clearly been politicized and further indicates a double standard when acts of terror are committed by those of the Islamic faith.

Choudhury and Roach argue that profiling has the potential of being a violation of §15 of the *Charter* and should explicitly be banned using a non-discrimination clause.[44] The absence of such a clause may lead to possible attempts to justify profiling under §1 of the *Charter* which provides that a limitation to a *Charter* right is justified provided it is "prescribed by law."[45] In *R. v. Oakes,* the Court asserted that the core values of the *Charter* derive from the idea that Canada is a "free and democratic society," which should ultimately dictate the standard for interpreting §1 of the *Charter*.[46] Ideas such as accommodation of beliefs and faith in social and political institutions are contained within these values. However, using a lenient "prescribed by law requirement" to justify profiling under the *ATA* is clearly at odds with democratic values as silence on this issue diminishes the possibility of democratic debate.[47] Having a definition of terrorism allowing for profiling is problematic as it forms the basis for other *ATA* provisions - such as investigative hearings, preventative arrests, and added powers to signals intelligence.

Having said that, Roach believes that the *ATA* demonstrates greater commitment to legality and democratic debate in comparison to the UK and Australia.[48] In agreement with Roach on this point, I find the primary issue with the *ATA* to be the broadened definition of terrorist activity. In fact, the Courts have stressed in *ATA* cases that their discretion to ensure fairness in terrorism cases is essential.[49] Emphasized in *R. v. Ahmad*, due process under the *ATA* was essential, even if it meant that cases could be "permanently halted."[50] There is no denying the *ATA* had its fair share of problems. However, compared to subsequent amendments, the *ATA* was quite restrained and guided by human rights.

II. BILL C-51: THE CURRENT ANTI-TERRORISM LAW

Although Canada updated its security offences multiple times since the amendment of the *ATA* in 2001, the most drastic and controversial change to Canada's security laws since 9/11 has been the enactment of Bill C-51, or the *Anti-Terrorism Act 2015* (*Act*), Canada's current counter-terrorism legislation. Following the October 2014 attacks by Martin Couture-Rouleau on two members of the Canadian Armed Forces and those by Michael Zehaf-Bibeau on Parliament, former Canadian Prime Minister Stephen Harper introduced Bill C-51 in an 'election-style rally'.[51] The *Act* was a politicized election tactic enacted using Canadians' fears and emotions instead of facts and lessons from past security failures.[52] The *Act* ratified the *Security of Canada Information Sharing Act* and the *Secure Air*

42 *R. v. Shepherd* [2016] N.S.S.C. 329.

43 Craig Forcese and Kent Roach, FALSE SECURITY: THE RADICALIZATION OF CANADIAN ANTI-TERRORISM 2 (2015).

44 Sujit Choudhury and Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability,* 41 *OSGOODE HALL LAW JOURNAL*, 3 (2003).

45 *Id*.

46 *R. v. Oakes,* [1986] 1 S.C.R. 103.

47 *Supra* note 47, at 14.

48 *Supra* note 4, at 243-244.

49 *R v. Ahmad* [2011] 1 S.C.R. 110

50 *Supra* note 4, at 254.

51 *Supra* note 47, at 2.

52 *Id*. at 3.

Travel Act and made significant amendments to the *Canadian Security Intelligence Service Act*, the *Criminal Code,* and the *Immigration and Refugee Protection Act*.[53] Specific to the *Criminal Code*, amongst other provisions, the *Act* claimed to make it easier for peace officers to apply to courts to impose 'reasonable conditions' on individuals to prevent terrorist activity. It also criminalized the advocacy or promotion of terrorism offences and gave the courts the authority to order the seizure and forfeiture of terrorist propaganda.[54] With concerns surrounding a lowered accountability threshold, the controversial act specifically raises three main human rights concerns relating to preventative arrests, free speech limitations and privacy violations.

Prior to the *Act*, §41 of the *ATA* gave officers the authority to arrest those reasonably suspected to be terrorists and hold them for 48 hours, with longer periods of detention subject to judicial authorization. This law was relatively restrained in comparison to that of the UK where the maximum detention period was initially set to seven days under the UK *Terrorism Act 2000* and subsequently extended to fourteen days.[55] The enactment of Bill C-51 seems to mirror the development of preventive counter-terrorism laws and policies in the UK. The *Act* increases the period of detention to up to seven days, thus extending preventive powers.[56] It is evident that extending the detention period leads down a slippery slope. As in the UK, seven days of detention can easily turn into fourteen days or more to 'strengthen' security laws. Forcese and Roach fear seven days of detention may subsequently lead to trademark post 9/11 counterterrorism tactics such as prolonged, abusive interrogation.[57] They suggest:

> Safeguards should be added to this legislation, including limitations on the total number of hours a person may be interrogated (as well as the circumstances of the interrogation). Nor should one assume that the "right person" always will be detained: There will be false positives, innocent people wrongly placed into custody. This is especially so in a system that allows the state to detain so easily, combined with cases where the boundaries of a suspected cell or group are unclear. Many Canadians may be vulnerable to detention based merely on the fact that their name appears on a terror suspect's cell phone call list.[58]

The Canadian Civil Liberties Association supports these views. They believe that preventive powers should only be used in accordance with the principles of fundamental justice.[59] This particularly pertains to §7 of the *Charter* which guarantees the right to life, liberty, security of the person, and to not be deprived thereof except in accordance with the principles of fundamental justice. *R. v. Heywood* establishes the overbreadth of the state may lead to the violation of the principles of fundamental justice. The Court finds:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose... If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to

53 *Supra* note 22.

54 The Criminal Code, 83.222

55 *Supra* note 4, at 251.

56 *Supra* note 22.

57 Craig Forcese and Kent Roach, Bill C-51, *The Good, the Bad… and the Truly Ugly*, THE WALRUS, Feb. 13, 2015, https://thewalrus.ca/bill-c-51-the-good-the-bad-and-the-truly-ugly/ (last visited August 9, 2017).

58 *Id.*

59 *Understanding Bill C-51: The Anti-Terrorism Act, 2015*, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/ (2015).

> accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.[60]

Interrogations lasting up to seven days with undefined rules to protect civil liberties undoubtedly violates the principle of fundamental justice. It is an example of disproportionately using state power to accomplish the objective of preventing terrorism. With human rights at stake, prolonging the detention period without defined limitations or safeguards placed on interrogators clearly "uses means which are broader than is necessary to accomplish that objective."[61] Many claim the harm of terrorism is greater than the harm of preventive detentions and the outcome of these tactics is the preservation of human life, liberty and dignity. I find this argument flawed as the preservation of human life, liberty and dignity cannot be achieved through the derogation of the very same values. Lorne Sossin, a Law Professor at the University of Toronto, believes that Canada has sacrificed civil liberties in exchange for enhanced detention powers.[62] He states:

> …the very fact that countries such as Canada showed such readiness to jettison fundamental civil liberties (e.g., the authorization of preventative detention) in the face of terrorist threats reflected an abnegation of the very values [that] stand so starkly opposed to the logic of terrorism (i.e., the rule of law, etc.). The Anti-Terrorism Act, in other words, represented an admission of defeat in the "war against terrorism."[63]

While his comments reflect his opinions on the *ATA* as a whole, they equally apply to the *Act* where detention powers are further broadened.

The *Act's* broad new speech offence also creates uncertainty and worry. The legislation makes it criminal to advocate and promote "terrorism offences in general".[64] Scholars fear that this provision casts a shadow on freedom of expression as it may target all speech vaguely linked to violence.[65] However, the Department of Justice claims:

> The offence does not criminalize the glorification or praising of terrorism. It is directed at prohibiting the active encouragement of the commission of terrorism offences and not mere expressions of opinion about the acceptability of terrorism.[66]

Nevertheless, the legislation conveniently blurs a fine line between ideologies or ideas that may seem extreme and actively encouraging violence. Again, the concern is the ambiguity of the provision. Chong and Kadous, who analyze similar anti-terrorism legislation in Australia, question the state's means of "weeding out" uncommon viewpoints and state:

> What does it mean to indirectly counsel the doing of a terrorist act? For example, consider the statement "the people of Iraq

60 *R v. Heywood*, [1994] 3 S.C.R. 761 at par. 49.

61 *Id.*

62 Gabor Thomas, Research and Statistics Division, *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*, DEPARTMENT OF JUSTICE CANADA, 9, (2004).

63 *Id.*

64 *Anti-terrorism Act, 2015*, S.C. 2015, c. 20, s.16.

65 *Supra* note 46, at 11.

66 The Department of Justice, *About the Anti-Terrorism Act, 2015,* THE GOVERNMENT OF CANADA, http://www.justice.gc.ca/eng/cj-jp/ns-sn/ata15-lat15.html (2017).

> have a duty to resist the occupation of their homeland by Western forces, including, if there is no alternative, through violent means". This would seem, prima facie, to be a statement that indirectly counsels the doing of a terrorist act. While some would disagree with this statement, and might indeed find it odious, the use of the criminal law as a tool in this case is both ideologically and pragmatically unsound, or at least grossly disproportionate.[67]

This argument, however, does not appeal to everyone since the protection of the freedom of speech sometimes seems to equate to free speech absolutism, an ideology also 'pragmatically unsound' for Canada. On the contrary, this argument is not in support of free speech absolutism. Supreme Court jurisprudence sufficiently outlines free speech limits and the concern is simply that the *Act* casts a shadow on free speech beyond common law jurisprudence. The Supreme Court has rightfully ruled countless times that limiting speech linked to violence or threats of violence does not infringe on the fundamental right of freedom of speech. In *Irwin Toy Ltd. v. Quebec (Attorney General),* Dickson C.J. and Wilson JJ. point out that when questioning whether there is a violation of the guarantee of freedom of expression, one must determine whether the plaintiff's conduct is protected by the guarantee.[68] They note that an activity "which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct."[69] Dickson CJ., writing for the majority, clarifies in *Canada (Human Rights Commission) v. Taylor*[70] that the scope of section 2b outlined in *Irwin Toy Ltd* does not exclude all forms of violence but only physical forms of violence.[71] Nevertheless, *RWDSU v. Dolphin Delivery Ltd.*,[72] cited in *Irwin Toy Ltd. v. Quebec (Attorney General),* establishes that freedom of expression does not extend to protect either threats or acts of violence.[73]

Judicial precedent demonstrates that it is evident speech linked to violence is not tolerated under the freedom of expression guarantee in the *Charter*. While there should be limits to this freedom, limiting free speech under anti-terror laws is problematic, because it equates questionable ideas with violence.[74] An overreaching limitation on free speech threatens to excessively target all types of opinions only distantly connected to violence. Thus, criminalizing ideas under anti-terrorism legislation is a grossly disproportionate response to the conduct in question.

The Act also poses threats to the right to privacy. The current legislation, while not a surveillance law, has implications related to surveillance powers due to the new speech crime provision.[75] Contrary to popular belief, intrusive surveillance is not a new provision under the *Act*. In fact, police powers used for excessive surveillance have a long history and derive from a number of sources in the *Criminal Code*.[76] While Part VI of the *Criminal Code* provides that unauthorized interception of "private communication" or "telecommunication" made by someone in Canada is a crime, this rule has exceptions that do not apply to cases

67 Agnes Chong & Waleed Kadous, *Freedom for Security: Necessary Evil or Faustian Pact,* 28 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 893 (2005).

68 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. Per Dickson C.J. and Wilson JJ.

69 *Id.*

70 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

71 *Id.*

72 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

73 *Id*. at par. 20.

74 *Supra* note 46, at 11.

75 *Id.* at 127.

76 *Id.* at 124.

of terrorism.[77] Wiretapping is a common practice in terrorism investigations and does not require judges to believe the interception was the last available measure or option available. Interceptions involving anti-terror investigations tend to last longer and investigators easily obtain extensions for delayed notification of the wiretaps.[78] The lenient standards and lowered accountability threshold will ultimately lead to a degradation of human dignity where every aspect of a person's private life is monitored.

Rahamim, who supports wiretapping, argues the tactic is necessary to keep up with the sophisticated nature of crimes that are planned.[79] He states:

> General technological advances such as the internet, wireless communications, and computer processing have given criminals incredibly advanced tools to plan and commit crimes. It does not require a stretch of logic to therefore purport that law enforcement agents must become acquainted with such technology and employ similar technology to monitor potential and actual criminal activity.[80]

However, it is apparent that wiretapping to maintain security has had serious consequences. *R. v. Sher*[81] reveals that wiretapping is not a perfect tactic and can make irreversible mistakes when interpreted in a certain way. Dr. Sher was falsely accused of conspiracy to facilitate terrorism mainly on the basis of an audio intercept from a 'probe,' which had been placed by the RCMP in the residence of a third party under investigation . The Crown alleged that the accused agreed in a meeting with two other individuals to form a group to assist the Mujahideen in Afghanistan, carry out 'activities' in Canada, and promote violence 'generally.' According to Hackland J, however, context often gets lost in interception. For example, "this extensive surveillance, involving over 80,000 interceptions, is also significant for what it does not disclose."[82] The central question in the case was whether the defendant agreed through a pledge to facilitate terrorist activity. Sher was acquitted following very stringent bail conditions for four years. The Court found the doctor, who had a track record of humanitarian involvement, had no real intention to join an extremist group and said things in the heat of the moment in an effort to get out of the situation he was unexpectedly placed in.[83] In the process of reaching a verdict, however, Sher lost his job, over a million dollars in earnings, his family, and his reputation in the community.[84] Forcese and Roach find that the new speech crime not only justifies and encourages wiretap tactics that detect 'the wrong kind of vocalized thoughts' but also justifies computer metadata searches on relaxed reasonable grounds.[85] Criminalizing opinions pose a great danger to human rights. Punishment for unpopular opinions, taken out of context, due to the original violation of privacy threatens free speech and is counterproductive, for a causal link between uncommon opinions and violent acts is yet to be found.

Further disturbing for human rights is the new information sharing regime. As stated

77 *Id.*

78 *Id.*

79 Yoni Rahamim, *Wiretapping and Electronic Surveillance in Canada: The Present State of the Law and Challenges to the Employment of Sophisticated and Intrusive Technology in Law Enforcement*, 18 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES 95 (2004).

80 *Id.*

81 *R v. Sher,* [2014] O.N.S.C. 4790.

82 *Id.* at par. 8.

83 Id. at par. 74-75.

84 CBC News, *Khurram Sher not guilty in al-Qaeda-linked terror trial*, CBC NEWS, http://www.cbc.ca/news/canada/ottawa/khurram-sher-not-guilty-in-al-qaeda-linked-terror-trial-1.2740135 (2014).

85 *Supra* note 46, at 127.

earlier, Resolution 1373 adopted by the United Nations following 9/11 called for all member states to "prevent and suppress the financing of terrorist acts."[86]Additionally, it encouraged the international community to assist one another with related criminal investigations or proceedings, including assistance in obtaining evidence in their possession.[87] There is no denying that intelligence sharing is essential for national security and highly beneficial for Canada, as it allows the country to gain access to information held by larger states with the capacity to hold data on a larger scale.[88] However, what is problematic is the expansion of exchanging federally held information to include "any activity that undermines the security of Canada."[89] This vague provision is counterproductive as any activity (i.e. illegal protests, speech taken out of context, etc.) can be interpreted as activity that may potentially undermine Canada's security.

In particular, the human rights concern stems from the possibility of torture or other forms of cruel, inhuman, or degrading treatment which can be an outcome of international information sharing.[90] The problem is most notably raised in the Arar case where United States Immigration and Naturalization Services arrested and detained Maher Arar, a dual Canadian and Syrian citizen, for 12 days of questioning in September of 2002 while transiting through John F. Kennedy International Airport in New York. He was subsequently subjected to rendition to Syria, where he was imprisoned for almost a year, interrogated, tortured, and held in inhumane conditions.[91] This was all done based on information received from Canadian authorities linking Arar and his wife to Al-Qaeda.[92] Then U.S. Secretary of State Colin Powell confirmed that the United States would not have detained Arar if not for the information received from their northern neighbor, confirming Canada's complicity in the torture.[93] The Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar found that the investigative files sent to the United States were, in fact, unvetted and uncaveated.[94] Additionally, the RCMP Operational Manual in a section dealing with "Enquiries from Foreign Governments that Violate Human Rights" outlines that decisions to disclose information with foreign agencies need to be made on a case by case basis and that sharing information with foreign agencies that do not share Canada's respect for democratic values or human rights is only justified if it does not result in the violation of human rights. None of these precautions were in place when dealing with the Arar files. The RCMP's transfer of unvetted and uncaveated investigative files, which led to the torture of Arar, provide a worrying example of the ease with which information sharing on a foreign level can be misused.

To avoid issues similar to the Arar case, the Arar Commission clearly recommended that shared information should be relevant, reliable, and accurate. However, expanding the scope of exchanging federally held information to include "any activity that undermines the security of Canada"[95]clearly ignores the Arar Commission's recommendations. The *Security of Canada Information Sharing Act* further does not

86 *Supra* note 1.

87 *Id.* at s. 2f.

88 *Id.*

89 *Supra* note 67, at s. 2.2.

90 *Supra* note 46, at 146.

91 *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar) (F.C.),* [2008] 3 F.C.R. 248. 2007 FC 766.

92 Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions Cure the Due Process Deficiencies in U.S. Removal Proceedings*, 93 CORNELL LAW REVIEW 634-5 (2008).

93 *Id.*

94 Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, 38-39, (2006).

95 *Supra* note 92.

incorporate any other such recommendations, such as including caveats to limit who can access shared information or creating integrated review by independent review bodies.[96] Canada may easily find itself in another questionable position as human rights issues could be swept under the rug yet again due to the new information sharing regime under the new body of anti-terrorism laws

Many argue the situation might have been different if Arar were affiliated with a terrorist organization and if valuable information gathered while he was imprisoned in Syria was provided to Canada. Roach and Forcese present two opposing views on the issue of sharing torture derived information:

> On the one hand are those who urge that any use of torture-derived information creates a "market" that may fuel the persistence of this horrific practice. On the other are those who conclude that in exigent circumstances the injury caused by failing to take steps in response to torture-derived intelligence outstrips the evil of torture.[97]

In my opinion, the former view is much stronger. For Canada, respecting the *Charter*, particularly the right not to be subjected to cruel and unusual treatment, punishment, or unreasonable search and seizure[98] is essential when formulating laws. To reiterate, the preservation of human life, liberty and dignity cannot be achieved through the derogation of the very same values. Abella JJ., Cromwell JJ. and Karakatsanis JJ. vocalize this opinion in *Wakeling v. United States*, where they state:

> Nothing restrains foreign law enforcement officials from using this highly personal information in unfair trials or in ways that violate human rights norms, from publicly disseminating the information, or from sharing it with other states… Section 8 requires that when a law authorizes intrusions on privacy, it must do so in a reasonable manner. A reasonable law must have adequate safeguards to prevent abuse. It must avoid intruding farther than necessary. It must strike an appropriate balance between privacy and other public interests.[99]

The Arar case offers an unfortunate, yet, realistic example of the risks of unconditional information sharing. Bill C-51- which broadens the scope of information sharing, threatens the right to privacy, endangers free speech and increases the period of preventative detention- not only undermines Canada's ability to learn from past mistakes, but also belittles respect for fundamental Charter rights and takes Canada a step back in the development of human rights.

III.IMMIGRATION LAW SUBSTITUTING ANTI-TERROR LEGISLATIONS

A. IMMIGRATION LAWS IN THE FACE OF NATIONAL SECURITY

Immigration law has been used to compensate for restrained anti-terrorism legislation. The unfortunate reality is that the banner of 'immigration law' leaves room for much less scrutiny of anti-terrorism policies, specifically with regards to security certificates used for prolonged detention and deportation orders for 'security' reasons.

Security Certificates[100] refer to a process

96 *Id.* at s. 2.4.

97 *Supra* note 46, at 146.

98 *Supra* note 42, at s. 8, s. 12.

99 *Wakeling v. United States,* [2014] 3 S.C.R. 549. Per Abella JJ. and Karakatsanis JJ.

100 *Immigration and Refugee Protection Act*, S.C. 2001, div. 9, s. 77.

within the *Immigration and Refugee Protection Act (IRPA)* where an immigration proceeding is held with the objective of removing non-Canadians, such as permanent residents and foreign nationals, from Canada for reasons concerning national security, "violating human or international rights, or involvement in organized or serious crimes."[101] However, they are only issued when information to determine the case cannot be disclosed for reasons pertaining to endangerment of safety of persons or national security.[102] Although reasonableness of the certificates are reviewed by federal court judges who suspend proceedings upon review,[103] the possibility of secret trials and indefinite imprisonment without formal convictions or charges poses great threats to human rights.

While those detained are theoretically only held until deported, the reality is that deported terror suspects face the risk of torture, as seen in the Arar case, and face indeterminate detention.[104] While *Suresh v. Canada (Minister of Citizenship and Immigration)*[105] establishes that the Courts can either defer to executive detention to see whether deportation leads to a substantial risk of torture, the case also establishes the disturbing *Suresh* exception, which states that deportation or torture might not infringe the *Charter* in exceptional circumstances.

In 2005, at the Proceedings of the Special Senate Committee on the Anti-terrorism Act, the minister argued in favor of security certificates to explain why they are often used instead of preventive detention orders under the *IRPA*.[106] In response, George Dolhai, Director and Senior General Counsel in the Strategic Prosecution Policy Section of the Department of Justice, stated:

> The section [regarding preventive arrests] contemplates that if there is detention to be ordered, it cannot be longer than 72 hours. The conditions that are imposed on the individual are conditions that address the safety concern that was posed, are irrespective of the person's immigration status and are not directed toward resolving that immigration status. It is focused only on the safety issue, whereas the certificates are focused on the immigration status of that person as well as the safety concern he or she represents.[107]

The reality, however, is that immigration law is used as anti-terrorism law, because unlike anti-terrorism legislation, immigration law permits prolonged detention, secret evidence, and a much lower standard of burden of proof than the beyond a reasonable doubt threshold. Additionally, detention can be based on membership in or association with a terrorist group. Such detentions are different from detentions under anti-terrorism legislation, which only criminalizes terrorist activity.[108] Immigration law is not limited to the legal confines of anti-terrorism legislation or the scrutiny or human rights concerns which follow. This view is echoed by Senator Lynch-Staunton who questioned why detention cannot be initiated under Bill C-36, which would

101 Department of Public Safety and Emergency Preparedness, *Security Certificates,* THE GOVERNMENT OF CANADA, https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx (2015).

102 *Id.*

103 Erin Kruger & Marlene Mulder & Bojan Korenic, *Canada after 11 September: Security Measures and "Preferred" Immigrants*, 15 MEDITERRANEAN QUARTERLY, DUKE UNIVERSITY PRESS 80 (2004).

104 *Supra* note 4, at 255.

105 *Supra* note 35.

106 Thirty-eighth Parliament, *Proceedings of the Special Senate Committee on the Anti-terrorism Act*, Issue 2 (21 February 2005).

107 *Id.*

108 *Supra* note 107.

allow a person to have the opportunity to know the charges against them within 72 hours under the *ATA* (later extended to 7 days).[109] While the framework for security certificates was affirmed to be constitutional in *Canada (Citizenship and Immigration) v. Harkat*,[110] Bell argues:

> …there are circumstances in which detention under immigration proceedings can come to be regarded as abusive enough to present a violation of section 7 of the Charter. This would appear plausible given that immigration proceedings are not criminal proceedings, making such lengthy detention less justifiable…As a result, non-citizens reside in an in-between space in which they are subject to the state's power, but are not benefactors of the rights that citizens have accrued to limit the power of the state in this regard. Detainees are regarded as undeserving of the minimum standards of equitable jurisprudence and the procedures of separated and checked power that are held to be a hallmark of liberal societies that claim to be governed by the rule of law.[111]

The lowered standard of proof required for detention also extends to deportation cases under the banner of 'inadmissibility due to security' in §34(1) of the *IRPA*, where the rights of non-citizens are also threatened.[112] This is particularly disturbing, as those not criminally liable and innocent beyond reasonable doubt are still subject to punitive measures under the *IRPA*. In *Pippin v. Canada (Public Safety and Emergency Preparedness),* Pippin, a permanent resident was deemed inadmissible in Canada and subject to deportation pursuant to §34(1)(f) and §34(1)(b) of the *IRPA* due to his association with the Lashkar-e-Taiba (LeT) when he was 16 years old.[113] Since he was not aware of the atrocities being committed by the LeT, the panel found that Pippin did not engage in terrorism as there was an absence of the mens rea element. In this case, however, issuing a deportation order pursuant to §34(1)(f), which provides that membership in certain organizations are grounds for inadmissibility, is particularly disturbing.[114] The panel found that Pippin's membership in the LeT twenty years prior, despite his lack of knowledge on the group, was enough for deportation under the *IRPA* even though he was not associated with the group, nor had any intention of getting involved in activities of that nature.[115] Reliance on a distant connection between past membership and security risk is a groundless base to violate freedom of association as established in *Al Yamani v. Solicitor General of Canada.*[116]

It should be noted that Pippin did not face any criminal charges[117] and his actions would not have been subject to any punitive measures if he were a Canadian citizen; primarily since no such charges are available in criminal law, which only criminalizes terrorist acts. Using the *IRPA*, which contains provisions specifically formulated to deport the criminally innocent, is pragmatically a disproportionate response to the conduct in question and is an unethical way of dealing with counter-terrorism policy. Using

109 *Supra* note 109.

110 *(Citizenship and Immigration) v. Harkat*, [2014] 2 S.C.R. 33.

111 Colleen Bell, *Subject to Exception: Security Certificates, National Security and Canada's Role in the War on Terror*, 21 CANADIAN JOURNAL OF LAW AND SOCIOLOGY, 69 (2006).

112 *Supra* note 103, at div. 4, s. 34.

113 *Pippin v. Canada (Public Safety and Emergency Preparedness),* [2016] CanLII 61891 (CA IRB).

114 *Id.*

115 *Id.*

116 *Al Yamani v. Canada (Solicitor General) et al.*, [1996] 1 F.C. 174.

117 *Supra* note 116.

immigration law as counter-terrorism law not only violates basic principles of human rights, but is also discriminatory in nature. This position is established in the UK House of Lords Belmarsh decision.[118] Lord Hoffman argued that differential treatment in the criminal justice system based on immigration status is contrary to the UK's commitment to human rights, stating, "a power of detention confined to foreigners is irrational and discriminatory."[119] This decision significantly altered UK anti-terrorism policy, yet, Canada still insists a decade later on using immigration law as informal anti-terrorism legislation. Up until the enactment of Bill C-51, immigration law seemed to be a loophole to disrespect *Charter* rights.

CONCLUSION

In tracking the development of Canadian anti-terrorism policies, it becomes clear that both formal anti-terror laws and immigration laws in Canada have a history of threatening human and constitutional rights enshrined in the *Charter*. There is no denying that anti-terror legislation in Canada and the motives behind their enactment has been far from perfect. In fact, the broad definition of terrorist activity, which was discussed earlier, arguably caused much damage, and ultimately resulted in profiling. However, earlier legislation still showed much restraint to respect human rights. For example, investigative detentions were limited to 72 hours pre-2015. Having said that, immigration law seems to be a loophole to counteract human rights restraints. Perhaps that is why stricter legislation was enacted. Immigration law does not need to compensate for restrained anti-terror legislation which are guided, arguably distantly, by the principles of human rights. After 2015, there has been concerns surrounding a lowered threshold of accountability. The enactment of the *Act* raises three main human rights concerns relating to preventative arrests, free speech limitations and privacy violations. Nonetheless, the goal of anti-terrorism policies should never counteract respect for human rights. Therefore, relying on immigration law or enacting stricter laws to escape following principles of human rights and *Charter* principles is fundamentally unconstitutional.

118 *A and Others v. The United Kingdom* [GC], no. 3455/05, ECHR 2009-301.

119 *Id*. at para 97.

Murder by Text?
The Legality of Commonwealth v. Michelle Carter

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Abstract

This article considers the recent case *Commonwealth v. Michelle Carter*, which dealt with Conrad Roy III's suicide and Michelle Carter's involvement in it. Carter was convicted of involuntary manslaughter by Judge Lawrence Moniz and is currently appealing the decision. This article explains the backdrop of the case, Judge Moniz's reasoning, the defense's argument, and the relevant Good Samaritan Laws in Massachusetts. I also argue that Judge Moniz misinterpreted the current Massachusetts laws in place; thus, Carter should not have been convicted. I set out to show how the interpretation of laws, specifically those concerning involved parties' words and an individual's presence at the scene of a crime, are changing and that this case can be setting a new precedent based on the technology of today.

"Based on words alone, can someone commit a crime?" the prospective jurors were asked.[1] Murder is a universally understood topic, but what actually constitutes the legal basis for a guilty verdict? Free speech would lead many to believe that words cannot kill; however, this sentiment seems to be changing. With today's technological advances, the U.S. legal system must adapt to the times, so that laws better reflect how society currently operates. In the absence of a federal law, 48 of 50 states have made cyber-bullying illegal, thus demonstrating the growing seriousness of the issue.[2] For Michelle Carter, the ability to communicate with her boyfriend with such ease proved to be the catalyst for her conviction; her electronically distributed words were self-incriminating in trial.[3] The use of phone calls and texts to support a conviction, as in *Commonwealth v. Michelle Carter*, is unprecedented.[4] Judge Lawrence Moniz of the Bristol Juvenile Court did not convict Carter based on her texts, but rather on her actions the day of Roy's suicide. Yet Carter's texts certainly influenced him to reach this conclusion.[5] Specifically, Carter's decisions before and during Roy's death, such as her encouraging him to commit suicide, to get back into his car, and her lack of reporting his suicide to anyone, are the premise of the case and the ethical dilemma that her ruling presents. This divisive case changes the dynamics of future court proceedings. Whereas before, physical proximity was typically a critical factor, it may no longer be so in cases such as these. *Commonwealth v. Michelle Carter* establishes a precedent that gives more weight to actions tangential to the actual crime in forthcoming cases. Within the framework of statutes as they presently stand, Michelle Carter should not be blamed for Conrad Roy III's death, and therefore should not have been found guilty of involuntary manslaughter.

In order to understand Judge Moniz's ruling, one must first understand the entirety of the case. The court proceedings shed light on the genesis and trajectory of the relationship between Michelle Carter and Conrad Roy. Having met for the first time in 2012, Carter and Roy lived thirty-five miles apart in Massachusetts; they saw each other in person only three times in total. Despite this, they sustained a drawn-out relationship for years through text and phone calls.[6] Just about a year apart in age, Carter was seventeen years old when Roy committed suicide. Roy was a troubled teenager. Having grown up with an abusive father, in 2012 he attempted to commit suicide "by swallowing a bottle of Tylenol."[7] After this failed attempt, Roy texted Carter, drawing on her sympathies as he said, "Do you even care what's happening to me?" to which she responded, "Oh my god is this my fault?".[8] This is a prime example of how Roy played with Carter's emotions, pulling her further into his own problems. This is further demonstrated by Roy's text message

1 Jesse Barron, *The Girl from Plainville*, ESQUIRE, August 23, 2017, https://www.esquire.com/news-politics/a57125/michelle-carter-trial/.

2 Teensafe, *Is Cyberbullying Illegal?: A Breakdown By State*, TEENSAFE, January 16, 2017, https://www.teensafe.com/blog/cyberbullying-illegal-breakdown-state/.

3 Ray Sanchez, et al., *Woman Sentenced to 15 Months In Texting Suicide Case*, CNN, August 3, 2017, www.cnn.com/2017/08/03/us/michelle-carter-texting-suicide-sentencing/index.html.

4 *Supra* note 1.

5 Chris Harris, *Legal Experts: Michelle Carter Will Probably Serve Jail Time After Appeals Process, Despite Judge's Ruling*, PEOPLE, August 3, 2017, people.com/crime/michelle-carter-legal-experts-believe-she-will-serve-jail-time/.

6 Richard Hartley-Parkinson, *Sick Messages Woman Sent Boyfriend to Get Him to Kill Himself for Attention*, METRO, June 7, 2017, metro.co.uk/2017/06/07/sick-messages-woman-sent-boyfriend-to-get-boyfriend-to-kill-himself-for-attention-6690531/.

7 *Supra* note 1, at 100-131.

8 Jesse Barron, *The Girl from Plainville*, ESQUIRE, August 23, 2017, https://www.esquire.com/news-politics/a57125/michelle-carter-trial/.

from 2013, indicating that he wanted to run away to California. Carter responded that she would need to go with him if he were to go.[9] At this point, Carter felt that she could not possibly bear the distance, showing a clear attachment – at least on Carter's part. Meanwhile, Roy's mental state continued to deteriorate. In 2014, he faced a suspension from school for fighting, during which he told Carter , "I wasn't comfortable and I'm feeling depressed again, and feels like everything's switched around."[10] Very soon he became suicidal once more; but this time, he had Carter's support in plotting the endeavor.[11] Although Carter initially refused to help Roy plot his suicide, she ultimately changed her mind and said she'd assist him, after he had played with her emotions.[12] Her decision to help Roy, along with her subsequent actions, is what Moniz declared illegal.

Since Carter's motives are critical to the case, we must attempt to understand her story, thereby allowing us to fully grasp her motives. Michelle Carter, suffering from anorexia, wrote that the eating disorder impacted her liver, in much the same way that Tylenol impacted Roy's stomach. Carter also suffered from depression and was taking the antidepressant drug, Celexa.[13] Given the possible side effects of the medicine, her defense attorneys attempted to prove that she was under the drug's influence and acted under the auspices of "involuntary intoxication."[14] However, this was thrown out as the expert defense witness, Dr. Peter Breggin, was discredited and found unreliable in his cross examination.[15] The timetable he provided of Carter's prescription kept shifting and "involuntary intoxication" is not a formal diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM).[16] Despite the defense strategy's failure, it is clear that Carter was emotionally distressed. During the school year following the summer she met Roy, Carter became "inseparable"[17] with a classmate, Alice Felzmann. However, Alice one day unexpectedly abandoned Carter, not returning texts or seeing her anymore. As such, Carter turned to Roy for emotional support and became dependent on him.[18] Carter cared deeply for Roy, and wished that neither of them would suffer. So, in June 2014, a month before Roy's eventual suicide, she went to the McLean Hospital in Belmont to get treated for her anorexia.[19] She urged him to join her in seeking treatment at the hospital. Trying to convince him to get better, she texted him, "[it] would be so good for you and we would get thru our issues together. Think about it. You aren't gonna get better on your own, you know it no matter how many times you tell yourself you are. You need professional help like me, people who know how to treat it and fix it."[20] Roy never joined her at the hospital.[21]

On July 13th, 2014, Conrad Roy III committed suicide with carbon monoxide poisoning.[22] He took his truck to a parking lot and then called and texted Carter. Leading up to the 13th, Roy was hesitant about his plan to commit suicide, but Carter firmly told him to go through with it.[23] She not only never told him to stop,

9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 Bob McGovern, *Brief: How the Michelle Carter Case Unfolded*, BOSTON HERALD, August 4, 2017, http://www.bostonherald.com/news/local_coverage/2017/08/how_the_michelle_carter_case_unfolded.
23 Jesse Barron, *The Girl from Plainville*, ESQUIRE, August 23, 2017, https://www.esquire.com/news-politics/a57125/michelle-carter-trial/.

but believed it would be best for him.[24] In fact, when Roy expressed uncertainty in following through with the suicide, she told him to "get back in."[25] In this moment, Carter was presented with the opportunity to put a stop to the suicide, but by doing the opposite, she was found to have broken the law. Judge Moniz convicted Carter based on this phone call with Roy, in which she told him to get back into the car and on the fact that she failed to reach out to authorities to stop him.[26] Because the texts alone were not adequate to convict Carter, the state argued that Carter never tried to stop Roy from committing suicide and thus encouraged it.

Involuntary manslaughter, as described by Massachusetts state law, is defined as "an unlawful killing that was unintentionally caused as the result of the defendants' wanton or reckless conduct."[27] Normally, this means that violators of the law did not have the intent to kill and that death occurred because of reckless behavior. Moniz's reasoning significantly expands the scope of the law's wording.

The judge looked to two precedent cases to help reach his conclusion. The first is an 1816 case, *Commonwealth v. Bowen,* where a prisoner, George Bowen, was tried for murder for "counseling to death" a fellow inmate, convicted murderer Jonathan Jewett, who happened to be on death row.[28] This case is rarely cited and does not have similar circumstances to Carter's trial. Joseph Cataldo, Michelle Carter's defense attorney, explains that "Bowen was charged with murder, not manslaughter, in an era where suicide was a crime and the judge was more concerned with depriving the community of the public execution."[29] So, a major reason that trial even occurred was because the townspeople wanted to see the execution of the inmate. It should be noted that the jury did acquit Bowen in the end. Although this case addresses the issue of words' ability to kill, it is almost 200 years old, and since then, with the emergence of new mediums of interpersonal communications, the dynamic of words' power has evolved. The principle Moniz drew from the decision in *Commonwealth v. Bowen* was "whether Conrad would have taken his life at another time does not control or even inform this court's decision."[30] This relates to Carter's case because Moniz applies the notion of "taking someone to death" by deciding to completely disregard Roy's suicidal tendencies and placing the full liability for his death on Carter. As such, he chose to rule only on her actions, without respect to Roy's hand in actually committing the suicide.

The second case Moniz cited is more relevant and is the judge's primary reasoning for convicting Carter. In *Commonwealth v. Levesque* (1999), two homeless people were convicted for the involuntary manslaughter of six firefighters who died attempting to put out

24 *Id.*

25 Mark Arsenaul, *Experts Say Michelle Carter Case Revolved Around Concept That Words Can Kill*, THE BOSTON GLOBE, June 16, 2017, www.bostonglobe.com/metro/2017/06/16/carteranalysis/VNeJVBH6phBlzfUNlsR07J/story.html.

26 Dialynn Dwyer, *6 Questions About Michelle Carter's Conviction in the Texting Suicide Trial, Answered*, THE BOSTON GLOBE, June 16, 2017, www.boston.com/news/local-news/2017/06/16/6-questions-about-michelle-carters-conviction-in-the-texting-suicide-trial-answered.

27 Mass. Gen. Laws ch.265, §13 (FindLaw).

28 Ephrat Livni, *A New Legal Precedent Means Americans Can Go to Jail for What They Say*, QUARTZ, June 20, 2017, qz.com/1009681/a-new-legal-precedent-means-americans-can-go-to-jail-for-what-they-say/.

29 Allison Manning, *What the Suicide-by-Text Case Has in Common with a 19th-Century Trial*, THE BOSTON GLOBE, September 8, 2015, www.boston.com/news/local-news/2015/09/08/what-the-suicide-by-text-case-has-in-common-with-a-19th-century-trial.

30 *Supra* note 1.

the fire that the homeless people had accidently started and failed to report.[31] Moniz derived the following:

> "Knowing that Conrad was in the truck, Michelle took no action. She did not call the police or Mr. Roy's family. She did not notify his mother or his sister, even though just several days before that she had requested their phone numbers. And finally, she did not issue a simple additional instruction: 'Get out of the truck.' Consequently, Michelle's 'failure to act, where she had a self-created duty, constituted each and all wanton and reckless conduct.'"[32]

Based on his understanding of *Levesque*, Moniz saw Carter's inaction and the failure to stop Roy as evidence of her guilt because she had a duty to act. In telling Roy to get back in the car and in failing to report Roy's intentions to authorities with the ability to prevent harm, Carter "murdered him by counsel."

Nonetheless, Cataldo challenged both the legitimacy of the charges and Moniz's logic. There is no law in Massachusetts which makes suicide a criminal act. Cataldo stated that, "being an accomplice to a lawful activity could not be a crime. And while free speech has certain limits—one cannot make 'true threats' (i.e. those that can be persecuted under the law)—Michelle did not threaten Conrad."[33] In addition, The Massachusetts American Civil Liberties Union went on the record on their own webpage saying,

> "There is no law in Massachusetts making it a crime to encourage someone, or even to persuade someone, to commit suicide. Yet Ms. Carter has now been convicted of manslaughter, based on the prosecution's theory that, as a 17-year-old girl, she literally killed Mr. Roy with her words. This conviction exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions."[34]

Given the above statements, it is fitting that Carter's appeal to the Massachusetts Supreme Court is based on a potential violation of her right to free speech.[35] We must consider whether texts and phone calls can kill an individual and if they fall under a protection of free speech. Specifically, the First Amendment states, "Congress shall make no law...abridging freedom of speech."[36] However, the Supreme Court has since found that statements which "incite actions that would harm others" is not protected by the amendment.[37] Thus, one might argue that Carter is denied freedom of speech because her words did cause harm to Roy. However, there remains a difference between her case and *Schenck*, which developed the clear and present danger test. Whereas the act of shouting fire in a crowded theatre creates a situation of mass chaos, Carter's words had only the potential to harm. Neither she, nor anyone else actually

31 *Supra* note 16.

32 *Supra* note 1.

33 *Id.*

34 Dialynn Dwyer, *6 Questions About Michelle Carter's Conviction in the Texting Suicide Trial, Answered*, THE BOSTON GLOBE, June 16, 2017, www.boston.com/news/local-news/2017/06/16/6-questions-about-michelle-carters-conviction-in-the-texting-suicide-trial-answered.

35 Joyce Chen, *Woman Convicted for Texts in Boyfriend's Suicide Case Files Appeal*, ROLLING STONE, March 5, 2018, www.rollingstone.com/culture/news/michelle-carter-appeals-conviction-texts-boyfriend-suicide-w517483.

36 U.S. Const. amend I.

37 *What Does Free Speech Mean?*, UNITED STATES COURTS, www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does.

compelled Roy to pursue a specific action. Furthermore, Carter's encouragement of Roy committing suicide, while immoral, does not seem to have had a malicious intent, which would be integral to testing whether her words are protected or not.

In addition to Cataldo's stated argument above, the defense argued that, based on his past proclivities, Roy would have killed himself even if Carter were not involved. It is important to note that, ultimately, Roy did act alone, for Carter was physically absent from the scene of the crime. This fact alone makes it harder to prove that she actually "caused" his death.[38] Although Carter's defense was unable to convincingly articulate these arguments, Moniz failed to properly interpret the law. It does not seem that Carter's actions can be called involuntary manslaughter, given the statutes as they stand. Moniz did acknowledge that Roy ultimately had acted autonomously, but firmly stated that Carter was the figurative "hand" that moved him toward his fate. While this may be true, without sufficient precedent relevant to cases of suicide and without Carter's physical presence at the scene of the 'crime,' Carter ought to have been found innocent in the eyes of the law. Until a verdict is delivered on Carter's appeal though, nothing is firmly ruled upon. The ramifications of this trial have yet to be felt.

Michelle Carter's case presents an opportunity to discuss Massachusetts's Good Samaritan Laws, one which neither Moniz nor Carter's defense counsel embraced. As per the official blog of the Massachusetts Trial Court Libraries,

> "There are several laws in Massachusetts insulating those rendering aid from liability, but no law requiring a bystander to provide assistance… Many sources suggest that Massachusetts has a 'duty to aid' law, which requires witnesses to come to the assistance of crime victims. In fact, this law creates a duty to report, but not a duty to aid**.** Chapter 268, section 40 provides Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable."[39]

Given that a case of involuntary manslaughter falls under this interpretation, Carter's civic duty was only to report Roy's intentions, not to actively prevent their materialization. Although the defense did argue that Carter was not at the scene of the crime, the Massachusetts Supreme Judicial Court ruled that Carter was "virtually present" during Roy's suicide, which thus allowed the manslaughter case to move forward.[40] Since Carter was found to have been at the scene of the crime, albeit electronically, it seems like the Good Samaritan Laws could then apply. By this logic, Carter only violated Good Samaritan Laws in her failure to report Roy's death, the absence of suicide laws notwithstanding. Pursuant to §40 of the law, "any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars."[41] If Carter were to be convicted under this premise, then the only punishment she would face would be a fine, as opposed to incarceration. It will be interesting to see if Carter's defense incorporates such a strategy on appeal.

38 Katharine Q. Seelye and Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, THE NEW YORK TIMES, June 16, 2017, www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html.

39 Meg, *Good Samaritan Laws*, MASSACHUSETTS LAW UPDATES, August 16, 2006, blog.mass.gov/masslawlib/misc/good-samaritan-laws/.

40 *Supra* note 21.

41 Mass. Gen. Laws ch. 268, §40 (FindLaw).

In an age of technology, there will inevitably be more cases similar to this one – cases dependent on the decision made in *Commonwealth v. Michelle Carter*. Dave Siegel, a professor at New Boston Law School, has put forward the possibility that "Moniz's decision could lead to criminal charges for someone who simply says they 'understand' another's desire to commit suicide in that hypothetical situation, as opposed to actively encouraging or aggravating them."[42] While the future is uncertain, it is clear that whatever the final verdict may be, this case is a turning point in the interpretation of law, given the current state of communication technology. Whether Michelle Carter is innocent or guilty, a sick girl or an immoral character, the ramifications of her case will surely resound for years to come.

42 *Supra* note 21.

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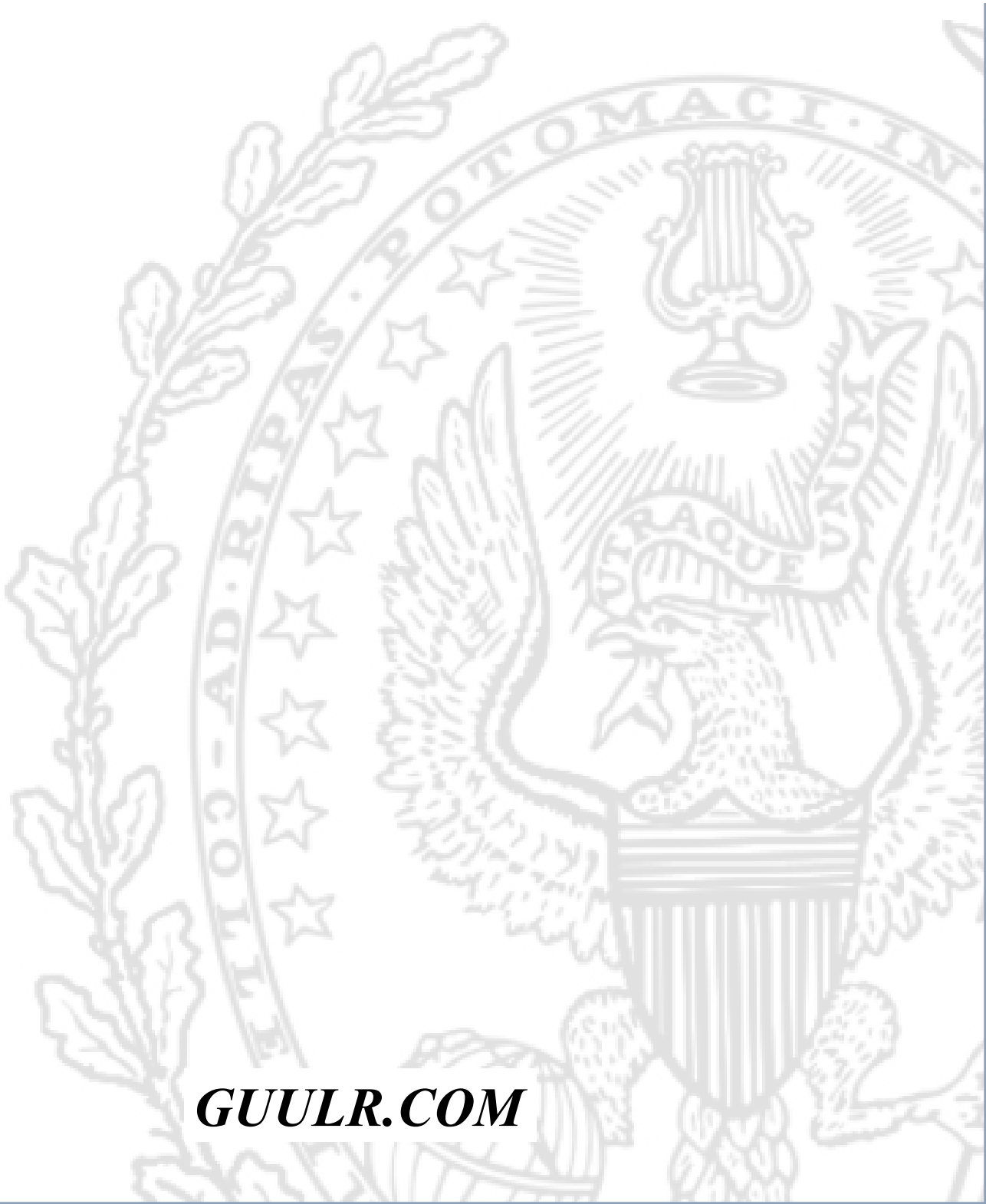

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