

ARTICLES

THE UNRESOLVED KK PARK SAGA ON HUMAN TRAFFICKING, CYBER SCAMS AND MODERN SLAVERY: ADAPTING THE NON- PUNISHMENT PRINCIPLE AS A SOLUTION

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ABSTRACT

Myanmar's KK Park scam factory saga is one of the most pressing and widely reported challenges of human trafficking and modern slavery in Southeast Asia. Victims were enticed, trapped, and coerced into conducting global-scale cyber scams. It involves three policy goals: stop crimes, protect enslaved victims, and protect scam victims. Holding the enslaved persons accountable for the scams that they committed is a balanced way to achieve these three policy goals, but they are *prima facie* shielded by the Non-Punishment Principle under international law, as victims of human trafficking and slavery. Applying this Principle directly without modifying it for the KK Park context has three shortcomings. First, the Non-Punishment Defense applies without regard to the enslaved victims' reckless fault for falling into *avoidable* job-scam-turned-enslavement. Second, the Defense looks at the crimes (scams), instead of their consequences (e.g. causing suicides of the scam victims). Third, the Defense overshadows the enslaved victims' laudable divulgence of their self-incriminating experience, because the Defense is premised on recognizing their victimization, instead of the former that deserves substantial mitigation. When the public has doubts as to their status as "ideal victims", a victimization-based Defense would have an arbitrary, weak basis. Garnering public understanding

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and support—via reinstating personal accountability—is crucial in the fight against KK modern slavery.

INTRODUCTION

The KK Park scam factory saga is one of the most pressing challenges of human trafficking and modern slavery in Asia. It started during the COVID-19 pandemic, and despite efforts of the media, governments, and NGOs, it is still happening today, where multilingual victims are trafficked and enslaved in parts of Southeast Asia for international cyber scams.¹ The situation calls for three policy goals, namely (1) to stop human trafficking and modern slavery,² (2) to protect the trafficked-enslaved victims, and (3) to protect the scam victims. This article considers the usefulness of the Non-Punishment Principle (the “Principle”) in this context and suggests that the Principle has to be adjusted for the KK situation. Heys & Niezna have explained this “international law” Principle:

The non-punishment principle reflects the understanding that victims of trafficking and slavery might be compelled to commit unlawful activities, and it prioritises the protection and rehabilitation of victims of trafficking and modern slavery over their prosecution. *The principle is recognised in international law*, and the UK developed a statutory defence under Section 45 (s45) of the Modern Slavery Act 2015

1. Nectar Gan, Joyce Jiang & Kocha Olarn, *A Chinese actor was abducted from Thailand. His swift return has sparked hopes – and fears – back home*, CNN (Jan. 15, 2025, 3:50 AM), <https://edition.cnn.com/2025/01/14/china/china-actor-thailand-scam-myanmar-intl-hnk/index.html> [<https://perma.cc/XGP3-68BP>]; Leo S.F. Lin, *Business As Usual? Chinese Organised Crime in Southeast Asia*, AUSTL. INST. OF INT'L AFFAIRS: AUSTRALIAN OUTLOOK (Jan. 17, 2025), <https://www.internationalaffairs.org.au/australianoutlook/business-as-usual-chinese-organised-crime-in-southeast-asia/> [<https://perma.cc/82RH-8RWY>]. (“Given the overall economic downturn in China, young job seekers will likely continue falling into the trap of organised fraud schemes. Despite the Chinese government’s crackdown on major organised crime rings, regulatory and enforcement loopholes exist in the Southeast Asian region. Especially in Myanmar, the intersection of organised fraud, human trafficking, and technology-driven crime has transformed the country into a critical crime nexus, with scam compounds taking advantage of gaps.”).

2. When there is already widespread understanding that the Southeast Asia scam center issue is classified as one of both human trafficking and modern slavery, this article does not have to dwell on whether the definitions for these two categories are met. *See, e.g.*, Mark Turner & Anthea McCarthy-Jones, *Cyber slavery starts up in Southeast Asia*, E. ASIA F. (Jun. 14, 2023), <https://eastasiaforum.org/2023/06/14/cyber-slavery-starts-up-in-southeast-asia/>; Ivan Franceschini et. al., *A new type of victim? Profiling survivors of modern slavery in the online scam industry in Southeast Asia*, in TRENDS IN ORGANIZED CRIME (2024), <https://link.springer.com/article/10.1007/s12117-024-09552-2> [<https://perma.cc/9ZTF-AYMF>]. *cf.* Office of the High Comm’r for Hum. Rts. (OHCHR), *Online Scam Operations and Trafficking into Forced Criminality in Southeast Asia: Recommendations for a Human Rights Response* 11 (2023), https://bangkok.ohchr.org/sites/default/files/wp_files/2023/08/ONLINE-SCAM-OPERATIONS-2582023.pdf [<https://perma.cc/AHR2-Z7AH>] (opposite to this understanding, there have been contentions that they constitute “labour migration,” but “not trafficked”).

(“MSA”) to comply with it. The purpose of s45 is to protect victims of modern slavery from being punished for offences they have been compelled to commit.³

The Principle leads to the corresponding Non-Punishment Defense (the “Defense”), which shields the enslaved victims from criminal liability for the coerced crimes.⁴

An unmodified application of the Principle to the KK Park context has three major shortcomings. First, the Defense applies without regard to the victims’ reckless fault for falling into *avoidable* job-scam-turned-enslavement. Second, the Defense looks at the crimes (scams), instead of their consequences (e.g., causing suicides). Third, the Defense overshadows the victims’ laudable divulgence of their self-incriminating experience, because the Defense is premised on recognizing their victimization, instead of the former that deserves substantial mitigation. When the public has doubts as to their status as “ideal victims”, a victimization-based Defense would have an arbitrary, weak basis. Garnering public understanding and support—via reinstating personal accountability—is crucial in the fight against KK Park’s human trafficking and modern slavery.

Accountability for their crimes is an underexplored topic when the public attention focuses more on their rescue and crackdowns.⁵ A further reason for the lack of attention on the trafficked/enslaved persons’ accountability is that, despite the international legal authority of the Principle, “the Council of Europe identified a significant lack of awareness about the [Principle] amongst competent authorities.”⁶ Furthermore, Lin sensibly predicted that, despite the intergovernmental efforts to crack down on the scam centers in Myanmar, such criminal activities are going to persist because “young job seekers will likely continue falling into the trap of organised fraud schemes.”⁷ Holding the enslaved victims accountable for the scams is a way to deter and ensure that they take responsibility for signing up for suspiciously high-paying jobs abroad, as the media has often warned. Their liability should be heavily discounted to reflect not just their victimization as slaves, but also their undernoted contribution of speaking out about their experiences. A full blanket immunity,

3. Alicia Heys & Maayan Niezna, *The Non-Punishment Principle and its Implementation in the UK*, BONAVERO REPS. NO. 1/2024, at 4 (Feb. 1, 2024) (emphasis added), <https://www.law.ox.ac.uk/content/bonaveroreports-series> (follow the hyperlink beside “BONAVERO REPORT NO.1/2024 (February 2024)”) [<https://perma.cc/6WHV-QHG7>].

4. *Id.*

5. See, e.g., Helen Davidson & Rebecca Ratcliffe, *A kidnapped Chinese actor, a scam gang, and a very public rescue operation*, GUARDIAN (Jan. 14, 2025), <https://www.theguardian.com/world/2025/jan/14/wang-xing-chinese-actor-abduction-thailand-myanmar-scam-ntwnfb> [<https://perma.cc/H43J-BMFR>] (describing the governmental rescue as “very public”).

6. Anne Gallagher & Klara Skrivanova, *Human Rights and Trafficking in Persons*, Fifteenth Informal ASEM Seminar on Hum. Rts., 72 (Nov. 24-26, 2015), <https://asef.org/wp-content/uploads/2020/10/Background-Paper-15th-Seminar-Final.pdf>. [<https://perma.cc/ZN9Q-FETF>].

7. Lin, *supra* note 1.

by contrast, does not adequately balance the scam victims' interests and the deterrence of modern slavery. Reinstating *proper* accountability on their part helps prevent *avoidable* enslavement and garner public support for them. Accountability better serves all three policy goals.

Whilst the KK Park saga happens in Southeast Asia, it requires international attention because of its impact beyond the region. Victims of slavery are lured from abroad and trafficked within Southeast Asia for their language abilities to conduct cyber fraud.⁸ Enslaved victims reportedly come from many jurisdictions, such as China, Indonesia,⁹ India,¹⁰ Japan,¹¹ the Philippines,¹² Morocco,¹³ Singapore,¹⁴ Sri Lanka,¹⁵ and South Korea.¹⁶ At the same time, cyber scams are suffered internationally, and the US is one of the severely affected jurisdictions: "U.S. citizens are frequently victims of the Southeast Asian scamming industry. USIP estimated that Americans lost \$3.5 billion to scams specifically originating in Southeast Asia in 2023."¹⁷ One report revealed that a job seeker was trafficked, and "was forced to target Canadians and other English-speaking Westerners in cryptocurrency scams designed to steal their

8. See, e.g., David Whitehouse, *Cambodia, Myanmar 'Cyber-Slaves Are Being Recruited Globally, Research Finds*, DIPLOMAT (May. 8, 2023), <https://thediplomat.com/2023/05/cambodia-myanmar-cyber-slaves-are-being-recruited-globally-research-finds/> [<https://perma.cc/877K-USBN>]; Suneth Perera & Issariya Praithongyaem, *My hell in Myanmar cyber slavery camp*, BBC (Apr. 20, 2024), <https://www.bbc.com/news/articles/cw076g5wnr3o> [<https://perma.cc/RTV9-ARS6>].

9. *'Modern slavery': Thousands of Indonesians in clutches of scam syndicates*, STRAITS TIMES (Dec. 21, 2024), <https://www.straitstimes.com/asia/se-asia/modern-slavery-thousands-of-indonesians-in-clutches-of-scam-syndicates> [<https://perma.cc/5379-RZQ9>].

10. Cherylann Mollan, *Cambodia: Hundreds of Indians rescued from cyber-scam factories*, BBC (Apr. 1, 2024), <https://www.bbc.com/news/world-asia-india-68705913> [<https://perma.cc/WGN3-TZCJ>].

11. Shin Kasahara, *NGO: 6 Japanese held captive in 'crime hub' in east Myanmar*, ASAHI SHIMBUN (Jan. 15, 2025), <https://www.asahi.com/ajw/articles/15585261> [<https://perma.cc/35BJ-XQCU>].

12. Virma Simonette & Kelly Ng, *Hundreds rescued from love scam centre in the Philippines*, BBC (Mar. 14, 2024), <https://www.bbc.com/news/world-asia-68562643> [<https://perma.cc/2NV3-AH4P>].

13. Latifa Babas, *Six Moroccans freed from Myanmar scam ring after paying ransom, many still captive*, YABILADI (Mar. 7, 2024), <https://en.yabiladi.com/articles/details/151463/moroccans-freed-from-myanmar-scam.html> [<https://perma.cc/KF8P-LUFT>].

14. David Sun, *Well-educated Singaporeans among people trafficked to work in scam centres: United Nations report*, STRAITS TIMES (Nov. 15, 2024), <https://www.straitstimes.com/singapore/well-educated-singaporeans-trafficked-to-work-in-scam-centres-united-nations-report> [<https://perma.cc/BX8K-AVAZ>].

15. Perera & Praithongyaem, *supra* note 8.

16. Lim Jeong-won, *More Koreans getting scammed, kidnapped in Golden Triangle, warns Seoul*, KOREA JOONGANG DAILY (Feb. 28, 2024, 3:02 PM), <https://koreajoongangdaily.joins.com/news/2024-02-28/national/diplomacy/More-Koreans-getting-scammed-kidnapped-in-Golden-Triangle-warns-Seoul/1990990> [<https://perma.cc/PX3B-SHKJ>].

17. Julia Dickson & Lauren Burke Preputnik, *Cyber Scamming Goes Global: Unveiling Southeast Asia's High-Tech Fraud Factories*, CSIS (Dec. 12, 2024), <https://www.csis.org/analysis/cyber-scamming-goes-global-unveiling-southeast-asias-high-tech-fraud-factories> [<https://perma.cc/4CQ5-DY3D>].

life savings.”¹⁸ Another report similarly noted that the trafficked victim was “forced to scam Australians.”¹⁹ Legal accountability is therefore an issue of international relevance.

I. THE “KK PARK” MODERN SLAVERY

A. The “KK Park” Cyber Scam Factory Saga

Job seekers from Asia and beyond are lured by fake high-paying work to travel to Southeast Asia, which is a human trafficking scheme.²⁰ The “KK Park,” a cyber scam site in Myanmar, has effectively become the slang term for scam factories. Such scam activities continue to exist in Southeast Asia. Victims are usually targeted for their language proficiency, such as the ability to speak Chinese.²¹ Scammers, lowering the job applicants’ guard, often lure them with promises of work in nearby tourist or vacation-friendly countries like Thailand, which is geographically proximate to the scam center in Myanmar.²² The job applicants are captured upon arrival, trafficked to these sites in Cambodia or Myanmar,²³ and coerced into conducting cyber scams.²⁴ The enslaved victims are provided with “well-rehearsed” scripts, and contact people abroad randomly

18. Katie Pedersen et al., *Human trafficking victim says he was forced to target Canadians in crypto investment scam*, CBC (Feb. 9, 2024), <https://www.cbc.ca/news/business/crypto-scam-human-trafficking-1.7105454> [<https://perma.cc/D6F6-NMAL>].

19. Cait Kelly, *‘I couldn’t escape’: the people trafficked into call centres and forced to scam Australians*, GUARDIAN (Apr. 2, 2023), <https://www.theguardian.com/law/2023/apr/02/i-couldnt-escape-the-people-trafficked-into-call-centres-and-forced-to-scam-australians> [<https://perma.cc/98DJ-VN6T>].

20. Julia Bayer, Julett Pineda & Yuchen Li., *How Chinese mafia are running a scam factory in Myanmar*, DW (Jan. 30, 2024), <https://www.dw.com/en/how-chinese-mafia-are-running-a-scam-factory-in-myanmar/a-68113480> [<https://perma.cc/BK5M-NTNR>] (reporting how an African job applicant for an IT position fell into enslavement). Dominic Faulder, *Asia’s scamdemic: How COVID-19 supercharged online crime*, NIKKEI (Nov. 16, 2022), <https://nikkei.shorthandstories.com/asias-scamdemic-how-covid-19-supercharged-online-crime/> [<https://perma.cc/7ZTL-3R2D>] (noting how cyber scams “[E]merged from a toxic combination of unemployment, lockdown isolation, and unprecedented social media use.”).

21. See Whitehouse, *supra* note 8.

22. Dave Grunebaum, *In Southeast Asia’s scam centers, human trafficking worsens*, VOA (Dec. 5, 2024, 12:00 PM), <https://www.voanews.com/a/in-southeast-asia-s-scam-centers-human-trafficking-worsens/7888452.html> [<https://perma.cc/6UYJ-FVMR>].

23. *Id.* (“Last year, the United Nations estimated that more than 200,000 people were forced to work in scam centers in Cambodia and Myanmar alone.”); Jintamas Saksornchai, *Thai police say Chinese actor was trafficked to Myanmar to work in a scam operation*, AP (Jan. 8, 2025, 5:10 AM), <https://apnews.com/article/thailand-china-actor-scam-myanmar-b1d6ac8d3d65446a7e82410bc9bf8b3e> [<https://perma.cc/V4LZ-KKFV>] (reporting that a Chinese actor was lured to work in Thailand, but then trafficked to a scam center in Myanmar); Vijitra Duangdee, *Myanmar scam operations move south along Thai border*, VOA (Feb. 1, 2025, 7:07 AM), <https://www.voanews.com/a/myanmar-scam-operations-move-south-along-thai-border/7959295.html> [<https://perma.cc/V3HB-JXZS>].

24. Charlie Campbell, *Poppies to Pig-Butchering: Inside the Golden Triangle’s Criminal Reboot*, TIME (Mar. 20, 2024, 11:00 PM), <https://time.com/6899646/scams-trafficking-drugs-southeast-asia-golden-triangle/> [<https://perma.cc/3VPP-74WF>].

via social media, cold calls, WhatsApp, Telegram, etc.²⁵

The enslaved, based on the scripts' instructions, pose as attractive singles for honey traps as in "pig butchering" scams.²⁶ The scripts are highly sophisticated, usually spanning over a month, patiently discussing causal topics such as pets, food, or hobbies, to lower the guard of the target. Once trust is built, the fraudster will come up with an excuse for urgent money, like healthcare bills or an investment opportunity.²⁷

Another common type of scripted scheme involves impersonation as law enforcement officers asking for personal particulars and bank information. For example, it can involve fabrications that some seldom-seen family members, like grandchildren, are in urgent need of bail money.

In general, the schemes utilize manipulative tactics, such as false urgency, loneliness, fear of missing out on moneymaking opportunities (the "FOMO" or "Kiasu" cultural-psychological construct),²⁸ sympathy, misconceptions about cross-border legal procedures, etc.

At the same time, they deploy cutting-edge technologies, like AI voice change and face shift, making the fraud nearly flawless, even to highly educated professionals.²⁹ Reportedly, "between 2020 and 2024, victims worldwide lost approximately \$75 billion to the Southeast Asian-based cyber scams."³⁰

B. The Coercion and Enslavement

The enslaved are given three options. The first option is to obey the demands to avoid torture.³¹ Repeated failures to defraud will result in organ harvesting.

25. See, e.g., Cordelia Lynch, *'They fall in love with me': Inside the fraud factories driving the online scam boom*, SKY NEWS (Oct. 18, 2024), <https://news.sky.com/story/they-fall-in-love-with-me-inside-the-fraud-factories-driving-the-online-scam-boom-13234505> [https://perma.cc/639A-A7RE].

26. See, e.g., Teele Rebane & Ivan Watson, *Killed by a scam: A father took his life after losing his savings to international criminal gangs. He's not the only one*, CNN (Jun. 20, 2024, 5:25 AM), <https://edition.cnn.com/2024/06/17/asia/pig-butchering-scam-southeast-asia-dst-intl-hnk/index.html> [https://perma.cc/E4CR-L6UA].

27. See, e.g., Sarah Hooper, *Forced to say 'sweet nothings': Hundreds rescued from love scam centre*, METRO (Mar. 15, 2024, 10:31 AM), <https://metro.co.uk/2024/03/14/hundreds-rescued-scam-masquerading-online-gambling-centre-20464696/> [https://perma.cc/EP2S-C975].

28. See, e.g., Brandon Christopher Dulisse, Nathan Connealy & Matthew William Logan, *"Get Rich Quick," Scheme or Script? The Effect of Cryptoculture on the Susceptibility of Fraud Victimization among Cryptocurrency Purchasers*, 94 J. CRIM. JUST. (2024).

29. U.N. Office on Drugs & Crime [UNODC], *Transnational Organized Crime and the Convergence of Cyber-Enabled Fraud, Underground Banking and Technological Innovation in Southeast Asia: A Shifting Threat Landscape* (Oct. 2024), https://www.unodc.org/roseap/uploads/documents/Publications/2024/TOC_Convergence_Report_2024.pdf. [https://perma.cc/D9GJ-7S4M].

30. Clara Fong & Abigail McGowan, *How Myanmar Became a Global Center for Cyber Scams*, COUNCIL ON FOREIGN RELATIONS (May 31, 2024), <https://www.cfr.org/in-brief/how-myanmar-became-global-center-cyber-scams> [https://perma.cc/C4QM-VU7V].

31. Davidson & Ratcliffe, *supra* note 5.

The second option is to call their family for ransom.³² Contacting the outside world is not strictly prohibited, since escaping the scam site is impossible. The final option, as another way out, requires the enslaved to find new victims as replacements.³³

II. HOW THE CURRENT FRAMEWORK FAILS TO DULY BALANCE THE THREE POLICY OBJECTIVES?

A. Crackdowns Are Inadequate and Too Difficult

The most effective prevention and protection for both scam and enslaved victims should be a governmental crackdown on the enterprise, because it directly addresses the source of human trafficking and slavery.

But this has not been successful.³⁴ The situation is inherently complicated because the scam factories are strategically situated in “lawless border” areas,³⁵ and the syndicates involve the junta’s control.³⁶ This makes intergovernmental interventions more challenging due to political and jurisdictional considerations. For example, the Chinese government crackdowns struck a blow against the crimes, but then the resurgent criminal enterprise targeted non-Chinese nationals instead and strategically avoided the Chinese government’s radar.³⁷

In addition, the goal of crackdowns is to prevent future similar incidents. However, imposing accountability is not just about the prevention of future cases, but also the resolution and reparation of cases that have already happened. In other words, crackdowns are not an adequate substitute for accountability. Even if all the scam centers are finally eliminated, accountability remains a relevant issue, as the wrongful acts have already been committed.

32. *Id.*

33. Raja Noraina Raja Rahim & Hakimi Suria Kencana, *Woman sends last messages before alleged human trafficking ordeal at Thailand-Myanmar border*, NEW STRAITS TIMES (Mar. 13, 2024), <https://www.nst.com.my/news/nation/2024/03/1025316/woman-sends-last-messages-alleged-human-trafficking-ordeal-thailand> [https://perma.cc/4YXF-6GW9].

34. Bayer, Pineda & Li, *supra* note 20.

35. See, e.g., Jihane Rahhou, *Cyber Mafias Hold Moroccans Captives on Thailand-Myanmar Border*, MOROCCO WORLD NEWS (May 1, 2024), <https://www.moroccoworldnews.com/2024/05/362396/cyber-mafias-hold-moroccans-captives-on-thailand-myanmar-border> [https://perma.cc/99EH-QB2Z]; Jonathan Head, *The Chinese mafia’s downfall in a lawless casino town*, BBC (Nov. 23, 2023), <https://www.bbc.com/news/world-asia-67471138> [https://perma.cc/S9V7-K49T].

36. Jason Tower & Priscilla A. Clapp, *Beijing’s crackdown pushes Myanmar criminal groups to Karen State as the junta’s control of these groups and their revenue weakens*, U.S. INST. OF PEACE (Apr. 22, 2024), <https://www.usip.org/publications/2024/04/china-forces-myanmar-scam-syndicates-move-thai-border> [https://perma.cc/Y688-CL8L]; Helen Regan et al., *Myanmar military loses control of key town on Thai border, rebels say, in major win for anti-junta resistance*, CNN (Apr. 11, 2024), <https://edition.cnn.com/2024/04/11/asia/myanmar-myawaddy-knu-military-junta-intl-hnk/index.html> [https://perma.cc/U59U-25K2].

37. Vincent MacIsaac, *Myanmar’s Scam Hells Can’t Release Their Captives*, IRRAWADDY: BURMA (Sep. 6, 2024), <https://www.irrawaddy.com/news/burma/myanmars-scam-hells-cant-release-their-captives.html> [https://perma.cc/E4BL-7YC7].

B. No Recourse for the Scam Victims

The scam victims, feeling angry and betrayed after being defrauded of their lifelong savings, may want to recover their financial loss. In addition, they might want to vindicate justice by holding the culprit accountable for the damage caused. However, they cannot possibly sue the remote masterminds behind the scenes due to a number of reasons, like the inability to apprehend them, etc.³⁸

The enslaved executed the scams, and the scam victims might want to hold them accountable for the misdeeds. The enslaved returns home upon release and might be in the same or an approximate jurisdiction as the scam victims. Financial losses could seem recoverable since the enslaved could afford the ransom.

Justice can be vindicated via public and/or private recourse—in the sense that legal accountability for the wrongdoing is duly upheld. In terms of public recourse, the prosecution might also want to sue the enslaved for the fraud. A criminal conviction can include a victim compensation order for the scam victims. But neither public prosecution nor private litigation would work, as the following analysis will demonstrate.

C. The Enslaved Are Generally Not Accountable for Their Crimes

To broaden the discussion and given the transboundary nature of the crimes, this article will highlight the relevant laws and principles that are hotly discussed internationally, many of which have strong referential uses for other jurisdictions affected by the crimes (e.g., common law jurisdictions like Hong Kong and the US).³⁹ The UK approach is particularly noteworthy for its adoption of the international Non-Punishment Principle. The impacted jurisdictions should consider the proposed adaptation of the Principle (to be discussed in Part III of this article).

*1. Criminal Immunity: The Non-Punishment Principle*⁴⁰

As the starting point, it is crucial to acknowledge that the enslaved are victims of modern slavery and human trafficking.⁴¹ They are forced to commit crimes “as they attempt to navigate the near-impossible choices displacement,

38. See Bayer, Pineda & Li, *supra* note 20.

39. See Dickson & Preputnik, *supra* note 17.

40. In this article, “immunity” is used in the same sense as “defense.”

41. Article 3 of the Palermo Protocol defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception . . . or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” G.A. Res. 55/25 (Nov. 15, 2000). Similar definitions have been adopted by other international instruments, such as Art.2 of the EU Directive 2011/36/EU.

destitution, and desperation confront them with.”⁴² The English Court of Appeal forcefully stated that they “should be protected against the further stigma of a criminal conviction for an offence committed in consequence of their initial victimisation.”⁴³ The “international standards” emphasize “the Non-Punishment Principle” for victims of modern slavery and human trafficking.⁴⁴ For example, Article 26 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 provides that each state party “shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”⁴⁵ Article 8 of the EU Directive 2011/36/EU stipulates that the authorities should be “entitled not to prosecute or impose penalties on victims of trafficking . . . for their involvement in criminal activities which they have been compelled to commit.”⁴⁶ These European conventions are enforceable in the European Court of Human Rights.⁴⁷ In this article, a corresponding full defense for compelled crime will be termed “Non-Punishment Defense.”

The Principle has a solid legal foundation because it “is not a new principle but rather draws on long-established principles common to all legal systems around concepts such as criminal responsibility and duress.”⁴⁸ Besides, the Principle “is now firmly established under European law” and “has been recognized outside Europe.”⁴⁹

As the Principle “is recognized in international law,”⁵⁰ it is not only found in European legal sources. The Principle is also stipulated in Article 4, paragraph 2 of the Protocol of 2014 to the 1930 Forced Labour Convention, which provides the exact same provision as the EU Directive 2011/36/EU quoted above.⁵¹ This Protocol has already been ratified by sixty countries, including Malaysia.⁵² But it has not yet been ratified by a number of

42. David Gadd & Rose Broad, *When Victims of Modern Slavery Became Offenders: The Unravelling of the UK's Modern Slavery Agenda*, 10 J. HUM. TRAFFICKING 302, 305 (2024).

43. *MK v. Regina* [2018] EWCA (Crim) 667 [36] (Eng.).

44. Alicia Heys, *The UK's Statutory Defence for Victims of Modern Slavery and its Narrow Understanding of Victimhood*, 87 J. CRIM. L. 237, 244 (2023).

45. Council of Europe Convention on Action Against Trafficking in Human Beings 2005, art. 26.

46. Council Directive 2011/36/EU, art. 8.

47. *See, e.g., V.C.L. v. United Kingdom*, App. Nos. 77586/12 and 74603/12 EUR. CT. H. R., (Feb. 16, 2021), <https://hudoc.echr.coe.int/fre?i=001-207927> [<https://perma.cc/SNC5-EAD7>].

48. Gallagher & Skrivankova, *supra* note 6, at 70.

49. Ryszard Wilson Piotrowicz & Liliana Sorrentino, *Human Trafficking and the Emergence of the Non-Punishment Principle*, 16 HUM. RTS. L. REV. 669, 698 (2016).

50. Heys & Niezna, *supra* note 3, at 4.

51. International Labour Organization [ILO], *Protocol of 2014 to the Forced Labour Convention, 1930*, art. 4 ¶ 2 (June 11, 2014), https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029 [<https://perma.cc/ZC3M-J3HV>].

52. International Labour Organization [ILO], *Ratifications of P029 - Protocol of 2014 to the Forced Labour Convention, 1930* (Nov. 9, 2016), https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672 [<https://perma.cc/ZE9M-ZMA3>].

jurisdictions where many of the enslaved victims are based, such as China, India, and Sri Lanka.⁵³ That said, Article 14, paragraph 7 of the ASEAN Convention Against Trafficking in Persons (“ACTIP”) provides that each member state shall “consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.”⁵⁴ It was noted that “seven ASEAN Member States have incorporated non-punishment provisions aligned with ACTIP.”⁵⁵ For example, the law of the Philippines “offer[s] legal protection to trafficked persons who committed unlawful acts as a direct result of, or as an incident in relation to being trafficked.”⁵⁶

Besides, the Principle is contained in the Recommended Principles and Guidelines on Human Rights and Human Trafficking where it states: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁵⁷ While the Recommended Principles are “not binding”, they reinforce “the basis for the emergence of customary international law.”⁵⁸

Furthermore, the Principle can be found in bilateral agreements or memorandums meant to combat human trafficking.⁵⁹ Some agreements explicitly restrict the Principle to only exempt immigration offences of illegal entry of the territory as a result of being trafficked, but there are also agreements that more extensively cover other offenses.⁶⁰

53. See Perera & Praithongyaem, *supra* note 8.

54. ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), art. 14, ¶7 (November 21, 2015), <https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf> [<https://perma.cc/BG8U-LYWA>].

55. Meg Fitzgerald, *Protecting Forced Offenders: Applying the Non-Punishment Principle to Victims of Trafficking Into Scam Centres*, 4(2) THAI LEGAL STUD. 162, 183 (2024).

56. Felicity Gerry et al., *Human trafficking and the proposed reintroduction of the death penalty*, INT’L BAR ASS’N, <https://www.ibanet.org/article/1F1659DA-6FAD-4296-9614-38D4CF90D2B6> [<https://perma.cc/TB6G-DFMP>] (last visited Aug. 28, 2025).

57. Recommended Principles and Guidelines on Human Rights and Human Trafficking, Rep. of the United Nations High Comm’r for Hum. Rts., at 3, U.N. Doc. E/2002/68/Add. 1 (2002), <https://docs.un.org/en/E/2002/68/Add.1> [<https://perma.cc/9RMU-DLDA>].

58. Saba Demeke, *A Human Rights-Based Approach for Effective Criminal Justice Response to Human Trafficking*, 9 J. INT’L HUMANITARIAN ACTION, at 1, 4 (2024).

59. MARIKA MCADAM, IMPLEMENTATION OF THE NON-PUNISHMENT PRINCIPLE FOR VICTIMS OF HUMAN TRAFFICKING IN ASEAN MEMBER STATES 161-62 (March 2022), https://www.aseanact.org/wp-content/uploads/2022/04/Non-Punishment_print_smallsize.pdf [<https://perma.cc/A7DL-JPB7>].

60. *Id.* at 2 (“some bilateral MOUs between ASEAN Member States include non-punishment provisions, though may limit protection to only some victims (e.g. women and children) or only to specified offences (e.g. immigration related offences)”), 4-5 (“In most countries in the region, the scope of protection from punishment only applies to a select list of offences, whether immigration and document-related (Brunei Darussalam, Malaysia); illegal immigration and prostitution (Lao PDR); immigration, prostitution, document or work-related offences (Thailand); or trafficking in persons offences (Myanmar). In Indonesia and the Philippines, protection from punishment is not limited to specified offences.”).

The Principle is not only found in international instruments, but also in national provisions. Incorporating the international obligations above, English law has introduced a defense under Section 45 of the Modern Slavery Act 2015 (“MSA”).⁶¹ It provides that the enslaved is not liable for certain crimes committed out of compulsion.

A number of US states have similar defenses. For example, California law provides a “defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm.”⁶² Bethany Simpson has conducted a thorough analysis of the US positions, noting that many other US states have such a defense, such as Kentucky and Wisconsin.⁶³ The defenses of different states afford a comparable extent of immunity, and Simpson’s comparison will not be repeated here. Overall, the US Congress holds the understanding that victims of trafficking should not be punished for illegal acts committed as a direct result of being trafficked.⁶⁴

Many other jurisdictions have their own Defense, which offers immunity to various extents.⁶⁵ Professor Davor Derenčinović has conducted a comparative study highlighting a number of European jurisdictions that have this Defense (again, the details of the defense will not be repeated here).⁶⁶

But even without a specific defense like the above, common law courts can still invoke the “abuse of process jurisdiction, whereby they could review the CPS’s prosecutorial decision, and, in certain cases, refuse to entertain

61. Heys, *supra* note 44, at 237-38.

62. Cal. Penal Code § 236.23(a) (West 2025); Bethany Simpson, *The Non-Criminalisation of Victims of Human Trafficking and Modern Slavery* (2023) (Ph.D. Thesis, Northumbria University Newcastle) (on file with Northumbria University Newcastle), <https://researchportal.northumbria.ac.uk/ws/portalfiles/portal/177397584/BethanySimpsonThesisUNN> [<https://perma.cc/8PZP-Y5LS>].

63. Simpson, *supra* note 62, at 225.

64. OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *PROTECTING VICTIMS OF TRAFFICKING: THE NON-PUNISHMENT PRINCIPLE* (June 2023), <https://www.state.gov/wp-content/uploads/2023/12/Protecting-Victims-of-Trafficking-The-Non-Punishment-Principle.pdf> [<https://perma.cc/S9FX-HD2F>] (citing the US Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101).

65. See ASEAN Secretariat, *Regional Review on Laws, Policies and Practices Within ASEAN Relating to the Identification, Management and Treatment of Victims of Trafficking, Especially Women and Children* 117-118 (2016), <https://asean.org/wp-content/uploads/2021/01/Regional-Review-on-Laws-Policies-and-Practices-within-ASEAN-relating-to-the-Identification-Management-and-Treatment-of-Victims-of-Trafficking-especially-Women-and-Children-2016.pdf> [<https://perma.cc/554B-S78M>] (“The Philippines protects trafficked persons from prosecution for “crimes directly related to the acts of trafficking”, while Indonesia protects trafficked persons from punishment for all illegal acts they are forced to commit, thereby extending the protection to trafficking for forced criminality. However, application of this provision appears to be restricted to cases in which a conviction of the trafficker has been secured.”).

66. Davor Derenčinović, *Comparative Perspectives On Non-Punishment Of Victims Of Trafficking In Human Beings*, 63 ANNALES XLVI 3 (2014), https://transcrim.pravo.unizg.hr/wp-content/uploads/2016/01/Prof.dr._sc._Davor-Derenčinovic-Comparative-Perspectives-On-Non-Punishment-of-Victims-of-Trafficking-in-Human-Beings.pdf [<https://perma.cc/8YBT-7LSQ>].

proceedings.”⁶⁷ The courts will consider whether the modern slavery is a “colourable excuse for criminality which is unconnected to and does not arise from their victimisation.”⁶⁸ The “dominant force of compulsion” must be “sufficient to reduce the Applicant’s criminality or culpability.”⁶⁹ The third relevant defense would be the common law defense of duress, and the English Court of Appeal has explained this succinctly in the context of trafficking:

The defences of duress and/or necessity (‘duress of circumstances’) may be in question where an offence has been committed by a trafficked victim whose case is that she was coerced into committing it . . . Duress is a defence (except to murder and attempted murder) if the offence has been committed as the direct (not indirect) result of a threat of death or serious injury aimed at the defendant or someone sufficiently close to him.⁷⁰

Outside common law systems, duress is also a commonly available ground in civil law jurisdictions.⁷¹ For example, the Criminal Law of the People’s Republic of China differentiates between the defense of necessity and mitigation by reason of duress.⁷² Necessity is a complete defense to liability, applicable when an act of damage is needed to prevent immediate danger. By comparison, duress is not a defense, but rather a partial mitigation or full exemption of sentence, applicable when the offense is coerced.⁷³

An additional safeguard lies with the prosecution. For example, the UK prosecution guidance will consider whether public interests would call for a prosecution.⁷⁴ The same holds true in many other jurisdictions, such as

67. Regina v. CS [2021] EWCA (Crim) 134 [45] (quoting The Crown v. DS [2020] EWCA (Crim) 285 [6]) (Eng.).

68. L. v. R [2013] EWCA (Crim) 991 [33] (Eng.).

69. Regina v. GS [2018] EWCA (Crim) 1824 [76] (Eng.).

70. LM v. The Queen [2010] EWCA (Crim) 2327 [8] (Eng.); MK v. Regin [2018] EWCA (Crim) 667 [38] (Eng.). (“duress is narrower in scope than the defence provided by section 45, but it bears some similarities” and they can be run in parallel).

71. See, e.g., Josephina S.R. Manifold, *What is the law on duress under international criminal law (ICL)? Is it a defence (full or partial)? If not, what effect does it have in mitigating culpability?*, WAR CRIMES MEMORANDA 1, 3 (2008); Laws of the People’s Republic of China (promulgated by the NPC Standing Comm. Legis. Aff. Comm’n., in English, Mar. 14, 1997, effective Oct. 1, 1997) art. 28.

72. Laws of the People’s Republic of China (promulgated by the NPC Standing Comm. Legis. Aff. Comm’n., in English, Mar. 14, 1997, effective Oct. 1, 1997) arts. 21, 28 (necessity and duress respectively).

73. Bo Wang, *Complicity Liability: English And Chinese Approaches Compared*, 8 J. INT’L COMP. L. REV. 175, 189 (2021) (“In Chinese law . . . duress is not a defence, so the coerced party will be liable for what he did unless the defence of necessity applies.”).

74. Crown Prosecution Servs., *Modern Slavery and human trafficking: offences and defences, including the section 45 defence*, (July 22, 2025) <https://www.cps.gov.uk/legal-guidance/modern-slavery-and-human-trafficking-offences-and-defences-including-section-45> [https://perma.cc/35HA-L8K3].

Belgium.⁷⁵

2. Immunity for Civil Liability

The civil liability of modern slaves or trafficked persons has rarely been explored. The Principle mentioned above, in general, applies only to the criminal context.

There are a few exceptions that have extended the Principle to the civil context.⁷⁶ For example, the relevant Qatar law provides that “the victim shall not be subject to criminal or civil liability of any of trafficking in human beings’ crimes when such a crime is initiated or directly associated with such person as being a victim.”⁷⁷ Yet, it still depends on if “any of trafficking in human beings’ crimes” can be construed to include the resulting scams.⁷⁸

Even without expanding the Principle for the civil context, the existence of a civil immunity is arguable. The notion of *respondeat superior* (let the master respond) can be traced to the context of slaves, which provides that the master is responsible for the acts of their slaves.⁷⁹

In addition, the historical precedent was that a slave could not be sued in court.⁸⁰ This was because the slave was deemed personal property with no legal capacity.⁸¹ In Allan Beaver’s words, “a slave . . . is a piece of property owned

75. Piotrowicz & Sorrentino, *supra* note 49, at 22.

76. United Nations Office on Drugs & Crime, E4J University Module Series: Trafficking in Persons & Smuggling of Migrants: *The principle of non-criminalization of victims* (Aug. 22, 2025), <https://www.unodc.org/e4j/en/tip-and-som/module-8/key-issues/principle-of-non-criminalization-of-victims.html> [<https://perma.cc/3RRA-FLRW>] (Article 21 of Egyptian Law No. 64 of 2010 regarding Combating Human Trafficking provides that “victim(s) shall not be criminally or civilly liable for any of the crimes of human trafficking as long as the crime occurred or was related to being a victim.”).

77. *Id.* (quoting Article 4 of Qatar Law No. 15 of 2011 on Combating Human Trafficking).

78. *Id.* (quoting portion of Article 4 of Qatar Law No. 15 of 2011 on Combating Human Trafficking).

79. Robert Luskin, *Caring About Corporate “Due Care”: Why Criminal Respondeat Superior Liability Outreaches Its Justification*, 57 AM. CRIM. L. REV. 303, 306 (2020); Christine W. Young, *Respondeat Superior: A Clarification and Broadening of the Current Scope of Employment Test*, 30 SANTA CLARA L. REV. 599, 600 (1990) (“[L]iability was imputed” where a person “was the owner of an animal or slave which caused the harm.”).

80. Paul Finkelman, *Northern Labor Law and Southern Slave Law: The Application of the Fellow Servant Rule to Slaves*, 11(2) NAT’L BLACK L. J. 212, 226 (1989) (“[S]laves could not be sued; therefore, even theoretically, injured parties would have no way of seeking compensation for their losses if they were hurt because of a slave’s negligence.”); *Creswell’s Ex’r v. Walker*, 37 Ala. 229, 234 (Ala. 1861) (Supreme Court of Alabama affirmed that “a slave cannot sue or be sued.”); *Wilson v. George*, 2 Del. Cas. 413, 422 (Del. 1818) (Delaware’s highest court held that a slave “cannot sue or be sued.”).

81. Compare Satvinder S. Juss, *How the Law Came to Support Slavery*, NEW L. J. 7, 7 (Oct. 2, 2020) (noting English courts analogized slaves with personal property), and Victor C.D. Mtubani, *African Slaves and English Law*, 3 BOTS. J. AFR. STUD. 71 (1983) (noting English case law deeming slaves as “chattels”), with Samantha D. E. Tucker, *No Way to Treat Man’s Best Friends: The Uncounted Injuries of Animal Cruelty Victims*, 19 ANIMAL L. R. 152, 177 (2012) (“[I]n terms of civil acts a ‘slave, not being a person, has no legal mind, no will which the law can recognize.”).

by his master. Therefore, as property cannot owe obligations a slave cannot.”⁸² This is known as “legal dehumanization.”⁸³ Looking further back, Roman law held that slaves “lacked full legal personhood.”⁸⁴ The “incapacity of slaves is strongly accentuated. They could not be in any way concerned.”⁸⁵ “The person primarily liable to be sued on the slave’s delict is his *dominus*.”⁸⁶ It is their master who bears “noxal liability.”⁸⁷

D. Not Necessarily a Blameless, “Ideal” Victim?

Gallagher and Skrivankova argued that, in order to duly recognize the victimization of the trafficked and enslaved persons, it is crucial for law enforcement to see “the crime behind the crime.”⁸⁸ In other words, they make the valid point that the ultimate culpability should lie with the masterminds and organizers of the crimes. However, the shortcoming of this view—in this context—is that the enslaved victims are not entirely blameless.

The notion of “ideal victim” suggests that “for society to recognize an individual as a victim, they must be *blameless* and weak.”⁸⁹ Official reports indicate that no tourists have been kidnapped into a scam factory for enslavement.⁹⁰ Instead, the victims were job applicants who fell into enslavement upon arrival.⁹¹

There is some arguable fault on their part. They were enticed by the unusually high remuneration, despite media warnings as to the legitimacy of

82. Allan Beever, *Kant on the Law of Marriage*, 18(3) KANTIAN REV. 339, 350 (2013).

83. Evan M. Gelobter, *Codified Chains: The Role of Louisiana’s Civil Code and Supreme Court in Regulating Slavery*, 5 LSU L. J. SOC. JUST. & POL’Y 108 (2025).

84. Maija Aalto-Heinilä & Juha Karhu, *Animals, Slaves, and Beyond*, 44 REVUS: J. CONST. THEORY & PHIL. (2021).

85. W. W. BUCKLAND, *THE ROMAN LAW OF SLAVERY* 83 (1908); cf. Nicholas Bozyk, *The Slave in Roman Law: Persona (person) or Res (thing)?*, https://warwick.ac.uk/fac/arts/classics/research/undergrads/the_slave_in_roman_law_-_persona_person_or_res_thing_final.pdf [<https://perma.cc/9MYD-QZ7F>] (Slaves did “not have the capacity to appear in court, except as defendants in criminal trials.”).

86. *Id.* at 101.

87. *Id.* at 112-13.

88. Gallagher & Skrivankova, *supra* note 6, at 73.

89. Heys, *supra* note 44, at 250 (emphasis added).

90. Ezra Cheung, *At least 38 Hong Kong victims in growing human-trafficking trend*, SCMP (Aug. 22, 2022), <https://www.scmp.com/news/hong-kong/law-and-crime/article/3189841/least-38-hong-kong-victims-growing-human-trafficking> [<https://perma.cc/RW3X-R9QE>]; Daryl Lim, *Are Chinese tourists targeted by scam syndicates in Southeast Asia?*, THINKCHINA (Oct. 26, 2023), <https://www.thinkchina.sg/society/big-read-are-chinese-tourists-targeted-scam-syndicates-southeast-asia> [<https://perma.cc/M2W5-68RX>] (reporting a rescuer’s observation that he has “never encountered a case where a tourist was kidnapped from the street and taken to a scam hub.”).

91. Campbell, *supra* note 24.

these jobs.⁹² The unreasonably high pay would have raised a reasonable person's suspicions. Arguably, the enslaved voluntarily and recklessly assumed the risky work. It would be unfair to shift the consequences of such gambles to the scam victims.

Even more concerning, certain victims knowingly accepted illegal employment, once again motivated by the promise of high pay.⁹³ A recent report reveals that a young man worked for an illegal online gambling company in Malaysia.⁹⁴ The corporate holiday trip to Thailand turned out to be a sale of the employees as slaves to a scam factory.⁹⁵ In another incident, the enslaved originally applied for positions in the illegal smuggling of gold—again a façade.⁹⁶

The worst incidents would be voluntary participation as scammers—and this actually happens, reportedly, something not uncommon.⁹⁷ In 2025, a Filipino woman who voluntarily went into one of the most notorious scam rooms told VOA and requested that her name not be used: “It’s in the news everywhere, social media, it’s impossible for them not to be aware.”⁹⁸ Arguably, the illegal job applicants bear legal responsibility for any further criminal acts. A strong analogy could be made with the law of criminal enterprise, where the

92. *Id.* (reporting the enslaved victim was offered a job with a pay that was seven times higher than comparable work); Fazleena Aziz, *Lured by fake Hong Kong job offer*, STAR (Jan. 19, 2024), <https://www.thestar.com.my/news/nation/2024/01/19/lured-by-fake-hong-kong-job-offer> [https://perma.cc/Z8YL-SFMQ] (the compensation was USD \$4,000 for a four-day work period); Chong Siaw Chan, *Individuals who rescue victims of job scams show how it is being done*, MALAY MAIL (Jun. 18, 2023), <https://www.malaymail.com/news/malaysia/2023/06/18/individuals-who-rescue-victims-of-job-scams-show-how-it-is-being-done/74860> [https://perma.cc/5P3Q-RQ2B]; Rashvinjeet S Bedi, *IN FOCUS: When lucrative overseas job offers turn into nightmare scams for these Malaysians*, CNA (Sept. 17, 2022), <https://www.channelnewsasia.com/asia/malaysia-overseas-job-scam-victims-cambodia-myanmar-laos-thailand-tortured-2940326> [https://perma.cc/FXD5-AVPS].

93. *See, e.g.*, Humanity Research Consultancy, *Responses to Trafficking in Persons for Forced Criminality in the Thai Context*, WINROCK INT’L 11 (Oct. 2024), https://winrock.org/wp-content/uploads/2024/10/HRC-FC-report_Final-10.2024.pdf [https://perma.cc/H5XM-WWL8] (noting online job advertisement that explicitly asks for “grey” workers); Fitzgerald, *supra* note 55, at 191; Lim, *supra* note 90 (reporting that “99% of kidnapping cases have to do with the grey industry [businesses bordering on illegality]. Many victims and kidnappers know each other.”).

94. Dimsum Daily Newsroom, *Malaysian firm lures 30 employees on holiday, then sells them into Myanmar scams*, DIMSUM DAILY (Oct. 27, 2024), <https://www.dimsumdaily.hk/malaysian-firm-lures-30-employees-on-holiday-then-sells-them-into-myanmar-scams/>. [https://perma.cc/N274-VUPQ].

95. *Id.*

96. Dimsum Daily Newsroom, *Hong Kong man recalls terrifying escape from Myanmar’s dark scam park*, DIMSUM DAILY (Dec. 16, 2024), <https://www.dimsumdaily.hk/hong-kong-man-recalls-terrifying-escape-from-myanmars-dark-scam-park/> [https://perma.cc/Z6HA-4YNE].

97. *See* Lim, *supra* note 90.

98. Duangdee, *supra* note 23; *See also* Fitzgerald, *supra* note 55, at 191-92 (Suggesting that there are people who voluntarily sign up for the “opportunity to make a lot of money quickly by working in a scam centre abroad.” Fitzgerald further highlighted an additional category of people who were “previously trafficked into a scam centre but [were] rescued during a police raid. After struggling to find legitimate work and facing financial difficulties, [they] decided to return to the scam centre, fully aware of the nature of the work.”).

participants are held accountable for any foreseeable crimes committed by members of the group.⁹⁹

Under the “gang exception,” the defense of duress is not available “where the defendant voluntarily associated with people engaged in criminality.”¹⁰⁰

Meg Fitzgerald argued that the Principle should be applied liberally to the KK Park context to recognize their victimization.¹⁰¹ The problem with this view is that the job scams are avoidable, and the voluntary enrollment for these high-paying jobs conceivably constitutes a reckless act. Arguably, the victimization basis alone fails to adequately justify full immunity.

E. But the Non-Punishment Defense Would Still Protect Non-Ideal Victims

Despite the existence of any arguable fault on the part of the enslaved, the Defense, like s.45, would still shield them from criminal liability. Unlike the defense of duress, its applicability is not negated by the person’s own fault.¹⁰² It applies when “a reasonable person in the same situation . . . and having the person’s relevant characteristics would have no realistic alternative to doing that act.”¹⁰³ The Defense provides immunity to “status offences,” which means crimes committed while being a trafficked or enslaved victim.¹⁰⁴ Even though they are not ideal victims, they still qualify for status and blanket immunity.

The facts of the KK Park saga apparently will satisfy the no-realistic-alternative threshold under s.45 given there were “torture and even weekly murders” for failing to comply.¹⁰⁵ Another report mentions “beatings, electrocutions, . . . sexual assault, rape, and having their organs forcibly harvested.”¹⁰⁶ The level of compulsion is serious enough to “extinguish” their

99. Elinor Fry & Elies van Slidregt, *Conspiracy/Joint Criminal Enterprise*, OXFORD BIBLIOGRAPHIES (Nov. 23, 2021), <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0096.xml?rskey=cN4h4m&result=1&q=Elinor+Fry+%26+Elies+van+Slidregt%2C+International+Law+Conspiracy%2FJoint+Criminal+Enterprise#firstMatch>. [https://perma.cc/2AK6-FQH9].

100. Crown Prosecution Servs., *supra* note 74; LM v R. [2010] EWCA (Crim.) 2327 [8] (Eng.), <https://www.bailii.org/ew/cases/EWCA/Crim/2010/2327.html> [https://perma.cc/8VSL-DEFS] (Duress will not “be established if the defendant has voluntarily associated with people in circumstances which amount to laying himself open to the compulsion to commit offences.”).

101. Fitzgerald, *supra* note 55, at 193 (Taking the view that “society should allocate all of the blame to the trafficker and none to the victim.”).

102. See Crown Prosecution Servs., *supra* note 74 (the gang exception); see also R v. GS [2018] EWCA (Crim) 1824 [76] (U.K.).

103. MSA 2015, c.30, §45(1)(d) (U.K.), <https://www.legislation.gov.uk/ukpga/2015/30/section/45>. [https://perma.cc/CS5C-B43C].

104. Marija Jovanovic, *The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance*, 1 J. TRAFFICKING & HUM. EXPLOITATION 41,70 (2017), <http://humantraffickingsearch.org/wp-content/uploads/2017/06/1001296261.pdf>. [https://perma.cc/MCF5-VWF5].

105. See Bayer, Pineda & Li, *supra* note 20.

106. See Campbell, *supra* note 24.

culpability.¹⁰⁷

III. ADAPTING THE NON-PUNISHMENT PRINCIPLE FOR THE KK PARK SAGA: REINSTATING ACCOUNTABILITY WITH DUE MITIGATION

This article proposes that there should be *some* legal accountability on the part of the enslaved, whilst heavily discounting their sentence to reflect their victimization.¹⁰⁸ Proper accountability is justifiable *for the KK context* because it balances the three policy goals.

Reinstating accountability does not mean undermining the protection of the enslaved victims. Holding them accountable addresses their “true pressures,” for example, by reminding them not to take suspicious jobs even in a dire financial situation. Inadequate accountability has many implications to the disadvantage of the enslaved. This Part will first explain the legal permissibility of adapting the Principle and then raise the grounds for justifying imposing accountability.

A. The Non-Punishment Principle Is Legally Adaptable

Although the Principle affords a *prima facie* defense for the enslaved victims, it is crucial to put it into context. Experts have agreed that there is “a discretion about how to apply the principle.”¹⁰⁹ Outside the KK Park context, many scholars have advocated for modifying or expanding the Principle to ensure that the “true pressures” of specific contexts are duly reflected.¹¹⁰ Gallagher and Skrivankova emphasized that:

It is important to note that the principle of non-prosecution/non-punishment for status offenses *does not grant victims of trafficking blanket immunity* for any and all crimes they may have committed before, during or after their trafficking experience . . . it is necessary for national criminal justice authorities to make a full and fair assessment of the situation and to consider, for example, *whether the fact of trafficking is a mitigating, rather than an exculpatory factor*.¹¹¹

As a matter of concept, it is important to distinguish between the Principle and the commonly associated non-prosecution principle,¹¹² which are often

107. R v. L(C) [2013] EWCA (Crim) 991 [33] (Eng. & Wales), *aff'd*, R. v. G.S. [2018] EWCA (Crim) 1824 at [76] (Eng. & Wales).

108. See, e.g., Nicola Wake, *Human Trafficking and Modern Day Slavery: When Victims Kill*, 9 CRIM. L. REV. 658 (2017).

109. Piotrowicz & Sorrentino, *supra* note 49, at 30.

110. See, e.g., Heys, *supra* note 44, at 248.

111. Gallagher & Skrivankova, *supra* note 6, at 72 (emphasis added).

112. Jovanovic, *supra* note 104, at 71.

discussed together.¹¹³ However, they are actually different, because the former is a broader term and does not preclude the initiation of prosecution (though it can entail non-prosecution), but simply that the defendant could be afforded a full or partial defense and/or mitigation in sentence, depending on the circumstances.¹¹⁴ Jovanovic succinctly described the notion of non-punishment as a “sliding scale,”¹¹⁵ quoting the English Court of Appeal’s explanation:

We cannot be prescriptive. *In some cases* the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished . . . *In other cases*, more likely in the case of a defendant who is no longer a child, culpability may be diminished but nevertheless be significant. For these individuals *prosecution may well be appropriate*, with due allowance to be made in the sentencing decision for their diminished culpability. *In yet other cases*, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail.¹¹⁶

Accordingly, the broad and adaptable nature of non-punishment arguably has resulted in approaches adopted by different states, such as non-prosecution, stay of proceedings, leniency in sentencing, and even post-conviction record cancellation.¹¹⁷ Accordingly, there is ample legal room for this article to propose reinstating accountability on the part of the enslaved/trafficked victims.

B. From Public Understanding to Growing Discontent

One worrying trend is the decline in public support for the enslaved and even rising public disdain.¹¹⁸ This is arguably caused by (1) the disastrous impact and prevalence of the scams and (2) the perception that the enslaved are victims of their own greed. There is some psychological fatigue in public support when the issue has been prolonged since the pandemic. When serious crimes are involved, the public may question whether “the victim is truly weak

113. See, e.g., the quote in the main text of *supra* note 111; Piotrowicz & Sorrentino, *supra* note 49, at 6-7.

114. Jovanovic, *supra* note 104, at 71-72.

115. *Id.* at 72.

116. R v. L(C) [2013] EWCA (Crim) 991 [33] (Eng.) (emphasis added).

117. The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *Issue Brief: Non-Punishment of Victims of Trafficking*, ICAT 8 (2020), https://icat.un.org/sites/g/files/tmzbd1461/files/publications/19-10800_icat_issue_brief_8_ebook_final.pdf [https://perma.cc/3394-JPPH].

118. This is observable from the public comments section where many suggest that the enslaved victims do not deserve sympathy, for carelessly falling into enslavement: See, e.g., HK01 INVESTIGATION, *Resurgence of Hongkongers Trafficked to Scam Factories in Myawaddy, Myanmar*, YOUTUBE (Dec. 16, 2024), https://www.youtube.com/watch?v=wZFW_f00b7Q [https://perma.cc/DN4Q-NEC5] (in Chinese).

and passive.”¹¹⁹ Accordingly, such a victim is “more likely to be *understood* . . . as a perpetrator.”¹²⁰

The “blame the victim” phenomenon affects not just the enslaved, but also the scam victims for being foolish. This is discernible from public discourse, for example, with one reporting themed as, “We’re not dumb. They’re just too good.”¹²¹ The widespread stigma arguably fuels public rage.

Without adequate public support, the result might be weakened crackdowns, media attention, and public condemnations. The stigma could deter people from speaking out about their experiences, which hinders investigations.¹²²

*C. Scams with Devastating Consequences on Par with the
Excluded Crimes in Sch.4 MSA*

A Defense usually does not apply to all types of crimes. Schedule 4 of the MSA 2015 lists crimes that cannot be justified under the Principle.¹²³ Under that list, fraud is immune from prosecution.¹²⁴ But other jurisdictions have their own lists of excusable offenses in which fraud remains punishable, for example, in Thailand.¹²⁵

Homicide and bodily harm crimes are not excused by s.45 MSA 2025, which implies that one life is not worth more than another. Yet the scams have caused suicides.¹²⁶ The scammers can likely predict the disastrous consequences when such huge sums of money and trust are involved.¹²⁷ These acts cannot be said to be the kind of “prosaic” crimes that Piotrowicz and Sorrentino contemplated, so letting them slide will arguably defeat the premise of the Principle.¹²⁸ “Trafficked persons are bound by the law just as much as any other

119. Heys, *supra* note 44, at 250.

120. *Id.*

121. CNA INSIDER, *I Was Scammed Of \$77k - Here's What You Need To Learn From My Story*, YOUTUBE (Oct. 20, 2022), https://www.youtube.com/watch?v=LOPz4_rvviE [<https://perma.cc/28EQ-9YBE>].

122. Jia Qu et al., *Fear and Perceived Risk of Cyber Fraud Victimization among Chinese University Students*, 82 CRIME, L. & SOC. CHANGE 543, 545 (2024) (“Cyber fraud caused financial losses and psychological trauma (such as despair and depression) to not only the victims but also impaired public trust in the government’s capability to protect public safety. As some victims were afraid of being blamed and shamed for their victimization experience (e.g., deemed as gullible, negligent, or even greedy), they were reluctant to report the crime to the police.”).

123. Jovanovic, *supra* note 104, at 65.

124. *Id.*

125. Fitzgerald, *supra* note 55, at 183 (Notably, the non-punishment defense under Thai law is narrower and “Thailand’s closed-list means that even if a person is identified as a VOT into scam centres, the non-punishment provision will not apply to them as committing cyberfraud is not a listed offence permissible of being excused.”).

126. Rebane & Watson, *supra* note 26; Poppy McPherson & Tom Wilson, *Crypto scam: Inside the billion-dollar ‘pig-butcher’ industry*, REUTERS (Nov. 23, 2023), <https://www.reuters.com/investigates/special-report/fintech-crypto-fraud-thailand/> [<https://perma.cc/Z7TD-BGFG>].

127. See Lynch, *supra* note 25.

128. Piotrowicz & Sorrentino, *supra* note 49, at 5.

victim of crime or indeed any other individual.”¹²⁹

This reveals another shortcoming of an *untailored* Defense, that its applicability usually depends on the crime—i.e. fraud—instead of its actual consequences. Proper accountability is needed *for the KK context*; the Defense should be waived based on the implications.

*D. Reinstating Accountability for this Context Is in Line
with the Goal of the Principle*

Part III(A) has already explained the *legal nature* of the Principle and Defense that its application depends on the circumstances.¹³⁰ In other words, the proposed accountability is in line with its legal character, and this sub-part argues that reinstating accountability is also consistent with the Principle’s *objectives*.

The Principle seeks to prevent punishing the trafficked victims “for being trafficked.”¹³¹ The Organization for Security and Co-operation in Europe (OSCE) commented that the “rationale for non-punishment of victims of trafficking is that, whilst on the face of it a victim may have committed an offence, such as irregular crossing of a State frontier or theft, the reality is that the trafficked person acts *without real autonomy*.”¹³²

The proposed accountability is not trying to punish the victims “for being trafficked,” but instead to hold them liable for their reckless act of signing up for suspicious jobs. At the same time, they have no “real autonomy” at the time of trafficking and slavery, but it was their autonomous decision to take up the risky jobs. Therefore, there is no contravention of the Principle.

In terms of the objectives of the Principle, the OSCE has further elaborated:

The punishment of victims of trafficking for crimes directly related to their trafficking is a violation of their fundamental dignity. It constitutes a serious *denial of reality* and of justice. . . . [I]t fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment. . . . This practice furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading trafficked victims from giving evidence against their traffickers and by enabling traffickers to exert even further control over their victims by threatening exposure to

129. *Id.* at 6.

130. *See supra* Part III(A).

131. *Id.*

132. Organization for Security and Co-operation in Europe (OSCE), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013), para. 31, <https://www.osce.org/files/f/documents/6/6/101002.pdf> [<https://perma.cc/7M39-XEU3>].

punishment by the State.¹³³

The OSCE's quote frames the enslaved/trafficked victims as *completely* faultless and having no autonomy at all.¹³⁴ If this is the case, then full immunity is justifiable. However, this is not the reality in the KK Park context, where the cause of the problems and calamitous crimes originates from the reckless act that would have been avoidable. The OCSE's quote has raised many considerations, such as diverting focus away from the ultimate mastermind behind the crimes. But it would be wrong to mix and confuse the separate considerations of what happened *before* the slavery/trafficking and the crimes committed *during* the slavery. The blameworthiness of pre-slavery/trafficking recklessness is unaffected by the considerations during/after slavery and trafficking.

E. Personal Accountability Helps Prevent Enslavement: Avoiding Suspicious Jobs in the First Place

"It is often said, 'when it is too good to be true, it probably is.'"¹³⁵ Personal accountability for crimes helps prevent enslavement by deterring one from applying for suspicious jobs.

Reckless behavior should be deterred. For example, the United States District Court for the Northern District of Illinois has captured the moral culpability of recklessness, which denotes "a course of action which . . . shows an utter indifference to or a conscious disregard for a person's own safety and the safety of others."¹³⁶ Besides, the blameworthiness of reckless behavior is reinforced by the common law crime of "culpable and reckless conduct" under Scottish law:

Culpable and reckless conduct involved exposing persons to a significant risk to life or health. Reckless conduct was criminal if there was danger to the lieges, either foreseeable or actual, or if the conduct had caused actual injury but a high degree of recklessness was needed going beyond carelessness or negligence. *What was required was an utter disregard of the consequences of this conduct, with total indifference to the safety of the public.*¹³⁷

The last sentence of the above quote reflects exactly the conduct to be deterred when the resulting scams spread harm to the public.

To avoid confusion, the point this article is making is *not* that the Principle should be dis-applied to incentivize the resistance of criminal demands,

133. *Id.* at para. 4 (emphasis added).

134. *Id.*

135. Chan v. Wan [2024] SGHC(A) 23 [Sing.].

136. Resolution Trust Corp. v. Franz, 909 F. Supp. 1128, 1141 (N.D. Ill. 1995).

137. Stewart v. Payne [2016] HCJAC 122 [19] (Scot.) (emphasis added).

comparable to the context of *Nuremberg* defense for war crimes.¹³⁸ This is the wrong goal, which ignores the dire situation in the enslavement scam camps. The goal of a tailored Defense should be about the *prevention of slavery in the first place*, not the *post-enslavement* prevention of scams.

*F. Accountability Prevents the Criminal Syndicate from
Exploiting Full Immunity*

The English Court of Appeal has warned that “apparent ease with which defendants can set up a defense under the section will result in their controllers being encouraged, rather than discouraged, to continue their exploitation, and through them commit offences.”¹³⁹

The Defense rationalizes obedience to criminal orders (which has no legal consequence), whereas disobedience leads to torture. Would reinstating personal accountability make the dilemma even worse: choosing between legal sanction or torture? This question misses the point, because the objective of imposing accountability concerns slavery prevention in the first place.

G. Heavy Discount in Liability to Reflect Victimization

The English Court of Appeal acknowledged there “will be cases where a decision to prosecute will be justified but due allowance can be made for mitigating factors at the sentencing stage.”¹⁴⁰ This corresponds to the very nature of the Principle—that it is *not a blanket immunity*.¹⁴¹ It is necessary to assess “whether the fact of trafficking is a mitigating, rather than an exculpatory factor.”¹⁴²

A discount recognizes their victimization. At the same time, the residual culpability reminds them they should take part of the blame for falling into *avoidable* job scams, and the harm flowing from the fraud.

However, the force for applying the Principle for this KK park context would be inadequate if the focus lies only on the victimization, because, as argued above, they bear some responsibility for the incident. Therefore, it is crucial to have an additional ground to justify the discount in liability, which will be explained in the next section.

138. Jessica Liang, *Defending the Emergence of the Superior Orders Defense in the Contemporary Context*, 2 GOETTINGEN J. INT'L L. 871, 872 (2010), <https://nasjournal.org/gojil/article/view/1944/1972> [<https://perma.cc/S7XY-R9YQ>].

139. *MK v. Regina* [2018] EWCA (Crim) 667 [39] (Eng.).

140. *Regina v. GS* [2018] EWCA (Crim) 1824 [76] (Eng.).

141. Gallagher & Skrivankova, *supra* note 6, at 72.

142. *Id.* at 72.

*H. Sharing Self-Incriminating Experience: Reward
for Relinquishing Legal Privilege*

Legally, there is no obligation to make self-incriminating statements, and there is no immunity if one does so. But after their escape, some escapees nevertheless share their traumatizing experience.¹⁴³

Speaking out evinces the remorse the enslaved suffered. Their insider information helps law enforcement, allows mass media to report on the situation, and raises public awareness to avoid similar traps. But for their self-identification, the scam victims would not have known the real identities of the pseudonymous scammers.

The redemptive nature of such confession seems under-appreciated by the public. This brave act should be judicially acknowledged via a fair discount in liability. From another perspective, the Defense actually overshadows their laudable divulgence because the Defense is premised on recognizing their victimization, instead of acknowledging the former. The problem is that when the public is already doubting their status as an “ideal victim,” a victimization-based defense only feels even more arbitrary. Yet, one who forgoes their legal privilege in making self-incriminating statements *for the public good* might be deemed worthier of support.

CONCLUSION

The KK scam factory saga remains a potent and prolonged challenge affecting Asia and beyond. This article explores how the law could help address trafficking, enslavement, and scams. Applying the international law¹⁴⁴ Non-Punishment Principle would be inadequate in this context, as it would underserve the three policy goals.

First, the Defense, like s.45 MSA 2015, does not depend on whether the victims bear some blame for falling into human trafficking and enslavement. It does not incentivize the avoidance of risky, suspicious jobs.

Second, another shortcoming of a Non-Punishment Defense is that its applicability looks at the crime—i.e., fraud—instead of its devastating consequences, like contributing to the suicides of scam victims. The Defense should reinstate proper accountability and be waivable based on the consequences.

Third, the Defense actually overshadows the victims’ laudable divulgence of their traumatized enslavement, because the Defense is premised on recognizing their victimization, instead of acknowledging the former. The problem with this is that, when the public is already doubting their status as “ideal victims”, a victimization-based defense only feels even more arbitrary.

143. Eileen Ng, *Malaysian dad pleads help for scam victims after son died*, ASSOCIATED PRESS (Sep. 21, 2022, 6:24 AM), <https://apnews.com/article/health-covid-myanmar-malaysia-thailand-7b4ce998d2925c4b782dc8b3f10bea1> [https://perma.cc/H5KH-N59M].

144. Heys & Niezna, *supra* note 3, at 4.

Yet, one who forgoes their legal privilege in providing self-incriminating information *for public good* (e.g. media warning, investigation, etc.), would be deemed worthier of support.

Heys rightly points out that it is difficult for the legal framework to handle “the blurred lines of a defendant occupying the simultaneous position of being both a victim and a perpetrator.”¹⁴⁵ But the KK Park saga shows that the victim-vs-perpetrator identity is a sliding scale depending on the circumstances and public perception.

Accordingly, the application of the Principle should be adjusted for the KK Park context. The primary legal goal should be the prevention *of slavery*—not the post-enslavement prevention of scams—because enslavement occurs from *avoidable* job scams. Prevention could be achieved by reinstating personal accountability for the scams, which would deter taking risky jobs.

The English Court of Appeal in *R v. GS* usefully acknowledges that there are circumstances where it is more suitable to mitigate the sentence, instead of a full defense.¹⁴⁶ The Defense in the KK Park context would warrant a heavy discount to fairly reflect the slavery victimization and privilege-waiving disclosure.

From another perspective, it is essential for the Defense to take into account the *pre-slavery*/trafficking reckless act on the part of the enslaved. It is an entirely separate issue from the *subsequent* wrongdoing and coercion exerted by the traffickers. The chain of causation should date earlier back in time: (1) the enslaved victims recklessly signed up for risky and suspicious jobs, (2) which only thereby fell into trafficking and slavery and (3) chose to conform with the criminal demands. An unadopted application of the Principle to consider only the circumstances *during* the slavery/trafficking (i.e. the coercion to commit crimes) would fail to fully reflect the actual culpability, fail to establish proper accountability for deterrence, and fail to do justice to the stakeholders involved.

145. Heys, *supra* note 44, at 250.

146. See Gallagher & Skrivankova, *supra* note 6.

CONFUSION REGARDING THE EXTRATERRITORIAL PRESIDENTIAL POWER IN RELATION TO THE ECONOMY AND DIGITAL PRIVACY

JUNKO ABE*

INTRODUCTION

Authoritarian states such as China have become more empowered in the international economic system. Since these states are generally in contrast to democratic states and the conventional international economic rules have been formed mainly by Western democracies, these current international rules have been challenged by the rise of authoritarian states.¹ Now, the US—especially the Trump administration—might share characteristics with authoritarian States due to its “uncompromising” policies on the economy and individual rights, such as free speech. In the context of the economy, these States may justify their national protectionist policies for national security.

“National security” exceptions may be used to justify states’ regulatory power under economic treaties such as the World Trade Organization (“WTO”) agreements,² which were founded on economic liberalism. While the subject matter of national security has been recognized as subject to states’ sovereignty, there seem to be limits on the scope of states’ “essential security interests” under WTO case law.

Additionally, states’ sovereignty would be legally exercised in line with constitutional limitations. There has been overlap in the concept of sovereignty in constitutional and international law, especially in relation to national security matters. Since different states have different national security policies, it should be questioned whether, and to what extent, they need to agree on the substantial scope of national security matters that can be justified under international law. For example, the matter of national security has been included as an “exception” to fundamental principles in international economic law, such as the GATT 1994³ and the GATS⁴, though it is not clear how the Panel and the Appellate Body would review states’ claims regarding “essential security” under such

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1. Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT’L L. 221, 221-23 (2020).

2. *See generally* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

3. GENERAL AGREEMENT ON TARIFFS AND TRADE ART. XXI, APR. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

4. General Agreement on Trade in Services art. XIV bis, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

treaties.

The US, as a “conventional” world leader after the Second World War, has contributed to the rulemaking of international law, including the international economic order. However, such an existing international economic order needs to be reconsidered in the context of the digital economy. Firstly, the traditional multilateral international economic order based on the WTO regime has not functioned as well as expected, which can negatively influence the effectiveness of the WTO regime itself. Secondly, it has been suggested that the US itself has been influenced by international and foreign states’ relations when making such an order and its national policies. It seems that the US policy on the digital economy has been affected by the EU. In the Data Privacy Framework to promote economic interests for these two regions, the US and the EU reached an executive agreement on cross-border flows of personal data. This data flow framework has been established in accordance with the EU’s “adequacy decision” under the EU’s personal data protection law, “GDPR”, which came into force on 25 May 2018.⁵ To satisfy the adequacy standard, a third country (i.e., a country outside the EU), into which protected data is intended to flow, is required to satisfy “essential guarantees” to restrict interference with fundamental rights to privacy and data protection for national security and law enforcement under Article 45(2)(a) of the GDPR.⁶ In line with the case law of the Court of Justice of European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”), this requirement, in particular, covers the proportionality principle, including a strict necessity test, which should be recognized in a democratic society.⁷ This strict test applies to a measure interfering with fundamental rights to privacy and protection of personal data, even for national security. The EU’s high standard of personal data protection for individuals can challenge and limit the US’s national security policy in the context of economic treaties and foreign surveillance activities.

While the EU requires a third country to protect personal data in ways

5. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1, 61 [hereinafter GDPR].

6. Christopher Kuner, *Article 45: Transfers on the Basis of an Adequacy Decision*, in THE EU GENERAL DATA PROTECTION REGULATION (GDPR): A COMMENTARY 79, 103 (Christopher Kuner et al., eds 2025).

7. E.g., EUR. DATA PROT. BD., RECOMMENDATIONS 02/2020 ON THE EUROPEAN ESSENTIAL GUARANTEES FOR SURVEILLANCE MEASURES (Nov. 10, 2020), https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_recommendations_202002_europeannessessentialguaranteessurveillance_en.pdf [https://perma.cc/3Z83-ZPQ7].

essentially equivalent to those of the EU's data protection law for data to be transferred from the EU to the third country, the US has not established a comprehensive privacy law at the federal level. To conclude the executive agreement with the EU, what the US did to deal with the requirements was to issue the President's executive order. Indeed, the US presidential power for foreign relations has been considered wide under the US Supreme Court case law, but the fundamental right to data privacy is at the center of the EU's requirements. Will the bilateral executive agreement relating to personal data influence the constitutional right to privacy in the context of the US foreign surveillance? Is there any possibility to admit justiciability of foreign surveillance activities for national security under the US Constitution?

Considering the relationship between foreign trade and personal data protection, the existing international economic rules based on economic liberalization should be considered in light of personal data protection rules in digitalization. This paper then examines how the US Constitution restricts the presidential power for foreign affairs for the purpose of national security. Due to the global influence of the EU's data protection law, this paper focuses on the EU's approach to personal data protection and its influence on US economic policy and presidential power. Examining the meaning of national security purpose in the context of the WTO rules and those of personal data protection, this paper considers how the US Constitution and international rules should bind the US presidential power through pursuing the concept of "sovereignty."

I. IMPACT OF DIFFERENT APPROACHES TO GOVERNMENT ACCESS TO PERSONAL DATA BETWEEN THE EU AND THE US ON THE TRADE LIBERALIZATION PRINCIPLE

A. Justiciability of the National Security Exceptions Under the WTO Agreements

The language of the national security exception under Article XXI of the GATT 1994 was copied from that of the GATT 1947,⁸ with substantially the same language being used under other WTO agreements, such as the GATS⁹ and the TRIPS agreement.¹⁰ More than

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

9. See GATS, *supra* note 4.

10. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS agreement].

seventy years after the initial introduction of the GATT, the national security exception clause had been rarely endorsed by the member states. After that, it has been invoked at the WTO Dispute Settlement Body (“DSB”) panels such as *Russia – Traffic in Transit* case,¹¹ which interpreted Article XXI of the GATT and *Saudi Arabia – IPRs* case,¹² mentioning the security exception of Article 73 of the TRIPS agreement. Additionally, numerous countries exporting steel and aluminum to the US requested the establishment of panels relating to the US’s regulatory measures to impose tariffs on the imports of these goods for national security based on Section 232 of the Trade Expansion Act of 1962,¹³ which was decided under the Trump presidency in 2018.¹⁴

The open texture of section (b) of Article XXI of the GATT (and the mirroring security exception clause of the TRIPS agreement) had raised controversy over what its substantive scope is and who has the authority to determine the same, especially considering the wording of its *chapeau*.¹⁵ It has been suggested that member states should understand the security exception as “self-judging,” on the basis that the freedom of the member states not to perform their obligations for national security

11. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia – Traffic in Transit* case] (Ukraine alleging that Russia violated its duty under Article V of the GATT 1994 by imposing various restriction measures on traffic in transit through its territory, while Russia rebutted the security exception under Article XXI).

12. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (circulated June 16, 2020) [hereinafter *Saudi Arabia – IPRs* case] (Qatar claiming that, inter alia, Qatari nationals’ ability to protect intellectual property rights in Saudi Arabia was affected by Saudi Arabia’s measures and that its measures brought the result of interfering with a Qatari-Based Media Group to enforce its IP rights through Saudi Arabia’s domestic judicial system, violating Articles 3.1, 4, 41.1, 42 and 61 of the TRIPS Agreement. Saudi Arabia invoked the security exception under Article 73(b)(iii). This dispute was terminated on 21 April 2022 without the adoption of the panel report).

13. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

14. China, India, Canada, the EU, Mexico, Norway, Russia, Switzerland and Turkey commenced the DSR procedures, and the U.S. appealed to the Appellate Body certain issues of law and legal interpretations in the panel reports. See Panel Report, *United States – Certain Measures on Steel and Aluminium Products* (China), WTO Doc. WT/DS544/R (circulated Dec. 9, 2022) [hereinafter *U.S. – Steel and Aluminium Products*]; Panel Report, *U.S. – Steel and Aluminium Products* (Norway), WTO Doc. WT/DS552/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium Products* (Switzerland), WTO Doc. WT/DS556/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium Products* (Turkey), WTO Doc. WT/DS564/R (circulated Dec. 9, 2022); Panel Report, *U.S. – Steel and Aluminium products* (Canada), WTO Doc. WT/DS550/R (circulated July 11, 2019) (mutually agreed solution reached); Panel Report, *U.S. – Steel and Aluminium Products* (Mexico), WTO Doc. WT/DS551/R (circulated July 11, 2019) (mutually agreed solution reached); Panel Report, *U.S. – Steel and Aluminium Products* (India), WTO Doc. WT/DS547/R (circulated Aug. 8, 2023) (mutually agreed solution reached).

15. Jacob Gladysz, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT’L L. 835, 839-840 (2021).

would be exercised rarely, and would act wisely and in good faith in striking an appropriate balance between free trade and national security as a defense.¹⁶

If the approach is indeed “self-judging,” with each member state to decide the substantive meaning as to what is “essential security interests” and “necessary” for its protection, the security exception must be a non-justiciable equivalent to a “political question” in international trade law, bringing the possible risks of states’ abuse of the power,¹⁷ and causing the inefficacy of the global trading order.¹⁸

The non-justiciability approach was taken by the U.S., joining as a Third Party in the *Russia – Traffic in Transit* case, asserting, based on the language of the exception clause, that there is no agreement between the member states that their own judgment of “essential security interests” is subject to review.¹⁹ This argument may be classified as a weak form of non-justiciability on substantive grounds,²⁰ in contrast to the strong form of non-justiciability on procedural grounds, which claims that the DSB has no jurisdiction regarding national security and that the security exception is absolutely self-judging, empowering member States to avoid the WTO dispute settlement system.²¹

On the other hand, a justiciability approach is supported by some countries, including the EU, advocating that panels, the Appellate Body and the DSB, should be the “ultimate arbiter” of the interpretation and application of the GATT rules, including the security exception clause, while member states should have a wide range of discretion in its application.²² As opposed to the non-justiciability approach, the

16. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 702, 758 (2011).

17. *Id.* at 698.

18. Gladysz, *supra* note 15, at 841.

19. Third-Party Oral Statement of the United States of America, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, ¶ 18 (Jan. 25, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf> [https://perma.cc/7HUI-KD4A].

20. Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L L. 424, 426 (1999) (noting that if WTO jurisdiction is accepted, justiciability is denied when the panel must defer to the defendant state due to the latter’s exclusive interpretive authority on the merits; under the weaker version of non-justiciability, authority to decide would be divided between authority to interpret (for the DSB) and authority to define (allocated to each member state based on sovereignty)).

21. *Id.* at 439-40 (suggesting that this position is inconsistent with the WTO Agreement’s purpose and negotiation process).

22. Third Party Oral Statement by the European Union, *Russia – Measures Concerning Traffic in Transit*, DS512, ¶ 6 (Jan. 25, 2018), <https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/317dea35-4f30-46ab-8939-4d7e0d5fcfe8/details> [https://perma.cc/VWH4-Z6AY].

justiciability approach would not apply the *chapeau* of (b) of Article XXI to the provisions of (i), (ii) and (iii), which some commentators argue should be more valid, taking into account concepts such as “good faith” and the “object and purpose,” under Article 31 of the Vienna Convention on the Law of Treaties.²³

While it has been noted that both panels applied a common approach to the security exception, a split has been suggested regarding how these panels applied the formal approach to the actual cases.²⁴ As for the common approach of both panels, while the security exception was deemed justiciable, the panels substantially deferred to the state parties in relation to the invocation of essential security interests and the relationship between the invoked interests and the actual actions.²⁵ Due to the deferential attitude of the panels regarding the essential security interests and good faith requirements, the analysis of both panels regarding the relationship between means and ends is not clear—only “a minimum requirement of plausibility” is examined in the *Russia – Traffic in Transit* case,²⁶ and the same analytical framework was used in the *Saudi Arabia – IPRs* case, showing the implausibility of the relevant actions is assessed considering their necessity to protect the relevant essential security interests.²⁷

However, how the minimum requirement of plausibility is to be applied is open to debate, since it is not derived from the text of the GATT itself but expressed by the panel in the *Russia – Traffic in Transit* case. In fact, the extent to which the security exception is self-judging under the WTO agreements can be questioned.²⁸

Furthermore, in today’s digitalization era, international economic rules should be considered from the perspective of personal data rules, in particular, regarding cross-border transfer of personal data, since both are intertwined with each other. The consistency of the adequacy decision, which is the EU’s rule of international transfer of personal data under the GDPR, with the WTO framework can be doubted, especially in light of non-discrimination principles between WTO member states and international and domestic businesses. It can then be questioned whether less restrictive trade measures may be reasonably available to achieve the EU’s desired level of data protection, which is founded on the EU Charter

23. Gladysz, *supra* note 18, at 841-42.

24. *Id.* at 838.

25. *Id.* at 848-49.

26. *Russia – Traffic in Transit* case, *supra* note 11, at ¶ 7.138.

27. *Saudi Arabia – IPRs* case, *supra* note 12, at ¶ 7.242.

28. Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 45 (2019).

of Fundamental Rights²⁹ and the European Convention on Human Rights³⁰ (“ECHR”).³¹

*B. Restrictions on Data Protection Principles as
‘Derogation’ in the EU Court*

1. US Surveillance Law Examined in Schrems II

The Court of Justice of the European Union (“CJEU”), the judicial authority of the EU, examined the legality of the US surveillance law in *Schrems II* from the perspective of the EU’s standard. The main questions concerned whether the EU-US frameworks for personal data flow from the EU to the US, including the Standard Contractual Clauses (“SCCs”) and the “Privacy Shield,” complied with the EU’s standards, especially in light of government access. The CJEU examined whether the US legal framework ensures an equivalent level of personal data protection standard to that of the EU, including its surveillance system for the purpose of national security in the *Schrems* judgments. This is because the EU has a strict approach toward government access to personal data, in line with the EU case law, which is referred to as the “European Essential Guarantee” adopted by the European Data Protection Board (“EDPB”).³² The EDPB draws out the four fundamental factors as applicable legal requirements which could justify limitations on the data protection and privacy rights recognized by the EU Charter and the ECHR: clear, precise, and accessible rules for processing, necessary and proportionality tests, an independent oversight mechanism, and effective remedies available to individuals.³³ This standard was developed after the

29. Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202) 389 [hereinafter EU Charter].

30. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005.

31. Mira Burri, *Privacy and Data Protection*, in THE OXFORD HANDBOOK OF INT’L TRADE LAW 745, 756-757 (Daniel Bethlehem et al. eds., 2nd ed. 2022).

32. EDPB, *supra* note 7; see also Organization for Economic Co-operation and Development (OECD), *Declaration on Government Access to Personal Data Held by Private Sector Entities*, Dec. 14, 2022, OECD/LEGAL/0487 (launching the concept of “Legitimate Government Access on the Basis of Common Values”).

33. EDPB, *supra* note 7, at 8-15.

CJEU's *Schrems II* in 2020,³⁴ following *Schrems I* in 2015,³⁵ both of which found the European Commission's adequacy decisions regarding the US invalid. This required examination of the US domestic surveillance law, in particular, Section 702 of the Foreign Intelligence Surveillance Act ("FISA") Amendments Act of 2008³⁶ and the Executive Order 12333 ("EO 12333").³⁷

FISA authorizes government surveillance activity and is viewed as the most important statutory authorization in this regard.³⁸ Under Section 702, for national security, the US Attorney General and the Director of National Intelligence may jointly authorize the acquisition of foreign intelligence information, targeting persons "reasonably believed to be located outside the United States," with prior approval from the Foreign Intelligence Surveillance Court ("FISC"), albeit there is an exception to the prior approval requirement for national security.³⁹ With authorization, the Attorney General or the Director of National Intelligence may direct an electronic service communication service provider, which is providing service to the target of the acquisition, to provide the Government with all information necessary to accomplish the acquisition.⁴⁰

EO 12333 provides independent sources of authorization for foreign intelligence activities by the US Government: the "Intelligence

34. Case C-311/18, *Data Prot. Comm'r v. Facebook Ir. Ltd.*, ECLI:EU:C:2020:559, ¶¶ 50-68, 168-202 (July 16, 2020) [hereinafter *Schrems II*] (following remand from *Schrems I*, Schrems reformulated his complaint challenging SCC validity; Data Protection Commissioner referred the case to the Irish High Court, which sought CJEU preliminary ruling).

35. Case C-362/14, *Maximilian Schrems v. Data Prot. Comm'r*, ECLI:EU:C:2015:650, ¶¶ 26-36, 68-106 (Oct. 6, 2015) [hereinafter *Schrems I*] (noting that *Schrems I* invalidated the Privacy Shield Framework; Schrems's complaint to the Irish Data Protection Commissioner challenging EU-U.S. data transfers prompted the High Court in Ireland to refer the case to the EU Court and the CJEU preliminary ruling).

36. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2440-41, 2446-47 (2008) (codified as amended at 50 U.S.C. § 1881a); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

37. Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981) (as amended by Exec. Orders No. 13284 (2003), 13355 (2004) and 13470 (2008)) [hereinafter EO 12333].

38. *More Data, More Problems: Standing, Surveillance, and Technology Companies*, 131 HARV. L. REV. 1742, 1742-43 (2018) [hereinafter *More Data, More Problems*]; see also Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 125 (2015) (noting that "Section 702 is a product of history," reflecting the Bush Administration's post-9/11 response via executive order, later replaced by FISA framework).

39. 50 U.S.C. § 1881a (g)(1)(B) (2008).

40. See *id.* (h)(1)(A); See also 50 U.S.C. § 1881a (h)(4)(A) (2008) (an electronic communication service provider may file a petition with the FISC "to modify or set aside such directive" when it receives the directive); 50 U.S.C. § 1881a (h)(6)(A)-(B) (2008) (allowing government or electronic communication service providers to petition Foreign Intelligence Surveillance Court of Review, then Supreme Court, for FISC directive review).

Community,” where the Director of National Intelligence serves as head, subject to the President by EO 12333,⁴¹ and to the Attorney General and the Director of National Intelligence by Section 702 of FISA. While the overall operation of the Intelligence Community is set forth in the National Security Act, the scope of its roles and responsibilities is largely determined by EO 12333 and FISA, together with other directives.⁴² Unless FISA and its 2008 amendments apply to government surveillance, which is subject to judicial review in limited cases, EO 12333 affords the sole basis of authorization under the broad remit of the executive branch.⁴³ *Schrems II* judgment found that the US government’s access to data “in transit” to the United States was also allowed under the surveillance programs based on EO 12333 without being subject to any judicial review.⁴⁴

The purpose of EO 12333 is to “provide for the effective conduct of United States intelligence activities and the protection of constitutional rights,”⁴⁵ including “freedoms, civil liberties and privacy rights guaranteed by Federal law.”⁴⁶ The surveillance target of EO 12333 is foreign intelligence activities, but here, too, the requirement is to strike a balance “between the acquisition of essential information and protection of individual interests.”⁴⁷ Foreign intelligence, including “SIGINT,”⁴⁸ is controlled by statutory authorization under FISA and/or by EO 12333.⁴⁹ Based on these, the US surveillance programs such as “PRISM” and “UPSTREAM” were carried out in relation to individuals who are not US citizens, located outside of the United States, requiring selected US internet service providers and telecommunications companies to provide the National Security Agency (“NSA”) with communication information,

41. EO 12333, *supra* note 37, § 1.3 (requiring the Director of National Intelligence to serve as “principal advisor to the President, to the NSC (National Security Council), and to the Homeland Security Council for intelligence matters related to national security” and to implement and execute the National Intelligence Program budget).

42. Diana Lee et al., *Gathering Intelligence: Drifting Meaning and the Modern Surveillance Apparatus*, 10 J. NAT’L SECURITY L. & POL’Y 77, 85 (2019).

43. *Id.* at 78.

44. *Schrems II*, *supra* note 34, ¶ 183.

45. EO 12333, *supra* note 37, pmb1.

46. *Id.* § 1.1(b).

47. *Id.* § 2.2.

48. *Signals Intelligence (SIGINT) Overview*, NAT’L SEC. AGENCY, <https://www.nsa.gov/Signals-Intelligence/Overview/> [https://perma.cc/5JDX-224S] (referring to SIGINT as “intelligence derived from electronic signals and systems used by foreign targets”).

49. Lee et al., *supra* note 42, at 77-78.

which they stored.⁵⁰

2. EU's Proportionality Test to Justify the Derogation from Data Protection Principles

The "Privacy Shield" established the data protection principles, which may be limited "to the extent to necessary to meet national security, public interest, or law enforcement requirements."⁵¹ The CJEU found such limitations to be a "derogation" from the data protection principles, which enables interference with the fundamental rights of persons whose personal data "is or could be" moved to the US.⁵² The CJEU noted that the EU-US Privacy Shield Decision presupposed that the derogation's requirements have primacy over the principles, meaning that US companies joining the Privacy Shield Framework "are bound to disregard" the principles in certain cases.⁵³ The Court considered that such interference can arise when US intelligence organizations have access to or use the data under plans code-named "PRISM" or "UPSTREAM," based on Section 702 of FISA and EO 12333.⁵⁴

Under the EU standard, the interference with fundamental rights for data protection must be provided for by law and be subject to the principle of proportionality.⁵⁵ This requires that the interference be "limited to what is strictly necessary to achieve the legitimate objective in question," and that effective legal safeguards against such interference exist.⁵⁶ Ensuring "effective and enforceable data subject rights" for data subjects requires compliance with a legal basis for processing their personal data that provides specific purposes for processing and the scope of limitations. The Court found neither Section 702 of FISA nor EO 12333 sufficient to indicate any limitations on the US intelligence power for intelligence purposes, nor to confer enforceable rights against the US authorities.⁵⁷ Additionally, the Court found that the Presidential Policy

50. *Schrems II*, *supra* note 34, ¶¶ 60-62 (referring to Irish High Court judgment and noting that some NSA communication information is also shared with the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA)).

51. Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, 2016 O.J. (L 207) L207/49, ¶ (I)(5) [hereinafter Privacy Shield Decision].

52. *Schrems II*, *supra* note 34, ¶ 165.

53. *Id.* ¶ 164.

54. *Id.* ¶ 165.

55. EU Charter, *supra* note 29, art. 52(1).

56. *Schrems II*, *supra* note 34, ¶ 167.

57. *Id.* ¶¶ 179-80 (noting that the FISC authorizes PRISM and UPSTREAM programs via annual certification basis, not individual measures).

Directive 28 (“PPD-28”) was not enough to safeguard the rights of the EU citizens since the policy directive allowed for the “‘bulk’ collection” of information when “the Intelligence Community cannot use an identifier associated with a specific target . . .” and did not give them rights for accessing the courts.⁵⁸ Overall, the Court declared the interference by US surveillance activities under Section 702, EO 12333, and PPD-28 was not limited to “what is strictly necessary.”⁵⁹

As an independent oversight mechanism and source of effective administrative or judicial redress, the US introduced a Privacy Shield Ombudsperson, though the Court denied it as providing actionable rights and a judicial remedy.⁶⁰

C. EU’s Fundamental Rights Approach for Personal Data Protection and Its Influence on US Extraterritorial Power

1. Derogation as “Exceptions” to Limit the Scope of Rights and Obligations

The above conclusions would mean that the EU’s strict fundamental rights approach, supported by its judicial branch, may require the EU to intervene in US executive power in foreign affairs as long as the US surveillance law applies outside of US territory. In this sense, the EU Court may not accept that the US extraterritorial surveillance activity falls within the scope of self-judging for the US, even if it is for national security.⁶¹ Additionally, since “national security remains the sole responsibility of each Member State” in the EU,⁶² it can be questioned whether the CJEU gives the EU member states more discretion to limit fundamental rights for national security than the US or, more generally, non-EU countries.

The CJEU apparently was strictly restricting its member states’ latitude to construct an extensive data retention framework, while establishing new possibilities for them to implement surveillance of

58. *Id.* ¶¶ 181-83.

59. *Id.* ¶ 184.

60. *Id.* ¶¶ 186-97.

61. Privacy Shield Decision, *supra* note 51, Annex II, § 1.5 (establishing limitations for “national security, public interest, or law enforcement requirements”); *Schrems II*, *supra* note 34, ¶¶ 164-65 (recognizing these exceptions as a “derogation” from the principles, enabling interference with EU citizens’ fundamental rights for U.S. data transfers).

62. Consolidated Version of the Treaty on European Union art. 4(2), Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

telephony and internet use on a large scale.⁶³ The CJEU judgments confirmed that EU member states' measures authorizing requirements on providers of electronic communication services to transmit traffic and location data to intelligence agencies for national security purposes on a general and indiscriminate basis are precluded by the "e-Privacy Directive."⁶⁴ The EU member states may still establish measures imposing obligations to retain such data on the telecommunication providers on a general and indiscriminate basis for national security purposes under certain conditions.⁶⁵ Indeed, the CJEU judgments found that, under Article 15(1) of the e-Privacy Directive, the member states are required to comply with the general principles of EU law, including proportionality, and with the fundamental rights guaranteed in the EU Charter, when intending to legislate limitations on particular rights and duties of the Directive.⁶⁶ These include the confidentiality of communications provided for in Article 5 of the Directive.

In the *Privacy International* judgment, however, the CJEU stated that "the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives," such as combating crime, including serious crime, and safeguarding public security.⁶⁷ The CJEU noted that the responsibility of each member state for safeguarding national security under Article 4(2) of TEU is referred to as "the primary interest in protecting the essential functions of the State and the fundamental interests of society," which includes the "prevention and punishment of activities capable of seriously destabilizing the fundamental constitutional, political, economic or social structures of a country."⁶⁸

The derogation from the rights and obligations provided under the e-Privacy Directive "cannot permit the exception to the obligation of

63. Sarah Eskens, *The Ever-Growing Complexity of the Data Retention Discussion in the EU: An In-Depth Review of La Quadrature du Net and others and Privacy International*, 8 EUR. DATA PROT. L. REV. 143, 154 (2022).

64. Case C-623/17, *Priv. Int'l v. Sec'y of State for Foreign and Commonwealth Affs.*, ECLI:EU:C:2020:790, ¶¶ 50-82 (Oct. 6, 2020) [hereinafter *PI* judgment]; see also Directive 2002/58/EC, 2002 O.J. (L 201) 37 [hereinafter *e-Privacy Directive*].

65. Joined Cases C-511/18, C-512/18 & C-520/18, *La Quadrature du Net and Others v. Premier Ministre & Others*, ECLI:EU:C:2020:791, ¶¶ 137-39 (Oct. 6, 2020) [hereinafter *LQDN* judgment] (requiring time-limited data retention with strict safeguards and effective judicial review where genuine national security threats exist).

66. *PI* judgment, *supra* note 64, ¶ 60; *id.* ¶ 113.

67. *PI* judgment, *supra* note 64, ¶ 75; *LQDN* judgment, *supra* note 65, ¶ 136 (noting that Article 4(2) TEU national security objective prevails over Article 15(1) e-Privacy Directive objectives).

68. *PI* judgment, *supra* note 64, ¶ 74; *LQDN* judgment, *supra* note 65, ¶ 135.

principle to ensure . . . confidentiality . . . to become the rule.”⁶⁹ This means that the derogation must be kept as an “exception” to the principles of rights and obligations for states. This also would lead to the conclusion that intelligence activities for national security purposes are not necessarily excluded from judicial review. The scope of duties imposed on the member states by the e-Privacy Directive may be limited in light of each state’s national security being recognized as a primary interest that allows states to protect essential functions and fundamental interests, as well as the state’s economic structures, including fundamental economic structures.

Additionally, the *LQDN* judgment suggested new possibilities for its member states to carry out large-scale surveillance of telephony and internet use for a variety of purposes.⁷⁰ The court then found that the member states are allowed to make domestic rules on the retention of IP addresses and data relating to the identity of the telecommunication users who accessed the electronic communication service on a general and indiscriminatory basis for the purposes of combating crime and safeguarding public security.⁷¹ Also, transmission of traffic and location data by electronic communications service providers to intelligence for national security in a general and indiscriminate way is not allowed.⁷² Furthermore, the Court held that the national legislation authorizing the automated analysis of and real-time collection of traffic and location data retained by electronic communications service providers for national security purposes can be justified.⁷³ The justification for the interference with certain fundamental rights guaranteed in the EU Charter is reviewed in accordance with the principle of proportionality, using the standards developed in non-national security cases.⁷⁴

The *PI* and *LQDN* judgments leave open the question of how the EU measures influence mass surveillance for national security purposes,⁷⁵ while it has been argued that the US and the EU come into conflict over

69. *PI* judgment, *supra* note 64, ¶ 59.

70. Eskens, *supra* note 63, at 154.

71. *Id.* at 155; *LQDN* judgment, *supra* note 65, ¶¶ 152-59.

72. *Id.* at 154; *PI* judgment, *supra* note 64, ¶¶ 50-82.

73. Eskens, *supra* note 63, at 155; *LQDN* judgment, *supra* note 65, ¶¶ 172-89.

74. Eskens, *supra* note 63, at 146-47.

75. *Id.* at 155; *PI* judgment, *supra* note 64, ¶ 75 (stating that national security objectives justify more serious fundamental rights interferences than other objectives); *LQDN* judgment, *supra* note 65, ¶ 136 (noting that Article 4(2) TEU national security objective prevails over Article 15(1) e-Privacy Directive objectives).

the data privacy policies in this regard.⁷⁶ The EU could adopt a less restrictive approach to reviewing surveillance measures of EU member states than to those of third countries, including the US.

Such restrictions based on personal data protection can restrict the economic activities of certain businesses, including electronic communication service providers. The EU's arguably stricter approach to foreign countries for the protection of personal data can be compared with its economic approach of maintaining a broad discretion over the member states regarding essential security interests under the WTO agreements, because there is a correlation between the free flow of personal data and the liberalization of trade and investment.

2. The US Revision to Meet the EU Standard for Cross-Border Flow of Personal Data

After long bilateral negotiations, the former US President Joe Biden and the European Commission President Ursula von der Leyen announced the new mechanism for the transatlantic data flow, the EU-US Data Privacy Framework ("EU-US DPF"), in March 2022, which was finally adopted as adequate by the European Commission in July 2023.⁷⁷ This was expected to enhance the transatlantic commerce of both parties.⁷⁸ To implement the US commitments under the EU-US DPF, President Biden signed the EO on Enhancing Safeguards for United States Signals Intelligence Activities (EO 14,086) in October 2022.⁷⁹

The US regulatory framework for US government access to personal data of EU data subjects may prove significant for the EU's cross-border transfer standard, since both countries reached an agreement despite the

76. Kristina Irion, Margot E. Kaminski & Svetlana Yakovleva, *Privacy Peg, Trade Hole: Why We (Still) Shouldn't Put Data Privacy in Trade Law*, U. CHI. L. REV. ONLINE 1, 14 (Mar. 27, 2023), <https://lawreview.uchicago.edu/online-archive/privacy-peg-trade-hole-why-we-still-shouldnt-put-data-privacy-trade-law> [<https://perma.cc/7QA8-WL5E>].

77. Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework, 2023 O.J. (L 231) 118 [hereinafter 2023 U.S. Adequacy Decision].

78. E.g., *Fact Sheet: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework*, THE WHITE HOUSE (Oct. 7, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/> [<https://perma.cc/FW7N-K85L>]; European Commission Press Release IP/23/3721, Data Protection: European Commission Adopts New Adequacy Decision for Safe and Trusted EU-U.S. Data Flows (July 10, 2023).

79. Exec. Order No. 14,086, 87 Fed. Reg. 62283 (Oct. 7, 2022) [hereinafter EO 14,086].

US adopting no federal “comprehensive” data privacy legislation.⁸⁰ The new adequacy decision of the European Commission recognizes the EO 14,086 as replacing the PPD-28, which was thought of as providing insufficient safeguards in light of the requirement for an adequate level of protection in *Schrems II*, enhancing the limitations and safeguards which supplement those of Section 702 of FISA and EO 12,333, and establishing a new redress mechanism.⁸¹

This mechanism consists of two levels. At the first level, the Civil Liberties Protection Officer of the Office of the Director of National Intelligence (“ODNI CLPO”) investigates, reviews, and determines, *inter alia*, whether the specified violation occurred and the appropriate remediation.⁸² At the second level, the complainant or an element of the Intelligence Community may resort to review by the Data Protection Review Court (“DPRC”).⁸³ This was newly established as an independent tribunal based on EO 14,086 and the Regulation on the Data Protection Review Court issued by the Attorney General.⁸⁴ This mechanism is available to individuals from countries or regions designated as “qualifying states” by the Attorney General;⁸⁵ so far, the EU and EEA, the UK, and Switzerland have been designated as qualifying states.⁸⁶ The European Commission considers the admissibility requirements for the redress mechanism to be low since, for example, it is not necessary to demonstrate that “the complainant’s data has in fact been subject to the United States

80. *E.g.*, Family Educational Rights and Privacy Act of 1974 (FERPA), Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (codified as amended at 20 U.S.C. § 1232g); Children’s Online Privacy Protection Act of 1998 (COPPA), Pub. L. No. 105-277, § 231, 112 Stat. 2681-728 (codified as amended at 15 U.S.C. §§ 6501-6506); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936 (codified as amended in scattered sections of the 42 U.S.C.) (establishing sectoral federal privacy protections); Cal. Civ. Code §§ 1798.100-.199 (West 2023) (CCPA, amended by Cal. Privacy Rights Act of 2020); Colo. Rev. Stat. §§ 6-1-1301 to -1314 (2023) (CPA); Va. Code Ann. §§ 59.1-575 to -585 (2023) (Consumer Data Prot. Act) (establishing comprehensive consumer privacy legislation in California, Colorado, and Virginia).

81. 2023 U.S. Adequacy Decision, *supra* note 77, recitals 124-25; Data Prot. Review Ct., 28 C.F.R. pt. 201 (2023); Att’y Gen. Order No. 5517-2022, 87 Fed. Reg. 62,305 (Oct. 14, 2022) [hereinafter AG Regulation].

82. Data Prot. Review Ct., 87 Fed. Reg. 62,303-04 (Oct. 14, 2022) (Supplementary Information).

83. *Id.* at 62,304 (noting that the DPRC reviews ODNI CLPO determinations pursuant to AG authority under 28 U.S.C. §§ 510-12 and EO 14,086).

84. EO 14,086, *supra* note 79, § 3(d); AG Regulation, *supra* note 81.

85. EO 14,086, *supra* note 79, § 3(f); 2023 U.S. Adequacy Decision, *supra* note 77, recital 176.

86. *Executive Order 14086*, U.S. DEP’T OF JUST. OFF. OF PRIV. & C.L., <https://www.justice.gov/opcl/executive-order-14086> [<https://perma.cc/5KUD-QV4L>] (last updated June 11, 2024).

signals intelligence activities.”⁸⁷

When a DPRC panel finds an ODNI CLPO determination inconsistent with the standard mentioned in EO 14,086, the panel is to issue its own determination.⁸⁸ After a written decision of a DPRC panel is issued, the Office of Privacy and Civil Liberties of the Department of Justice (“OPCL”) has to submit it to the ODNI CLPO.⁸⁹ Each DPRC panel decision is “final and binding with respect to the application for review before it.”⁹⁰ Moreover, a DPRC panel is to provide a report on information indicating a violation of any authority subject to the oversight of the FISC to the Assistant Attorney General for National Security, who is required to report violations to the FISC.⁹¹ The European Commission expects this would lead to additional enforcement action.⁹²

The Privacy and Civil Liberties Oversight Board (“PCLOB”), an independent executive agency consisting of five members appointed by the President with the advice and consent of the Senate, is supposed to review the redress process under the mechanism annually.⁹³ On the other hand, OPCL is under an obligation to maintain records relating to the decisions of the DPRC panel, as well as related information, which are available to future DPRC panels for consideration as non-binding precedent.⁹⁴

In response to the *Schrems II* judgment, the US chose to issue the President’s order, EO 14,086, as supplemented by the AG Regulation, rather than enacting a new data privacy congressional law or amending existing surveillance laws. The President’s order aims to enhance the data protection framework applied to US commercial entities, especially by strengthening oversight and redress mechanisms for EU data subjects whose personal data are expected to be transferred to the US. However, these measures would not establish limitations on US surveillance activities based on US domestic law, including the US Constitution, Section 702 of the FISA, and EO 12,333. Whether the US satisfied the

87. 2023 U.S. Adequacy Decision, *supra* note 77, recital 178; EO 14,086, *supra* note 79, § 4(k)(ii).

88. AG Regulation, *supra* note 81, § 201.9 (e).

89. AG Regulation, *supra* note 81, § 201.9 (h); 2023 U.S. Adequacy Decision, *supra* note 77, recital 192.

90. AG Regulation, *supra* note 81, § 201.9 (g); 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

91. AG Regulation, *supra* note 81, § 201.9 (i); 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

92. 2023 U.S. Adequacy Decision, *supra* note 77, recital 191.

93. 42 U.S.C. § 2000ee(h)(1) (2022); EO 14,086 *supra* note 79, § 3(e).

94. AG Regulation, *supra* note 81, § 201.9 (j); 2023 U.S. Adequacy Decision, *supra* note 77, recital 192.

EU's essential guarantee requirement should be questioned, since it has been suggested that the US should provide such restrictions in Section 702 of FISA or EO 12,333 to meet the EU standard.⁹⁵

Nevertheless, the Commission adopted the adequacy decision to the US again, concluding that the US ensured an adequate level of protection for personal data. The Commission might refrain from intervening in the US surveillance policy to safeguard national security based on its own sovereignty; however, the legal validity of the adequacy decision can be questioned. Suppose the CJEU holds that it substantially requires the US executive authority to mitigate any interference with the fundamental rights to data privacy, which can be inconsistent with the US's own national security policy. Could such a judgment be justified by any international discipline, especially considering that both states do not share the same rules for data protection and flows? This question reflects the fundamental division between the EU and the US legal systems regarding the fundamental right to data protection and/or privacy, which could create obstacles for data flows and commerce between both jurisdictions. The next chapter will provide a brief background of the Fourth Amendment of the US Constitution, which covers the jurisprudence of the right to privacy.

II. TERRITORY AND NATIONALITY AS FUNDAMENTAL TO THE US GOVERNMENT OBLIGATIONS UNDER THE FOURTH AMENDMENT OF THE US CONSTITUTION

A. The Right to Privacy in the Context of Surveillance Under the Fourth Amendment

1. Reasonable Expectation of Privacy Test

While no comprehensive federal privacy law has been enacted, there is no doubt that the right to privacy has been recognized as significant in the US jurisprudence, but it is hard to define. It has been more difficult to define the constitutional right to privacy or its value under the US Constitution in today's era of digitalization. Indeed, it has been noted that US courts are unwilling to grant relief for a breach of data privacy, often due to insufficient evidence of direct or actual harm, leading to

95. EDPB, *supra* note 7, ¶ 36 (noting that legal basis permitting fundamental rights interference must define limitation scope to satisfy EU Charter art. 52 proportionality).

petitioners' lack of standing.⁹⁶

In *Whalen v. Roe*, the constitutional protection to privacy is referred to as at least two interests— “one is the individual interest in avoiding disclosure of personal matters” and the other “is the interest in independence in making certain kinds of important decisions.”⁹⁷ It has also been pointed out that the right “to be free in his private affairs from governmental surveillance and intrusion” is “directly protected by the Fourth Amendment.”⁹⁸

The Fourth Amendment provides the right of the people to be free from unreasonable searches and seizures and requires warrants based upon probable cause to be issued.⁹⁹ As for the protection of privacy under the Fourth Amendment, in *Katz v. United States*,¹⁰⁰ overruling *Olmstead v. United States*,¹⁰¹ the Court enunciated that the protection of the Fourth Amendment entails “individual privacy against certain kinds of governmental intrusion.”¹⁰² The Court makes clear that the Fourth Amendment protects not places, but people, and that it may protect what a person “seeks to preserve as private, even in an area accessible to the public.”¹⁰³ Indeed, the problem recognized by the Court is not whether the public telephone booth, to the outside of which FBI agents attached the electronic eavesdropping device, is a constitutionally protected area.¹⁰⁴ The scope of the Fourth Amendment does not depend on “the presence or absence of a physical intrusion into any given enclosure;”¹⁰⁵ rather the scope of the Fourth Amendment may cover “the recording of oral statements overheard without any technical trespass,” as well as that

96. Matthew Humerick, *The Tortoise and the Hare of International Data Privacy Law: Can the United States Catch up to Rising Global Standards?*, 27 CATH. U. J. L. & TECH. 77, 96-97 (2018).

97. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

98. *Id.* at 599 n.24 (referring to the three facets of the right to privacy by Professor Philip Kurland).

99. U.S. CONST. amend. IV.

100. *Katz v. United States*, 389 U.S. 347 (1967); cf. *Silverman v. United States*, 365 U.S. 505 (1961) (rejecting *Olmstead*'s “trespass doctrine” for Fourth Amendment violations while not overruling it).

101. *Olmstead v. United States*, 277 U.S. 438 (1928).

102. *Katz*, 389 U.S. at 350 (holding that Fourth Amendment protection exceeds property-based privacy interests, such that the Amendment “cannot be translated into a general constitutional ‘right to privacy’”); see also *id.* at 373 (Black, J., dissenting) (“The Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”). *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (“[T]he right to be let alone . . . [is] the most comprehensive of rights and the right most valued by civilized men.”).

103. *Katz*, 389 U.S. at 351-52.

104. *Id.* at 352 (mentioning the role of the public telephone for private communication).

105. *Id.* at 353.

of tangible property.¹⁰⁶ The Court found the government activity relating to the use of electronic devices to listen to and record the petitioner's words to violate "the privacy upon which he justifiably relied."¹⁰⁷

Justice Harlan mentioned a constitutionally protected reasonable expectation of privacy for an area which may be covered by the Fourth Amendment, since reference to a place is necessary to consider what protection is given to the people under the Amendment, though the Court just indicated "the Fourth Amendment protects people, not places."¹⁰⁸ Justice Harlan noticed a twofold requirement for the protection of the precedents; one relates to a person's actual (subjective) expectation of privacy, and the other is that the expectation should be recognized as "reasonable" in society.¹⁰⁹

As *Kyllo v. United States* found the act of law enforcement utilizing a thermal imaging device to detect indoor marijuana growth violated the Fourth Amendment,¹¹⁰ it is expected that the privacy right under the Fourth Amendment can be changed according to citizens' reasonable expectation of privacy, as the public generally accepts new technological innovations.¹¹¹ While the Supreme Court noticed that "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes,"¹¹² it held that it was nevertheless important to maintain "the degree of privacy against government that existed when the Fourth Amendment was adopted."¹¹³

2. Critics of the Reasonable Expectation of Privacy Test in the Digital Era

The reasonable expectation of privacy test has been mentioned so often in the Supreme Court, but has been criticized as obsolete in the digital information age. Critics go further, arguing that the test is not

106. *Id.* (dismissing the "trespass doctrine" of *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942) (upholding the detectaphone use)).

107. *Id.*

108. *Id.* at 360-61 (Harlan J., concurring).

109. *Id.* at 361 (Harlan, J., concurring).

110. 533 U.S. 27 (2001).

111. April Nichols, *Constitutional Law: Fourth Amendment Search and Citizens' Right to Privacy: the Use of Thermal Imaging to Measure Heat Emanating from a Home is a Fourth Amendment Search*, 32 CUMB. L. REV. 675, 684-85 (2002); see also *United States v. Jones*, 565 U.S. 400 (2012) (holding that attaching a GPS tracker to a vehicle constitutes a Fourth Amendment search); *Riley v. California*, 573 U.S. 373 (2014) (holding that cell phone data searches incident to arrest generally require a warrant); *Carpenter v. United States*, 585 U.S. 296 (2018) (holding that warrantless government acquisition of CSLI from wireless carriers violates the Fourth Amendment).

112. *Carpenter*, 585 U.S. at 305.

113. *Kyllo*, 533 U.S. at 34.

appropriate as a “legal rule,”¹¹⁴ in particular, in light of its “subjective expectation of privacy.”¹¹⁵ Under the test, the Court must apply an objective test in asking what makes an expectation of privacy reasonable.¹¹⁶

It has been argued that a majority of the United States Supreme Court consistently answers this question based on a “rights-based approach”—where a “reasonable” or “legitimate” expectation of privacy is considered depending on “whether a given individual has an enforceable right to enjoin others from invading her privacy.”¹¹⁷ After all, the Supreme Court will focus on “whether the individual can take reasonably effective, societally acceptable steps to enjoin the government’s invasion of privacy.”¹¹⁸ In this view, the rights-based conception of the Fourth Amendment might not be able to adequately protect privacy rights in cyberspace since the jurisprudence has been established in the physical world, not on the internet.¹¹⁹

On the other hand, the Supreme Court has also assessed reasonableness under the Fourth Amendment based on widely shared social expectations such as customary social understandings in *Georgia v. Randolph*, where the validity of a seizure was challenged when one occupant of the property in common authority gave consent, but the other occupant was physically present at the scene and expressed their objection.¹²⁰

However, it has been pointed out that the Court’s widely shared social expectation approach includes a critical flaw.¹²¹ In principle, the Fourth Amendment prohibits the warrantless entry of a person’s house as unreasonable *per se*, subject to exceptions which would allow the entry to be valid. Voluntary consent is an exception when obtained, either from

114. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (1979) (criticizing the “circularity” of the reasonable expectation of privacy test).

115. Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a “Reasonable Expectation of Privacy?”*, 33 CONN. L. REV. 503, 507 (2001).

116. *Id.*

117. *Id.* at 507-08 (noting that statistical conception of Fourth Amendment holds privacy expectation “reasonable” if statistically justified).

118. *Id.* at 511 (noting that rights-based Fourth Amendment conception protects privacy even absent statistical expectation of secrecy).

119. *Id.* at 532 (arguing the role of Congress and state legislatures is significant to make rules to “restore” the privacy protections); *contra* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 747-48, 776-77 (2005) (rejecting Kerr’s view that legislatures, not courts, should regulate criminal procedure technology).

120. *Georgia v. Randolph*, 547 U.S. 103, 106, 110-11, 121 (2006).

121. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 108 (2008).

the individual whose property is searched or from a co-occupant who has joint authority over the common area.¹²² The criticism of this approach overlooks the caller's identity when considering what any sensible person would do under the circumstances.¹²³ Without identifying the caller, it would be impossible to know "what the customary social expectations of behavior will be."¹²⁴ Then, courts might have to consider what people would reasonably expect a policeman to do under these circumstances.¹²⁵ But courts cannot ask this.¹²⁶ In order to avoid self-validation, the conduct of policemen will be measured in line with "the behavior of well-socialized or sensible non-law-enforcement callers," which would result in circularity or self-validation.¹²⁷

The "Stranger Principle" is a second defense for assessing reasonable expectations of privacy, which considers how much information people have exposed to or kept private from strangers, and uses that to "determine what policemen may and may not do."¹²⁸ This principle can be supported by case law—the implication is that the government may acquire individuals' information if they have spontaneously disclosed it to a third party.¹²⁹ In case law, when individuals voluntarily expose or share information with strangers, there is no justifiable expectation of privacy, or it is no longer considered private.¹³⁰ However, it has been argued that the "Stringer Principle" would "spell the end of the Fourth Amendment."¹³¹ The question of whether the government action can be analogous to that of private businesses should be carefully considered under the Fourth Amendment, where protection from unreasonable searches and seizures "by the government" is a bedrock point.

Overall, the reasonable expectation of privacy test is "doomed" since the Supreme Court has failed to provide empirical evidence to support what the Court considers reasonable social expectations of privacy.¹³² Systematic government surveillance cannot be solved with "endless attempts to find the core meaning of the Fourth Amendment or to identify a singular type of problem to trigger its protections." The pragmatic

122. *Randolph*, 547 U.S. at 109 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) and *United States v. Matlock*, 415 U. S. 164, 170 (1974)).

123. *Rubinfeld*, *supra* note 121, at 108.

124. *Id.* at 108.

125. *Id.*

126. *Id.* at 108-09

127. *Id.*

128. *Id.* at 110-12.

129. *Id.* at 110-13.

130. *Id.* at 110-12.

131. *Id.* at 113.

132. Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B. C. L. REV. 1511, 1521 (2010).

approach to the Fourth Amendment should deal with the complicated reality of the issues, rather than the traditional approach of using the reasonable expectation of privacy standard.¹³³ The pragmatic approach will cover government information gathering comprehensively rather than haphazardly and focus on how to best regulate it.¹³⁴

3. *The Court's Response to Digitalization*

The development of technology has made private spheres public. However, in the United States Supreme Court's view, the public sphere does not lose Fourth Amendment protection because individuals have a reasonable expectation of privacy in their physical movements.¹³⁵ In *Carpenter v. United States*, the Court held that cellphone location information, as well as GPS information, can include a "person's life" such as "familial, political, professional, religious, and sexual associations," in addition to particular movements.¹³⁶

It is noteworthy that, compared with certain precedents,¹³⁷ *Carpenter* did not endorse the third-party doctrine in relation to government access to the cellphone location records, even though it acknowledged that individuals continuously reveal the location to the wireless carrier.¹³⁸ The Court stated that invoking the third-party doctrine in this case would fail to consider the seismic shifts in digital technology, because police could access cell-site records held by the wireless carrier in a wider scope of information than the targeted individual and without time limits.¹³⁹ The Supreme Court proposes that individuals could have a reasonable expectation of privacy in relation to data or information held by a third party, but that the critical factor is the sharing of the data with the third

133. *Id.* at 1527.

134. *Id.* at 1528.

135. *Carpenter v. United States*, 585 U.S. 296, 310 (2018) (citing *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito J., concurring)).

136. *Id.* at 311 (citing *Jones*, 565 U.S. at 415, (Sotomayor, J., concurring)).

137. *See* *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that the Fourth Amendment does not prohibit the government from obtaining third-party information); *Smith v. Maryland*, 442 U.S. 735, 743-46 (1979); *If These Walls Could Talk: The Smart Home and the Fourth Amendment Limits of the Third Party Doctrine*, 130 HARV. L. REV. 1924, 1925-29 (2017) (arguing that the third-party doctrine from *Miller* and *Smith* inadequately protects smart home privacy, predating *Carpenter*); Harvey Gee, *Last Call for the Third-Party Doctrine in the Digital Age after Carpenter?*, 26 B.U. J. SCI. TECH. L. 286, 288-89 (2020) (claiming *Carpenter* "[departed] from a long tradition of deference paid to the [third-party] doctrine").

138. *Carpenter*, 585 U.S. at 308-09.

139. *Id.* at 313.

party for the benefit of the user.¹⁴⁰ In conclusion, the reasonable expectation of privacy test is still supported in a digital age to strike the right balance between individual privacy rights and legitimate law enforcement needs, depending on the context.¹⁴¹

At the same time, the “necessary and proportionate principles” based on international human rights law may be considered in striking the right balance. These principles may be more useful in the context of surveillance, rather than in the context of the reasonable expectation of privacy test and the third-party doctrine.¹⁴² As the European Commission admitted, Section 2(a) of the EO 14,086 requires the “overarching necessity and proportionality standards” to achieve a proper balance between privacy and public interests, including national security.¹⁴³

4. *Property-Based Concept of the Fourth Amendment Revisited*

That *Katz* chose the reasonable expectation of privacy test to define the scope of “unreasonable search and seizures” under the Fourth Amendment could represent a departure from a textual, “property-based” concept of the Amendment.¹⁴⁴ While the majority opinion of *Carpenter* upheld the privacy framework established in *Katz*, Justice Gorsuch denounced the *Katz* approach based on “some abstract expectation of privacy” and focused instead on the significance of the text and original understanding of the Fourth Amendment.¹⁴⁵ Justice Thomas also criticized the reasonable expectation privacy test due to the lack of the basis of the text or history of the Fourth Amendment and supported a property-based approach.¹⁴⁶ Additionally, in his dissenting opinion, Justice Kennedy supported a property-based concept of the Fourth Amendment, asserting the legitimacy of the third-party doctrine endorsed in *Miller* and *Smith* which would limit privacy interests protected by the

140. Jay E. Town, *The Digital Person: Law Enforcement & the Purchase of Data in a Post Carpenter Age*, 11 BELMONT L. REV. 1, 17-18 (2023).

141. Zachary Silver, *Katz in the Cradle: The Second Justice Harlan and Reasonable Expectations of Privacy in Electronic Transactional Information*, 41 CARDOZO L. REV. 761, 808-09 (2019).

142. Cindy Cohn, *Protecting the Fourth Amendment in the Information Age: A Response to Robert Litt*, 126 YALE L.J.F. 107, 108-16 (2016) (the “necessary and proportionality principles” are referred to as “the International Principles on the Application of Human Rights so Communications Surveillance”).

143. *E.g.*, 2023 U.S. Adequacy Decision, *supra* note 77, recital 137.

144. Sam Kamin, *Katz and Dobbs: Imagining the Fourth Amendment Without a Right to Privacy*, 101 TEX. L. REV. 80, 81 (2022).

145. *Carpenter v. United States*, 585 U.S. 296, 391 (2018) (Gorsuch, J., dissenting).

146. *Id.* at 342-43 (Thomas, J., dissenting) (stating that “[t]his case should not turn on ‘whether’ a search occurred” but “on whose property was searched”).

Fourth Amendment.¹⁴⁷

These dissenting opinions in *Carpenter* may draw attention since the Supreme Court rejected the concept of a constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*,¹⁴⁸ which had been recognized as including a constitutional right to "privacy" under the Due Process Clause of the Fourteenth Amendment.¹⁴⁹ In particular, Justice Thomas criticized the substantive due process jurisprudence, stating that "the Due Process Clause does not secure *any* substantive rights; it does not secure a right to abortion."¹⁵⁰ While Justice Thomas suggested that the Supreme Court should follow the "text of the Constitution" in delineating certain substantive rights under the Fourteenth Amendment,¹⁵¹ the text-based privacy jurisprudence in *Dobbs* may lead to the return to the property-based view of the Fourth Amendment, rather than the reasonable expectation of privacy test.¹⁵²

Justice Gorsuch's criticism of the reasonable expectation of privacy test in *Carpenter* covered the third-party doctrine since he claimed that the Court has failed to offer a persuasive justification.¹⁵³ According to Justice Gorsuch, the justification of a third-party doctrine referred to an "assumption of risk doctrine," which premises that one would assume the risk of the information being revealed to the police by providing it to a third party. However, the doctrine originates in tort law.¹⁵⁴ Justice Gorsuch explained that the key to the doctrine should be an explicit or implicit agreement for the acceptance of risk, rather than the assumption of the risk itself.¹⁵⁵ The clarity of a third-party doctrine can also be doubted since the scope of the protection for one's information is not certain.¹⁵⁶ After all, Justice Gorsuch stated that the precedents added "[a] doubtful application of *Katz* that lets the government search almost

147. *Id.* at 322-23 (Kennedy, J., dissenting) (claiming the Court should apply a property-based Fourth Amendment and the government may obtain business records per precedent).

148. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

149. *Roe v. Wade*, 410 U.S. 113, 152 (1973), *reaffirmed by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845-46 (1992) ("essential holding of *Roe v. Wade* should be retained" and constitutional protection for abortion "derives from the Due Process Clause of the Fourteenth Amendment"); *Dobbs*, 597 U.S. at 302 (overruling *Roe* and *Casey*); *see also* *Roe*, 410 U.S. at 115 ("[t]his right of privacy . . . [is the] woman's decision"); *Casey*, 505 U.S. at 874 (applying undue burden test).

150. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

151. *Id.* at 336 (Thomas, J., concurring).

152. Kamin, *supra* note 144, at 81.

153. *Carpenter v. United States*, 585 U.S. 296, 389 (2018) (Gorsuch, J., dissenting).

154. *Id.* (referring to a third-party doctrine mentioned in *Smith*, at 743-44).

155. *Id.*

156. *Id.* at 390.

whatever it wants whenever it wants.”¹⁵⁷ Justice Gorsuch examined the possibility of revisiting the holdings of such precedents under the *Katz* framework.¹⁵⁸ He offered a possibility to use the “traditional approach” for the interpretation of the Fourth Amendment.¹⁵⁹

Although Justice Gorsuch supported a textualist and originalist approach for constitutional interpretation, he sometimes accepted the judges’ capability to discern and describe existing social norms, which is particularly likely to be feasible when a judge is depending on positive law rather than intuition in identifying such norms.¹⁶⁰ Justice Gorsuch suggested that the traditional approach, which he preferred, might follow from applying *Katz* in this manner.¹⁶¹ What was needed to trigger the Fourth Amendment under the traditional approach was asking only “if a house, paper or effect was *yours* under law.”¹⁶² This approach includes ambiguities such as the sources of law possibly determining the scope of the Fourth Amendment, for example, “whether someone has a sufficient property interest to invoke Fourth Amendment protection.”¹⁶³

However, these ambiguities may make Justice Gorsuch’s approach broad and flexible.¹⁶⁴ While in *Carpenter*, Justice Thomas’s property-based approach required the defendant to prove that information accessed by the police must be his to invoke the Fourth Amendment, rather than depending on positive law,¹⁶⁵ Justice Gorsuch would refer to positive law in discerning “existing societal norms.”¹⁶⁶ Positive law would help to determine constitutionally relevant property rights under the approach suggested by Justice Gorsuch.¹⁶⁷ It has been argued that Justice Gorsuch’s mixed approach of traditional norms and positive law may expand the concept of property under the Fourth Amendment.¹⁶⁸ Although judges would be given similar levels of flexibility and discretion either by the broad property or a conventional privacy approach, which would raise a concern about democratic legitimacy, it is noteworthy that the Gorsuch model may appropriately deal with emerging threats to the people’s right

157. *Id.* at 391.

158. Nicholas A. Kahn-Fogel, *Property, Privacy, and Justice Gorsuch’s Expansive Fourth Amendment Originalism*, 43 HARV. J.L. & PUB. POL’Y 425, 431 (2020).

159. *Id.* at 437.

160. *Id.* at 434.

161. *Id.*

162. *Carpenter*, 585 U.S. at 397-98 (Gorsuch, J., dissenting).

163. Kahn-Fogel, *supra* note 158, at 438.

164. *Id.*

165. *Id.* at 455.

166. *Id.*

167. *See id.* at 472.

168. *See id.* at 475.

to be secure in their persons, houses, papers, and effects.¹⁶⁹

Furthermore, Justice Kennedy argued that the principles in *Miller* and *Smith* are correct in light of the defendant's property interest and the safeguards against the compulsory process to obtain the business records held by the cell phone service providers.¹⁷⁰ According to Justice Kennedy, the concept of reasonable expectation of privacy used in *Katz* aimed to evaluate "whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it," which he claimed has been developed in property and tort law.¹⁷¹ He firmly maintained that privacy interests protected by the Amendment should be determined based on "property concepts," pointing out that *Katz* did not abandon reliance on these concepts.¹⁷² He argued that the significance of these precedents lies in limiting the *Katz* framework.¹⁷³

Justice Kennedy further explained the fundamental factor of the 'text' of the Fourth Amendment to determine the scope of the protection under the Amendment—protections must be limited to "persons, houses, papers, and effects".¹⁷⁴ Under the reasonable expectation of privacy test, individuals may have a greater expectation of privacy "in things and places that belong to them, not to others" under the settled expectations from property law.¹⁷⁵ Justice Kennedy claimed that traditional practices and positive law are significant factors in determining what the social norms should be under the *Katz* test.¹⁷⁶

While Kennedy's opinion is in line with precedents, it fails to sufficiently consider the value of privacy in striking a proper balance against security.¹⁷⁷ In particular, his main points of analysis in relation to the third-party doctrine would lead to an underestimation of customer knowledge—simply assuming it is reasonable that cell phone owners expect their information held in the phone company will be used for "a variety of business and commercial purposes."¹⁷⁸ Justice Kennedy's

169. *Id.* at 476.

170. *Carpenter*, 585 U.S., at 327 (Kennedy, J., dissenting).

171. *Id.* at 328.

172. *Id.*

173. *Id.* at 329.

174. *Id.* at 328.

175. *Id.*

176. *Id.* at 331-33 (noting that the *Carpenter* defendant did not challenge subpoenas (affording objection opportunity) and 47 U.S.C. § 222 provides no meaningful customer interest in cell-site records).

177. Tonja Jacobi & Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contact Tracing, and Mass Surveillance*, 97 NOTRE DAME L. REV. 823, 863 (2022).

178. *Id.* at 863-64 (citing *Carpenter*, 585 U.S. at 332 (Kennedy, J., dissenting)).

property-based approach does not acknowledge the difference between government intervention and private companies' intervention in privacy interests, especially the protection of personal and sensitive information against government access. If the Fourth Amendment protects the right to privacy, the difference should not be overlooked.

The possible impact of *Dobbs* on the jurisprudence of privacy can be significant. It has been claimed that it generally provided a critique of unenumerated rights, including privacy under the Fourth Amendment.¹⁷⁹ However, the criticisms in abortion cases on the substantive due process theory developed under the Fourteenth Amendment should not be conflated with the jurisprudence under the Fourth Amendment. Rather, it has been argued that rights under the Fourth Amendment included a broad definition of property, as supported by John Locke, and that this theory was incorporated into the text and history of the Fourth Amendment in the eighteenth century. This theory provided a fundamental framework for the Supreme Court before *Olmstead v. United States* in the early twentieth century.¹⁸⁰ Considering the history of the Bill of Rights generally and the Supreme Court's Fourth Amendment jurisprudence, it has been suggested that viewing the Amendment as essentially a property-based protection can be "untenable."¹⁸¹

B. Domestic Law Intertwined with Foreign Relations

1. Foreign Property and the Fourth Amendment

It was not clear until 1990 whether and to what extent the Fourth Amendment governed "searches" conducted outside of the US territory.¹⁸² The Supreme Court "reject[ed] the idea that when the [US] acts against citizens abroad it can do so free of the Bill of Rights," because the power and authority of the US stem solely from the Constitution.¹⁸³ However, the Court rejected the extraterritorial applicability of rights of the Fifth or Sixth Amendments.¹⁸⁴ In *United States v. Verdugo-Urquidez*,

179. Kamin, *supra* note 144, at 100-01.

180. Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 37 (2018).

181. Kif Augustine Adams, *Foreigners, Foreign Property, and the Fourth Amendment: United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 13(3) HARV. J.L. & PUB. POL'Y 1037, 1046 (1990).

182. *Id.* at 1037.

183. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

184. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 304-05, 309 (1922) (Sixth Amendment jury trial inapplicable to territories including Puerto Rico based on locality); *Dorr v. United States*,

the Court rejected the applicability of the Fourth Amendment to the search and seizure of the property of nonresident aliens on foreign territory, which US agents conducted.¹⁸⁵

The majority found the textual reference to “the people” in the Fourth Amendment to be “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁸⁶ Based on the available historical data and the contemporary understanding of the Framers, the Court rejected the notion that the Fourth Amendment applied to the activities conducted by the Federal government against aliens outside of the US territory or in international waters.¹⁸⁷ To fall within the scope of the Fourth Amendment, the majority opinion indicated two factors: presence within American territory and a significant connection to the American people, as defined above.¹⁸⁸

In his concurring opinion, Justice Kennedy mentioned the plurality opinion in *Reid v. Covert* as a reminder that “the Government may act only as the Constitution authorizes, whether their actions in question are foreign or domestic.”¹⁸⁹ He further stated that the full protection of the Fourth Amendment would apply if the search were conducted within the territory of the US.¹⁹⁰ But “the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien” since the warrant requirement by the Fourth Amendment should not be impracticable or anomalous.¹⁹¹ When US agents operate outside of US territory, they need to cooperate with the officials of other sovereign states; there is no judicial organization to issue warrants, and there have been different concepts regarding privacy and reasonableness, which all may hinder the Fourth Amendment’s

195 U.S. 138 (1904) (considering whether congressional statute required jury trial as necessary judicial procedure in the Philippines, the Court found the “Constitution does not . . . carry [jury trial] right to territory so situated”); *see also* *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury inapplicable to Philippines absent congressional act); *Hawaii v. Mankichi*, 190 U.S. 197, 214 (1903) (addressing whether a congressional act relating to Fifth/Sixth Amendments should instantly change Hawaiian Islands practice, the Court held that the congressional act not intended to instantly change Hawaiian Islands practice).

185. *Adams*, *supra* note 181, at 1037-38.

186. *Verdugo-Urquidez*, 494 U.S. at 265.

187. *Id.* at 266-67.

188. *Adams*, *supra* note 181, at 1042 (pointing out that the need for a significant connection to the American people “makes the application of Fourth Amendment protections to other aliens extremely fortuitous.”).

189. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

190. *Id.* at 278.

191. *Id.*

warrant requirement application.¹⁹²

As the majority in *Verdugo-Urquidez* mentioned, whether and to what extent the Fourth Amendment might apply depends on the presence within the US territory and a significant connection between the surveillance and the American people. For an authorization based on Section 702 of FISA and EO 12,333, whether the surveillance targets are US citizens or non-US persons and whether the surveillance activities are carried out within or outside of the US territory are significant. This is because the executive branch and Congress must act consistently with constitutional law, especially the Fourth Amendment.

2. Justiciability and Constitutionality of Section 702 of FISA

The US has recently adopted a protectionist approach toward cross-border data flows.¹⁹³ It reached a consensus with the European Commission regarding the international transfer mechanism for personal data, the EU-US Privacy Shield, whose legal validity was derived from the EU's adequacy decision. This can be considered a regime shift for the US since it had avoided establishing its own mechanisms of cross-border transfer of personal data for generations.¹⁹⁴ For example, it has been mentioned that the US-Japan Digital Trade Agreement "clearly attempts to strike a balance between 'free flow' and 'trust' in a variety of fields" based on the notion of Data Free Flow with Trust ("DFFT"),¹⁹⁵ which was launched to facilitate the free flow of data and enhance the opportunities in the digital economy while considering privacy rights.¹⁹⁶ Although this agreement reveals the United States's "newest innovations" regarding electronic commerce and the free flow of data, it has also been suggested that the US and Japan can still take a range of "necessary" measures, including cybersecurity measures, which fall within the broad scope of the national security exception.¹⁹⁷ Indeed, it has been pointed out that the US adopts fundamentally different policies from

192. Adams, *supra* note 181, at 1046.

193. Irion, Kaminski & Yakovleva, *supra* note 76, at 15.

194. *Id.* at 2.

195. David G. Litt & A. Reid Monroe-Sheridan, *The US-Japan Digital Trade Agreement and "Data Free Flow with Trust": Can the US Lead without a Uniform Data Privacy Law?*, U.S.-ASIA L. INST. (Feb. 3, 2022), <https://usali.org/usali-perspectives-blog/the-us-japan-digital-trade-agreement-and-data-free-flow-with-trust> [<https://perma.cc/S966-W5HZ>].

196. G20 2019 Japan, *G20 Osaka Leaders' Declaration*, (June 28–29, 2019), https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/documents/final_g20_osaka_leaders_declaration.html [<https://perma.cc/A7ZT-HQJM>] (last visited Aug. 29, 2025).

197. J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT'L L. 223, 238–39 (2020).

the EU regarding how to balance the free flow of information and personal data protection, particularly for safeguarding national security.¹⁹⁸

Any action of the executive branch should be subject to constitutional limits. However, under US case law, the constitutionality of executive extraterritorial activities based on the US surveillance law may be considered non-justiciable.¹⁹⁹

In *Clapper v. Amnesty Int'l. USA*, the US Supreme Court declined to grant Amnesty International standing under Article III in their challenge to the constitutionality of Section 702 of FISA and further rejected Amnesty's request for an injunction to stop the government's overseas surveillance.²⁰⁰ The Supreme Court seemed to think restrictions on government activities should be imposed by the political branches "through diplomatic understanding, treaty, or legislation" in the extraterritorial spheres,²⁰¹ since "modern nation-states must be able to function effectively outside their own borders."²⁰²

One can see a difference in approach between the CJEU and the US Supreme Court regarding how broad the constitutionality of US law is justifiably reviewed. This raises the question of whether EU and US organizations legally exercise their powers; in particular, it asks how the intervention of the EU judicial branch can be legally assessed, especially in the context of political decisions for national security. The CJEU found the Privacy Shield, the adequacy decision of the EU's executive branch, invalid in *Schrems II*, but the declaration was based on a review of foreign (US) surveillance law and on its inconsistency with the EU's data protection standard, which was considered left to the political branches in the US Supreme Court's jurisprudence. Ultimately, President Biden agreed with the EU-US DPF; however, it remains unclear whether the US Supreme Court considers foreign intelligence surveillance for the national security purpose as an "exception" to the reasonable expectation of privacy test under the Fourth Amendment.²⁰³

198. Irion, Kaminski & Yakovleva, *supra* note 76, at 2.

199. In re Directives to Yahoo! Inc., Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01, 2008 WL 10632524, at *2, *4 (FISA Ct. Rev. 2008) (accepting the statutory standing of Yahoo on behalf of customers for challenging the constitutionality of the directives based on the Fourth Amendment, where the U.S. government commanded Yahoo to assist with warrantless surveillance of certain customers).

200. *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398 (2013).

201. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

202. Adams, *supra* note 181, at 1044.

203. Noah C. Chauvin, *The Warrant Exception That Isn't: FISA Section 702, "Defensive" Searches, and the Fourth Amendment*, 74 AM. U. L. REV. 563, 605 (2025) (noting the Supreme

The bedrock of Fourth Amendment jurisprudence is considered to be that “warrantless searches and seizures are *per se* unreasonable unless an established exception applies.”²⁰⁴ The US Supreme Court mentioned that such exceptions have been “jealously and carefully drawn.”²⁰⁵ The question is then whether foreign intelligence surveillance falls within the scope of such an exception. As opposed to foreign intelligence surveillance under EO 12333, which is not subject to judicial review, foreign intelligence surveillance under Section 702 of FISA has been reviewed by “regular” judicial branches since 2013, when the Department of Justice changed its notification policies for criminal defendants.²⁰⁶ Before that time, only the FISA Court reviewed such surveillance since the government avoided its statutory duty to notify criminal defendants of the use of evidence obtained or derived from surveillance under Section 702.²⁰⁷

Among recent judgments of circuit courts, it has been pointed out that none of these decisions depend on the nationality or location of the other party to the communication when considering a US citizen’s expectation of privacy in its communications.²⁰⁸ The Second, Ninth, and Tenth Circuits held that the Constitution requires there a balance between national security and individual privacy, lending more weight to the importance of the government’s interests, after considering the totality of the circumstances.²⁰⁹

The courts acknowledged that an individual’s privacy interest in already-received emails will be “diminished,” rather than extinguished, when he/she sends a message under the reasonableness test.²¹⁰ This rationale can be considered similar to the third-party doctrine,²¹¹ though the receiver is not regarded as a “third-party.” It has been suggested that the third-party doctrine can be criticized for failing to understand the concept of privacy, because it equates disclosure to one with disclosure

Court has never clarified a foreign intelligence exception to the Fourth Amendment; judiciary no longer needs to address post-FISA (1978); however, the FISA constitutional basis should still be questioned).

204. Elizabeth Goitein, *Another Bite out of Katz: Foreign Intelligence Surveillance and the “Incidental Overhear” Doctrine*, 55 AM. CRIM. L. REV. 105, 120 (2018).

205. *Jones v. United States*, 357 U.S. 493, 499 (1958).

206. Goitein, *supra* note 204, at 108-10.

207. *Id.* at 109-110.

208. *Id.* at 116.

209. *United States v. Hasbajrami*, 945 F.3d 641, 645, 667 (2nd Cir. 2019); *United States v. Mohamud*, 843 F.3d 420, 441-442 (9th Cir. 2016); *United States v. Muhtorov*, 20 F.4th 558, 603-04 (10th Cir. 2021).

210. Goitein, *supra* note 204, at 116-17, 125.

211. *Id.* at 117.

to all or to the public.²¹² Justice Marshall condemned the third-party doctrine in the context of the third-party consensual surveillance cases, stating that “[i]t is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.”²¹³ While there has been an attempt to justify third-party cases by understanding these as consent cases,²¹⁴ Justice Gorsuch’s analysis held that the consent theory was just “re-labeled” by the assumption of risk idea.²¹⁵

Carpenter “modernized” the reasonable expectation of privacy test in line with digitalization, rejecting the application of third-party doctrine precedents. The rejection of the third-party doctrine would mean that the concept of privacy may be understood as an individual’s interest in their personal information, even after it is disclosed to others, including the public.

The modern digital era has seen numerous states establish their own domestic data protection laws and regulations, as well as their own regulatory frameworks. However, digitalization also requires an international discipline, as data flows easily across national borders. The lack of such domestic legislation would pose risks to the improper processing of citizens’ personal data. A state may be required to introduce a measure to ensure that its citizens’ personal data is appropriately processed, regardless of its location and movement, within or outside the state’s territory, in light of its domestic legislation. The regulatory power of a state must be extended beyond its territory, as international law and domestic law share the same subject matter: personal data.

The US tries to regulate transnational data flows through trade rules, recognizing its protectionist approach to data flows as a “national security bracket” to trade law based on US sovereignty, rather than carving out exceptions for data privacy.²¹⁶ The EU addresses the same subject matter, and data flows from the perspective of fundamental rights, with the CJEU as the final authority on the interpretation and application of fundamental rights. The two Courts’ approaches to the same subject matter appear to conflict. The *Schrems II* judgment examined the legality of the Commission’s decision regarding the flow of personal data to the US, outside of the EU’s territory. The CJEU now needs to factor in considerations under international law as well as its domestic law.

212. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 571 (2009).

213. *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

214. Kerr, *supra* note 212, at 587.

215. *Carpenter v. United States*, 585 U.S. 296, 390 (2018) (Gorsuch, J., dissenting).

216. Irion, Kaminski, & Yakovleva, *supra* note 76, at 15.

3. *Judicial Uncertainty of the 'Foreign Intelligence Exception' Under the Fourth Amendment*

While the Court in *Katz* disagreed with the government's claim that surveillance should be exempt from the usual requirement of a prior warrant based on probable cause under the Fourth Amendment, it carefully avoided answering that question in a case involving national security.²¹⁷ Justice White's concurring opinion agreed that no warrant is reasonably required to search under some circumstances, including national security matters, mentioning the power of the President or the Attorney General to authorize electronic surveillance without the warrant procedure for national security.²¹⁸

United States v. United States District Court for the Eastern District of Michigan (Keith) articulated the limitation on the President's power to authorize electronic surveillance in "internal" security matters, suggesting that there should be a distinction between domestic and foreign national security matters.²¹⁹ *Keith* carefully limited the scope of this decision to the domestic aspects of national security and did not deal with the issues relating to activities of foreign powers and their agents.²²⁰ This raised the question of how to strike the right balance of basic values relating to the government's duty to protect domestic security against unlawful subversion of the government itself and the citizens' rights to individual privacy and free expression, which are to be protected against unreasonable intrusion by the government.²²¹ The question presented in the case was limited and left open by *Katz*, *i.e.*, whether the Fourth Amendment required the President or the Attorney General to obtain prior authorization in a national security context.²²²

In contrast to the cases concerning the activities of foreign powers within or outside the territory of the US, where the Court does not reach in the case,²²³ the Court noted the values under the First and Fourth Amendments in national security cases, stating that "[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security'," regardless

217. *Katz v. United States*, 389 U.S. 347, 358 (1967).

218. *Id.* at 363-64 (White, J., concurring).

219. *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 299 (1972) [hereinafter *Keith*].

220. *Id.* at 321-22.

221. *Id.* at 299.

222. *Id.* at 309 (citing *Katz*, 389 U.S. at 358).

223. *Id.* at 308-09.

of the difficulty of defining the “domestic security interest.”²²⁴ In cases only involving the domestic aspects of national security, the Court concluded that the government must comply with “the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.”²²⁵

As mentioned in *Clapper v. Amnesty International USA*, *Keith* may implicitly permit “a special framework for foreign intelligence surveillance” under the Constitution.²²⁶ *Keith* then focused on the difference between ordinary crime surveillance and surveillance for national security, and avoided assessing the scope of the President’s surveillance power over foreign activities.²²⁷ Such a framework for foreign surveillance purposes has been established under FISA.²²⁸ Section 702 of FISA creates a new independent source of electronic surveillance of foreign intelligence activities, which does not require the government to show probable cause that the target of the electronic surveillance is a foreign power or the agent of a foreign power.²²⁹ The Court in *Clapper* stated that Section 702 involves a constitutional challenge, which led to the reconsideration of the concept of standing in courts.²³⁰ *Clapper* noted that the surveillance conducted under Section 702 is subject to being consistent with the Fourth Amendment and statutory requirements, judicial review, and congressional oversight.²³¹ The roles of the FISC were also considered, in particular, how it authorizes the government’s surveillance as “independent decisionmakers” and how the Court denied endorsing standing theories based on “speculation” about such independent decisionmakers’ decisions.²³²

Section 702 of FISA does not authorize intentionally targeting a United States person reasonably believed to be outside the United States.²³³ Still, respondents in *Clapper*, who were US persons, alleged that their sensitive international communications with non-US citizens, which were directly targeted by the surveillance authorized under this section, constituted injury in fact.²³⁴ They sought a declaratory judgment

224. *Id.* at 314.

225. *Id.* at 321.

226. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (citing *Keith* at 322-23).

227. *Id.* at 404.

228. *Id.*

229. *Id.*

230. *Id.* at 404-08.

231. *Id.* at 404-05.

232. *Id.* at 405-06, 414.

233. 50 U.S.C. § 1881a(b)(3) (2008).

234. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401-02 (2013).

for the provision in violation of the Fourth Amendment of the constitutional provisions, including the Fourth Amendment.²³⁵ This is referred to as “incidental collection,” which section 702 of FISA defines as restricting intelligence surveillance from targeting US persons’ information, but the government nonetheless accesses such communications through “constitutionally” targeting their source.²³⁶

Lower courts have suggested that US citizens’ privacy interests should be protected in their communications with foreign targets under Section 702 of FISA, though they also accepted that their warrant protections are removed since such foreign targets are not entitled to Fourth Amendment protections.²³⁷ However, these courts may have misread incidental overhear cases as “indirectly establishing an exception to the warrant requirement” on the basis that the communications in such cases fell within the warrants obtained by the government.²³⁸

Instead, it has been claimed that in such incidental overhear cases, the relevant communications fall within the warrants obtained by the US government under Section 702 for the collection of communications of US citizens.²³⁹ Read properly, therefore, the incidental overhearing cases still leave open the issue of the constitutionality of Section 702 surveillance. In particular, the courts may have to address whether there is a “foreign intelligence exception” to the warrant requirement under the Fourth Amendment and, if so, what the proper scope of the exception is.²⁴⁰ The government put forward a “victim exception” to justify using the US people’s communications, which were “incidentally” collected by its intelligence agencies.²⁴¹ The government explained its necessity “to identify victims targeted by foreign criminals and intelligence services,” while it has been argued that there is no such exception under the Fourth Amendment.²⁴²

235. *Id.* at 407-08.

236. *More Data, More Problems*, *supra* note 38, at 1743.

237. Goitein, *supra* note 204, at 125.

238. *Id.*

239. *Id.*

240. *Id.*

241. Chauvin, *supra* note 203, at 563.

242. *Id.* at 628.

*C. Inconsistencies of the Executive Power with Traditional
Private Rights Jurisprudence*

*1. Redress for the EU Data Subjects by the US Executive, Not the Judiciary,
Under the Data Flow Framework*

In *Clapper*, the Court dismissed the respondents' claim for lack of standing under Article III of the Constitution, asserting that the claim of "future injury" was "too speculative" to satisfy the injury-in-fact requirement and would not traceable to the provision.²⁴³ Additionally, the Court referred to the Article III standing function as preventing the judicial process from "usurp[ing] the powers of political branches" based on principles of the separation of powers.²⁴⁴ In line with this doctrine's purpose, the Court's standing requirement has been especially rigorous in cases related to the question of unconstitutionality of the branches of the Federal Government.²⁴⁵ The judiciary have often denied standing in cases where the political branches' actions in intelligence gathering and foreign affairs are challenged.²⁴⁶

Spokeo, Inc. v. Robins held that the injury-in-fact requirement under Article III remains necessary even when a person's statutory right under the Fair Credit Reporting Act has been violated; a bare procedural violation of a statutory right does not satisfy Article III.²⁴⁷ While *Clapper* makes it unclear how a person can challenge the constitutionality of the President's surveillance power if they cannot know what information has been subject to surveillance, *Spokeo* held that it is not enough to allege a violation of a statutory right without showing actual and concrete harm.²⁴⁸

It seems impossible to prove such harm when surveillance occurs secretly, without any notification to the targeted people. Section 702 of FISA or EO 12,333 authorizes the executive branch to conduct such secret surveillance over foreign intelligence activities,²⁴⁹ while access to

243. *Clapper*, 568 U.S. at 398, 401-02.

244. *Id.* at 408.

245. *Id.* (citing *Raines v. BYRD*, 521 U.S. 811, 819-820 (1997)) (quotation marks omitted).

246. *Id.* at 409.

247. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341-43 (2016).

248. H Jacqueline Brehmer, *Data Localization: The Unintended Consequences of Privacy Litigation*, 67 AM. U. L. REV. 927, 942-43 (2018).

249. E.g., 50 U.S.C. §§ 1881a(a), (c)(2), (j)(3) (2024) (no notification requirement); EO 12333, *supra* note 37, § 3.5 (no substantive/procedural rights conferred); *also*, ANDREAS KUESTEN, CONG. RESCH. SERV., R48592, FISA SECTION 702 AND THE 2024 REFORMING INTELLIGENCE AND SECURING AMERICA ACT 1 (2025) (RISAA reauthorized § 702 in April 2024;

the courts is limited in the context of foreign intelligence surveillance. As mentioned above, the Supreme Court has never definitively argued about a foreign intelligence exception to the Fourth Amendment, and the government's "victim exception" is difficult to justify. Thus, it remains uncertain how the constitutionality of such presidential power can be legally examined and how the right to data protection and privacy for individuals, including non-US persons, can be protected.

Considering the European Commission's adequacy decision for the EU-US DPF, which means the US's data framework is considered an essential equivalent to that of the EU, these questions should be considered in the context of the legal requirement for effective remedies guaranteed under EU jurisprudence. This requires ensuring that access to the courts should be available to "any person who suspects that his or her communications are being or have been intercepted[.]"²⁵⁰ Since a national authority for an effective remedy is not necessarily a judicial authority,²⁵¹ the DPRC established by the US Attorney General would meet the EU requirement. Each DPRC panel decides to be "final and binding,"²⁵² which the European Commission understands binds other executive or administrative branches, including the US President.²⁵³ Also, a resort to judicial courts is subject to existing law—the AG Regulation does not change the availability or scope of judicial review of the DPRC.²⁵⁴ In sum, the US seems unwilling to make an effort to offer adequate assurance to foreigners that their personal data would be protected within the US by establishing federal privacy laws; instead, the US would rely on its negotiating power in relation to its economic interests.²⁵⁵

permits programmatic surveillance without individualized court authorization for each target); *About the Foreign Intelligence Surveillance Court*, U.S. Foreign Intel. Surv. Ct., <https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court#:~:text=The%20FISC%20considers%20these%20applications,an%20imminent%20surveillance%20or%20search> [https://perma.cc/3RJ5-ZB57] (last visited Dec. 9, 2025) (FISC proceedings are *ex parte* and non-public).

250. EDPB, *supra* note 7, ¶ 45 (noting that subsequent notification of surveillance activities after the termination would be effective for court access); *See also* Roman Zakharov v. Russia, App. No. 47143/06, ¶ 234 (Dec. 4, 2015), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-159324%22%7D> [https://perma.cc/LGA4-T2CG] (last visited Dec. 9, 2025) (noting limited individual court recourse absent notification of secret surveillance).

251. EDPB, *supra* note 7, ¶ 46.

252. AG Regulation, *supra* note 81, § 201.9(g).

253. 2023 U.S. Adequacy Decision, *supra* note 77, ¶ 191 n.383.

254. AG Regulation, *supra* note 81, § 201.12 (providing that "[t]his part is not intended to, and does not, modify the availability or scope of any judicial review of the decisions rendered through the redress mechanism, which is governed by existing law.").

255. Anupam Chander, *The Trade Origins of Privacy Law*, 99 IND. L.J. 649, 669 (2024).

2. *Executive Discretionary Power Based on a Dichotomy Between Public and Private Rights*

Judicial power is vested in and limited to the cases and controversies of the jurisdictional provisions under Article III of the US Constitution.²⁵⁶ Although there is no concrete guidance on cases and controversies under the US Constitution, US courts have long recognized that the provisions impose various constraints on judicial power, known as the doctrines of justiciability.²⁵⁷ As one of most debated requirements under justiciability, the doctrine of standing may include three elements: an injury in fact, a causal connection between the cause and the result such that the injury is fairly traceable to, not independent from, the challenged action, and the likelihood, rather than a mere speculation, “that the injury will be ‘redressed by a favorable decision.’”²⁵⁸

The doctrines of justiciability may be supported by the view of the role of the federal courts in the US government system, which is often called a “private rights view,” in contrast to public rights or a special function view.²⁵⁹ Under the former view, the role of judicial power is mainly to resolve a concrete dispute, where the power of the courts to declare the law is regarded as incidental to judicial responsibility for dispute resolution, while under the latter view, courts have the special judicial function of enforcing the rule of law, aside from their role in dispute resolution.²⁶⁰ While the US Supreme Court has never explicitly rejected the federal courts’ dispute resolution model, it can be questioned whether such a simple dichotomy can capture the complexity fully in the context of the history or function of the role of the federal judiciary,²⁶¹ raising the question of the validity of the two-model approach regarding the role of the courts.²⁶²

The constraints of justiciability led to the dismissal of cases, limiting the scope in which “the judicial power may be exercised.”²⁶³ But this

256. U.S. CONST. art. III, § 2, cl. 1.

257. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76-78 (2007) (noting justiciability constraints beyond standing, including ripeness, mootness, and political question doctrine).

258. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

259. Siegel, *supra* note 257, at 77-78.

260. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 73-75 (Robert C. Clark et al. eds., 7th ed. 2015) (noting the difference between the dispute resolution and law declaration model is not clear regarding the role of the federal courts).

261. *Id.* at 75.

262. Siegel, *supra* note 257, at 77-78.

263. *Id.* at 83.

does not necessarily mean “the end of the story.” Rather, it may be recognized as an “invitation for legislative action,” which can affect the separation of powers and change the Supreme Court’s jurisprudence of justiciability.²⁶⁴ Indeed, recent decades in the US have seen an emphasis on the use of presidential power to achieve particular policy goals through a variety of means, raising controversy over the legislative and adjudicative functions that the executive’s power can exercise.²⁶⁵

On the one hand, the executive’s power has changed to “enforcement lawmaking” in practice, and the line between law and policy has blurred.²⁶⁶ On the other hand, executive adjudication has been allowed under the public rights view in principle.²⁶⁷ Under the new EU-US Data Protection Framework, whether the US executive branches can deal with private rights cases properly can be questioned. What can be noted here is that requiring the executive branches to review and protect private rights, including those for personal information protection, is derogated from the role of the executive power based on the dichotomy between public and private rights. One can see the EU law’s influence on the US legal system in relation to the protection of foreign (EU) data subjects from US surveillance activities. The question should then be how the President may “legally” make a new rule in relation to foreign affairs.

III. US EXECUTIVE POWER IN FOREIGN RELATIONS UNDER DOUBLE SOVEREIGNTY

A. Justification of Executive Power for National Security Under the US Constitution and International Law

1. Executive Power to Make Rules in Cooperation with or Without Congress

The US Supreme Court’s case law distinguishes between domestic and foreign intelligence activities, especially in the context of national security under the Constitution. But the constitutional scope of the President’s power to regulate extraterritorial activities for national security is unclear. Regarding the function of the President mentioned in

264. Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1437, 1439, 1468 (2018).

265. John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 147 (2019).

266. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 950-52 (2022).

267. *Oil Statutes Energy Services, LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (defining public-rights doctrine as matters between government and persons subject to its authority) (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

Article II, the Constitution provides the executive power,²⁶⁸ the role as Commander in Chief,²⁶⁹ and the power to make treaties by and with the advice and consent of the Senate based on two-thirds of the present concurrent Senators.²⁷⁰

The Court's national security jurisprudence in the twentieth century—*United States v. Curtiss-Wright Export Corporation*²⁷¹ and *Youngstown Sheet & Tube Co. v. Sawyer*²⁷²—seems to regard congressional-executive relations as key, though how these two cases can be reconciled with each other has been questioned.²⁷³

On the one hand, the power of the president in relation to foreign surveillance activities may be considered with regard to the constitutional power of Congress, as some statutes, such as the National Security Act of 1947,²⁷⁴ the USA Patriot Act,²⁷⁵ the Intelligence Reform and Terrorism Prevention Act,²⁷⁶ and the National Security Intelligence Reform Act,²⁷⁷ may empower the President's authority. In this case, the ultimate source of the President's power should be grounded on the legislative power of Congress provided in Article I,²⁷⁸ since these statutes mentioned above are thought of as delegating the executive power to the President.

On the other hand, it has been argued that the US Department of Justice has supported "National Security Fundamentalism," which may allow the President to do whatever is necessary to protect the US when national security is at risk and "call for a highly deferential role for the

268. U.S. CONST. art. II, § 1, cl. 1.

269. U.S. CONST. art. II, § 2, cl. 1.

270. U.S. CONST. art. II, § 2, cl. 2.

271. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

272. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

273. Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 7-9 (2001) (saying, "courts have yet to reconcile the two opinions adequately" and "no article has been devoted to synthesizing the two cases."); see also *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981) (finding the tension between the "plenary and exclusive power of the President" expressed in *Curtiss-Wright* case and "such unlimited executive power" mentioned in *Youngstown*, but not intending to solve it).

274. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. §§ 3001-244).

275. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

276. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

277. National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

278. U.S. CONST. art. I, § 1.

judiciary.”²⁷⁹ For example, in 2006, the US Department of Justice referred to the “inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs” to engage in warrantless surveillance of international communications regardless of the location of the person, within or outside of the US, if they relate to certain terrorist organizations, including al Qaeda.²⁸⁰ Additionally, some lower federal courts recognized the inherent constitutional power of the president to conduct foreign affairs and to protect national security, allowing the president to authorize warrantless wiretaps to gather foreign intelligence.²⁸¹

Regardless of national security considerations, the executive power in foreign affairs should be considered in light of international law and the US Constitution. The jurisdiction of such a power cannot be captured by reference to sovereignty based on US territory. It is covered by the foreign relations law of the US,²⁸² which is defined under the Restatement as consisting of “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”²⁸³ The US government’s extraterritorial activities may intervene in the legal interests or rights of such persons.

As the Constitution states, “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”²⁸⁴ However, the legal status of treaties under the US domestic legal system is not self-evident—“an international law obligation on the part of the United States” does not necessarily mean that all such obligations “automatically

279. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693-94 (2005) (noting a tension between National Security Fundamentalism and the Constitution).

280. U.S. DEP’T OF JUST., LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (Jan. 19, 2006), <https://www.justice.gov/sites/default/files/opa/legacy/2006/02/02/whitepaperonnsalegalauthorities.pdf> [<https://perma.cc/8LUD-VJQ9>] (last visited Dec. 10, 2025).

281. *United States v. Brown*, 484 F.2d 418, 426 (1973) (citing *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)).

282. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (A.L.I. 1987) (“The foreign relations law of the United States, as dealt with in this Restatement, consists of (a) international law as it applies to the United States; and (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.”).

283. *Id.* § 101.

284. U.S. CONST. art. VI, cl. 2; see, e.g., *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

constitute binding federal law enforceable in United States courts.”²⁸⁵ The Supreme Court has long recognized “the distinction between treaties that automatically have effect as domestic law, and those that . . . do not by themselves function as binding federal law.”²⁸⁶ To sum up, according to the Supreme Court, while treaties “may comprise international commitments,” they are not domestic law “unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”²⁸⁷

Indeed, the Constitution requires the consent of two-thirds of the members of the Senate to make treaties, while the power to make treaties itself is vested in the President. However, international commitments concluded by the US include various forms—they have not always been made through this constitutionally provided process—and the President repeatedly concludes “executive agreements” and “non-binding instruments” without the advice and consent of the Senate.²⁸⁸

How this presidential power may be legitimized under the Constitution should be questioned. Article II provides “[t]he Executive Power shall be vested in a President,” while it leaves unclear whether this sentence affirmatively grants power or merely designates the office of the President.²⁸⁹ In contrast to a constitutionally provided “treaty,” unwritten executive agreements can be classified into three categories according to the source of the authority for the President to conclude them: congressional-executive agreements, executive agreements made pursuant to a treaty, and the sole executive agreement.²⁹⁰

285. *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (noting the question as “whether the Avena judgment [the ICJ’s judgment] has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts”).

286. *Id.* (a treaty is equivalent to federal legislation if it is self-executing; otherwise it requires an implementing statute).

287. *Id.* at 505 (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (C.A. 1 2005) (en banc) (Boudin, C.J.)).

288. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW I (2023).

289. U.S. CONST. art. II, § 2, cl. 1; *United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505, 513 (Mar. 1961) (noting that the former interpretation to grant the power affirmatively would admit that the power of the President is plenary in the context of foreign affairs, which means that the President has an authority to “bind the United States internationally on any subject without prior congressional authorization”) [hereinafter *U.S. Participation in GATT*].

290. MULLIGAN, *supra* note 288, at 5-9 (noting that some modern executive agreements exceed traditional categories); *see, e.g.*, Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L. J. F. 338, 345 (2017) (proposing a new framework based on binding obligations, congressional approval, constitutional authority); Daniel Bodansky & Peter Spiro, *Executive Agreements*+, 49 VAND. J. TRANSNAT’L L. 885, 928-

Under the category of congressional-executive agreements, the President is given the domestic authority by legislation enacted through the bicameral process in Congress.²⁹¹ The difference is that both houses of Congress approve congressional-executive agreements, whereas the advice and consent of the Senate is required to make treaties.²⁹² The Supreme Court has given effect to the second category agreement,²⁹³ and it can arise in many contexts. However, there is controversy as to whether a certain treaty truly authorizes the President to conclude the agreement in question.²⁹⁴ The source of the last category, the sole executive agreement, is neither treaty nor congressional authority,²⁹⁵ but is to be derived from the presidential power under Article II. The Supreme Court has recognized the presidential power to conclude agreements on such a basis,²⁹⁶ but the question may be raised whether the President has the authority to conclude agreements in relation to certain subject matters where constitutional authority is unclear. In this case, it seems that the Court considers the relationship between Congress and the President regarding the validity of executive agreements; unless Congress expresses the opposite view of the President, courts may tend to find the agreement valid.²⁹⁷

2. *Expansion of Executive Power Under Constitutional Pragmatism*

The key issue under this classification should be the applicability or enforceability of the executive agreements in the domestic law, rather than the validity of the presidential power itself. For example, while international trade has been included in the form of the executive

29 (2016) (noting legislative activity bolstered executive agreements during the Obama Administration).

291. MULLIGAN, *supra* note 288, at 5-7.

292. *Id.* at 6.

293. *See, e.g.,* Wilson v. Girard, 354 U.S. 524 (1957) (recognizing the validity of the administrative agreement between the United States and Japan authorized by Article 3 of their 1952 Security Treaty).

294. MULLIGAN, *supra* note 288, at 7.

295. *See, e.g.,* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (stating that "our cases have recognized that the President has authority to make 'executive agreement' with other countries, requiring no ratification by the Senate or approval by Congress" (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937)).

296. *See, e.g.,* Garamendi, 539 U.S. at 396; *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

297. MULLIGAN, *supra* note 288, at 8; *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring) (articulating three categories of presidential power, with congressional acquiescence supporting validity in category two).

agreement, it has been suggested that the plenary power of the President in foreign affairs should be subject to his domestic authority because his domestic power to make or change domestic law is not plenary under the Constitution, which may produce gaps between international obligations and their domestic implementation.²⁹⁸

In that sense, the constitutional relationship between the statute-making power and the treaty-making power should be a matter for the enforceability of the executive agreements. Then, the problem should be examined as to whether a majority of both Houses could approve international agreements by exercising the statute-making powers.²⁹⁹ It has been pointed out that, for that matter, a constitutional transformation occurred during the Franklin D. Roosevelt Administration. After all, during and after the Second World War, "the President won the constitutional authority to substitute the agreement of both Houses for the traditional advice and consent of the Senate."³⁰⁰ This means that the treaty could be recognized as interchangeable with the "congressional-executive treaty" in constitutional law ("the doctrine of interchangeability").³⁰¹ Under the doctrine, the domestic enforceability of the treaty-making power may be affected by the relationship between the treaty-making power and the statute-making power.

In *State of Missouri v. Holland*,³⁰² the constitutionality of the treaty-making power was involved in the context of federalism. The Migratory Bird Treaty Act of 1918 was enacted to enforce a treaty between the US and Great Britain, proclaimed by the President, and aimed to protect migratory birds traveling through the US and Canada during a specified period.³⁰³ Regulations were also proclaimed.³⁰⁴ The State claimed the Act was unconstitutional under the Tenth Amendment.³⁰⁵ Before this

298. *US Participation in GATT*, *supra* note 289, at 513-16 (tariffs require congressional delegation as within legislative, not executive, constitutional authority).

299. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808-09 (1995) (noting that the Senate's treaty role reflects federalism; Madison sought presidential involvement); THE FEDERALIST NO. 42, at 270 (James Madison) (Edward Mead Earle ed., 1937) (stating that "treaties might be substantially frustrated by the regulations of the States" under the Articles of Confederation).

300. Ackerman & Golove, *supra* note 299, at 802-03.

301. See *id.* at 896 (citing the Trade Act of 1974, WWII internationalists, 1945 congressional process as congressional-executive agreement background).

302. *Missouri v. Holland*, 252 U.S. 416 (1920) (The State of Missouri intended to make a bill to challenge the constitutionality of the Migratory Bird Treaty Act of 1918 and regulations made by the Secretary of Agriculture based on 10th Amendment, alleging that these intervened in a state's sovereign right to regulate).

303. *Id.* at 431; See The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712.

304. *Holland*, 252 U.S. at 431-32.

305. *Id.* at 430-31.

Act, it was difficult for lower federal court judges to interpret the free flight of migratory birds as “commerce” under the Commerce Clause.³⁰⁶ As a majority opinion in *State of Missouri v. Holland*, Justice Holmes raised the question whether the treaty and statute would interfere with the rights reserved to the States and void,³⁰⁷ while avoiding asking the question whether the lower courts were right about the Commerce Clause.³⁰⁸

The Court upheld the treaty and statute. For Justice Holmes, it seems that the treaty-making powers of the President and the Senate may not be limited to the statute-making powers which are “explicitly granted” by the Constitution.³⁰⁹ Congress would have the authority to pass implementing legislation under the Necessary and Proper Clause, once a treaty is concluded validly.³¹⁰ This presupposes a two-step process—“treaty first, statute second.”³¹¹

In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court granted a wide range of presidential power for “external sovereignty” without affirmative grants from the Constitution, based on the difference between federal governmental powers with respect to foreign or external affairs and those with respect to domestic or internal affairs.³¹² It has been noted that *Curtiss-Wright* exemplified the triumph of a wide range of federal executive discretion within the constitutional regime of foreign relations.³¹³ This departed from the previous jurisprudence of foreign relations powers, which were distributed among the federal executive branch, the Senate, federal and state courts, and the people in the late nineteenth century.³¹⁴

306. Ackerman & Golove, *supra* note 299, at 843.

307. *Holland*, 252 U.S. at 431-32.

308. Ackerman & Golove, *supra* note 299, at 843.

309. *Id.* (mentioning that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .” in *Missouri v. Holland*, 252 U.S., at 433).

310. *Id.* at 843-44.

311. *Id.* at 844 (noting a remaining question: “how could congressional-executive agreements overcome the powers reserved to the states by the Tenth Amendment?”); *see also Holland*, 252 U.S. at 434 (stating that “[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

312. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936).

313. Congress supported the dichotomy to mention that “Congress may vest in the President far greater discretion than would be permissible in the case of enactments which relate solely to domestic matters.” *Extending Reciprocal Trade Agreement Act: Hearings Before the Senate Finance Comm.*, 75th Cong. 71 (1937).

314. *E.g.*, G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).

3. *Double Sovereignty Based on the Dichotomy Between External and Internal Affairs Under the Constitution*

Recognizing the transformation of development in constitutional jurisprudence during the period from the 1880s to 1930s (the “*Lochner* era”) should be significant.³¹⁵ The transformation reflects new insight into the expansive power of the federal executive branch in light of federalism³¹⁶ and the principle of separation of powers.³¹⁷ The orthodox constitutional foreign relations jurisprudence in the late nineteenth century presumed that the text of the Constitution should capture the exercise of foreign relations powers, while also acknowledging that it reserved powers to the states under the structure of sovereignty created by the Constitution.³¹⁸ Under this orthodox theory, the foreign relations powers were to be allocated based on the text of the Constitution, which generally limited them to tariff³¹⁹ or treaty powers,³²⁰ without raising vexatious constitutional problems despite gaps or overlaps in the constitutional enumeration of foreign relations powers.³²¹

Firstly, the President began to conclude “executive agreements,” a new category distinct from treaties, to conduct a broader range of foreign policy without the consent of the Senate during World War I. This led to deviations from the orthodox theory in the late nineteenth century.³²² In 1892, on the one hand, *Field v. Clark* upheld the constitutionality of a series of customs laws, including the proclamation provisions of the

315. *Lochner v. New York*, 198 U.S. 45 (1905). It may be common to mention the *Lochner* era as the period from 1905, when *Lochner* was decided. However, this paper designates the *Lochner* era as the period from the late nineteenth century when the background to the *Lochner* case developed in Supreme Court cases.

316. Examination of constitutional legitimacy of the presidential powers in foreign relations during the New Deal is often limited to the relationship between the federal executive branch and Congress. See Ackerman & Glove, *supra* note 299, at 804-08; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149-50 (2d ed. 1996) (noting, regarding “international sovereignty” or “international statehood,” the states “have none under the Constitution” in foreign affairs and “do not exist” at the end of the eighteenth and twentieth centuries).

317. White, *supra* note 314, at 3.

318. *Id.* at 9 (mentioning that the Constitution allocates treaty-making power to the President and Senate, and prohibits allocation of it to the states, but that the states nevertheless should retain powers in light of sovereignty).

319. U.S. CONST. art. I, § 8, cl. 3 (stating that the power “[t]o regulate Commerce with foreign Nations” shall be distributed to Congress). However, it could be argued whether and to what extent states remain the power for foreign commerce in the context of digital economy, considering the traditional argument of the “dormant interstate commerce clause” and the U.S.’s federalism.

320. U.S. CONST. art. II, § 2, cl. 2 (stating that the power “to make Treaties” shall be distributed to the President, with the advice and consent of the Senate).

321. White, *supra* note 314, at 13-14.

322. *Id.* at 18.

Tariff Act of 1890,³²³ authorizing the President to restrict free imports from the countries that the President found imposed duties on US export goods in a “reciprocally unequal and unreasonable” way.³²⁴ The Court then mentioned the delegation of the legislative power allocated to Congress—it was not allowed to delegate the legislative power itself to the President,³²⁵ but did have discretion to delegate a power to decide to the President to some degree, with reference to trade and commerce precedent cases.³²⁶ In 1936, on the other hand, Justice Sutherland in *Curtiss-Wright* endorsed the extensive powers of the President in foreign relations policymaking based on constitutional enumeration and the “inherent powers of sovereignty,” which were not subject to constitutional limits.³²⁷

There are arguable differences in approach during the *Lochner* era regarding the delegation doctrine. Justice Sutherland referred to the “extraconstitutional” basis of the external foreign relations powers, based on the dichotomy between the external and internal affairs. He did not use the nondelegation doctrine supported by separation of powers among the federal government, in line with constitutional enumeration in the constitutional jurisprudence in the late nineteenth century.³²⁸ Instead, Justice Sutherland drew attention to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,” which “must be exercised in subordination to the applicable provisions of the Constitution.”³²⁹ If one takes this sentence seriously, the distinction between the origin and the nature of foreign relations powers of the federal government should be of significance, since “[t]he sovereignty of the United States as a nation in the international community is not the equivalent of the sovereignty of the federal government under the United

323. Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (1890) (repealed 1894).

324. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680-81 (1892).

325. *Id.* at 691-94.

326. *Field*, 143 U.S. at 683; *see also* White, *supra* note 314, at 20-21 (noting that by World War I, the Court could not deal with cases only by asking if the exercise of the power was related to a tariff, a treaty, or something else, in light of the increasing number of executive agreements).

327. White, *supra* note 314, at 104.

328. *See id.* at 104. In discussing *U.S. v. Curtiss-Wright Export Corp.*, Justice Sutherland stated, “[w]hether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine.”

329. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

States Constitution.”³³⁰ This means that the sovereign powers originating from international status as a nation do not provide the federal organizations of the government with corresponding powers to exercise plenary control over the states and the people without constitutional limitations.³³¹

Secondly, indeed, there should be some room for the potential exercise of state reserved powers in the areas, including foreign affairs, where the plenary power was distributed to the federal government under the late nineteenth-century orthodox constitutional jurisprudence.³³² It has been pointed out that there was no convenient analytical category for the exercise of foreign relations powers under constitutional jurisprudence, which could be permitted only within the enumeration of the Constitution, partly due to the respect for reserved state powers.³³³

Here, the discretionary and regulatory powers of the federal executive branch should be distinguished. The principle of federal discretion in foreign affairs was established in *Curtiss-Wright*, justified by the extraconstitutional concept of international sovereignty, which was accompanied by constitutional limitations, while the broader scope of federal autonomy emerged after *Curtiss-Wright*.³³⁴ In *United States v. Belmont*, Justice Sutherland admitted the validity of the executive agreement between the US and the Soviet governments to release private property within the state of New York.³³⁵ While the conventional account classified Justice Sutherland into opponents to the extension of regulatory powers of federal government, this only applied to a domestic realm.³³⁶ However, when *Curtiss Wright* and *Belmont* were captured in the constitutional transformation of foreign relations in the early twentieth century, Justice Sutherland was completely satisfied with the extension

330. White, *supra* note 314, at 108 (referring to Quincy Wright’s idea that the nation’s activity can be governed simultaneously by constitutional and international law, with one providing power and the other imposing responsibility, which may create conflicts between them, especially in the application of both laws; under the dual position of foreign relations power, a state may not be allowed to exercise all its powers originating from its concluded treaties due to constitutional restriction on such powers, which is why Senate consent is necessary for the President to conclude treaties under the U.S. Constitution).

331. *Id.* at 49-51 (noting Sutherland followed federalism maxim that sovereign powers are allocated among federal government, states, and people; see *Van Husan v. Kanouse*, 13 Mich. 303, 313-14 (1865) (Campbell J.) (as cited in *White*), though White points out that it is unclear if the maxim directly concerns with foreign relations).

332. *Id.* at 21-22.

333. *Id.* at 25.

334. See *id.* at 4-5.

335. *United States v. Belmont*, 301 U.S. 324, 330 (1937); see also *United States v. Pink*, 315 U.S. 203, 203 (1942).

336. White, *supra* note 314, at 117-18.

of the federal regulatory power “without any concern for potentially competing state interests.”³³⁷

B. The Law-Making Power Under the US’s Sovereignty from Isolationist to Internationalist Approach

1. Sovereignty Not Based on Territory or Nationality?

The driving force of the constitutional change in the President’s power during that period may have been a fundamental shift in public opinion, as well as considerations of principles in the 1940s.³³⁸ Additionally, considering that the US Supreme Court during the *Lochner*-era dramatically expanded federal powers in foreign policy, covering immigration and foreign trade fields,³³⁹ it has been suggested that the US’s foreign economic policy affected the *Lochner*-era Court (*i.e.* protectionist policy) in the previous era, from the Civil War to the Great Depression, which the idea of economic nationalism supported, leading to the greater discretion of the federal government and authority dealing with foreign, rather than domestic, policies.³⁴⁰ A new perspective has been proposed regarding the presidential administration as the sponsor of an agenda for fundamental legal and constitutional change³⁴¹, given that the President’s foreign policies influenced the *Lochner*-era Court’s judgments.

What is more, as the US emerged as a world leader post-World War II, the constitutional link between the New Deal and the new American internationalism becomes clear: the former aimed to overcome the Great Depression, while the latter sought to build a new world order.³⁴² The international economic order with respect to the US and Europe during the postwar era has been described as “embedded liberalism,” which maintained liberalist trade rules while also allowing regulatory powers of state governments to ensure domestic economic stability.³⁴³ It should not be overlooked that the expansion of presidential power over foreign policy,

337. *Id.* at 118.

338. See Ackerman & Golove, *supra* note 299, at 814-15.

339. Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1323 (2019).

340. *Id.* at 1340-42.

341. See *id.* at 1327.

342. Ackerman & Golove, *supra* note 299, at 909.

343. John Gerald Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 388 (1982) (describing the postwar international economic order as balancing liberal trade rules with domestic regulatory powers).

underpinned by the dichotomy between the domestic and foreign realms of constitutional law and between the internal and external powers of the federal government, has led to stronger powers allocated to the President even in the domestic socioeconomic policies culminating in the New Deal regulatory framework.³⁴⁴ The constitutionality of such domestic regulatory policies by the presidency should not be considered without regard to its roots in the foreign policy context during the *Lochner* era, reflecting the dramatic change in the scope of international politics.³⁴⁵

The constitutional change could affect the concept of the US's sovereignty. The notable example of the isolationist approach is the US's official abstention from the League of Nations. The US did not participate in the Treaty of Versailles after World War I, which could result in distrust of the people in the Senate. The Treaty of Versailles was seen as a compromise to the US's sovereignty under the isolationist approach.³⁴⁶ This must be understood in light of the shift towards the new US internationalism, which can be classified as embedded liberalism. At the same time, the international economic order was transformed into "neoliberalism."

After the *Lochner* era, the mainstream constitutionalists have tended to recognize the expansive legislative power of Congress under Article I,³⁴⁷ rejecting the traditional interpretation strictly limited to the constitutionally enumerated matters.³⁴⁸ This can be regarded as the reaffirmation of Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*, in which he stated "[I]f the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, . . . are constitutional."³⁴⁹ A fully adequate basis for congressional action in the aid of congressional-executive agreements can be provided by this "Marshallian reading" of the Foreign Commerce

344. See White, *supra* note 314, at 3-5.

345. See *id.* at 5.

346. Ackerman & Golove, *supra* note 299, at 803.

347. Regarding Congress's power under U.S. CONST. art. I, § 8, cl. 3 (interstate commerce clause), see, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (finding that commerce power "includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices"); *U.S. v. Darby*, 312 U.S. 100, 115 (1941) (stating that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise" which the Constitution and the courts do not have control over, and that the commerce clause confers on Congress the plenary power as long as it does not infringe some constitutional prohibition).

348. Ackerman & Golove, *supra* note 299, at 913.

349. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Clause.³⁵⁰

Such an understanding of Justice Marshall's "expansion" of congressional power based on the Necessary and Proper Clause of Article I is criticized as wrong. For example, in *Marbury v. Madison*,³⁵¹ Justice Marshall strictly limited the congressional power under Article III, lacking the power to expand the original jurisdiction.³⁵² According to this criticism, Justice Marshall aimed to avoid an interpretation that the lack of the word "only" in certain constitutional provisions, such as Article II or Article III, licensed plenary authority to Congress under Article I.³⁵³ Indeed, this criticism rejects the basic concept of "higher lawmaking," which would be justified by the lack of the word "only" in the constitutional amendment process under Article V.³⁵⁴ This basic concept can be supported by the fundamental principles of "popular sovereignty,"³⁵⁵ which is the "true and sovereign source of all lawful power."³⁵⁶

The constitutional transformation during the New Deal could be legitimized under the system of higher lawmaking, which gave the President constitutional authority to speak in the voice of the people due to its electoral victories, parallel to the authentic voice expressed through the federalist rules of Article V.³⁵⁷ It should be necessary to go through the amendment process for a congressional-executive agreement if deficiencies in the constitutional texts or structure that legitimize such presidential authority have been practically realized. In fact, the New Deal and *Lochner* era observed the dramatic change in the presidency's economic policy, including diplomacy and expansion of the President's power to make domestic and international policies. Nevertheless, it should still be asked whether it has shifted constitutional rules and whether certain constitutional amendments would be required under constitutional law. It can be questioned whether this practical change

350. Ackerman & Golove, *supra* note 299, at 914.

351. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

352. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1275-76 (1995).

353. *Id.*

354. *Id.* at 1240-41.

355. BRUCE ACKERMAN, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, 63, 73 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*].

356. AKHIL REED AMAR, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, at 89, 90; *see also* ACKERMAN, *supra* note 355 (suggesting that monopolizing Article V as the exclusive way to amend would be inconsistent with the concept of popular sovereignty).

357. ACKERMAN, *supra* note 355, at 81 (noting that such transformation of the separation of powers originally dated back to the Reconstruction era).

fundamentally transformed the constitutional presidential power to make international agreements.

Based on the precedents, the presidential regulatory power for the tariff policy was constitutionally recognized with congressional delegation in *Field v. Clark*, maintaining the validity of the nondelegation doctrine in the domestic context. The turning point lay in the court's shift in attitude toward the dichotomy between domestic and international spheres, which would result in a declaration of a new category of executive agreements. The decisive question is whether the President exercises the power without violating the Constitution in concluding international agreements. The criticism above would say congressional-executive agreements are unconstitutional, but it should depend on the limits imposed on the President under constitutional and international laws.

2. International Sovereignty as Political Legitimacy Under the Constitution

The treaty-making power includes the law-making function in the US domestic legal system. As any treaty should not be inconsistent with the US Constitution, the treaty-making power should be subject to constitutional limitations.³⁵⁸ Then, it should be questioned whether the law-making function allocated to the President and the Senate, through the treaty-making power, can include an "essentially legislative" function that, under the constitutional principle of separation of powers, properly belongs to Congress. In *INS v. Chadha*, the Court described essentially legislative action as one with "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . all outside the legislative branch" as essentially legislative in purpose and effect.³⁵⁹

If the President and the Senate are not allowed to exercise such essentially legislative power, how could the US conclude international agreements such as international human rights law? The US has concluded human rights treaties in the form of treaties, rather than

358. *E.g.*, *Reid v. Covert*, 354 U.S. 1, 17 (1957) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); *The Cherokee Tobacco*, 78 U.S. 616, 620 (1870) ("[A] treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); *see also* *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the states.").

359. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983).

congressional-executive agreements, showing that the US political branches intentionally chose the former.³⁶⁰ For example, the International Covenant on Civil and Political Rights (“ICCPR”) is regarded as non-self-executing by the US.³⁶¹ Since it is the responsibility of Congress, not the Executive, to “[transform] an international obligation arising from a non-self-executing treaty into domestic law,”³⁶² choosing a form of congressional-executive agreement is more consistent with the constitutional principle and the US’s new internationalism.³⁶³

The presidential power to conclude executive agreements is subject to the same Constitutional limits as the other law-making functions of the federal government, including provisions of the Bill of Rights.³⁶⁴ Once the US concludes an international commitment, whether it is a treaty or an executive agreement, how it is implemented in the domestic legal system must be considered.

As Justice Marshall noticed in *Foster v. Neilson*,³⁶⁵ there is a difference between self-executing and non-self-executing treaties.³⁶⁶ Non-self-executing treaties require legislation to make them applicable to domestic courts,³⁶⁷ whereas self-executing treaties become part of US law upon ratification, without special legislation to make them

360. John C. Yoo, *Law as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 806-07 (2001).

361. U.S. Reservations, *Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

362. *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008).

363. Under the new U.S. internationalism, which admits the dramatic extension of the presidential power in domestic and international society, the expansion of the scope of the congressional legislative power can function to expand the presidential power, including domestic legislative power in foreign affairs through the conclusion and enforcement of congressional-executive agreements. *See, e.g., Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (declaring unconstitutional the provisions of the Foreign Relations Authorization Act allowing U.S. citizens born in Jerusalem to list “Israel” as their place of birth on their passport).

364. 3 WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 38:56 (3rd ed., updated Nov. 2023); *see also* Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 917 (1986) (stating that while some writers assert that congressional approval would be required in each case where a violation of customary international law is proposed (since the Executive is obliged by domestic law to comply with the same), this would be too inflexible an approach)(“[T]he President must have the unilateral power to enter into the international lawmaking process”).

365. *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (noting that when the stipulations of treaties cover a contract, it is classified as a non-executive treaty which addresses the political, not judicial, branch) *overruled in part on other grounds by* *U.S. v. Percheman*, 32 U.S. 51 (1833).

366. RICH, *supra* note 364, § 38:51.

367. *Foster*, 27 U.S. at 314.

effective.³⁶⁸ Whether a treaty provision is self-executing relies on how to implement it domestically and whether to “affect the obligation of the United States to comply with it under international law.”³⁶⁹ The duties imposed on the US under treaties may be achieved through judicial application of preexisting or new law, or through political actions by legislative or executive organizations—but not through the courts, even for non-self-executing treaties.³⁷⁰ However, the distinction between self-executing and non-self-executing treaties may lead to a misunderstanding of the legal effect and applicability of treaties.

Regardless of this distinction, the legal effect of a treaty would be the supreme law of the land. “The treaties were of no greater legal obligation than the act of congress,” and “no paramount authority is given to one over the other.”³⁷¹ Whether a treaty requires legislation to carry into effect its stipulations due to its character as a merely promissory or operates by its own force, if the treaty stipulations conflict with an act of Congress, “the last expression of the sovereign will must control.”³⁷² The sovereign will can be expressed in the international agreements as well as domestic law, but cannot change the Constitution. The confusion derived from the distinction between self-executing and non-self-executing treaties may overlook the domestic legal effect of treaties as a legally binding power on the government, including the presidential power.

C. Common Approach to Foreign Economic Policies Between the Lochner Era and the Presidency of Trump Under Different International Economic Rules

1. Development of a Concept of the Government's Property Based on Sovereignty

Furthermore, the constitutional jurisprudence of the US Supreme Court during the *Lochner* era, based on the difference between internal and external matters, is remarkably similar to the constitutional doctrine including the conceptions of individual rights, federal government power and sovereignty adopted by the modern US presidency, especially the

368. See *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 161 (1940); see also, *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (arguing whether the local ordinance regulating engagement in the business of a pawnbroker is inconsistent with a treaty with Japan and concluding it violates the treaty).

369. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310(1) (A. L. I. 2018).

370. *Id.*

371. *Ping v. United States*, 130 U.S. 581, 600 (1889).

372. *Id.*

Trump administration, alongside its agenda for the federal government particularly regarding immigration and foreign trade.³⁷³ For example, the Trump presidency exercised its expansive executive branch authority, imposing tariffs on goods, including steel and aluminum, costing hundreds of billions of dollars.³⁷⁴ These regulatory measures that the US adopted brought the commencement of the WTO disputes by numerous countries, while the US also initiated disputes against some of these countries.³⁷⁵

It seems that some US Presidents, such as Donald Trump and Franklin Roosevelt, advanced a constitutional vision reflected in a political agenda as to how constitutional powers should be exercised and how constitutional rights should be protected.³⁷⁶ Especially, it is noticeable that the Trump administration has a unique vision and that a set of ideas regarding government power, individual rights, and sovereignty can be recognized as linked to those of the *Lochner* era Court.³⁷⁷ In such foreign relations areas, the Court recognized stronger governmental powers as legitimate, and did not hesitate to limit individual rights—foreigners’ privileges—while it imposed limits on state powers and shielded individual liberty in the domestic economic domain in the *Lochner* era.³⁷⁸

In the *Lochner* era, individual economic liberty as “private ordering” under the federal Constitution promoted state governments’ policy of deregulation in domestic spheres, while the business or property relating to “public interest” may be controlled or regulated by the government.³⁷⁹ These regulatory policies may not be founded on the *laissez-faire* doctrine, but rather national protectionism, since the *Lochner*-era Court permitted some types of governmental intervention in the market.³⁸⁰ The *Lochner*-era Court declared that regulatory intervention in relation to the market and workers in the domestic economy was constitutionally permissible, reducing the federal and state regulatory power over the domestic market and workers.³⁸¹

373. Sohoni, *supra* note 339, at 1325.

374. *Id.* at 1354.

375. Voon, *supra* note 28, at 47.

376. Sohoni, *supra* note 339, at 1327.

377. *Id.* at 1327-28.

378. *Id.* at 1343, 1348.

379. *Id.* at 1332, 1339-40 (suggesting that the state’s right to property prevailed over the alleged right to property by the alien where the state has a “special public interest”).

380. *Id.* at 1332-33, 1342-43.

381. *Id.* at 1334. The Supreme Court recognized the regulatory power over foreigners within the territory of the U.S., which should be left to the political departments of the government since it may affect international relations. *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893)

It has also been pointed out that these public policies in such areas restrict the entry of foreign labor and impose tariffs on foreign goods to safeguard US workers and industries from market competition with foreigners, reflecting the US's economic protectionism rather than free trade.³⁸² These federal regulatory policies limiting immigrants' access to public resources or funds include "public charges"³⁸³ and go as far back as those first proposed by the federal government during the *Lochner* era, which the *Lochner*-era Court initially supported as constitutional.³⁸⁴

The reason behind the *Lochner*-era Court was the government's own property rights, which were recognized in relation to the concept of sovereignty—the government as the sovereign is entitled to exercise freely the right to property, including its core element of "the right to exclude."³⁸⁵ This can now be put forward as the basis of the constitutionality of the social-economic policy preferring American citizens or workers under the Trump administration in the context of foreign relations.³⁸⁶

However, the legitimacy of the idea of such property rights based on economic nationalism should now be questioned under the economic liberalization of international economic law. The idea of the government's property rights supported by protectionism may legally deny foreigners property interests without compensation within the territory of the US, which can be supported by the concept of sovereignty, while the disfavored treatment to foreigners (e.g., foreign investors) may conflict with liberalization under WTO agreements.

(referring to "an inherent and inalienable right" essential to its safety, its independence and its welfare, the Court mentioned that every sovereign and independent nation has such a right as to exclude aliens from its territory, which can affect international relations."). The plenary power to regulate foreign commerce constitutionally conferred upon Congress would include its power to make law to delegate a power to the President to determine something relating to its action, not the law-making power itself. Such a power to regulate foreign commerce by political branches of the government can be justified for the purpose of national prosperity and safety. *See also* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-96 (1892); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

382. Sohoni, *supra* note 339, at 1340-44, 1354-55, 1367-70.

383. *Id.* at 1339 (it has been pointed out that the U.S.'s immigration policy in the *Lochner* era may be shaped by the right of property, which the Court confirmed gives the government power to avoid spending public resources on immigrants and foreigners; indeed, Congress established the Immigration Act of 1891 following the Court decision in *Ping v. United States*, 130 U.S. 581 (1889), upholding the exclusion of the Chinese immigrants as likely becoming a public charge).

384. *Id.* at 1326.

385. *Id.*

386. *Id.*

2. Constitutional Limitations Based on Double Sovereignty

The distinction between the concept of sovereignty under international and constitutional law should not be ignored. However, how both laws should be intertwined must be considered under a new internationalist approach in the US. The concept of “external sovereignty” mentioned by Justice Sutherland in *Curtiss-Wright* may require examination of how such unwritten-constitutional but international-originated foreign relations powers belonging to the President can be incorporated into the Constitution, since it is not clear how these powers can be regarded as constitutional; though, such “extraconstitutional” powers do not necessarily mean unconstitutional.³⁸⁷

The question of how international law should be incorporated into the Constitution in the foreign relations context may be understood by Justice Sutherland to mean that powers based on international relations must be exercised in line with applicable provisions of the Constitution.³⁸⁸ Under Articles I and II, the President is allocated a wide range of discretionary and regulatory policymaking powers in the public domain, including foreign relations. This is in contrast to private rights with which the Court is inclined to recognize justiciability. The Court in *The Paquete Habana* held that “[customary] [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,” including cases “where there is no treaty and no controlling executive or legislative act or judicial decision.”³⁸⁹

Justice Sutherland implied in *Curtiss-Wright*, which was issued around the end of the *Lochner* period, that the federal government possessed an “inherent,” “plenary,” and “exclusive” character in relation to foreign relations powers.³⁹⁰ This meant that the Court, as well as the Senate and the states, should defer to such executive policy decisions.³⁹¹ It has been suggested that Justice Sutherland found foreign affairs to be so basic to “the sovereignty” of the US, which Justice Sutherland thought

387. See White, *supra* note 314, at 57 (pointing out that “the basis of inherent foreign relations powers was extraconstitutional rather than unconstitutional” in *U.S. v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936)).

388. *Curtiss-Wright Export Corp.*, 299 U.S. at 318-20 (noting that “the power to make such international agreements as do not constitute treaties in the constitutional sense”, but “exists as inherently inseparable from the conception of nationality”); see also EXTENDING RECIPROCAL TRADE AGREEMENT ACT: HEARINGS BEFORE THE SENATE FINANCE COMM., 75th Cong., 1st Sess. 75 (1937) (mentioning the power to make international agreements referred to in the *Curtiss-Wright* case as “essential to make the United States ‘completely sovereign’”).

389. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

390. White, *supra* note 314, at 60.

391. *Id.* at 60-61.

of as political policies and nonjusticiable issues.³⁹²

Under the plenary power doctrine, the distinction between law and politics would be blurred, leading to blurred boundaries among the federal government's branches. In fact, it has been pointed out that the US Supreme Court premised that the determination and application of international law is the responsibility of the federal government, which is "integral to the conduct of foreign relations," and that the federal courts determine and make international law if there is no federal statute, treaty, or authoritative executive action.³⁹³ The doctrine should be supported by the government's property rights concept based on "sovereignty" in the *Lochner* era, but it should include sovereignty under constitutional and international laws, which led to the vagueness between federal organizations and the emphasis on the presidential plenary power without recognizing the gaps between the concepts of sovereignty under both laws. However, under the Supreme Court jurisprudence, it should be noted that the constitutional limitations on presidential power relating to foreign relations would be considered in light of international law through incorporating it.

The international economic order under the WTO system was developed based on neoliberalism, which could force state governments to adopt more limited regulatory powers on markets and domestic industries compared to embedded liberalism. The US should have adjusted its domestic and foreign policies in line with neoliberalism since this would have influenced the concept of property in constitutional law, realizing the development of "individual private rights" in relation to the government's property, which should be subject to judicial review.

In 2024, the US Supreme Court endorsed the Major Questions Doctrine ("MQD") in *West Virginia v. EPA*,³⁹⁴ which firmly includes the idea of "presumption against novelty," which requires clear congressional authorization for the agency assertions of "highly consequential power."³⁹⁵ This presumably reflects the need to address constitutional nondelegation concerns following the *Lochner* era.³⁹⁶

392. *Id.* at 61-62 (implying that Justice Sutherland might have extended the scope of inherent federal powers to informal executive agreements which might also be included in "international" political questions).

393. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 223 (1st ed., 1972) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

394. *West Virginia v. EPA*, 597 U.S. 697, 700 (2024).

395. Thomas Nielsen, *The Presumption Against Novelty in the Roberts Court's Separation-of-Powers Case Law*, 137 HARV. L. REV. 2034, 2045 (2024) [hereinafter *Presumption against Novelty*].

396. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L. J. F. 693, 702 (2022).

While the MQD may reconstruct administrative law and restrict a wide range of presidential power, this is not “lawless” or “senseless.”³⁹⁷ The Court seemed to invoke a “Burkean minimalist” approach as its conservatism, quoting the phrase of Justice Frankfurter’s opinion to say that “the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”³⁹⁸ Based on the conventional private-public rights distinction, the Burkean approach considers Congress as a proper branch to define “injury in fact,” which is needed to bring suit, rather than focusing on common law and history.³⁹⁹ Additionally, the Court finally overturned *Chevron USA v. National Resources Defense Council*,⁴⁰⁰ overruling the Court doctrine requiring the courts to “defer to ‘permissible’ agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently.”⁴⁰¹

If the justiciability of Section 702 of FISA is not denied, the communications of US citizens with foreign targets, even for national security, may be subject to judicial review, and Congress should determine Article III standing in such a case, independent from presidential power. Considering the state governments’ role as global economic actors and that more states have established their own privacy statutes, Congress should consider uniformity in establishing federal privacy legislation,⁴⁰² and Congress and the Courts need to reconsider the wide range of presidential power and the power balance between federal organizations in the context of foreign affairs in light of international law. Additionally, Congress and the Courts should consider constitutional limitations for the private rights cases regarding the right to privacy under Fourth Amendment jurisprudence.

397. Oren Tamir, *Getting Right What’s Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANSNAT’L L. 543 (2024).

398. Nielsen, *supra* note 395, at 2047; *see also* W. Va. v. EPA, 597 U.S. at 725 (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941)).

399. *See* Nielsen, *supra* note 395, at 2053-54.

400. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024); *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

401. *Loper Bright*, 603 U.S. at 378.

402. Carol E. Head, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123 (2001) (arguing the significance of the actions of states as global economic actors, especially from the perspective of foreign relations and examining the Dormant Foreign Affairs Power).

3. Possible Influence of Personal Data Rules on the US Digital Economic Policy

While the EU and the US reached an agreement on the cross-border transfer framework of personal data for promoting their economic interests after *Schrems II*, both economies failed to conclude the Transatlantic Trade and Investment Partnership (“T-TIP”). Here, Japan can be an example to consider the influence of the EU’s personal data rules on the US executive power since the European Commission recognized it as providing an adequate level of personal data,⁴⁰³ and it concluded trade agreements with the US.

The US and Japan signed the Agreement concerning Digital Trade (“US-Japan DTA”),⁴⁰⁴ which entered into force in January 2020, when the trade Agreement between both countries (“US-Japan TA”)⁴⁰⁵ also entered into force. Both agreements aim to liberalize trade between the countries.⁴⁰⁶ After the entry into force of the Japan-EU EPA in 2019 and the Trans-Pacific Partnership 11 (“TPP-11” or “CPTPP”) in 2018,⁴⁰⁷ from which the US Trump presidency withdrew, the US was expected to have a competitive disadvantage in the Japanese market in some fields, including agricultural and industrial goods. The Trump Administration intended to overcome these hardships, including the deficiencies, by concluding bilateral trade agreements.⁴⁰⁸

403. Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information, 2019 O.J. (L 76) 1; *Report from the Commission to the European Parliament and the Council on the first review of the functioning of the adequacy decision for Japan*, COM (2023) 275 final (Apr. 3, 2023).

404. Agreement Between the United States of America and Japan Concerning Digital Trade, U.S.-Japan, Oct. 7, 2019, T.I.A.S. No. 20-101.1 (*entered into force Jan. 1, 2020*) [hereinafter U.S.-Japan DTA].

405. *Id.*

406. Brock R. Williams, Cathleen D. Cimino-Isaacs & Anita Regmi, Cong. Rsch. Serv., R46140, “*Stage One*” *U.S.-Japan Trade Agreements* 1 (Dec. 20, 2019).

407. Afterwards, the UK joined the CPTPP, which entered into force in December 2024; *E.g.*, NEW ZEALAND FOREIGN AFFAIRS & TRADE, *United Kingdom Accession to the CPTPP*, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/cptpp-information/seventh-commission-meeting-of-the-cptpp/united-kingdom-accession-to-the-cptpp> [<https://perma.cc/HME3-8A8S>].

408. *E.g.*, Williams, Cimino-Isaacs & Regmi, *supra* note 406, at 2; Anita Regmi et al., Cong. Rsch. Serv., R46653, *Major Agricultural Trade Issues in the 117th Congress* 38 (Jan. 8, 2021). The OECD analyzes the United States as the sole OECD member state to take “a decentralized, market-driven approach to its digital strategy”, and does not have a national digital strategy. Rather, the US chooses “a portfolio strategy” which is referred to as “a collection of policies, regulations and laws that are associated with specific issues and/or sectors that together support

With such a short formal negotiation period of around six months, the different agreements were concluded in the area of trade in goods and digital trade, both of which are commonly provided in the modern FTAs. Compared to general FTAs, the coverage of the goods in the US-Japan TA is limited to certain areas covering agricultural and industrial goods and it has been noted that such a limited scope of the US-Japan TA would not meet the requirement of “substantially all trade” under Article XXIV of the GATT and that, in practice, the question of whether it is inconsistent with the WTO rules would likely depend on the timeline and scope of the next negotiations.⁴⁰⁹ Indeed, these agreements were seen as “Stage One”—a part of broader trade liberalization plans by the administrations in Japan (Prime Minister Shinzo Abe) and the US (President Donald Trump),⁴¹⁰ though the US-Japan DTA was seen as parallel to the “comprehensive and high-standard” digital trade agreement such as United States-Mexico-Canada Agreement (“USMCA”) with some differences,⁴¹¹ which was concluded with the US leading the negotiations. The US President is supposed to put pressure on its like-minded partners to protect its own industry.

Complying with existing WTO rules based on economic liberalization and market competition itself is significant. In addition, it should affect the US constitutional limitations on presidential power and be incorporated into constitutional law through the concept of double sovereignty. Moreover, the influence of personal data rules on economic treaties should not be ignored. Under the US-Japan DTA, the liberalization principles such as “Non-Discriminatory Treatment of Digital Products”⁴¹² are provided, and the general exceptions are provided in a way of *mutatis mutandis* with Article XIV of the GATS and Article XX of the GATT.⁴¹³ The US-Japan DTA provides that the making of regulatory measures on the cross-border transfer of information (including personal information) by electronic means is, in principle, prohibited if the activity is conducted for business purposes.⁴¹⁴ While the

the evolution and enhancement of the digital economy”. OECD Digital Economy Outlook 2017, 34, 38 n.1 (2017), https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/10/oecd-digital-economy-outlook-2017_g1g7aa8d/9789264276284-en.pdf [https://perma.cc/T3M9-PPLG].

409. Williams, Cimino-Isaacs & Regmi, *supra* note 406, at 20-21.

410. *Id.* at 1.

411. Office of the U.S. Trade Representative, *Factsheet on U.S.-Japan Digital Trade Agreement* (Oct. 2019), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/october/fact-sheet-us-japan-digital-trade-agreement> [https://perma.cc/BUN7-H7S3].

412. US-Japan DTA, *supra* note 404, art. 8.

413. *Id.* art. 3.

414. *Id.* art. 11(1).

GATS includes a privacy exception in the general exceptions clause,⁴¹⁵ the US-Japan DTA also provides that any restrictions on cross-border transfer of personal information will be expected to be limited to “necessary and proportionate to the risks presented.”⁴¹⁶

Whether the regulatory measures on free data flows will be justified should be considered in the context of the privacy exception under the GATS, considering that such restrictions should be limited to necessary and proportionate to the risks presented. If such a regulatory measure satisfies the requirements under the privacy exception clause under the GATS, it would be justified. However, it would still be questionable whether the US-Japan DTA incorporates WTO jurisprudence as well as the texts. The necessary and proportionate clause should be considered in light of this perspective. In the context of cross-border transfer, the basic rule under Japan’s personal information law, the Act on the Protection of Personal Information (“APPI”), seems to be the restriction on the free cross-border transfer of personal data, while the free cross-border transfer seems to be a basic rule under the US-Japan DTA. The Japanese data protection law, APPI, restricts transfers of personal data to third parties in foreign countries without the data subjects’ consent, except in certain cases.⁴¹⁷ The gap between the APPI and the bilateral digital trade agreement raises the question of whether and how the requirement to obtain the consent of data subjects before transferring data to third countries is consistent with the necessary and proportionate clause. Partly due to the substantial difference between the US and Japan’s data protection approaches, “the risks presented” is also unclear, while the US-Japan DTA imposes an obligation on both parties to adopt or maintain a legal framework for the protection of personal data, and both parties “should encourage” to promote interoperability between the different regimes for the protection of personal information.⁴¹⁸

Furthermore, when US companies transfer personal data originating from the EU based on the EU-US Data Privacy Framework to third countries, including Japan, they are required to comply with the rules in

415. GATS, *supra* note 4, art. XIV(c)(ii).

416. US-Japan DTA, *supra* note 404, art. 15(4) (“The Parties recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross border flows of personal information are necessary and proportionate to the risks presented.”). Such a necessary and proportionate limitation on the derogation of free cross-border flows is not mentioned in the Japan-EU Economic Partnership Agreement.

417. Act on the Protection of Personal Information, art. 28, (Act No. 57 of May 30, 2003); *see also* Personal Information Protection Commission Order No. 3, *Enforcement Rules for the Act on the Protection of Personal Information*, arts. 15-18 (2016).

418. US-Japan DTA, *supra* note 404, art. 15(1) & (3).

line with the EU-US DPF.⁴¹⁹ Whether the restrictions on such onward transfers by US businesses based on the EU-US DPF may comply with the necessary and proportionate clause should also be considered. While the US and Japan shall not be precluded from taking measures that they consider necessary for the protection of their own essential security interests and the maintenance of international security under the US-Japan DTA,⁴²⁰ the US seems to face a problem of whether it can invoke the security exception clause to allege its presidential broad discretionary power when US companies receive the personal data from the jurisdiction of the EU based on the EU-US DPF. Now, the US needs to accept that the executive agreement legally binds the presidential power for foreign policies.

CONCLUSION

Donald Trump again won the presidential election in November 2024. It can be expected that the Trump Administration will disregard market-based policies and accelerate its protectionist policies to indiscriminately guard the US domestic industry and businesses, while the US's consistency with the economic liberalization rules developed under the WTO framework has been questioned. Moreover, given the close relationship between personal data rules and the economy, it should be questioned whether the US can invoke the essential security exception clause under the WTO agreements, given the EU's strict approach to a national security exception in its personal data protection principles. After all, the US will now face the need to address the ambiguous separation of powers in foreign relations among federal organizations following the *Lochner* era.

This paper considers the legality of the extraterritorial presidential power in light of constitutional and international law. During the *Lochner* era, the presidential power to make domestic economic policies was strengthened by a transformation in constitutional jurisprudence, followed by the emergence of the US President as a world leader in shaping international economic law and order after the Second World

419. 2023 U.S. Adequacy Decision, *supra* note 77, Annex I, Section II.3 & Annex I, Section III.10 ("Obligatory contracts for Onward Transfers" in Supplemental Principles); *see also* Supplementary Rules under the Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU and the United Kingdom based on an Adequacy Decision (3), https://www.ppc.go.jp/files/pdf/Supplementary_Rules_en.pdf [<https://perma.cc/D86L-9864>] (providing restrictions on Japanese businesses regarding onward transfers of personal data received from the EU or the UK to third countries).

420. US-Japan DTA, *supra* note 404, art. 4(b).

War. The legality of the president's power over foreign policy was supposed to be based on the US's sovereignty under constitutional and international law, though the understanding of the domestic legal effect of treaties under US Supreme Court case law is unclear regarding self-executing and non-self-executing treaties.

Moreover, the concept of sovereignty during the *Lochner* era would presuppose the concept of property based on US nationality and territory. This allowed for its protection as a private sphere for US citizens and/or those within a US territory. Such a concept of property cannot deal with government access to personal data in the digital economy. However, Fourth Amendment jurisprudence has developed alongside digitalization. This would change the conventional dichotomy between public and private rights, which were also based on the two factors of nationality and territory. The *Lochner* era's concept of sovereignty would blur the distinction, thereby limiting the Court's review in private rights cases. The influence of the EU's personal data rules on US presidential power should not be overlooked, as they can substantially constrain it, even for national security.

NOTES

BEYOND THE SMOKE: CLOSING THE LEGAL GAPS ON WHITE PHOSPHORUS AND INCENDIARY WEAPONS

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INTRODUCTION

In modern warfare, the line between legality and atrocity often blurs when it comes to weapons with dual-use capabilities. White Phosphorus, colloquially known as “Willie Pete,” falls under this dilemma.¹ Deployed for its tactical benefits as a smokescreen and incendiary weapon, it has since become the focal point of controversy due to the catastrophe it brings upon civilians when used in populated areas.² White phosphorus exists in a legal gray area of international law, dodging stringent regulation and accountability under all major treaties. How does this happen?

Before conducting an in-depth analysis of white phosphorus, Part I of this Note will first examine the history of chemical warfare and the evolution of legal frameworks regulating its use. Chemical warfare dates back to World War I, when chlorine and mustard gas were deployed on the battlefield, causing approximately 90,000 deaths and over a million casualties.³ The widespread devastation led to early international attempts at regulation, such as the 1925 Geneva Protocol, which prohibited the use of chemical and biological weapons in war but lacked enforcement mechanisms.⁴

Despite early efforts, countries have remained hesitant to impose a

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1. Matt Collins, *Why “Willy Pete” (White Phosphorus) is a Scourge On the Modern Battlefield*, MIRA SAFETY (Oct. 27, 2023), <https://www.mirasafety.com/blogs/news/controversial-history-of-willy-pete> [https://perma.cc/H9AV-JSXS].

2. *Id.*

3. Gerard Fitzgerald, *Chemical Warfare and Medical Response During World War I*, 98 AM. J. PUB. HEALTH 611 (2008), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2376985/> [https://perma.cc/GW37-TRYP].

4. *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

comprehensive ban on chemical warfare, as it continues to serve as an offensive military strategy under certain geopolitical circumstances.⁵ This reluctance ultimately led to the establishment of the International Criminal Court (“ICC”) through the Rome Statute in 1998, which 123 countries have since ratified.⁶ The Rome Statute’s Article 8 explicitly prohibits the use of “poison or poisoned weapons” and “asphyxiating, poisonous or other gases,” which are classified as war crimes.⁷ However, it notably fails to mention white phosphorus, leaving its classification somewhat ambiguous.⁸ This omission was not accidental; rather, it reflects the political maneuvering of states that sought to maintain white phosphorus as a viable military tool while “formally” condemning other chemical weapons.

Given this ambiguity, the critical question remains: Can chemical warfare, particularly involving white phosphorus, be prosecuted under the Rome Statute? As most law students learn in their first year of Civil Procedure, jurisdictional limitations apply not only in domestic courts but also at the international level.⁹ The ICC operates under strict jurisdictional constraints, including complementarity and state consent, which significantly hinder its ability to prosecute chemical warfare cases.¹⁰ Part I of this Note will explore how these jurisdictional barriers within the Rome Statute make it nearly impossible for the ICC to effectively prosecute chemical warfare crimes, leaving significant gaps in accountability and enforcement.¹¹

If white phosphorus does not fall under the Rome Statute or any other comprehensive international regulation, then what legal framework does it exist under? And fundamentally, what is white phosphorus? Part II of this Note will provide an in-depth examination of this wax-like chemical compound and how it has evaded regulation under international treaties. While the scientific background may not be the primary focus for those approaching this issue from a legal standpoint, understanding the chemical properties of white phosphorus is crucial to comprehending its devastating effects on humans. Upon contact with skin, white phosphorus burns at temperatures exceeding 800°C (1,472°F),

5. *Chemical weapons remain a threat to the world*, EUR. UNION EXTERNAL ACTION (Nov. 30, 2022), https://www.eeas.europa.eu/eeas/chemical-weapons-remain-threat-world_en [<https://perma.cc/GZ2P-TUNP>].

6. *The States Parties to the Rome Statute*, Assembly of States Parties to the Rome Statute, Int’l Crim. Ct., <https://asp.icc-cpi.int/states-parties> [<https://perma.cc/GU5P-84R4>] (last visited Oct. 9, 2025).

7. Rome Statute of the International Criminal Court art. 8(2)(b)(xvii) – (xviii), July 17, 1998, 2187 U.N.T.S. 90.

8. *Id.*

9. Cedric Ryngaert, *The Concept of Jurisdiction in International Law* 2, <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf> [<https://perma.cc/JZK2-M68D>] (last visited Sep. 14, 2025).

10. Rome Statute of the International Criminal Court arts. 5, 11 – 12, 17, July 17, 1998, 2187 U.N.T.S. 90.

11. Nadia Ahmad, *The Language Barrier: Can the ICC Prosecute Chemical Warfare?*, 46 HUM. RTS. Q. 98 (2024).

causing deep, excruciating injuries that can reignite upon exposure to oxygen.¹² These burns frequently result in severe disfigurement, organ failure, and, in some cases, death.¹³

Given the catastrophic humanitarian consequences of white phosphorus, why does its use persist? As part II will further explore, white phosphorus remains widely deployed due to its effectiveness as a smokescreen in military operations, obscuring troop movements and targeting systems.¹⁴ This function classifies it as an incendiary, rather than a chemical, weapon, bringing it under the purview of the CCW, specifically Protocol III.¹⁵ However, Protocol III contains critical loopholes, most notably, it restricts the use of incendiary weapons against civilians but does not explicitly prohibit their deployment in urban warfare when used for purposes other than as a direct weapon.¹⁶ This regulatory gap allows militaries to justify their use of white phosphorus under the pretense of non-lethal strategic necessity, despite its well-documented civilian harm. If white phosphorus is technically regulated under the CCW, then why does its abuse continue unchecked? The answer lies in enforcement weaknesses and political reluctance to impose stricter bans.¹⁷

Part III of this Note will examine how, despite its nominal regulation under the CCW, white phosphorus continues to be misused by countries such as Russia, Israel, Syria, and Iraq.¹⁸ While Protocol III of the CCW restricts the use of incendiary weapons, its loopholes and lack of enforcement mechanisms have allowed states to deploy white phosphorus in ways that cause widespread civilian suffering. Reports from human rights organizations, such as Amnesty International, document the recurring use of white phosphorus in densely populated areas, resulting in severe civilian casualties, long-term environmental destruction, and devastating psychological effects.¹⁹ In conflicts worldwide, white phosphorus has burned thousands of civilians, including children, and

12. *White Phosphorus*, WORLD HEALTH ORGANIZATION (JAN. 15, 2024), <https://www.who.int/news-room/fact-sheets/detail/white-phosphorus> [https://perma.cc/H25J-X9ED]; Collins, *supra* note 1.

13. Collins, *supra* note 1.

14. Collins, *supra* note 1.

15. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 171 [hereinafter Protocol III].

16. *Id.*

17. Collins, *supra* note 1.

18. Brendan Rascius, *what is white phosphorus-and why is it so controversial? Israel accused of using it in Gaza*, MIAMI HERALD (Oct. 13, 2023), <https://www.miamiherald.com/news/nation-world/world/article280507374.html> [https://perma.cc/DUJ2-C9ZK]; *Lebanon: Evidence of Israel's unlawful use of white phosphorus in southern Lebanon as cross-border hostilities escalate*, AMNESTY INT'L (October 31, 2023), <https://www.amnesty.org/en/latest/news/2023/10/lebanon-evidence-of-israels-unlawful-use-of-white-phosphorus-in-southern-lebanon-as-cross-border-hostilities-escalate/> [https://perma.cc/J6FU-PC6C].

19. Rascius, *supra* note 18.

contaminated water supplies, making entire regions uninhabitable.²⁰ For example, during the conflicts in Syria and Iraq, white phosphorus has been used in urban centers, leading to mass displacement and permanent injuries among civilian populations.²¹

This section will argue that existing regulations are grossly insufficient and fail to uphold the fundamental principles of international humanitarian law, which prioritize the protection of civilians in armed conflict.²² The strategic military use of white phosphorus as a smokescreen and signal flare has often taken precedence over humanitarian concerns, making it unlikely that nations will voluntarily adopt stricter prohibitions.²³ However, the continued and well-documented misuse of this weapon underscores the urgent need for reform. If direct regulation proves politically unfeasible, alternative mechanisms must be explored to curb its abuse.²⁴

Thus, this Note will propose alternative solutions in Part VI, including broadening accountability through international legal bodies, establishing clearer definitions of incendiary weapons in current treaties, and suggesting regional enforcement mechanisms that bypass political gridlock at the international level. In addition, this Note will argue that universal jurisdiction can be used by states to prosecute those responsible for white phosphorus misuse, thereby creating legal precedents that may deter future violations.²⁵ Without substantial reform, the cycle of white phosphorus abuse will continue, and irreversible damage will be done to civilian populations across the globe.

If existing regulations are too weak to prevent the misuse of white phosphorus, then individual countries must take the initiative to hold perpetrators accountable. One way to achieve this is through universal jurisdiction, an international law doctrine that enables states to prosecute persons for serious crimes committed outside their territory if such crimes fall under universally accepted offenses such as crimes against humanity, torture, war crimes, and genocide.²⁶ As there is overwhelming proof of civilian harm caused by white phosphorus, universal jurisdiction can be exercised by states in order to prosecute military personnel and officials responsible for its unlawful deployment. This approach would bypass the loophole of international treaties and provide a direct path to accountability.

However, prosecuting such cases on a state-by-state basis is not enough.

20. WORLD HEALTH ORGANIZATION, *supra* note 12; Justin Salhani, *Israel's toxic legacy: White phosphorus bombs on south Lebanon*, AL JAZEERA (Mar. 25, 2024), <https://www.aljazeera.com/features/longform/2024/3/25/israels-toxic-legacy-bombing-southern-lebanon-with-white-phosphorus> [<https://perma.cc/8ATY-A3HQ>].

21. Collins, *supra* note 1.

22. Ahmad, *supra* note 11, at 100.

23. Collins, *supra* note 1.

24. *Id.*

25. *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*, AMNESTY INT'L (Oct. 9, 2012), <https://www.amnesty.org/en/documents/ior53/019/2012/en/> [<https://perma.cc/PM2B-XST8>].

26. *Id.*

This Note suggests the creation of an international committee to oversee and prosecute the misuse of incendiary weapons. Similar to organizations like the United Nations Human Rights Council or the ICC, this specialized body would focus solely on monitoring, investigating, and prosecuting those who authorize and carry out the unlawful use of white phosphorus. There is a need to invest resources in such an institution because the humanitarian cost of incendiary weapons far outweighs their military benefits.

This need is particularly urgent in areas heavily affected by white phosphorus attacks, such as Gaza, which has a population of approximately 2 million people, nearly half of whom are children.²⁷ The indiscriminate and wide use of incendiary weapons amidst densely populated zones exacerbates an already dire humanitarian crisis. An organization responsible for monitoring the application of white phosphorus would not only bring justice to the offenders but also collect and document evidence on white phosphorus usage, providing crucial evidence in subsequent proceedings. Through an institutionalized process of oversight and prosecution of abuses, the world could make considerable strides toward preventing subsequent humanitarian disasters resulting from the use of these weapons.

I. THE EVOLUTION AND REGULATION OF CHEMICAL WARFARE

A. *What Is Chemical Warfare?*

Chemical warfare, defined as the use of chemical agents to cause harm or death in armed conflict, has a complex and often grim history. Chemical agents differ from traditional weapons, which exert physical effects directly, in that they are specifically intended to disrupt the physiological processes of living things.²⁸ This type of warfare indiscriminately and prolongedly harms not only combatants but also civilian communities, with catastrophic consequences that can persist long after hostilities have ended.²⁹ The agents of chemical warfare can be classified into several categories, including toxins, asphyxiants, and incendiary agents.³⁰ The agents have played significant roles in shaping military strategy and international law during the 20th and 21st centuries.

The earliest large-scale application of chemical warfare was in World War I, when military forces used chlorine and mustard gas against other troops in

27. Linah Mohammad, *Children make up nearly half of Gaza's population. Here's what it means for the war*, NPR (Oct. 19, 2023), <https://www.npr.org/2023/10/19/1206479861/israel-gaza-hamas-children-population-war-palestinians> [<https://perma.cc/C62A-85FC>].

28. K. Ganesan, S. K. Raza & R. Vijayaraghavan, *Chemical Warfare Agents*, 2 J. PHARM. & BIOALLIED SCI. 166 (2010), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3148621/> [<https://perma.cc/K7EE-AVEG>].

29. *Id.*

30. *Id.*

combat.³¹ The atrocities of the agents made a lasting impression on war tactics and evoked widespread outcry among civilians. The indiscriminate use of chemical weapons not only caused casualties but also traumatized entire populations, and it became a psychological weapon that persisted in the collective memory.

B. The First Attempt to Regulate

Reacting to the indiscriminate destruction wrought by chemical weapons, the international community moved to create regulations on their use. This resulted in the Geneva Protocol of 1925, which sought to ban the use of asphyxiating and poisonous gases in warfare.³² The Protocol expressly prohibited the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices."³³ Nevertheless, notwithstanding its importance as the first significant international treaty to deal with chemical and biological weapons, the Geneva Protocol had some deficiencies. It banned the use of chemical weapons alone but not their development, production, or storage.³⁴ Therefore, it created a loophole that allowed states to continue producing chemical agents, rendering the treaty ineffective.

In spite of the Geneva Protocol, the utilization of chemical weapons continued in future wars, most egregiously in the Iran-Iraq War during the 1980s.³⁵ Not only were chemical agents employed against military forces, but they were also used against civilian populations, revealing once again the shortcomings of the current rules.³⁶ The flagrant disregard of the Geneva Protocol during this period illustrated the necessity for a more comprehensive regime to deal with chemical weapons.

In response to these ongoing problems, the Chemical Weapons Convention (CWC) was implemented in 1993. This treaty expanded on the Geneva Protocol by prohibiting not just the use of chemical weapons but also their development, production, acquisition, and stockpiling.³⁷ It included verification and enforcement measures, which made it one of the strongest arms control treaties available. The CWC broadly defined chemical weapons, in an effort to close the loopholes that had, up to then, permitted states to evade responsibility.³⁸

There remain difficulties in the categorization of incendiary weapons,

31. JEFFREY K. SMART, *History of Chemical and Biological Warfare: An American Perspective*, in MED. ASPECTS OF CHEM. AND BIOLOGICAL WARFARE 9, 16 (1997).

32. *Id.* at 29.

33. Geneva Protocol, *supra* note 4.

34. *Id.*

35. Javed Ali, *Chemical Weapons and the Iran-Iraq War: A Case Study in Noncompliance*, 8 NONPROLIFERATION REV. 43 (2001).

36. *Id.* at 52.

37. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter CWC].

38. *Id.*

including white phosphorus. Although incendiary weapons are dealt with under Protocol III of the CCW, white phosphorus is not a chemical weapon according to the CWC or the CCW.³⁹ This ambiguity has resulted in abuse in several conflicts, and it has been used by certain states to utilize white phosphorus in a manner that would possibly constitute war crimes if the weapon were deemed a chemical agent.

*C. Why the International Criminal Court Does Not
Prosecute Chemical Warfare*

The formation of the ICC in 2002 was a significant development in the international fight against war crimes, including those related to chemical weapons. Article 8 of the Rome Statute specifically enumerates the use of biological, chemical, and eludes to nuclear weapons as war crimes.⁴⁰ The fact still is that the ICC has a limited jurisdiction to try individuals for chemical warfare.

There are two important requirements that must be fulfilled for the ICC to exercise jurisdiction: (1) the crime must either have been committed on the territory of a state party to the Rome Statute or by a national of a state party; and (2) the ICC will need to determine whether the alleged crime is subject to its jurisdiction.⁴¹ Regrettably, the above requirements pose formidable challenges. Because many states are not parties to the Rome Statute, the ICC's ability to hold offenders of chemical warfare accountable is limited. The threshold of proof for determining jurisdiction is so stringent that it becomes almost impossible to prosecute the offenders.⁴²

As noted by international law scholar William Schabas, the challenge of enforcing international law in cases of war crimes highlights the shortcomings of the ICC's jurisdictional framework.⁴³ This is particularly concerning given ongoing conflicts where chemical weapons may be utilized. The absence of effective legal mechanisms too frequently leaves an impression of impunity for those who commit such atrocities.

The history of chemical warfare reveals a disappointing reality: in spite of the establishment of international agreements banning such lethal weapons, they have not been abandoned. Although the Geneva Protocol and the CWC were intended to prevent chemical attacks, enforcement under the Rome Statute remains sporadic due to jurisdictional limitations.⁴⁴ Some weapons' classifications add complexity to the case. White phosphorus, for example, an incendiary chemical

39. *Id.*

40. Rome Statute of the International Criminal Court art. 8 (xxvii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

41. Ahmad, *supra* note 11.

42. *Id.* at 108.

43. William A. Schabas, *The International Criminal Court and Non-Party States*, 28 WINDSOR Y.B. ACCESS TO JUST. 1, 3 (2010).

44. *Id.*

capable of causing extensive and indiscriminate destruction, is not necessarily banned under chemical weapons conventions. Due to this legal loophole, its misuse is frequently never punished. Aside from classification problems, it is very difficult to prosecute those who use chemical weapons due to the ICC's limited jurisdiction.

The Rome Statute mandates that the ICC prosecute only when the crime was perpetrated within a party state or against a national of a party state.⁴⁵ These limitations have the operational consequence of rendering prosecution practically impossible even when solid evidence of chemical weapons use exists. Political barriers and legal technicalities further prevent or delay accountability. If the ICC and the Rome Statute do not apply to white phosphorus, then why does the CWC govern its use?

II. THE ROLE OF WHITE PHOSPHORUS IN MODERN WARFARE AND LEGAL FRAMEWORK

A. "Willie Pete": Understanding White Phosphorus

White phosphorus is an extremely reactive allotropic.⁴⁶ It is wax-like, colorless or white, highly flammable, and dangerous when exposed to oxygen.⁴⁷ This agent is soft and can easily be cut into pieces, which ignite spontaneously when exposed to air. The substance burns at approximately 1,500°F.⁴⁸ It produces a dense, toxic smoke when reacting with atmospheric oxygen; visibility cannot be seen past the smoke. Because of its extreme reactivity, white phosphorus is a hazardous chemical and requires special handling to prevent accidental ignition.⁴⁹ White phosphorus is soluble in organic solvents and is commonly used in the production of phosphoric acid and fertilizers, though it is most notoriously used as a weapon.⁵⁰ The substance is a key component in various munitions such as smoke shells, grenades, and artillery rounds.⁵¹

White phosphorus is often referred to by its military nickname, "Willie Pete."⁵² The origins of that name remain unknown, but it is believed to have been a term coined by soldiers to describe the substance during World War II.⁵³ American soldiers used the term "Pete" to refer to any phosphorus-based smoke round and incendiary shell.⁵⁴ It thus became used often during military

45. *Id.* at 2-3.

46. Racijs, *supra* note 18.

47. *Id.*

48. Marc Garlasco et al., *Rain of Fire- Israel's Unlawful Use of White Phosphorus in Gaza*, HUM. RTS. WATCH, 3 (Mar. 25, 2009), <https://www.hrw.org/reports/iopt0309webwcover.pdf> [<https://perma.cc/E6P4-92DX>].

49. Racijs, *supra* note 18.

50. *Id.*

51. *White Phosphorus*, *supra* note 12.

52. Collins, *supra* note 1.

53. *See id.*

54. *Id.*

campaigns with such types of ammunition, and the phrase has since widely been recognized in military circles when referring to the white phosphorus mention.⁵⁵ The nickname is now used by civilians, as many military video games have begun using the term.⁵⁶

The use of this nickname demonstrates how soldiers and military personnel often take a more colloquial approach to the dangerous weapons they use in combat. Despite the playful nature of the term, the use of Willie Pete is far from benign. The effects of white phosphorus, particularly when used in civilian areas, are catastrophic and result in horrific suffering for civilians exposed.

As mentioned, white phosphorus is a highly reactive chemical, and its implications for humans are very adverse. White phosphorus burns immediately upon exposure to air, producing heat and toxic gases that can cause human injury.⁵⁷ Its most fundamental hazard is the tendency to ignite at contact with oxygen. This leads to severe burns to the skin and internal organs if inhaled.⁵⁸ When white phosphorus is used in civilian areas, the consequences can be lethal. The chemical burns caused by white phosphorus are often deep and irreversible.⁵⁹ These burns are unlike typical fire burns because they continue burning until the phosphorus is deprived of oxygen.⁶⁰ The burns are extremely painful and could cause long-lasting tissue damage. Further, once phosphorus penetrates the skin, it can further damage muscles, nerves, and blood vessels.⁶¹

Inhalation of the white phosphorus fumes is equally dangerous. The toxic smoke produced by burning white phosphorus can cause severe respiratory distress and lung damage.⁶² The phosphorus pentoxide reacts with water in our respiratory system to form phosphoric acid.⁶³ This reaction causes chemical burns to the lungs, leading to difficulty breathing, lung disease, and death.⁶⁴ The inhalation of phosphorus smoke can cause liver and kidney damage.⁶⁵ The use of white phosphorus is equally harmful to the environment. The substance burns hot enough to potentially destroy vegetation and deep soil.⁶⁶ It can also contaminate water supplies and cause mass destruction when deployed in densely populated areas.⁶⁷

55. *Id.*

56. *Willy Pete*, CALL OF DUTY WIKI, https://callofduty.fandom.com/wiki/Willy_Pete [<https://perma.cc/ZL2N-K7HH>] (last visited Dec. 20, 2025).

57. *White Phosphorus*, *supra* note 12.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, WHITE PHOSPHORUS TOX FAQS (1997), <https://www.atsdr.cdc.gov/toxfaqs/tfacts103.pdf> [<https://perma.cc/EZH7-QL9N>] (last visited Oct. 17, 2024).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

All of these issues come into play when white phosphorus is used in zones of armed conflict. In areas that already have little to no aid, deploying white phosphorus can be costly. Civilians will have no way to treat the resulting chemical burns or other health issues. They also cannot fix the environmental impact with the limited relief they have, worsening their situation.

Nevertheless, white phosphorus continues to be used even in modern military conflicts. The widespread use of white phosphorus is mainly due to its practical advantages as a smoke screen and fire starter. These advantages are realized during combat situations where movement may need to be concealed.

One of the key tactical reasons militaries use white phosphorus is its inherent ability to create thick smoke.⁶⁸ When ignited, white phosphorus produces a dense, white cloud that can obscure vision, thus acting as a smoke cover for troops. This smoke not only obscures movement from enemies but also upsets enemy targeting systems, including infrared and optical sensors, making it difficult to strike the intended target.⁶⁹

White phosphorus is also used to mark targets, with common contexts including artillery and airstrikes.⁷⁰ The fact that white phosphorus burns fiercely and for a long time makes it a very effective means of indicating the enemy's positions for subsequent attacks. The chemical's incendiary nature also makes it useful for destroying stockpiles and enemy vehicles.⁷¹ However, the use of white phosphorus as a weapon becomes controversial when it is deployed in or around civilian areas. While its military utility is often cited as justification, the human cost can be staggering.

B. The Convention on Certain Conventional Weapons and Gaps in Its Enforcement

The CCW, adopted in 1980, aimed to mitigate the humanitarian effects of specific weapons that were considered excessively injurious or indiscriminate.⁷² In fact, under the CCW, there is an added protocol called Protocol III, dedicated to incendiary weapons alone.⁷³ The Protocol defines incendiary weapons as those “primarily designed to set fire to objects or to cause burn injury to persons” and prohibits their use in civilian areas.⁷⁴ However, there are significant loopholes, especially with respect to white phosphorus. Since white phosphorus is often considered a dual-use material that has legitimate military uses, such as to cover troop movements by creating smoke or to illuminate targets, it is not,

68. Logan Nye, *The Legal Argument for Willie Pete as a Weapon*, WE ARE THE MIGHTY (Dec. 15, 2022, at 6:59 PST), <https://www.wearethemighty.com/popular/white-phosphorous-legal-war-weapons/> [https://perma.cc/8XMM-Z89C].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Protocol III, *supra* note 15.

74. *Id.* at 171-72.

strictly speaking, prohibited under Protocol III unless employed indiscriminately against civilian targets.⁷⁵

Aside from the limitations identified above, enforcement of the CWC and Protocol III has been problematic. Key states, including the United States, Israel, and Russia, have either failed to ratify certain provisions or have interpreted them in ways that allow the continued use of controversial weapons like white phosphorus.⁷⁶ The United States has ratified the CCW, but with reservations regarding Protocol III, which limits its enforceability in American military operations.⁷⁷ This selective adherence undermines the universal applicability of these treaties and complicates efforts to hold violators accountable.

Besides, there is no express classification of white phosphorus either as a chemical or incendiary weapon within the ambit of these treaties. Thus, its usage falls into a regulatory gray area. The ambiguity allows states to justify their deployments under the guise of military necessity, even when they cause significant harm to civilians. This loophole has been exploited in numerous conflicts, including in Gaza, Iraq, and Syria, where white phosphorus has been used in densely populated areas with devastating consequences.⁷⁸

The historical development of international regulation on chemical and incendiary weapons demonstrates both progress and persistent challenges. While the Geneva Protocol, the CWC, and Protocol III of the CCW established important norms, their limitations leave huge gaps in accountability. The dual-use nature of white phosphorus, combined with its exclusion from more robust regulatory frameworks, underlines the demand for more stringent international standards. Closing these gaps will require not only revisiting existing treaties but also adopting new mechanisms to address the unique challenges posed by weapons like white phosphorus in modern warfare. This historical context provides a foundation for understanding the current regulatory landscape and the urgent need for reform.

III. DOCUMENTED WHITE PHOSPHORUS ATTACKS AND IMPACT

While some countries argue that its primary purpose is to create smokescreens or to serve as a lighting source during battle, its application in civilian areas has raised serious humanitarian and legal concerns, as evidence of its use in such areas has become available. White phosphorus often leaves severe injuries, civilian casualties, and long-term environmental damage, but only

75. Nye, *supra* note 68.

76. Alan Arms & Marija Ristic, *Israel/OPT: Identifying the Israeli army's use of white phosphorus in Gaza*, CITIZEN EVIDENCE LAB: AMNESTY INT'L (Oct. 13, 2023), <https://citizeneyvidence.org/2023/10/13/israel-opt-identifying-the-israeli-armys-use-of-white-phosphorus-in-gaza/> [https://perma.cc/U52T-UKDR].

77. S. REP. NO. 110-22 (2008) at 3-4, <https://www.congress.gov/congressional-report/110th-congress/executive-report/22/1> [https://perma.cc/UG2V-6CDB] (last visited Sep. 10, 2025).

78. Rascius, *supra* note 18.

weak enforcement provisions exist under international law.

A. Israel (2008)

The most widely known use of white phosphorus was in Operation Cast Lead (2008-09), when Israeli troops used white phosphorus shells in Gaza.⁷⁹ Human rights groups, including Amnesty International and Human Rights Watch, and a United Nations fact-finding mission found that white phosphorus shells were used in civilian areas, including around schools, hospitals, and United Nations bases.⁸⁰ The material's incendiary nature led to severe burns, destruction of civilian infrastructure, and many deaths.

Although Israel initially denied the use of white phosphorus, later admissions justified its use as a means of creating smokescreens and concealing troop movements.⁸¹ Senior Military Analyst Marc Garlasco argued that deploying such a weapon in a crowded urban environment violated international humanitarian law.⁸² The UN 71-page report (2009) stated that these actions could have been war crimes because the indiscriminate impact of white phosphorus on civilians and infrastructure was evident.⁸³

The effects of this attack were felt beyond immediate death tolls. Gaza's water and soil sources were polluted, rendering farming operations almost impossible in targeted zones.⁸⁴ Structures and houses were left permanently damaged, aggravating the humanitarian situation in an already dire area.⁸⁵ Although worldwide condemnation ensued, legal measures were scant, illustrating the difficulties of bringing state actors to book for the use of white phosphorus.

B. US-Led Coalition in Iraq and Syria (2017)

White phosphorus use has not been limited to state-state conflicts. White phosphorus munitions were utilized by the U.S.-coalition in Iraq and Syria to attack ISIS in Mosul, Iraq (2016-17) and Raqqa, Syria (2017).⁸⁶ Although the coalition claimed the material was used primarily to generate smokescreens and target enemy positions, video footage showed its use in urban areas. Eyewitness accounts further alleged that the attacks caused civilian fatalities and the

79. Garlasco, *supra* note 48.

80. *Id.*

81. *Id.* at 4.

82. *Id.* at 62.

83. *Id.* at 65.

84. *Id.* at 55.

85. *Id.* at 49-56.

86. *Iraq/Syria: Danger from US White Phosphorus*, HUM. RTS. WATCH (June 14, 2017), <https://www.hrw.org/news/2017/06/14/iraq/syria-danger-us-white-phosphorus> [<https://perma.cc/8SJ7-SJ4X>].

displacement of entire neighborhoods.⁸⁷

Amnesty International and Human Rights Watch reports documented horrific wounds to civilians.⁸⁸ White phosphorus burns continue to smolder in the victim's body, rendering treatment virtually impossible and frequently lethal or permanently crippling.⁸⁹ Uncontained spread in urban areas is the cause of widespread destruction.⁹⁰ Not much has been done regarding such conduct despite overwhelming proof, which likewise signifies loopholes for international law enforcement of incendiary weapons.

C. Russia's War on Ukraine (2022)

The use of white phosphorus by Russian troops has been widely reported since February 2022, when Russia invaded Ukraine to fight on Luhansk's soil.⁹¹ The evidence consisted of videos supplied by the authorities in Ukraine, satellite photographs, and eye reports seemed to indicate that the bombings were likely incendiary white phosphorus bursts.⁹² Notwithstanding the subsequent investigations, experts view the use of such weaponry targeting civilians as an international humanitarian law violation.

White phosphorus was reportedly used in Mariupol, where residents described widespread fires, burns, and damage to homes and hospitals.⁹³ As in earlier conflicts, the Russian-aligned officials deny reports that they used incendiary munitions against civilian targets, but the evidence is compelling nonetheless.⁹⁴ If true, the attacks would be war crimes under the Geneva Conventions, but enforcement is complicated by geopolitical forces.⁹⁵

D. Israel's Use of White Phosphorus in Lebanon (2006 and 2023)

In the 2006 war between Israel and Hezbollah, Lebanon accused Israel of using white phosphorus weapons in southern Lebanon.⁹⁶ The Lebanese government and medical officials reported civilian casualties from severe burns

87. *Id.*

88. *Id.*

89. *Id.*

90. Marc Garlasco, *supra* note 79.

91. Juliette Bénézit & Marie Slavicek, *War in Ukraine: What are white phosphorus bombs?*, LE MONDE (Mar. 25, 2022, 5:29 CET), https://www.lemonde.fr/en/international/article/2022/03/25/war-in-ukraine-what-are-white-phosphorus-bombs_5979151_4.html [<https://perma.cc/FN5N-7PHJ>].

92. *Id.*

93. Yuras Karmanau & Adam Schreck, *Ukraine investigates claim that phosphorus munitions were dropped in Mariupol*, PBS NEWS (April 12, 2022, 11:05AM EDT), <https://www.pbs.org/newshour/world/ukraine-investigates-claim-that-phosphorus-munitions-were-dropped-in-mariupol> [<https://perma.cc/AA3G-QFTW>].

94. *Id.*

95. Geneva Protocol, *supra* note 4.

96. Salhani, *supra* note 20.

that were consistent with white phosphorus exposure.⁹⁷ Israeli forces initially denied the claim, but later confirmed it, again justifying their actions as military necessities on a battlefield and not as attacks on civilians.⁹⁸

The long-term consequences of such attacks were catastrophic. In addition to immediate casualties, the environmental destruction rendered large areas unlivable, as contaminated land and water resources disrupted agriculture and local economies.⁹⁹ As in Gaza, there was no accountability for these attacks, reflecting the weaknesses in international enforcement mechanisms.

Israel has indicated, as recently as 2023, that it has again employed white phosphorus in South Lebanon and Gaza, sparking renewed global outrage.¹⁰⁰ Human Rights Watch has verified the presence of white phosphorus shells among civilian populations through video and eyewitness accounts.¹⁰¹ The use of this chemical weapon in civilian residential areas escalated tensions and caused severe injuries among civilians. The latest incidents once again highlight how white phosphorus remains a repeat perpetrator of contemporary warfare, even as it is nearly universally reviled and exists in a state of legal ambiguity.

E. The Broader Impact: Civilian Harm and Environmental Damage

White phosphorus inflicts multi-dimensional harm on civilian populations. The unusual combustion characteristics of the material make it essentially impossible to extinguish once it has come into contact with skin, often causing deep tissue burns that are fatal or permanently disfiguring.¹⁰² Survivors face long-term medical consequences, including chronic pain, respiratory distress, and psychological trauma from witnessing the gruesome wounds inflicted on their communities.

In addition to the immediate human loss, environmental pollution is one of the most serious consequences of white phosphorus use. The chemical contaminates water and soil, rendering the affected land uninhabitable for humans.¹⁰³ Wildlife is not spared either, as poisoned water sources and burnt landscapes lead to ecosystem collapse in the affected regions.¹⁰⁴

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Questions and Answers on Israel's Use of White Phosphorus in Gaza and Lebanon*, HUM. RTS. WATCH (Oct. 12, 2023), <https://www.hrw.org/news/2023/10/12/questions-and-answers-israels-use-white-phosphorus-gaza-and-lebanon> [<https://perma.cc/TJ8H-AJGN>].

102. *White Phosphorus*, *supra* note 12.

103. United Nations Environment Programme, *Damage to Gaza Causing New Risks to Human Health and Long-Term Recovery*, NEW UNEP ASSESSMENT, (June 18, 2024), <https://www.unep.org/news-and-stories/press-release/damage-gaza-causing-new-risks-human-health-and-long-term-recovery> [<https://perma.cc/3RXW-F2N8>].

104. *See generally*, Antoine Kallab & Leila Rossa Mouawad, *The Socio-Environmental Impact of White Phosphorous Ammunition in South Lebanon: Analysis and Mitigation Strategies*,

For example, the residue of white phosphorus bombings in Gaza impeded reconstruction and posed long-term health risks through lingering contamination.¹⁰⁵ The same environmental devastation was seen elsewhere, including Mosul and Raqqa, underscoring the enduring effects of white phosphorus use in urban warfare.¹⁰⁶

IV. THE FIRST REFORMS: STRENGTHENING INTERNATIONAL REGULATIONS OF INCENDIARY WEAPONS

The international legal framework governing incendiary weapons, particularly white phosphorus, is in dire need of reform. The existing treaty, Protocol III, has proven insufficient to adequately regulate the use of white phosphorus, especially in civilian contexts. Although Protocol III prohibits the use of incendiary weapons in populated areas, ambiguities and a lack of comprehensive enforcement have allowed states to exploit loopholes in the law, with civilians suffering the most consequences.¹⁰⁷ The following section offers reforms for the augmentation of existing protocols and the creation of new treaties to fill in the knowledge gap that has created an accountability shortfall with respect to the use of incendiary weapons like white phosphorus.

A. Banning White Phosphorus Completely

The most immediate and self-evident reform would be to ban white phosphorus as an outright, scheduled chemical weapon under existing international accords. But this prohibition is impractical since it has essential military applications, including illumination, signals, and generating smoke screens to cover up the movements of troops.¹⁰⁸ If an outright prohibition were feasible, it would most likely have already been included in past chemical warfare norms, such as the CWC or the CCW. The reason that it is outside of these bans is exactly due to its acknowledged tactical value, which renders a complete ban unlikely to receive international acceptance. Rather, reforms need to concentrate on constraining its use in manners that reduce civilian damage while maintaining its legitimate military roles.

B. Strengthening Protocol III

The reform of Protocol III is a key first step toward better regulation of

AUB NATURE CONSERVATION CTR. (Nov. 2023), <https://www.aub.edu.lb/natureconservation/Documents/Brief%20WP%20English.pdf> [<https://perma.cc/7SCP-CGJM>].

105. See HUM. RTS. WATCH, *supra* note 86.

106. *Id.*

107. Unchecked Harm: The Need for Global Action on Incendiary Weapons, HUM. RTS. WATCH (Nov. 2022), https://www.hrw.org/sites/default/files/media_2022/11/incendiariesreport_11.08_final.pdf [<https://perma.cc/959R-JWAL>].

108. Collins, *supra* note 1.

incendiary weapons. The first to be discussed is the definition of incendiary weapons under the protocol. As it stands, the treaty language fails to capture the full scope of weapons like white phosphorus.¹⁰⁹ Redefining the standards of incendiary weapons is a crucial step toward addressing this gap. This would entail broadening the definition to include dual-use materials like white phosphorus, which serve legitimate military purposes yet cause devastating effects in civilian areas. Such an expanded definition prevents states from exploiting technicalities to continue using this weapon in populated regions, forcing legal language to keep pace with evolving battlegrounds.

A second area of reform involves clearer prohibitions on the use of incendiary weapons in civilian areas. While Protocol III already prohibits the use of incendiary weapons against civilian targets, it does not account for the effects of dual-use weapons like white phosphorus, which can be used for military purposes while still causing significant civilian harm.¹¹⁰ This loophole should be closed by revising the protocol to explicitly prohibit any use of an incendiary weapon, including white phosphorus, in an urban or other densely populated environment. This would remove any gray areas or wiggle room and guarantee that any military benefit derived from these weapons would not come at the expense of civilian lives and infrastructure.

Another key area of reform needed is the inclusion of non-state actors within the scope of Protocol III. Non-state actors, such as insurgent groups and militias, have increasingly used weapons during urban warfare in conflicts in recent times.¹¹¹ However, these actors generally fall outside the jurisdiction of traditional international treaties, and accountability mechanisms are lacking for their actions.¹¹² This gap calls for a revision to Protocol III, ensuring ways to hold non-state entities responsible for using incendiary weapons.¹¹³ In this way, international law would extend these prohibitions to non-state actors, further developing and solidifying its system regulating incendiary weapons, while preventing such groups from exploiting loopholes in the law.

The prosecution of the use of white phosphorus as an incendiary weapon often relies on proof of intent, which is quite difficult to prove under international law.¹¹⁴ White phosphorus is a dual-use item: it may be used for legitimate military purposes, including creating smoke screens or illumination to mark targets, but it may also be weaponized with devastating impacts on

109. Protocol III, *supra* note 15.

110. *See id.*

111. *Middle East and North Africa 2024*, AMNESTY INT'L (<https://www.amnesty.org/en/location/middle-east-and-north-africa/report-middle-east-and-north-africa/>) [<https://perma.cc/4KVC-TVRR>] (last visited Sep. 14, 2025).

112. *See id.*

113. *Id.*

114. Matthew J. Aiesi, *The Jus in Bello of White Phosphorus: Getting the Law Correct*, LAWFARE (Nov. 26, 2019), <https://www.lawfaremedia.org/article/jus-bello-white-phosphorus-getting-law-correct> [<https://perma.cc/F4WT-6F9X>].

civilians and infrastructure.¹¹⁵ The latter would need to be evidenced clearly as having been deployed with the intent to cause harm to non-combatants¹¹⁶ specifically, or to violate humanitarian considerations per se, and not to fulfill a legitimate military purpose.¹¹⁷ This is problematic in an armed conflict where the same act, such as attacking a location, can be perceived as both a strategic imperative and an intentional attack on civilians.¹¹⁸ Furthermore, military forces can use the vagueness of their legal standing by claiming tactical necessity to employ the device, while evading liability for the incidental damage it inflicts.¹¹⁹ The legal gray area involved makes it exceedingly difficult to develop a case that meets the burden of proof necessary for prosecution under international law.

Finally, to ensure all these changes are effective, provisions for monitoring compliance and reporting are necessary. A strong monitoring and enforcement system would provide greater transparency and accountability for those using incendiary weapons.¹²⁰ Proposals for such bodies could include the establishment of an international commission empowered to investigate incidents involving white phosphorus and other incendiary weapons. This body would be able to impose sanctions on violators and provide greater avenues for affected communities to report violations. This would also have the added effect of fostering transparency initiatives that might include regular reporting by state parties on military practices and the use of incendiary weapons, which would keep the international community vigilant in its protection of civilians.

C. Ratifying a New Treaty

Besides strengthening Protocol III, there is an urgent need to broaden the scope of the CCW to more effectively deal with the use of white phosphorus in civilian areas.¹²¹ This would include punishing the use of white phosphorus in populated areas as a serious violation of international law. While Protocol III discusses incendiary weapons in general, a more explicit framework for regulating white phosphorus could emanate from the CCW. This extended framework would, once and for all, establish that the use of white phosphorus as a weapon of war, especially in urban areas, is an unacceptable breach of

115. *Id.*

116. *Practice relating to Rule 1, The Principle of Distinction between Civilians and Combatants*, ICRC DATABASE: CUSTOMARY IHL: PRAC., <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule1> [<https://perma.cc/XG9B-V45W>] (last visited Sept. 14, 2025).

117. Collins, *supra* note 1.

118. Luigi Daniele, *Incidentalities of the Civilian Harm in International Humanitarian Law and its Contra Legem Antonyms in Recent Discourses on the Laws of War*, 29 J. OF CONFL. & SEC. L. 21 (2024), <https://doi.org/10.1093/jcsl/krae004> [<https://perma.cc/CZ75-B29M>].

119. Collins, *supra* note 1.

120. Maya Brehem, *Protecting Civilians From the Effects of Explosive Weapons: An Analysis of International Legal and Policy Standards*, U.N. INST. FOR DISARMAMENT RSCH. (Aug. 2012), <https://unidir.org/files/publication/pdfs/protecting-civilians-from-the-effects-of-explosive-weapons-en-293.pdf> [<https://perma.cc/D7HN-8UVV>].

121. Collins, *supra* note 1.

international humanitarian law and human rights, which warrants stronger deterrents and penalties.¹²²

Second, the expanded CCW should provide for binding compliance measures, including sanctions, audits, and penalties against violators. Today, the CCW depends on voluntary compliance, which has proven farcical in the face of violations by state and non-state actors.¹²³ The introduction of binding mechanisms would require states to comply with international regulations on incendiary weapons and establish penalties for non-compliance. These actions could include financial penalties, trade embargoes, and limitations on military assistance for states identified for irresponsible or unlawful use of white phosphorus.

D. This Note's Sample Reform to Protocol III

Because this note urges a drastic revision of current regulations, the following is a sample treaty on incendiary weapons that differs from Protocol III in addressing its shortcomings and closing remaining loopholes. The proposed system has more specific definitions, stricter limits on the deployment of such incendiary weapons, and binding enforcement provisions to ensure compliance. The reform to Protocol III would be as follows:

Prohibition and Regulation of White Phosphorus and Incendiary Weapons in Civilian Populations aims to fill existing loopholes and establish strict regulations regarding the use of incendiary weapons. *Article 1* makes a provision for the field of application such that this protocol will extend to the production, use, and stockpiling of all incendiary weapons, including white phosphorus, in international armed conflicts.¹²⁴ The bans are on both state and non-state actors, including insurgents and paramilitary groups.¹²⁵ *Article 2* is particularly aimed at the use of incendiary weapons in or adjacent to civilian-populated areas.¹²⁶ "Close proximity" is not less than 5,000 meters (approximately 3.1 miles)¹²⁷ from any civilian center, a definition which will be determined and updated by the International Regulatory Commission on Incendiary Weapons (IRC-IW).¹²⁸ The IRC-IW will also be charged with conducting surveys and updating geographic classifications of civilian and military zones to ensure conformity. Any use of incendiary weapons in civilian

122. U.N. SCOR, 78th Sess., 9632d mtg. at 16, U.N. Doc. S/PV.9632 (Resumption 1) (May 21, 2023), <https://documents.un.org/doc/undoc/pro/n24/140/54/pdf/n2414054.pdf> [<https://perma.cc/5A73-32FK>].

123. U.N. Convention on Certain Conventional Weapons, art. 3, Oct. 10, 1980, 1342 U.N.T.S. 137.

124. Protocol III, *supra* note 13.

125. *Id.*

126. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 2, Oct. 10, 1980, 1342 U.N.T.S. 137.

127. This number is given as an example and is subject to change.

128. This Committee does not currently exist but would be created to oversee the use of incendiary weapons.

spaces will constitute a grave violation of international humanitarian law.

Article 3 establishes procedures for verification and compliance by creating an International Monitoring and Enforcement Body (“IMEB”). IMEB will be authorized to conduct surprise inspections, impound forensic evidence, and document claimed violations. In addition, all state parties are mandated to submit annual reports on their military’s use, storage, and deployment of incendiary weapons.¹²⁹ Failure to comply will have sanctions, including economic sanctions, restrictions on military aid, and potential referral to the ICC for prosecution.

Article 4 has very limited exceptions, and incendiary weapons are employed only against unoccupied, fixed military positions subject to stringent IMEB verification. Any state or non-state actor that wishes to utilize such weapons must obtain advance permission, except for cases of imminent and verifiable national defense needs. With these measures, this proposed protocol aims to strengthen international norms and encourage responsibility in the use of incendiary weapons.

V. THE SECOND REFORM: ALLIANCES AND THE CREATION OF NEW INTERNATIONAL BODIES

A. Regional Alliances

Regional cooperation and agreements can also be a crucial factor in improving international standards for regulating incendiary weapons.¹³⁰ Regional cooperation and agreements would mean regional neighbor-states coming together to build commonly unified standards for the application and trade of incendiary weapons.¹³¹ This may involve bilateral commitments¹³² regarding the ban on production, sale, and use of white phosphorus, or an agreement to cooperate in investigations and prosecutions for unlawful use. Examples from other areas of international law, such as regional arms control agreements, can serve as a model for how such initiatives could work. Additionally, regional organizations could bridge gaps among states resistant to international norms, enabling dialogue and cooperation on regulating incendiary weapons.

Such regional partnerships could further extend to regional pacts on the humanitarian effects of incendiary weapons and shared efforts in monitoring

129. See *Myths and Realities about Incendiary Weapons*, HUM. RTS. WATCH (Nov. 14, 2018), <https://www.hrw.org/news/2018/11/14/myths-and-realities-about-incendiary-weapons> [<https://perma.cc/BL4X-65A9>].

130. *Disarmament*, U. N., <https://www.un.org/en/global-issues/disarmament> [<https://perma.cc/6Y2F-QNBS>] (last visited Feb. 16, 2025).

131. *Id.*

132. Adam Hayes, *Bilateral Contract: Definition, How it Works, and Example*, INVESTOPEDIA (Apr. 22, 2024), <https://www.investopedia.com/terms/b/bilateral-contract.asp> [<https://perma.cc/ZBT7-9FCB>].

and enforcement. The pacts could provide aid to the victims of white phosphorus incendiary attacks and establish methods for investigating violators and holding perpetrators accountable. Similarly, regional agreements could nurture cooperation among neighboring states and create momentum for broader international reforms, with improved mechanisms to enforce laws regulating incendiary weapons.¹³³

A multi-faceted approach is required to regulate incendiary weapons such as white phosphorus: strengthening existing treaties, introducing binding mechanisms to ensure greater compliance, and increasing international cooperation. Reinforcing Protocol III of the CCW and making the CCW as comprehensive as possible are key to the critical humanitarian and environmental impacts of white phosphorus.¹³⁴ But for this reform to actually take hold, what must complement it is a more robust enforcement mechanism and regional coordination to ensure accountability is secured, and recurrence is avoided.¹³⁵ In addressing these gaps in international law, the international community could go a long way toward putting an end to the ignoble use of white phosphorus in civilian concentrations and limiting its horrific effects.

B. The Creation of New International Bodies

Apart from the original reform, this note introduces the creation of new international institutions to regulate the use of incendiary weapons. The IRC-IW and the IMEB would be the primary institutions to regulate, monitor, and ensure compliance with the newly proposed international norms on the use of incendiary weapons, in particular white phosphorus.¹³⁶ These institutions would be established under multilateral agreements, with both state and non-state actors, and would exist within the broader framework of international humanitarian law.¹³⁷

C. Establishing the IRC-IW and IMEB

The creation of the IRC-IW and IMEB would be a multilateral agreement to be ratified by a large majority of state parties. The agreement would establish the composition, mandate, and jurisdiction of these bodies. The

133. Press Release, Security Council, Today's Challenges Require More Effective and Inclusive Global Cooperation, Secretary-General Tells Security Council Debate on Multilateralism, U.N. Press Release, SC/15140 (Dec. 14, 2022), <https://press.un.org/en/2022/sc15140.doc.htm> [<https://perma.cc/F8K2-DXZJ>].

134. *Id.*

135. *Id.*

136. "They Burn Through Everything:" *The Human Cost of Incendiary Weapons and the Limits of International Law*, HUM. RTS. WATCH (Nov. 9, 2020), <https://www.hrw.org/report/2020/11/09/they-burn-through-everything/human-cost-incendiary-weapons-and-limits> [<https://perma.cc/D6GT-BT3G>] (proposing institutions analogous to those regulating CCW Protocol III).

137. *Id.* (envisioning multilateral mechanisms within international humanitarian law framework to strengthen incendiary weapons regulation).

IRC-IW would be an administrative body responsible for demarcating the geographic boundaries between civilian and military areas in which incendiary weapons are banned or controlled.¹³⁸ IMEB, on the other hand, would be an enforcement authority, monitoring compliance with the new legal regime, conducting investigations, and imposing penalties on defaulters.

These institutions would be funded through obligatory contributions from signatory nations, international institutions, and voluntary contributions from parties committed to applying international humanitarian law.¹³⁹ The treaty will also establish an independent review committee of legal and military experts, human rights groups, and representatives of communities affected by armed conflict to achieve transparency and accountability in their actions.

D. IRC-IW: Regulation

The IRC-IW would be tasked with establishing clear geographical criteria for the employment of incendiary weapons.¹⁴⁰ It would establish and revise an international registry that categorizes areas of conflict, areas with civilians, and military battlefields of operations. The registry would be regularly updated using satellite imagery, ground surveys, and consultations with humanitarian organizations operating in conflict zones.¹⁴¹

The IRC-IW would also provide advisory opinions on the legal status of particular weapons under international law. It would provide annual reports on incendiary weapon employment and provide suggestions to the United Nations and state parties for reforms needed in law.¹⁴² The IRC-IW would also play a significant role in developing training materials for military officers on compliance with the newly introduced limitations on incendiary weapons.

E. IMEB: Monitoring and Enforcement

IMEB will be the principal enforcement mechanism, enforcing the revised regulations through independent investigations and compliance audits. IMEB could conduct unannounced inspections on military bases, weapons storage

138. *Id.* (proposing administrative mechanisms to enforce spatial restrictions on incendiary weapons under international humanitarian law).

139. Magdalena Sapala & Sophia Stutzmann, *Understanding the Financing of Intergovernmental Organisations*, EUR. PARLIAMENTARY RSCH. SERV., EUR. PARL. DOC. (PE 652.084) (2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652084/EPRS_BRI\(2020\)652084_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652084/EPRS_BRI(2020)652084_EN.pdf) [<https://perma.cc/U5SR-UM6P>] (last visited Sep. 17, 2025) (demonstrating that other intergovernmental institutions receive funding this way making it a practical way for this proposed organization to receive funding as well).

140. U.N. OFF. FOR DISARMAMENT AFFS., *The United Nations Office for Disarmament Affairs hosted an event on the regulation of Incendiary Weapons*, (Dec. 6, 2024), <https://disarmament.unoda.org/en/updates/united-nations-office-disarmament-affairs-hosted-event-regulation-incendiary-weapons> [<https://perma.cc/YL32-HCCG>].

141. *Id.*

142. *Id.*

facilities, and combat zones where suspected use of incendiary weapons occurs.

IMEB would rely on a combination of satellite imagery intelligence, forensic analysis of battle site wreckage, and testimony by target civilians and NGOs. IMEB would compile evidence and report findings to a global court, the ICC, or send files to a new judicial body assigned to prosecute allegations of violations against the prohibitions on incendiary weapons.

IMEB would also implement a whistleblower mechanism to encourage military staff and civilians to report abuse of white phosphorus and other incendiary weapons. Protection from intimidation would be ensured for whistleblowers, and evidence collection must be free from political or military interference.

F. Sanctions and Accountability Mechanisms

The IRC-IW and IMEB would each have enforcement provisions to ensure perpetrators' accountability through diplomatic, economic, and legal means. States that violate the treaty can be penalized with economic sanctions, military aid suspension, and potential trade restrictions on arms sales.¹⁴³

For state responsibility, military commanders and government leaders responsible for the use of incendiary weapons among civilian populations would be taken to the ICC or to a special treaty tribunal. Incendiary weapons users who were non-state actors could be found guilty of criminal charges and then face international arrest warrants and asset freezes, cutting off their financial resources to engage in operations.

The establishment of the IRC-IW and IMEB would provide a robust framework for the regulation and enforcement of bans on incendiary weapons, particularly white phosphorus. Through the application of clear geographical controls, autonomous monitoring, and rigorous accountability procedures, these organizations would significantly reduce the misuse of incendiary weapons in conflict zones. The success of these organizations would depend on mass international cooperation and an unwavering commitment to enforcing humanitarian law in modern warfare.

VI. THE LAST REFORM: UNIVERSAL JURISDICTION

Although other reforms will take years to be ratified, the final reform discussed in this note emphasizes that it is now up to individual countries to act. The final recommendation involves prosecuting crimes under universal jurisdiction, empowering countries to prosecute individuals regardless of where the crimes were perpetrated. This approach not only fortifies the global fight against impunity but also encourages states to participate positively in

143. Michael Galant, *US Sanctions Policy: Asked Questions*, CTR. FOR ECON. & POL'Y RSCH. (Feb. 25, 2025), <https://cepr.net/publications/us-sanctions-policy-frequently-asked-questions/> [https://perma.cc/J422-GR3L].

implementing international justice and law.

A. What Is Universal Jurisdiction?

Universal jurisdiction provides a unique and powerful legal mechanism for the prosecution of individuals responsible for the unlawful use of white phosphorus in war.¹⁴⁴ While amending existing protocols, as discussed in the preceding parts of this note, would significantly strengthen the legal regime for incendiary weapons, universal jurisdiction is an independent means of assurance of accountability. This principle allows states to prosecute suspects of serious crimes such as war crimes and crimes against humanity, regardless of where the suspected crimes were committed or the nationality of the perpetrator.¹⁴⁵ Given the disastrous humanitarian consequences of white phosphorus used in populated neighborhoods, universal jurisdiction is one feasible path in the pursuit of justice when the aggressor state declines or is unable to prosecute its own government leaders or soldiers.

The rationale behind universal jurisdiction is that certain crimes, like war crimes and crimes against humanity, are so grave that they concern the international community at large.¹⁴⁶ The indiscriminate effects of white phosphorus, when deployed in a civilian zone, cause severe burns, damage to the environment, and long-term harm to civilians, making its use qualify under these definitions of international crimes.¹⁴⁷ When white phosphorus is employed intentionally or indiscriminately in a way to attack civilians or cause unnecessary suffering, it violates the fundamental principles of international humanitarian law, those of distinction and proportionality. These violations are prosecutable under universal jurisdiction, as they constitute the type of crimes that have already been tried in international courts.

One of the most important advantages of universal jurisdiction is its potential to circumvent political and legal obstacles that often bar prosecution within the state where the crimes were committed.¹⁴⁸ The majority of states that have used white phosphorus in civilian areas have failed to prosecute their own soldiers, typically citing national security or military necessity as justifications.¹⁴⁹ In such instances, universal jurisdiction provides an alternative

144. *Universal Jurisdiction*, THE CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> [https://perma.cc/6H7B-QRDH] (last visited Sep. 24, 2025).

145. *Id.*

146. *Universal Jurisdiction*, TRIAL INT'L, <https://trialinternational.org/topics-post/universal-jurisdiction/> [https://perma.cc/EYK8-2FZM] (last visited Sep. 25, 2025).

147. Collins, *supra* note 1.

148. AMNESTY INT'L, *Universal Jurisdiction: The duty to enact and enforce jurisdiction – Introduction*, Index No. IOR 53/002/2001, at 5 (Aug. 31, 2001), <https://www.amnesty.org/en/documents/IO53/002/2001/en/> [https://perma.cc/ZP34-UQVV].

149. *Id.*

avenue of justice by allowing third-party states to prosecute offenders.¹⁵⁰ The principle of universal jurisdiction has been used effectively in numerous instances of prosecuting war crimes and crimes against humanity, and there exists a sound precedent for its application to white phosphorus abuses.¹⁵¹

B. Examples of Universal Jurisdiction

One of the best examples of the application of universal jurisdiction is the prosecution of individuals responsible for the Rwandan Genocide. Following the 1994 atrocity, several European nations, including Belgium¹⁵² and France, exercised universal jurisdiction to prosecute Rwandan officials and militia members who fled the country.¹⁵³ These cases demonstrate that even when a government does not wish to prosecute its own citizens, the international legal framework can still be utilized to prosecute criminals. Similarly, the International Criminal Tribunal for the former Yugoslavia ("ICTY") used the precepts of universal jurisdiction to prosecute individuals who perpetrated war crimes in the Balkan wars of the 1990s.¹⁵⁴ These cases established a precedent for the prosecution of war criminals beyond their home jurisdictions, reaffirming the principle that egregious violations of international law ought not to go unpunished.

More recently, universal jurisdiction has been invoked in response to war crimes committed during the Syrian Civil War.¹⁵⁵ Several European states, including Germany and Sweden, have arrested and prosecuted Syrian officials suspected of torture, extrajudicial killings, and other human rights abuses.¹⁵⁶ Several European nations, including Germany and Sweden, have employed universal jurisdiction to prosecute individuals for war crimes committed in the Syrian Civil War.¹⁵⁷ In Germany, the landmark Al-Khatib trial commenced in April 2020, the first international prosecution of state-sponsored torture in

150. *See Id.*

151. *Id.* at 21-27.

152. Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST., 428 (2003).

153. Pierre Lepidi, *Le docteur Eugène Rwamucyo condamné à vingt-sept ans de réclusion pour complicité du génocide des Tutsi au Rwanda*, [Dr. Eugène Rwamucyo sentenced to twenty-seven years in prison for complicity in the genocide of the Tutsi in Rwanda] LE MONDE (Oct. 31, 2024), https://www.lemonde.fr/afrique/article/2024/10/31/le-docteur-eugene-rwamucyo-condamne-a-vingt-sept-ans-de-reclusion-pour-complicite-du-genocide-des-tutsi-au-rwanda_6368021_3212.html/ [https://perma.cc/XQ44-NUGD].

154. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 1, U.N. Doc. S/RES/827 (1993) (amended Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [https://perma.cc/Y3R8-CLSU].

155. *First criminal trial worldwide on torture in Syria before a German Court*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/> [https://perma.cc/6DAR-HQLG] (last visited Feb. 16, 2025).

156. *Id.*

157. *See id.*

Syria.¹⁵⁸ The main defendant, Anwar R., a former President Bashar al-Assad government official, was found guilty in January 2022 of crimes against humanity, including murder and torture.¹⁵⁹

Likewise, Sweden has sought actively to bring Syrian war crimes to justice. Swedish prosecutors charged Lina Ishaq, aged 52, with genocide, crimes against humanity, and war crimes in September 2024 for her role in Syria between 2014 and 2016.¹⁶⁰ She is alleged to have assisted the Islamic State (“IS”) in buying and enslaving Yazidi women and children and subjecting them to grave suffering and cruel treatment while being held captive at her home in Raqqa.¹⁶¹ It was the first time that Sweden had made such an indictment.

These prosecutions have been made possible by domestic legislation that embraces universal jurisdiction, which allows courts to prosecute extraterritorially committed crimes. The success of these cases demonstrates that universal jurisdiction can be a useful tool for prosecuting violations of international humanitarian law when international courts are unable to become involved because of jurisdictional limitations or political factors.

Exercising universal jurisdiction over white phosphorus offenses would require states to expand their national laws to explicitly place incendiary weapons within the scope of prosecutable crimes. Even though international law has already prohibited the indiscriminate use of incendiary weapons in civilian areas, mechanisms for enforcement remain absent. Such states that are willing to prosecute based on universal jurisdiction must have clear legal thresholds for when the deployment of white phosphorus constitutes a war crime or crime against humanity. This could involve amending domestic legislation to cover violations of Protocol III as prosecutable crimes under domestic jurisdictions.

Universal jurisdiction, for all its promise, is not without challenges. Political factors typically enter the picture on whether states choose to bring cases, as prosecuting individuals from powerful countries can damage diplomatic relations.¹⁶² It might also be difficult to secure sufficient evidence to demonstrate intentional misuse of white phosphorus, particularly in war zones where access to forensic evidence and witness testimony is limited. Nevertheless, satellite photography, forensic investigation, and international cooperation have increased the ability of courts to make sound cases against offenders. International agencies and human rights groups play a significant role in documenting atrocities and supporting prosecutions under universal jurisdiction with evidence.

On the basis of the previous success of universal jurisdiction for the prosecution of war crimes, there is a strong legal and moral argument for its

158. *Id.*

159. *Id.*

160. *Sweden charges woman with genocide, crimes against humanity in Syria*, REUTERS, <https://www.reuters.com/world/sweden-charges-woman-with-genocide-crimes-against-humanity-syria-2024-09-19/> [<https://perma.cc/52G8-JX3G>] (last visited Feb. 16, 2025).

161. *Id.*

162. AMNESTY INT’L, *supra* note 148 at 38.

application to the use of white phosphorus in warfare. Where states do not legislate for or prosecute the unlawful use of incendiary weapons, universal jurisdiction offers a pathway to accountability.¹⁶³ By prosecuting individuals responsible for the use of white phosphorus in civilian zones, the international community can contribute to consolidating the principle that egregious humanitarian law violations will not be tolerated, wherever they occur and whoever commits them.¹⁶⁴ While legal amendments to existing treaties are crucial, universal jurisdiction is an essential and distinct mechanism in the fight against impunity for unlawful use of incendiary weapons.

VII. POTENTIAL ISSUES ARISING FROM THE REFORMS

The introduction of these reforms carries potential problems. At the top of the list is the possibility that states would be hesitant to sign the amended Protocol outlining these new initiatives. The overwhelming majority of states have been reluctant to vest powers in agencies above the state or to encode principles of law under which external states might exert surveillance powers over domestic processes. This reluctance can be driven by a need to maintain sovereignty, political risk aversion, or opposition to the perceived intrusiveness of international law into domestic legal systems.¹⁶⁵ If the edited Protocol fails to secure sufficient ratifications, the entire edifice of accountability could be undermined, and enormous gaps in enforcing international law could follow.

Beyond ratification problems, the establishment of new global institutions to monitor compliance with and enforce these changes introduces a new level of complexity. To be effective, such organizations would require clear jurisdictional authority and, in most cases, approval by member states to pursue enforcement. This dependence on international cooperation can create severe bottlenecks; states can impose limiting conditions or engage in protracted negotiations, thereby hindering the expeditious dispensation of justice. Moreover, a state's political culture can determine the extent to which it will cooperate with international institutions, especially in cases involving influential individuals or politically sensitive matters.¹⁶⁶ Selective cooperation erodes the effectiveness and legitimacy of these new institutions.

The exercise of universal jurisdiction also poses its own set of challenges regarding the cost of money and prosecutorial resource priorities.¹⁶⁷ Prosecution under universal jurisdiction can be extremely expensive, as it entails establishing legal frameworks, training law enforcement and the judiciary, and building investigative capacity.¹⁶⁸ Most countries, especially poorer ones, may

163. *See id.*

164. *See id.*

165. Mark A. Pollack, *Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order*, 13 INT'L J. CONST. L. 873, 873-900 (2015).

166. *Id.*

167. AMNESTY INT'L, *supra* note 148.

168. *Id.*

find the above expense prohibitive.¹⁶⁹ Hence, the implementation of justice for global crimes could take a back seat to other national issues deemed of higher priority. Under such circumstances, the states' potential ability to opt out of universal jurisdiction trials presents a prominent issue, leading to disparate use of justice across jurisdictions.

The principle of universal jurisdiction could also be incompatible with the political priorities of most nations.¹⁷⁰ Leaders may find prosecution inconvenient or unnecessary, particularly if they are politically powerful or represent national interests. The reluctance to prosecute can be enhanced by apprehension for public opinion, potential backlash, or diplomatic relations with other nations. In these environments, the invocation of universal jurisdiction can become selectively exercised, defeating its very purpose of universal accountability for odious crimes.¹⁷¹

The interplay of these challenges is intended to highlight the complexity of changing international legal regimes. Even as the aim of such reforms is to raise the level of accountability and deter future crimes, the pragmatic considerations of implementation must be considered. States may find it difficult to balance their national interests with the demands of international law and thus may have varying levels of commitment towards prosecuting international crimes.¹⁷² For this purpose, policymakers and advocates need to recognize and address these potential issues so that a more effective, sustainable, and equitable system of global justice is established.¹⁷³ The future will be a collaborative effort to coordinate consensus among nations, develop robust legal frameworks, and ensure that the pursuit of justice is not a plague of political or economic expediency.

CONCLUSION

The evolving nature of international law is a barometer of wider changes in society and among states' priorities. As the world becomes more integrated, states' responsibilities no longer end at their frontiers but call upon their involvement to safeguard human rights and bring justice to the perpetrators of atrocities. However, the note has identified that, despite such transformations in legal frameworks, most nations still prioritize military needs and national security over the welfare of their people.¹⁷⁴ Such misplaced prioritization not only helps maintain a culture of impunity but also undermines the very fabric of justice and human rights.

169. *Id.*

170. *Id.*

171. *Id.*

172. See *Understanding the International Criminal Court*, INT'L CRIM. CT. (2018), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> [https://perma.cc/A2V2-2AH2] (last visited Sep. 13, 2025).

173. *Id.*

174. See Exec. Order No. 14,183, 90 Fed. Reg. 8757 (Jan. 27, 2025).

The humanitarian impact of this neglect is severe and should not be exaggerated.¹⁷⁵ Failure to adequately react to crimes against humanity, genocide, and war crimes results in extensive victim and community suffering.¹⁷⁶ It denies them their right to justice and allows future perpetrators the latitude to do it again, establishing a culture of impunity that entrenches cycles of violence and repression.¹⁷⁷ The cycle will be perpetuated as long as states chase military objectives before humanitarian concerns, leaving at-risk groups with no protection or recourse.

In addition, the note has demonstrated that the global community must confront the unpleasant truth that the mechanisms in place today may not be sufficient to deal with the scale and complexity of these humanitarian issues. The resistance to ratifying new protocols, the hurdles posed by the establishment of international institutions, and the hesitancy to prosecute suspected persons under universal jurisdiction all point to a world in which accountability is illusory. The world is changing, but the responses of the majority of countries lag behind, reflecting a significant disparity between the principles of international law and the political circumstances that govern state behavior.

While moving ahead, it should be realized that solutions to such humanitarian issues involve an effort on the part of individual countries and the whole international community. Cooperation, communication, and shared responsibility for upholding human rights are essential components of a successful strategy against impunity. States need to be persuaded to cherish the safeguarding of their people and realize that military might can never be attained at the expense of justice. Instead, a robust system of law that guarantees accountability on the part of the perpetrators needs to be envisioned as a pillar of national security and stability.

Furthermore, it is essential that civil society, advocacy groups, and global communities join hands to raise awareness about such pressing humanitarian emergencies. With an awakened public opinion, greater understanding of the consequences of impunity for international stability and human rights, and action to pressurize their governments, advocacy can exert pressure towards constructive action. This collective response must include the voices of victims and excluded groups, so that their own stories and appeals for justice constitute the focal point of the international law and accountability discussion.¹⁷⁸

By and large, the above issues listed in this note are less than bureaucratic hurdles; they are a grave humanitarian emergency calling for immediate attention and response. The interplay between national interest, security needs, and the pursuit of justice must be approached with care and tact. The international community must now re-evaluate its approach to crimes against

175. See Collins, *supra* note 1.

176. See *id.*

177. See *id.*

178. *Justice for Chemical Attacks*, CW TRIBUNAL, <https://www.cwtribunal.org/#hero/> [https://perma.cc/P86J-3MKL] (last visited Sept. 24, 2025).

humanity and recognize that a nation's power is not measured by its defense but by how it upholds the rights and dignity of every individual. It is only through a continued dedication to reform, accountability, and partnership that we can expect to build such a world where justice will be the standard and victims' voices are heard, opening the door to a more humane and equitable society.

CHARGING AHEAD: LESSONS FROM THE EUROPEAN UNION AND CHINA FOR UNITED STATES FEDERAL REGULATION OF ELECTRIC VEHICLE BATTERY WASTE

MOLLY DONNELL*

INTRODUCTION

“If there is one country that bears the most responsibility for the lack of progress on international environmental issues, it is the United States.”—
Gus Speth, *Red Sky at Dawn*¹

The late nineteenth century saw one of the most monumental battles between three of the greatest inventors of their time: Thomas Edison, Nikola Tesla, and George Westinghouse. Each sought to determine whether the United States’ standard electrical system would be direct current (“DC”) or alternating current (“AC”).² This battle was dubbed the “War of the Currents.”³ Driven by huge leaps in technological innovation, this battle “shape[d] the future of electric power distribution,”⁴ but, more importantly, these technological leaps also solidified an era of environmental challenges that would soon become apparent in the following century.

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1. Steven F. Hayward, *The United States and the Environment: Laggard or Leader?*, AM. ENTER. INST. 1, 1 (Feb. 21, 2008), https://www.aei.org/wp-content/uploads/2011/10/20080221_22749EPO01Hayward_g.pdf?x85095 [<https://perma.cc/2HWC-8K4Z>].

2. Elizabeth Nix, *How Edison, Tesla and Westinghouse Battled to Electrify America*, HIST. (Sep. 5, 2025), <https://www.history.com/news/what-was-the-war-of-the-currents> [<https://perma.cc/J8K2-XG7M>] (explaining that Edison supported the adoption of DC current, which is when “electrical current flows steadily in one direction,” while Tesla and Westinghouse supported AC current resulting in “the current’s flow constantly alternat[ing]”).

3. The “War of the Currents” was a battle deciding whether the DC current or AC current was the most efficient method for electricity distribution. Edison’s invention of the first electrical power station was a revolutionary contribution to the DC current system, which supplied electricity to consumers who lived within a square mile of the DC system. The DC current, however, was quite limited in that electricity could only be supplied within a one-to-two-mile radius because of the large amount of electricity lost during transmission from long distances. Tesla’s AC system marked a significant turning point and was able to overcome what Edison’s could not: the ability to transmit electricity over long distances through efficient power transmission. A monumental demonstration at the Chicago World’s Fair, where twenty-seven million people witnessed AC power lighting the fair, propelled the AC system forward and marked the end of the “War of the Currents.” Arlen Olsen, *The War of the Currents*, SCHMEISER OLSEN & WATTS LLP (Mar. 25, 2024), <https://iplawusa.com/the-war-of-the-currents-a-battle-of-patents-and-power/> [<https://perma.cc/T5UF-UWAF>].

4. *Id.*

While Tesla's AC system—through the eventual trust and support of Westinghouse and the public—became the standard electrical system, it was Edison's invention of the first electrical power station that gave rise to coal-fired power plants.⁵ In 1882, Edison built the Holborn Viaduct, the first coal-fired power station to open in the world.⁶ Coal dominated the energy sector; this increased usage of coal became responsible not only for large increases in greenhouse gas emissions ("GHG") but also brought upon the world the infamous "wicked problem": climate change.⁷

Edison's legacy, however, cannot solely be attributed to environmental harm. In the early 1900s, Edison invented the alkaline storage battery, which eventually evolved into the rechargeable battery technologies seen today.⁸ Edison's invention of the alkaline battery helped pave the way for lithium-ion batteries ("LIBs"), a battery crucial for the rise of electric vehicles ("EVs").⁹ These LIB-powered vehicles help reduce carbon emissions from the transportation sector.¹⁰ Edison's invention of the electric power system and alkaline storage battery highlights an important message: technological progress comes with a vital responsibility to protect the environment.

Just as Edison's electrical power station led to inadvertent and unforeseen environmental problems, the current push to adopt EVs in today's transportation market is presenting a new environmental dilemma: managing the disposal of LIBs at the end of their life cycle.¹¹ While EVs are arguably the answer to reducing carbon emissions from the transportation sector, once a life-cycle analysis is applied to these vehicles, one may question whether EVs are truly the answer to bringing the United States towards a low-carbon future.¹²

5. *Id.*; Clean Growth Fund (@Jonathan Tudor), *Thomas Edison: The Father of Coal-Fired Power and the Unintended Environmental Consequences: A Mixed Legacy?*, LINKEDIN (Oct. 1, 2024), <https://www.linkedin.com/pulse/thomas-edison-father-coal-fired-power-unintended-environmental-kjuge/> [https://perma.cc/9J5T-FUE5].

6. Clean Growth Fund, *supra* note 5.

7. *Id.*; The term "wicked problem" refers to an issue that "presents great scientific and economic complexity, some very deep uncertainties, profound ethical issues, and even lack of agreement on what the problem is." *A Wicked Problem: Controlling Global Climate Change*, WORLD BANK GRP. (Sep. 30, 2014), <https://www.worldbank.org/en/news/feature/2014/09/30/a-wicked-problem-controlling-global-climate-change> [https://perma.cc/8VSY-9H7T].

8. Clean Growth Fund, *supra* note 5.

9. *Id.*

10. *Id.*

11. See Ian Morse, *A Dead Battery Dilemma*, SCI. (May 20, 2021, 12:44 PM), <https://www.science.org/content/article/millions-electric-cars-are-coming-what-happens-all-dead-batteries> [https://perma.cc/2ASF-TMAS].

12. A life cycle analysis "is a tool that scientists and policymakers use to assess the environmental impacts of a product, process, or activity throughout its life cycle—from the extraction of raw materials to its processing, transport, use, and disposal." Two common types of life cycle analyses include the attributional life cycle analysis and the consequential life cycle analysis. An attributional life cycle analysis "seeks to determine what portion of total human environmental impact can be traced to a particular product," whereas a consequential life cycle

Specifically, the source of electricity powering the EVs and the battery waste disposal issues may lead some to question the zero-carbon promises of these vehicles.¹³ Without a standardized system for proper disposal and recycling of LIBs, the materials in the batteries will inevitably reach landfills and result in environmental harm through the release of hazardous materials.¹⁴

With the invention of rechargeable batteries, the next crucial step in the evolution of battery technology will be to address the environmental concerns of disposal and recycling. The goal now is to implement proper practices, so history does not repeat itself, where one problem is solved only to create another. Implementing proper disposal and recycling practices has become increasingly urgent as EVs gain popularity across the world and in the United States.¹⁵ In 2023, EV sales in the United States increased by fifty percent in one year, with over 1.4 million units sold.¹⁶ Further, EV sales approached fourteen million in 2023, with ninety-five percent of these sales occurring in the United States, the European Union (“EU”), and China.¹⁷ The retirement of EV batteries is expected to grow during the second half of the 2030s due to the increasing sales of EVs.¹⁸ These EV sales will lead to an increasing number of batteries that need to be disposed of: “the cumulative burden of electric-vehicle waste is substantial given the growth trajectory of the electric-vehicle market.”¹⁹

This growth in EV sales is not merely a market trend. The top EV sellers have pushed for the adoption of these vehicles to decarbonize the transportation sector and address climate change.²⁰ Importantly, EVs are viewed as the better

analysis “asks how total human environmental impact changes as a result of producing and using that product.” Alexandra B. Klass & Andrew Heiring, *Life Cycle Analysis and Transportation Energy*, 82 BROOK. L. REV. 485, 486-488 (2017).

13. *Id.* at 486.

14. Jay N. Meegoda, Sarvagna Malladi & Isabel C. Zayas, *End-of-Life Management of Electric Vehicle Lithium-Ion Batteries in the United States*, 4 CLEAN TECHS. 1162, 1162 (Nov. 14, 2022), <https://doi.org/10.3390/cleantechnol4040071> [<https://perma.cc/XRW7-G39G>].

15. See *Global EV Outlook 2024*, IEA 11, 24 (2024), <https://www.iea.org/reports/global-ev-outlook-2024> [<https://perma.cc/AM4Z-AZCK>].

16. *Statement by U.S. Energy Secretary Jennifer M. Granholm on 2023 EV Sales*, DEP’T OF ENERGY (Jan. 5, 2024), <https://www.energy.gov/articles/statement-us-energy-secretary-jennifer-m-granholm-2023-ev-sales> [<https://perma.cc/JX8W-JRFJ>].

17. *Global EV Outlook 2024*, *supra* note 15, at 17.

18. *Id.* at 14.

19. Gavin Harper et al., *Recycling Lithium-Ion Batteries from Electric Vehicles*, 575 NATURE 75, 75 (2019).

20. In the United States, the push for decarbonization policies in the transportation sector has been largely affected by presidential administrations, especially in the past decade. For example, the 2017-21 Trump Administration rolled back over one hundred environmental policies, many of which weakened the Obama Administration’s policies, such as mitigating carbon emissions from cars and trucks. The 2021-25 Biden Administration then reversed some of the rollbacks of the Trump Administration. While the United States has made climate progress, the back-and-forth actions of successive administrations have made it difficult to maintain a consistent push for climate-friendly initiatives. See, Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES (Jan. 20, 2021),

alternative to gas- and diesel-powered automobiles due to their mitigating effects of air pollution and GHG emissions.²¹ Moreover, the United States has implemented specific climate targets such as “cut[ting] overall [United States] greenhouse gas emissions 50-52 percent by 2030 relative to 2005 levels, fifty percent electric vehicle sales share by 2030, one hundred percent carbon pollution-free electricity by 2035, and a net-zero emissions economy by 2050.”²² By 2030, the EU seeks to cut GHGs by at least fifty-five percent compared to 1990 levels²³ and aims to achieve net-zero GHG emissions by 2050.²⁴ The EU also seeks to achieve twenty-three percent of global EV sales by 2030.²⁵ In comparison, China seeks to achieve carbon neutrality before 2060 and increase its non-fossil fuel share of primary energy consumption to about twenty-five percent by 2030.²⁶ Despite the United States’ climate goals and its status as a top seller of EVs, the United States continues to lag behind the EU and China in LIB disposal and recycling regulations. This note argues that while the United States has been slow to implement federal LIB waste programs, adopting similar frameworks to those in the EU and China and amending the Resource Conservation and Recovery Act (“RCRA”) could improve the regulatory landscape of LIB recycling and disposal in the United States.

Part I of this note examines the nature of LIBs, the challenges related to their disposal and recycling at the end of their life, and the need for proper disposal and recycling practices. Part II discusses a broad overview of the legal regulatory frameworks for managing the disposal and recycling methods of EV LIBs in the EU, China, and the United States, particularly focusing on RCRA. Part III discusses extended producer responsibility (“EPR”) broadly and considers the shortcomings and successes of the EU and China’s EPR frameworks. Part III also compares China and the EU’s frameworks for EV

<https://www.nytimes.com/interactive/2020/climate/trump-environment-rollback-list.html> [<https://perma.cc/HA28-72WA>]; Oliver Milman & Alvin Chang, *How Biden is reversing Trump’s assault on the environment*, THE GUARDIAN (Feb. 2, 2021), <https://www.theguardian.com/us-news/2021/feb/02/biden-trump-environment-climate-crisis> [<https://perma.cc/5HY8-WRQ8>].

21. David Keith & Aaron Krol, *Electric Vehicles*, MIT CLIMATE PORTAL (July 24, 2023), <https://climate.mit.edu/explainers/electric-vehicles> [<https://perma.cc/2GGA-L728>].

22. *The Climate Crisis: Working Together For Future Generations*, U.S. DEP’T OF STATE, <https://www.state.gov/policy-issues/climate-crisis/> [<https://perma.cc/KE7H-PJG8>] (last visited Oct. 30, 2024).

23. *2030 Climate Targets*, EUR. COMM’N, https://climate.ec.europa.eu/eu-action/climate-strategies-targets/2030-climate-targets_en [<https://perma.cc/M6JB-LEZH>] (last visited Oct. 30, 2024).

24. *2050 Long-Term Strategy*, EUR. COMM’N, https://climate.ec.europa.eu/eu-action/climate-strategies-targets/2050-long-term-strategy_en [<https://perma.cc/E8JT-N78D>] (last visited Oct. 30, 2024).

25. Lauren Fricke, *The Long-Term Problem with Electric Vehicle Batteries: A Policy Recommendation to Encourage Advancement for Scalable Recycling Practices*, 12 SEATTLE J. TECH., ENV’T & INNOVATION L. 27, 39 (2022).

26. MINISTRY OF ECOLOGY & ENV’T OF CHINA, CHINA’S POLICIES AND ACTIONS FOR ADDRESSING CLIMATE CHANGE 5 (2022), <https://english.mee.gov.cn/Resources/Reports/reports/202211/P020221110605466439270.pdf> [<https://perma.cc/MLQ2-RVLQ>].

battery waste regulation to the United States' current framework, while also examining the benefits and limitations of implementing an EPR approach. Lastly, Part IV includes recommendations the United States should consider, drawing from successful practices in the EU and China, to implement a federal EV battery waste management system and strengthen its regulatory landscape.

I. LITHIUM-ION BATTERIES

A. Structure and Components

While Edison's alkaline storage batteries helped pave the way for rechargeable battery technologies, it was not until 1979 that John B. Goodenough created LIBs.²⁷ LIBs are a popular choice of battery in both electronic devices and EVs for their rechargeable and portable systems.²⁸

At the end of its life, EV batteries are generally broken down, and their materials are either recycled individually or used to make a different product than their current form.²⁹ The complexity of LIBs and the materials contained within them emphasizes the challenges in ensuring proper disposal and recycling. To illustrate, current LIBs consist of multiple cells assembled into modules and enclosed within a large pack.³⁰ The battery consists of "an anode, cathode, separator, electrolyte, and two current collectors (positive and negative)."³¹ The lithium is stored in the anode and cathode, where the electrolyte then transports positively charged lithium ions between the anode and the cathode through a separator.³² The cathode material can vary and contain different metal oxides, including lithium cobalt oxide, lithium nickel, or lithium-ion phosphate.³³ As the lithium ions move, free electrons are created in the anode, creating "a charge at the positive current collector," where the electrical current then follows from the current collector to the negative current collector.³⁴ Other parts of the battery are made of additional resources and recyclable materials. The anodes contain materials such as graphite, PVDF, and copper foil; separators contain plastic films generally containing polyethylene or polypropylene; and the electrolyte is usually made of "lithium

27. Harrison Lebov, *A Darker Shade of Green: Hazards Associated with Lithium-Ion Batteries*, 17 J. HIGH TECH. L. 78, 81 (2016).

28. Lauren Neuhaus, *The Electrifying Problem of Used Lithium Ion Batteries: Recommendations for Recycling and Disposal*, 42 ENVIRONS ENV'T L. & POL'Y J. 67, 70 (2018).

29. Fricke, *supra* note 25, at 32.

30. *Id.* at 31.

31. *How Lithium-ion Batteries Work*, U.S. DEP'T OF ENERGY: ENERGY SAVER (Feb. 28, 2023), <https://www.energy.gov/energysaver/articles/how-lithium-ion-batteries-work> [<https://perma.cc/99UQ-9675>].

32. *Id.*

33. Fricke, *supra* note 25, at 31.

34. *How Lithium-ion Batteries Work*, *supra* note 31.

hexafluorophosphate dissolved in ethylene carbonate and dimethyl carbonate.”³⁵

B. Environmental and Social Impacts of LIBs

Manufacturers of LIBs often vary in the design of the battery, including its configuration, size, shape of the cells, modules, packs, and chemical compositions.³⁶ This design inconsistency makes LIBs from EVs difficult to recycle, since the materials’ diverse chemical compositions may require different recycling conditions.³⁷ Moreover, because battery designs vary by manufacturer, the compositions of batteries may never standardize.³⁸ Accordingly, the environmental impacts of a LIB depend largely on the design of the battery.³⁹

The environmental impact of LIBs must be considered when implementing waste management regulations. If LIBs become disposed of at the end of their life, the batteries become electronic waste, also known as e-waste.⁴⁰ The World Health Organization has identified e-waste as one of the fastest-growing types of solid waste globally.⁴¹ Furthermore, since e-waste contains toxic materials, if not properly recycled, it can create toxic chemicals that harm not only the environment but also human health.⁴² Specifically, hazardous materials in the batteries can leak from the battery casings, contaminating groundwater and soil.⁴³ The waste can also end up in landfills and cause large fires due to its mixture with combustible waste.⁴⁴ Because LIBs are chemically and electrically hazardous, the United States Department of Transportation regulates the

35. Fricke, *supra* note 25, at 31. PVDF is a synthetic resin, also known as polyvinylidene fluoride. *Polyvinylidene Fluoride*, BRITANNICA, <https://www.britannica.com/science/polyvinylidene-fluoride> [<https://perma.cc/CJ5E-Y53S>] (last visited Mar. 4, 2025).

36. Fricke, *supra* note 25, at 31.

37. Liz Harland, *The Dirty Effects of Clean Energy Technology: Supportive Regulations to Promote Recycling of Lithium Ion Vehicle Batteries*, 7 SAN DIEGO J. CLIMATE & ENERGY L. 167, 175-176 (2016) (arguing that “[s]tandardization of batteries, materials, and cell design would make recycling easier and more cost-effective.”).

38. Neuhaus, *supra* note 28, at 70, 74.

39. *Id.* at 71.

40. *Environmental Impacts of Lithium-ion Batteries*, UL RSCH. INST. (Mar. 16, 2022), <https://ul.org/research/electrochemical-safety/getting-started-electrochemical-safety/environmental-impacts> [<https://perma.cc/5NWJ-YT2J>].

41. *Electronic Waste (E-waste)*, WORLD HEALTH ORG. (Oct. 1, 2024), [https://www.who.int/news-room/fact-sheets/detail/electronic-waste-\(e-waste\)](https://www.who.int/news-room/fact-sheets/detail/electronic-waste-(e-waste)) [<https://perma.cc/4KZG-EGH5>].

42. *Id.* at 1-4. Children and pregnant women are particularly vulnerable to e-waste’s hazardous effects. Children can become exposed to toxic pollutants from the hazardous waste through waste picking and scavenging for parts, and fetuses exposed to the toxic chemicals may experience a disruption in the development of the central nervous system. Moreover, exposure can harm the structural development and proper functioning of the lungs.

43. Fricke, *supra* note 25, at 35.

44. *Environmental Impacts of Lithium-ion Batteries*, *supra* note 40.

movement of these batteries under the Hazardous Materials Regulations, 49 C.F.R., Parts 171-180.⁴⁵

In addition to harmful battery leakage, there are issues with the mining extraction process used to gather minerals to make the LIBs.⁴⁶ Corporations engage in a “race to the bottom” to make cheap investments in minerals from nations that have an abundance of such resources; however, these mineral-rich nations often engage in harmful practices that allow minerals to be extracted quickly and cheaply.⁴⁷ To gain business from corporations, these nations ignore social and environmental factors, such as cheap child labor, that would otherwise impede quick and cheap extraction.⁴⁸ The extraction process also results in extensive water usage, which creates water scarcity and contamination risks.⁴⁹ The Salar de Atacama region in Chile has been especially impacted by the extraction process: lithium mining consumes sixty-five percent of the region’s water.⁵⁰ Local communities were forced to abandon their ancestral settlements due to groundwater depletion, contaminated soil, and environmental degradation.⁵¹

Cobalt, another mineral extracted for the creation of LIBs, also poses serious environmental risks during the extraction phase. Cobalt mines create sulfuric acid from the sulfur minerals mixing with air and water, a process known as acid mine drainage.⁵² Sulfuric acid itself harms the environment, particularly through its long-term toxicity to aquatic life and its ability to burn plants, birds, and other land animals exposed to its corrosive nature.⁵³

45. Heather D. Stewart, *Municipalities Could Provide Valuable Second-Life Uses of Electric Vehicle Li-Ion Batteries While Legislators and Manufacturers Refine Safe Recycling and Disposal Practices*, 12 BARRY U. ENV’T & EARTH L. J. 130, 147 (2022).

46. Elizabeth H. Rudolf, *Out of Sight, Out of Mind: Addressing the Unseen but Potentially Detrimental Issues of the Lithium-Ion Battery Supply Chain*, 96 TUL. L. REV. ONLINE 28, 39 (2022); Dylan Hays, *My Brother’s Keeper: A Framework for a Legal Obligation to Respect Human Rights in Global Supply Chains*, 88 GEO. WASH. L. REV. 454, 459 (2020).

47. *Id.*

48. *Id.*

49. *Id.* at 39-40.

50. *Id.* at 40 (illustrating how the lithium extraction process has impacted indigenous communities and writing that, “one indigenous protestor’s sign read, “[w]e don’t eat batteries They take the water, life is gone.”).

51. *Id.*

52. *Id.* at 41; *Acid Mine Drainage*, EARTHWORKS, <https://earthworks.org/issues/acid-mine-drainage/> [https://perma.cc/ZMN9-B78P] (last visited Nov. 18, 2024) (explaining that acid mine drainage is particularly harmful because it can persist long after mining activities have stopped. For hard rock surface mines, once acid mine drainage occurs at a large scale, it is not likely that the drainage can be stopped. Therefore, water treatment may be required for hundreds to thousands of years in many hard rock mines across the western United States).

53. *Sulfuric Acid*, AUSTRALIAN GOV’T: DEP’T OF CLIMATE CHANGE, ENERGY, THE ENV’T & WATER (Aug. 15, 2022), https://www.dceew.gov.au/environment/protection/npi/substances/fact-sheets/sulfuric-acid#toc_2 [https://perma.cc/HET4-A4QQ].

C. Environmental and Economic Benefits of EV Battery Recycling

While improper disposal of LIBs can cause significant environmental impacts, effective recycling programs for these batteries can present both environmental and economic benefits.

Effective recycling management offers several environmental benefits. First, improved recycling practices can reduce environmental damage caused by leaking toxins, as fewer hazardous materials would end up in landfills.⁵⁴ Second, recycling is expected to reduce dependence on extracting raw materials by allowing companies to repurpose recovered battery components.⁵⁵ Third, not only can dependence on raw materials be reduced, but this reduced dependence can help conserve rare earth metals and mitigate the environmental harm caused by mining activities.⁵⁶ This reduced dependency can help pave the way toward a circular economy, which is especially important in an era where demand for metals is expected to soar over the next several decades.⁵⁷ The circular economy aims to make a transition to renewable energy and materials while “decoupl[ing] economic activity from the consumption of finite resources.”⁵⁸ This requires tackling issues associated not only with a product’s end-of-life management, but also focusing on pre-disposal elements such as product design, manufacturing, delivery, and repair and refurbishing.⁵⁹

A key economic benefit of recycling LIBs is the ability to reuse the recovered materials in the production of new batteries, which will lower manufacturing costs and consumer purchase prices from the decreased manufacturing costs.⁶⁰ Furthermore, recycling can generate income and boost employment in local communities, as the high cost of transporting used batteries incentivizes companies to keep recycling operations local.⁶¹

D. Types of LIB Recycling

LIB recycling recovers a diverse group of materials, including lithium, cobalt, nickel, manganese, copper, aluminum, and steel.⁶² There are three main recycling practices used for LIBs, especially in the EU and China.⁶³ These

54. Fricke, *supra* note 25, at 35.

55. *Id.*

56. *Id.*

57. *Circular Economy and Extended Producer Responsibility*, GLOB. ALL. ON CIRCULAR ECON. & RES. EFFICIENCY 3, https://www.unido.org/sites/default/files/unido-publications/2023-11/GACERE_Circular%20Economy%20and%20Extended%20Producer%20Responsibility_webinar%20report.pdf [https://perma.cc/DX5T-H7MM] (last visited Feb. 16, 2025).

58. *Id.*

59. *Id.*

60. Fricke, *supra* note 25, at 36.

61. *Id.*

62. Luigi Toro et al., *A Systematic Review of Battery Recycling Technologies: Advances, Challenges, and Future Prospects*, 16 ENERGIES 1, 9 (Sep. 12, 2023).

63. Fricke, *supra* note 25, at 32.

practices are pyrometallurgical, hydrometallurgical, and direct recycling. Each recycling method is specifically designed to target particular materials from the LIBs.⁶⁴

Under pyrometallurgical recycling, the LIB is first dismantled at the modular level and then essentially smelted, where the electrolyte and plastic burn off, leaving behind valuable metals including copper, cobalt, nickel, and iron.⁶⁵ While this recycling method is effective in recovering the aforementioned resources, it is quite energy-inefficient and uneconomical, resulting in the loss of lithium, aluminum, and organic compounds during the process.⁶⁶ While seemingly lacking in this regard, the process can be used on any battery regardless of its chemical components; no pretreatment is required, and it can also be used on a larger scale.⁶⁷

The hydrometallurgical recycling method differs from the pyrometallurgical process because it involves acid leaching to dissolve metals such as lithium, cobalt, nickel, manganese, and copper.⁶⁸ This process can be tailored to dissolve specific metals based on their chemical composition⁶⁹ and is also recognized for its high metal recovery rates, energy efficiency, and zero emissions.⁷⁰ Some drawbacks include the process's high chemical reagent consumption and its generation of corrosive effluents.⁷¹

The last common method is direct recycling. Direct recycling seeks to recover and restore the functionality of LIB components rather than completely breaking the LIBs down into metals.⁷² This process involves removing the electrolyte using carbon dioxide under controlled conditions, breaking down the battery components, and separating them based on their properties, with some materials requiring further treatment before being reused.⁷³ Direct recycling attempts to reduce the number of processing steps and metal losses, allowing most battery components to be saved and reused.⁷⁴ The major drawback to direct

64. See Toro et al., *supra* note 62, at 9-13.

65. Fricke, *supra* note 25, at 33.

66. *Id.*

67. *Id.* Pretreatment is the first step of the recycling process for spent LIBs. It involves “battery sorting, deactivation, disassembling, classification, and separation of active cathode material from the current collector foils.” Once the battery goes through pretreatment, it then becomes subject to the pyrometallurgical or hydrometallurgical processes. Dawei Yu et al., *Pretreatment Options for the Recycling of Spent Lithium-Ion Batteries: A Comprehensive Review*, 173 MINERALS ENG'G (Nov. 1, 2021), <https://www.sciencedirect.com/science/article/abs/pii/S0892687521004477?via%3Dihub> [<https://doi.org/10.1016/j.mineng.2021.107218>].

68. Acid leaching is a process that uses “hot concentrated sulfuric acid” to dissolve metals. Toro et al., *supra* note 62, at 10.

69. Toro et al., *supra* note 62, at 10.

70. Fricke, *supra* note 25, at 34.

71. Toro et al., *supra* note 62, at 13.

72. *Id.*

73. Fricke, *supra* note 25, at 34.

74. *Id.*

recycling is that it requires complex pretreatment and separation of material in the battery.⁷⁵

E. Challenges to Recycling

There are two key issues that make LIB recycling difficult. First, recycling LIBs is economically burdensome. Due to the batteries' complex chemistry, recycling the materials is challenging, and the process is expensive because of the low recovery rates of the metals from the battery.⁷⁶ Furthermore, materials recovered from the batteries cannot cover the full recycling costs, including collecting, transporting, and sorting between battery chemistries, due to the LIB material's low market value.⁷⁷ Second, as previously mentioned, because manufacturers use different designs and chemical components for their batteries, the various recycling values make recycling more difficult.⁷⁸ The recycling processes differ depending on the type of chemical composition the manufacturer used for the LIB.⁷⁹ These challenges make it more difficult to achieve a uniform, efficient recycling program.⁸⁰ Effective uniform regulation of LIBs at the end of their life may help address these challenges, and by looking to China and the EU for guidance, the United States will be well on its way to promulgating effective regulatory laws for managing battery waste.

II. REGULATORY FRAMEWORKS FOR EV BATTERY WASTE MANAGEMENT: UNITED STATES, EUROPEAN UNION, AND CHINA

A. United States

1. Resource Conservation and Recovery Act ("RCRA")

The Resource Conservation and Recovery Act authorizes the United States Environmental Protection Agency ("EPA") to regulate hazardous waste from "cradle-to-grave," which includes its "generation, transportation, treatment, storage and disposal."⁸¹ RCRA regulates hazardous solid waste under Subtitle C, and non-hazardous solid waste under Subtitle D.⁸² To be considered "solid

75. *Id.*

76. Harland, *supra* note 37, at 175.

77. *Id.*

78. *Id.* at 175-76; *see supra* Section I.B.

79. Neuhaus, *supra* note 28, at 74.

80. *Id.*

81. *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1976); *Resource Conservation and Recovery Act (RCRA) Overview*, U.S. ENV'T PROT. AGENCY (Sep. 5, 2025), <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> [<https://perma.cc/8MM3-S7HG>].

82. Note that in order to be considered a "hazardous waste," the waste must first qualify as a "solid waste" under RCRA. *Resource Conservation and Recovery Act Overview*, *supra* note 81.

waste,” the waste must be discarded and can include any solids, liquids, and gases.⁸³ To be considered “hazardous waste,” the waste:

Because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.⁸⁴

Furthermore, a hazardous waste will be regulated under RCRA if it is either specifically classified as a hazardous waste by the EPA, or if the waste “exhibits characteristics of ignitability, corrosivity, reactivity, or toxicity under prescribed testing conditions.”⁸⁵

Historically, there has been a lack of specific federal regulation guiding the recycling and proper disposal of spent LIBs from EVs.⁸⁶ In fact, there are currently no federal or state laws in force mandating EV battery recycling, except from New Jersey’s framework taking effect in 2027, discussed in Part III of this note.⁸⁷ Lithium itself is not classified as a hazardous material, and LIBs themselves are not listed as such either; nonetheless, because of the characteristics of some LIBs, including ignitability, corrosivity, reactivity, or toxicity, RCRA may apply.⁸⁸

To address the lack of regulation and guidance, the EPA’s Office of Resource Conservation and Recovery has issued new guidance in a memorandum clarifying how hazardous waste regulations for universal waste and recycling apply to LIBs under RCRA.⁸⁹ While the memorandum imposes no new federal regulatory requirements, it offers further direction for companies

83. *Id.*; See 40 C.F.R. § 261.2(a)(2)(i) (2025) for the EPA’s definition of “discarded material.”

84. 42 U.S.C. § 6903(5)(A)–(B) (1976); RCRA § 1004(5).

85. Neuhaus, *supra* note 28, at 73.

86. Stewart, *supra* note 45, at 148.

87. Samuel Boxerman & Drew Langan, *U.S. EPA Memo Offers Direction on Lithium Battery Recycling – Essential to the Future Supply Chain for Battery Electric Vehicles*, SIDLEY AUSTIN (Aug. 16, 2023), <https://environmentalenergybrief.sidley.com/2023/08/16/u-s-epa-memo-offers-direction-on-lithium-battery-recycling-essential-to-the-future-supply-chain-for-electric-vehicle-batteries/> [https://perma.cc/G8PW-8RJC].

88. Neuhaus, *supra* note 28, at 73–74; see *Defining Hazardous Waste: Listed, Characteristic and Mixed Radiological Wastes*, U.S. ENV’T PROT. AGENCY (Dec. 17, 2024), <https://www.epa.gov/hw/defining-hazardous-waste-listed-characteristic-and-mixed-radiological-wastes> [https://perma.cc/R8DH-2P99].

89. Memorandum from Carolyn Hoskinson, Dir., Off. of Res. Conservation and Recovery, to LCRD Division Directors, Region 1-10 (May 24, 2023), <https://rcrapublic.epa.gov/files/14957.pdf> [https://perma.cc/BEE8-SMMK].

involved in the generating, handling, storing, and recycling of spent LIBs.⁹⁰ The EPA made clear in its memo that LIBs are likely hazardous waste at the end of their life cycle and can first be regulated under the universal waste standards set forth in 40 C.F.R. Part 273 until the battery reaches a recycling or discard facility.⁹¹ Once the battery reaches its recycling or discard facility, the battery is no longer considered a universal waste and instead becomes a fully regulated hazardous waste.⁹² The EPA is currently working on a new proposal seeking to establish LIBs as a “new, distinct category of universal waste.”⁹³

To encourage the recycling and reusing of LIBs, EPA guidance provides that LIBs are not considered waste if they are being reused or repurposed.⁹⁴ If the batteries are determined to be non-reusable, they are considered solid waste subject to RCRA and regulated as universal waste until they reach the destination facility.⁹⁵ EPA guidance also provides that certain activities taken prior to the recycling phase, including removal of batteries from devices, sorting, and battery discharge, among other activities, are exempt from the RCRA hazardous waste permit requirement.⁹⁶ On the other hand, if a recycling facility is only holding batteries indefinitely, an RCRA permit may be needed, resulting in the loss of the benefit of exemption from needing an RCRA permit.⁹⁷ Further guidance from the EPA clarifies that generators are responsible for deciding whether spent LIBs should be classified as hazardous waste.⁹⁸ Classification of hazardous waste, however, could vary since the chemistry of batteries can differ.

90. Amanda G. Halter, Reza Zarghamee & Eric Moorman, *EPA Clarifies Requirements for Management of End-of-Life Lithium-Ion Batteries under RCRA*, PILLSBURY (July 10, 2023), <https://www.pillsburylaw.com/en/news-and-insights/epa-management-rcra-spent-lithium-ion-batteries.html> [<https://perma.cc/S6RX-FRTT>].

91. Hoskinson, *supra* note 89, at 1; The EPA’s universal waste program streamlines hazardous waste management and applies to five categories of universal waste: batteries, pesticides, mercury-containing equipment, lamps, and aerosol cans. Regulations under this program aim to accomplish three objectives: (1) promoting universal waste collection and recycling, (2) easing the regulatory burden on retail stores, generators, and transporters of the waste, and (3) decreasing the amount of waste sent to municipal solid waste landfills or combustors. *Universal Waste*, U.S. ENV’T PROT. AGENCY (Apr. 17, 2024), <https://www.epa.gov/hw/universal-waste> [<https://perma.cc/3KH6-324D>].

92. Hoskinson, *supra* note 89, at 9. Universal waste is generally regulated under more relaxed rules, unlike hazardous wastes, because universal waste is deemed to pose a lower immediate risk to human health and the environment. *Managing Hazardous Waste*, CAL. DEP’T OF TOXIC SUBSTANCES & CONTROL (Dec. 12, 2022), <https://dtsc.ca.gov/universalwaste/> [<https://perma.cc/5AWD-UXEZ>].

93. *Improving Recycling and Management of Renewable Energy Wastes: Universal Waste Regulations for Solar Panels and Lithium Batteries*, U.S. ENV’T PROT. AGENCY (Feb. 10, 2025), <https://www.epa.gov/hw/improving-recycling-and-management-renewable-energy-wastes-universal-waste-regulations-solar> [<https://perma.cc/4XC7-TYVX>].

94. Halter, Zarghamee & Moorman, *supra* note 90.

95. *Id.*

96. *Id.*

97. *Id.*

98. Boxerman & Langan, *supra* note 87.

While the EPA has issued this guidance for proper recycling, states have the authority to enact their own, more stringent RCRA programs.⁹⁹ Most states have not taken advantage of this authority, as they have not implemented separate disposal programs for spent LIBs.¹⁰⁰ The District of Columbia and California are outliers that have addressed battery regulation. The District of Columbia requires battery manufacturers to participate in a battery stewardship organization, and California has offered recycling recommendations through reports, but has not implemented direct legislation.¹⁰¹

Although the EPA has issued guidance on the recycling and disposal of LIBs under RCRA, the United States' approach is "less prescriptive" than the EU's approach.¹⁰² The EPA's memorandum recognizes the importance of having a plan in place to address battery recycling as EVs become increasingly popular, but unlike the EU's new battery regulations, discussed later, the United States falls drastically behind without these prescriptive battery requirements.¹⁰³ Without establishing specific regulatory frameworks for EV LIBs, the United States risks lagging behind in developing proper recycling and disposal practices, an increasingly critical issue as the nation's EV sales rise.¹⁰⁴

2. RCRA Case Study

Beyond the guidance the EPA provided, courts have added additional direction on applying RCRA to spent batteries, albeit not EV batteries directly. In *United States v. ILCO, Inc.*, the Eleventh Circuit considered "whether [the] EPA [had] reasonably construed the RCRA to permit regulation of the recycling of hazardous materials."¹⁰⁵ Specifically, on appeal, the EPA questioned whether reclaimed lead parts from automobile batteries for recycling purposes were exempt from RCRA.¹⁰⁶ The court recognized that the United States has experienced an increase in the number of spent batteries that have become

99. *Id.*

100. *Id.*

101. *Id.*; The California Energy Commission ("CEC") published several studies evaluating the need for recycling and the infrastructure required for successful LIB recycling. The CEC published a study titled "Direct Recycling Technology for Plug-In Electric Vehicle Lithium-Ion Battery Packs" and also publishes a report every two years titled the "Integrated Energy Policy Report." The CEC determined that direct recycling was the most cost effective and sustainable method to extract materials from LIBs. Neuhaus, *supra* note 28, at 85-86.

102. Boxerman & Langan, *supra* note 87.

103. *Id.*

104. In 2024, EV sales increased compared to the previous year, but the United States is experiencing a slowdown in the growth rate, which falls short of the 47% increase seen in 2023. Tom Krisher, *Despite Slowing Sales, Automakers are Expanding Electric Vehicle Models, Including Family Haulers*, THE SEATTLE TIMES (Nov. 20, 2024, 5:01 PM), <https://www.seattletimes.com/business/despite-slowing-sales-automakers-are-expanding-electric-vehicle-models-including-family-haulers/> [https://perma.cc/ZW7R-LDY5].

105. 996 F.2d 1126, 1130 (11th Cir. 1993).

106. *Id.*

useless and need disposal.¹⁰⁷ The court importantly noted that each unclaimed spent battery was a pollutant and a threat to human health.¹⁰⁸ The problem here was that the lead smelters that were open to reclaiming these batteries became a major environmental liability as well. The environmental problem was exacerbated when these smelters went out of business due to high regulatory compliance costs, and the smelters that remained open only reclaimed seventy percent of “[all the discarded batteries].”¹⁰⁹ The court understood the important role the smelter industry played in handling hazardous materials but found that the industry could not be exempt from regulation because its role in addressing environmental issues outweighed the harm caused by its operations.¹¹⁰

In this case, ILCO, a lead smelting facility, argued that the lead parts they reclaimed were not considered “solid waste” under RCRA and consequently not subject to RCRA because the lead parts were being recycled and were raw materials.¹¹¹ The court held that reclaimed lead parts from spent batteries are a solid waste and, therefore, are considered hazardous waste under RCRA.¹¹² The court reasoned that spent car batteries are considered hazardous waste when consumers discard them, and that it is irrelevant that the lead parts are not permanently discarded.¹¹³ Discarded solid waste that may be recycled is still solid waste.¹¹⁴ The court’s holding in *ILCO* may provide some guidance on proper disposal for future cases.

ILCO highlights a principle that can inform future regulatory decisions concerning EV LIB waste: materials that are discarded with the intent to be recycled may still fall under RCRA’s definition of hazardous waste; and when subject to RCRA, the EPA can regulate the battery waste from “cradle-to-grave.” While *ILCO* can be contrasted with EPA guidance that LIBs are not considered waste if they are being reused or repurposed, both frameworks are useful to determine how LIBs may be classified and regulated in the future.

B. European Union

1. EU Battery Directive

While the United States relies on RCRA to manage hazardous waste, the EU addresses similar challenges through a couple of regulatory frameworks. In response to the EU’s climate goals and achieving twenty-three percent of global EV sales by 2030, the EU promoted battery recycling through legislation called

107. *Id.* at 1128.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1131-32.

112. *Id.*

113. *Id.* at 1132.

114. *Id.*

the “Battery Directive” (“Directive”).¹¹⁵ The Directive took effect on September 26, 2006, and sought to ban the sale of batteries that contain some hazardous substances, create a system to ensure high levels of collection and recycling, and establish fixed targets for these collecting and recycling activities.¹¹⁶

The Directive functions by applying EPR, placing the responsibility of recycling and disposal of spent LIBs back on producers and manufacturers.¹¹⁷ The Directive requires the use of battery passports, which inform consumers of the materials the batteries contain, where those materials came from, and their environmental impacts.¹¹⁸ Lastly, it also seeks to accomplish several other goals: mandate recycling efficiencies, material recovery rates, and target collection rates for recyclers, and create LIB reuse and remanufacturing standards.¹¹⁹

2. EU Batteries Regulation

The EU proposed an update to the EU Battery Directive called the EU Batteries Regulation (“Regulation”), which entered into force in 2023 and is expected to fully repeal the 2006 Battery Directive in 2025.¹²⁰ The European Commission proposed revising the previous Directive because of current “socioeconomic conditions, technological developments, markets, and battery uses.”¹²¹ The Regulation’s scope is broader than its predecessor and is being implemented in stages. Its first regulatory stage was implemented in February 2024, and its second in August 2024.¹²² Essentially, the 2006 Directive is being

115. Fricke, *supra* note 25, at 39; *2050 Long-Term Strategy*, *supra* note 24.

116. See Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, 2006 O.J. (L 266); Hagan et al., *Annex - Comparative Analysis of Legal Frameworks*, WORLD ECON. F. at 11 (Dec. 2020), https://pacecircular.org/sites/default/files/2021-03/WEF_Annex_Comparative_Analysis_of_Legal_Frameworks_2020.pdf [https://perma.cc/AZG8-DVEF].

117. Stewart, *supra* note 45, at 151.

118. Robert Bird et al., *The Regulatory Environment for Lithium-Ion Battery Recycling*, 7 ACS ENERGY LETTERS 736, 738 (2022).

119. *Id.*

120. See Commission Regulation 2023/1542, 2023 O.J. (L 191); Marcus Navin-Jones & Oleksii Yuzko, *The EU Batteries Regulation: Taking Stock of the New EU Battery Requirements*, CROWELL (Sep. 11, 2024), <https://www.crowell.com/en/insights/client-alerts/the-eu-batteries-regulation-taking-stock-of-the-new-eu-battery-requirements> [https://perma.cc/6JH8-TWPC].

121. Directorate-General for Environment, *Circular Economy: New Law on More Sustainable, Circular and Safe Batteries Enters into Force*, EUR. COMM’N (Aug. 17, 2023), https://environment.ec.europa.eu/news/new-law-more-sustainable-circular-and-safe-batteries-enters-force-2023-08-17_en [https://perma.cc/GW82-M7Y2].

122. Roddy Martin et al., *EU Batteries Regulation: Next Implementation Stage Aims at Greater Transparency*, HERBERT SMITH FREEHILLS KRAMER (Sep. 16, 2024), <https://www.herbertsmithfreehills.com/insights/2024-09/EU-Batteries-Regulation--Next-implementation-stage-aims-at-greater-transparency-> [https://perma.cc/F5CN-7DHF]; Many of the legal requirements under the EU Batteries Regulation have not yet taken effect. The following are

phased out as the new Regulation is being phased in. The Regulation marks a significant turning point in the EU's regulation of batteries because it emphasizes a "strategic imperative" in achieving the EU's clean energy transition, moving beyond the primary focus of regulating solely for product safety.¹²³

Batteries coming from EVs fall within the scope of the Regulation if they are classified as "electric vehicle batteries"; batteries that do not comply with the Regulation cannot be sold on the market or enacted into service in the EU.¹²⁴ While the Regulation manages the manufacturing and sale of batteries, it also sets forth requirements on waste, disposal, recycling, and end-of-life issues.¹²⁵ Key requirements of the Regulation include battery passports, battery management systems, labeling, and EPR.¹²⁶ Recyclers will be required to provide reports on the recycling rates of materials extracted from the batteries and their recycling efficiency.¹²⁷

The United States falls behind the EU in regulation because the EU implements more prescriptive regulations and adopts different approaches addressing technologies for new policies, which may explain the United States' inadequate response to creating an effective battery recycling and disposal system.¹²⁸ The EU differs in that it embraces a precautionary approach, while the United States adopts a post-hoc regulatory approach.¹²⁹ This means that the EU seeks to proactively regulate risks, whereas the United States waits for evidence of actual harm before taking any steps to regulate.¹³⁰ This is likely due to the EU's "decentralized political system" versus the United States' federal system, which creates a "politically insulated process" for regulation, resulting in slow policy enactment and less responsiveness to consumers.¹³¹ The EU's decentralized system means that power is given to the individual member states to enforce the EU's regulations and policies, spreading power to multiple parties rather than concentrating power in a single authority.¹³² The United States is a

deadlines for additional stages to be implemented: "18 February 2025, 18 August 2025 (e.g. Due Diligence), 18 February 2027 (e.g. Battery Passport), 18 June 2028, 18 August 2028, 31 December 2028, 18 August 2031, 18 August 2036." Navin-Jones & Yuzko, *supra* note 120.

123. Navin-Jones & Yuzko, *supra* note 120; see *Proposal for a Regulation of the European Parliament and of the Council Concerning Batteries and Waste Batteries, Repealing Directive 2006/66/EC and Amending Regulation (EU) No 2019/1020*, at 1, COM (2020) 798 final (Dec. 10, 2020).

124. Navin-Jones & Yuzko, *supra* note 120.

125. *Id.*

126. For a more detailed list of other requirements in the EU Batteries Regulation, see *id.*

127. Meegoda, Malladi & Zayas, *supra* note 14, at 1169.

128. Neuhaus, *supra* note 28, at 88.

129. *Id.* at 88.

130. Jonathan B. Wiener & Michael D. Rogers, *Comparing Precaution in the United States and Europe*, 5 J. RISK RSCH. 317, 318 (2002).

131. Neuhaus, *supra* note 28, at 88.

132. *Introduction: The EU – A Political System, But Not a State*, CARLETON UNIV., <https://carleton.ca/ces/elearning/?p=404> [<https://perma.cc/3Y3X-GKM7>] (last visited Mar. 2, 2025).

constitution-based federal system in which power is distributed between the federal and state governments.¹³³ This federal system of government has drawbacks, particularly when conflicts arise between the federal and state governments over regulatory disagreements.¹³⁴

C. China

Like the EU, China has sought to embrace a leading role in adopting effective battery recycling practices to advance its goal of achieving a circular economy.¹³⁵ China has implemented plans and policies to address batteries, including China's Thirteenth Five-Year Plan, the Ministry of Ecology and Environment's "Policy on Technologies for Waste Batteries Pollution Prevention," and the 2020 "PRC Law on Prevention and Control of Environmental Pollution caused by Solid Wastes."¹³⁶ The Thirteenth Five-Year Plan seeks to improve the recycling industry for spent batteries and to "encourage the circular use of resources between production and society."¹³⁷ The "Policy on Technologies for Waste Batteries Pollution Prevention" provides guidance on spent batteries, including their collection, transportation, storage, maintenance, use, and reuse.¹³⁸ The PRC Law on Prevention and Control deals specifically with solid wastes, spent batteries included, by encouraging reuse and recycling.¹³⁹

Similar to the EU, China's regulatory approach for recycling and reuse of batteries rests primarily on EPR and regulates according to the type of battery classification.¹⁴⁰ Since EV sales have risen in China, Beijing has specifically enacted guidelines for spent battery recycling and placed responsibility for recycling on car manufacturers.¹⁴¹ Furthermore, China implemented the "Electric Vehicle Battery Recycling Technology Policy" in 2016, creating an EPR system that specified the responsibilities of producers to treat EV battery waste and develop aspects of treatment such as design, manufacturing, recycling, and reuse.¹⁴² Moreover, the "Promotion Plan for Extended Producer Responsibility System" in 2017 implemented an EPR system to regulate

133. *Federalism and the Constitution*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.7-3/ALDE_00000032/ [<https://perma.cc/5YRX-AWZB>] (last visited Mar. 2, 2025).

134. *Federalism*, EVERYTHINGPOLICY (Nov. 14, 2023), <https://www.everythingpolicy.org/policy-briefs/federalism> [<https://perma.cc/GA4K-LL7T>].

135. Hagan et al., *supra* note 116, at 16.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 17.

141. *Id.*

142. Wenbo Li et al., *Treatment of Electric Vehicle Battery Waste in China: A Review of Existing Policies*, 29 J. ENV'T ENG'G & LANDSCAPE MGMT. 111, 116 (2021).

LIBs.¹⁴³ Another distinct aspect of China's recycling programs is that vehicle manufacturers are required to attach a unique code to every battery produced or imported into China, which is shared with dismantling and recycling enterprises.¹⁴⁴ This helps further aid the tracking and proper recycling of spent batteries.¹⁴⁵ For every violation where a battery is not recycled properly, companies can expect a fine between ¥10,000 and ¥30,000.¹⁴⁶

Lastly, in 2018, China adopted the "Interim Measures for the Management of Recycling and Utilisation of Power Batteries of New Energy Vehicles" ("Interim Measures"), which consolidated some existing regulations and provided an overarching framework on EV battery waste treatment.¹⁴⁷ The Interim Measures seek to accomplish four goals: (1) make EV battery manufacturers responsible for end-of-life treatment, (2) encourage battery manufacturers to design easy-to-disassemble batteries and supply technical information about the batteries for end-of-life treatment to EV manufacturers, (3) promote reuse of waste batteries, and (4) place responsibility of progressing waste battery management standardization and implementation of a system regulating the waste process on the Ministry of Industry and Information Technology and other departments.¹⁴⁸

III. ANALYSIS

It is important to recognize that any meaningful discussion on solutions to environmental issues must also engage with policy considerations that help shape the legal atmosphere surrounding environmental law. The forthcoming analysis focuses on a policy argument, not with the intent to distract from legal discussion, but as a discussion necessary to illustrate that environmental law cannot exist without policy.

Chad McGuire offers a unique perspective on this and provides an illustration of how law is a piece of the puzzle for policy considerations.¹⁴⁹ For example, what might be a solution to address the issue of climate change? One policy option might be to prevent the release of carbon dioxide by prohibiting the uses of energy that release carbon emissions into the atmosphere, while another might be to mitigate carbon dioxide release through the integration of

143. Meegoda, Malladi & Zayas, *supra* note 14, at 1169.

144. Alexander Tankou, Georg Bieker & Dale Hall, *Scaling Up Reuse and Recycling of Electric Vehicle Batteries: Assessing Challenges and Policy Approaches*, INT'L COUNCIL ON CLEAN TRANSP., 1, 24 (Feb. 2023), <https://theicct.org/wp-content/uploads/2023/02/recycling-electric-vehicle-batteries-feb-23.pdf> [<https://perma.cc/7AKL-8QWU>].

145. *Id.*

146. *Id.* (10,000 Chinese yuan is equivalent to \$1,480 USD, and 30,000 Chinese yuan is equivalent to \$4,430 USD.)

147. Li et al., *supra* note 142, at 117.

148. *Id.*

149. CHAD J. MCGUIRE, ENVIRONMENTAL LAW FROM THE POLICY PERSPECTIVE: UNDERSTANDING HOW LEGAL FRAMEWORKS INFLUENCE ENVIRONMENTAL PROBLEM SOLVING 1 (Routledge 2014).

renewable energy portfolios.¹⁵⁰ A third option could focus on adaptation measures, but this route would emphasize dealing with climate change's effects rather than trying to address the cause of it.¹⁵¹

When solutions to climate change are considered, the context of how the law will impact these solutions and the law's ability to ensure the solutions' validity becomes important.¹⁵² In other words, when addressing environmental issues such as EV battery disposal, it is essential to evaluate the current laws and regulations to determine whether they promote or hinder the potential policy solutions. Once the solutions are generated, the law can then be examined to "help us determine its influence on our solution(s) to the problem."¹⁵³

For EV LIB disposal, one policy approach might be to require manufacturers to comply with recycling and disposal requirements through EPR. As argued in the ensuing analysis, this policy could be implemented by amending RCRA and establishing new recycling standards to promote a circular economy. Applying McGuire's approach, EV battery recycling solutions must be framed within policy decisions that can then be influenced and validated by the law. Establishing a foundation through a policy discussion is essential for addressing the legal environmental challenges for spent EV LIBs.

A. Extended Producer Responsibility

1. EPR Background

Although the United States is attempting to develop strategic practices for LIB recycling and reuse, it remains behind the EU and China, despite having high EV sales similar to those of both regions. Unlike the United States, the EU and China have implemented comprehensive EPR frameworks. These differing regulatory approaches between the jurisdictions can be partially blamed for this lag.

The foundation of EPR stems from two principles under international environmental law: the Principle of Pollution Prevention and the Polluter-Pays Principle.¹⁵⁴ The Principle of Pollution Prevention is commonly implemented in the environmental law sphere and suggests that environmental protection be achieved by taking a precautionary approach and preventing harm before it happens, instead of addressing the harm through remedies after it occurs.¹⁵⁵ On the other hand, the Polluter-Pays Principle requires those who pollute to

150. *Id.* at 2.

151. *Id.* at 3.

152. *Id.* at 4.

153. *Id.*

154. Tiptira Rammaniya, *Extended Producer Responsibility (EPR): An Alternative Solution to Regulate the International Electronic Waste Trade* 163-164 (Nov. 22, 2010) (S.J.D. dissertation, Golden Gate University) (on file with the Student Scholarship at GGU Law Digital Commons, Golden Gate University).

155. *Id.* at 165.

internalize their environmental externalities by taking responsibility for the social and environmental costs of their polluting activities.¹⁵⁶

Specifically, EPR “is a policy approach that requires manufacturers to finance the costs of collecting and recycling or safely disposing of products consumers no longer want,”¹⁵⁷ and can contribute to the establishment of a circular economy by increasing recycling and material recovery rates.¹⁵⁸ EPR is especially favored among municipalities because municipalities carry the burden of paying for waste management.¹⁵⁹ In addition to the benefits of saving the government money, implementing EPR can create an incentive for manufacturers to create products that are more durable and recyclable.¹⁶⁰

2. EPR in the United States

In the United States, states have implemented their own EPR policies, but EPR policies addressing the disposal of EV batteries have not been implemented at the federal level.¹⁶¹ While states have promulgated their own EPR policies, very few have implemented EPR policies focusing specifically on EV batteries. New Jersey is an exception and became the first state to implement an EPR policy for electric and hybrid vehicle batteries, enacting the Electric and Hybrid Vehicle Battery Management Act in January 2024.¹⁶² Taking effect in January 2027, the Act introduces EPR for EV batteries by placing the primary responsibility for recycling on the producers of batteries sold within the state.¹⁶³

156. Natalia Urzola et al., *State Responsibility for Disrupting Earth's Climate System: Anticipating the ICJ Advisory Opinion*, 55. ENV'T. L. REP. 10073, 10085 (2025); An environmental externality can either be positive or negative, and it is the result of a specific economic activity that affects a third party who is unrelated to the economic activity. Examples of a negative environmental externality include higher air pollution levels, degradation of land, and deforestation. Using the same examples, a positive environmental externality would be lower air pollution levels, rehabilitation of land, and reforestation. *What is an Externality?*, INT'L INST. FOR SUSTAINABLE DEV., <https://www.iisd.org/savi/faq/what-is-an-externality/> [<https://perma.cc/PD2P-RZDR>] (last visited Feb. 1, 2025).

157. Jennifer Nash & Christopher Bosso, *Extended Producer Responsibility in the United States: Full Speed Ahead?*, 2 (Harvard Kennedy School, Working Paper No. 10, 2013), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Nash_Bosso_2013-10.pdf [<https://perma.cc/KR62-U6EK>].

158. *Circular Economy and Extended Producer Responsibility*, *supra* note 57, at 4.

159. Nash & Bosso, *supra* note 157, at 5.

160. *Id.*

161. *Id.* at 2.

162. S.B. 3723, 220th Gen. Assemb., Reg. Sess. (N.J. 2022-2023); *Recycle more batteries so they do less harm*, PROD. STEWARDSHIP INST., <https://productstewardship.us/products/batteries/> [<https://perma.cc/WR25-G897>] (last visited Feb. 2, 2025).

163. The Act has not fully been implemented. Starting January 2025, EV battery producers in New Jersey will be required to register with the New Jersey Department of Environmental Protection, and beginning January 2026, producers “must annually report to the DEP the quantity of EV batteries they sold, offered for sale, or distributed in New Jersey.” In January 2027, unauthorized persons will be prohibited from disposing EV batteries and its other components as

Additionally, the Act makes it illegal to dispose of EV batteries in landfills and mandates their reuse and recycling.¹⁶⁴ Other states, such as California and Washington State, as well as the District of Columbia, have enacted their own EPR battery policies, but New Jersey remains the only state to implement comprehensive EPR legislation for EV batteries.¹⁶⁵

Building on these state efforts, the EPA announced the agency's plan to implement EPR at the national level as required through the Bipartisan Infrastructure Law.¹⁶⁶ The scope of this EPR framework considers all battery chemistries and types, including lithium-based batteries and large batteries made for electric vehicles.¹⁶⁷ However, this framework is just in its beginning phases as the EPA is seeking input from experts to develop the national battery EPR framework.¹⁶⁸ The EPA recognizes the importance of having feedback from different industry groups and plans to seek input from battery producers, manufacturers, retailers, recyclers, collectors or processors, states and municipalities, and environmental, energy, or consumer organizations.¹⁶⁹

3. EPR in the European Union

The EU has begun its transition from regulating waste batteries under the 2006 Battery Directive to the revised regulation under the 2023 Batteries Regulation. The EU saw a need to revise its Directive “due to new socioeconomic conditions, technological developments, markets, and battery uses.”¹⁷⁰ Furthermore, the European Commission recognized the importance of providing “legal certainty” to players involved in the battery market, as batteries

solid waste, and solid waste facilities will be prohibited from knowingly accepting an EV battery for disposal, unless the facility has been given authorization from the state. Shennie Patel & Amanda Berman, *New Jersey Sets the Stage as the First State to Mandate Recycling of EV Batteries*, CROWELL (Feb. 14, 2024), <https://www.crowell.com/en/insights/client-alerts/new-jersey-sets-the-stage-as-the-first-state-to-mandate-recycling-of-ev-batteries> [https://perma.cc/G8T4-D76A].

164. *Id.*

165. *Id.*

166. *Extended Battery Producer Responsibility (EPR) Framework*, U.S. ENV'T PROT. AGENCY (Sep. 8, 2025), <https://www.epa.gov/infrastructure/extended-producer-responsibility-framework-batteries> [https://perma.cc/8WWL-DFEE]. The Bipartisan Infrastructure Law requires the EPA and the U.S. Department of Energy (“DOE”) to “develop a national EPR framework for batteries that addresses battery recycling goals, cost structures for mandatory recycling, reporting requirements, product design, collection models, and transportation of collected materials.” *Id.*

167. *Id.*

168. *Id.* (writing that the input includes discussion on covered batteries and products and potential exclusions; producer responsibilities and producer responsibility organization structure; federal, state, and local government roles and responsibilities; collection and recycling infrastructure; and product design).

169. *Battery Collection Best Practices*, U.S. ENV'T PROT. AGENCY (Aug. 22, 2025), <https://www.epa.gov/infrastructure/battery-collection-best-practices-and-battery-labeling-guidelines> [https://perma.cc/2YC3-J2EC].

170. Directorate-General for Environment, *supra* note 121.

are a key source of energy.¹⁷¹ To provide this legal certainty, the European Commission seeks to create a harmonized regulatory framework that addresses the entire life cycle of batteries that are placed on the EU market.¹⁷² The EU's framework can support the synergies of creating economic opportunities while addressing energy, climate, transport, and industry policies.¹⁷³

To understand the impacts of a battery waste management system and the potential effectiveness of the Regulation on the EU, it is important to consider the outcomes of the 2006 Directive and the foundation it provided for the newly amended, and yet to be fully implemented, Batteries Regulation. The European Commission assessed the Directive's successes and shortcomings by analyzing five elements: relevance, effectiveness, efficiency, coherence, and EU added value.¹⁷⁴

Relevance. The European Commission concluded that due to the rising use of batteries in the market, the presence of dangerous substances in batteries, and the number of spent batteries still not being properly treated, the Directive remains relevant.¹⁷⁵ The measures have achieved some success, such as reducing mercury and cadmium levels in batteries and increasing the collection and treatment of waste batteries. However, hazardous substances remain present in batteries, posing ongoing risks. Proper disposal is crucial to prevent environmental harm, but significant gaps in waste battery collection highlight that effective management remains a concern for the EU.¹⁷⁶ The Directive allows the member states to create their own national schemes, many of which are autonomous.¹⁷⁷ These schemes determine the success of the member states in meeting their collection rate targets. One of the Directive's key critiques was its insufficiency regarding material recovery.¹⁷⁸ While the Directive aimed to have high levels of material recovery through its collecting and recycling efforts, the Regulation did not adequately account for the growing significance of resource efficiency and circular economy policies.¹⁷⁹

Another criticism of the Directive was that lithium-based batteries were classified as "other batteries," which did not reflect the growing change and importance of battery use in "new 'transport' applications," such as electric

171. Commission Regulation 2023/1542, *supra* note 120, ¶ 2.

172. *Id.*

173. *Id.* ¶ 3.

174. *Commission Staff Working Document on the Evaluation of the Directive 2006/66/EC on Batteries and Accumulators and Waste Batteries and Accumulators and Repealing Directive 91/157/EEC*, at 28, SWD (2019) 1300 final (Apr. 9, 2019), https://ec.europa.eu/environment/pdf/waste/batteries/evaluation_report_batteries_directive.pdf [<https://perma.cc/WT9J-PYW9>] [hereinafter *Commission Staff Working Document*].

175. *Id.* at 30.

176. *Id.* at 31.

177. *Id.* at 55.

178. *Id.* at 32.

179. *Id.*; Stakeholders criticized the Directive in that its definition of recycling efficiency was not written to emphasize material recovery and that it failed to recognize high quality recycling as a priority. *Id.* at 33.

vehicles.¹⁸⁰ The issue with classifying lithium-based batteries as “other batteries” is that this category has only a recycling efficiency target of fifty percent.¹⁸¹ In other words, the recovery of lithium and other materials from these batteries was not guaranteed, which harmed efforts made to maximize the recovery of materials and align policies with circular economy goals. This issue was further aggravated by the Directive’s vague provisions on waste collection for industrial lithium batteries.¹⁸² The Directive categorizes industrial batteries as “exclusively designed for industrial or professional use or for use in any type of electric vehicle.”¹⁸³ So, while the *use* of the battery is classified as industrial, the lithium properties powering the battery classify it as “other batteries.” The Directive failed to set collection targets and mandatory reporting for lithium batteries, and the EPR policies addressing lithium batteries were weak compared to the EPR policies set for other types of batteries under the Directive.¹⁸⁴ The Battery Regulation recognized this shortfall and requires that EV batteries be specifically classified in their own category as “electric vehicle batteries.”¹⁸⁵

Finally, stakeholders believe that the Directive lacked a clear legal framework for the development of the second life of batteries.¹⁸⁶ For LIBs from EVs, the term “second life” means “a new nonautomotive use of an automotive LIB after its initial use in a vehicle.”¹⁸⁷ Due to the large capacity of LIBs in EVs, batteries often have storage capacity leftover when the battery can no longer be used to meet the energy demands the EV requires. Because of this, the battery’s remaining capacity can be repurposed for other opportunities.¹⁸⁸ The Directive did not consider second-life batteries because current legislation was unable to integrate them into the Directive.¹⁸⁹

Due to the previously mentioned reasons, and since environmental concerns will still exist from the increase in battery usage, the Directive’s objectives remain relevant. Accordingly, the 2023 Battery Regulation can hopefully address some of these concerns where the Directive fell behind.

Effectiveness. The European Commission reported that the Directive has been able to decrease batteries’ environmental impact by reducing the hazardous materials used in batteries and preventing waste portable batteries from ending up in landfills or incineration facilities.¹⁹⁰ Unfortunately, the huge misstep in the

180. *Id.* at 33-34.

181. *Id.* at 34.

182. *Id.*

183. *Id.* at 5.

184. *Id.* at 34.

185. Navin-Jones & Yuzko, *supra* note 120.

186. *Commission Staff Working Document*, *supra* note 174, at 34.

187. U.S. DEP’T OF ENERGY, BATTERY SECOND LIFE FREQUENTLY ASKED QUESTIONS (2020), https://afdc.energy.gov/files/u/publication/battery_second_life_faq.pdf [<https://perma.cc/XN6H-C4KC>].

188. *Id.* (noting that an LIB could still have 80% of its usable energy capacity at the end of its life).

189. *Commission Staff Working Document*, *supra* note 174, at 34.

190. *Id.* at 69.

Directive's monitoring collection rates of batteries is that it failed to require reporting obligations for automotive and industrial batteries, making it difficult to see a full and accurate set of data to determine what happened to all waste batteries.¹⁹¹ The root problem was limiting the collection targets to portable batteries only, ultimately contradicting the Directive's goal of applying to all types of batteries.¹⁹² However, parties involved with the SET action plan seek to achieve a goal of collecting seventy percent of lithium batteries by 2030.¹⁹³ Despite the EU's data collection limitations, the Commission reported success on some of its initiatives when member states met the Directive's recycling efficiency goals, along with reports showing a significant increase in recycled batteries and improved environmental performance.¹⁹⁴

Stakeholders reported that labeling requirements failed to effectively inform users of the batteries' characteristics, the risks of using them, and the need to collect and recycle them once they are spent.¹⁹⁵ The Directive should have included labeling provisions informing users of hazardous substances and the risks of lithium batteries, specifically.¹⁹⁶ To address this issue, the Regulation suggests implementing labeling practices for batteries to "provide end-users with transparent, reliable and clear information about batteries and waste batteries."¹⁹⁷ This labeling information will assist end-users in making informed choices when purchasing and disposing of batteries, and also help waste operators treat the waste batteries.¹⁹⁸ The labels will include key information, including the batteries' characteristics, such as their capacity and the hazardous substances present in the battery.¹⁹⁹

Efficiency. Stakeholders shared that the Directive has caused businesses to incur significant costs, but admitted that the costs are justified given that the Directive not only produced current and future benefits, but also brought market opportunities.²⁰⁰ For lithium batteries specifically, the costs of collecting, treating, and recycling the batteries often offset the revenue generated from selling the recovered materials from these batteries. Recyclers argue that, because there is a lack of a recycling efficiency target and an obligation to recover the metals, incentives are reduced to ensure efficient recovery.²⁰¹ Consequently, it is the producers who bear responsibility for covering the extra

191. *Id.* at 36.

192. *Id.* at 38.

193. *Id.*; Implemented in 2007, the SET plan seeks to advance the EU's energy and climate goals while positioning Europe as "a global leader in low-carbon energy and energy efficiency technology." *SET Plan in Action*, EUR. COMM'N, https://setis.ec.europa.eu/about-set-plan/set-plan-action_en [<https://perma.cc/8642-G8P3>] (last visited Feb. 8, 2025).

194. *Commission Staff Working Document*, *supra* note 174, at 39-41.

195. *Id.* at 44.

196. *Id.*

197. Commission Regulation 2023/1542, *supra* note 120, ¶ 44.

198. *Id.*

199. *Id.*

200. *Commission Staff Working Document*, *supra* note 174, at 49.

201. *Id.* at 50.

costs through their recycling fees.²⁰² The Regulation addresses this issue by implementing targets for recycling efficiency and recovery of materials for lithium-based batteries.²⁰³

The Commission stated that setting clear and reliable targets for lithium recycling would significantly enhance recycling efforts. If these recycling targets are set for lithium batteries, the Commission anticipates that these efforts can decrease the demand needed for lithium and cobalt to manufacture EVs in the EU.²⁰⁴ An increase in recycling could provide a significant portion of “secondary lithium for EV batteries from 2050.”²⁰⁵ Notably, a decrease in demand for lithium and cobalt could also positively affect the environment, as it could mitigate harm from mining activities. The Battery Regulation, fortunately, seeks to address this gap. The Regulation recognizes that effectively using recovered raw materials would not only support the goal of achieving a circular economy but also help the EU reduce its dependency on purchasing raw materials from outside nations.²⁰⁶ The Regulation therefore seeks to establish mandatory recycled content targets for lithium by 2031, with plans to raise these targets by 2036.²⁰⁷ Furthermore, the recycling rate for lithium is expected to increase from thirty-five to seventy percent between 2026 and 2030.²⁰⁸

The Directive faces efficiency challenges due to inconsistent enforcement among the member states. These enforcement gaps place producers who strictly comply with the Directive at a disadvantage compared to those engaging in less compliant practices, because the sub-standard practices and different levels of recycling among EU nations may cause unfair competition.²⁰⁹ This creates an uneven playing field for producers who face higher compliance costs, whereas less compliant producers avoid these costs. Another issue is that calculations for recycling efficiencies are distorted because of the lack of EU-wide criteria for determining when recycled battery parts, such as the lead and plastics of batteries, cease to be classified as waste.²¹⁰ To address these concerns, stakeholders believe that creating a certification system for recycling plants would ensure uniform standards for battery recycling across all EU countries.²¹¹ Most public consultation respondents agreed the current and future benefits of the Directive outweighed the costs associated with its implementation,²¹² and

202. *Id.*

203. Commission Regulation 2023/1542, *supra* note 120, ¶ 115.

204. *Commission Staff Working Document*, *supra* note 174, at 51.

205. *Id.*

206. Commission Regulation 2023/1542, *supra* note 120, ¶ 30.

207. *Id.*

208. Meegoda, Malladi & Zayas, *supra* note 14, at 1169.

209. *Commission Staff Working Document*, *supra* note 174, at 57.

210. *Id.* at 57-58.

211. *Id.* at 58.

212. *Id.* at 54.

further agreed the Directive was not suitable for handling the anticipated rise in industrial batteries.²¹³

Batteries used in the transport sector will see a sharp increase in the number placed on the market; however, a major drawback of the Directive was that responsibility for returning spent industrial batteries was placed on the end-user, leaving some to question whether this responsibility was suitable when it came to returning large batteries.²¹⁴ Moreover, the Commission notes that the relevant provisions for introducing industrial batteries onto the market and for managing battery waste are too ambiguous to provide enough guidance for enforcing EPR principles.²¹⁵

Coherence and internal consistency. The Commission considered the overlap and interactions of the Directive with other EU policies. The Commission briefly discussed the Directive's relationship with the Waste Framework Directive ("WFD"), REACH ("Registration, Evaluation, Authorization, and Restriction of Chemicals"), and RoHS ("Restriction of Hazardous Substances"), concluding that the policies are complementary, nonduplicative, and mutually exclusive in managing hazardous substances, respectively.²¹⁶ The Directive has some overlap with the Directive on the Management of Waste Electric and Electronic Equipment ("WEEE"), which has caused concerns with non-harmonious definitions between the two policies. For example, the Directive and WEEE's definition of "producer" are different.²¹⁷ Inconsistencies between the Directive and other EU policies can lead to misreporting issues and concerns with proper classification for battery treatment.²¹⁸

Criticism of the Directive's internal consistency surrounds its failure to properly present long-term goals and objectives, and it lacks specific targets for some of these goals, preventing the ability to assess compliance with the Directive.²¹⁹

EU Added Value. The Directive is recognized for its benefits, particularly its role in protecting human health and the environment.²²⁰ It has also prompted member states to adopt legal provisions on batteries and integrate EPR into their frameworks.²²¹

Moving beyond the Commission's analysis of the five elements previously discussed, the Directive recognizes and incorporates the Polluter Pays Principle, imposing responsibilities on the producers to integrate EPR principles into their

213. *Id.* at 58.

214. *Id.*

215. *Id.* at 59.

216. *Id.* at 60.

217. *Id.* at 61.

218. *Id.* at 61-62.

219. *Id.* at 65.

220. *Id.*

221. *Id.*

management practices for the end-of-life batteries.²²² Producers will be obligated to pay for collection costs, treatment of batteries, recycling, reports on batteries and waste batteries, and inform end-users and waste operators about proper re-use and management of waste batteries.²²³ The new EPR rules under the Regulation aim to achieve high levels of protection for the environment and human health by optimizing the separate collection of waste batteries and ensuring that the collected batteries are recycled through processes that achieve both high recycling efficiency and material recovery, in accordance with current technical and scientific progress.²²⁴

Although the full impact of the Regulation remains unclear, since its implementation is still in progress, its refinement and expansion from the Directive will not only serve as a major milestone for the protection of human health and the environment, but also holds the potential to serve as a valuable blueprint for other nations.

4. EPR in China

EVs are also emerging in China, and like the EU and the United States, China is not immune to the environmental effects of battery pollution. While a comprehensive evaluation of China's battery waste management systems and EPR framework is limited compared to the extensive analysis provided by the EU, there are still valuable studies that highlight the successes of EPR in managing EV battery waste in China. These studies emphasize the role of EPR in advancing sustainable practices, improving recycling efficiency, and fostering green technological innovation in the EV battery sector. Additionally, the United States can learn from China's approach by analyzing the successes and challenges of its EPR system and using these insights to inform the development of a national battery recycling program.

Due to the rapid rise in EVs in China, companies may produce "immature technologies" to prioritize their short-term profit.²²⁵ The production of immature technologies, coupled with incomplete recycling management programs, can lead to significant metal waste and contribute to environmental pollution.²²⁶ China's policies, including the Plan for Extended Producer Responsibility, place responsibility for recycling battery waste on enterprises involved in battery

222. Commission Regulation 2023/1542, *supra* note 120, ¶ 101. The Regulation defines producer as "any manufacturer, importer or distributor who, irrespective of the selling technique used . . . supplies a battery for the first time for distribution or use, including when incorporated into appliances, light means of transport or other vehicles, within the territory of a member state on a commercial basis." *Id.* ¶ 100.

223. *Id.* ¶ 101.

224. *Id.*

225. Cailou Jiang & Yue Zhang, *Does Extended Producer Responsibility System Promote Green Technological Innovation in China's Power Battery Enterprises?*, SUSTAINABILITY 1, 1-2 (Aug. 12, 2023).

226. *Id.* at 2.

production.²²⁷ To address recycling costs and mitigate the pollution issues arising from a battery's life cycle, these companies participate in "green technological innovation" to enhance efficient use of raw materials, including lithium.²²⁸

Imposing recycling responsibility on the producer is done through external measures, which encourage the movement away from traditional cost-driven production models and encourage businesses to strengthen their pollution control technology and recycling methods.²²⁹ Additionally, government subsidies play a crucial role in promoting green technological innovation among battery producers by providing financial incentives, which further encourage these producers to adopt practices that promote pollution control and recycling.²³⁰ EPR also promotes these practices through consumers' prioritization of environmentally friendly products, pushing companies to adopt green innovation measures to avoid the outside pressure of failing to meet regulatory expectations.²³¹

Despite researching a small sample size, Cailou Jiang and Yue Zhang concluded that the EPR system in China has advanced the green innovation of battery producers, resulting in an increase in high-quality green invention patents.²³² The study indicated that the EPR system fosters green innovation through enhanced government subsidies and increased awareness of environmental sustainability by company executives.²³³

Another study further considered China's policies on management for spent EV batteries and discussed several shortcomings of the policies addressing battery waste: (1) lack of provisions for historical and orphan batteries, (2) no target on battery collection, (3) unclear definition of the scope of authority, (4) inadequate regulatory standards for data auditing and verification, (5) uncooperative stakeholders, (6) and lack of specificity on financing mechanisms.²³⁴

China's policies lack guidance on whether or not China considers historical and orphan batteries in its waste management framework. Historical batteries are "waste batteries from EVs that have been sold prior to the implementation of the current policy framework," and orphan batteries are "waste batteries from EVs whose manufacturers have ceased to exist."²³⁵ The significance of addressing historical and orphan battery issues is highlighted by China's experience of declining EV sales in 2019 due to reduced government subsidies

227. *Id.*

228. *Id.*

229. *Id.* at 13.

230. *Id.*

231. *Id.*

232. *Id.*; Green invention patents are essentially patents for technologies related to resource conservation and clean production. Cailou Jiang and Yue Zhang assessed the quality of patents as it relates to alternative energy, transportation, energy conservation, and waste management. *Id.* at 6.

233. *Id.* at 13-14.

234. Li et al., *supra* note 142, at 118-19.

235. *Id.* at 118.

and the impact of the COVID-19 pandemic.²³⁶ A drop in sales means EV manufacturers will struggle to stay afloat, which could pose an issue for effective battery management if these producers were to go bankrupt. Bankruptcy results in the manufacturers' batteries becoming orphan products, making the EPR framework difficult to implement when spent batteries cannot be sent back to their original manufacturer.²³⁷ Another concern is the lack of targets for battery collection. China's battery framework only sets targets focusing on material recovery from EV batteries during the recycling process and fails to set targets for the overall collection of these batteries.²³⁸ In other words, while China has importantly set recovery goals for lithium, for example, the lack of overall collection means fewer batteries are being brought into the waste stream for proper recycling and disposal.²³⁹

The failure to have a clear definition for the scope of authority is another issue presented by China's regulatory framework. Managing EV battery waste in China is challenging due to the dominance of an informal recycling sector. Unqualified recyclers are often able to offer high bids to EV users for their spent batteries because they do not have to pay environmental and safety compliance costs associated with recycling.²⁴⁰ EV users are then misled about their battery's remaining value and recycle the battery with these unqualified recyclers, leading to issues where fewer qualified waste recyclers are treating EV batteries. The Chinese government has taken action by introducing regulatory standards for waste battery treatment, but the success of this measure depends on its effective administration and enforcement, a responsibility shared between central and local agencies.²⁴¹ There is a lack of clear authority between these agencies, which not only results in poor administration and enforcement but also leads to EV subsidy fraud by large EV makers due to weak auditing and oversight.²⁴²

Additionally, China has implemented a traceability management system for battery manufacturers, EV makers, car dealers, and reuse and recycling companies to record and update battery information for the battery's life cycle from production to disposal.²⁴³ However, the Interim Measures govern this system, which is a problem for effective data collection because they lack defined requirements for data auditing and verification.²⁴⁴

Uncooperative stakeholders also present a significant challenge for the implementation of China's battery policies. While Cailou Jiang and Yue Zhang have noted that the EPR system has improved the sustainability of pollution

236. *Id.*

237. *Id.*

238. *Id.*

239. *See id.*

240. *Id.*

241. *Id.*

242. *Id.* at 118-19.

243. *Id.* at 119.

244. *Id.*; *see supra* Section II.C. (discussing China's Interim Measures and the four goals the Interim Measures seeks to achieve for EV battery recycling).

control technology and recycling methods in China, EPR's success relies on the support of stakeholders involved in the collection, recycling, and disposal processes.²⁴⁵ Without this cooperation, manufacturers face significant obstacles in effectively taking back used batteries, undermining the goals of the EPR system and limiting its overall impact.

Lastly, China's policies addressing battery waste lack specificity regarding financing mechanisms. Incentives for EV battery recycling are often limited due to technological immaturity, a small reused battery market from high battery refurbishment costs and lower new battery costs, and poor economic viability.²⁴⁶ The current framework for treating used batteries lacks explicit financing mechanisms, leaving producers to develop their own mechanisms for treating waste batteries.²⁴⁷ This is problematic, however, since developing unilateral policies can lead to ineffective cost recovery for producers, a problem that is only exacerbated for EV producers who are seeing declines in their EV sales.²⁴⁸

*B. A Comparative Analysis of EPR Systems in the EU & China,
to the United States*

Admittedly, the different physical, social, and political landscapes between the EU, China, and the United States determine the policies that will be implemented and how these policies will take effect.²⁴⁹ These differentiating factors often mean that environmental problems are viewed differently in each jurisdiction. Importantly, the United States' historical frameworks of individualism and capitalism often limit the policies and laws the government can implement, and the attempts to fully enact EPR at a national level have been no exception.²⁵⁰ Limitations of EPR at the national level are also a result of company concerns surrounding lawsuits in the United States, specifically worrying about the liability that may be incurred from taking back products with hazardous materials.²⁵¹ Consumers are also the ones who end up paying for waste management of end-of-life products through internalized costs in the products' price increases.²⁵²

The United States' efforts to implement federal EPR policies have been unsuccessful. In 1992, although not specifically related to EV battery management, there was an attempt to introduce provisions related to EPR

245. Li et al., *supra* note 142, at 119.

246. *Id.*

247. *Id.*

248. *Id.*

249. Bette K. Fishbein, *Part II: The EPR Policy Challenge for the United States*, in EXTENDED PRODUCER RESPONSIBILITY: A MATERIALS POLICY FOR THE 21ST CENTURY 1, 55 (INFORM, Inc. 2000).

250. *Id.* at 56.

251. *Id.*

252. *Id.* at 62.

packaging into the RCRA reauthorization bill.²⁵³ This attempt failed, curbing the efforts to enact EPR legislation at the federal level and further creating a hostile political climate surrounding federal EPR legislation.

The United States' efforts to implement successful EPR policies for effective EV battery waste management continue to fall short of the regulations enacted by the EU and China. The EU and China's comprehensive frameworks have established clear responsibilities for producers, set ambitious recycling targets, and integrated circular economy principles into their frameworks. In contrast, the United States not only lacks a comprehensive regulatory framework for EPR battery management but also fails to implement any regulation at all at the national level. This leaves battery waste management to be inconsistently addressed at the state level, creating fragmented policies, limiting enforcement mechanisms, and limiting recycling efforts in the few states with waste policies compared to the broader impact that could be achieved through federal implementation.

For the few states that have either implemented an EPR battery regulation or are attempting to introduce legislation, their efforts provide an opportunity to examine how these state initiatives compare with the regulations seen by the EU and China. As the first state to implement a policy on EPR EV battery waste, New Jersey's Electric and Hybrid Vehicle Management Act framework is worth analyzing. First, the Act requires each producer to develop its own management plan detailing its recycling system once the New Jersey Department of Environmental Protection finalizes the framework for the entire recycling process for EV battery producers.²⁵⁴ New Jersey's Act shares some similarities with the EU's approach in that it provides overarching regulatory requirements while allowing producers the flexibility to enact their own management plans, subject to state approval. This is compared to the EU's approach, where its legal framework sets rules and objectives, but allows the implementation of the framework to be left to each individual member state. It will be interesting to see if New Jersey's reliance on individualized management plans becomes problematic in the future, as variations between producers' plans could lead to inconsistencies during implementation if each producer develops a different approach to its recycling system.

Second, New Jersey's Act is comparable to the EU and China because the Act sets standards and criteria for EV batteries' entire recycling process, including collecting, transporting, recycling, reusing, repurposing, and disposing.²⁵⁵ This approach aligns with the principles of a circular economy, ensuring that batteries are not just properly disposed of but also recycled and reused to minimize waste and mitigate environmental impacts.

Thus, while New Jersey's Act shares some similarities regarding frameworks, goals, and concerns, New Jersey's model only works in isolation with no federal

253. *Id.* at 73.

254. Patel & Berman, *supra* note 163.

255. *Id.*

regulation or overarching guidance, unlike the EU and China. Though limited, New Jersey can still provide a blueprint for other states to follow. California, for example, attempted to pass SB 615, which focused on EPR for EV batteries, under which suppliers would be responsible for the collection and management of EV batteries at the end of their life.²⁵⁶ The bill proposed a “battery management hierarchy” that would prioritize reuse, repair, and remanufacture, while also requiring unique identifiers for each battery to enable responsible tracking.²⁵⁷ Surprisingly, given California’s quite progressive nature on environmental matters, SB 615 did not pass, as it was vetoed by Governor Gavin Newsom. Governor Newsom justified his veto by explaining that rather than expanding on the effectiveness of current EPR models, SB 615 would impose a significant burden on the Department of Toxic Substances Control to implement the policy.²⁵⁸

Even implementing EPR at the state level is proving to be difficult. While efforts are still underway, state-level efforts may continue to struggle without a comprehensive, uniform federal framework for states to follow.

C. Consequences of Failing to Devise a National EPR Program

Aside from the obvious environmental consequences if the United States does not implement an EPR framework for EV battery recycling programs, the United States will continue to be viewed as lagging behind in environmental policy leadership.²⁵⁹ Rather than being a leader in environmental policy, the United States has fallen behind other developed-world nations,²⁶⁰ as is especially evident by the current discussion surrounding the United States lagging behind the EU and China concerning EV battery waste management plans. However, through the United States’ government and businesses embracing sustainable initiatives, such as supporting and implementing an EPR battery waste framework, the United States will have the potential to be seen as a leader in taking positive environmental initiatives. Additionally, not only will the United States benefit from sustainable initiatives taken by businesses, but businesses themselves can expect to see improved reputations, competitive

256. *EPR Bills on California Governor’s Desk Reflect Strong and Growing Movement*, PROD. STEWARDSHIP INST. (Sep. 5, 2024), <https://productstewardship.us/epr-bills-on-california-governors-desk-reflect-strong-and-growing-movement/> [<https://perma.cc/7BLZ-9FM9>].

257. *Id.*

258. Letter from Gavin Newsom, Governor of the State of Cal., to Members of the California State Senate (Sep. 29, 2024) (on file with the Office of the Governor).

259. See Jason Scorse, *Why the U.S. is No Longer a Leader in Environmental Policy*, PROGRESSIVE POL’Y INST. (Apr. 22, 2011), <https://www.progressivepolicy.org/why-the-u-s-is-no-longer-a-leader-in-environmental-policy/> [<https://perma.cc/7H58-M6AF>]; see also *Perceptions of U.S. Environmental Policy Lag Behind Many Other Countries*, UNIV. OF MOUNT SAINT VINCENT (Mar. 7, 2018), <https://mountsaintvincent.edu/perceptions-of-u-s-environmental-policy-lag-behind-many-other-countries/> [<https://perma.cc/258N-HD2P>].

260. Scorse, *supra* note 259.

advantages, receive government incentives, be viewed as leaders in innovation, and be ahead of compliance regulations.²⁶¹

D. EPR—The Right Approach?

Implementing an EPR framework may not only be a turnoff due to its complexity, but also the costs still remain a concern in the transition toward an EPR approach.²⁶² Determining the costs of design, manufacturing, marketing, extraction, and recycling, and who should bear these costs, is difficult to assess.²⁶³ In some cases, the costs to take back the materials and recycle them could exceed the initial costs of extracting the materials.²⁶⁴ The concern is that EPR will raise product costs because producers would be inclined to pass these recycling costs on to consumers. However, there has been no credible evidence that consumers will bear the costs associated with implementing EPR.²⁶⁵ A Columbia University paper argued that the biggest driver of prices is due to supply and demand, and that this elasticity plays an important role in the pricing.²⁶⁶ Other factors, such as commodity prices, energy costs, transportation costs, and inflation, also affect product prices.²⁶⁷ Essentially, there are too many factors affecting product prices, and it is difficult to argue that EPR alone would cause prices to increase. Blaming price increases on EPR “would be like saying that a rock thrown into an ocean could cause a tsunami.”²⁶⁸

Another concern with EPR laws is that this principle does not address levels of consumption.²⁶⁹ EPR can promote sustainable design, reuse, and recycling, but it has no effect on the number of products consumed.²⁷⁰ This concern could be applicable to battery waste management, as the previously mentioned EU and Chinese policies do not directly address battery consumption levels. EPR for batteries can, of course, address the design, reuse, and recycling of the products, but it seems the policies do not have a significant impact on the number of batteries produced and consumed. In other words, even with EPR enacted, the demand for batteries will rise as demand for EVs increases. With EPR focusing mostly on producers taking back batteries for proper disposal and recycling, the framework addresses end-of-life management issues. In essence, the EPR

261. *Why Are Green Initiatives Suddenly So Important for Your Business?*, OCTOPUS ELEC. VEHICLES (Nov. 12, 2024), <https://octopusev.com/ev-hub/the-importance-of-green-initiatives> [https://perma.cc/N44N-57DS].

262. Rammaniya, *supra* note 154, at 197, 200.

263. *Id.* at 200.

264. *Id.* at 200-01.

265. Michael Washburn, *Blog: Does EPR Increase Consumer Costs? Spoiler Alert – Not as Much as Critics Say*, THE RECYCLING P'SHIP (Aug. 1, 2022), <https://recyclingpartnership.org/economicresearch/> [https://perma.cc/T5WZ-2K78].

266. *Id.*

267. *Id.*

268. *Id.*

269. James Salzman, *Sustainable Consumption and the Law*, 27 ENV'T L. 1243, 1280 (1997).

270. *Id.*

principle appears more reactive in nature, focusing on managing batteries only after they have been used and completed their life cycle. As mentioned in previous sections, however, ideally, the EPR framework would create effective reuse and recycling programs, which would decrease the demand for new batteries and the need for heightened mining extraction of raw materials.

Despite the United States having a relatively hostile view of EPR mandates, perhaps it could gain favor among stakeholders involved throughout the battery management process. Moreover, although EU stakeholders considered costs an issue, many agreed that the Directive's costs were justified given the current and future benefits and market opportunities.²⁷¹

IV. RECOMMENDATIONS

The United States should follow in the footsteps of the EU and China and implement federal EPR legislation for EV batteries that addresses the full life cycle of the batteries, including reuse and recycling. To do this, Congress should amend RCRA to address the emerging issue of increased EV battery waste. RCRA could provide a legal foundation to bring these policy solutions to fruition. RCRA has been amended in the past to address environmental challenges, and similar amendments can incorporate provisions for EPR policies focused on end-of-life battery management for EVs.²⁷² Specifically, RCRA's amendments include the Hazardous and Solid Waste Amendments of 1984, Federal Facility Compliance Act of 1992, and Land Disposal Program Flexibility Act of 1996.²⁷³ The following are recommendations on steps the United States should take to address the spent battery problem.

First, rather than rely only on the EPA's guidance memo establishing LIBs as hazardous waste, EV LIBs should be explicitly categorized under RCRA as hazardous waste. Since RCRA gives the EPA the authority to regulate hazardous waste from "cradle to grave," this would grant the EPA authority over the battery's entire life cycle.²⁷⁴ Second, RCRA should be amended to integrate provisions based on the EPR principle for EV batteries. Similar to the requirements under the EU and China's frameworks, the provisions should

271. *Commission Staff Working*, *supra* note 174, at 49.

272. *See History of the Resource Conservation and Recovery Act (RCRA)*, U.S. ENV'T PROT. AGENCY (Feb. 11, 2025), <https://www.epa.gov/rcra/history-resource-conservation-and-recovery-act-rcra> [<https://perma.cc/GF7C-KAFJ>].

273. *Id.*; The Hazardous and Solid Waste Amendments of 1984 made substantial additions to RCRA by expanding the "coverage and requirements for hazardous industrial waste." The Federal Facility Compliance Act of 1992 "strengthened enforcement of RCRA at Federal facilities," and the Land Disposal Flexibility Act of 1996 "provided regulatory flexibility for land disposal of certain wastes." *The History of the Resource Conservation and Recovery Act*, DANIELS TRAINING SERVS. (Feb. 11, 2013), <https://danielstraining.com/the-history-of-the-resource-conservation-and-recovery-act/> [<https://perma.cc/GYD6-F63R>].

274. *Summary of the Resource Conservation and Recovery Act*, U.S. ENV'T PROT. AGENCY (July 31, 2024), <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> [<https://perma.cc/X4HL-VY2X>].

outline the obligations of battery producers, such as establishing take-back programs, financing collection, and meeting specific recycling rates. Additionally, new provisions should give the EPA authority to establish a national framework modeled after the EU's harmonized approach. The provisions should include setting consistent collection targets, requiring producers to report to the EPA the quantity of batteries collected and recycled, and ensuring uniform compliance standards nationwide. A strict EPR take-back policy, however, that provides producers with little to no incentive to reuse or recycle their batteries will have no effect on fixing the battery problem.²⁷⁵ Therefore, the government should provide incentives through tax deductions or credits for the products they take back.²⁷⁶

Here, RCRA provides a strong foundation for identifying and regulating hazardous waste, including spent batteries. However, RCRA alone cannot provide the solution to the challenges the United States will face regarding battery waste management. This is where EPR becomes vital to integrate into federal law: EPR can build upon the foundation laid by RCRA by shifting the responsibility of managing this waste onto producers. An attempt to establish harmony between RCRA and the EPR framework can ensure compliance with current waste standards while developing the much-needed solution of sustainable recycling and proper disposal.

While the EU and China provide valuable frameworks for managing EV battery waste, the United States should remain aware of the shortcomings of these approaches. By assessing the limitations of these frameworks, the United States can craft laws that prioritize effective and efficient battery management while tailoring solutions to its social, political, and economic landscape. Despite these valuable frameworks, a key challenge in using the EU and China's frameworks to inform the United States' approach is the absence of standardized definitions, data, and reporting mechanisms.²⁷⁷ For example, terms such as "waste" and "recycling" can have different meanings across nations.²⁷⁸

Even though the United States has resisted EPR mandates, EPR remains an internationally used framework and "the success or failure of EPR programs abroad will undoubtedly influence future policy in the [United States]."²⁷⁹ However, it is crucial to recognize that nations may interpret successes and failures differently, depending on the specific goals of each program and country implementing it.²⁸⁰

275. Betsy M. Billinghurst, *E-Waste: A Comparative Analysis of Current and Contemplated Management Efforts by the European Union and The United States*, 16 COLO. J. INT'L ENV'T L. & POL'Y 399, 426 (2005).

276. *Id.* at 427.

277. FISHBEIN, *supra* note 249, at 105.

278. *Id.* at 106.

279. *Id.*

280. *Id.*

V. CONCLUSION

As a top seller of EVs, the United States can expect an increase in spent battery waste in the coming years. Therefore, it is key to implement solutions to mitigate the environmental and human health impacts of waste. Although EV sales have risen over the past several years, the United States lags significantly behind the EU and China, despite these jurisdictions also seeing a rise in EV sales. The United States will benefit from implementing EPR principles into its regulatory framework through legislation by amending RCRA. Specifically, the United States needs to implement federal legislation that places responsibility for battery reuse and recycling back on producers to promote sustainable battery products and manufacturing processes and push the nation towards a circular economy model. The United States should consider the EU and China's frameworks to inform its approaches and learn from their policy shortcomings to enact effective policies for battery waste management. The United States has the opportunity to improve its battery recycling landscape, and it must take it. The decisions made now will define the trajectory of battery waste management for years to come, and with legislative action, the United States can turn its inevitable battery crisis into an opportunity for international leadership. The United States must leave behind its historical resistance to a national EPR approach and adopt a uniform, comprehensive battery waste regulation. In the words of George Bernard Shaw, "[p]rogress is impossible without change, and those who cannot change their minds cannot change anything."²⁸¹

281. *Progress Is Impossible Without Change*, THRIVE GLOB. (Sep. 5, 2018), <https://community.thriveglobal.com/progress-is-impossible-without-change/> [https://perma.cc/LJM6-8APA].

A CALL FOR RESTORATIVE ACTION: REDUCING THE RISK OF DEATH BY SUICIDE FOR TRANSGENDER, NONBINARY, AND INTERSEX YOUTH THROUGH ENSURED ACCESS TO GENDER-AFFIRMING EDUCATIONAL SPACES

ANASTASIA LUC^{*,**,***}

INTRODUCTION

“Meeting people where they are is not selling out – it’s what this work is.”

Rep. Sarah McBride¹

* Anastasia Luc is a current law student enrolled at Indiana University McKinney School of Law. Originally from the Chicagoland area, Luc plans to practice law in Indianapolis, Indiana after graduating in May 2026. Luc would like to thank their faculty advisor, Professor Jami Sayeed, for coaching them in developing a Note that weaves together a tapestry of law, fact, and advocacy in the name of justice. Luc would like to acknowledge and thank Kristal Larson for providing feedback as to how this Note affirms, respects, and captures the trans experience. Luc also appreciates the support of the Indiana International & Comparative Law Review Volume XXXV and XXXVI Boards and Student Note Candidates for their work in editing and providing feedback for this Note. Finally, Luc thanks their partner and their family for offering support throughout the writing process. Luc dedicates this Note to all transgender, intersex, and gender non-conforming youth: May you all live unapologetically proud of your authentic self, both inside and out. When that happens, the world is a better place for us all.

** This Author would like to remind readers that every person’s experience with gender and sexuality is unique. This Author has put in an intentional, good-faith effort to craft a Note that is affirming, uplifting, and inclusive of the transgender and gender non-conforming communities. When reading this Note, readers should be cautious not to make generalized assumptions about any one individual’s gender identity, nor should readers make any such generalized assumptions about the transgender or gender non-conforming communities at large. Moving forward, readers are encouraged to continue learning and listening to transgender and gender non-conforming voices, as well as those among the collective LGBTQ+ community. *See Being an LGBTQ+ Ally*, HUM. RTS. CAMPAIGN FOUND. (Oct. 2022), <https://reports.hrc.org/being-an-lgbtq-ally> [<https://perma.cc/K2R8-78UV>].

*** This Note discusses several heavy topics, including but not limited to death by suicide, gender dysphoria, bullying, and harassment. This Note also briefly discusses material that may have included or alluded to anti-LGBTQ+ themes. This Author asks readers to be mindful and take care while reading this Note. For individuals struggling or in crisis, help is available by calling or texting 988 to connect with the Suicide & Crisis Lifeline. For young LGBTQ+ individuals struggling or in crisis, help is also available through The Trevor Project by texting ‘START’ to 678-678, calling 1-866-488-7386, or messaging a counselor online. Trans individuals may also call Trans Lifeline at 877-565-8860 to talk to another trans and/or nonbinary individual. *See If you need to talk, the 988 Lifeline is here*, 988 LIFELINE, <https://988lifeline.org/> [<https://perma.cc/7MU3-7ZHA>] (last visited Sep. 15, 2025); *We’re here for you*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/get-help/> [<https://perma.cc/2A9W-GHUV>] (last visited Sep. 15, 2025); *Hotline*, TRANS LIFELINE, https://translifeline.org/hotline/?gad_source=1&gad_campaignid=15918598973&gbraid=0AAAAoQgEevgWMzkmm2yMR3wz-oyeMZEx&gclid=Cj0KCQjwxL7GBhDXARIsAG0cmIOPX5SsJruFbSR2fVwpVVQzNjFUuYYvZUCZRmkADAYTyYwRlP9q7kQaAgYYEALw_wcB [<https://perma.cc/8PYM-JRE8>] (last visited Sep. 15, 2025).

1. HUMAN RIGHTS CAMPAIGN, *Rep. Sarah McBride Speaks at the 2025 HRC Greater New York Dinner* (YouTube, Feb. 3, 2025), <https://www.youtube.com/watch?v=fObv7A93YDM> [<https://perma.cc/VKG2-URAS>].

I. A NATIONAL CRISIS

On March 14, 2024, the President of the United States issued a statement, asserting that “[e]very young person deserves to have the fundamental right and freedom to be who they are, and feel safe and supported at school and in their communities.”² The statement was issued in response to the death of sixteen-year-old Nex Benedict.³

Nex attended a public high school in the Owasso School District in Oklahoma.⁴ To some of his⁵ peers, Nex was known as brave, easy to love, and overall, a good person.⁶ One friend recalled looking up to Nex and admiring their authenticity and willingness to “stick up for themselves or for someone else.”⁷ Another reflected that Nex “would have done anything for someone that he cared about or loved.”⁸

However, on February 7, 2024, Nex had been beaten unconscious by three students in the girls’ bathroom at school.⁹ Even though Nex had bruises over his face and eyes, and scratches behind his head, the school did not call an ambulance, nor did they file a police report. Instead, Nex’s mother took them to a medical center for treatment.¹⁰ The next day, on February 8, 2024, Nex

2. JOE BIDEN, *Statement from President Joe Biden on Nex Benedict*, THE WHITE HOUSE (MAR. 14, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/14/statement-from-president-joe-biden-on-nex-benedict/> [https://perma.cc/VA5E-NBBQ].

3. *Id.*; see also Laurel Powell, *U.S. Department of Education Finds Nex Benedict’s School District Accountable for Fostering Hostile Climate in Response to HRC Complaint*, HUM. RTS. CAMPAIGN (Nov. 13, 2024), <https://www.hrc.org/press-releases/u-s-department-of-education-finds-nex-benedicts-school-district-accountable-for-fostering-hostile-climate-in-response-to-hrc-complaint> [https://perma.cc/ZB6S-357Y].

4. Powell, *supra* note 3.

5. Some sources state that Nex used they/them pronouns, and some state Nex used he/him pronouns. Other sources state that Nex used both he/him and they/them pronouns. Out of respect, this Author will use both he/him and they/them pronouns for Nex. See e.g., Colbi Edmonds & Adeel Hassan, *What We Know About the Death of a Nonbinary Student in Oklahoma*, N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/article/nex-benedict-oklahoma.html> [https://perma.cc/BVH4-69QD] (stating that Nex often used they and them pronouns); Lana Leonard, *Read the Stories of Nex Benedict as Told by Their Chosen Family, Friends and Allies at Owasso Vigil*, GLAAD (Feb. 27, 2024), <https://glaad.org/read-the-stories-of-nex-benedict-as-told-by-their-chosen-family-friends-and-allies-at-owasso-ok-vigil/> [https://perma.cc/5HV7-NQZ9] (quoting a friend of Nex who alleged Nex used he and him pronouns); *LIVE UPDATES: The Death of Nex Benedict and Community Response in Greater Oklahoma*, GLAAD (Feb. 28, 2024), <https://glaad.org/live-updates-the-death-of-nex-benedict-and-community-response-in-oklahoma> [https://perma.cc/7S3Y-8RJ8] (stating that Nex used he and they pronouns); C Mandler, *What happened to Nex Benedict?* NPR (Mar. 22, 2024, 10:24 A.M.), <https://www.npr.org/2024/03/15/1238780699/nex-benedict-nonbinary-oklahoma-death-bullying> [https://perma.cc/C93W-T8QV] (stating that Nex used he and him pronouns as well as they and them pronouns).

6. See Leonard, *supra* note 5.

7. *Id.*

8. *Id.*

9. Edmonds & Hassan, *supra* note 5.

10. Bevan Hurley, *Oklahoma banned trans students from bathrooms. Now Nex Benedict is dead after a fight at school*, INDEPENDENT (Feb. 20, 2024) <https://www.independent.co.uk/news/world/americas/nex-benedict-dead-oklahoma-b2501844.html> [https://perma.cc/W3W3-VZSU].

collapsed in his living room and was taken to a pediatric emergency room.¹¹ Eventually, he could no longer sustain his injuries.¹² Nex was officially declared dead later that day.¹³

The incident came after Nex had already been subjected to bullying and harassment for over a year.¹⁴

The reason for the bullying and harassment? Nex's gender identity.¹⁵

Nex identified as Two-Spirit,¹⁶ transgender,¹⁷ and gender non-conforming.¹⁸ Yet, Nex was more than their gender identity.¹⁹ Outside of school, Nex lived and had interests like any other adolescent. Nex enjoyed drawing, reading, and playing games, and he had a cat named Zeus.²⁰ Nex, who was Indigenous, had family roots tracing back to the Choctaw Nation.²¹ They also had a family that "encouraged open discussion about questions of gender and identity."²²

Ultimately, Nex was a kid who "just wanted to be accepted, [and who] should still be here with us today."²³ An autopsy report later revealed multiple

11. *Id.*

12. Jose Soto, *Honoring Nex Benedict, a 16-Year-Old Non-Binary Oklahoma High School Student Who Tragically Died One Day After Being Beaten Unconscious in a School Bathroom*, HUM. RTS. CAMPAIGN (Feb. 21, 2024), <https://www.hrc.org/news/honoring-nex-benedict-16-year-old-non-binary-high-school-student-who-tragically-died-after-school-beating> [<https://perma.cc/R92D-3D5C>].

13. Hurley, *supra* note 10.

14. Compl. ¶ 1, *Benedict v. Indep. Sch. Dist. No. 11*, No. 4:25-cv-00321-MTS (N.D. Okla. June 26, 2025), ECF No. 2; Hurley, *supra* note 10. Nex's mother, Sue, filed suit as administrator of Nex's estate on June 26, 2025. In her complaint, Sue alleged that Nex endured "verbal abuse, physical assault, sexual harassment, cyberbullying, social isolation, and humiliation by other students on a regular basis." Compl. ¶ 15.

15. *PFLAG National Glossary*, PFLAG, <https://pflag.org/glossary/> [<https://perma.cc/W9HV-TDCD>] (last visited Oct. 6, 2025) (referring to "gender identity" as "a person's deeply held core sense of self in relation to gender. . . . Gender identity is a separate concept from sexuality and gender expression."); Complaint, *supra* note 14, ¶ 16; *see also* Leonard, *supra* note 5; Mandler, *supra* note 5.

16. *PFLAG National Glossary*, *supra* note 15 (defining Two-Spirit as a "term used within some American Indian (AI) and Alaska Native (AN) communities to refer to a person who identifies as having both a male and a female essence or spirit [The term] encompasses sexual, cultural, gender, and spiritual identities, and provides unifying, positive, and encouraging language that emphasizes reconnecting to tribal traditions").

17. *Id.* (explaining that "transgender" is a "term describing a person's gender identity that does not necessarily match their assigned sex at birth [It is] an umbrella term to describe groups of people who transcend traditional expectations of gender identity or expression").

18. *Id.* (explaining that "gender non-conforming" is an "umbrella term for those who do not follow gender stereotypes, or who expand ideas of gender expression or gender identity"); Recognize that some sources reported that Benedict identified as "nonbinary." *See e.g.* Mandler, *supra* note 5 (reporting that Benedict identified as transgender and nonbinary); Soto, *supra* note 12 (describing Nex as nonbinary); *see also* *PFLAG National Glossary*, *supra* note 15 (explaining that "nonbinary" refers to individuals "who do not subscribe to the gender binary.")

19. *See* Leonard, *supra* note 5.

20. Soto, *supra* note 12.

21. Hurley, *supra* note 10.

22. Soto, *supra* note 12.

23. Biden, *supra* note 2.

injuries to Nex's head, neck, and torso.²⁴ The same report concluded that "a toxic combination of diphenhydramine, an antihistamine commonly used for allergies, and fluoxetine, a drug often used to treat depression," caused Nex's death.²⁵ The Oklahoma Medical Examiner's Office ultimately determined that Nex died by suicide.²⁶

Risk of death by suicide for teens and adolescents is considered a "substantial public health concern" in the United States, especially as rates of poor mental health and behaviors related to death by suicide have continued to rise in recent years.²⁷ As of January 2024, death by suicide is the second leading cause of death for children between the ages of 10 and 14 and the third leading cause of death for children and emergent adults between the ages of 15 and 24.²⁸ In 2023, 20.4% of adolescents "seriously considered attempting [death by] suicide," and 9.5% did attempt death by suicide.²⁹

Death by suicide "stems from a complex mix of factors and affects people of all backgrounds."³⁰ Although young people are impacted collectively, studies show some groups of teens and adolescents face additional stressors that disproportionately increase their risk of death by suicide.³¹ For instance, youth living in rural communities, Black youth, American Indian and Alaska Native youth, girls and young women, and youth involved in the criminal legal system are all disproportionately at risk for death by suicide.³² Indeed, also among those disproportionately affected are LGBTQ+³³ youth.³⁴

24. Edmonds & Hassan, *supra* note 5.

25. *Id.*

26. *Id.*; Mandler, *supra* note 5.

27. Jorge V. Verlenden et al., *Mental Health and Suicide Risk Among High School Students and Protective Factors – Youth Risk Behavior Survey, United States, 2023*, 73 MORBIDITY AND MORTALITY WKLY. REP. 79, 79 (Oct. 10, 2024), <https://www.cdc.gov/mmwr/volumes/73/su/pdfs/su7304a9-H.pdf> [<https://perma.cc/J97V-CXF5>].

28. *Facts About Suicide Among LGBTQ+ Young People*, THE TREVOR PROJECT (Jan. 2024), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/> [<https://perma.cc/5KM6-VYY5>].

29. Verlenden et al., *supra* note 27.

30. YOUTH SUICIDE: CURRENT TRENDS AND THE PATH TO PREVENTION, THE JED FOUND. 36 (Dec. 6, 2023) https://jedfoundation.org/wp-content/uploads/2024/06/JED-Suicide-Trends-Report_June-2024.pdf [<https://perma.cc/U52Q-9D2T>].

31. *Id.* at 17.

32. *See id.* at 18-25.

33. *PFLAG National Glossary*, *supra* note 15 (defining "LGBTQ+" as "an acronym collectively [referring to] lesbian, gay, bisexual, transgender, or queer [individuals].") Sometimes, the term is stated merely as LGBT (lesbian, gay, bisexual, or transgender), GLBT (gay, lesbian, bisexual, and transgender). Sometimes, the "Q" in LGBTQ stands for "questioning." The "+" represents members of the LGBTQ community whose identities may not be captured by the letters "L," "G," "B," "T," or "Q," such as, for instance, "pansexual," "asexual," "intersex," "Two-Spirit," etcetera. This Author may use LGBTQ+ interchangeably with LGBT, GLBT, LGBTQIA, or other collective acronyms to write with clarity and in a good-faith effort intended to affirm all members of the LGBTQ+ community.

34. YOUTH SUICIDE: CURRENT TRENDS AND THE PATH TO PREVENTION, *supra* note 30, at 23.

II. RISK OF DEATH BY SUICIDE AND LGBTQ+ YOUTH

For LGBTQ+ youth, the risk of death by suicide is higher compared to that of their heterosexual³⁵ and/or cisgender³⁶ peers.³⁷ According to the Trevor Project's 2023 U.S. National Survey on the Mental Health of LGBTQ+ Young People, 41% of surveyed LGBTQ+ youth seriously considered attempting death by suicide, a rate almost double that of the 20.8% of adolescents overall in the same year.³⁸ In 2024, 39% of surveyed LGBTQ+ youth seriously considered death by suicide.³⁹

LGBTQ+ youth are not “inherently prone” to risk of death by suicide because of their sexual orientation⁴⁰ or gender identity, but are, in fact, at higher risk because of how they are treated and stigmatized in society.⁴¹ Research suggests that LGBTQ+ children subjected to anti-LGBTQ+ experiences or messages may “compound and produce negative mental health outcomes and increase [risk of death by suicide] among LGBTQ+ individuals.”⁴² Notably, LGBTQ+ youth are “more than four times as likely” to attempt death by suicide.⁴³ The risk of death by suicide is even higher for transgender and

35. *PFLAG National Glossary*, *supra* note 15 (defining “heterosexual” in that it “refers to a person who is sexually attracted to a person of a different gender or sex.”)

36. *Id.* (defining “cisgender” as a “term used to refer to an individual whose gender identity aligns with the sex assigned to them at birth.”) Cisgender is not a slur. *Id.* “Cis” or “cisgender” may be used to refer to non-trans people. SHON FAYE, *THE TRANSGENDER ISSUE: TRANS JUSTICE IS JUSTICE FOR ALL* xviii (Verso, 2022); *see e.g., id.* at xvii (“We need a word for the 99 per cent of people in our society who do not have the experience of being trans, who fill almost all positions of power and authority, who control access to healthcare and education, and who make our laws.”).

37. Verlenden et al., *supra* note 27, at 83.

38. 2023 U.S. NATIONAL SURVEY ON THE MENTAL HEALTH OF LGBTQ+ YOUNG PEOPLE, THE TREVOR PROJECT 4 (2023) https://www.thetrevorproject.org/survey-2023/assets/static/05_TREVOR05_2023survey.pdf [<https://perma.cc/C2WY-84F6>] [hereinafter TREVOR PROJECT 2023 SURVEY].

39. R. NATH ET AL., 2024 U.S. NATIONAL SURVEY ON THE MENTAL HEALTH OF LGBTQ+ YOUNG PEOPLE, THE TREVOR PROJECT 2 (2024), https://www.thetrevorproject.org/survey-2024/assets/static/TTP_2024_National_Survey.pdf [<https://perma.cc/RN62-JW4J>]; LGBTQ+ youth of color reported even higher rates of death by suicide compared to their white peers. In 2023, 11% of white LGBTQ+ youth did attempt death by suicide “compared to 22% of Native/Indigenous [LGBTQ+] youth, 18% of Middle Eastern/North African [LGBTQ+] youth, 16% of Black [LGBTQ+] youth, 17% of multiracial [LGBTQ+] youth, 15% of Latinx [LGBTQ+] youth, and 10% of Asian/Pacific Islander [LGBTQ+] youth.” *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 28. In 2024, 10% of white LGBTQ+ youth did attempt death by suicide, compared to 24% of Native/Indigenous LGBTQ+ youth, 14% of Middle Eastern/Northern African LGBTQ+ youth, 14% of Black LGBTQ+ youth, 16% of multiracial LGBTQ+ youth, 13% of Latinx LGBTQ+ youth, and 10% of Asian American/Pacific Islander LGBTQ+ youth. NATH ET AL., *supra* note 39, at 5.

40. *PFLAG National Glossary*, *supra* note 15 (explaining that sexual orientation refers to “the sexual attraction toward other people or no people.”)

41. THE TREVOR PROJECT, *Learn with Love: Trey & Gloria* (YouTube, Nov. 14, 2024), <https://www.youtube.com/watch?v=gXzKHxD3WoA> [<https://perma.cc/HM3G-BSG5>].

42. *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 28.

43. *Id.*

nonbinary⁴⁴ children.⁴⁵

III. INCREASED RISKS OF DEATH BY SUICIDE FOR TRANSGENDER AND GENDER NON-CONFORMING YOUTH

Of the surveyed LGBTQ+ youth who seriously considered death by suicide in 2024, 46% were transgender or nonbinary.⁴⁶ Of that percentage, 14% of transgender and nonbinary youth attempted death by suicide, compared to only 7% of cisgender youth, and of those surveyed:

- 47% of transgender girls and young women considered death by suicide, a rate 16% *higher* than that of cisgender girls and young women.⁴⁷
- 14% of transgender girls and young women attempted death by suicide, compared to only 8% of cisgender girls and women.⁴⁸
- 52% of transgender boys and young men considered death by suicide, a rate 25% *higher* than that of cisgender boys and young men.⁴⁹
- 18% of transgender boys and young men attempted death by suicide, compared to 7% of cisgender boys and young men.⁵⁰
- 43% of nonbinary youth considered death by suicide. 13% attempted death by suicide.⁵¹

While researchers haven't been able to determine precisely which factors contribute to a heightened risk of death by suicide for transgender and nonbinary youth, some theorize that bullying, discrimination, social exclusion, and

44. *PFLAG National Glossary*, *supra* note 15 (explaining that some individuals use the term “nonbinary” (or “non-binary”) interchangeably with terms such as “genderqueer,” “genderfluid,” “gender non-conforming,” “gender diverse,” or “gender expansive.”) For purposes of this Note, this Author will use “nonbinary” (or “non-binary”), unless the source explicitly uses the term “gender non-conforming.” This Author advises readers to recognize the nuances between the terms “nonbinary” and “gender non-conforming,” that not all transgender and nonbinary people consider themselves gender nonconforming, and that “trans” is “used for shorthand for ‘transgender.’” *Id.*; *Glossary of Terms: Transgender*, GLAAD <https://glaad.org/reference/trans-terms> [<https://perma.cc/AHC3-KT7D>] (last visited Sep. 16, 2025).

45. YOUTH SUICIDE: CURRENT TRENDS AND THE PATH TO PREVENTION, *supra* note 30, at 23.

46. NATH ET AL., *supra* note 39, at 3.

47. *Id.* at 4. (emphasis added).

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.*

prejudice have all contributed to such high risks.⁵² Research also shows that various environmental, mental, and physical risk factors have contributed to heightened risks of death by suicide among LGBTQ+ youth.⁵³ Nevertheless, the fact of the matter is this:

Children who identify as transgender or nonbinary are dying.

IV. THE ROLE OF SCHOOLS IN THE UNITED STATES AND REDUCING RISKS OF DEATH BY SUICIDE FOR TRANSGENDER AND GENDER NON-CONFORMING YOUTH

Death by suicide is preventable, and schools can play a key role in preventing death by suicide for students.⁵⁴ Research demonstrates that the risk of death by suicide is lower for transgender and nonbinary students who attend schools that are welcoming to LGBTQ+ students.⁵⁵ Still, in 2024, only 54% of surveyed transgender and nonbinary students had access to a gender-affirming space at school.⁵⁶ On that basis, schools must implement policies and practices that cultivate an inclusive, affirming, and safe environment for all LGBTQ+ students and, in particular, for transgender and nonbinary students.⁵⁷

In the last several years, the United States has taken small steps to promulgate legal guidance that empowers schools to protect transgender and gender non-conforming students. In April 2024, Title IX was amended to offer federal protections for LGBTQ+ students and teachers of color.⁵⁸ Specifically, the Department of Education clarified that Title IX's prohibition of sex-based discrimination includes discrimination based on sexual orientation and gender identity, in light of the United States Supreme Court's historic ruling in *Bostock*

52. Jen Christensen, *Transgender people face significantly higher suicide risk, Danish study finds*, CNN (June 28, 2023, at 6:18 P.M.), <https://www.cnn.com/2023/06/28/health/transgender-suicide-risk/index.html> [<https://perma.cc/LD7V-BGZX>].

53. See *Suicide Risk Factors for LGBTQ+ Youth*, THE TREVOR PROJECT (July 16, 2021) <https://www.thetrevorproject.org/resources/article/suicide-risk-factors/> [<https://perma.cc/YUQ4-E9BY>].

54. *Id.*; *LGBTQ Youth and Suicide*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, <https://www.nyc.gov/site/doh/health/health-topics/lgbtq-youth-suicide.page> [<https://perma.cc/DJU7-NKQQ>] (last visited Sep. 16, 2025); Lynsay Ayer & Lisa J. Colpe, *The Key Role of Schools in Youth Suicide Prevention*, 62 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 19, 20 (Jan. 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9384325/pdf/main.pdf> [<https://perma.cc/3EP2-QBTC>].

55. *Does Your School Welcome LGBTQ+ Students?*, THE TREVOR PROJECT (Aug. 23, 2023), <https://www.thetrevorproject.org/resources/guide/is-your-school-lgbtq-affirming/> [<https://perma.cc/V7ET-6B42>].

56. NATH ET AL., *supra* note 39, at 23.

57. See *Does Your School Welcome LGBTQ+ Students?*, *supra* note 55.

58. Press Release, U.S. Dep't of Education, U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination (Apr. 19, 2024), <https://www.ed.gov/about/news/press-release/us-department-of-education-releases-final-title-ix-regulations-providing> [<https://perma.cc/NF8W-JKLR>].

v. Clayton County.⁵⁹ But this proved to be short-lived. In January 2025, less than one year later, the United States Department of Education notified schools that Title IX would be enforced as it had been written in 2020, leaving transgender and gender nonconforming students without federal protections from sex-based discrimination and Title IX schools without the resources to deliver a gender affirming educational space.⁶⁰

To that end, there remains a sense of urgency in the United States for policymakers to implement legal protections for transgender and nonbinary students that would inherently reduce the risks of death by suicide. In this effort, the United States would not be in isolation. According to the International LGBTQI⁶¹ Youth & Student Organisation (“IGLYO”), Malta, Norway, and Sweden are the top three-ranked European countries based on the degree to which their educational systems are inclusive for LGBTQ+ students.⁶² In particular, Malta achieved the highest score for most of the indicators assessed by IGLYO.⁶³ The United States must study and implement similar systemic, research-based legal protections like those in Malta to contribute to a lessened risk of death by suicide for transgender and gender non-conforming youth. By first ensuring public school students have guaranteed access to gender-affirming educational spaces on a federal level, Congress should pass the Equality Act to codify the Supreme Court’s decision in *Bostock v. Clayton County*, and the Department of Education should reimplement Title IX as amended in 2024.

59. *Id.*; see also *Updates Clarify LGBTQI+ Protections in Title IX*, GLSEN, <https://www.glsen.org/sites/default/files/2024-04/Title%20IX.PDF> [https://perma.cc/RQ4W-NA7D] (last visited Oct. 7, 2025).

60. Press Release, U.S. Dep’t of Educ., U.S. Department of Education to Enforce 2020 Title IX Rule Protecting Women (Jan. 31, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-enforce-2020-title-ix-rule-protecting-women> [https://perma.cc/T7B7-C2XM].

61. *PFLAG National Glossary*, *supra* note 15 (explaining that LGBTQI is the acronym used in Malta and the International LGBTQI Youth & Student Organisation. The “I” stands for “Intersex” and that “Intersex” refers to “people whose bodies exhibit characteristics associated with both male and female biology.”)

62. *LGBTQI Inclusive Education Map 2025*, INT’L LESBIAN, GAY, BISEXUAL, TRANS, QUEER & INTERSEX YOUTH & STUDENT ORG. (2025), <https://www.education.iglyo.org/> [https://perma.cc/2BVB-Q95W].

63. LGBTQI INCLUSIVE EDUCATION REPORT 2025, INT’L LESBIAN, GAY, BISEXUAL, TRANS, QUEER, & INTERSEX YOUTH & STUDENT ORG. 137 (3d ed. 2025), https://iglyo326-my.sharepoint.com/personal/jeremy_iglyo_com/_layouts/15/onedrive.aspx?id=%2Fpersonal%2Fjeremy%5FIGlyo%5Fcom%2FDocuments%2FIGLYO%20LGBTQI%20Inclusive%20Education%20Report%202025%20%2D%20Compressed%2Epdf&parent=%2Fpersonal%2Fjeremy%5FIGlyo%5Fcom%2FDocuments&ga=1 [https://perma.cc/8PGM-7BWS] (Malta received perfect scores for the following indicators: Anti-Discrimination Legislation Applicable to Education, Policies and Action Plans, Inclusive Compulsory Education Curricula, School Environment and Partnerships, Legal Gender Recognition, Support Systems for LGBTQI Young People, Information and Guidelines, and International Commitments).

BACKGROUND

“There is nothing to be feared, only understood. Now is the time to understand more so that we fear less.”

-Marie Curie⁶⁴

I. UNDERSTANDING WHAT IT MEANS TO IDENTIFY AS ‘TRANSGENDER,’
‘NONBINARY,’ OR ‘INTERSEX.’

“How does someone know if they’re transgender?”

“I like to think about it in terms of handedness . . . If I asked you to sign your name with your nondominant hand, it would feel weird. If I asked you to describe it to me, you’d probably say things like *the pen doesn’t fit comfortably in my hand*; or *it’s awkward*; or *I have to try hard to make legible something that I can do with my other hand effortlessly*. It feels forced. . .

“This example is a really great way to understand what it means to be transgender. Everyone has a dominant gender identity. It’s not a preference, it’s not something you can change just because you feel like it—it’s just how you’re wired.”⁶⁵

Excerpt from Mad Honey, written by authors Jodi Picoult and Jennifer Finney Boylan

“Transgender” is a term⁶⁶ describing people who identify with a gender

64. TEDx TALKS, *Making Space for Transgender Kids* | Sarah Garwood | TEDxRitenourRoad, (YouTube, Mar. 28, 2019), <https://www.youtube.com/watch?v=k931AO6b9pY> [<https://perma.cc/BFU8-9ZHB>].

65. JODI PICOULT & JENNIFER FINNEY BOYLAN, *MAD HONEY* 330 (Jennifer Hershey ed., Penguin Random House 2022).

66. “Terms are always changing in the LGBTQ+ community.” *Definitions*, TRANS STUDENT EDUC. RES., <https://transstudent.org/about-2-2/definitions/> [<https://perma.cc/9CQL-ZMXM>]; *See also* FAYE, *supra* note 36 at xvi (“[L]anguage evolves so rapidly that specialist terms commonly used even five years previously soon become redundant through changes in linguistic fashion and in society or simply through the development of new perspectives that change the way language is used.”) Some individuals interpret and use terms differently than others. GUIDE TO BEING AN ALLY TO TRANS AND NONBINARY PEOPLE, PFLAG 5 (2024) <https://pflag.org/wp-content/uploads/2016/04/S4E-Trans-Ally-Guide-FINAL.pdf> [<https://perma.cc/6ZCJ-Z32Z>]. This Author has put in a good faith attempt to use language that is affirming, just, and accurate as the language exists as of December 2025. This Author may also use “trans” in a good-faith effort to use inclusive language while recognizing that individuals may use varying terms in accordance with their gender identity or expression. *See PFLAG National Glossary, supra* note 15.

identity that is inconsistent with the individual's sex assigned⁶⁷ at birth.⁶⁸ Some individuals, including some who identify as transgender, do not identify as either a "man" or a "woman" and may feel comfortable identifying as "nonbinary."⁶⁹ Others who do not follow gender stereotypes may use the term "gender non-conforming."⁷⁰

Some individuals are born with, or develop during childhood, "differences in their sex traits or reproductive anatomy," meaning that they may have differences in their genitalia, hormones, internal anatomy, or chromosomes.⁷¹ These people are "intersex." An estimated 2% of humans are born with different intersex variations.⁷² For perspective, this is the same percentage of people born with red hair.⁷³ Although "intersex" is distinct from "transgender," the struggles and needs of intersex people are "deeply intertwined" with those of transgender people.⁷⁴

Transgender people represent a diverse and complex community, and there is no "one right way" to "be transgender."⁷⁵ Some cisgender people find it difficult to understand what it means to "be transgender," and others have few opportunities to learn about transgender and gender non-conforming identities.⁷⁶ However, a person need not understand another individual's identity to consider societal factors that impact a transgender person's needs and authentic life

67. *PFLAG National Glossary*, *supra* note 15. (defining "assigned sex" as "[t]he sex assigned to an infant at birth based on the child's visible sex organs, including genitalia and other physical characteristics" and that "biological sex" is sometimes referred to as "sex assigned at birth," too, and is not to be confused with "gender.")

68. *Understanding Transgender People: The Basics*, ADVOCS. FOR TRANS EQUAL., <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [https://perma.cc/A5LS-66TP] (last visited Mar. 9, 2025); *see also* TRANS STUDENT EDUC. RES., *supra* note 66 ("Encompassing term of many gender identities of those who do not identify or exclusively identify with their sex assigned at birth. The term transgender is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life.").

69. Not every person who identifies outside the gender binary uses "nonbinary." Other terms include, without limitation, "genderqueer," "agender," "bigender," and "genderfluid." The person may use the word that they feel is the best or most affirming term for their personal lived experience. *Understanding Nonbinary People: How to Be Respectful and Supportive*, ADVOCS. FOR TRANS EQUAL., <https://transequality.org/issues/resources/understanding-nonbinary-people-how-to-be-respectful-and-supportive> [https://perma.cc/UVB7-XLZN] (last visited Mar. 9, 2025).

70. *See PFLAG National Glossary*, *supra* note 15.

71. *What is intersex?*, INTERACT ADVOCS. FOR INTERSEX YOUTH, <https://interactadvocates.org/faq/> [https://perma.cc/5QS8-9YZJ] (last visited Mar. 9, 2025).

72. Tekla Taylor, *On Intersex Awareness Day, we celebrate trans and intersex solidarity*, ADVOCS. FOR TRANS EQUAL. (Oct. 26, 2024), <https://transequality.org/news/intersex-awareness-day-we-celebrate-trans-and-intersex-solidarity#:~:text=As%20we%20honor%20Intersex%20Awareness,Intersex%20is%20different%20from%20transgender> [https://perma.cc/3RTE-DDGY].

73. *Id.*

74. *Id.*

75. *Understanding Transgender People: The Basics*, *supra* note 68; TEDx TALKS, *What does being transgender mean anyway?* | Jay Simmons | TEDxSt Albans (YouTube, Nov. 14, 2023), <https://www.youtube.com/watch?v=26E9Eeyipto> [https://perma.cc/E35L-ZQJ3].

76. *Understanding Transgender People: The Basics*, *supra* note 68.

experiences.⁷⁷ Nevertheless, evidence demonstrates that transgender people are not new; transgender people have existed throughout human history and across the globe.

II. LIFE OUTSIDE THE GENDER BINARY: A BRIEF HISTORY

Although the modern term “transgender” first manifested in the 1960s, people have challenged the gender binary for centuries.⁷⁸ In Hindu society, evidence of third gender people can be found in holy texts such as the Ramayana and the Mahabharata.⁷⁹ Often revered, various groups of third gender individuals have existed throughout South Asian history.⁸⁰ One such group, hijras, has historically been highly respected.⁸¹ By 2014, India, Nepal, and Bangladesh “had all officially recognized third gender people as citizens deserving of equal rights.”⁸² Still, today, many hijras continue to experience prejudice and a lack of essential resources.⁸³

Many Indigenous nations⁸⁴ recognize a third gender, which today commonly falls under the umbrella term “Two-Spirit.”⁸⁵ Geo Soctomah Neptune, a Passamaquoddy Two-Spirit basket maker, explained that the more recent term “Two-Spirit” was proposed in 1990 to help educate and contextualize Native gender variance for non-Native peoples.⁸⁶ Not all Indigenous nations have a concept of Two-Spirit people, although across the more than 150 different Native American tribes that do, Two-Spirit people have been held in high regard and considered sacred.⁸⁷ Colonization has led to less acceptance of Two-Spirit people, resulting from an attempt to “civilize Indigenous people.”⁸⁸ More

77. *Id.* (emphasis added).

78. Erin Blakemore, *How historians are documenting the lives of transgender people*, NAT’L GEOGRAPHIC (June 24, 2022), <https://www.nationalgeographic.com/history/article/how-historians-are-documenting-lives-of-transgender-people> [https://perma.cc/EJ85-H2KY]; *See also Seven Things About Transgender People That You Didn’t Know*, HUM. RTS. CAMPAIGN (Apr. 26, 2024), <https://www.hrc.org/resources/seven-things-about-transgender-people-that-you-didnt-know> [https://perma.cc/B9BB-N7M3].

79. Kristofer Rhude, *The Third Gender and Hijras*, HARV. DIVINITY SCH. (2018), <https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras> [https://perma.cc/L9SB-DSC3].

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. At the highest risk for death by suicide are Indigenous youth who are Two-Spirit or LGBTQ+, with reports showing that 2% of Indigenous LGBTQ+ youth people attempted death by suicide in 2024. NATH ET AL., *supra* note 39.

85. THEM, *What does “Two-Spirit” Mean?* | *InQueery* | *them*. (YouTube, Dec. 11, 2018), <https://www.youtube.com/watch?v=A4lBibGzUnE> [https://perma.cc/U275-Z2P2].

86. *Id.*

87. *Id.*; *Two Spirit and LGBTQ+ Identities: Today and Centuries Ago*, HUM. RTS. CAMPAIGN (Nov. 23, 2020), <https://www.hrc.org/news/two-spirit-and-lgbtq-idenitites-today-and-centuries-ago> [https://perma.cc/BGL7-6M7U].

88. THEM, *supra* note 85.

recently, many Indigenous peoples are working to reclaim Two-Spirit traditions to “heal from the injustices” stemming from American colonization.⁸⁹

For years, too, researchers have studied the effects of gender-affirming care on gender dysphoria.⁹⁰ In 1895, one of the earliest informal transgender support groups, the Cercle Hermaphrodites, formed in New York City.⁹¹ Instituted during a period where trans⁹² people were subject to intense violence,⁹³ the Cercle Hermaphrodites was a secret society where transfemme⁹⁴ persons could safely gather in private, connect with one another, and store their gender affirming clothing.⁹⁵ Also around this time, German Jewish physician Magnus Hirschfeld shifted the focus of his work from medicine to a lifelong study of sex, gender, and sexuality.⁹⁶ In 1897, Hirschfeld cofounded the Scientific-Humanitarian Committee, an organization known as one of the first queer⁹⁷ advocacy groups, and in 1919, he founded the Institute for Sexual Science in

89. *Id.*

90. Alejandra Caraballo, *To protect gender-affirming care, we must learn from trans history*, HARV. PUB. HEALTH (June 21, 2023), <https://harvardpublichealth.org/equity/to-protect-gender-affirming-care-we-must-learn-from-trans-history/> [<https://perma.cc/L7D9-YHBS>]. “Gender dysphoria” refers to a “sense of unhappiness . . . over the incongruence between how one subjectively understands one’s experience of gender and how one’s gender is perceived by others.” SUSAN STRYKER, *TRANSGENDER HISTORY: THE ROOTS OF TODAY’S REVOLUTION* 17 (Seal Press, 2nd ed. 2017).

91. STRYKER, *supra* note 90, at 57.

92. Recognize that “trans” is “used as shorthand for *transgender*.” *Glossary of Terms: Transgender*, *supra* note 44.

93. At the time, cities enforced laws that criminalized gender nonconformity and people who expressed themselves in a manner deemed inconsistent with their sex assigned at birth were at risk of being “arrested, fined, jailed or institutionalized.” Trans people also had “no legal recognition of gender transition” and “no gender-affirming clinics.” Also, during this period, “newspapers sensationalized anyone who defied gender norms,” and “medical authorities pathologized any form of gender nonconformity.” *Trans History Spotlight: The Cercle Hermaphrodites*, PLUME CLINIC (May 27, 2025, 23:59 EST), <https://getplume.co/blog/trans-history-spotlight-the-cercle-hermaphrodites/> [<https://perma.cc/57V3-7D5T>] [hereinafter *Trans History Spotlight*].

94. *PFLAG National Glossary*, *supra* note 18 (explaining that “transfemme” is an abbreviation of “transfeminine;” “transfeminine” refers to a person assigned male at birth who is “closer to femininity than masculinity but is not a binary woman.” See also *Glossary of Terms: Transgender*, *supra* note 44 (explaining that “sex at birth” refers to the assignment infants are given “based on the appearance of their external anatomy.”)

95. *Trans History Spotlight*, *supra* note 93; Eamon Schlotterback, *Cercle Hermaphrodites*, GAY & LESBIAN REV. (June 6, 2025), <https://glreview.org/cercle-hermaphrodites/> [<https://perma.cc/7EK8-7QFS>].

96. *Magnus Hirschfeld*, U.S. HOLOCAUST MEM’L MUSEUM (Dec. 17, 2021), <https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2> [<https://perma.cc/ETF3-UXBT>].

97. *PFLAG National Glossary*, *supra* note 15 (explaining that “queer” is a term reclaimed by some members of the LGBTQ+ community to “describe themselves and/or their community . . . [T]he term is also considered by some to be inclusive of the entire community and by others who find it to be an appropriate term to describe their more fluid identities.”)

Berlin.⁹⁸

The Institute for Sexual Science facilitated research efforts and offered resources for transgender people, including treatments that today are known as gender-affirming care.⁹⁹ In 1931, Dora Richter, one of the Institute's housekeepers, underwent one of the first male-to-female genital transformation surgeries.¹⁰⁰ Likewise, Danish painter Lili Elbe received several gender reassignment surgeries, one of which was performed under Hirschfeld's supervision.¹⁰¹ Notably, Hirschfeld recognized the distinctions between sexuality and gender identity.¹⁰²

Hirschfeld's work came to an abrupt halt once Adolf Hitler rose to power.¹⁰³ On May 6, 1933, Nazi-supporting youth broke into and looted the Institute for Sexual Science and the Scientific-Humanitarian Committee.¹⁰⁴ Days later, the entirety of the Institute's library materials were publicly burned¹⁰⁵ by Nazi officials in Berlin's Bebelplatz Square.¹⁰⁶ With more than 20,000 books consumed in flames, the incident is known as one of the first and largest Nazi book burnings and also one of the first recorded attempts to erase transgender people from history.¹⁰⁷ Soon after, Hirschfeld fled Germany.¹⁰⁸ Only two years later, in 1935, Hirschfeld died of a heart attack.¹⁰⁹

During the 1940s and early 1950s, scientific researchers in the United States began studying sexuality and gender.¹¹⁰ In 1952, former United States Army private Christine Jorgensen became the first American to receive sex-reassignment surgery.¹¹¹ Jorgensen's story soon made headlines, and she later

98. STRYKER, *supra* note 90, at 55; see, Brandy Schillace, *The Forgotten History of the World's First Trans Clinic*, SCI. AM. (May 10, 2021), <https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/> [https://perma.cc/M9YF-ARRD].

99. STRYKER, *supra* note 90, at 55.

100. *Id.*

101. *Id.*; *Lili Elbe – Nominee*, LEGACY PROJECT <https://legacyprojectchicago.org/person/lili-elbe> [https://perma.cc/5NG6-SGGT] (last visited Sep. 16, 2025); *Lili Elbe*, BIOGRAPHY, <https://www.biography.com/artists/lili-elbe> [https://perma.cc/M97U-7SKE] (last visited Sep. 20, 2025).

102. *Magnus Hirschfeld*, *supra* note 96.

103. Gerard Koskovich, *Through Knowledge to Justice: The Sexual World of Dr. Magnus Hirschfeld*, GLBT HIST. SOC'Y MUSEUM & ARCHIVES, <https://www.glbthistory.org/hirschfeld> [https://perma.cc/J47R-Z3RY] (last visited Sep. 16, 2025).

104. *6 May 1933: Looting of the Institute of Sexology*, HOLOCAUST MEM'L DAY TR., <https://hmd.org.uk/resource/6-may-1933-looting-of-the-institute-of-sexology/> [https://perma.cc/4ZRJ-ZWJ5] (last visited Sep. 16, 2025).

105. *Id.*

106. *Id.*

107. *Id.*; see also TED, *A Short History of Trans People's Long Fight for Equality* | Samy Nour Younes, at 04:15 (YouTube, Apr. 30, 2019), <https://www.youtube.com/watch?v=qRJJR6bGyL4> [https://perma.cc/8LJV-SP9P].

108. STRYKER, *supra* note 90, at 56.

109. *Id.*

110. *Id.* at 60.

111. Blakemore, *supra* note 78.

became known as a celebrity, entertainer, and public speaker.¹¹² By the late 1950s, the American transgender liberation movement had gained momentum.¹¹³

One of the first movements of collective trans resistance likely began in 1959 with the Cooper Do-Nuts riots in Los Angeles, where queer patrons defended themselves from police harassment by allegedly throwing coffee, utensils, and pastries at the officers.¹¹⁴ In 1965, members of a local gay and lesbian rights group joined together with local teenagers to stage sit-ins at Dewey's lunch counter in Philadelphia.¹¹⁵ Inspired by the American Civil Rights Movement, Dewey's sit-in participants protested a new policy that asked staff to refuse service to any customers who appeared to challenge heteronormative gender expression or sexuality.¹¹⁶

Roughly a year later, in 1966, Gene Compton's Cafeteria in San Francisco became the site of yet another significant act of trans resistance.¹¹⁷ Known today as the Compton's Cafeteria Riots, the event began when a group of trans women reached a breaking point after a police officer put his hand on one of them.¹¹⁸ This came after law enforcement continually targeted trans women for a variety of "crimes," like "female impersonation" and "obstructing the sidewalk."¹¹⁹

Notably, on June 28, 1969, New York Police Department officers raided the Stonewall Inn, a popular queer establishment in the city, giving rise to a six-

112. Rebecca Poole, *From GI Joe to GI Jane: Christine Jorgensen's Story*, THE NAT'L WORLD WAR II MUSEUM (June 30, 2020), <https://www.nationalww2museum.org/war/articles/christine-jorgensen> [<https://perma.cc/VF3L-X8DD>]; John T. McQuiston, *Christine Jorgensen, 62, Is Dead; Was First to Have a Sex Change*, N.Y. TIMES (May 4, 1989), <https://www.nytimes.com/1989/05/04/obituaries/christine-jorgensen-62-is-dead-was-first-to-have-a-sex-change.html> [<https://perma.cc/RS9L-NWKG>]; *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html> [<https://perma.cc/R4XX-5P3R>].

113. See *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html> [<https://perma.cc/R4XX-5P3R>].

114. *Id.*; There remains some skepticism as to whether the Cooper Do-nuts riots truly happened or not. Even still, in 2023, the City of Los Angeles honored Cooper Do-nuts as "a safe haven for all members of the queer community." Erik Piepenburg, *A Gay Riot at a Doughnut Shop? The Legend Has Some Holes*, N.Y. TIMES (June 6, 2023), <https://www.nytimes.com/2023/06/05/dining/gay-riot-los-angeles-doughnut-shop.html> [<https://perma.cc/8UN7-ANX7>].

115. STRYKER, *supra* note 90, at 81-85.

116. Susan Ferentinos, *Dewey's Lunch Counter Sit-In*, ENCYC. GREATER PHILA. (2016), <https://philadelphiaencyclopedia.org/essays/deweys-lunch-counter-sit-in/> [<https://perma.cc/TNS2-JG86>].

117. STRYKER, *supra* note 90, at 81-85.

118. *Id.*; Sam Levin, *Compton's Cafeteria riot: A historic act of trans resistance, three years before Stonewall*, GUARDIAN (June 21, 2019), <https://www.theguardian.com/lifeandstyle/2019/jun/21/stonewall-san-francisco-riot-tenderloin-neighborhood-trans-women> [<https://perma.cc/JS8H-JKN2>].

119. Levin, *supra* note 118.

day-long protest against discrimination and police brutality.¹²⁰ Today, the Stonewall Riots are remembered as “an explosive beginning of a new chapter in the fight for LGBTQIA+ rights, a battle waged against a backdrop of harsh laws and societal disdain.”¹²¹ Among those at Stonewall were trans activists, including Miss Major Griffin-Gracy, as well as Marsha P. Johnson¹²² and Sylvia Rivera:

“Stonewall turned [Rivera], [Johnson], and all their street queen comrades from ladies-in-waiting to ladies-in-action, ladies who would no longer tolerate being kept out, locked up, pushed around, and beaten down. Their timing was perfect; divine even. The arc of history was simply following them, trending toward where they already were: being their fullest, deepest, irrepressible selves, even as every message in social and political life told them that they couldn’t be, that they had to be otherwise.”¹²³

Later, Johnson and Rivera would become co-founders of the Street Transvestite Action Revolutionaries (“STAR”).¹²⁴ STAR has since been recognized as one of the first American organizations dedicated to advocacy and to providing resources for queer and trans youth and adults alike.¹²⁵ Miss Major Griffin-Gracy, who passed away on October 13, 2025 in Little Rock, Arkansas, also left behind a legacy in the fight for trans liberation from which her participation in

120. *Today in History – June 28: The Stonewall Uprising of 1969*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/june-28/> [<https://perma.cc/32MK-SCGY>] (last visited Oct. 1, 2025); *Stonewall Riots*, HIST. (July 18, 2025), <https://www.history.com/topics/lgbtq/the-stonewall-riots> [<https://perma.cc/7UPH-FUZM>].

121. TOURMALINE, MARSHA: THE JOY AND DEFIANCE OF MARSHA P. JOHNSON 70–71 (Penguin Random House, 1st ed. 2025); *See also Today in History – June 28: The Stonewall Uprising of 1969*, *supra* note 120 (“[Stonewall’s events] would fundamentally change the nature of LGBTQ+ activism in the United States”).

122. The modern term “transgender” became more widespread in use after Johnson’s death. *Marsha P. Johnson*, NAT’L WOMEN’S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/marsha-p-johnson> [<https://perma.cc/B6LZ-49YV>] (last visited Dec. 19, 2025). Marsha was transfeminine and gender nonconforming and described herself as “transvestite” and a “queen.” SHON FAYE, *THE TRANSGENDER ISSUE: TRANS JUSTICE IS JUSTICE FOR ALL* 129 (Verso, 2022). The term “transvestite” was first coined by Magnus Hirschfeld and was “used in much the way that *transgender* came to be used in the 1990’s and afterward, to convey a sense of a wide range of gender-variant identities and behaviors.” STRYKER, *supra* note 90, at 39–40. Sylvia Rivera, who later described herself as transgender, also identified as “queen” and “transvestite.” FAYE, *supra* note 36 at 208.

123. TOURMALINE, *supra* note 121, at 89–90, 203; *see also* STRYKER, *supra* note 90, at 105; *Marsha Johnson, Sylvia Rivera, and the history of Pride Month*, SMITHSONIAN INST. (June 7, 2021) <https://www.si.edu/stories/marsha-johnson-sylvia-rivera-and-history-pride-month> [<https://perma.cc/5Y7B-2WM9>].

124. *Marsha P. Johnson: The Transgender Activist Who Pioneered the Fight for LGBTQ+ Rights*, N.H. CTR. FOR JUST. & EQUITY, <https://nhcje.org/blog/marsha-p-johnson-the-transgender-activist-who-pioneered-the-fight-for-lgbtq-rights> [<https://perma.cc/8QED-NXE4>] (last visited Oct. 1, 2025).

125. *Id.*

the Stonewall Riots marked only the beginning.¹²⁶ Miss Majors spent her life as a fierce advocate for incarcerated trans women, and eventually worked with the Transgender Gender-Variant & Intersex Justice Project,¹²⁷ as well as with various AIDS organizations and resource centers.¹²⁸ The Stonewall Riots instigated a “global movement of gay pride and gay liberation,” where “LGBT people stood shoulder to shoulder.”¹²⁹ While the transgender liberation movement gained traction, transgender people would continue to face hardships in the upcoming decades, including high rates of discrimination, unemployment, arrests, and the AIDS epidemic.¹³⁰

III. TODAY AND BEYOND: WHY UNITED STATES POLICYMAKERS MUST ADVOCATE FOR ACCESS TO A GENDER-AFFIRMING EDUCATIONAL EXPERIENCE FOR TRANSGENDER YOUTH

To this day, American transgender people continue to advocate for equal treatment under the rule of law.¹³¹ Currently, an estimated 2.8 million transgender individuals live in the United States and represent all ethnic and racial backgrounds.¹³² Research demonstrates younger age groups are more likely to identify as transgender compared to older age groups.¹³³ While roughly 0.8% of adults identify as transgender, 3.3% of youth between ages 13 and 17 identify as transgender in the United States.¹³⁴ According to experts, young people have increased access to terminology to explore their gender identities, unlike adults, who may feel more constrained due to generational differences.¹³⁵ Experts have also found that it has become more socially acceptable to explore gender, especially as social media has afforded young people a new platform to find

126. Alex Traub, *Miss Major Griffin-Gracy, Trans Activist Who Saw It All, Dies*, N.Y. TIMES (Oct. 21, 2025), <https://www.legalbluebook.com/bluebook/v21/tables/t6-case-names-and-institutional-authors-in-citations?id=327192&tokens=institut> [https://perma.cc/5V7A-SE8E].

127. The Transgender Gender-Variant & Intersex Justice Project’s (“TGIJP”) mission is “to challenge and end the human rights abuses committed against Black, Black/Brown Trans people inside of California prisons, jails, detention centers and beyond.” *About TGIJP*, MISS MAJOR ALEXANDER L. LEE TGIJP BLACK TRANS CULTURAL CTR. <https://tgijp.org/sample-page/> [https://perma.cc/N32H-3MU2] (last visited Dec. 19, 2025).

128. Traub, *supra* note 126; jmasters, *Miss Major-Griffin-Gracy: The Celebrated Trans Elder Opens Up on the LGBTQ&A Podcast, “There Aren’t That Many Black Girls Still Alive,”* GLAAD, (Feb. 23, 2021) <https://glaad.org/miss-major-griffin-gracy-celebrated-trans-elder-opens-lgbtqa-podcast/> [https://perma.cc/8X3P-WYMH].

129. FAYE, *supra* note 36 at 209.

130. TED, *supra* note 107, at 03:12-03:18.

131. *Id.* at 03:08.

132. JODY L. HERMAN & ANDREW R. FLORES, HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (Aug. 2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug-2025.pdf> [https://perma.cc/7ARP-GYKZ].

133. *Id.* at 21.

134. *Id.* at 2.

135. Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S.*, N.Y. TIMES (June 10, 2022), <https://www.nytimes.com/2022/06/10/science/transgender-teenagers-national-survey.html> [https://perma.cc/8XVU-8APE].

communities of other youth with similar feelings related to gender.¹³⁶

In 2024, 88% of surveyed young LGBTQ+ people reported that one of the top actions people can do to show support and acceptance is to trust that they know who they are, and 62% reported that learning more about LGBTQ+ identities can do the same.¹³⁷ Dr. Sarah Garwood, MD, an Adolescent Medicine specialist, commented that what hurt her transgender youth patients the most was “being around people and environments that reject them.”¹³⁸

Supporting transgender youth remains a matter of life and death.¹³⁹ Many transgender children do not have access to such needed support, stemming from a variety of reasons.¹⁴⁰ Author Shon Faye wrote in her book, *The Transgender Issue: Trans Justice Is Justice For All*, “[t]ypically trans people are lumped together as ‘the transgender issue,’ dismissing and erasing the complexity of trans lives, reducing them to a set of stereotypes of which various social anxieties can be brought to bear.”¹⁴¹ Faye also notes that “[h]uman beings rely on familiarity to understand and empathize with others.”¹⁴² In effect, trans

136. *Id.*

137. NATHET AL., *supra* note 39, at 22.

138. TEDx TALKS, *Making Space for Transgender Kids* | Sarah Garwood | TEDxRitenourRoad, at 2:33 (YouTube, Mar. 28, 2019), <https://www.youtube.com/watch?v=k931AO6b9pY> [<https://perma.cc/BFU8-9ZHB>].

139. *Transgender Children & Youth: Understanding the Basics*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-children-and-youth-understanding-the-basics> [<https://perma.cc/PR45-PNNG>] (last visited Feb. 17, 2025).

140. HUM. RTS. CAMPAIGN, *Supporting Transgender, Non-Binary, And Gender-Expansive Children: Navigating Care in a Complicated Political Landscape* (2024), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/documents/Supporting-Caring-for-Trans-Children-UPDTE-100424.pdf> [<https://perma.cc/F8R5-YH8D>]. There are many reasons why transgender, nonbinary, and intersex children do not have access to support. Author Shon Faye explained that “[t]he demand for true trans liberation echoes and overlaps with the demand of workers, socialists, feminists, anti-fascists, and queer people.” Faye, *supra* note 36 at xiv. Additionally, “the existence of trans people is a source of constant anxiety for many who are either invested in the status quo or fearful about what would replace it.” *Id.* Likewise, “trans people are positioned in relation to a normative culture that is both fascinated and repelled by [transgender people].” Ivan Natividad, *Why is anti-trans violence on the rise in America?* UC BERKELEY NEWS (June 25, 2021) <https://news.berkeley.edu/2021/06/25/why-is-anti-trans-violence-on-the-rise-in-america/> [<https://perma.cc/T5Q5-TECB>]. Transgender people also experience “misunderstanding, prejudice, and discrimination.” Stryker, *supra* note 90, at 7. Some anti-trans advocates exploit misinformation to advance their political agenda. Simón(e) D. Sun & Florence Ashley, *Anti-Trans Myths: How a political movement manufactured scientific misinformation and legitimized hate*, OPENMIND MAG. (Nov. 6, 2023), <https://www.openmindmag.org/articles/anti-trans-myths> [<https://perma.cc/UN36-FTAR>]. Yet, “[trans people] are not an ‘issue’ to be debated and derided.” Faye, *supra* note 36 at 271. Trans people have “been discriminated against, pathologized and victimized.” *Id.* at xiii. See also Stryker, *supra* note 90, at 7 (“Being trans is like being gay: some people are just ‘that way,’ though most people aren’t. We can be curious about *why* some people are gay or trans, and we can propose all kinds of theories or tell interesting stories about how it’s possible to be trans or gay, but ultimately we simply need to accept that some minor fraction of the population (perhaps including ourselves) simply *is* ‘that way.’”) [<https://perma.cc/P9YH-HYZB>].

141. FAYE, *supra* note 36 at xiv.

142. *Id.* at 11.

people “rely more heavily on media representation, on political solidarity from people who aren’t trans and vocal, and ongoing support from public institutions to create the right conditions for understanding and compassion from the rest of society.”¹⁴³

It remains imperative not only for all people to have access to scientifically accurate information on gender identity, but also for transgender children to have access to supportive educational settings.¹⁴⁴ For this reason, the United States has a duty to ensure that students attending schools that receive federal funding have access to a gender-affirming education.

ANALYSIS

“If you still don’t get what it means to be transgender, that’s alright because it’s confusing and, genuinely, you don’t need to. All you need to do is respect trans people.”
-Jay Simmons¹⁴⁵

I. CAN LEGAL SAFEGUARDS ENSURING ACCESS TO GENDER-AFFIRMING SPACES IN SCHOOLS REDUCE THE RISKS OF DEATH BY SUICIDE FOR TRANSGENDER YOUTH?

School policies that ultimately protect transgender and gender-nonconforming students also lead to increased academic success. According to researchers at the UCLA School of Law Williams Institute, compared to that of their cisgender counterparts, roughly three times as many transgender people stated that “lifetime adverse treatment at school impacted their academic success.”¹⁴⁶

Research also demonstrates that school policies protecting transgender and gender non-conforming students will have a positive impact on mental health.¹⁴⁷ For instance, when school policies explicitly name gender identity or expression as a protected status, rates of bullying and victimization decrease.¹⁴⁸ Providing teachers and school personnel with adequate training on topics related to gender identity and expression also leads to decreased rates of victimization of transgender and gender non-conforming students.¹⁴⁹ Schools can also ensure

143. *Id.*

144. *See generally* HUM. RTS. CAMPAIGN, *supra* note 140.

145. TEDx TALKS, *supra* note 75, at 09:42-09:53.

146. KERITH J. CONRON, KATHRYN K. O’NEILL & LUIS A. VASQUEZ, EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 2 (Apr. 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf> [<https://perma.cc/Z2FU-75VB>].

147. Russell B. Toomey et al., *Gender-Affirming Policies Support Transgender and Gender Diverse Youth’s Health*, SOC’Y FOR RSCH. IN CHILD DEV. 1 (Jan. 2022), <https://www.srcd.org/sites/default/files/resources/SRCD%20SOTE-Gender%20Affirming%20Policies%202022.pdf> [<https://perma.cc/PHJ5-X4ZJ>].

148. *Id.* at 2.

149. *Id.*

that transgender and gender non-conforming students can use gendered facilities, including locker rooms and restrooms, that align with their affirmed gender.¹⁵⁰ Overall, transgender and nonbinary youth who have access to gender-affirming spaces report lower rates of attempted death by suicide compared to students without access to gender-affirming spaces.¹⁵¹

American policymakers can set the expectation that federally funded schools must provide students with a gender-affirming educational atmosphere by implementing Title IX, as amended in April 2024. Because Title IX serves to ensure students are protected at a federal level from discrimination on the basis of gender identity, sexual orientation, and sex characteristics, transgender, gender non-conforming, and intersex youth can have assurance that schools will be safer and more inclusive.¹⁵²

II. WHAT IS TITLE IX?

On June 23, 1972, President Richard Nixon signed Title IX into law.¹⁵³ Title IX of the Education Amendments of 1972, commonly called “Title IX,” protects persons from sex-based discrimination “in education programs or activities that receive federal financial assistance.”¹⁵⁴ Congress had two key objectives when enacting Title IX. First, Title IX is meant to ensure that public financing would not contribute to discriminatory educational practices, and second, Title IX was intended to protect individual citizens from being subject to discriminatory educational practices.¹⁵⁵

Title IX protects against sex discrimination in all aspects of an educational program, including admissions, employment, and treatment of the participants enrolled in the program.¹⁵⁶ The Department of Education’s Office of Civil Rights enforces Title IX by evaluating, investigating, and resolving complaints that allege sex discrimination in institutions receiving federal financial assistance, including schools and local and state agencies.¹⁵⁷ Under Title IX, financial assistance constitutes grants or loans of Federal financial assistance, a

150. NATH ET AL., *supra* note 39, at 21; *PFLAG National Glossary*, *supra* note 15 (Affirmed gender refers to “an individual’s true gender, as opposed to their gender assigned at birth. This term should replace terms like new gender or chosen gender, which imply that an individual chooses their gender”).

151. NATH ET AL., *supra* note 39, at 24.

152. *UPDATES TO TITLE IX: WHAT YOU NEED TO KNOW ABOUT THE RIGHTS OF LGBTQI+ YOUTH IN SCHOOLS*, GLSEN, <https://www.glsen.org/title-ix> [<https://perma.cc/Y43L-SSYH>] (last visited Mar. 9, 2025).

153. *Title IX Legal Manual*, U.S. DEP’T OF JUST. C.R. DIV. (SEP. 14, 2023), [<https://perma.cc/3F5Y-4N4R>]; *The 14th Amendment and the Evolution of Title IX*, U.S. CTS. <https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix> [<https://perma.cc/7H59-3XDF>] (last visited Dec. 19, 2025).

154. 20 U.S.C. § 1681 (1972); *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Aug. 23, 2024), [<https://perma.cc/VSK3-WXTT>].

155. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

156. *Title IX Legal Manual*, *supra* note 153.

157. *Title IX and Sex Discrimination*, *supra* note 154.

grant of Federal real or personal property, services of Federal personnel, sales or leases of Federal property for nominal or no consideration, or any other contract assisting an educational program or activity.¹⁵⁸

Schools and educational programs that receive federal funds, with some exceptions,¹⁵⁹ must adhere to the requirements outlined in Title IX. For instance, such programs must have at least one employee as a designated Title IX Coordinator.¹⁶⁰ The school or educational program must also adopt, publish, and implement a nondiscrimination policy and grievance procedures consistent with the requirements of the federal code.¹⁶¹ Parents, guardians, or other authorized stakeholders must receive a notice of nondiscrimination, which must include a statement of nondiscrimination based on sex, a discussion of the application of Title IX, and the name and contact information of the Title IX coordinator.¹⁶² The notice must also instruct stakeholders on how to locate the institution's nondiscrimination policy, the procedures for filing a grievance, and how to report information or make a complaint regarding conduct constituting sex discrimination.¹⁶³ Although, the notice of nondiscrimination is not the only requirement that a school or institution must adhere to under Title IX; all requirements outlined in the Code of Federal Regulations shall be maintained.¹⁶⁴

III. THE 2024 TITLE IX RULE

On April 19, 2024, the United States Department of Education published a Final Rule amending Title IX.¹⁶⁵ The 2024 Amendment aimed to clarify the definition of "sex-based harassment" to protect against discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.¹⁶⁶ Before the 2024 Amendment, Title IX did not explicitly protect against discrimination based on "sexual orientation" or

158. 34 C.F.R. § 106.2 (2020).

159. Educational institutions controlled by religious organizations are exempt to the extent that the application of Title IX would be "[inconsistent] with the religious tenets of [the] organization." 34 C.F.R. § 106.12 (2020). Educational institutions that prepare individuals for the United States military of the merchant marine also have Title IX exemptions. 34 C.F.R. § 106.13 (2020). Other organizations with Title IX exemptions include social fraternities, social sororities, voluntary youth service organizations, Young Men's Christian Association (YMCA), Young Women's Christian Association (YWCA), Girl Scouts, Boy Scouts, and Camp Fire Girls. 34 C.F.R. § 106.14 (2020).

160. 34 C.F.R. § 106.8(A) (2020).

161. *Id.* § 106.8(b) (2020).

162. *Id.*

163. *Id.*

164. *See generally* 34 C.F.R. § 106 (2020).

165. Hereafter, the "2024 Amendment" will refer to the Title IX amendment as articulated by the Final Rule issued on April 19, 2024. The "2020 Title IX Rule" refers to Title IX particularized to the 2024 Amendment published on April 19, 2024. Press Release, *supra* note 60.

166. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33476 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

“gender identity.”¹⁶⁷

The 2024 Title IX Rule explicitly stated that sex-based discrimination includes discrimination based on sexual orientation and gender identity.¹⁶⁸ Essentially, the 2024 Amendment clarified that discrimination based on sexual orientation or gender identity is a violation of federal law.¹⁶⁹ Whereas Title IX used to only prohibit “sex harassment,” the Final Rule’s amended language states that harassment that is “sex-based” is prohibited.¹⁷⁰ Although the Final Rule explicitly stated such protections, the U.S. Department of Education previously interpreted Title IX to protect against such discrimination due to the 2020 Supreme Court’s holding in *Bostock v. Clayton County*.¹⁷¹ In an opinion written by Justice Gorsuch, the majority held that Title VII, the federal law prohibiting sex discrimination in employment, protects against discrimination based on sexual orientation and gender identity.¹⁷² While Title VII and Title IX are two distinct statutes, Title VII has traditionally served as a guide for interpreting Title IX, as both statutes prohibit sex-based discrimination.¹⁷³

The Final Rule offering protections for LGBTQ+ students was initiated approximately one year after the Supreme Court decided *Bostock*. On March 8, 2021, President Joe Biden issued an Executive Order guaranteeing that all students were protected against discrimination based on sex, which included discrimination “on the basis of sexual orientation or gender identity.”¹⁷⁴ The Executive Order directed the Secretary of Education and the Attorney General to review rules, regulations, orders, guidance documents, policies, and agency actions to ensure consistency with Title IX and the policy outlined in the Executive Order.¹⁷⁵

Days later, on March 26, 2021, Principal Deputy Assistant Attorney General Pamela S. Karlan issued a memorandum to the Federal Agency Civil Rights Directors and General Counsels to address whether the Court’s holding in *Bostock* applied to Title IX.¹⁷⁶ Karlan’s memorandum stated that the U.S. Department of Justice Civil Rights Division had determined that the “best reading of Title IX’s prohibition on discrimination” included discrimination based on gender identity and sexual orientation.¹⁷⁷

On July 12, 2022, the Department of Education published the Notice of

167. Libby Stanford, *New Title IX Rule Has Explicit Ban on Discrimination of LGBTQ+ Students*, EDUC. WEEK (Apr. 19, 2024), <https://www.edweek.org/policy-politics/new-title-ix-rule-has-explicit-ban-on-discrimination-of-lgbtq-students/2024/04> [<https://perma.cc/49H2-GHVZ>].

168. 34 C.F.R. § 106.10 (2024).

169. *Updates Clarify LGBTQI+ Protections in Title IX*, *supra* note 59.

170. *Id.*

171. Stanford, *supra* note 167.

172. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 (2020).

173. *Title IX Legal Manual*, *supra* note 153.

174. Exec. Order No. 14,021, 86 Fed. Reg. 13797, at 13803-04 (Mar. 11, 2021).

175. *Id.*

176. Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen. for the C.R. Div., to Fed. C.R. Div. and Gen. Couns. (Mar. 26, 2021), [<https://perma.cc/V696-SERQ>] (on file with the U.S. Dep’t of Justice).

177. *Id.*

Proposed Rulemaking regarding the 2024 Amendment.¹⁷⁸ On April 29, 2024, approximately 240,000 public comments were received on the docket regarding the 2024 Amendment.¹⁷⁹ Numerous commenters shared personal experiences as either complainants or respondents or as persons managing such complainants or respondents involved in the Title IX grievance procedures.¹⁸⁰ Here, commenters spoke about a wide range of concerns and ideas, ranging from areas of weakness regarding enforcement and investigations of alleged Title IX violations to personal stories where persons felt as though their Title IX complaints were not taken seriously by school administrators.¹⁸¹ Further, some comments concerned experiences relating to sexual orientation and gender identity, in which some commenters shared personal experiences in support of the 2024 Amendment:

Commenters from more than 40 States in all regions of the United States and in communities across the political spectrum shared their experiences as members of the LGBTQI+ community, or as parents, teachers, and friends of LGBTQI+ individuals. They described bullying and harassment of students based on sexual orientation and gender identity that ranged from single interactions with peers to systemic concerns such as constant verbal harassment, bullying, and threats of physical violence that are often ignored or excused by recipients from early elementary school through graduate school.¹⁸²

Parents, teachers, and school counselors also shared a variety of concerns, many of which acknowledged that inclusive school environments had or could have a positive impact on LGBTQI+ students.¹⁸³ Some commenters also expressed detrimental impacts that could happen when students do not have access to an inclusive school environment. These concerns addressed an increase in harassment, bullying, and threats of physical violence.¹⁸⁴

The comments also addressed specific concerns for transgender and nonbinary students. For instance, transgender and nonbinary individuals shared experiences where they faced threats or actual physical violence as students.¹⁸⁵ Such experiences caused lasting anxiety and led to an impact in their ability to

178. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

179. *Id.*

180. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33478 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

181. *Id.*

182. *Id.* at 33479.

183. *Id.* at 33479-80.

184. *Id.* at 33480.

185. *Id.*

engage academically.¹⁸⁶ Moreover, transgender students spoke on bathroom inaccessibility.¹⁸⁷ Many students shared that they felt unsafe using a facility that did not align with their gender identity, and some shared that they had no access to a gender-neutral facility at all.¹⁸⁸ Commentators also discussed that a safe educational environment is a “matter of life or death” for transgender and nonbinary students.¹⁸⁹ Many transgender students also shared that they or their peers had attempted death by suicide as a consequence of harassment or discrimination based on their gender identity.¹⁹⁰ Transgender students also expressed that a supportive school environment positively impacted their social, emotional, and academic well-being.¹⁹¹

Not all commenters vocalized support for the 2024 Amendment. Many commenters expressed that Title IX should only strive to provide equal educational access to cisgender women.¹⁹² Some commenters also voiced concern that the 2024 Amendment would interfere with personal family lives.¹⁹³ And, some commenters wrote that the 2024 Amendment would “diminish the role of parents” regarding a child’s decision-making.¹⁹⁴

The Department of Education provided responses to many of the concerns addressed by commenters. For example, the Department agreed that transgender students experience substantial harm when they are excluded from using facilities consistent with their gender identity and that access to such facilities is “critical to the health and well-being of transgender youth.”¹⁹⁵ The Department also addressed the contention that Title IX, in part, would provide greater protections for transgender students compared to cisgender students. Here, the Department clarified that Title IX encompasses protections for *all* students experiencing discrimination based on their gender identity.¹⁹⁶ They argue that transgender students do not pose a threat to cisgender students, specifically noting that “preferences or discomfort” cannot “justify otherwise unconstitutional discrimination against others.”¹⁹⁷ Overall, the Department’s discussion and analysis of the comments regarding the 2024 Amendment convey that inclusive policies lead to increased positive school experiences for all students.

By offering clear legal protections to LGBTQ+ students, the 2024 Title IX Rule ensured that schools and institutions were held accountable for facilitating

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 33820.

196. *Id.*

197. *Id.*

an inclusive school environment to continue receiving federal funding.¹⁹⁸ In a federal investigation, the United States Department of Education Office of Civil Rights (“OCR”) found that Owasso School District violated Title IX of the Education Amendments of 1972 because it was “well aware of the hostile climate in their schools, yet repeatedly chose indifference and action when confronted.”¹⁹⁹ The investigation also revealed that there had been several other instances where the district had failed to respond to notices of sexual harassment.²⁰⁰ OCR ultimately entered into a resolution agreement with Owasso Public Schools to “remedy the District’s failure to comply with the requirements of Title IX.”²⁰¹ Kelley Robinson, president of the Human Rights Campaign, responded to the OCR’s findings with the following: “Trans and non-binary students have worth . . . they deserve the same access to a quality and safe education – just like every other child in America.”²⁰²

IV. THE BRIEF ENACTMENT OF THE 2024 TITLE IX RULE

On February 4, 2025, the United States Department of Education sent a “Dear Colleague” letter to advise educators and administrators that Title IX would be enforced per its 2020 enactment.²⁰³ The decision to enforce the 2020 Title IX rule came after *Tennessee v. Cardona*, a decision issued by the United States District Court for the Eastern District of Kentucky.²⁰⁴ In *Tennessee v. Cardona*, the court set aside 2024 Title IX Rule on the basis, that the Final Rule regarding the 2024 amendment “impermissibly redefine[d] discrimination on the basis of sex for purposes of Title IX,”²⁰⁵ The court also concluded the 2024 Title IX Rule violated the Constitution on the basis it would require Title IX recipients to use a student’s affirmed name and pronouns, and thus offended the First Amendment.²⁰⁶ Moreover, the court found that the 2024 Title IX Rule is arbitrary and capricious, that the appropriate remedy is to vacate the 2024 Title IX Rule in its entirety, and that schools and educational institutions receiving federal funding need not comply with the 2024 Title IX Rule to receive

198. *Updates Clarify LGBTQI+ Protections in Title IX*, *supra* note 59.

199. Powell, *supra* note 3.

200. *Id.*

201. Email from Karen E. Mines, Reg’l Dir. of Region V, U.S. Dep’t Educ. Off. for C.R., to Dr. Margaret Coates, Superintendent of Owasso Pub. Schs. (Nov. 13, 2024), <https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/05241363-a.pdf> [<https://perma.cc/8LMC-RZEY>].

202. Powell, *supra* note 3.

203. Press Release, U.S. Dep’t of Education, U.S. Department of Education to Enforce 2020 Title IX Rule Protecting Women (Jan. 31, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-enforce-2020-title-ix-rule-protecting-women> [<https://perma.cc/T7B7-C2XM>]; Letter from Craig Trainor, Acting Assistant Sec’y, Off. C.R., U.S. Dep’t Educ. (Feb. 4, 2025) <https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf> [<https://perma.cc/5HJQ-JXNY>].

204. Letter from Craig Trainor, Acting Assistant Sec’y, *supra* note 203.

205. 762 F. Supp. 3d 615, 624 (E.D. Ky. 2025).

206. *Id.* at 624.

funding.²⁰⁷

Shortly after *Tennessee v. Cardona*, on January 20, 2025, President Trump issued an Executive Order in which “all agencies and departments within the Executive Branch” were ordered to “enforce all sex-protective laws to promote [the] reality” that there are “two sexes, male and female.”²⁰⁸ On January 29, 2025, President Trump signed an executive order that would ultimately withhold federal funds from educational institutions that allow students to transition socially.²⁰⁹ The order, *Ending Radical Indoctrination in K-12 Schooling*, attempts to protect children from “radical, anti-American ideologies [that] deliberately [block] parental oversight.”²¹⁰ Within less than one year of the 2024 Title IX Rule going into effect, schools and institutions were no longer bound by its language and thus no longer had the incentive to facilitate a learning environment that is inclusive of LGBTQ+ children, at least in regard to the receipt of federal funds.

At the same time, there remains an increase in the number of anti-LGBTQ+ policies in state and local legislatures, many of which affect schools and limit access to queer-affirming spaces and support in the classroom.²¹¹ Some transgender and nonbinary students have been targeted with policies banning youth from participating in sports activities and using gendered facilities that align with their gender identity.²¹² Other policies require schools to out transgender students to their families by requiring school personnel to report when a student asks to use a different affirmed name or pronouns.²¹³ 58% of transgender and/or nonbinary youth reported being prevented or discouraged from using a bathroom that corresponds to their gender identity.²¹⁴ Among those, 85% reported experiencing depressive moods, and 60% seriously considered death by suicide.²¹⁵

The vacatur of the 2024 Title IX Rule, paired with the increasing number of anti-LGBTQ+ policies, has left transgender and nonbinary individuals feeling

207. *Id.* at 628.

208. Letter from Craig Trainor, Acting Assistant Sec’y, *supra* note 203; Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

209. *US: Trans Youth’s Access to Lifesaving Care Under Threat*, H. RTS. WATCH (Feb. 3, 2025, at 09:00 ET), <https://www.hrw.org/news/2025/02/03/us-trans-youths-access-lifesaving-care-under-threat> [<https://perma.cc/6FMC-KMPT>].

210. *Ending Radical Indoctrination in K-12 Schooling*, THE WHITE HOUSE (Jan. 29, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-indoctrination-in-k-12-schooling/> [<https://perma.cc/2B4W-VRLC>].

211. *Anti-LGBTQ+ School Policies and LGBTQ+ Young People*, THE TREVOR PROJECT (Aug. 21, 2024), <https://www.thetrevorproject.org/research-briefs/anti-lgbtq-school-policies-and-lgbtq-young-people/> [<https://perma.cc/EMZ3-8BPW>].

212. *Id.*

213. *Id.*

214. Myeshia Price-Feeney, Amy E. Green & Samuel H. Dorison, *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. ADOLESCENT HEALTH 1142 (2021), <https://pubmed.ncbi.nlm.nih.gov/33288457/> [<https://perma.cc/FCU2-AX8N>].

215. Price-Feeney, Green & Dorison, *supra* note 214, at 1145.

increasingly fearful and anxious in trying to navigate everyday life.²¹⁶ With research demonstrating that trans students are already at heightened risks for death by suicide, there remains a compelling need for the Department of Education to reenact the 2024 Title IX Rule. Such action would demand that public school students have guaranteed access to gender affirming educational spaces and improve the mental, social, and emotional well-being of public-school students who identify as trans.

DISCUSSION

“Changemaking is not easy, and it’s not always fair. But, it is possible.”
*Rep. Sarah McBride*²¹⁷

I. INTERPRETING TITLE IX: HOW HAVE THE UNITED STATES COURTS PREVIOUSLY CONSIDERED RIGHTS OF TRANSGENDER YOUTH IN THE EDUCATIONAL CONTEXT?

Even before the 2024 Title IX Rule, Title IX has been construed differently among various federal courts in the United States in the context of its application to LGBTQ+ students. In *Adams v. Sch. Bd. of St. Johns Cnty.*, the Eleventh Circuit held that separating school bathrooms based on how a student’s sex is assigned at birth is constitutional and complies with Title IX.²¹⁸ The court held that the school board’s guidelines for best practices for LGBTQ+ students allowed transgender students to have control over their gender expression and noted that transgender students would be allowed to use a gender-neutral restroom.²¹⁹ Under the policy, transgender students could be denied the use of the restroom that corresponds to the child’s gender identity.²²⁰ The court considered the plain and ordinary meaning of the word “sex” as it was understood in 1972, and stated that if gender identity were to be protected by law, such a decision should be left to Congress and not the courts.²²¹

Only two years before *Adams*, the Fourth Circuit came to a different conclusion than the Eleventh Circuit. In *Grimm v. Gloucester Cty., Sch. Bd.*, the court considered whether equal protection and Title IX could protect transgender students by allowing them to use the restroom that aligns with their gender identity.²²² In *Grimm*, Gavin Grimm began his social transition at the

216. Rachel Crumpler, *Trump’s executive orders spark anxiety among NC’s transgender, nonbinary community*, NC HEALTH NEWS (Feb. 13, 2025), <https://www.northcarolinahealthnews.org/2025/02/13/trump-executive-orders-restrictions-spark-anxiety-nc-transgender-community/> [https://perma.cc/MY6N-RR63].

217. HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 07:48.

218. 57 F.4th 791, 796 (11th Cir. 2022).

219. *Id.* at 802-03.

220. *Id.* at 798.

221. *Id.* at 817.

222. 972 F.3d 586, 593 (4th Cir. 2020).

end of his freshman year of high school.²²³ Although the school initially allowed him to use the male restrooms, the school rescinded this permission when the Gloucester County School Board received community backlash.²²⁴ The school board responded by implementing a policy that forced students to use the restroom that aligned with their sex assigned at birth, and installed single-stall restrooms as an “alternative” for students with “gender identity issues.”²²⁵

The court began its analysis by explaining what it means to be a transgender person.²²⁶ The court emphasized that being transgender “is not a psychiatric condition, and ‘implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.’”²²⁷ The court also acknowledged that many transgender people suffer from mental illnesses and exhibit suicidal ideation at a rate of nine times more than the general population.²²⁸ The court also emphasized that a transgender student’s ability to achieve academic success may be impaired by harassment and bullying.²²⁹ The court also stated what transgender people have always known to be true: “transgender students have better mental health outcomes when their gender identity is affirmed.”²³⁰

Notably, the Fourth Circuit builds space to explain why bathroom accessibility is so imperative for transgender individuals. In her autobiography, Jazz Jennings recounted her experience in preschool, where her restroom options were to either use the classroom bathroom, where her classmates could easily hear her relieving herself, or to use the nurse’s bathroom.²³¹ Today, transphobic rhetoric has circulated online regarding transgender people and bathroom usage.²³² Yet, research demonstrates that there are no increased risks to women and children when transgender individuals use the restroom that aligns with their gender identity.²³³ Research also demonstrates that forcing transgender and nonbinary young people to use the restroom that aligns with their sex assigned at birth is a source of distress that leads to poorer mental health and increased risk of death by suicide.²³⁴ Transgender individuals who

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 594.

227. *Id.*

228. *Id.*

229. *Id.* at 597.

230. *Id.*

231. JAZZ JENNINGS, BEING JAZZ: MY LIFE AS A (TRANSGENDER) TEEN 35 (Ember, 2016).

232. See Elena Moore & Rachel Treisman, *GOP lawmaker seeks bathroom restrictions on federal property*, NPR (Nov. 20, 2024), <https://www.npr.org/2024/11/19/nx-s1-5196116/capitol-transgender-bathroom-ban-nancy-mace-sarah-mcbride> [<https://perma.cc/7WKW-H7DH>].

233. Julie Moreau, *No link between trans-inclusive policies and bathroom safety, study finds*, NBC NEWS (Sep. 19, 2018), <https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106> [<https://perma.cc/NNR6-H4FH>].

234. Jonah P. DeChants, et. al, *Transgender and nonbinary young people’s bathroom avoidance and mental health*, 26 INT’L J. OF TRANSGENDER HEALTH 351, 358 (2025); https://pmc.ncbi.nlm.nih.gov/articles/PMC12016251/pdf/WIJT_26_2335512.pdf [<https://perma.cc/74MN-LHF9>].

are denied access to their affirmed restroom are also more likely to experience negative experiences, including being subject to verbal harassment, physical assault, and denial of access.²³⁵

The Fourth Circuit recognized the harmful effect that limiting restroom policies can have on transgender and nonbinary students.²³⁶ Citing an amicus brief prepared by The Trevor Project, the court in *Grimm v. Gloucester Cnty. Sch. Bd.* noted that “58% of transgender youth reported being discouraged from using the bathroom that corresponds with their gender.”²³⁷ Additionally, 40% of transgender students “fast, dehydrate, or find ways not to use the bathroom” when denied use of a restroom that aligns with their gender.²³⁸ Significantly, schools from around the country have allowed transgender students the use of a bathroom that aligns with their gender identity, and such permissions have not resulted in violence towards other students.²³⁹ Notably, the Ninth Circuit made a similar finding in one case, noting that “[c]ourts have recognized that the presence of transgender people in an intimate setting does not, by itself, create a sexually harassing environment that is severe and pervasive.”²⁴⁰

Forcing transgender students to use only single-stall restrooms can make a child feel “stigmatized and isolated.”²⁴¹ Moreover, forcing students to use single-stall restrooms can disrupt a transgender student’s learning experience if the option is located in a physically inconvenient location.²⁴² For Grimm, because he had been denied use of the restroom that aligned with his gender identity, he suffered urinary tract infections as a result of practicing restroom avoidance.²⁴³ Ultimately, the court held that the school board’s policy constituted sex-based discrimination and that transgender individuals constitute a quasi-suspect class.²⁴⁴

Grimm lent instructive guidance for students seeking relief from restrictive restroom policies in future cases.²⁴⁵ In *Doe v. South Carolina, Doe*, an eighth-grade child, attended a South Carolina public school.²⁴⁶ At the time, the South Carolina legislature’s budget appropriation bills included a provision that, in

235. JODY L. HERMAN, ANDREW R. FLORES, & ELANA REDFIELD, SAFETY AND PRIVACY IN PUBLIC RESTROOMS AND OTHER GENDERED FACILITIES, UCLA SCH. OF LAW WILLIAMS INST. 5 (Feb. 2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Bathroom-Access-Feb-2025.pdf> [<https://perma.cc/BC97-JSZQ>].

236. See DeChants et al., *supra* note 234, at 358.

237. 972 F.3d 586, 597 (4th Cir. 2020).

238. *Id.*

239. *Id.*

240. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1102 (D. Or. 2018).

241. *Grimm*, 972 F.3d at 600.

242. *Id.*

243. *Id.*

244. *Id.* at 613.

245. See *Doe v. South Carolina*, No. 25-1787, 2025 U.S. App. LEXIS 20849, at *19 (4th Cir. Aug. 15, 2025).

246. *Id.* at *3.

part, demanded that multi-stall restrooms would be used for and by one sex.²⁴⁷ The relevant provision defined “sex” as “a person’s biological sex, either male or female, as objectively determined by anatomy and genetics existing at the time of birth.”²⁴⁸ The provision also provided that school districts who did not comply with the provision would have 25% of their state funding withheld.²⁴⁹

The student, Doe, while assigned female at birth, had a gender identity as male and “live[d] consistently with his male gender in all aspects of life.”²⁵⁰ Accordingly, Doe used the boys’ restroom.²⁵¹ This caused teachers and administrators to punish Doe, and he eventually received a one-day suspension.²⁵² Even more, Doe’s parents were informed that, should Doe, a minor child who identified as a boy, continue to use the boys’ restroom, Doe would continue receiving penalties, one of which could be expulsion.²⁵³ Doe’s parents withdrew Doe from public school, and he finished out the remainder of his eighth-grade year online.²⁵⁴

As a result, Doe’s academic performance began to suffer.²⁵⁵ His parents ultimately concluded that attending an in-person public school would be a superior academic setting for Doe because of the educational and social opportunities that in-person school delivers to students.²⁵⁶ Doe’s parents later filed suit, alleging that the relevant provision violated Title IX and the Equal Protection Clause by “forbid[ding] transgender students from using the restroom consistent with their gender identities.”²⁵⁷

Two days after filing the complaint, Doe filed a motion for a preliminary injunction to “enjoin enforcement of the [provision].”²⁵⁸ In light of the Supreme Court’s decision to grant *certiorari* in another case, the U.S. District Court for the District of South Carolina stayed the case and denied all pending motions, including Doe’s complaint and motion for a preliminary injunction without prejudice.²⁵⁹ Doe then filed a notice of appeal and a motion for an injunction pending appeal, which the State of South Carolina moved to dismiss.²⁶⁰

Among other conclusions, the Fourth Circuit Court of Appeals recognized that *Grimm* is binding precedent and thus granted Doe’s motion for an injunction pending appeal.²⁶¹ Yet, the Fourth Circuit’s opinion is written with a veil of uncertainty:

247. *Id.*

248. *Id.*

249. *Id.* at *3.

250. *Id.* at *4.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *5.

258. *Id.*

259. *Id.* at *6-7.

260. *Id.* at *8.

261. *Id.* at *22-23.

“[A]lthough this concern will no doubt be taken up more fully by the panel to consider Doe’s appeal on the merits, we briefly note that the State discounts *Grimm*’s presently binding effect on Doe’s claims by forecasting that it—or its premises—will be overruled by the Supreme Court[.]”²⁶²

In his concurrence, Chief Judge Albert Diaz echoed the court’s concerns with the future of *Grimm* in light of the Supreme Court granting *certiorari* in *B.P.J. v. West Virginia State Board of Education*, a case involving a law barring transgender girls from participating in girls’ school sports.²⁶³ Even still, Chief Judge Diaz reiterated that “Doe has endured—and will continue to endure—irreparable harm without an injunction. The constitutional violation is [thus] reason enough to grant relief.”²⁶⁴ Moreso, Chief Judge Diaz noted that Doe’s harms also included him “feel[ing] physically uncomfortable from a full bladder” from his own restroom avoidance and, of course, “the shame and indignity Doe will face for being singled out based on his transgender status.”²⁶⁵ In the end, Chief Judge Diaz states, point-blank, the truth of the matter: “That’s a harm that can’t possibly be remedied with money damages.”²⁶⁶

The State applied for a stay of injunction pending appeal to the United States Supreme Court.²⁶⁷ Although the Court denied the application, the Court made it a point to explain that it did not rule on the case merits: “The denial of the application is not a ruling on the merits of the legal issues presented in the litigation. Rather, it is based on the standards applicable for obtaining emergency relief from this Court.”²⁶⁸ As the Fourth Circuit earlier indicated, the future of *Grimm* remains uncertain.

Even still, other circuits have also recognized the value of *Grimm*’s holding. The Seventh Circuit reached a similar conclusion in *Whitaker v. Kenosha Unified School District Number 1 Board of Education*, where a seventeen-year-old student was only permitted to use the girls’ restroom or the single-use restroom, despite having publicly transitioned and identified as male.²⁶⁹ In *Whitaker*, the court acknowledged that Whitaker was afraid that using the gender-neutral bathroom would merely draw more attention to his gender identity.²⁷⁰ Like the plaintiff in *Grimm*, Whitaker began avoiding the restroom, partly because he was afraid that he would be disciplined for using the boys’

262. *Id.* at *21-22.

263. *Id.* at *25 (Diaz, C.J., concurring) (“[W]hatever the Court decides in [*West Virginia State Board of Education v. B.P.J.*], the law today is *Grimm*.”); *West Virginia v. B.P.J.*, No. 24-43, 2025 U.S. LEXIS 2661 (July 3, 2025).

264. *Doe*, 2025 U.S. App. LEXIS 20849, at *27 (Diaz, C.J., concurring)

265. *Id.* at *27-28.

266. *Id.* at *28.

267. *South Carolina v. Doe*, No. 25A234, 2025 U.S. LEXIS 2784, at *1 (Sep. 10, 2025).

268. *Id.*

269. 858 F.3d 1034, 1040 (7th Cir. 2017).

270. *Id.*

restroom.²⁷¹ In effect, Whitaker began restricting his water intake.²⁷² This harmed Whitaker, who was diagnosed with vasovagal syncope, a condition which made him prone to fainting or seizures when dehydrated.²⁷³ The Seventh Circuit ultimately held that forcing a transgender student to use the bathroom that aligns with their sex assignment is sex stereotyping.²⁷⁴ Consequently, as the court noted, “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”²⁷⁵

After the 2024 Title IX Rule came into effect, some courts started to consider the impact of *Bostock* as it relates to Title IX and transgender public-school students. In *A.C. v. Metropolitan School District of Martinsville*, the Seventh Circuit applied *Bostock*’s reasoning to Title IX, and “ha[d] no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes.”²⁷⁶ Per *Bostock*’s instruction, the court proceeded by “ask[ing] whether . . . [the] plaintiffs [were] suffering negative consequences . . . for behavior that is being tolerated in male students who are not transgender.”²⁷⁷ For Title IX purposes, this analysis concerned the “lack of equal access to school programs.”²⁷⁸ Additionally, In *Tirrell v. Edelblut*, the New Hampshire District Court cited *A.C.*, noting that “applying *Bostock*’s recognition of the inextricable relationship between sex and transgender status to Title IX would not prevent schools from maintaining different housing, bathrooms, or athletic teams for men and women.”²⁷⁹ Here, the court went on to add “[t]he fact that Title IX expressly allows for sex-separated athletic teams does not mean that a law barring all transgender girls from playing on girls’ teams comports with Title IX.”²⁸⁰

In *Tirrell*, plaintiffs challenged a New Hampshire law that prohibited transgender girls from participating in girls’ sports.²⁸¹ The plaintiffs alleged that their rights had been violated under the Equal Protection Clause of the Fourteenth Amendment and under Title IX.²⁸² In its opinion, the court considered that the plaintiffs had experienced gender dysphoria, a medical condition that results when one’s sex assignment is not in alignment with gender identity.²⁸³ The court noted that it would be unrealistic for either girl to play on the boys’ sports teams, as such participation would be “humiliating, damaging

271. *Id.* at 1040–41.

272. *Id.* at 1041.

273. *Id.*

274. *Id.* at 1048.

275. *Id.* at 1049.

276. 75 F.4th 760, 769 (7th Cir. 2023).

277. *Id.*

278. *Id.*

279. 748 F. Supp. 3d 19, 48 (D.N.H. 2024)

280. *Id.* at 44.

281. *Id.* at 28.

282. *Id.* at 24.

283. *Id.* at 25.

to her mental health, and would exacerbate her symptoms of gender dysphoria.”²⁸⁴ The court applied the Supreme Court’s holding in *Bostock v. Clayton County*, noting that, as both a “textual and logical matter,” a prohibition of sex-based discrimination “encompasses a prohibition on transgender-based discrimination” as well.²⁸⁵ The court also acknowledged that the plaintiffs would encounter public stigmatization, and that such exclusion would “directly counter to their medical providers’ recommendations that they seek social acceptance of their gender identities[.]”²⁸⁶

II. THE POTENTIAL OF THE EQUALITY ACT

Despite all the ways courts have previously interpreted Title IX, it remains that the 2024 Title IX Rule has been vacated. As of January 2025, Title IX does not require schools to have protections ensuring access to an educational experience free from discrimination based on gender identity. If Title IX is reissued as it was in April 2024, then the United States will have enacted policies that ultimately reduce the risk of death by suicide for transgender students. Even so, there are additional steps the United States could take in the effort to prohibit discrimination for the LGBTQ+ community beyond the public-school setting.

On June 21, 2023, members of Congress reintroduced H.R. 15, or as it is commonly known, the Equality Act. The Equality Act aims to “prohibit discrimination on the basis of sex, gender identity, and sexual orientation[.]”²⁸⁷ Under the Act, sex, sexual orientation, gender identity, pregnancy, childbirth (or a related medical condition of such), and sex-based stereotypes can serve as the basis for discrimination, and each, in itself, is a form of sex discrimination.²⁸⁸

The Equality Act would amend the Civil Rights Act of 1964 and other civil rights laws to provide explicit protections for LGBTQ+ people in areas including “housing, employment, public education, credit, public spaces, federally funded programs, and jury service.”²⁸⁹ The act also provides that women may not be discriminated against in public spaces and federal programs.²⁹⁰ The Equality Act also prohibits racial and religious discrimination in public spaces. The act also speaks on the intersectionality that manifests in sex-based discrimination.²⁹¹ For instance, section 2(a)(2) provides that discrimination may be based “on a combination or the intersection of multiple protected characteristics.”²⁹²

LGBTQ+ persons are also explicitly named under the Equality Act. The Act

284. *Id.* at 28.

285. *Id.* at 44.

286. *Id.* at 45.

287. H.R. 15, 118th Cong. (2023).

288. *Id.*

289. *Equality Act*, GLSEN, https://www.glsen.org/sites/default/files/2021-06/GLSEN_Equality_Act_Factsheet_June_2021.pdf [<https://perma.cc/3KWA-YWY7>] (last visited Mar. 9, 2025).

290. *Id.*

291. *Id.*

292. H.R. 15, 118th Cong. (2023).

provides that discrimination includes the “exclusion and denial of entry, unequal or unfair treatment, harassment, and violence” that prevents “full participation” of LGBTQ+ persons in society and commerce.²⁹³ In totality, the Act addresses positive social *and* economic outcomes resulting from strengthened protections under the Equality Act.²⁹⁴

The Equality Act would codify *Bostock v. Clayton County*.²⁹⁵ Currently, the Supreme Court’s decision in *Bostock v. Clayton County* is vulnerable to being overruled by a future Court.²⁹⁶ As evidenced by the vacatur of the 2024 Title IX Rule, the Equality Act would provide protections for LGBTQ+ persons in a much more stable capacity. By passing the Equality Act, the United States would be among other global leaders striving to extend protections to LGBTQ+ persons. The United States has the potential to become a global leader in LGBTQ+ inclusion by learning from other countries that have already paved the way.

PROTECTING TRANSGENDER, GENDER NON-CONFORMING, AND INTERSEX STUDENTS: LEARNING FROM MALTA

To reemphasize, the United States would not be alone in the pursuit to extend protections for LGBTQ+ students, and particularly for transgender, nonbinary, and, likewise, intersex students. As previously stated, the International LGBTQI Youth & Student Organisation ranked Malta as one of the top three European countries in 2025, based on its offering of inclusive education to LGBTQI students.²⁹⁷ However, Malta is no stranger to recognition from IGLYO. IGLYO ranked Malta as one of the top three countries in 2022 and 2018, indicating that Malta has consistently been ranked in this position across all three editions of its Inclusive Education Report, making it a model country for the United States.²⁹⁸

I. MALTA’S GOVERNMENTAL STRUCTURE

Unlike the United States, Malta is a single-chamber parliamentary republic with a prime minister as the head of government.²⁹⁹ Malta, a member of the

293. H.R. 5, 117th Cong. (2021).

294. *Id.*

295. *The Equality Act*, HUM. RTS. CAMPAIGN (Apr. 29, 2025), <https://www.hrc.org/resources/equality> [<https://perma.cc/AAC2-HGAG>].

296. *Id.*

297. See *LGBTQI Inclusive Education Map 2025*, *supra* note 62.

298. See *LGBTQI Inclusive Education Map 2022*, INT’L LESBIAN, GAY, BISEXUAL, TRANS, QUEER, AND INTERSEX YOUTH & STUDENT ORG. 2 (2022), <https://www.education.iglyo.org/#chart> [<https://perma.cc/2BVB-Q95W>]; *LGBTQI Inclusive Education Map 2018*, INT’L LESBIAN, GAY, BISEXUAL, TRANS, QUEER, AND INTERSEX YOUTH & STUDENT ORG. 2 (2018), <https://www.education.iglyo.org/#chart> [<https://perma.cc/2BVB-Q95W>].

299. *Malta*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/eu-countries/malta_en [<https://perma.cc/2QMC-4QEU>] (last visited Oct. 11, 2025).

European Union since 2004, is considered one of the most transgender-friendly countries in the world.³⁰⁰ Malta is one of only five nations that have constitutionally established LGBTQ+ rights and was the first to establish gender identity as a protected class.³⁰¹ In fact, Malta was the first country in the European Union to add protections for gender identity to its constitution, and transgender people have the ability to change their legal gender marker without a court-mandated application or parental consent beginning at age sixteen.³⁰²

Under Chapter IV of the Malta Constitution, “every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sexual orientation, or *gender identity*[.]”³⁰³ The Malta Constitution also provides that no person should be discriminated against by any public official or public authority on the basis, in part, of gender identity.³⁰⁴

Malta ratified the European Convention on Human Rights in 1967.³⁰⁵ As a European country, Malta is bound to abide by the rights and guarantees designated in the European Convention of Human Rights.³⁰⁶ The Convention on Human Rights gives effect and makes binding the rights stated in the Universal Declaration of Human Rights.³⁰⁷

II. MALTA AND ITS HISTORICAL ADHERENCE TO THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights, based in Strasbourg, France, considers applications by individuals or member states alleging human rights violations.³⁰⁸ Proceedings, which commence at a national level, are first brought before the national courts and then to the highest domestic court of a nation.³⁰⁹ Afterward, applications are sent to the European Court of Human Rights, and

300. Laura Begley Bloom, *New LGBTQ+ Safety Report Ranks Trans Friendly Travel Destinations*, FORBES (June 27, 2023, 6:00 A.M.), <https://www.forbes.com/sites/laurabegleybloom/2023/06/27/new-lgbtq-safety-report-ranks-trans-friendly-travel-destinations/> [https://perma.cc/82WM-Z543].

301. Stephen Emms, *Malta: The tiny European island of tolerance*, BBC (Jan. 31, 2024), <https://www.bbc.com/travel/article/20240130-malta-the-tiny-european-island-of-tolerance> [https://perma.cc/9PV4-8DZD].

302. Bloom, *supra* note 300.

303. MALTA CONST. art. 32 (emphasis added).

304. *Id.* at art. 45.

305. MALTA, EUR. CT. OF HUM. RTS. (June 2025), https://www.echr.coe.int/documents/d/echr/cp_malta_eng [https://perma.cc/NND2-GQSF].

306. *What is the European Court of Human Rights?*, EQUAL. & HUM. RTS. COMM’N (Aug. 9, 2016), <https://www.equalityhumanrights.com/human-rights/what-are-human-rights/what-european-court-human-rights> [https://perma.cc/DN85-ZBEA].

307. *European Convention on Human Rights*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/european-convention-on-human-rights> [https://perma.cc/FXH6-S8SK] (last visited Oct. 11, 2025).

308. *What is the European Court of Human Rights?*, *supra* note 306.

309. *The life of an application*, EUR. CT. OF HUM. RTS., https://www.echr.coe.int/documents/d/echr/Case_processing_ENG [https://perma.cc/Q8F3-69EP] (last visited Oct. 11, 2025).

proceedings thus commence.³¹⁰ In conducting its initial analysis, the Court will examine the merits of the application.³¹¹ The court may enter a final judgment if a violation is found.³¹² Afterward, the judgment is executed, and the State in question may be required to (a) pay compensation, (b) adopt general compliance measures, or (c) adopt individual measures as a sense of redressability.³¹³ In 2024, the Court considered twenty-two applications from Malta.³¹⁴ Of those twenty-two applications, fifteen were declared inadmissible or struck out.³¹⁵ Consequently, seven judgments were delivered by the Court, and it found at least one violation of the European Convention on Human Rights.³¹⁶

Notably, in 2013, the Court passed down a decision in *Cassar v. Malta*.³¹⁷ In *Cassar v. Malta*, applicant Joanne Cassar alleged that Malta had violated Article 12 of the Convention on Human Rights because she had been denied the right to marry after she had undergone sex-reassignment surgery.³¹⁸ Cassar also alleged that her complaint was made under Articles 8 and 13 and stated that she had not been provided with an effective remedy when her rights were violated.³¹⁹ Ultimately, the case was struck out³²⁰ because an out-of-court settlement had been reached by the applicant in 2013, in which Malta agreed to compensate Cassar ten thousand euros.³²¹ The settlement also provided that Malta would make “all necessary amendments to enable the applicant to marry a person of the sex opposite to that of the applicant acquired sex” by the end of 2013.³²²

Accordingly, other applications for Malta have concerned: right to life; detention conditions of those awaiting immigration proceedings; inhuman or degrading treatment or punishment; right to liberty and security; Article 6 of the Convention on Human Rights; family and private life; freedom of expression; discrimination; and property issues.³²³

III. MALTA AND ITS FIGHT FOR TRANSGENDER INCLUSION

In 2015, Malta adopted the Gender Identity, Gender Expression, and Sex

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. MALTA, *supra* note 305, at 1.

315. *Id.*

316. *Id.*

317. *Id.* at 5.

318. *Cassar v. Malta*, App. No. 36982/11, ¶¶ 7-10, 16 (July 9, 2013), <https://hudoc.echr.coe.int/eng?i=001-123392> [<https://perma.cc/L62C-KBCA>].

319. *Id.* ¶ 16.

320. *Id.* ¶ 20. (The court “may decide to restore an application to its list of cases if it considers that the circumstances justify such a course, as would be if the Government fails to fulfill its commitment to take the above-mentioned action”).

321. *Id.* ¶ 18.

322. *Id.*

323. MALTA, *supra* note 305, at 2-4.

Characteristics Act.³²⁴ The Act provides that all persons in Malta have the right to (a) “the recognition of their gender identity;” (b) the ability to develop in accordance to their gender identity; (c) treatment in accordance of their gender identity, including the ability to have their legal documentation reflect such; and (d) “bodily integrity and physical autonomy.”³²⁵ The act also provides that a person’s gender identity shall be respected at all times.³²⁶ Significantly, the act explicitly provides that a person is not required to provide any proof of physical surgeries, hormone therapies, or any other “psychiatric, psychological, or medical treatment to make use of the right to gender identity.”³²⁷ In fact, the Act provides that Maltese citizens have the right to request name and gender-marker changes to align with a person’s gender identity.³²⁸

The purpose of the Act is essentially to ensure a “simplified procedure” could be offered in a capacity that “respects the privacy of the person requesting that one’s official documents be changed to reflect the person’s gender.”³²⁹ The Act also provides that the “best interest of the child” standard is applicable to children.³³⁰ The Act also acknowledges non-binary genders, as Maltese individuals can apply the gender marker “X” on official documents.³³¹

Part of the reason why Malta has been focusing its government policy on offering protections for LGBTQ+ equity is due to the Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics Unit (“SOGIGESC”). Developed in June 2018, SOGIGESC currently focuses its work on implementing the 2023—2027 LGBTIQ Equality Strategy and Action Plan.³³² The LGBTIQ Equality Strategy and Action Plan reflects Malta’s commitment to advancing the rights of queer individuals while maintaining its first-place ranking on various global indices measuring LGBTIQ+ legal and policy frameworks.³³³

324. ATT DWAR L-IDENTITA TAL-ĠENERU, L-ESPRESSJONI TAL-ĠENERU U L-KARATTERISTIĊI TAS-SESS [GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS ACT] 2015, Cap. 540, § 3(1) (Malta).

325. *Id.* § 3.

326. *Id.* § 3(3).

327. *Id.* § 3(4).

328. *Id.* § 4.

329. Kyle Knight, *Dispatches: Malta’s Inspiring Gender Recognition Law*, HUM. RTS. WATCH (Apr. 1, 2015, at 17:59 ET), <https://www.hrw.org/news/2015/04/01/dispatches-maltas-inspiring-gender-recognition-law> [<https://perma.cc/23CR-MVG6>].

330. *Id.*

331. *Legal Gender Recognition and Bodily Integrity*, HUM. RTS. DIRECTORATE (2023), <https://humanrights.gov.mt/legal-gender-recognition-and-bodily-integrity/#> [<https://perma.cc/SN8P-U2EK>].

332. *About the SOGIGESC Unit*, HUM. RTS. (2023), <https://humanrights.gov.mt/about-the-sogigesc-unit/> [<https://perma.cc/QP2F-H8SB>].

333. *LGBTIQ Equality Strategy and Action Plan 2023—2027*, HUM. RTS. DIRECTORATE (2023), <https://humanrights.gov.mt/wp-content/uploads/2024/04/LGBTIQ-Equality-Strategy-and-Action-Plan-2023-%E2%80%932027-EN-1.pdf> [<https://perma.cc/N38T-HEWU>].

IV. MALTA'S 2023—2027 LGBTIQ EQUALITY STRATEGY AND ACTION PLAN

The 2023—2027 Plan provides a list of initiatives that the Maltese government has implemented in the spirit of improving life and wellness for LGBTIQ citizens.³³⁴ Specifically for transgender persons, the 2023—2027 Plan indicates that Malta has conducted an intentional program to identify vulnerable transgender individuals in alliance with their employers.³³⁵ The 2023—2027 Plan also conveys that schools have taken on measures to ensure academic environments are inclusive for transgender and intersex students.³³⁶ The 2023—2027 Plan also provides that transgender individuals would be able to access healthcare that is specific to the needs of trans and gender non-conforming individuals.³³⁷ Other specific measures outlined in the policy fall within Malta's promise for Right to Equality and Freedom from Discrimination; Right to Education; Right to Health; Equality in Sport; Right to Private and Family Life; Freedom from Hatred; LGBTIQ Civil Society; Right to Seek Asylum; Promotion of LGBTIQ Equality on an International Level; and other relevant measures alike.³³⁸

The 2023—2027 Plan also reflects the progress from the 2018—2022 Plan. Accordingly, around 80% of the targets outlined in the 2018—2022 Plan were achieved, and some were even evolved into other measures in the 2023—2027 Plan.³³⁹ One of the challenges for Malta seemed to be a lack of resources.³⁴⁰ On the other hand, a significant achievement that resulted from the efforts to implement the 2018—2022 Plan includes the “promoti[on] [of] LGBTIQ inclusive educational approaches” through effective teacher training, although such efforts still need extra support to transfer such skills to intra-curricular approaches.³⁴¹

Importantly, the 2023—2027 Plan is not ignorant of the idea that Malta isn't perfect—prejudice is still real and impacts LGBTIQ Maltese citizens.³⁴² However, by explicitly naming this area of improvement in the 2023—2027 Plan, Malta has implicitly emphasized yet another reason for edits continual implementation. In other words, if Malta did not need improvement, in theory, there would be no need for an implementation plan in the first place.

V. EDUCATIONAL INITIATIVES OUTLINED IN MALTA'S 2023—2027 PLAN

Area D6 of the 2023—2027 Plan focuses on “ensur[ing] that the right to education can be effectively enjoyed by LGBTIQ+ individuals, free from

334. *Id.* at 11.

335. *Id.*

336. *Id.* at 12.

337. *Id.*

338. *Id.* at 11-13, 15.

339. *Id.* at 16.

340. *Id.*

341. *Id.*

342. *Id.* at 10.

discrimination.”³⁴³ Some of the outlined provisions provide that Malta aims to develop practical resources teachers can use to dissuade bullying, encourage allyship, embrace consensual relationships, and more.³⁴⁴ The 2023—2027 Plan also aims to provide diverse resources to both teachers and students.³⁴⁵

Such efforts are not the only acts Malta has implemented to ensure LGBTIQ+ curriculum is implemented in Maltese schools. In 2015, Malta’s Ministry for Education and Employment introduced the Trans, Gender Variant, and Intersex Students in School Policy. The Policy, which was initially developed in alignment for the 2014—2024 Framework for the Education Strategy for Malta, strives to provide “every student . . . with the necessary knowledge, skills, competencies, and attributes for citizenship and employability within an inclusive, safe, secure and motivating school environment that inspires and facilitates learning.”³⁴⁶ The Policy provides three primary aims: (1) “foster a school environment that is inclusive, safe, and free from harassment and discrimination for all members of the school community, students, and adults, regardless of sex, sexual orientation, gender identity, gender expression, and/or sex characteristics;” (2) “promote the learning of human diversity that is inclusive of trans, gender variant, and intersex students, thus promoting social awareness, acceptance and respect;” and (3) “ensure a school climate that is physically, emotionally, and intellectually safe for all students to further their successful learning development and well-being, including that of trans, gender variant and intersex persons.”³⁴⁷

As reflected in the Policy, “inclusivity,” “diversity,” “equity,” and “social justice” are among Malta’s core values, and the policy shall cover “behavior [*sic*] that takes place in the school, on school property, and school-sponsored functions, and activities.”³⁴⁸ The Policy’s scope also reaches into online platforms.³⁴⁹

The Policy alludes to the idea that many people do not have a sufficient awareness of what it means to be a transgender, gender variant, or intersex child.³⁵⁰ However, the Policy also notes it is not the responsibility of trans, gender variant, and intersex individuals to need to fight for access to human rights merely because others lack a sense of familiarity with gender non-conforming lives.³⁵¹ As the Policy notes, “every student deserves to be treated with respect and to be protected from violations of their human rights, including

343. *Id.* at 46.

344. *Id.* at 47.

345. *Id.*

346. SILVAN AGIUS ET AL., TRANS, GENDER VARIANT AND INTERSEX STUDENTS IN SCHOOLS POLICY, MINISTRY FOR EDUC. & EMP. (Dolores Gauci ed., June 2015), <https://sustainabledevelopment.gov.mt/wp-content/uploads/2021/10/Trans-Gender-Variant-and-Intersex-Students-in-Schools-Policy.pdf> [<https://perma.cc/XH22-CT9X>].

347. *Id.* at 5-6.

348. *Id.* at 6.

349. *Id.*

350. *Id.* at 6-7.

351. *Id.* at 7.

their right to be free from discrimination, harassment, and violence.”³⁵²

The Policy reflects similar research findings as explored by The Trevor Project and other research organizations regarding the correlation between mental health, academic success, and discriminatory experiences. The Policy recognizes that many trans, gender variant, and intersex students have a heightened experience of bullying across the European Union.³⁵³ It is uncontested, though, that “[b]eing able to be one’s self at school is an essential factor in every student’s success and well-being.”³⁵⁴ As a result, schools have a social responsibility to ensure that learning environments are safe and inclusive, especially for trans, gender variant, and intersex students.

As emphasized above, communities must recognize areas of growth in setting established targets for improvement. The Policy provides the following as issues faced by trans, gender variant, and intersex students:

“Sex and gender stereotypes; culture and cultural expectations; lack of well-being due to discrimination, bullying, and other unfair treatment; exclusion from sports and other gendered activities; unease with gendered uniforms, toilets, and other gendered spaces; decreased attention during school time and failure to learn due to lack of safety in school and lack of support services; decreased attention during school time and failure to learn due to lack of safety in school and lack of support services; minority stress and social isolations; absenteeism due to lack of safety in schools.”³⁵⁵

The Policy also outlines specific needs required for the care of trans, gender non-conforming, and intersex students, including adequate facilities, inclusive school policies, support from the school and broader community, and more.³⁵⁶

VI. EXPECTATIONS OF TEACHERS

Malta’s Trans, Gender Variant, and Intersex Students in School Policy emphasizes that teachers should use affirming language when referring to students, rather than outdated or harmful language.³⁵⁷ Teachers must also facilitate effective partnerships with parents, students, and other stakeholders to ensure that each child receives a validating educational experience.³⁵⁸ In fact, teachers are also expected to adhere to Malta’s Teachers’ Code of Ethics and Practice. According to the Code, teachers are “encourage[d] to adopt an informed approach to their teaching and its contexts and to reflect on the good

352. *Id.* at 8.

353. *Id.*

354. *Id.*

355. *Id.* at 12.

356. *Id.*

357. *Id.* at 13.

358. *Id.* at 13-14.

and correct practices as professional teachers.”³⁵⁹

Key Principle 3 of Malta’s Teachers Code of Ethics and Practice outlines that teachers shall “[r]espect the [u]niqueness and [d]iversity of students.”³⁶⁰ Principle 3.1 provides that teachers must “demonstrate respect for diversity, maintain fairness and promote equality irrespective of gender, race, religion, sexual orientation, appearance, age, language or different needs or abilities.”³⁶¹

RECOMMENDATION

“Some of the biggest misunderstandings [people] have about being trans is (sic) you’re trying to be someone else. No. You’re trying to be you. You’re trying to be you to the fullest.”
*Nel Huff*³⁶²

Malta’s Trans, Gender Variant, and Intersex Students in School Policy marks the first time that a European country has implemented a “comprehensive education policy focusing on the needs of trans, gender variant and intersex children.”³⁶³ Like the United States’ 2024 Amendments, the policy provided different procedures for Maltese schools, offering guidance on how the policy could be implemented and that authentic adherence to the policy is fundamental.³⁶⁴ Though unlike the United States, Malta, to date, has remained firm in its commitment to facilitating inclusive atmospheres for students. Approximately 77 percent of Maltese survey respondents agreed that school and educational materials should include information about gender identity, compared to only 54 percent of Americans, as reported in a separate survey.³⁶⁵

The 2024 Title IX Rule set forth hope for transgender students in the United States. Even more, after it initially went into effect, organizations such as GLSEN offered resources, including model policies, to help implement Title IX

359. Teachers’ Code of Ethics and Practice, 2012, S.L.327.02, sch. A, <https://legislation.mt/eli/sl/327.2/eng/pdf> [<https://perma.cc/6JUW-K4JS>] (Malta).

360. *Id.* Principle 3.

361. *Id.* Principle 3.1.

362. NPR, *A Few Things to Know About Being Transgender* | NPR, YOUTUBE (Nov. 21, 2017) <https://www.youtube.com/watch?v=SHR-0TeUq3U> [<https://perma.cc/YEH9-JX9Q>].

363. *Malta launches inspiring education policy for trans, gender variant and intersex children*, ILGA EUR. (June 16, 2015), <https://new.ilga-europe.org/resources/news/latest-news/malta-education-policy-june2015> [<https://perma.cc/3YLP-ENQD>].

364. *Id.*

365. LUONA LIN ET AL., PUBLIC VIEWS ON PARENTS OPTING THEIR CHILDREN OUT OF LEARNING ABOUT RACE AND LGBTQ ISSUES, PEW RSCH. CTR., 1, 25 (Feb. 22, 2024), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2024/02/ST_24.02.22_lgbtq-race-in-schools_report.pdf [<https://perma.cc/8P2S-WPMP>]; James Debono, *Educate us: 77% agree with school lessons about transgender identity*, MALTA TODAY, (Jan. 17, 2024, 7:00 AM ET), https://www.maltatoday.com.mt/news/national/127010/educate_us_77_agree_with_school_lessons_about_transgender_identity [<https://perma.cc/8PXP-GU6K>].

in a manner that complied with both federal and state law.³⁶⁶ Specifically, GLSEN’s model policy attempted to meet all schools and educators at the level at which they could digest and understand how to support transgender and gender-nonconforming students. For instance, the policy provided definitions for inclusive language, a reader-friendly explanation of what Title IX entails, and information about other inclusive acts, such as the Family Educational Rights and Privacy Act (“FERPA”) and the Americans with Disabilities Act (“ADA”).³⁶⁷ In essence, the model policy shared many similarities with Malta’s Trans, Gender Variant, and Intersex Students in School Policy. GLSEN’s model policy instructed stakeholders on how to file complaints with the Title IX coordinator and outlined supportive measures schools could take to ensure student success and agency compliance.³⁶⁸ The model policy provided examples of how teachers could ensure their curricula were inclusive for LGBTQ+ students, noting that research shows that access to a queer-inclusive curriculum leads to a positive overall impact on school experiences for LGBTQ+ students.³⁶⁹ Not only would the United States be side-by-side with Malta in the charge for LGBTQ+ inclusion, but so would other United States organizations, thereby establishing one collective charge to facilitate learning environments where trans students have ensured access to a gender-affirming space.

Malta’s commitment to transgender, gender variant, and intersex inclusion has impacted the overall Maltese perception of transgender individuals. By reimplementing the 2024 Title IX Rule and by codifying the Equality Act, the United States would scaffold its perception of transgender individuals, too.

CONCLUSION

“I was born Trans, and I will die Trans. And until then, I will not be silent.”
*Danielle Tanner*³⁷⁰

While countries such as Malta have taken restorative steps to advocate for trans youth, there remains a disconnect in the United States. For one, it is material that the “debate about trans youth doesn’t *exclude the voices of trans youth*.”³⁷¹ At heart, transgender people are the “best spokespeople for their own

366. See MODEL LOCAL EDUCATION AGENCY POLICIES ON IMPLEMENTING TITLE IX AND OTHER FEDERAL NONDISCRIMINATION PROTECTIONS FOR LGBTQIA2S+ YOUNG PEOPLE IN K-12 SCHOOLS, GLSEN (2024), <https://www.glsen.org/sites/default/files/2024-04/Model%20Local%20Education%20Agency%20Policies.pdf> [<https://perma.cc/M57U-ZNVF>].

367. See *id.*

368. *Id.* at 12-13.

369. *Id.* at 28-29.

370. Danielle Tanner (@ddarlingnyc), INSTAGRAM, *I was born Trans, and I will die Trans. And until then, I will not be silent* (Mar. 17, 2023), <https://www.instagram.com/p/Cp6YMAyri2I/> [<https://perma.cc/SV42-P3AD>].

371. JACK TURBAN, *FREE TO BE: UNDERSTANDING KIDS & GENDER IDENTITY*, 249 (Simon & Schuster, LLC, 2024).

experience.”³⁷² “Like many trans kids, I knew who I was in my heart,” stated activist Dylan Mulvaney.³⁷³ Recently, in December 2025, Congresswoman Sarah McBride shared more about her personal experience during the same week in which politicians announced more plans to limit gender affirming care for trans youth:

“I get it’s hard to understand what it feels like to be trans. I get that it is hard to understand what it’s like to be me. I get that it’s hard to understand [gender affirming care] and understand the need for it. But one of the things that gets so lost in this conversation is that the transgender adults of today were kids once. I was a kid once. I didn’t have the courage to come out until I was twenty-one, but it’s a fact I’ve known about myself for my entire life. I didn’t have the courage to come out until I was twenty-one and that means twenty-one years of pain. Twenty-one years of unwavering homesickness that only went away when I was able to get the care that I needed. And my biggest regret in life is that I never had a childhood without that pain.”³⁷⁴

“[N]ow more than ever, gender has exploded into the political arena, with legal implications for everything from medical regulation to education policy, to sports.”³⁷⁵ In times where trans people “have become targets of extreme political discrimination and violence,” community advocates should “learn the facts about who trans people are, become educated about the realities trans people face, and understand that [their] collective equality is connected to the safety and freedom of people who are transgender.”³⁷⁶ This includes undertaking a thoughtful analysis into the needs of trans youth, and the power that comes with safe, gender-affirming educational spaces.

Yes, “gender is complex.”³⁷⁷ Nevertheless, the work to understand the

372. Corrine Segal & Eric Krupke, *Here’s what most people get wrong about the transgender community*, PBS (Apr. 23, 2015) <https://www.pbs.org/newshour/nation/breaking-common-misconceptions-gender> [https://perma.cc/HD9D-EAW3].

373. Video posted by Dylan Mulvaney (@dylvanmulvaney) & Human Rights Campaign (@humanrightscampaign), INSTAGRAM (Sep. 28, 2023), <https://www.instagram.com/reel/Cxv04INRkD4/> [https://perma.cc/P552-A2W9].

374. Video posted by Rep. Sarah McBride (@congresswomansarahmcbride), INSTAGRAM (Dec. 17, 2025), https://www.instagram.com/congresswomansarahmcbride/reel/DSYd_6jCdHb/ [https://perma.cc/43WT-69DX]; See also Selena Simmons-Duffin, *RFK Jr. and Dr. Oz announce moves to ban gender-affirming care for young people*, NPR (Dec. 18, 2025, 5:25 PM) <https://www.npr.org/sections/shots-health-news/2025/12/18/nx-s1-5647789/transgender-gender-affirming-care-rfk-jr-dr-oz-trump> [https://perma.cc/45AF-27TQ]; Ellis Kim, *House passes bill criminalizing gender-affirming care for minors*, CNN (Dec. 17, 2025), <https://www.cnn.com/2025/12/17/politics/house-bill-criminalizing-gender-affirming-care-minors> [https://perma.cc/WQA5-CZM4].

375. TURBAN, *supra* note 371, at 382.

376. *Transgender Awareness Week*, GLAAD <https://glaad.org/transweek/> [https://perma.cc/EV7X-JUV4] (last visited Dec. 19, 2025).

377. TURBAN, *supra* note 371, at 249.

complexities of gender is important.

The work to unpack the complexities of our own genders, how society's handling of gender has impacted us, and how gender and society intersect is tough work, but it's essential—now more than ever. Fighting the temptation to oversimplify, as many politicians have done, and instead jumping into the complexity, will allow us all to not just support trans youth, but also better understand ourselves, as we continue through a world that is inevitably impacted by gender.”³⁷⁸ Ultimately, “the liberation of trans people would improve the lives of everyone in our society.”³⁷⁹ However, transgender and nonbinary people should not carry this burden alone. By ensuring that youth have access to gender-affirming educational spaces, the United States can take a step towards reducing the risk of death by suicide for LGBTQ+ youth as a whole, and especially for transgender, nonbinary, and intersex youth. For that reason, the 2024 Title IX Rule should be reimplemented and enforced, and Congress should codify the Equality Act.

“I marvel at the courage of transgender young people today who are sharing themselves with their families and the world, despite the toxicity and the hate that too often emanates from the building behind me, and from politicians within it.

All any of us want is to live a life of purpose and happiness and wholeness. None of us know how long we have. None of us know how much time we have on this planet. It is already hard enough to raise a family. It is already hard enough to be a kid.

And government should not make it harder.”

*Rep. Sarah McBride*³⁸⁰

378. *Id.* at 249, 295.

379. FAYE, *supra* note 36, at xiii.

380. Rep. McBride, *supra* note 374.

THROUGH THE VEIL: AN INTERNATIONAL COMPARISON ON RELIGIOUS FREEDOM AND THE *HIJAB* IN THE ISLAMIC REPUBLIC OF IRAN, FRANCE, AND THE UNITED STATES

ALISHAH C. SALMAN*

“[W]e’re crushed not only by the government but by the weight
of our traditions!”

—Marjane Satrapi, *Persepolis 2: The Story of a Return*¹

I. INTRODUCTION

Religious freedom has been a significant pillar of United States history, as far back as the Pilgrims who set sail on the Mayflower so that they might escape religious persecution.² American elementary schools have frequently taught students the significance of the United States being a refuge for individuals around the world who faced religious persecution of some type.³ At the formation of the United States, the Founders wanted to withdraw religion from the authority of the new federal government to allow for greater individual religious practice.⁴ Nearly 250 years after its formation, it appears that religious freedom is unequally distributed among American citizens. While Christianity is widely accepted in the United States and represented in the government, other religions are often underrepresented, misunderstood, and demonized.

This Note specifically compares religious freedom through the lens of how Muslim women who wear the *hijab* are treated in France, the Islamic Republic of Iran, and the United States. These countries offer a useful basis for a comparative analysis, as France and Iran are at opposite ends of the spectrum of religious freedom, and the United States tends to oscillate between both extremes without ever fully reaching either. By acknowledging the need for stronger protections for Muslim American women, especially those who wear *hijabs*, this Note further recommends broadening the federal prosecution of hate

* J.D. Candidate, 2026, Indiana University Robert H. McKinney School of Law; Bachelor of Arts in International Studies, 2016, from University of Southern Indiana. This author would like to thank her father who inspired this note by reflecting that when he fled Iran, he left one theocracy to end up in a different theocracy decades later. She would also like to thank her dog, Mina, who kept her company during late nights of writing. She would also like to thank Dr. Frank Emmert for his guidance in developing this note and the Vol. XXXVI executive board, student note candidates, and associate members of the Indiana International and Comparative Law Review for all their feedback and support. Finally, this author would like to draw attention to the gender apartheid in Iran which recently gained attention through the “woman, life, freedom” movement following the tragic murder of Mahsa Jina Amini.

1. MARJANE SATRAPI, *PERSEPOLIS 2: THE STORY OF A RETURN* 185 (Pantheon 2004).

2. *Freedom of Religion*, HISTORY (May 28, 2025), <https://www.history.com/topics/united-states-constitution/freedom-of-religion> [<https://perma.cc/RN36-5JDB>].

3. Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAGAZINE (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/> [<https://perma.cc/U49G-278E>].

4. Holly Hollman, *Understanding America’s First Freedom*, AM. BAR ASS’N (July 5, 2022), <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/understanding-americas-first-freedom/> [<https://perma.cc/X3UA-R67X>].

crimes, establishing an interfaith council to better represent minority religions, and allowing the Religious Freedom Restoration Act to better protect American Muslim women. Religious freedom, this Note argues, cannot fully be recognized in the United States until religious minorities, including Muslims, are better protected in ways that avoid the extreme secularism of France or a Christian theocracy with a similar foundation to Iran.

II. BACKGROUND

Internationally, religious freedom is recognized through the International Covenant on Civil and Political Rights.⁵ Article 18 § 1 of this covenant states,

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁶

France, Iran, and the United States have each ratified this treaty and therefore have an obligation under international law to uphold the right to “freedom of thought, conscience, and religion” in their respective countries.⁷ The Human Rights Committee, an organ of the United Nations, is responsible for observing whether State parties are following the International Covenant on Civil and Political Rights.⁸ The Human Rights Committee released an opinion in 2004 addressing an allegation that Uzbekistan violated a citizen’s rights under the International Covenant on Civil and Political Rights.⁹ The plaintiff claimed that Uzbekistan violated the covenant when she was expelled from her public university for choosing to wear a headscarf.¹⁰ The Human Rights Committee found that the state violated the plaintiff’s right to express her religion under the International Covenant on Civil and Political Rights.¹¹ The committee ordered Uzbekistan to provide a remedy and to take measures within 90 days of its opinion to ensure compliance with the Covenant.¹²

France and the Islamic Republic of Iran are good choices for a comparative analysis of religious freedom in the United States because they are on different

5. International Covenant on Civil and Political Rights, art. 18, *adopted* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.

6. *Id.*

7. *Id.*

8. *Human Rights Committee*, U.N. HUM. RTS. TREATY BODIES, <https://www.ohchr.org/en/treaty-bodies/ccpr#:~:text=The%20Human%20Rights%20Committee%20is,Rights%20by%20its%20States%20parties> [https://perma.cc/8EXM-L86K].

9. *Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000, at 3 (Nov. 5, 2004).

10. *Id.* at 5.

11. *Id.* at 7.

12. *Id.* at 7-8.

ends of the spectrum regarding the presence of religion in government. France is a secular state.¹³ Secular states have four components: “the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State.”¹⁴

On the opposite end, the Islamic Republic of Iran is an Islamic Theocracy where the Supreme Leader has ideological and political control over the entire government, with clerics who are also involved with every state function.¹⁵ A theocracy is a form of government in which power is held by the clergy of a religion.¹⁶ The clergy acts based on what their particular divinity requires, according to the guidelines of that specific religion.¹⁷ Generally, theocracies are most common in the Muslim world.¹⁸ This trend in the Muslim world is interpreted as a reaction by the Muslim peoples against Western colonialism, as well as the failure of new forms of self-rule, which were often led by corrupt, authoritarian, and incompetent leaders who were still supported by Western politics, including military intervention by Western powers.¹⁹

The United States falls somewhere on the range between a secular state and a theocratic state. In the United States, the government is not supposed to exercise religious authority, and spiritual entities are not permitted to have any governmental authority.²⁰ Politicians can still openly practice their religions, and religious organizations are still able to be involved in politics, but the government is meant to stay out of religion.²¹ However, even with these strict laws regulating religious influence on the United States government, there are still many instances where laws are passed that contradict the Constitutional protections of freedom of religion.²² Furthermore, the steady increase of religiously motivated hate crimes indicates that the United States government is failing to protect its citizens, which is perhaps the most important role of any

13. Arthur Kutoroff, *First Amendment versus Laicite: Religious Exemptions, Religious Freedom, and Public Neutrality*, 48 CORNELL INT’L L.J. 247, 249 (2015), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1861&context=cilj> [<https://perma.cc/2CV2-BZ48>].

14. Javier Martínez-Torrón & W. Cole Durham, Jr., *Religion and the Secular State/ La religion et l’Etat laïque*, INT’L CTR. FOR L. & RELIGION STUD. 3 (Dec. 14, 1999), <https://classic.iclrs.org/content/blurp/files/General%20Report.pdf> [<https://perma.cc/99YJ-G68U>].

15. *The Structure of Power in Iran: An overview of the Iranian government and political system*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/tehran/inside/govt.html> [<https://perma.cc/TXL8-SFPT>] (last visited Oct. 28, 2025).

16. Nick Megoran, *Theocracy*, 11 INT’L ENCYCLOPEDIA OF HUM. GEOGRAPHY 223 (2009), <https://www.staff.ncl.ac.uk/nick.megoran/pdf/theocracy.pdf> [<https://perma.cc/GRK2-GQD2>].

17. *Id.* at 226-27.

18. *Id.* at 227.

19. *Id.* at 227-28.

20. Kent Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 CARDOZO L. REV. 2383, 2384 (2009), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=3583&context=clr> [<https://perma.cc/4T8C-48HF>].

21. *Id.*

22. *Which US states have passed religious laws?*, BBC (Apr. 7, 2016), <https://www.bbc.com/news/world-us-canada-35990353> [<https://perma.cc/B9KR-HU79>].

government to its citizens.²³

A. Religious Freedom and France

France has a bicameral parliamentary democracy and is a republican state.²⁴ There are three levels of governance in France: the *régions* (the Regions), *départements* (the Departments), and *communes* (the Municipalities).²⁵ There is no hierarchy among these governments, and local authorities can enact short-term policies they do not usually have the authority to enact.²⁶ French law is applied universally, without consideration of citizens' religion, race, or socioeconomic status.²⁷ The central government, or the Parliament, holds all responsibility regarding national sovereignty matters and has the power to pass laws.²⁸ The regional authority is responsible for regional transportation, departmental transportation, education, vocational training, culture, regional planning, economic development, environmental protection, and scientific development.²⁹ The Department is responsible for departmental transit, education, vocational training, inclusion and social welfare, public health, planning, economic development, environmental protection, rural development, tourism, and business development.³⁰ The Municipalities are responsible for municipal transport, culture, public health, economic development, the environment, and housing.³¹ While the French government does not recognize or promote any religion and is supposed to respect all beliefs, it also holds freedom and protection of religion relevant at each level of government.³²

In 1905, France enacted a law that separated the Church and the State, and it is commonly referred to as *laïcité*, or secularism.³³ This term refers to the official secularism that permeates the French government, encompassing both the public's neutrality towards religion and the guarantee of religious freedom.³⁴ *Laïcité* reflects how France's relationship with the church has evolved over

23. *Report to the Nation 2023: Faith Under Fire*, CTR. FOR THE STUDY OF HATE & EXTREMISM CAL. ST. UNIVERSITY SAN BERNARDINO (2023), <https://www.csusb.edu/sites/default/files/2023-03/REPORT%20TO%20THE%20NATION%202023%20Relig4PM.docx.pdf> [https://perma.cc/67M5-E52X].

24. *France*, EUR. COMM. OF THE REGIONS, <https://portal.cor.europa.eu/divisionpowers/Pages/France-Introduction.aspx> [https://perma.cc/RC4D-BTZW] (last visited Oct. 28, 2025).

25. *Id.*

26. *Id.*

27. Dominique Decherf, *French Views of Religious Freedom*, BROOKINGS (July 1, 2001), <https://www.brookings.edu/articles/french-views-of-religious-freedom/> [https://perma.cc/RN5T-Z8X3].

28. *France*, *supra* note 24.

29. *Id.*

30. *Id.*

31. *Id.*

32. Decherf, *supra* note 27; *France*, *supra* note 24.

33. Anastasia Colosimo, *Laïcité: Why French Secularism is So Hard to Grasp*, INSTITUT MONTAIGNE (Nov. 12, 2017), <https://www.institutmontaigne.org/en/expressions/laicite-why-french-secularism-so-hard-grasp> [https://perma.cc/N5VR-WEQA].

34. Kutoroff, *supra* note 13, at 249-50.

several centuries, and the 1905 law had the effect of losing a portion of France's religious cultural identity.³⁵ *Laïcité* is also enshrined in the First Amendment of the French Constitution, which states,

France shall be an indivisible, secular, democratic and social republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.³⁶

Under *Laïcité*, private parties are meant to be free to act as they wish, but the public must not be biased toward or against religion.³⁷ In France, religious freedom is a human right, but it is not independent of other human rights and does not get special status over other human rights.³⁸

While France's government is meant to be neutral towards religion, its current stance on the Muslim headscarf, or *hijab*, demonstrates a clear stance on religion by the French government.³⁹ If religions are protected, then French women should be allowed to wear a headscarf for religious purposes; however, the French government has instead broadly interpreted *Laïcité* and restricted French citizens from legally expressing their religion in certain spaces.⁴⁰

France has enacted laws that have suppressed Muslim women multiple times. The French government has weaponized its secularism to pass laws that disproportionately affect Muslim women and girls.⁴¹ Prejudice, racism, and Islamophobia have driven lawmakers to regulate Muslim women's and girls' clothing.⁴²

In 2010, France passed a law, commonly referred to as the "burqa ban," which prohibited French women from wearing full head and body veils while in public spaces.⁴³ Before passing the law, President Nicolas Sarkozy justified the policy and said, "[The burqa] is not a religious symbol. It is a symbol of servitude and humiliation...We cannot accept, in our country, women imprisoned behind a mesh, cut off from society, deprived of all identity...that is

35. Colosimo, *supra* note 33.

36. 1958 CONST. art. 1 (Fr.).

37. Kutoroff, *supra* note 13, at 250.

38. Decherf, *supra* note 27.

39. *Id.*

40. *Id.*

41. *France: Hijab bans in French sport expose discriminatory double Standards ahead of Olympic and Paralympic Games*, AMNESTY INT'L (July 16, 2024), <https://www.amnesty.org/en/latest/news/2024/07/france-hijab-bans-olympic-and-paralympic/> [https://perma.cc/R4NR-BJ3F].

42. *Id.*

43. Adam Scott Kunz, *Public Exposure: Of Burqas, Secularism, and France's Violation of European Law*, 44 GEO. WASH. INT'L L. REV. 79 (2012), [https://heinonline-org.proxy.ulib.uit.edu/HOL/Page?handle=hein.journals/gwlr44&id=95&collection=journals&index=\[https://perma.cc/AV3U-DTY8\]](https://heinonline-org.proxy.ulib.uit.edu/HOL/Page?handle=hein.journals/gwlr44&id=95&collection=journals&index=[https://perma.cc/AV3U-DTY8]).

not the French Republic's idea of women's dignity."⁴⁴ France has justified the burqa ban by saying that the law would protect Muslim women from being forced under the supposed domination of the burqa.⁴⁵ Additionally, the ban was also meant to support national security by allowing enforcement officers to identify women's faces more easily.⁴⁶ While most French citizens supported the burqa ban when it came out, international organizations and non-profit organizations condemned the ban and called it a violation of a Muslim woman's right to freedom of expression.⁴⁷

In 2023, France banned Muslim schoolchildren from wearing *abayas*, which are loose-fitting garments that cover a woman's entire body except for her head, hands, and feet.⁴⁸ The French Education Minister at the time, Gabriel Attal, said, "Schools of the Republic are built on very strong values and principles, especially *laïcité*. For me, *laïcité*, when put in the framework of a school, is very clear: you enter a classroom, and you must not be able to identify the religious identity of students just by looking at them."⁴⁹

In 2024, France prohibited Muslim women from wearing head veils during the 2024 Summer Olympics and Paralympics.⁵⁰ In fact, France has banned Muslim women from wearing a *hijab* while participating in several sports, including football, basketball, and volleyball.⁵¹ This ban was enacted both in professional sport leagues and amateur leagues.⁵² As a result of these bans, Muslim women are not able to play sports they enjoy, and some Muslim women have even left France to pursue their sports.⁵³

Laïcité has conflicted with international law and, under international law, is not an accepted reason to restrict freedom of religion or freedom of expression.⁵⁴ *Laïcité* also contradicts France's First Article by enacting statutes that unequally affect its citizens based on religion.⁵⁵ State-sponsored secularism in France has not coexisted with a Muslim woman's full freedom to practice her faith, and it also has contradicted France's obligation to protect religious freedom under international law.

44. *Id.* at 80.

45. *Id.* at 83.

46. *Id.*

47. *Id.*

48. Rob Picheta et al., *France to ban the wearing of abayas in schools, fueling accusations of Islamophobia*, CNN (Aug. 28, 2023, at 09:00 EDT), <https://www.cnn.com/2023/08/28/europe/france-abayas-schools-ban-intl> [<https://perma.cc/HR6N-8ZPH>]; *What is an Abaya*, HIKMAH BOUTIQUE (Mar. 8, 2024), https://hikmahboutique.com.au/blogs/useful-articles/what-is-an-abaya-a-comprehensive-guide?srsId=AfmBOop_V7DMylqLYkYGEWJXHhUs6UcwUrgHc7xpQocxCU7mZX8l2Gz- [<https://perma.cc/SRN2-9QRH>].

49. Picheta et al., *supra* note 48.

50. *France: Hijab bans in French sport expose discriminatory double standards ahead of Olympic and Paralympic Games*, *supra* note 41.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. 1958 CONST. art. 1 (Fr.).

B. Religious Freedom and the Islamic Republic of Iran

Women in Iran, prior to the 1979 revolution, had the same freedoms as women in most Western societies.⁵⁶ In fact, throughout most of the 20th century, leading up to the 1979 revolution, Iran was viewed as a secular, Western society.⁵⁷ Western states, such as the United States and the United Kingdom, even supported Iran's last Shah, Mohammad Reza Pahlavi, because he was viewed as a Western, progressive ally, and Western leaders shared powerful alliances with the Shah.⁵⁸ On January 8, 1936, however, Shah Pahlavi banned all Islamic veils in a mandate known as *Kashf-e Hijab*.⁵⁹ This decree was the antithesis of a mandated *hijab*.⁶⁰ Police were authorized to remove *hijabs* from any women wearing them in public physically, and some women who did not comply were beaten.⁶¹

In the 1970s, as anti-government movements grew in anticipation of the revolution, Iranian women began wearing *hijabs* and *chadors* as a protest against the secular government of Shah Pahlavi.⁶² The *hijab* was used as a symbol of opposition against the Pahlavi rule, and many female followers of Ayatollah Khomeini, the next leader of Iran after the removal of Shah Pahlavi, wore *chadors* while they rallied against the monarchy.⁶³

Following the 1979 Islamic Revolution, the Shah was removed from power and subsequently exiled from Iran. Post-revolutionary Iran mandated that women dress modestly and cover their hair with a *hijab* or *chador*.⁶⁴ The Islamic Penal Code of the Islamic Republic of Iran detailed the legal punishment Iranian women may face when they are unveiled in Book Five, Chapter Eighteen, Article 638 which states, "Women, who appear in public places and roads without wearing an Islamic *hijab* shall be sentenced from ten days to two months' imprisonment or a fine of fifty thousand to five hundred Rials."⁶⁵ Ayatollah Khomeini also segregated beaches and sports based on gender, banned married women from attending regular schools, and prohibited women

56. Nicolas Garon, *Veiling Laws Throughout Iranian History: The Relationship to Religion, Before and During Islamic Law*, 38 CONN. J. INT'L L. 50, 53 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4933290 [<https://perma.cc/PGN8-PERT>].

57. *Id.*

58. *Id.*

59. Sara Atta, *Iranian women in Pahlavi regime; isolation or advancement?*, TEHRAN TIMES (May 17, 2023, at 16:39 EST), <https://tehrantimes.com/news/484810/Iranian-women-in-Pahlavi-regime-isolation-or-advancement> [<https://perma.cc/E257-PDKS>].

60. Garon, *supra* note 56, at 56.

61. Atta, *supra* note 59.

62. Garon, *supra* note 56, at 53.

63. Yoonji Han, *Women in Iran are burning headscarves and cutting their hair in protests over the hijab. They follow a long history of rising up for a woman's right to choose*, BUS. INSIDER (Sep. 28, 2022, at 13:30 EDT), <https://www.businessinsider.com/hijab-protests-iran-veiling-mahsa-amini-history-womens-rights-2022-9#unveiling-was-met-with-opposition-from-the-religious-establishment-and-many-iranian-women-2> [<https://perma.cc/3CD5-SJA8>].

64. Garon, *supra* note 56, at 53.

65. *Id.* at 53-54.

from becoming judges.⁶⁶ Many of the women rallying for Ayatollah Khomeini did not expect the mandatory *hijab*, and several of them did not support this law.⁶⁷ Today, ironically, Iran has similarities to France in its low levels of religious freedom as it pertains to a Muslim woman's choice to wear a *hijab*.⁶⁸

Religion was unsurprisingly mentioned several times in Iran's Constitution following the Islamic revolution, where Iran became a Muslim theocracy with the Ayatollah, who communicates Allah's commands for Iran to the elected officials, having the ultimate authority.⁶⁹ Article 12 of the Iranian Constitution states:

The official religion of Iran is Islam and the Twelver Ja'fari school, and this principle will remain eternally immutable. Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school, without infringing upon the rights of the followers of other schools.⁷⁰

Article 14 of the Iranian Constitution lays out the treatment of non-Muslims in Iran by saying:

In accordance with the sacred verse 'God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes' [60:8], the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.⁷¹

Article 72 of the Iranian Constitution details the significance of Islam in enacting laws and states, "The Islamic Consultative Assembly cannot enact laws contrary to the official religion of the country or to the Constitution. It is the

66. Han, *supra* note 63.

67. *Id.*

68. Kutoroff, *supra* note 13, at 250.

69. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 12, 14, 72, 115.

70. *Id.* art. 12.

71. *Id.* art. 14.

duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.”⁷²

Finally, Article 115 of the Iranian Constitution lays out qualifications for the elected president and states, “The President must be elected from among religious and political personalities possessing the following qualifications: Iranian origin; Iranian nationality; administrative capacity and resourcefulness; a good past record; trustworthiness and piety; and convinced belief in the fundamental principles of the Islamic Republic of Iran and the official madhhab of the country.”⁷³

So, not only is Islam enshrined in several places in the Iranian Constitution, but there are also clarifications on how to treat non-Muslims, as well as clarifications on the significance of Islam to the Iranian presidency role.⁷⁴ A *hijab* mandate contradicts Article 14 of the Iranian Constitution by forcing all Iranian women, including those who are not Muslim, to practice an act specific to the Islamic faith.⁷⁵ Additionally, because the Islamic Republic of Iran ratified the International Covenant on Civil and Political Rights, its mandatory *hijab* and mistreatment of women who choose not to wear a *hijab* violate Iran’s obligations under the treaty and are a violation of international law.

C. Religious Freedom and the United States

Religious freedom in the United States, like that in Iran, shares similarities with France’s *laïcité*.⁷⁶ In response to religious persecution, immigrants fled from Europe to the United States, and thus the American concept of secularism was built around individual religious freedom rather than the collective freedom from religious institutions that is embedded in the French *laïcité*.⁷⁷ Because of this history of religious persecution, the United States Constitution’s Establishment Clause prevents the federal government from participating in individual religious practices.⁷⁸ The First Amendment of the United States Constitution says, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁷⁹ The First Amendment of the United States Constitution directly conflicts with the approaches to religious freedom in both France and Iran.⁸⁰ “Congress shall make no law respecting an establishment of religion”⁸¹ conflicts with Iran’s state-established religion of

72. *Id.* art. 72.

73. *Id.* art. 115.

74. *Id.* art. 12, 14, 72, 115.

75. *Id.* art. 14.

76. Nicolas Cadène, *French Secularism Isn’t Illiberal*, FOREIGN POL’Y (Apr. 7, 2021, at 12:15 ET), <https://foreignpolicy.com/2021/04/07/french-secularism-isnt-illiberal/> [<https://perma.cc/4XE6-DVVQ>].

77. *Id.*

78. *Id.*

79. U.S. CONST. amend. I.

80. *Id.*

81. *Id.*

Islam.⁸² “Congress shall make no law prohibiting the free exercise [of religion]”⁸³ conflicts with France’s *laïcité* and enactment of laws regulating French Muslim women from expressing their religion.⁸⁴ The Supreme Court has held that the Fourteenth Amendment extends the majority of the Bill of Rights, including the First Amendment, to the states as well as the federal government.⁸⁵

Although the United States and France both deal with the paradox between public neutrality and religious freedom, they each resolve the tension differently.⁸⁶ The United States values religious freedom more than public neutrality toward religion by protecting religious beliefs more than it protects secular beliefs.⁸⁷ On the other hand, France prioritizes public neutrality towards religion by protecting secular beliefs more than it protects religious beliefs.⁸⁸

The United States Constitution is the supreme law of the land and details the powers of the American government.⁸⁹ In *McCulloch v. Maryland*, Chief Justice John Marshall, the first Chief Justice of the United States Supreme Court, amplified the significance of the Constitution when he wrote in his opinion, “This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs.”⁹⁰ In theory, the American people have the final authority to amend the Constitution through their elected and appointed government officials.⁹¹ The Constitution has been amended twenty-seven times since it was enacted, with the most significant changes happening when the first ten amendments, the Bill of Rights, were added to the Constitution.⁹² This is where freedom of worship, freedom of speech, freedom of the press, the right of peaceful assembly, the right to protest, the right to bear arms, and other rights were enshrined for the American people.⁹³ A majority of the twenty-seven amendments expanded individual freedoms, while only a few expanded governmental power.⁹⁴

The United States is a constitutional federal republic in which the people elect officials to serve in political capacities for specific terms, and the Constitution binds these officials.⁹⁵ The federal government holds restricted

82. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 12, 14, 72, 115.

83. U.S. CONST. amend. I.

84. Kutoroff, *supra* note 13, at 250.

85. Greenawalt, *supra* note 20, at 2385.

86. Kutoroff, *supra* note 13, at 250.

87. *Id.*

88. *Id.*

89. *The Constitution: An Enduring Document*, INFOUSA: U.S. DEP’T OF ST., <https://usinfo.org/enus/government/overview/ch1.html> [<https://perma.cc/45D3-6355>] (last visited Oct. 28, 2025).

90. 17 U.S. 316, 415 (1819).

91. *The Constitution: An Enduring Document*, *supra* note 89.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Section 1: Principles of the American Republic*, ARIZ. ST. U. CTR. FOR AM. CIVICS, <https://civics.asu.edu/civic-literacy-curriculum/section1> [<https://perma.cc/NLB8-FY4P>].

power, and state governments retain the remainder of governmental power.⁹⁶ While there is technically no state religion, and while the First Amendment prohibits the government from making any laws that favor or prohibit any religion, some scholars have described the United States under the George W. Bush administration as a Christian theocracy due to the morphing of Republican policies to satiate the conservative Christian base.⁹⁷

The United States was so concerned with protecting the exercise of religion that in 1993, Congress enacted the Religious Freedom Restoration Act, which applied the strict scrutiny standard to all assertions that the government has in any way burdened the exercise of religion.⁹⁸ The Religious Freedom Restoration Act has two defining principles: First, the standard it sets for governments is consistent with the fundamental nature of the right to the free exercise of religion; Second, by applying the standards to all government action, the Religious Freedom Restoration Act is not meant to be outcome-determinative.⁹⁹ However, more recently, the significance of religious freedom overall has declined, and some political officials in the United States government with legislative powers have sought to remove the protection of the Religious Freedom Restoration Act from broad categories of government action, categorizing religious freedom as negative, oppressive, or worse.¹⁰⁰

Even though the United States government is hesitant to enact laws that better protect minorities, the Federal Bureau of Investigation (“FBI”) has been investigating hate crimes against minority communities for over 100 years.¹⁰¹ The FBI defines a hate crime as a crime “against a person or property motivated in whole or in part by an offender’s bias against race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”¹⁰² A prosecutor must prove two elements for a hate crime conviction to be upheld.¹⁰³ First, the prosecutor must prove that the defendant committed a crime.¹⁰⁴ Second, the prosecutor must prove that the defendant committed the crime because of the victim’s “race, religion, ethnicity, gender, sexual orientation, or disability.”¹⁰⁵ Because of the rising popularity of Christian Nationalism in the United States, American

96. *Id.*

97. Megoran, *supra* note 16, at 224.

98. THOMAS JIPPING & SARAH PARSHALL PERRY, THE RELIGIOUS FREEDOM RESTORATION ACT: HISTORY, STATUS, AND THREATS, LEGAL MEMORANDUM NO. 284, at 1 (Heritage Found., May 4, 2021), <https://www.heritage.org/sites/default/files/2021-05/LM284.pdf> [<https://perma.cc/XH76-ZCJF>].

99. *Id.* at 17.

100. *Id.* at 29.

101. *Hate Crimes*, FED. BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/6KJK-KGCD>] (last visited Mar. 9, 2025).

102. *Id.*

103. Mokhtar Ben Barka, *Religion, Religious Fanaticism and Hate Crimes in the United States*, 4 REVUE FRANÇAISE D’ÉTUDES AMÉRICAINES 107, 108 (2006), <https://shs.cairn.info/journal-revue-francaise-d-etudes-americaines-2006-4-page-107?lang=en&tab=texte-integral> [<https://perma.cc/5KX7-UX2Z>].

104. *Id.*

105. *Id.*

Christians are more emboldened to physically attack religious minorities.¹⁰⁶ Because of the apparent issue of hate crimes in the United States and the rise of a desire for a state-sponsored religion, the United States is not sufficiently protecting Muslim women. Additionally, because Muslim women who wear a *hijab* are easily identifiable, their religious freedom is at stake and needs to be better protected due to the United States' obligation under the International Covenant on Civil and Political Rights.

III. ANALYSIS

A. *The Hijab in France*

Although there is no definitive data on the number of Muslim women in France due to France not using religion as a category in census or population registers, it is estimated that French Muslims make up about 8% of the French population.¹⁰⁷ Most of the French Muslim population is composed of migrants and their children, and between 43% and 45% of all French migrants are Muslims.¹⁰⁸ Muslim immigrant women are unemployed at a higher rate than non-Muslim immigrant women, and there are many complaints of discrimination in access to employment.¹⁰⁹ Additionally, research conducted in 2015 found that French candidates with Muslim-sounding names were 2.5 times less likely to receive a job interview callback than comparable applicants with Christian-sounding names.¹¹⁰

In 2014, Muslim women were targeted for Islamophobic acts in France more than Muslim men, when it was reported that 81.5% of Islamophobic acts and speech targeted Muslim women.¹¹¹ Muslim women account for almost 100% of Muslim victims of physical aggression, especially Muslim women who wear a *hijab*, as they are more easily identifiable.¹¹² In the two weeks following the Paris attacks in January of 2015, there were 128 Islamophobic incidents, and most of the verbal or physical aggressions were towards women wearing some sort of Muslim veil.¹¹³

106. Nilay Saiya and Stuti Manchanda, *Christian Nationalism and Violence Against Religious Minorities in the United States: A Quantitative Analysis*, 64 J. SCI. STUDY RELIG. 3 (2024), <https://onlinelibrary.wiley.com/doi/10.1111/jssr.12942> [<https://perma.cc/G5DK-F2MW>].

107. *Forgotten Women: The Impact of Islamophobia on Muslim Women in France*, EUR. NETWORK AGAINST RACISM, https://www.enar-eu.org/wp-content/uploads/factsheet_france_-_en.pdf [<https://perma.cc/AFS4-ZTSM>] (last accessed Nov. 24, 2024, 21:33 EST).

108. *Id.*

109. *Id.*

110. Claire Adida, David Laitin & Marie-Anne Valfort, *Research Suggests Discrimination Against Muslims in France Likely to Worsen*, IPI GLOB. OBSERVATORY (Jan. 23, 2015), <https://theglobalobservatory.org/2015/01/research-suggests-discrimination-against-muslims-in-france-likely-to-worsen/> [<https://perma.cc/W7DS-VC9M>].

111. *Forgotten Women: The Impact of Islamophobia on Muslim Women in France*, *supra* note 107.

112. *Id.*

113. *Id.*

Secularism has also been used in court cases in France as a way to restrict Muslim women.¹¹⁴ In the *Baby Loup* case, the applicant was fired from her job at a nursery called Baby Loup for violating the establishment's rules by wearing a *hijab*.¹¹⁵ Baby Loup claimed that the *hijab* violated the principles of *laïcité*.¹¹⁶ The case made it to the French Supreme Court twice, and the Court initially held that the Muslim employee could not be fired because the prohibition on the *hijab* contradicted the employee's religious freedom.¹¹⁷ The second time, the Court reversed its decision and held that the restriction was allowed because the daycare's employees were in constant contact with children and their parents, and they had a legitimate interest in accepting families from all religious backgrounds.¹¹⁸

Religious freedom in France is not equally applied to all of its citizens, as Muslim women do not get the same protection as the rest of the population. France has obligations both under its own Constitution and under international law to protect freedom of religion. For this reason, the French government must stop passing laws that disproportionately affect the rights of Muslim women.

B. The Hijab in Iran

Iran continues to draft and enact laws that are aimed at further suppressing and controlling women, and, in April of 2024, Tehran's head of the Islamic Revolutionary Guard Corps announced that a new police group was created solely to enforce the *hijab* mandate.¹¹⁹ This body was going to be retrained to enforce the *hijab* mandate in an even more severe way in public locations.¹²⁰ Previously, hundreds of businesses were closed when their owners did not enforce the *hijab* mandate.¹²¹

Additionally, Iran's newest *hijab* law, consisting of 71 articles, strengthens government control over women's lives and threatens businesses that fail to

114. See Stephanie Berry, *Eroding Religious Freedom Step by Step: France and the Baby Loup Case*, EJIL: TALK!: BLOG EUR. J. INT'L L. (July 1, 2014), <https://www.ejiltalk.org/eroding-religious-freedom-step-by-step-france-and-the-baby-loup-case/> [https://perma.cc/97RW-Z8ZB].

115. *Id.*

116. *Id.*

117. Vivian Grosswald Curran, *Guest Post by Professor Vivian Grosswald Curran: The French Supreme Court Reverses Itself in an Islamic Veil Case in L'Affaire Baby Loup*, CONFLICT OF L. (June 26, 2014), <https://conflictoflaws.net/2014/guest-post-by-professor-vivian-grosswald-curran-the-french-supreme-court-reverses-itself-in-an-islamic-veil-case-in-laffaire-baby-loup/?print=print> [https://perma.cc/47DY-URCC].

118. *Id.*

119. Jeremy Laurence, *Iran: Crackdown on hijab law*, U.N. HUM. RTS. OFF. HIGH COMM'R (Apr. 26, 2024), <https://www.ohchr.org/en/press-briefing-notes/2024/04/iran-crackdown-hijab-law> [https://perma.cc/53VP-Z2PD].

120. *Id.*

121. *Id.*

enforce it with fines or forced closures.¹²² This law was introduced as a reaction to the “Women, Life, Freedom” movement in Iran, and Nahid Naghshbandi, a researcher on Iran at Human Rights Watch, said, “[r]ather than responding to the Women, Life, Freedom movement with fundamental reforms, the autocratic government is trying to silence women with even more repressive dress laws. This law will only breed fierce resistance and defiance among women in and outside Iran.”¹²³ The law also details what acceptable covering of Iranian women looks like and states that unacceptable covering is defined as “revealing or tight clothing, or clothing that shows parts of the body lower than the neck or above the ankles or above the forearms.”¹²⁴ The punishment for *hijab* violations might be a financial penalty, but it could also include imprisonment for violations committed in an organized manner, involving contact with the media or other governments.¹²⁵ This bill has been viewed as a “form of gender apartheid.”¹²⁶

This bill was passed nearly one year after the death of Mahsa Amini, a Kurdish Iranian who Iran’s morality police murdered for incorrectly wearing her *hijab*.¹²⁷ In September of 2022, Mahsa Amini was visiting Tehran, Iran’s capital, when the morality police stopped her.¹²⁸ The police pushed her into a van, beat her, tortured her, and she fell into a coma before dying three days later in custody at Kasra Hospital in Tehran.¹²⁹

Following Amini’s death, Iran erupted into protests, and security forces beat, kicked, and slapped women and girls for not complying with the *hijab* mandate.¹³⁰ The Iranian government has also used the threat of the death penalty as a deterrent for Iranians protesting and expressing themselves.¹³¹ Because of the lack of deterrence for the Iranian government to stop violating human rights, the United Nations Office of the High Commissioner does not believe that Iranians, specifically women and girls, will be able to realize their fundamental rights and freedoms.¹³²

122. *Iran: New Hijab Law Adds Restrictions and Punishments*, HUM. RTS. WATCH (Oct. 14, 2024, 00:00 EDT), <https://www.hrw.org/news/2024/10/14/iran-new-hijab-law-adds-restrictions-and-punishments> [<https://perma.cc/T5HH-N3D7>].

123. *Id.*

124. Maziar Motamedi, *Iran’s parliament approves ‘hijab bill’; harsh punishments for violations*, AL JAZEERA (Sep. 20, 2023), <https://www.aljazeera.com/news/2023/9/20/irans-parliament-approves-hijab-bill-harsh-punishments-for-violations> [<https://perma.cc/6H4F-GAYD>].

125. *Id.*

126. *Id.*

127. *Id.*

128. *What Happened to Mahsa/Zhina Amini?*, AMNESTY INT’L (Sep. 15, 2023), <https://www.amnesty.org/en/latest/news/2023/09/what-happened-to-mahsa-zhina-amini/> [<https://perma.cc/M9VL-N8WH>].

129. *Id.*

130. Press Release, U.N. Off. of the High Comm’r for Hum. Rts., *Iran Intensifying Efforts to Repress Women and Girls on Second Anniversary of Nation-Wide Protests*, UN Fact-Finding Mission Says (Sep. 13, 2024).

131. *Id.*

132. *Id.*

Iran has a duty to adhere to international law, including the rights to freedom of religion and expression as outlined in the International Covenant on Civil and Political Rights.¹³³ A *hijab* mandate rooted in Islam directly conflicts with a woman's freedom of expression and religion. Additionally, Iran has punished all Iranian women and girls as if they were Muslims, which conflicts with its own Constitution.¹³⁴ Iran must allow women to choose whether to wear a *hijab* so that they can fully recognize their religious freedom.

C. The Hijab in the United States

The United States Constitution guarantees individuals' freedom to practice religion and prohibits the government from establishing or favoring any religion.¹³⁵ However, Muslim women have faced discrimination for their *hijab* by being prohibited from wearing a head covering, facing harassment, being terminated from jobs, being excluded from public places, and facing other forms of discrimination that are traced to the *hijab*.¹³⁶ Recently, in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, a Muslim applicant named Samantha Elauf was refused employment for a position in a retail store because her *hijab* conflicted with Abercrombie's employee dress code.¹³⁷ The district manager said, "Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise."¹³⁸ The Supreme Court held that the district manager's actions violated Title VII of the Civil Rights Act of 1964 and that an applicant's religious practice cannot be used as a factor to determine if they should be hired.¹³⁹ Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees, or prospective employees, based on several factors, including religion and sex.¹⁴⁰

Following the horrific September 11th attacks in 2001, Muslim women who wear a *hijab* have experienced a significant increase in harassment.¹⁴¹ From 2000 to 2006, one Muslim civil rights advocacy group's complaints increased by 674%.¹⁴² Additionally, 69% of Muslim women who wear a *hijab* reported at least one incident of discrimination, compared to only 29% of Muslim women

133. International Covenant on Civil Political Rights, *supra* note 5.

134. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 14.

135. U.S. CONST. amend. I.

136. *Discrimination Against Muslim Women – Fact Sheet*, AM. C.L. UNION (May 29, 2008), <https://www.aclu.org/documents/discrimination-against-muslim-women-fact-sheet#:~:text=Muslim%20women%20have%20been%20prohibited,against%20because%20they%20wear%20hijab> [https://perma.cc/DWA9-6LQU].

137. 575 U.S. 768, 769 (2015).

138. *Id.* at 770.

139. *Id.* at 774-75.

140. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

141. *Discrimination Against Muslim Women – Fact Sheet*, *supra* note 136.

142. *Id.*

who do not wear a *hijab*.¹⁴³ 69% of Muslim women reported discrimination in 2018.¹⁴⁴ American Muslim women have been denied their right to wear headscarves or *hijabs* as police officers, public school teachers, jail and courthouse attendees, prison visitors, and even while being arrested or seeking police help, leading to firings, harassment, and exclusions.¹⁴⁵ At school, American Muslim girls have been harassed, assaulted, denied the right to wear a *hijab*, and banned from participating in certain extracurricular activities.¹⁴⁶ Muslim women and girls have been excluded from entering public buildings, malls, pools, and parks unless they agree to be searched by male guards or remove their head coverings.¹⁴⁷ Muslim women have also been denied driver's licenses for failing to remove their *hijab* for the photograph.¹⁴⁸

The mistreatment of Muslim women is a violation of the International Covenant on Civil and Political Rights and, as such, the United States is obligated to enact changes to better protect Muslim women.¹⁴⁹ It is also a violation of the United States Constitution, as Muslim women and girls are not entirely free to exercise their religion.¹⁵⁰ The United States must make changes so that Muslim women can realize their religious freedom fully.

D. American Christian Nationalism

Christianity has influenced the United States since its beginning, as most of the Founders were Protestants.¹⁵¹ Christianity was used as a justification for taking land from the Indigenous Peoples of the United States through *Johnson v. M'Intosh*, where Chief Justice Marshall wrote:

The right of discovery given by this commission, is confined to countries 'then unknown to all Christian people;' and of these countries Cabot was empowered to take possession in the name of the King of England. Thus asserting the right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.¹⁵²

143. *Id.*

144. Dalia Mogahed, *Six Facts Key to Understanding American Muslim Women*, INST. FOR SOC. POL'Y & UNDERSTANDING (Mar. 1, 2021), <https://ispu.org/six-facts-about-muslim-women/> [<https://perma.cc/MJ3N-5YT7>].

145. *Discrimination Against Muslim Women – Fact Sheet*, *supra* note 136.

146. *Id.*

147. *Id.*

148. *Id.*

149. International Covenant on Civil Political Rights, *supra* note 5.

150. U.S. CONST. amend. I.

151. David L. Holmes, *The Founding Fathers, Deism, and Christianity*, BRITANNICA (Dec. 21, 2006), <https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214> [<https://perma.cc/W65F-W6JU>].

152. 21 U.S. (8 Wheat.) 543, 576-77 (1823).

In *Loving v. Virginia*, the Supreme Court held that statutory bans on interracial marriages were unconstitutional.¹⁵³ Chief Justice Warren, writing for the majority, referenced the trial judge's opinion, which used religion as a rationale for miscegenation statutes that prohibited sexual relationships between individuals of different races.¹⁵⁴ The trial judge wrote in his opinion:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹⁵⁵

Although this opinion was struck down at the Supreme Court, it is another example of a United States court basing part of an opinion on Christianity.

During the Jim Crow era, segregation seeped into Christianity in the form of "Jim Crow Bibles."¹⁵⁶ Jim Peck, an activist who was arrested for disobeying segregation laws, described his encounter with such Bibles, saying:

In the courtroom where we were tried, I saw the most fantastic extreme of segregation in my experience—Jim Crow Bibles. Along the edges of one Bible had been printed in large letters the words 'white.' Along the page edges of the other Bible was the word 'colored.' When a white person swore in he simply raised his right hand while the clerk held the Bible. When a Negro swore in, he had to raise his right hand while holding the colored Bible in his left hand. The white clerk could not touch the colored Bible.¹⁵⁷

Christianity has rationalized many of America's darkest historical moments, and powerful American figures today continue invoking it to justify ongoing hatred.

Christianity has maintained its significance in today's American government, as illustrated by President Trump's signing of an executive order in early February 2025 aimed specifically at combating anti-Christian discrimination.¹⁵⁸ President Trump also paved the way for a Muslim ban in early February of 2025, which had the potential to be even stricter than the travel ban on Muslims enacted in his first

153. 388 U.S. 1 (1967).

154. *Id.* at 3.

155. *Id.*

156. RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 49 (Oxford University Press, 1st ed. 2006).

157. *Id.*

158. Nandita Bose & Doina Chiacu, *Trump to create religious office in White House, target 'anti-Christian bias'*, REUTERS (Feb. 6, 2025, at 17:55 EST), <https://www.reuters.com/world/us/trump-says-he-will-sign-order-targeting-anti-christian-bias-2025-02-06/> [<https://perma.cc/64A6-2BCA>].

term.¹⁵⁹ This focus on anti-Christian discrimination is particularly interesting against the backdrop of a 2019 poll, which found that only 18% of Americans believe Evangelical Christians face a lot of discrimination, while 56% of Americans believe Muslims face a lot of discrimination in the United States.¹⁶⁰

President Trump also announced his choices for the White House Faith Office, which was reestablished as a part of a personnel order on February 7, 2025, and included Pastor Paula White-Cain, Jennifer S. Korn, and Jackson Lane.¹⁶¹ All three of the appointees identify as Christian.¹⁶² The Protestant evangelical right has spewed a false narrative of persecution, and President Trump, appealing to his large Evangelical voter base, weaponized this false fear and built his anti-Christian bias task force and Faith Office through executive order.¹⁶³ Christians make up approximately two-thirds of the United States, and are therefore categorically not the “embattled minority” the Trump administration and his Evangelical supporters have painted them to be.¹⁶⁴

Christian nationalism has existed long before the Trump administration, and it encompasses the idea that America is essentially a Christian theocracy.¹⁶⁵ The normalization of Christian nationalism encourages bigotry against actual religious minorities, such as Muslim and Jewish Americans.¹⁶⁶ Christian nationalism also clashes with the Establishment Clause of the First Amendment by promoting the ideology that the United States is fundamentally a country for

159. Press Release, Don Beyer, Congressman, As Trump Administration Prepares Revamped Muslim Ban, Bicameral Delegation Reintroduces Bill to Prevent Presidents from Enacting Religious Travel Bans (Feb. 5, 2025), <https://beyer.house.gov/news/documentsingle.aspx?DocumentID=6364> [<https://perma.cc/JN52-ATA3>].

160. *Sharp Rise in the Share of Americans Saying Jews Face Discrimination*, PEW RSCH. CTR. (Apr. 15, 2019), <https://www.pewresearch.org/politics/2019/04/15/sharp-rise-in-the-share-of-americans-saying-jews-face-discrimination/> [<https://perma.cc/49UB-B78F>].

161. *President Trump Announces Appointments to the White House Faith Office*, THE WHITE HOUSE (Feb. 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/president-trump-announces-appointments-to-the-white-house-faith-office/> [<https://perma.cc/5VL5-9N5L>].

162. Monica Sager, *Who is Paula White-Cain? Trump's Pick to Lead White House Faith Office*, NEWSWEEK (Feb. 7, 2025, at 12:52 EST), <https://www.newsweek.com/paula-white-pastor-trump-white-house-faith-office-2028007> [<https://perma.cc/TXM6-9GSZ>]; See Jenny Korn (@JennySKorn), X (Apr. 20, 2025 at 12:26 EST) <https://x.com/JennySKorn/status/1913992657841660103> [<https://perma.cc/W5AY-F6EX>]; Nathan Layne & Alexandra Ulmer, *How Trump netted evangelical votes in Iowa, with help from a young Christian operative*, REUTERS (Dec. 14, 2023, at 10:17 EST), <https://www.reuters.com/world/us/how-trump-netted-evangelical-votes-iowa-with-help-young-christian-operative-2023-12-14/> [<https://perma.cc/5KT3-T83P>].

163. Jason DeRose, *Here's how Trump's Faith Office and task force against 'anti-Christian bias' may work*, NAT'L PUB. RADIO (Feb. 14, 2025, at 16:31 EST), <https://www.wlrn.org/2025-02-14/heres-how-trumps-faith-office-and-task-force-against-anti-christian-bias-may-work> [<https://perma.cc/AP4S-BTGN>].

164. *Id.*

165. Guthrie Graves-Fitzsimmons & Maggie Siddiqi, *Christian Nationalism Is 'Single Biggest Threat' to America's Religious Freedom*, CTR. FOR AM. PROGRESS (Apr. 13, 2022), <https://www.americanprogress.org/article/christian-nationalism-is-single-biggest-threat-to-americas-religious-freedom/> [<https://perma.cc/B7JR-ZC3B>].

166. *Id.*

Christians.¹⁶⁷ While Christian nationalism traces back to the late 1600s in the United States, it tends to amplify when white Christians feel threatened by war, increased immigration, or economic instability.¹⁶⁸

Project 2025 is a nearly 900-page document created by far-right, conservative Americans that essentially detailed a plan for the first 180 days of President Trump's second term, and the Heritage Foundation, a far-right organization, spearheaded the drafting of this document.¹⁶⁹ Not all of the document is blatantly Christian nationalistic; still, there are parts of the text that strongly support Christian-centric beliefs and put other religions, or nonreligions, in inferior positions to Christianity by imposing it on everyone.¹⁷⁰ Project 2025 added a religious interpretation to the "pursuit of happiness" as mentioned in the Declaration of Independence and stated that this pursuit can only be achieved when one lives as their Creator decreed.¹⁷¹ In case there was a possibility of interpreting this statement not to be religious in nature, the document goes on to state, "Religious devotion and spirituality are the greatest sources of happiness around the world."¹⁷² To further demonstrate the intended audience of Project 2025, the word "church" is mentioned nine times throughout the document, the word "synagogue" is mentioned once, and nowhere in the document are the words "mosque" or "temple" mentioned.¹⁷³

During the 2024 presidential campaign, President Trump denied having any connections to Project 2025, even though 140 former Trump administration staffers helped draft the document.¹⁷⁴ Several such authors, including Russell Vought, are also serving in President Trump's second term.¹⁷⁵ Furthermore, many of the executive orders President Trump drafted in the first days of his second term were Project 2025 policies.¹⁷⁶ Even if President Trump claims to have no connection to Project 2025, this denial does not hold much weight when Project 2025's authors now occupy key roles in his administration, and his policies mirror its Christian nationalist agenda.¹⁷⁷

167. *Id.*

168. *Understanding White Christian Nationalism*, YALE UNIV.: YALE INST. FOR SOC. & POL'Y STUD. (Oct. 4, 2022), <https://isps.yale.edu/news/blog/2022/10/understanding-white-christian-nationalism> [<https://perma.cc/5757-B28K>].

169. Andra Watkins, *Project 2025: A Christo-fascist manifesto designing a theocracy*, FULCRUM (Aug. 19, 2024), <https://thefulcrum.us/democracy/project-2025-christian-nationalism> [<https://perma.cc/W7HD-J8TT>].

170. THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 480-81, 589 (Paul Dans & Steven Groves eds., 2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [<https://perma.cc/7TCT-2MU6>].

171. *Id.* at 13.

172. *Id.* at 13-14.

173. *Id.* at 4, 9, 16, 276, 453, 481, 493.

174. *Project 2025, Explained*, AM. C.L. UNION, <https://www.aclu.org/project-2025-explained> [<https://perma.cc/WFC3-5WLX>] (last visited Oct. 9, 2025).

175. Melissa Quinn, *Where Trump policies and Project 2025 proposals match up*, CBS NEWS (Feb. 3, 2025, at 17:02 EST), <https://www.cbsnews.com/news/trump-project-2025-playbook/> [<https://perma.cc/5Q5X-TQA4>].

176. *Id.*

177. *Id.*

Christian nationalist ideas embedded within Project 2025, such as banning information access in schools or attempting to prohibit members of the LGBTQ community from exercising their fundamental right to marriage, are particularly contradictory to a functioning democracy.¹⁷⁸ The ultimate goal of Christian nationalism is a society with two groups: real Americans who subscribe to a Christian American culture, and the rest of Americans who will lose their voices entirely.¹⁷⁹ Ironically, although they would never admit a similarity with a country they hate, Christian nationalists want a Christian version of the Islamic State of Iran, where, as written in Article 14 of the Iranian Constitution, non-Christians still have a place in the country but are not able to perform in the same capacity within the American government.¹⁸⁰ Like Iran after the Islamic Revolution, if Christian nationalism succeeds, the rights for which Americans have fought so hard will disappear and be replaced with biblical law. Rights will only be those granted by God.¹⁸¹

Project 2025's underlying Christian nationalism contravenes international law, specifically the International Covenant on Civil and Political Rights. It also violates the Establishment Clause of the United States Constitution. Finally, by focusing on protecting an unoppressed group, Project 2025 invites further acts of violence against those in minority religious communities.

III. RECOMMENDATION

To better protect Muslim women and ensure that Christianity does not become a state-sponsored religion in the United States, as Islam is in Iran, or that the United States does not adopt such a strict form of secularism as to ban religious acts, as in France, the United States government should work to protect minority religions. A diverse interfaith council, composed of leaders representing all religions, should be implemented at the federal level. Federal hate crime prosecutions should also increase to deter individuals from committing hate crimes. Finally, the Religious Freedom Restoration Act should be amended to cease being a weapon used by a religious majority against already marginalized groups.

A. Interfaith Council

For over two decades, presidents of the United States, beginning with

178. THE HERITAGE FOUND., *supra* note 170 at 5, 451.

179. Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 834 (2020).

180. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 14.

181. Donald J. Trump, *Remarks by President Trump at the 66th Annual National Prayer Breakfast*, TRUMP WHITE HOUSE ARCHIVES, [https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-66th-annual-national-prayer-breakfast/#:~:text=Each%20year%2C%20this%20event%20reminds,\(Applause.\)](https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-66th-annual-national-prayer-breakfast/#:~:text=Each%20year%2C%20this%20event%20reminds,(Applause.)) [https://perma.cc/9XXC-GPGM] (stating that Creator gives rights, not man).

President Bush, have utilized the White House Office of Faith-Based and Neighborhood Partnerships to work across federal agencies and ensure that such agencies can best serve Americans.¹⁸² The federal agencies which have previously utilized a Faith-Based and Neighborhood Partnership include: the Department of Agriculture, the Department of Health and Human Services, the Department of Justice, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of Labor, the Department of Commerce, the Environmental Protection Agency, the Department of Education, the Corporation for National and Community Service, the Department of Veterans Affairs, the Department of Small Business Administration, and the United States Agency for International Development.¹⁸³ In addition to working with federal agencies, the White House Office of Faith-Based and Neighborhood Partnerships has also previously coordinated with the President's Advisory Council, which advises the federal government on how it can best work with religious organizations.¹⁸⁴ This council is composed of leaders with diverse religious backgrounds, including secular individuals, who serve one-year terms.¹⁸⁵

The Obama Administration utilized this office, and the Biden Administration re-established the office one month into its term.¹⁸⁶ The Office of Faith-Based and Neighborhood Partnerships played a crucial role in various areas during the Biden Administration, including the distribution of COVID-19 vaccines and the development of strategies to combat Islamophobia and antisemitism.¹⁸⁷ However, instead of the White House Office of Faith-Based and Neighborhood Partnerships, the Trump Administration opted for the White House Faith Office,¹⁸⁸ which does not represent any minority religion; instead, its leaders all identify as Christians.¹⁸⁹

Interfaith involvement is important at the federal level because it encourages dialogue across different religions, including with those people who choose not to

182. *Office of Faith-Based and Neighborhood Partnerships*, U.S. DEP'T OF COM., <https://www.commerce.gov/bureaus-and-offices/os/faith-based-and-neighborhood-partnerships> [<https://perma.cc/S47A-K6ZA>] (last visited Feb. 17, 2025) (due to a change in administration, this website has been updated and currently omits information which previously displayed information about previous administrations' utilization of Faith-Based and Neighborhood Partnerships; the archived permalink provides this information); *Center for Faith-Based and Neighborhood Partnerships*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/about-usda/general-information/staff-offices/office-congressional-relations/office-external-and-intergovernmental-affairs/center-faith-based-and-neighborhood-partnerships> [<https://perma.cc/WP2T-Q4KK>] (last visited Oct. 9, 2025).

183. *Center for Faith-Based and Neighborhood Partnerships*, *supra* note 182.

184. *Id.*

185. *Id.*

186. *Office of Faith-Based and Neighborhood Partnerships*, *supra* note 182.

187. Mark Silk, *The White House has a Faith Office!*, RELIGION NEWS SERV. (Feb. 13, 2025), <https://religionnews.com/2025/02/13/the-white-house-has-a-faith-office/> [<https://perma.cc/B4AY-W2NC>].

188. *President Trump Announces Appointments to the White House Faith Office*, *supra* note 161.

189. See e.g., Sager, *supra* note 162; Korn, *supra* note 162; Layne & Ulmer, *supra* note 162.

practice any religion.¹⁹⁰ This dialogue is necessary to achieve genuine religious freedom because it fosters harmony among religions.¹⁹¹ David Saperstein, the former Ambassador-at-Large for International Religious Freedom, said, “Interfaith engagement unites people across faith and ideological lines and encourages mutual trust, shared values, and understanding.”¹⁹² During the Obama Administration, interfaith religious leaders collaborated to combat rising Islamophobia in the forms of Qur’an burnings, protests against mosque constructions, and efforts to prevent Muslims from entering the United States.¹⁹³

By only focusing on the religion of the majority, the Trump Administration is leaving a necessary need unmet. Community leaders of minority religions, as well as nonreligious leaders, must also have a voice at the federal level.¹⁹⁴ An interfaith council that accurately reflects all faith options in the United States is necessary to achieve religious freedom and unite Americans across all religions.¹⁹⁵ An interfaith council would benefit Muslim women because there would be actual representation at the federal level to address the struggles of Muslim women. Religious freedom cannot be achieved if the only religion represented is the religion of the majority.¹⁹⁶ In fact, the opposite is more likely to be true; by only representing the Christian faith, the United States is more likely to adopt the worst parts of the governments of Iran and France regarding religious expression.¹⁹⁷ The American government will be a Christian theocracy, with the American Christian having more rights than any other group, and it has the potential to infringe on American Muslims’ ability to practice their religion, as France has done with its treatment of Muslim women who choose to wear a *hijab*.¹⁹⁸ If the government represents any religion, then all religions must be represented by the government, or freedom of religion is at stake.¹⁹⁹ If any religion is represented in the government, all religions should be represented to protect religious liberty.

190. David N. Saperstein, *Living Together in Peace: The Importance of Interreligious Harmony for Religious Freedom*, U.S. DEP’T OF ST. (Sep. 21, 2016), <https://2009-2017.state.gov/j/drl/rls/rm/2016/263725.htm> [<https://perma.cc/NP3V-ZP5C>].

191. *Id.*

192. *Id.*

193. *Id.*

194. See David Saperstein, *Too Few Faiths in a Nation of Many*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (Aug. 22, 2025), <https://berkeleycenter.georgetown.edu/responses/too-few-faiths-in-a-nation-of-many> [<https://perma.cc/964P-D54G>].

195. Saperstein, *supra* note 190.

196. See Saperstein, *supra* note 194.

197. See *supra* Part II.A–B (summarizing that when one religion is represented or targeted, citizens of those countries are not able to fully express their religious freedoms).

198. See *supra* Part II.A–B (summarizing that the United States might develop a Christian theocracy similar to Iran’s theocracy which would ultimately mirror France’s treatment of Muslim women).

199. See Saperstein, *supra* note 194.

B. Federal Hate Crime Prosecution

Under 18 U.S.C. § 245, it is a crime to use or threaten force against a person based on religion.²⁰⁰ Most states have hate crime statutes as well that criminalize hate crimes based on religion, except for South Carolina and Wyoming, which do not have local hate crime statutes for any groups.²⁰¹ Religious hate crimes have the second-highest incident rates, with 23.5% of the 11,323 single-bias hate crime incidents in 2024 motivated by religious hatred.²⁰²

Unfortunately, a large majority of hate crime suspects face no punishment, with just 17% of suspects being prosecuted between 2005 and 2019.²⁰³ However, of the suspects prosecuted from 2015 through 2019, 94% were convicted of hate crimes.²⁰⁴ This statistic does not accurately portray hate crime incidents aimed at potential Muslim Americans. Many Americans mistakenly interchange the labels “Arab American” and “Muslim.”²⁰⁵ However, of the 3.7 million Arab Americans in the United States, only about 25% practice Islam.²⁰⁶ This means that 925,000 Arab Americans are Muslim. This is significant because until 2015, anti-Arab incidents were not reported as hate crimes after the FBI quietly removed the category two years after its implementation in 1990.²⁰⁷ Because of the ignorant belief that “Arab” and “Muslim” identities are interchangeable, hate crimes against Arab-Americans were not reported as hate crimes, even though a rise in anti-Arab hate did occur after 9/11.²⁰⁸

Furthermore, many Arab and Muslim communities underreport hate crimes even more than other groups due to a lack of trust in the government stemming from the United States implementing stronger surveillance measures on Arab and Muslim Americans following 9/11.²⁰⁹ In 2012, a national survey showed that approximately 60% of hate crime victimizations were not reported to the

200. 18 U.S.C. § 245(b)(2).

201. *Laws and Policies*, U.S. DEP’T OF JUST. (Jan. 24, 2025), <https://www.justice.gov/hatecrimes/laws-and-policies> [https://perma.cc/5KLP-BYX7].

202. *Facts and Statistics*, U.S. DEP’T OF JUST. (Sep. 25, 2024), <https://www.justice.gov/hatecrimes/hate-crime-statistics> [https://perma.cc/84PY-5CY2].

203. Annika Kim Constantino, *Justice Department declined to prosecute 82% of hate crime suspects investigated from 2005 to 2019*, CNBC (July 9, 2021, at 08:25 EDT), <https://www.cnbc.com/2021/07/08/doj-declined-to-prosecute-82percent-of-hate-crime-suspects-from-2005-to-2019.html> [https://perma.cc/H8GA-24XZ].

204. *Id.*

205. *National Arab American Heritage Month*, INSIGHT INTO DIVERSITY (Mar. 16, 2021), <https://www.insightintodiversity.com/national-arab-american-heritage-month/> [https://perma.cc/N4P5-QYLD].

206. *Id.*

207. Odette Yousef, *For years, the FBI quietly stopped tracking anti-Arab violence and hate crimes*, NAT’L PUB. RADIO (Dec. 1, 2023, at 05:00 ET), <https://www.npr.org/2023/12/01/1215840101/for-years-the-fbi-quietly-stopped-tracking-anti-arab-violence-and-hate-crimes> [https://perma.cc/3P5K-X6M9].

208. *Id.*

209. *Id.*

police and were, therefore, not included in the FBI's hate-crime data.²¹⁰ Additionally, there are further complications with reporting hate crimes for Muslims, as they may often have language barriers as well as complicated relationships with immigration authorities and law enforcement.²¹¹

To receive a conviction for a hate crime, federal prosecutors must prove beyond a reasonable doubt the underlying crime and that the suspect was motivated by bias.²¹² It is normal in a hate crime case for the victim not to know the perpetrator, and this makes it more difficult for violent hate crimes to result in an arrest.²¹³ Violent crimes where hate is not involved are three times more likely to result in an arrest than violent crimes that are the result of a hateful bias.²¹⁴ Because of the need to prove the biased motivation beyond a reasonable doubt, investigators are hesitant to apply hate crime charges before thoroughly investigating.²¹⁵

The biggest hurdle to prosecuting hate crimes is a lack of evidence.²¹⁶ When an attacker uses hate speech during a crime, it is easier to prosecute and convict an individual for a hate crime.²¹⁷ However, this does not always happen, and so the bias element can be extremely challenging to prove. Additionally, states often cannot prosecute hate crimes due to a lack of resources to gather sufficient evidence of a hateful bias.²¹⁸

In 2009, 18 U.S.C. § 249, also known as The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act ("Shepard-Byrd Act"), was enacted and "provides funding and technical assistance to state, local, and tribal jurisdictions to help them to more effectively investigate and prosecute hate crimes."²¹⁹ The Shepard-Byrd Act also authorizes the federal government to prosecute some hate crimes where local prosecutors are either unable or unwilling to prosecute such crimes.²²⁰ To step in, though, the Department of Justice must assert one of the following: that the state lacks jurisdiction to prosecute the hate crime, that the state has asked the federal government to take the case, that a verdict under

210. Eric Levenson, *Why prosecuting hate crimes can be difficult*, CABLE NEWS NETWORK (Oct. 31, 2018, at 09:59 EDT), <https://www.cnn.com/2018/10/31/us/hate-crimes-charges-motive> [<https://perma.cc/A725-F2EC>].

211. *Id.*

212. Michael Lieberman, *Hate Crimes, Explained*, S. POVERTY L. CENTR. (Oct. 1, 2024), <https://www.splcenter.org/resources/reports/hate-crimes-explained/#:~:text=Hate%20crimes%20are%20difficult%20to,it%20is%20a%20difficult%20hurdle> [<https://perma.cc/FCX5-2FJK>].

213. *Id.*

214. *Id.*

215. Levenson, *supra* note 210.

216. Lieberman, *supra* note 212.

217. *Id.*

218. *Id.*

219. *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, C.R. DIV. U.S. DEP'T OF JUST. (May 30, 2023), <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> [<https://perma.cc/4NLC-KEYZ>]; 18 U.S.C. § 249.

220. Lieberman, *supra* note 212.

the state charges would inadequately punish hate crime-related violence, or that it is in the public's interest for the United States to prosecute the defendant.²²¹

A prosecutor's predisposition towards the available evidence in a case influences the investigation into hate crime allegations.²²² If a prosecutor believes the evidence is insufficient to secure a hate crime conviction, that belief inevitably becomes a self-fulfilling prophecy, as the availability of evidence is what motivates law enforcement to investigate a crime.²²³ Prosecutors usually will not attempt to prosecute a crime if they believe they will not be able to convict a suspect, and they usually only bring hate crime charges "in cases entailing injury and clear evidence that racial, religious, or other slurs were written or uttered during the offense."²²⁴ When discussing the determination of whether a case is worth prosecuting, one prosecutor stated:

What I think makes a hate crime more difficult is...getting the jury to understand. What do I mean by that? Let's talk about an LGB [sic] hate crime. I don't know if this is going to be the first time that a juror has ever interacted with someone who's gay. That's legitimately a concern that I have. I try to vet all that out in jury selection, but you only get so much.²²⁵

The biggest hurdle to reaching a hate crime conviction once a case enters the criminal justice system is the prosecutor.²²⁶ In cases where attackers do not make hateful statements during the crime, three factors reduce the likelihood that the prosecution will bring hate crime charges.²²⁷ The first is that law enforcement generally believes a higher burden of proof is necessary than what is actually required.²²⁸ The second is that police officers and prosecutors do not coordinate effectively, and often hate crime charges are not brought when there is no evidence of the hate crime at the time of the arrest.²²⁹ The third reason is that there is frequently a cultural distance between investigators and victims.²³⁰ Because of the more masculine and conservative mindset in law enforcement, police officers often lack "the development of soft skills to uncover bias as a

221. *Id.*

222. Ryan D. King & Besiki L. Kutateladze, *A Higher Bar: Institutional Impediments to Hate Crime Prosecution*, 57 L. & SOC'Y REV. 489, 490 (2023), <https://www.cambridge.org/core/journals/law-and-society-review/article/higher-bar-institutional-impediments-to-hate-crime-prosecution/D1ADB3AE0FA28C59CD4A1519642BA408> [<https://perma.cc/5AH5-P7S4>].

223. *Id.* at 491.

224. *Id.*

225. *Id.* at 496.

226. Tiên Nguyễn, *Why are hate crimes so hard to convict in court?*, CTR. FOR PUB. INTEGRITY (May 9, 2024), <https://publicintegrity.org/inequality-poverty-opportunity/addressing-anti-asian-hate/why-are-hate-crimes-so-hard-to-convict-in-court/> [<https://perma.cc/L2L2-2P XK>].

227. King & Kutateladze, *supra* note 222, at 497.

228. *Id.*

229. *Id.* at 499.

230. *Id.* at 500.

motive, especially for crimes perpetrated against LGBTQ victims.”²³¹ Muslim victims are especially less likely to report hate crimes as they generally feel “especially disconnected from the law enforcement community.”²³²

For Muslim women to be better protected by federal hate crime statutes, they need to feel safer and more comfortable reporting their hate crimes.²³³ There needs to be better training for police officers to handle hate crimes more efficiently, so this is attainable.²³⁴ Suppose local departments were to focus more attention and sensitivity on how to spot potential instances of hate crimes or speak to minority groups in general. In that case, likely, there would at least be an increase in the reporting of hate crimes against Muslim women. Police officers and prosecutors must also be better trained to ask questions about an attacker’s possible motive, especially when the victim does not know the instigator.²³⁵ Local law enforcement departments should also establish a standard for investigative procedures, clearly communicate with prosecutors when handing off a case, and step in to help with investigations when possible.²³⁶ Finally, the federal government should recognize that it is always within the public interest to prosecute hate crimes and should assist in whatever way possible to help local governments convict hate crime offenders.²³⁷

An increase in hate crime prosecutions would provide a much-needed deterrent to anti-Muslim hate crimes against Muslim women. Suppose a Muslim woman is unable to practice her religion without fear of violent acts of bigotry. In that case, she is not fully able to recognize her religious freedom as enshrined in the United States Constitution. As such, it is a matter of religious liberty to prosecute religious hate crimes better, and, therefore, there must be an increase in federal prosecution of hate crimes.

C. Religious Freedom Restoration Act of 1993

The Religious Freedom Restoration Act (“RFRA”) was passed in 1993 and imposes a higher standard of review when the government substantially encroaches on an individual’s religion.²³⁸ A substantial burden is generally inferred when an individual has to choose between possible legal repercussions and adhering to their religious beliefs.²³⁹ For an action burdening an individual’s

231. *Id.*

232. *Id.*

233. Yousef, *supra* note 207.

234. King & Kutateladze, *supra* note 222, at 500 (demonstrating how cultural distance keeps officers from effectively questioning victims and suggests a need for better training to bridge cultural gaps).

235. Lieberman, *supra* note 212.

236. King & Kutateladze, *supra* note 222, at 500.

237. *See id.* at 491.

238. Whitney K. Novak, *The Religious Freedom Restoration Act: A Primer*, CONG. RSCH SERV. (Apr. 3, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11490> [<https://perma.cc/Q4RZ-HXT2>].

239. *Id.*

religion to be upheld, the government must show that its actions were in pursuit of a compelling government interest and there was no other reasonable alternative for the government to carry out that particular interest.²⁴⁰ Congress's RFRA initially applied only to the federal government, as it was an overreach of Congressional power to apply it to the states; however, many states have passed their own versions of RFRA with local applicability.²⁴¹

RFRA was initially passed with the intention of protecting minority religious groups from religious persecution.²⁴² In *Employment Division v. Smith*, the Supreme Court held that Indigenous Americans in Oregon were not allowed to use the Free Exercise Clause as a means to participate in ceremonial ingestions of peyote.²⁴³ Following the *Employment Division* case, Congress sought to value free exercise more than the Supreme Court allowed, passed RFRA, and chose to apply strict scrutiny to government actions that burden an individual's free exercise of religion rather than the rational basis test.²⁴⁴

Today, RFRA is "used as a vehicle for institutions and individuals to argue that their faith justifies myriad harms."²⁴⁵ In *Burwell v. Hobby Lobby Stores*, for example, Hobby Lobby claimed that, because of RFRA, it did not have to comply with the Affordable Care Act's requirement that it provide contraceptives through its employee insurance.²⁴⁶ The Court ruled in favor of Hobby Lobby and held that requiring the business, a closely held corporation, to give up its religious freedom violated RFRA.²⁴⁷ This is just one example of how RFRA can be used to exclude rather than protect. The Trump Administration has also previously allowed for RFRA to be a basis for federally funded foster care agencies, one of which received nearly \$1 million from the federal government, to discriminate against Catholic, Jewish, and LGBTQ families by allowing these agencies to discriminate against potential adopters based on the agency's religious affiliation.²⁴⁸

In *Jama v. Peters*, a District Court in the Eighth Circuit ruled against

240. Memorandum from the U.S. Att'y Gen. to all Exec. Dep'ts and Agencies, Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/crt/page/file/1006786/dl> [<https://perma.cc/QF8N-ZZXW>].

241. Novak, *supra* note 238.

242. *Do No Harm Act*, HUM. RTS. CAMPAIGN (Mar. 28, 2025), <https://www.hrc.org/resources/do-no-harm-act#:~:text=What%20is%20the%20Do%20No,of%20harm%20on%20other%20people> [<https://perma.cc/9Y74-ZHSG>].

243. 494 U.S. 872, 890 (1990) (holding that states can deny unemployment benefits to individuals fired for using illegal drugs for religious purposes).

244. Jake Greenblum & Ryan Hubbard, *Should Employment Division v. Smith be Overturned?*, 23 AMA J. ETHICS 864, 865 (2021), https://journalofethics.ama-assn.org/sites/joedb/files/2021-10/hlaw1-peer-2111_0.pdf [<https://perma.cc/ZJE5-LDDY>].

245. *The Religious Freedom Restoration Act is discriminatory. Let's fix it*, RELIGION NEWS SERV. (May 18, 2016), <https://religionnews.com/2016/05/18/the-religious-freedom-restoration-act-is-discriminatory-lets-fix-it/#> [<https://perma.cc/32LG-TNE4>].

246. 573 U.S. 682, 736 (2014).

247. *Id.*

248. Robert C. "Bobby" Scott, *Do No Harm Act*, ED & WORKFORCE DEMOCRATS (Apr. 19, 2023), https://democrats-edworkforce.house.gov/imo/media/doc/do_no_harm_fact_sheet.pdf [<https://perma.cc/7AFD-F6TK>].

protecting an incarcerated Muslim woman's right to wear her *hijab*.²⁴⁹ Muna Jama was an incarcerated Muslim woman who was coerced into removing her *hijab* for her booking photo through a threat of solitary confinement.²⁵⁰ The picture showed Jama without her *hijab*, even though she explained to the officers that it went against her religion to be seen without her *hijab*.²⁵¹ The photo was used on Jama's ID card, which she carried at all times and was consistently visible to everyone around her; it also appeared in a book officers used during bed count and was displayed on her locker.²⁵² After filing a complaint at the prison, the officers took two new photos of Jama—one of her with a *hijab*, and one of her without a *hijab*.²⁵³ The photo of her in the *hijab* was used on her ID card until she lost her ID card.²⁵⁴

After replacing her ID photo with the uncovered photo, Jama filed an action alleging that the officers violated her religious rights under RFRA and asked the federal court to issue an order requiring the prison to replace her uncovered photo in the database with a photo of Jama in her *hijab*, stop using the uncovered photo to identify Jama in her daily activities, and replace Jama's ID card with the photo of her where she is wearing her *hijab*.²⁵⁵ The Court decided that Jama did not point to a binding authority demonstrating that the officers had fair warning that their ID policy violated Jama's rights under RFRA.²⁵⁶ The Court concluded that removing a *hijab* for booking photos and identification did not violate a clearly established religious right and that, therefore, the prison officials had qualified immunity.²⁵⁷

Some federal districts, however, have ruled in favor of the RFRA protecting Muslim women. In *Forde v. Zickefoose*, the Second Circuit had to determine if Beverly Forde's religious exercise was substantially burdened while she was in prison and, if it was, if the government had a compelling interest and was using the least restrictive means to further that interest.²⁵⁸ Forde was an incarcerated Muslim woman at FCI Danbury in Connecticut, and was required to use an identification photograph that showed her without a *hijab*, even though it went against her religion.²⁵⁹ Forde was forced to humiliate herself and disrespect her religion by showing this photo to various men regularly; the government claimed that it was justified because of the State's interest in having updated, uncovered pictures for security purposes.²⁶⁰ The District Court determined that

249. No. 23-CV-03075, 2024 WL 4444710, slip op. at *5-6 (D. Minn. Oct. 7, 2024).

250. *Id.* at *1.

251. *Id.*

252. *Id.* at *2.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at *6.

257. *Id.* (explaining that officials are not entitled to qualified immunity unless plaintiff states “a plausible claim for violation of a constitutional or statutory right” and the right is “clearly established at the time of the alleged infraction”).

258. 612 F. Supp. 2d 171, 177 (D. Conn. Apr. 2, 2009).

259. *Id.*

260. *Id.* at 179.

the State's interest could have been met by keeping an uncovered photo of Forde in a locked office and allowing her to wear her *hijab* in her identification photo.²⁶¹ The Court then said that the State did not show that requiring Forde to carry a photograph of herself without her *hijab* was the least restrictive means of addressing security concerns.²⁶² If more courts followed the Second Circuit's approach when deciding on religious discrimination cases, then Muslim women could have better judicial protection.

The Do No Harm Act ("DNHA") was first introduced in the House of Representatives in May of 2016.²⁶³ DNHA is a proposed amendment to RFRA and would protect religious freedom with a crucial clarification: religious freedom cannot be used as a means to harm others.²⁶⁴ Under DNHA, RFRA could not be used as a justification for violating: "nondiscrimination laws; employment laws governing wages and collective bargaining; child labor and protection laws; access to health care; services provided through a government contract or grant; and services by government officials."²⁶⁵ This would allow for better protection of religious minorities, including Muslim women. DNHA's necessity is best illustrated by a recent amicus brief filed by the Church of Jesus Christ of Latter-day Saints.²⁶⁶ While the argument is not related to Muslim women's religious rights, it still illustrates how RFRA can be used to harm a marginalized community.²⁶⁷ In this brief, the Mormon church argued that allowing transgender individuals heightened scrutiny under the Fourteenth Amendment would chill the exercise of religion.²⁶⁸ Minority groups will continue to be the victims of RFRA until the statutory protections of DNHA are implemented.

Although DNHA has not been passed, it was reintroduced to the House of Representatives and the Senate in March 2025.²⁶⁹ While it is unlikely to pass until there is a power shift, especially since it does not align with the Christian nationalistic policies of the Trump Administration, Congress should reintroduce DNHA to the House of Representatives.²⁷⁰ Suppose individuals, businesses, or nonprofits can use RFRA to withhold health care or further discriminate against members of marginalized communities. In that case, others can use that same discriminatory basis to exclude Muslim women. The same justification Hobby

261. *Id.*

262. *Id.*

263. *The Do No Harm Act*, AMS. UNITED FOR SEPARATION OF CHURCH & ST., <https://www.au.org/how-we-protect-religious-freedom/do-no-harm-act/#:~:text=May%202016,in%202018%20and%202019> [https://perma.cc/A632-25ME] (last visited Oct. 29, 2025).

264. *Id.*

265. Scott, *supra* note 248.

266. Brief of the Church of Jesus Christ of Latter-Day Saints; National Association of Evangelicals; Ethics & Religious Liberty Commission of the Southern Baptist Convention; Coalition for Jewish Values; and Jewish Coalition for Religious Liberty as Amici Curiae Supporting Petitioners, at 24-43, *Little v. Hecox*, 145 S. Ct. 2871 (2025) (No. 24-38), 24-43.

267. *Id.*

268. *Id.* at 2.

269. *Do No Harm Act*, *supra* note 242.

270. See *supra* Part II.D.

Lobby used to justify disobeying the Affordable Care Act could also be used to harm Muslim women.²⁷¹ The *hijab* does not usually allow Muslim women, specifically Muslim women who choose to wear a veil, to hide their religion. As such, Muslim women are particularly vulnerable to discrimination. A business owner could say that it is against their religion to hire or serve a Muslim woman until RFRA is amended to become a shield for religious minorities instead of a sword for religious majorities. This is why the United States legislative branch must work together to pass the DNHA and promote RFRA's original intention of protecting religious minorities.

IV. CONCLUSION

The United States has historically emphasized the separation of church and state and the right of individuals to practice the religion of their choice.²⁷² This freedom of religion cannot be fully recognized, though, when individuals of minority religions are targeted for their beliefs. Muslim women are particularly at risk of religious hate crimes as they often wear a veil and are easily identifiable to non-Muslims.

Dialogue between community leaders is necessary, especially in areas across the United States with little diversity, as many misconceptions about Islam allow people to act out of ignorance and hate.²⁷³ The establishment of an interfaith council at the federal level is crucial, as the current administration prioritizes using Christian leaders to advise on religious matters.²⁷⁴ An interfaith council could assist with the underreporting of hate crimes, especially by Muslim women, as it would encourage more dialogue and could empower Muslim women to feel more comfortable coming forward after experiencing what might be a hate crime.²⁷⁵ Additionally, prosecutors and local law enforcement officers need better training on how to identify and gather evidence of possible hate crimes.²⁷⁶ Hate crimes are not prosecuted nearly as much as they could be, and this is primarily due to a lack of evidence.²⁷⁷ Prosecutors need to better work with police officers to gather more evidence establishing the bias component of a hate crime.²⁷⁸ If more hate crime convictions take place, there is a more substantial likelihood that potential attackers would be less emboldened and more deterred from acting upon their hate.²⁷⁹ Finally, the Religious Freedom Restoration Act needs to be amended so that it ceases to be a weapon used against minority religions and can instead be

271. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

272. John A. Ragosta, *A Wall Between a Secular Government and a Religious People*, 26 ROGER WILLIAMS U. L. REV. 545, 545-48 (2021).

273. See *supra* Part III.A.

274. See e.g., Sager, *supra* note 162; Korn, *supra* note 162; Layne & Ulmer, *supra* note 162.

275. King & Besiki, *supra* note 222.

276. Lieberman, *supra* note 212.

277. *Id.*

278. *Id.*

279. See *supra* Part III.B.

used as it was intended when drafted in the early 90s.²⁸⁰ By passing the DNHA, the RFRA would instead be a shield used to protect minority groups from the religious majority, using the Act as a tool for discrimination.²⁸¹

Until every individual feels safe and comfortable practicing their religion, the United States will not fully achieve religious freedom. Like the Islamic Republic of Iran and France, when Muslim women are forced to wear a *hijab* or not to wear a *hijab*, there can be no religious freedom. The United States government needs to address minority religions and protect a Muslim woman's right to practice her religion through wearing a *hijab*, or the very fundamental religious freedom that was articulated in the First Amendment cannot be fully realized by all Americans.

280. *See supra* Part III.C.

281. *Id.*