Regent University School of Law

Journal of Global Justice and Public Policy

In Collaboration with Handong International Law School

Volume 7 **Spring 2021**

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Lynne Marie Kohm

A Case for Additional Crimes Triable Before the International Criminal Court: The African Context
Daniel R. Ruhweza and Kitenda Jesse Stephen

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Editor-in-Chief
Journal of Global Justice and Public Policy
Regent University School of Law
Robertson Hall 225
1000 Regent University Drive
Virginia Beach, VA 23464

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PRINTED BY THE SHERIDAN PRESS, HANOVER, PENNSYLVANIA

REGENT UNIVERSITY SCHOOL OF LAW

JOURNAL OF GLOBAL JUSTICE AND PUBLIC POLICY

IN COLLABORATION WITH HANDONG INTERNATIONAL LAW SCHOOL

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INTRODUCTORY NOTE

During our time working on this volume of the Journal of Global Justice and Public Policy, the world has faced monumental challenges and changes. Because of the COVID-19 pandemic, life, health, and education as we know it all look different now. Simply put, these are some tough, strange days we are living in. This process has reminded us that we are called as Christians to be a light in the darkness, and that calling does not pause or lessen in the hard times. If anything, it is even more important during tough and strange days such as these. We hope you find this volume convicting, captivating, and a reminder of the important issues that still need and deserve our attention, prayer, and solutions- around the corner and around the globe.

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REGENT UNIVERSITY SCHOOL OF LAW

JOURNAL OF GLOBAL JUSTICE AND PUBLIC POLICY

IN COLLABORATION WITH HANDONG INTERNATIONAL LAW SCHOOL

VOLUME 7 SPRING 2021

THE INTERSECTIONALITY OF RACE AND CLASS IN BIOETHICS

*Lynne Marie Kohm**

INTRODUCTION

The intersectionality of race and class in bioethics presents an opportunity to address how legal racial inequality intersects with class and legal status in bioethics.[1] Bioethics, the study of the implications of biological or biomedical advances, generally in fields of genetic engineering and research, shapes the public policy in this field of study.[2] This Article applies that discipline to reproductive health advances in the context of race.

Currently, advances in ongoing research in genetic engineering have provided us with a full set of instructions for creating a human being,[3] and

* Professor and John Brown McCarty Professor of Family Law, Regent University School of Law. J.D. Syracuse, B.A. Albany. This material was also presented in January of 2021 at The Federalist Society National Convention, Faculty Scholars Panel.

[1] Intersectionality is the theory that the cumulative effects of various forms of discrimination connect in a complex way to "combine, overlap, or intersect especially in the experiences of marginalized individuals or groups." *Intersectionality,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/intersectionality (last visited Feb. 2, 2021). This concept is popularly applied to the intersection of two or more identities an individual may hold. Race and class are among those identities. *Id*. *See* Arica L. Coleman, *What is Intersectionality? A Brief History of the Theory,* TIME (Mar. 29, 2019), https://time.com/5560575/intersectionality-theory/.

[2] *See generally* BARRY FURROW ET. AL, BIOETHICS: HEALTH CARE LAW AND ETHICS vol. 2, 4–5 (W. Acad. 8th ed. 2018), the excellent casebook we use for Regent University School of Law's course in Bioethics.

[3] *See generally* JOHN S. FIENBERG & PAUL D. FEINBERG, ETHICS FOR A BRAVE NEW WORLD 21 (Crossway Books 2d ed. 2010); *see also generally* Lynne Marie Kohm, *Designer Babies: Are Test Tubes and Microbes Replacing Romance*, in DESIGNER BABIES AND GENE EDITING: ARE WE READY FOR THIS? (Scholars Press forthcoming 2021).

once created other advances have provided us with a myriad of avenues for choosing which human beings survive to birth.[4] As the law races to catch up with science, it is imperative that exploring legal and ethical concerns can guide law and public policy, principally when a particular race, class, and social identity group experiences a most evident level of disparity. This Article seeks to apply these ideas to those who are identified with the classes of women and children[5] of color.

Addressing the racial disparities that some face at the beginning of life is a critical aspect of working against racial discrimination. While evidence of discrimination in assisted reproductive technology (ART) is extremely challenging to discern,[6] the most obvious empirical evidence for racism in bioethics appears to be in the abortion data rather than in ART, [7] pointing to systemic racism.[8] According to the New York City Health Department, thousands more Blacks are aborted than born, and the abortion rate for Black mothers is three times what it is for white mothers.[9] The intersectionality of race and class in abortion is evident in

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[4] *See* Audrey K. Chapman, *Human Dignity in the Debate about Specific Reproductive Technologies*, HUMAN DIGNITY IN BIOETHICS: FROM WORLDVIEWS TO THE PUBLIC SQUARE 210, 210 (Stephen Dilley & Nathan J. Palpant eds., 2013) (discussing selection technologies for choosing which human embryos advance to birth and which do not).

[5] Children as an identity group or a class have been categorized over the years in many ways, as possessing only minority legal status, to varied levels of legal responsibility. *See generally* LYNN D. WARDLE ET. AL., FAMILY LAW FROM MULTIPLE PERSPECTIVES 557 (West 2d ed. 2019). Children have been in the past categorized inappropriately in their legal statuses, most notably in illegitimacy, a status dependent not on their own being, but on the marital status of their parents. While once used as a category upon which to discriminate against children in a particular manner that legalization of illegitimacy of children has been essentially removed as a legal and social category upon which to discriminate against children. *See id.* at 197 "In a series of cases, the United States Supreme Court struck down laws disadvantaging children born out of wedlock, reasoning in part that innocent children should not be disadvantaged merely because their parents engaged in sexual relations outside of marriage." *Id.* (excepting that illegitimacy may still have consequences for inheritance). The status of a child as born or unborn could be characterized as a social and legal identity that intersects here with race of the child and is the derivation for this Article. For a thorough discussion of the legal status of unborn children, *see generally* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law,* 6 ST. THOMAS J. L. PUB. POL'Y 141, 141–42 (2011).

[6] *See e.g.,* E. McClennen et al., *The Impact of Race and Ethnicity on ART Outcomes*, 106 FERT. & STER. E99, E99–100 (2016) (showing unexplainably low outcomes for minorities, and recommending further investigation).

[7] Mary Zeigler, *Abortion Wars Have Become a Fight over Science*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/opinion/abortion-roe-science.html (discussing the law and medicine surrounding abortion).

[8] *See* Jason Riley, *Let's Talk About the Black Abortion Rate*, WALL ST. J. (Jul. 10, 2018), https://www.wsj.com/articles/lets-talk-about-the-black-abortion-rate-1531263697, with additional evidence referred to throughout Part I of this Article.

[9] *Id.* (noting the shift in viewpoints and the lack of a solid understanding for that shift).

the combination of marginalization that exposes the disadvantages presented by extremely high abortion rates among people of color. For too long a sense of urgency has been missing in examining these issues, which has allowed them to become even more entrenched.

To date, biomedical ethics has been dominated by a principled approach that is not concerned with underlying theories and frameworks, but rather considers various issues of autonomy, beneficence, confidentiality, distributive justice, and pragmatism, operating in turn to influence law and public policy.[10] The solution is a focused outcome-based approach by bioethicists that protects against systemic racial discrimination.

Initially it might appear that the heart of this question is the constitutionality of race selective abortion.[11] That will be further discussed in Part I, but this Article focuses on three converging questions: 1) Should bioethics law protect minorities? 2) Should bioethics and bioethicists advocate for protection from racial discrimination? 3) Are such policies essential to the survival and development of minority groups of color? Addressing each question considers the intersectionality of class and racism and bioethics. So while abortion may be constitutionally protected and part of current public policy, it may also be foundational to systemic racism in an intersectional manner.

Part I of this Article offers some compelling data showing racial disparity, while Part II fleshes out the substance regarding the three converging questions. Part III offers some solutions regarding bioethics and the duty and obligation of bioethicists to respond to and work to counter act and amend racism in bioethics, and particularly in reproductive health.

The debate over racism in abortion is a relatively new but critically important one,[12] made more precarious when considering the amplified

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[10] BARRY R. FURROW ET. AL, BIOETHICS: HEALTH CARE LAW AND ETHICS, 15–16 (West Acad. Pub. 2018) (discussing both consequentialist and deontological theories, utilitarianism, Kantian theories, religiously-based ethics, and natural law). James Mumford, *A Bioethics of the Strong*, THE NEW ATLANTIS 160, 161–162 (Winter 2021) (reviewing O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS (Harvard 2020)), notes, "For Snead, American public bioethics already *does* have an anthropology, one it pretends not to have: expressive individualism…. [T]he heart of expressive individualism is the unencumbered self, the atomized individual, shorn of social ties, long on rights but short on duties." This conundrum is at the heart of racism in bioethics.

[11] Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 U. CIN. L. REV. 545, 550 (2018) (examining the rise of legal concern over this issue).

[12] *See generally* Zeigler, *supra* note 7 (discussing the role of science in the abortion debate).

and united cries against racial inequality.[13] When threaded into the issues of status and class of children in bioethics, their intersectionality of the two become extremely consequential.

I. COMPELLING DATA

Black women make up less than 14% of the U.S. population,[14] yet the Center for Disease Control (CDC) reports that minority women have some of the highest abortion rates.[15] Evidence shows that 36% of all abortions abort Black babies.[16] 27.1 of every 1000 Black women have an abortion whereas only 10 of every 1000 White women have abortions.[17] In 2014, 18.1 of every 1000 Hispanic women received an abortion.[18] These are the most recent numbers from 2019, declining a bit from 2011:

> Nationwide today, black women terminate their pregnancies at a rate five times that of white women. For Latinas, the rate is more than double that of non-Latina whites (28 per 1,000 women compared with 11.) These startling differences reflect equally stark differences in the rate of unintended pregnancy. Forty percent of white women's pregnancies are unintended, compared with well over half among the two other groups. "Unintended," of course, does not necessarily mean unwelcome. But

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[13] *See, e.g.*, Hedwig Lee et al., *The Demographics of Racial Inequality in the United States,* BROOKINGS (Jul. 27, 2020), https://www.brookings.edu/blog/up-front/2020/07/27/the-demographics-of-racial-inequality-in-the-united-states/ (quantifying racial inequality in terms of justice, economic security, health, employment, and other categories); Jacqueline Howard & Kristen Rogers, *US Racial Inequality Just as Deadly as Covid-19, If Not More, Report Suggests,* CNN.com (Aug. 26, 2020), https://www.cnn.com/2020/08/26/health/racial-inequality-death-rate-covid-19-wellness/index.html.

[14] *See QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US# (last visited Feb. 7, 2021).

[15] *See* Emily Ward, *CDC: 36% of Abortions Abort Black Babies*, CNSNEWS.COM (Nov. 28, 2018), https://www.cnsnews.com/news/article/emily-ward/blacks-make-134-population-36-abortions.

[16] *Id.*

[17] *See* John Eligon, *When 'Black Lives Matter' is Invoked in the Abortion Debate*, N.Y. TIMES (July 6, 2019), https://www.nytimes.com/2019/07/06/us/black-abortion-missouri.html.

[18] *Abortion Rates by Race and Ethnicity*, GUTTMACHER INST. (Oct. 19, 2017), https://www.guttmacher.org/infographic/2017/abortion-rates-race-and-ethnicity.

> sometimes it means disaster. And the difference in the rates raises questions about barriers to access to contraception, not only financial but cultural, too complex to be reduced to a sound bite.[19]

More than one third of all abortions in America, or 19 million Black children have been aborted since 1973.[20] 2009 estimates from the CDC, the National Center for Health Statistics (NCHS) and the Guttmacher Institute, "showed that 11.9% of non-Hispanic white pregnancies were aborted, 17.1% of Hispanic pregnancies, and 35.5% of those of non-Hispanic Blacks."[21] The numbers for just one year are staggering.

> Applied to the overall pregnancy figures, this translates into 383,000 abortions for whites, 252,000 abortions for Hispanics, and 445,000 abortions for blacks. Looked at in relation to other causes of death by race and ethnicity, this makes abortion responsible for 16.4% of white deaths–the third most significant cause behind heart disease and cancer. *But abortion is by far the leading cause for Hispanics, responsible for 64% of deaths, and for blacks, at 61.1%– close to two out of every three deaths experienced by these communities.*[22]

These statistics should be alarming to anyone, and show further evidence of glaring racial disparity.[23] Bioethicists as a key collective

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[19] Linda Greenhouse, Opinion, *What Would Shirley Do?*, N.Y. TIMES (Feb. 9, 2011), https://opinionator.blogs.nytimes.com/2011/02/09/what-would-shirley-do/ (citing, *Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states).

[20] *See* Walt Blackman, *Abortion: The Overlooked Tragedy for Black Americans,* ARIZ. CAP. TIMES (Feb. 25, 2020), https://azcapitoltimes.com/news/2020/02/25/abortion-the-overlooked-tragedy-for-black-americans/.

[21] Randall K. O'Bannon, *UNC Study Shows Enormity of Abortions Impact on Public Health, Minorities*, NAT'L RT. TO LIFE NEWS (Aug. 31, 2016), https://www.nationalrighttolifenews.org/2016/08/unc-study-shows-enormity-of-abortions-impact-on-public-health-minorities/#.V6t7JY-cHIV.

[22] *Id.* (emphasis added) (offering 2016 statistics).

[23] *See* Tysharah Jones Gardner, *Race Selective Abortion Bans: A New Way to Prevent the Elimination of Minority Groups in the United States,* 7 REG. UNIV. J. GLOB.

should sense a compelling charge to search for solutions addressing the racism of high abortion rates in minority communities.

Race–selective abortion is a fairly new concept,[24] as women decide to get abortions for numerous reasons, from resource limitations, to lack of partner support, to career aspirations.[25] Only two U.S. states have tried to use their regulatory power to prohibit abortions based on race–Arizona[26] and Indiana.[27] Research has not suggested that women of color, or any woman, obtains an abortion based on the race of her unborn child.[28] This lack of data contributes to the fact that states seem to be avoiding race selective abortion bans.[29] It is possible that state legislators fear a backlash from the minority community, or that such legislation would not pass due to similar bills failing in other states.[30] Whatever the reason, it is unlikely that the Supreme Court will decide whether race selective abortions are constitutional in the near future, unless considered with other sex or disability selective abortion bans. Nevertheless, concerns over the engineered elimination of a race through abortion were expressed recently by the Supreme Court of the United States in a separate opinion by Justice Clarence Thomas.[31]

JUSTICE & PUB. POL'Y (forthcoming 2021). (Published in this issue of the Journal of Global Justice and Public Policy, whose research and ideas on this subject have been an important and crucial impetus to the ideas presented here).

[24] *See* Gooder, *supra* note 11, at 545.

[25] Lawrence Finer et. al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 115, 117 (2005).

[26] ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (2011).

[27] IND. CODE ANN. § 16-34-4-8(a)(b) (2016). Challenged and found unconstitutional in *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018). On appeal to the Supreme Court of the United States, the High Court quickly denied the petition stating that the Court would follow its ordinary practice of waiting for other Courts of Appeal to consider the issue first. *Box v. Indiana*, 139 S. Ct. 1781, 1781–82 (2020).

[28] *See Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 2020), https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly.

[29] A race selective abortion ban would outlaw an abortion based on race of the child, not on the race of the mother or the father. *See* Gardner, *supra* note 23, at Section II. A. for legislative language.

[30] *See* S.B. 2790(1)(d)(3), 2014 Reg. Sess. (Miss. 2014), https://legiscan.com/MS/bill/SB2790/2014.

[31] Box v. Indiana, 139 S. Ct. 1780, 1782–83 (2020) (Thomas, J., concurring), said the following: "Some believe that the United States is already experiencing the eugenic effects of abortion. … On this view, 'it turns out that not all children are born equal' in terms of criminal propensity.… And legalized abortion meant that the children of 'poor, unmarried, and teenage mothers" who were "much more likely than average to become criminals' 'weren't being born.' Whether accurate or not, these observations echo the views articulated by the eugenicists and by Sanger decades earlier: 'Birth Control of itself . . . will make a better race' and tend 'toward the elimination of the unfit.' Racial Betterment 11–12." *Id*. at 1791. The full concurring opinion is an important read on racial

Furthermore, the topic of race selective abortion is a very sensitive one with multiple perspectives. Some in minority communities support legal access to abortion but nonetheless hold that it is morally wrong.[32] Some in minority communities may hold that race selective abortion laws will infringe on a minority woman's right to have an abortion, or may be used as a continued tool of institutionalized racism.[33] Others may argue that "race-selective abortion laws are based on the idea that women of color are coerced into abortions or are complicit in a 'genocide' against their own community."[34] Still others argue that abortion and population control facilities are disproportionately placed in minority communities, targeting those communities, and that race selective abortion laws protect minorities from the pressures of these organizations.[35] Finally, others argue that abortion disparities are more appropriately a public health concern.[36]

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discrimination in America, in the context of eugenic engineering. While not the focus of this Article, and currently beyond its scope, it is important to also note that racial discrimination in abortion access has been discussed elsewhere, in equally compelling ways. *See* April Shaw, *How Race- Selective and Sex-Selective Bans on Abortion Expose the Color Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color,* 40 N.Y.U. REV. L. & SOC. CHANGE 545, 545 (2016).

[32] *See* Eligon, *supra* note 17 (for example, civil rights activist Rev. Clinton Stancil stated "As much as I believe with all my heart about the killing, the taking of innocent lives, I also believe that I will never support giving white legislators, who have no interest in our community, the ability to tell our women what they can do with their bodies."); *see* Ward, *supra* note 15; *see also* Gardner, *supra* note 23 (for further discussion of these perspectives).

[33] This is a surmise, but it is evident that identity theory examines the disadvantage and obstacle even of motherhood. *See e.g.* Jane H. Aiken, *Motherhood as Misogyny*, WOMEN & L., 2020, at 20, 22 (discussing "the hidden expectation of selflessness incorporated in our consciousness and deeply embraced by our social structures" in the context of the author's lived experiences).

[34] *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, *supra* note 28.

[35] Mark Crutcher et. al., *Racial Targeting and Population Control Abstract*, LIFE DYNAMICS (2011), https://www.klannedparenthood.com/wp-content/themes/trellis/PDFs/Racial-Targeting-Population-Control.pdf. *See also* an outline of this concern set forth in *Box v. Indiana. Box*, 139 S. Ct. at 15, 25, examples of this engineering in Black communities: "Avoiding the word 'eugenics' did not assuage everyone's fears. Some black groups saw "'family planning' as a euphemism for race genocide" and believed that "black people [were] taking the brunt of the 'planning'" under Planned Parenthood's "ghetto approach" to distributing its services." David Dempsey, *Dr. Guttmacher Is the Evangelist of Birth Control*, N.Y. TIMES MAG., Feb. 9, 1969, at 82. "The Pittsburgh branch of the National Association for the Advancement of Colored People," for example, "criticized family planners as bent on trying to keep the Negro birth rate as low as possible." Kaplan, *Abortion and Sterilization Win Support of Planned Parenthood*, N.Y. TIMES, at L50, col. 1 (Nov. 14, 1968).

[36] Christine Dehelendorf et. al., *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH, 1772 (Oct. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3780732/.

What does seem intuitive is that a woman of color does not get an abortion based on the race of her child.[37] As Tysharah Jones Gardner notes, it is true that at one point in history Black women prevented the birth of their children to prevent their babies from experiencing the horrors of slavery,[38] but legislating on this racial issue might work to exacerbate discrimination, rather than protect against it. This issue affects white women as well who wish to abort a child by a man of a different race.[39] Still, it is clear that this is "a true crisis … that there are more African-American babies being aborted than born."[40] What cannot be overlooked is that these disparities in reproductive health outcomes work against unborn minority children and are unmistakably a form of racism – and quite potentially evidence of systemic racism.

In overcoming the trepidation that accompanies examining these issues, bioethicists, constitutionalists, and life science legal scholars can make important contributions. To accomplish this, they will need to consider three converging questions.

II. THREE CONVERGING QUESTIONS

Addressing the three questions stated at the outset become extremely important to reveal the issues surrounding this critical issue.

A. Should bioethics and life science law protect minorities?

Constitutional decrees are most relevant in answering this question. The United States Constitution prohibits discrimination based on race.[41] The Thirteenth Amendment outlawed slavery,[42] the Fourteenth Amendment secured citizenship rights to a race recently emancipated,[43]

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[37] *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, *supra* note 28.

[38] Gardner, *supra* note 23; *see also* Loretta Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR POOR & UNDERSERVED 274, 276 (1992). Ross argues that African-American women have always attempted to control their fertility. She points out that slave owners would often use African-American fertility for financial means and that the African-American women would often take contraceptives to resist slavery for them and their children. *Id.* at 276.

[39] *See* Gardner, *supra* note 23.

[40] Clare Hunter, *Abortion is Leading Cause of Death in Black Community*, CATH. REV. (Jan. 19, 2012), https://www.archbalt.org/pro-lifer-says-abortion-is-leading-cause-of-death-in-black-community/.

[41] U.S. CONST., amend. XV, §1, XIV §1 (prohibiting racial discrimination in voting, and prohibiting governments from denying citizens of equal protection under the law).

[42] *Id.* amend. XIII, §1.

[43] *Id.* amend. XIV, §1.

a race that through many generations had been held in slavery,[44] all the civil rights that the other races enjoy, upholding the rights of all citizens regardless of race or skin color.[45] Ending segregation in public places and banning employment discrimination based on race, color, sex, religion, or national origin, The 1964 Civil Rights Act secured in law prohibitions against treatment disparities based on race.[46] The United States Equal Employment Opportunity Commission (EEOC) was designed and developed to implement that Act to protect against racial discrimination in employment.[47]

State constitutions, laws, and policies also include mandates against racial discrimination. The Fourteenth Amendment of the U.S. Constitution applies all federal laws to the several states,[48] and most states have protections from racial discrimination written into their own state constitutions.[49] Public demand and cultural pressure served to advance protections from racial discrimination, and cultural organizations such as the National Association for the Advancement of Colored People (NAACP) have been watchdogs against such discrimination, helping to promote the best interests of people of color for more than a century.[50]

Faith perspectives throughout the United States also advance and foster the fair and equal treatment of all peoples, regardless of race. Scripture mandates that there is neither Jew nor Greek, slave nor free, male nor female, as all have, should enjoy, and must respect inherent

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[44] Khushbu Shah & Juweek Adolphe, *400 Years Since Slavery: A Timeline of American History*, GUARDIAN (Aug. 15, 2019), https://www.theguardian.com/news/2019/aug/15/400-years-since-slavery-timeline (detailing some of those generations); *id*. ("Though enslaved Africans had been part of Portuguese, Spanish, French and British history across the Americas since the 16th century, the captives who landed in Virginia were probably the first slaves to arrive into what would become the United States 150 years later.").

[45] U.S. CONST., amend. V.

[46] Civil Rights Act of 1964, 42 U.S.C. §1971 et seq., §201(a)–(b) (1988).

[47] *See Facts about Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 1997), https://www.eeoc.gov/laws/guidance/facts-about-racecolor-discrimination (offering the guidance document detailing employment protections in conditions surrounding hiring, recruiting, advancement, compensation, harassment, retaliation, segregation, and classification of employees, etc.).

[48] U.S. CONST. amend. XIV, §1, §5.

[49] For a summary and update of these rights manifested in the several states, *see* Goodwin Liu, *State Constitutions and the Protections of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1307–08 (Nov. 2017), (Liu's piece is updating the premier original work on this subject: William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977)).

[50] Begun in 1909, the National Association for the Advancement of Colored People (NAACP) has been active in culture and community to thwart and end racial discrimination. *See generally About Us,* NAACP, https://www.naacp.org/ (last visited Mar. 7, 2021).

equality, as created in the image of the Creator.[51] While brokenness seems to be central to our world, it is nonetheless deeply puzzling, as most people still have an intense innate desire for fairness, freedom and friendship.[52] Based on federal law, state law, and faith traditions, there does seem to be a moral imperative to follow these principles. This leads to the second of our converging questions.

B. Should bioethics and life science law advocate for protection from racial discrimination?

Race and health science has experienced a windfall of scholarship in the wake of the tragedies brought upon people of color in the COVID-19 virus.[53] Race law generally has likewise seen an increased awareness in public concern over racial disparities in the general community.[54] These events have opened up for fresh viewing the intersectionality of race and health law, something feminist legal theory is most concerned with regarding reproductive health.[55]

Arising out of feminist legal theory, the concept of intersectionality seeks to protect people and groups that experience discrimination from multiple sides and angles of their lives due to their social identities.[56] "Throughout the final decades of the 20th and the first decade of the 21st centuries, women of color published many groundbreaking works that highlighted these dynamics. In doing so they exposed the interlocking systems that define women's lives."[57] In this scholarship, black feminist legal scholars considered the abortion question, deeming it to be largely a personal moral choice.[58] This public support for abortion brought a shift

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[51] *Galatians* 3:28; *Colossians* 3:11; Genesis 1:27.

[52] N.T. WRIGHT, BROKEN SIGNPOSTS: HOW CHRISTIANITY MAKES SENSE OF THE WORLD 4–6 (2020) (discussing the seven themes which function as signposts that enable us to make sense of a world that is not always right and fair, these signposts include justice, love, spirituality, beauty, freedom, truth, and power, all of which are central to fairness and equality, but which are now broken in some significant way).

[53] *See e.g.* the research and work of Vernellia R. Randall, *Dying While Black – Covid-19: Another Manifestation of the Impact of Chronic Racial Stress,* RACE, RACISM & L. (Dec. 12, 2020), https://racism.org/covid-19/covid-19-articles/8681-dying-while-black-covid19. *See also generally* Howard, *supra* note 13.

[54] Again, the efforts of Vernellia R. Randall are important here. *See* Randall, *supra* note 53.

[55] *See, e.g.* Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, 24 STUD. FAM. PLANNING 73, 73 (1993), https://www.jstor.org/stable/2939201 (discussing the impact of feminist thinking on abortion).

[56] *See* Arica L. Coleman, *What is Intersectionality? A Brief History of the Theory,* TIME (Mar. 29, 2019), https://time.com/5560575/intersectionality-theory/.

[57] *Id.* Citing e.g. BEVERLY GUY-SHEFTALL, WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN AMERICAN FEMINIST THOUGHT (The New Press 1995), as a leading feminist scholarship of women of color.

[58] *See* Rebecca J. Cook, *supra* note 55, at 73.

in African-American policy and thinking on abortion, promoting it in a new way, despite historical opposition from the black religious community to abortion.[59]

It now seems clear that these early efforts toward understanding intersectionality have not considered the alarming statistics and facts presented in Part I. One must question why they have been ignored, even exacerbated, creating unintended consequences. Barriers to contraception access, both financially and culturally, have been suggested by feminist opinions.[60] What was perceived as a way to protect women of color from the harm and tragedy of illegal back-alley abortion appears to have been turned on its head to vast harm on a much larger scale, to the great detriment of the very race of the women they sought to protect.

> I'm certain that Shirley Chisholm, who died in 2005 at the age of 80, would be distressed to know that the shibboleths she risked her career to fight are even more potent in today's wired world than they were in the days when abortion was a crime. Those of us privileged to live in the world that she helped to make have an obligation to resist the cynicism of those who know better and the recklessness of those who don't.[61]

Feminist legal theory should be protecting the lives of black women and children, lives that face discrimination from multiple angles. Rather, it seems that very same theory has controverted intersectionality to have surrendered or forfeited black lives to its own theory, in a manner. In the face of such egregious statistics as those presented herein, bioethics and life science law must indeed advocate for protection from racial disparity in reproductive health. Scholarship cited here has led to greater equality in other areas, and in a logical and natural progression, this scholarship is obligated to be applied to this issue as well.

Critical race theory (CRT) scholarship may also shed light on these issues. CRT approaches racism by analyzing systems and biases embedded in social structures, recognizing claims that systemic racism is

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[59] *See generally About Us,* CHISHOLM PROJECT, http://chisholmproject.com/about-us (last visited Mar. 7, 2021) (outlining and detailing this important shift).

[60] Greenhouse, *supra* note 19.

[61] *Id.*

part of the American life, and challenging beliefs that allow it to flourish.[62] This Article is seeking to challenge systemic racism in the context of race and abortion. CRT is axiomatic, providing an approach to grappling with a history of what is referred to as white supremacy that rejects the belief that what is in the past is in the past, and that the laws and systems that grow from that past are essentially detached from it.[63] While the theory was started as a way to examine how laws and systems promote inequality,[64] it has since expanded. "Critical race theory attends not only to law's transformative role which is often celebrated, but also to its role in establishing the very rights and privileges that legal reform was set to dismantle…."[65] CRT should be leading the way in questioning, researching, and curbing the high black abortion rate. By not doing so it has abdicated its foundational responsibility of remedying racial inequality.

It is likely that within critical race circles abortion is perceived as liberating black women from oppression,[66] yet that very perception misses the alarming disparity in numbers of aborted blacks. The tangible reality is that all women, which includes minority women, who wish to keep their babies, require emotional, financial, and social support if they are not to abort their children.[67] These concrete goods are as critical, and even more important than, the theory. Yet, theories are helpful in that they serve as ideological guardrails to leading the way out of the oppression of the skyrocketing abortion of black Americans. It could make a tremendous difference, and is something bioethicists should turn their ears to in protecting against racism in America and globally. "Critical race theory

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[62] *See Critical Race Theory (1970s – present*), PURDUE U., https://owl.purdue.edu/owl/subject_specific_writing /writing_in_literature/literary_theory_and_schools_of_criticism/critical_race_theory.html (last visited Mar. 8, 2021) (detailing the rise of the theory and significant terms used to apply and advance it).

[63] *See generally* Victor F. Caldwell, *Book Note: Critical Race Theory*, 96 COLUM. L. REV. 1363, 1363–64 (1996) (reviewing KIMBERLÉ CRENSHAW et. al., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (The New Press 1995)).

[64] *Critical Race Theory*, *supra* note 62. CRT scholarship also emphasizes the importance of finding a way for diverse individuals to share their experiences. However, CRT scholars do not only locate an individual's identity and experience of the world in his or her racial identifications, but also their membership to a specific class, gender, nation, sexual orientation, etc. They read these diverse cultural texts as proof of the institutionalized inequalities racialized groups and individuals experience every day. *Id*.

[65] Faith Karimi, *What Critical Race Theory Is – and Isn't*, CNN (Oct. 1, 2020), https://edition.cnn.com/2020/10/01/us/critical-race-theory-explainer-trnd/index.html.

[66] Carl R. Trueman, *Evangelicals and Race Theory*, FIRST THINGS (Feb. 2021), https://www.firstthings.com/article/2021/02/evangelicals-and-race-theory. ("Critical theory, whatever form it takes, relies on the concept of false consciousness – the notion that the oppressors control society so completely that the oppressed believe their own interests are served by the status quo.").

[67] Finer et. al., *supra* note 25.

is American in its origin and content, but Black Lives Matter (BLM) has given it currency worldwide."[68] When Black Lives Matter is invoked in an abortion debate black women and children can be unfairly juxtaposed against each other.[69] CRT and BLM ought to proffer and advance the significance and importance of black lives at all stages of black life, including the initial beginning of black life, for both mother and child. Here the politics of racial identity and class identity intersect in the particular context of abortion.

The politics of abortion, while inappropriately boxing in women to one view– that of pro-abortion,[70] must be balanced with the reality of systemic racial disparity in the highest abortion rates of all women being experienced by minority women, thus the intersectionality of race and class in bioethics. Equality means protection of life of all races, which requires and demands abetting and supporting better minority birth rates.

The evidence presented in this section unveils that bioethics and life science law should advocate for protection from racial discrimination, and when appropriately applied race theories can be helpful in leading the way toward this justice. This leads to the third converging question.

C. Are such policies essential to the survival and development of minority groups of color?

To determine what effect, if any, the survival and development of minority groups of color may be based on minority abortion rates, or how great that effect is on the survival of minority groups, a quick review of mortality rates is necessary.

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[68] Trueman, *supra* note 66 (discussing how the CRT portrays power struggles and solidified oppression into a self-justifying system, and a comprehensive explanation for all evils).

[69] Eligon, *supra* note 17 ("The racial intolerance that exists in the country is an intrinsic part of the discussion. 'Black Lives Matter,' a motto born of the abuse black people suffer at the hands of police officers, can be heard on both sides of the abortion debate among black people, with one side emphasizing the life of the mother and the other the fetus.").

[70] Not all women are politically, socially, or morally favorable toward abortion. *See, e.g.* Lynne Marie Kohm & Colleen Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?,* 6 WM & MARY J. WOMEN & L. 381, 394 (2000); Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM & MARY J. WOMEN & L. 91, 91, 96 (1997). Both of these articles discuss how not all women favor abortion even though abortion may be perceived as freeing women it has worked to harm women.

For the last twenty years mortality rates for people of color have declined.[71] Age-adjusted death rates for "black adults declined through 2011 and 2012 respectively, and then were stable through 2017."[72] Furthermore, the difference in death rates between non-Hispanic white and non-Hispanic Black adults has generally narrowed.[73] While death rates for Blacks over 65 were about 5 percentage points higher than white death rates for people of the same age group, those numbers are nearly the same now at the end of the second decade of the 21st century.[74] These demographics on minority populations are important to consider and review, and they are very different from the minority abortion rate.

Total fertility rate is another important factor to address especially when contrasted with the minority abortion rate. "The total fertility rate is an estimation of the number of children who would theoretically be born per 1,000 women through their childbearing years (generally considered to be between the ages of 15 and 44) according to age-specific fertility rates."[75] These fertility rates are "different from the birth rate, in that the birth rate is the number of births in relation to the population over a

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[71] Sally C. Curtin & Elizabeth Arias, *Mortality Trends by Race and Ethnicity Among Adults Aged 25 and Over: United States 2000–2017*, NAT'L CTR. FOR HEALTH STAT. (July 2019), https://www.cdc.gov/nchs/products/databriefs/db342.htm#ref1.

[72] *Id*. ("Rates for Hispanic adults were always lower than for non-Hispanic white and non-Hispanic black adults. The difference in age-adjusted rates between Hispanic and non-Hispanic black adults remained relatively stable over the period, whereas the difference in rates between Hispanic and non-Hispanic white adults widened. The difference in age-adjusted death rates between non-Hispanic white and black adults was reduced by almost one-half over the period, from 24% lower for non-Hispanic white adults in 2000 to 13% lower in 2017. Among those aged 25–44, all race and ethnicity groups experienced increases in death rates more recently, with greater percentage increases for non-Hispanic white and non-Hispanic black adults than for Hispanic adults. Trends for Hispanic adults aged 45–64 differed from trends for non-Hispanic white and black adults. After declining from 2000 through 2011, death rates for Hispanic adults aged 45–64 remained steady from 2011 through 2017. Rates for non-Hispanic white and non-Hispanic black adults increased recently, from 2010–2011 to 2017, with a greater percentage increase for non-Hispanic white adults than for non-Hispanic black and Hispanic adults. For adults aged 65 and over, all race and ethnicity groups showed general declines over the period, with non-Hispanic black adults experiencing the greatest percentage decline. The findings in this report are consistent with previous research showing that Hispanic adults in the United States have traditionally had lower mortality and higher life expectancy than non-Hispanic white and non-Hispanic black adults. This report also shows that the mortality advantage for Hispanic adults has endured through 2017 and has been increasing with respect to non-Hispanic white adults.").

[73] *Id*. (citing to specific aspects of the study in their summary).

[74] *Id*. at fig. 4.

[75] *Total Fertility Rate by Ethnicity U.S. 2018,* STATISTA (Nov. 28, 2019), https://www.statista.com/statistics/226292/us-fertility-rates-by-race-and-ethnicity/.

specific period of time."[76] The total fertility rate (TFR) is the best indicator of a population group's increase or decline over time, and a rate of 2.1 is needed to maintain a population. "The fertility rate for all ethnicities in the U.S. was 1,729.5 births per 1,000 women" or 1.729 in 2018,[77] with the Black TFR of 1.79, the Hispanic TFR of 1.96, and the white TFR of 1.64.[78]

These facts seem to indicate that race of a population is not a factor for either increased death rates nor for decreased total fertility rates. Considering these indicators alongside abortion statistics provides clarity in that minority populations, particularly Black Americans, are consequentially experiencing tremendous disparity in the number of persons lost to abortion, rather than to normal death or declining births. An examination of the entire life span of a person is important,[79] and further research would not be unhelpful here. It is also clear that bioethics policies that protect racial minorities could very well be quite helpful, if not essential, to the survival and development of minority groups of color.

The answer to the third converging question is affirmative in that such policies would protect Black children from racial discrimination at the beginning of their lives and are essential to the survival and development of minority groups of color.

The three questions posited at the outset have assisted in clarifying and contrasting the interlocking issues crystalizing the concerns surrounding this critical issue. These answers are not exhaustive, and further research may more fully develop the solutions suggested herein.

III. AMENDING AND RECTIFYING RACISM IN BIOETHICS

One initial hurdle in amending and rectifying racism inherent in bioethics is the level of distrust of the health care system held generally by minorities.[80] This distrust is not surprising and more than

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[76] *Id.* For a fuller view of TFR in America over the past 200 years *see generally* Aaron O'Neill, *Total Fertility Rate in the United States from 1800 to 2020,* STATISTA (Feb. 17, 2021), https://www.statista.com/statistics/1033027/fertility-rate-us-1800-2020/.

[77] *Total Fertility Rate by Ethnicity U.S. 2018, supra* note 75.

[78] *Id.* ("Native Hawaiian and Pacific Islander women had the highest fertility rate of any ethnicity in the United States in 2018, with about 2,106.5 births per 1,000 women.").

[79] As stated by one concerned about this issue, "[t]hose who are most vocal about abortion and abortion laws are my white brothers and sisters, and yet many of them don't care about the plight of the poor, the plight of the immigrant, the plight of African-Americans,' said the Rev. Dr. Luke Bobo, a minister from Kansas City, Mo., who is vehemently opposed to abortion. 'My argument here is, let's think about the entire life span of the person.'" Eligon, *supra* note 17. I would like to thank Lee Otis of the Federalist Society for challenging me to pursue these facts in the context of this thesis during my presentation of this material at the 2021 Annual Convention's Faculty Scholarship Panel.

[80] *See generally* Randall, *supra* note 53, at 191–92.

understandable given the tragic and sad history of medical experimentation endured by Black Americans throughout America's history.[81]

This distrust extends to bioethics research and scholarship. Leading bioethics scholars are asking "Who are the gatekeepers in bioethics? Does editorial bias or institutional racism exist in leading bioethics journals?"[82] When researchers analyzed the composition of the editorial boards of 14 leading bioethics journals by country, they found a clear bias against representation of members from minorities and developing countries.[83] "This severe underrepresentation of bioethics scholars from developing countries on editorial boards suggests that bioethics may be affected by institutional racism, raising significant questions about the ethics of bioethics in a global context."[84] This discovered reality was accompanied by a concern for greater racial fairness in bioethics scholarship. These same bioethics experts have also come to the conclusion that "[g]lobal health and ethics are far more effectively served by egalitarian partnerships between local and global experts working together to identify and reduce health inequities in culturally competent ways. Bioethics journals must open their pages to the whole of humanity."[85]

Furthermore, bioethicists themselves are starting to come to the conclusion that their field must consider and be more active against systemic racism.[86] "The problems of racism and racially motivated violence in predominantly African American communities in the United States are complex, multifactorial, and historically rooted. While these problems are also deeply morally troubling, bioethicists have not

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[81] *Id*. at 191 (citing fears about the AIDS epidemic of the 1980s and the experimentation on the Tuskegee airmen during WWII).

[82] Subrata Chattopadhyay & Catherine Myser & Raymond De Vries, *Bioethics and Its Gatekeepers: Does Institutional Racism Exist in Leading Bioethics Journals?* 10 BIOETHICAL INQUIRY 7 (2013).

[83] *Id*. (using an index called "Human Development Index" to assess national involvement in bioethics publications).

[84] *Id.*

[85] *Id*. at 8–9 (noting that some "members have redoubled influence by serving on the editorial and advisory boards of more than one bioethics journal, yet again multiplying the exclusion of would be developing country board members.").

[86] *See* Patrick R. Granzka, Jenny Dyck Bryan & Janet K. Shim, *My Bioethics Will Be Intersectional or It Will Be [Bleep],* 16 AM. J. BIOETHICS 27 (Mar. 16, 2016), https://www.tandfonline.com/doi/abs/10.1080/15265161.2016.1145289?journalCode=uajb20 ; KARLA F. HOLLOWAY, PRIVATE BODIES, PUBLIC TEXTS: RACE, GENDER, AND A CULTURAL BIOETHICS (Duke Univ. Press 2011); Laura Mamo and Jennifer Fishman, *Why Justice?: Introduction to the Special Issue on Entanglements of Science, Ethics, and Justice*, 38 SCIENCE, TECH., & HUM. VALUES 159 (2013); ALONDRA NELSON, SOCIAL LIFE OF DNA: RACE, REPARATIONS, AND RECONCILIATION AFTER THE GENOME (Beacon Press 2016); and DOROTHY E. ROBERTS, FATAL INVENTIONS: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (The New Press 2012).

contributed substantially to addressing them."[87] Indeed, bioethicists themselves are realizing that they not only need to be more proactive but they need to be part of the solution, stating that they "should contribute to addressing these problems."[88] Bioethicists have been "glaringly absent from ongoing social movements to combat racism."[89] Some bioethics scholars have called this racial problem "unbearable whiteness."[90] Bioethics needs and has the capacity and "obligation to engage in a robust and sustained anti-racist politics."[91]

This obligation not only addresses racism, but to do something about it must include confronting the data that reveals disparities facing minorities. To affect change, rather than engaging a one-dimensional approach, a different multi-faceted and multi-layered approach, indeed one of intersectionality is needed, as supported by leading bioethicists.[92] "Thus intersectionality compliments and extends the essential work of bioethics that aims to intervene and transform disparities in health status and effects of unequal access to medical science and technologies."[93] In this Article I have argued that reproductive health cannot and should not be excluded from this transformation simply because abortion is a political issue. Abortion's heightened political friction should increase its importance and make it all the more imperative to intersectionality scholars and bioethicists, especially considering the immense racial disparities revealed in the statistical evidence.

The confluence of abortion's political significance, the minority community's distrust of the health care system, and distrust of bioethics scholarly structures, reveals a knotted and interwoven fabric that is harmful to minorities.

> Polls show that most African-Americans support at least some form of legal access to abortion. More than 33 percent of African-Americans said they believed that abortion should be legal under any

[87] Marion Danis, Yolanda Wilson & Amina White, *Bioethicists Can and Should Contribute to Addressing Racism*, 16 AM. J. BIOETHICS 3 (2016) (noting that "concern for justice is one of the core commitments of bioethics.").

[88] *Id*.

[89] Granzka, *supra* note 86, citing Danis, *supra* note 87.

[90] Kahan Parsi, *The Unbearable Whiteness of Bioethics: Exhorting Bioethicists to Address Racism*, 16 AM. J. BIOETHICS 1 (2016), https://www.tandfonline.com/doi/full/10.1080/15265161.2016.1159076.

[91] Granzka, *supra* note 86 (agreeing wholeheartedly with this premise).

[92] *Id*. (arguing exactly as I have here, that the rich intersectional and intellectual history of Black feminism should be invoked and highly involved in this discussion); *see* discussion *supra*, Part II. B.

[93] *Id*.

> circumstance, and 47 percent said they favored allowing it under certain conditions, according to Gallup polls.
>
> Still, those who believe abortion should be legal, the polls suggest, want limits. More than a third of both black and white respondents said abortion should be legal "in only a few" circumstances. Black and white Americans opposed abortion at similar rates: Around 16 percent of African-Americans said it should be illegal in all circumstances, compared with 17 percent of white respondents.[94]

These complex views pull back the curtain on the African American community's desire for protections against racism in bioethics, specifically in abortion and reproductive health. Bioethicists, minorities, and legal scholars seem to agree that things as they are now are not as they could, or should, be.

The value of life for Black human beings, for Black women, and for Black children should be undervalued and unvalued no longer.[95] Racial value can and ought to be embedded into bioethics public policy, and it can and should be done by bioethicists, bioethics scholars, researchers, engineers, doctors, and all health specialists who deal with reproductive health. The facts on racial disparity in abortion cannot and should not go undiscussed, or unconfronted, any longer.

Abortion has been characterized as the most common form of death in America,[96] and that fact is all the more profound for minorities, as evidenced by the alarming effects on national mortality rates of minorities.[97] "How long will justice be crucified and truth bear it?"[98] When the intersection of race and class in abortion are considered together the "consequences are enormous, across the board, but the impact is

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[94] Eligon, *supra* note 17.

[95] In 1994 Professor Lee Sigelman wrote the important book BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED (Cambridge Univ. Press 1994).

[96] Danny David, *Study: Abortion is the Leading Cause of Death in America,* LIVEACTIONNEWS.ORG *(*Aug. 11, 2016, 01:44PM), https://www.liveaction.org/news/unc-study-demonstrates-effect-of-abortion-on-minorities-and-public-health/.

[97] O'Bannon, *supra* note 21; "Unlike most health studies or mortality statistics, authors James Studnicki, Sharon J. Mackinnon, and John W. Fisher chose to include deaths from abortion as human fatalities." David, *supra* note 96.

[98] Martin Luther King, Jr., *Our God is Marching on!*. THE MARTIN LUTHER KING, JR. RSCH. AND EDUC. INST. (March 25, 1965), https://kinginstitute.stanford.edu/our-god-marching.

absolutely devastating on Black and Hispanic communities. When one considers not only the lives, but the years lost, the loss is staggering."[99]

Fortification of Black families is needed to combat racism in bioethics. Bioethicists can offer meaningful contributions to the public discourse, to the needed further research, to teaching students and law students particularly of the need to combat systemic racism in this area.[100] Training medical professionals in guarding against this systemic racism at the time of abortion can be extremely helpful, as can "policy development, and academic scholarship in response to the alarming and persistent patterns of racism and implicit biases associated with it."[101] Amending and rectifying racism in bioethics is absolutely essential, and should go undone no longer.

CONCLUSION

Bioethics is critical to fairness and equality in American reproductive science, and it should be a cohesive, integrated, dynamic area of law that can address critical issues of racial disparity. An important discussion must ensue among legal scholars toward protection against systemic racial discrimination from the very beginnings of life.

This Article has presented some facts that can no longer be ignored, while attempting to draw together the issues presented in this data via three key questions. Those questions are focused on issues related to the intersectionality of race and class for certain persons. This Article has also offered some solutions on this intersectionality in the bioethics of race and class, and the duty and obligations of bioethicists and legal scholars to respond and to work to counteract and amend racism in bioethics, most particularly in reproductive health.

When considering the current cries against racial inequality, the debate over racism in abortion is a critically important one. Combined with the status and class of women and children in bioethics, the intersectionality of the two become extremely consequential for not only the present, but for future generations.

A focused and targeted outcome-based approach by bioethicists that protects against systemic racial discrimination is possible, and right, and good, and ought to be pursued. Based on the shared common interest in protecting against racial discrimination, the issues surrounding race selective abortion as potentially discriminatory are pivotal legal concerns.

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[99] O'Bannon, *supra* note 21 (examining and analyzing the multidimensional areas of loss because of the loss of these lives in the minority community).

[100] Danis, *supra* note 87 (offering details on these strategies).

[101] *Id.* (noting also that to "make any useful contribution, bioethicists will require preparation and should expect to play a significant role through collaborative action with others.").

Bioethicists along with American law and public policy makers must move forward against racism in bioethics, with close particular attention in reproductive health.

A CASE FOR ADDITIONAL CRIMES TRIABLE BEFORE THE INTERNATIONAL CRIMINAL COURT: THE AFRICAN CONTEXT

Daniel R. Ruhweza[*] *and Kitenda Jesse Stephen*[†]

ABSTRACT

This article shows the prevailing weakness of the International Criminal Court's (ICC) failure to try crimes committed by Multi-National Corporations (MNCs). The article examines these crimes, giving their inception, the main actors as well as the effects that have been suffered over the years. It shows reasons as to why these crimes should be considered as part of ICC jurisdiction. This article also justifies why the ICC ought to handle these cases, despite having other alternatives that can be considered. The article outlines various case scenarios in the African context together with recommendations and the way forward. In conclusion, the article asserts that Multi-National Corporations should be held liable by the ICC for their crimes against humanity and the environment in general.

INTRODUCTION

The idea of an international court that would adjudicate over the crimes against humanity was mooted after the Yugoslavia and Rwanda massacres.[1] This led to the formation of the ICC in 1998 and later its commencement of operations in 2002.[2] It was also an indication of

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[1] James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. Rev. 1, 2–3 (2009).

[2] Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (June 25, 2020), https://www.cfr.org/backgrounder/role-international-criminal-court.

worldwide efforts to promote respect for human dignity and rule of law. African countries were enthusiastic as this would relieve them of the political and economic burden of prosecuting international crimes as well as complimenting national courts.[3] From the onset, environmental and economic crimes were not considered.[4] Many human rights abuses are predominantly carried on by MNCs that have their main offices in other countries.[5] Unfortunately, these and the environmental crimes go unpunished. These include the dumping of poisonous waste, land grabbing, illegal fishing, illegal trading in wildlife, and corruption of political leaders, tax evasion and many more.[6] Human rights observers like Human Rights Watch and Oxfam have long criticized corporations operating in war torn countries for maximizing profits without respect for human rights.[7] Funding rebels, environmental crimes, and corruption to attain favors among others are some of the crimes that these organizations commit.[8]

The criminal activities by MNCs in Africa should be addressed. The preamble to the Rome Statute emphasizes that there is a determination to create a permanent ICC.[9] This is however not seen as the perpetrators

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[3] Hlawulani Mkhabela, *Africa and the ICC Going Forward*, IFRI, 2 (Jan. 17, 2017), https://www.ifri.org/en/publications/editoriaux-de-lifri/lafrique-questions/africa-and-icc-going-forward.

[4] *Id.* at 3.

[5] Miguel Juan Taboada Calatayud, Jesus Campo Candelas, & Patricia Perez Fernandez, *The Accountability of Multinational Corporations for Human Rights' Violations*, 64/65 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL, 171, 172 (Spain).

[6] Collins Odote, *Environmental Crime In Africa: Issues, Challenges and The Role of Prosecutors* (March 4, 2014), https://www.iap-association.org/getattachment/Conferences/Regional-Conferences/Conference-Documentation-Zambia/3AIORC_Zambia_P1_Collins_Odote.pdf.aspx [hereinafter Collins]; *The case against land grabbing: How corporations and investors are pushing people off their land and wreaking havoc on the environment*, FRIENDS OF THE EARTH, https://foe.org/wp-content/uploads/2017/legacy/Issue_Brief_3_-_The_case_against_land_grabbing.pdf (last visited Feb. 19, 2021) *Corruption: Multinationals in developing countries – who's accountable?*, GLOBAL GOVERNMENT FORUM((July 17, 2017), https://www.globalgovernmentforum.com/corruption-multinationals-in-developing-countries-whos-accountable/.

[7] Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUMAN RIGHTS BRIEF 1 (2004).

[8] Phumlani Majavu, *The Role of Natural Resources in Civil Wars*, GLOBAL POLICY FORUM (May 3, 2010), https://archive.globalpolicy.org/the-dark-side-of-natural-resources-st/other-articlesanalysis-and-general-debate/49048-the-role-of-natural-resources-in-civil-wars.html; Irene di Valvasone, *Holding multinational corporations accountable for the commission of international environmental crime*, CENTRE FOR AFRICAN JUSTICE, PEACE AND HUMAN RIGHTS, http://centreforafricanjustice.org/holding-multinational-corporations-accountable-for-the-commission-of-international-environmental-crime/; M*ultinational Corporations, Governance Deficits, and Corruption*, GDRC, https://www.gdrc.org/u-gov/doc-business_gg.html (last visited March 10, 2021).

[9] Rome Statute of the International Criminal Court, Preamble (July 12, 1999).

of these crimes are more likely to remain behind the scenes, issuing secret orders or supplying the means to commit the crime.[10] Environmental and economic crimes must be taken to be some of the most serious crimes given their direct impact on peoples' livelihoods. These environmental and economic crimes have similar effects on the people as compared to the crimes under the jurisdiction of the ICC.[11] This is because they are crimes of a serious nature which have a widespread effect on many people.[12] The gravity of these crimes therefore calls for ICC intervention as it will add the much-needed international character to such crimes. MNCs provide employment to Africans, contribute to GDP through tax and are very active in social charitable activities.[13] However, there needs to be a balance between promoting economic growth and respect for human rights and the law by these companies.

I. HISTORY OF MULTINATIONAL CORPORATIONS

The earliest historical origins of Multi-National Corporations (MNCs) "can be traced to the major colonizing and imperialist ventures from Western Europe, notably England and Holland."[14] The first MNCs were founded to "undertake colonial expeditions at the behest of their European monarchical patrons."[15] A majority of European colonies were administered by chartered MNCs and examples of such corporations include the British East India Company, Swedish Africa Company, German East Africa Company and Imperial British East Africa Company

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[10] Graff, *supra* note 7, at 3.

[11] *See generally* Alessandra Mistura, *Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 COLUMBIA J. OF ENV'T L. 182 (2019).

[12] *Id.*

[13] Tejvan Pettinger, *Multinational Corporations in Developing Countries*, ECONOMICS HELP (March 17, 2019), https://www.economicshelp.org/blog/1413/development/multinational-corporations-in-developing-countries/; Koen De Backer, Sébastien Miroudot, & Davide Rigo, *Multinational enterprises in the global economy: Heavily discussed, hardly measured*, VOX EU (Sept. 25, 2019), https://voxeu.org/article/multinational-enterprises-global-economy; Lok Yiu Chan, *Corporate Responsibility of Multinational Corporations*, UW TACOMA DIGIT. COMMONS, 7 (2014).

[14] Moiseenko Ksenia, Ovseets Maria, and Kostikova Olga, *Multinational Corporations* PLEKHANOV RUSS. UNIV. OF ECON. (2016).

[15] *Multinational Background Information*, BDO, https://www.bdo-ea.com/en-gb/microsites/sample-bdo-investment-site/multinationals/multinational-background-information, (last visited March 10, 2021) [hereinafter BDO].

among others.[16] They exploited colonial resources and labor, investing the resultant profits in their home countries.[17] All this was done without any sort of legal controls on these companies and therefore gross abuse of human rights, plundering of resources and so on took place.[18]

In 1906, there were two or three leading firms with assets of up to USD500 million, however, by 1971 there were 333 of such companies, holding billions of dollars' worth of assets.[19] All Africa benefited was suffering through environmental crimes and corrupting African leaders who never fought for the African cause.[20] In all this, these companies have been involved in a lot of environmental and economic crimes that require immediate attention by the legal tribunals of this world.[21] Examples include illegal trade in wildlife, corruption, illegal trade in ozone-depleting substances, and the dumping and illegal transport of various kinds of hazardous waste illegal.[22] Other crimes include unregulated and unreported fishing, as well as illegal logging and trading in timber.[23] All these crimes directly affect the economy of the continent, as well as the gross abuse of human rights involved when committing the crimes.[24] There is a need to bring such crimes and MNCs under the jurisdiction of the ICC.

These companies participate in gross abuse of human rights.[25] Some of them go as far as offering African leaders various bribes in form of benefits.[26] These require immediate attention by international tribunals.[27] In the same context, others compare current activities of the

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[16] BDO, *supra* note 15; Buluda Itandala, *African Response to German Colonialism in East Africa: The Case of Usukuma, 1890-1918*, 20 UFAHAMU: A J. OF AFR. STUD. 3, 3–4 (1992).

[17] BDO, *supra* note 15.

[18] Kamari Maxine Clarke, *Treat Greed in Africa as a War Crime*, N.Y. TIMES (Jan. 29, 2013), https://www.nytimes.com/2013/01/30/opinion/treat-greed-in-africa-as-a-war-crime.html [hereinafter Clarke].

[19] *Special Political and Decolonization Committee*, MUNUC 33 ONLINE 40, https://munuc.org/wp-content/uploads/2020/11/SPECPOL_FINAL_Online.pdf (last visited March 10, 2021).

[20] *Multinational corporations and corrupt African leadership*, MMEGIONLINE (Jan. 22, 2016), https://www.mmegi.bw/index.php?aid=57161&dir=2016/january/22.

[21] Clarke, *supra* note 18.

[22] Collins, *supra* note 6.

[23] *Id.*

[24] Prasadi Wijesinghe, *Human Rights Violations by Multinational Corporations: Nestle as the culprit* 3—9, (March 8, 2018), https://ssrn.com/abstract=3136321 [hereinafter Wijesinghe].

[25] *Id.* at 3.

[26] *Foreign Firms Linked to Bribery, Graft Claims Hurting Africa's Image*, THE EAST AFRICAN (March 14, 2015), https://www.theeastafrican.co.ke/tea/news/east-africa/foreign-firms-linked-to-bribery-graft-claims-hurting-africa-s-image--1333674.

[27] Clarke, *supra* note 18.

MNCs to neo-colonialism[28] and see it as an indication of lack of independence in Africa.[29] Multinational Corporations have for long used the weaknesses in the legal regime to commit these crimes.[30] The absence of corporate personality in international law means that these companies cannot be checked legally on their activities by any authority or tribunal.[31] They therefore use this gap to commit economic and environmental crimes and this brings untold consequences to Africans as well as the environment.[32] There is a need to bring the history to an end and start a new chapter where these MNCs' activities are checked and their crimes brought under the jurisdiction of the International Criminal Court.

II. CURRENT STATUS OF MULTINATIONAL CORPORATIONS

The number of MNCs operating in Africa has increased tremendously.[33] MNCs from countries like China, India, United States, Brazil and Europe have long known about this potential and have made significant investments across Africa.[34] Some of them are attracted by African leaders to "invest" in Africa and with this, MNCs' activities have hardly found any legal controls.[35] This is because they come with a lot of "favor" from the various host governments.

Governments of developing countries have been subsequently pushed into unfavorable agreements and citizens do not have economic rights.[36] This is because MNCs and investors turnover national sovereignty to themselves, enjoying healthy returns on their investments at the expense of the citizens in developing countries.[37] At a summit in 2013, African

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[28] Abayomi Azikiwe, *Burkinabe Masses Rise Up Against Neo-colonial Rule*, PAMBAZUKA NEWS (Nov. 5, 2014), https://www.pambazuka.org/global-south/burkinabe-masses-rise-against-neo-colonial-rule.

[29] Oseni Taiwo Afisi, *Neocolonialism*, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/neocolon/ (last visited March 10, 2021).

[30] Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 227 (2008).

[31] *Id.* at 229.

[32] Clarke, *supra* note 18.

[33] *5 Multinational Corporations Making Significant Investments in Africa*, DEMAND AFRICA, https://www.demandafrica.com/travel/culture/5-multinational-corporations-making-significant-investments-in-africa/ (last visited Feb. 19, 2021).

[34] *Id.*

[35] *See CEO Investment Summit and Investment & Business Leader Awards 2015: Growing Africa's Businesses and Financing the Continent's Development*, OSAA (Sept. 24, 2015), https://www.un.org/en/africa/osaa/events/2015/aisummit20150924.shtml.

[36] *Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries*, AFRICA ON THE BLOG, https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/ (last visited Feb. 19, 2021).

[37] *Id.*

Union leaders suggested the expansion of the African Court on Human and People's Rights' criminal jurisdiction, in order to include liability for corporations which illicit exploitation of natural resources and the trafficking of hazardous waste.[38] However, it is hard to fathom Africans, especially leaders, prosecuting or allowing the prosecution of MNCs. This loyalty exists because these companies majorly contribute to the African economy and any plans or ideas to restrict these activities to be met with serious political opposition.[39]

In 2011, the United Nations Guiding Principles on Business and Human Rights were unanimously passed.[40] They seek to provide an authoritative global standard for preventing and addressing the risk of adverse Human Rights impacts linked to business activity.[41] Such a development shows the international recognition of the need to control activities of MNCs, especially in the Human Rights perspective. However, states are at times unable to create or enforce such regulations.[42] Further, these UN guiding principles are soft law and therefore not binding because corporations are creatures of national law.[43] These companies also employ a huge number of people who, irrespective of poor working conditions see this as survival.[44] For example in South Africa, fifteen international companies have been reported to employ over one million people and the situation is not different in other African countries.[45] According to the 2010 Oxfam report, Africa was cheated out of US $11

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[38] Clarke, *supra* note 18.

[39] Chloé Maurel, *Will there be a UN treaty to punish the abuses committed by multinationals?* EQUAL TIMES (July 26, 2018), https://www.equaltimes.org/will-there-be-a-un-treaty-to#.YEb4XWhKiM8; Hans Wetzels, *Countries propose a treaty to end corporate impunity,* AFRICA RENEWAL (April 9, 2019), https://www.un.org/africarenewal/magazine/april-2019-july-2019/countries-propose-treaty-end-corporate-impunity.

[40] *The UN Guiding Principles on Business and Human Rights: An Introduction*, THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Feb. 18, 2021).

[41] *Id.*

[42] Flor Gonzalez Correa, *How Multinational Companies Keep Avoiding the Threat of Regulation*, THE CONVERSATION (March 17, 2015 11:12 AM), https://theconversation.com/how-multinational-companies-keep-avoiding-the-threat-of-regulation-38795.

[43] Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L. J. 591, 592 (2016).

[44] Laura Counts, *Do multinational corporations exploit foreign workers? Q&A with David Levine*, BERKELEYHAAS (March 11, 2020), https://newsroom.haas.berkeley.edu/do-multinational-corporations-exploit-foreign-workers/.

[45] NIKKICHALFORDWEALTH, *These 15 SA companies employ 1 million people*, CHALFORD WEALTH MANAGEMENT (June 9, 2015), https://www.chalfordwealth.co.za/these-15-sa-companies-employ-1-million-people/.

billion through reduction of tax bills and other tricks by MNCs.[46] These companies leave the continent grappling with health complications, political problems and economic instability.[47] They continue to make huge profits with little regard to human rights and the dignity of Africans.[48] There is a grave need for accountability.

III. THE CASE FOR CRIMINALIZING MNC ACTIVITIES BEFORE THE ICC

MNCs are one of the biggest perpetrators of environmental crimes in Africa but there is no law that brings them to book.[49] Furthermore, corporations do not only directly commit environmental or economic crimes but they can also facilitate other crimes like terrorism and dealing in contraband.[50] A case is made on why MNCs' activities in Africa should be subject to legal checks since it is the Africa continent that suffers from the effects.[51] On the other hand, these companies' home countries never experience such effects.[52]

Environmental crimes are simply crimes against the environment for example pollution, deforestation, swamp reclamation, discharge of poisonous fumes, dumping of wastes and many more.[53] These crimes have been credited with causing some of the most dangerous health risks against humans.[54] The health complications lead to deaths, disabilities, and in most cases, the African governments incurring a lot of expenses

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[46] Multinational Companies Cheat Africa Out of Billions of Dollar, OXFAM INT'L (JUNE 1, 2015), https://www.oxfam.org/fr/node/10394.

[47] Kendyl Salcito et al., *Multinational corporations and infectious disease: Embracing human rights management techniques*, PUBMED.GOV. (Nov. 3, 2014), https://pubmed.ncbi.nlm.nih.gov/25671119/.

[48] Peter T. Muchlinski, *Human Rights and Multinationals: Is There a Problem?* 77 INT'L AFFAIRS 31, 35, 40 (2001).

[49] O.E. Udofia, *Imperialism in Africa: A Case of Multinational Corporations*, 14 J J. OF BLACK STUD. 353, 367 (1984); *see generally* Hakeem O. Yusuf & Kamil Omoteso, *Combating environmental irresponsibility of transnational corporations in Africa: an empirical analysis*, 21 LOC. EN'T 1371–86 (2016).

[50] Franziska Oehm, *Thinking globally, acting globally*, VÖLKERRECHTSBLOG (May 31, 2016), https://voelkerrechtsblog.org/de/thinking-globally-acting-globally-ii/.

[51] *Id*.

[52] Irwin Arieff, *If Africa is so Rich, Why is it so Poor?* PASS BLUE INDEP. COVERAGE OF THE UN (May 18, 2015), https://www.passblue.com/2015/05/18/if-africa-is-so-rich-why-is-it-so-poor/.

[53] Carole Gibbs & Rachel Boratto, *Environmental Crime*, OXFORD RES. ENCYCLOPEDIAS (March 29, 2017), https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-269.

[54] *7 million premature deaths linked to air pollution*, WORLD HEALTH ORGANIZATION [WHO] (March 25, 2014), https://www.who.int/mediacentre/news/releases/2014/air-pollution/en/.

trying to combat such occurrences.[55] In 2010, the South African government handled a case where health care waste was dumped all over Free State.[56] According to Amnesty International, Shell and ENI were responsible for 550 Oil spills in the Niger Delta in 2014.[57] "Such crimes against environment and nature are frequently linked and part of the same criminal enterprise(s) that are already codified as 'war crimes' or 'crimes against humanity', as incorporated by the Rome Statute and the ICC."[58] MNCs are a major cause of all this and therefore setting up mechanisms to prosecute them for their role in environmental crimes will help in establishing a safer environment by controlling such activities.[59]

For instance, there is new evidence suggesting that "environmental crime including pervasive exploitation and illegal trade in natural resources is helping to push some people out of sub-Saharan Africa."[60] Prosecuting MNCs for environmental crimes will therefore ensure that the health risks and effects associated with these activities are dealt with. It will also enable the people to freely enjoy their right to livelihood.

Reports have showed that many of these MNCs get involved in gross human rights abuses.[61] Amnesty international reported that corporations do this by exploiting weak and poorly enforced domestic regulations on people and communities.[62] Human rights watch also reported that MNCs carry out many activities that devastate vulnerable communities.[63] These are inflicted directly on Africans for example forced labor with little or no

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[55] *Niagara's state oil company and partners spent $360 million on Delta cleanup: NNPC*, REUTERS (February 17, 2020), https://www.reuters.com/article/us-nigeria-oil-environment-idUSKBN20B1YI.

[56] Compass Waste Services (PTY) LTD v. The Mec: Department of Health of the Free State Province, Case No: 4411/2011, 4–7 (S. Afr.), http://www.saflii.org/cgibin/disp.pl?file=za/cases/ZAFSHC/2012/19.html&query=%20health%20care%20waste.

[57] *Oil spills keep devastating Niger Delta*, DW, https://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732 (last visited Feb. 6, 2021).

[58] Muhamed Sacirbey, *Should Crimes Against the Environment and Animals DeserveI International Prosecution?* HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/crimes-against-environment-animals-deserve-international-prosecution_b_8171798.

[59] Oehm, *supra* note 50, at 10.

[60] Wachira Kigotho, *Environmental Crimes Change Face of Sub-Saharan Africa*, BLOOMBERG L. (Oct. 6, 2015), https://www.bloomberglaw.com/product/blaw/document/NVRQ1X3H0JK0?criteria_id=a8817d1f870312ea42d6840cf8811b51.

[61] *Corporations*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/corporate-accountability/, (last visited Feb. 6, 2021).

[62] *Id.*

[63] *Business*, HUM. RTS. WATCH, https://backend.hrw.org/topic/business (last visited March 13, 2021).

wage, land grabbing, and torture to mention but a few.[64] These acts constitute a direct abuse of international instruments like the International Convention on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).[65] In Bodo Community v Royal Dutch Shell, the court addressed this issue.[66] "Oil poured from faults in the Trans-Niger Pipeline for weeks, covering the area in a thick slick of oil through spilling as well as the Niger Delta in 2008 and 2009. The 15000 Plaintiffs asked for compensation for losses suffered to their health, livelihoods and land as well as a cleanup for the oil pollution. In 2015, Shell accepted responsibility for the spill and agreed to an out of court settlement of Fifty five million pounds. "[67] In *Presbyterian Church of Sudan v. U.S.C.A*, Talisman Energy faced legal action for facilitating crimes against humanity in South Sudan in 1998.[68] This led to unprecedented loss of property and health complications for the people in these areas as some were forced to leave their land and property get destroyed.[69] These are all in contravention of various international and regional laws and guidelines.[70]

Unfortunately, Multinational Corporations always survive because they have no serious laws that bind them, only soft laws.[71] This exposes the people of Africa to various abuses by these companies.[72] Since there is no restriction, most of the money they earn is spent in trying to heal from these human rights abuses and not economic development.[73] It has been reported that one of the oil giants Exxon began a major effort to

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[64] *Time to Recharge*, AMNESTY INT'L, 18 (November 2017), https://www.amnesty.org/en/documents/afr62/7395/2017/en/.

[65] G.A. Res. 2200A (XXI), art. VII, (Dec. 16, 1966), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. XXIV, art. XXV (Dec. 10, 1948).

[66] The Bodo Community v. The Shell Petroleum Development Company of Nigeria Ltd. [2012] QB Claim 1 (Eng.).

[67] *Id.*

[68] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

[69] *Sudan: Talisman Energy Must do More to Protect Human Rights*, AMNESTY INT'L (May 1, 2001, 12:00 AM), https://www.amnesty.org.uk/press-releases/sudan-talisman-energy-must-do-more-protect-human-rights.

[70] *See* G.A. Res., *supra* note 65, art. 6.

[71] *Kiobel v. Royal Dutch Petroleum Co.* 621 F.3d 111, 141, 149 (2d Cir. 2010).

[72] Karen McVeigh, *World is Plundering Africa's Wealth of 'Billions of Dollars a Year'*, THE GUARDIAN (May 24, 2017, 2:00), https://www.theguardian.com/global-development/2017/may/24/world-is-plundering-africa-wealth-billions-of-dollars-a-year.

[73] Mark Bou Mansour, *$427bn Lost to Tax Havens Every Year: Landmark Study Reveals Countries' Losses and Worst Offenders*, TAX JUSTICE NETWORK (NOV. 20, 2020), https://www.taxjustice.net/2020/11/20/427bn-lost-to-tax-havens-every-year-landmark-study-reveals-countries-losses-and-worst-offenders/.

manufacture doubt about the reality of global warming.[74] It lobbied to block federal and international action to control greenhouse gas emissions and helped erect a vast edifice of misinformation on climate change that stands to this day.[75] Such an atmosphere is a clear explanation as to why there is need to establish mechanisms of control and supervision over these companies' activities, given their influential power and economic might. Environmental crimes are a reality in Africa and the attention of the law is needed so that such effects are curbed. Multinational Corporations work in an environment where they have no regulations, laws and/or bodies responsible for supervising their work and ensuring that they follow the law.[76] Multinational and transnational companies do not exist as an entity defined or recognized by law.[77] They are made up of complex structures of individual companies with an enormous variety of inter-relationships.[78] This is mostly attributable to the fact that they operate in many parts of the world and therefore matters of locus, jurisdiction and liability may be hard to ascertain.[79]

It was reported in 2015 that Africa is losing more than $50bn (£33bn) every year in schemes aimed at tax avoidance, impeding development projects and denying poor people access to crucial services.[80] This explains why most of these corporations engage in impunity. MNCs present specific regulatory problems to ensure socially responsible conduct, particularly when they operate in developing countries where the regulatory mechanisms are relatively weaker.[81] Such weaknesses are attributable to forces like corruption, poverty, absence of political will among other reasons all of which somewhat affect any sort of enforcement against MNCs.[82] There should be a legal regime, with prosecution and punishment, for these multinationals for their role in environmental and economic crimes.

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[74] Jenny White, *2016 Top Ten Corporate Criminals*, GLOBAL EXCHANGE (2018), https://globalexchange.org/campaigns/corporatecriminals2016/#Exxon.

[75] *Id.*

[76] Amao O Olufemi, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 J. AFR. L. 89, 96 no.1 (2008).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Mark Anderson, *Africa Losing Billions from Fraud and Tax Avoidance*, THE GUARDIAN (Feb. 2, 2015, 10:43), https://www.theguardian.com/global-development/2015/feb/02/africa-tax-avoidance-money-laundering-illicit-financial-flows.

[81] Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad–Cameroon Pipeline Project*, 16 AFR. J. INT'L & COMP. L. 83 (2008).

[82] *See id.* at 83, 86, 91.

Multinationals have been cited as chief sponsors of callous corruption endeavors by many African leaders.[83] They promise such leaders favors and benefits from projects, with conditions.[84] Such conditions entail various activities like land grabbing, freedom to dump waste, enacting laws favoring the MNCs activities, at the expense of indigenous people and many others.[85] It was observed that some MNCs in Africa such as Halliburton in Nigeria, Mabey & Johnson in countries such as Ghana, Madagascar, Angola, Mozambique and South Africa among others have been involved in various corrupt practices in collaboration with corrupt government officials.[86] These activities lead to deficits on the national GDP and service provision of government is curtailed.[87] It has been alleged that Western countries led by the US, Britain, France and lately by China, continue to sell weapons to horrible dictators to crash democratic forces throughout the continent using these companies.[88] The additional military power adds political power in the African setting and leaders can therefore use their positions to allow illicit activities by these companies, with the least concern for fellow Africans.[89] However, the fact that environmental and economic crimes are not under the ambit of international courts yet the local mechanisms are full of corruption means such corporations are answerable to no one.[90] This shows the urgent need to prosecute these companies.

MNCs have been documented to plunder African resources.[91] Foreign multinational and foreign owned corporations have been scrambling for Africa's resources.[92] As a result of bad political leadership that is mainly interested in short-term gains, Africa's resources are being used for individual enrichment and preservation of political elitism.[93] This shows a serious problem as the resource misuse involves the African leaders who

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[83] Richard E. Brissel & Michael S. Radu, *Africa in the Post-Decolonization Era*, 29 AFR. STUD. REV. 125 vol. 29, no. 4 (1986).

[84] Mark Thomas, *Minerals in Africa: A Curse or an Excuse for Plunder*, USPIKED (Aug. 2015), https://www.uspiked.com/editorial/2015/08/21/minerals-in-africa-a-curse-or-an-excuse-for-plunder/.

[85] *See id.*

[86] Zekeri Momoh, *Multinational Corporations (MNCs) and Corruption in Africa*, 5 J. MGMT. AND SOC. SCI. 80 no.2 (2016).

[87] Solly Rakgomo, *Multinational Corporations and Corrupt African Leadership*, MMEGIONLINE (Jan. 22, 2016), https://www.mmegi.bw/index.php?aid=57161&dir=2016/january/22.

[88] *Id.*

[89] *Id.*

[90] Franziska Oehm, *Thinking Globally, Acting Globally*, VOLKERRECHTSBLOG (May 31, 2016), https://intr2dok.vifa-recht.de/receive/mir_mods_00003053.

[91] Christopher Oyier, *Multinational Corporations and Natural Resources Exploitation in Africa: Challenges and Prospects*, 1(2) J. Conflict Mgmt. & Sustainable Dev. 69, 74 (2017).

[92] Thomas, *supra* note 84.

[93] *Id.*

are in a better position to fight this.[94] They have also been showed as eminent perpetrators of crimes against the environment and human resources.[95] Richly endowed with natural resources, African states often need the investment of multinational corporations in order to harness these resources.[96] Yet, many African states lack the capacity to regulate multinational corporations effectively.[97] Unsurprisingly, therefore, multinational corporations are able to make significant profits with little regard for or even complicity in the violation of human rights and environmental laws.[98]

Prosecuting Multinationals will not only help fight the prevalence of environmental crimes in Africa but also conserve the environment and protect African resources.[99] It is an internationally recognized right that all people are entitled to live in a clean and healthy environment which entails that a person will only remain healthy if he is living in the healthy environment and his surroundings are clean.[100] We need fresh air to breathe; fresh water to drink, shelter to live, etc.[101] All this is becoming mythical in Africa due to MNCs' activities.[102] There is also need for African states to start benefiting directly from their resources.[103] Introducing a mechanism of prosecuting MNCs in the frame of the ICC will ensure that the living standards of Africans improve.

IV. LESSONS FROM OTHER LEGAL REGIMES

The ICC would be best suited to try Multinationals and have jurisdiction for economic and environmental crimes.[104] The ICC was established in 1998 to ensure that crimes against humanity and mass

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[94] *See* Zekeri, *supra* note 86 at 92, 93.

[95] *Id.* at 92.

[96] Isaac Terungwa Terwase, Cyril Iligh, Felix C. Asogwa & Clifford Terhide Gbasha, *Conflict, War, and Peace Building in Africa as Emerging Economy* 1 CCU J. HUMAN. 1, 3, 10 no. 1 (2019).

[97] *See Corporations*, *supra* note 61.

[98] *See id.*

[99] Matiangai V.S. Sirleaf, *Prosecuting Dirty Dumping in Africa*, *in* 20 THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT 553, 554–55 (Cambridge U. Press 2019).

[100] *Right Clean Environment,* L. Tchr. (July 3 2019), https://www.lawteacher.net/free-law-essays/human-rights/right-to-clean-environment.php, *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

[101] *Id.*

[102] Oyier, *supra* note 91, at 78.

[103] Alex Blair, *Africa's Natural Resources: 3 Things Governments Need to Get Right*, OXFAM, https://politicsofpoverty.oxfamamerica.org/africas-natural-resources-3-things-governments-need-to-get-right/ (last visited Mar. 15, 2021).

[104] Sacirbey, *supra* note 58.

atrocities do not occur with impunity.[105] The court has existed for 19 years and its mandate has a criminal element about it.[106] However, it is important to appreciate the established mechanisms that have been employed by other regions to make MNCs accountable. Lessons can be drawn out of the discussion on how to go about the aspect of making these companies accountable. New alternatives may also be considered, so that the ICC acts as the last resort.

A. The Alien Tort Claims Act (ATCA) of the United States of America

This Act can also be referred to as the Alien Tort Statute.[107] This was an act passed in 1789 and grants jurisdiction to United States Federal Courts over any civil action by an alien for tort.[108] The ATCA allows foreigners to sue foreign companies and individuals who are not American citizens but are in America for any violations of the law.[109] This Act/Statute has over the years been used to bring MNCs before courts for the offences they commit.[110]

In *Doe v. Unocal and Total*, the defendants were charged with abuses of human rights including forced labor, rape, torture and murder committed during the construction of the Yadana pipeline in Myanmar.[111] The court, in finding for the plaintiffs held that the Alien Tort Statute empowered American courts to handle matters that involve non-citizens.[112] This case represents various criminal activities that MNCs are involved in today like forced labor, forced relocation and torture.[113] The defendants were found liable and ordered to pay compensation.[114] This is a clear example of a corporation that is held accountable for its human rights abuses.

In *Wiwa v. Royal Dutch Petroleum Company*, the United States Court of Appeal stated that the interest of the US in pursuing claims committed

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[105] *Understanding the International Criminal Court*, ICC, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf (last visited Mar. 6, 2021).

[106] *Id.*

[107] STEPHEN P. MULLIGAN, CONG. RESEARCH CTR., THE ALIEN TORT STATUTE (ATS): A PRIMER 1, n.2 (2018).

[108] *Id.* at 1.

[109] John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. CHAMBER COMM. (Oct. 8, 2002, 8:00 PM), https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation.

[110] *See id.*

[111] Doe v. Unocal Corp., 395 F.3d 932, 936–37 (9th Cir. 2002).

[112] *Id.* at 946, 976–77 (citing Kadic v. Karadzic, 70 F.3d 232, 234–44 (2d Cir. 1995).

[113] *Id.* at 942.

[114] *Id.* at 962–63.

outside America was vested under the ATCA.[115] This Act therefore provides an easier route for any individual who has a claim against any MNC to sue under American jurisdiction.[116] African countries can therefore establish written laws that can be used to make MNCs accountable.[117] Such laws also empower courts to handle such matters.[118] The Rome Statute should therefore be amended to add these crimes to the jurisdiction of the ICC so that the MNCs are subject to the court.[119]

B. Multilateral Environmental Agreements

A Multilateral Environmental Agreement (MEA) is a legally binding agreement between three or more states relating to the environment.[120] These agreements set out the criteria to be followed by any corporation that is going to use the environment.[121] "MEAs are important in raising environmental standards that are applicable to MNCs, which are otherwise too dependent on national laws."[122] These agreements are more specific and practical than national laws since they deal with the management of the environment.[123] Failure to comply may lead to penalties as set out in the agreement. MEAs can therefore be used to control MNCs since they are cheaper, and the rigors of litigation may be avoided in most cases.[124] Such agreements can be a starting point by Africans under the African Union to fight impunity by MNCs. Examples include the United Nations convention on climate change which calls on

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[115] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 101, 105 (2d Cir. 2000).

[116] *See Plain Responses to Attacks on the Alien Tort Claims Act (ATCA),* Ctr. for Const. Rts., https://ccrjustice.org/sites/default/files/assets/Wiwa_ATCAQ&A.pdf (last visited on Feb. 8, 2021).

[117] See Aaron Xavier Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 YALE HUM. RTS. & DEV. L. J. 241, 244 (2002).

[118] *See id.* at 2–4 (ATCA expressly gives the courts the jurisdiction to handle these cases.).

[119] *See id.*

[120] *Multilateral Environmental Agreements*, MINISTRY FOR ENV'T, https://www.mfe.govt.nz/more/international-environmental-agreements/multilateral-environmental-agreements (last visited Feb. 8, 2021).

[121] Natalia Escobar-Pemberthy & Maria Ivanova, *Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index*, 12 SUSTAINABILITY 1, 3 (2020).

[122] Vidyaranya Chakravarthy Namballa, *Global Environmental Liability: Multinational Corporations under Scrutiny*, 1(2) Exchs.: WARWICH RSCH J. 181, 184 (2014).

[123] *See id.* at 186 (citing David M. Ong, *The Contribution of State–Multinational Corporation 'Transnational' Investment Agreements to International Environmental Law*, 17 Y.B. ON INT'L ENV'T L. 168, 168, 172, 177 (2007)).

[124] *See* Namballa, *supra* note 122, at 183.

signatories to desist climatic crimes and activities that affect the climate.[125]

There is the Stockholm convention on persistent organic pollutants, which bans the use of toxic chemicals that are dangerous to humans.[126] There is the London dumping convention, which controls dumping of toxic wastes in seas to protect marine life.[127] All these have helped to protect the environment and can offer reference for African countries wishing to establish controls on MNCs.[128] This arrangement may also help to unburden the ICC if economic and environmental crimes are added to the Rome Statute.

C. Transnational Investment Agreements (TIAs)

These are agreements between MNCs and host states that layout obligations for both parties when the particular MNC is commencing business in the specific state.[129] Such agreements are therefore used to impose obligations on MNCs in their activities that help to protect the interests of the host states.[130] Some of the examples are the Baku–Tbilisi–Ceyhan (BTC) Hydrocarbon Pipeline Project, which involves three countries, Azerbaijan, Georgia, and Turkey.[131] The other is the Chad–Cameroon Pipeline Project.[132] These agreements can therefore help countries to protect their masses against any human rights abuses by these companies.[133] However, Vidrayanya, in using the Chad example, argues that these agreements give third world home countries low bargaining power at times because they need the investments more.[134]It

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[125] *See What is the United Nations Framework Convention on Climate Change?*, UNFCCC, https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change (last visited Feb. 21, 2021).

[126] *Stockholm Convention on Persistent Organic Pollutants*, U.S. DEP'T STATE: OFF. ENV'T QUALITY, https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/stockholm-convention-on-persistent-organic-pollutants/ (last visited Feb. 21, 2021).

[127] *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, INT'L MAR. ORG., https://www.imo.org/en/OurWork/Environment/Pages/London-Convention-Protocol.aspx (last visited Feb. 21, 2021).

[128] *See What is the United Nations Framework Convention on Climate Change?, supra* note 125; *see also Stockholm Convention on Persistent Organic Pollutants, supra* note 126; *see also id.*

[129] David M. Ong, *The Contribution of State–Multinational Corporation 'Transnational' Investment Agreements to International Environmental Law*, 17 Y.B. ON INT'L ENV'T L. 168, 168, 172, 177 (2007).

[130] *Id.* at 177.

[131] *Id.* at 169.

[132] *Id.*

[133] *See id.* at 180.

[134] *See* Namballa, *supra* note 122, at 186–87.

would therefore be hard to enforce punishments on MNCs in cases of breach. These contracts may not be favorable for third world countries because of the aspect of bargaining and can therefore offer guidance in establishing more effective ways of prosecuting MNCs.[135]

D. Corporate self-regulation

This is when companies voluntarily commit to desist from certain practices that have unhealthy effects on society.[136] It is defined as is the process whereby an organization monitors its own adherence to legal, ethical, or safety standards, rather than have an outside, independent agency such as a third-party entity monitor and enforce those standards.[137] It is used by some organizations in the United States.[138] This method is more of an advocacy strategy which cannot be legally enforced.[139] Companies are merely expected to have these mechanisms as a social preference without any force of law.[140] This means that such a strategy may not be as effective in the African setting since companies are given freedom to do anything after registration. African states can therefore appeal to all MNCs conducting business in Africa to adopt these mechanisms as a way of preventing economic and environmental crimes.[141]

E. Soft International Law

Soft international laws are quasi legal instruments which do not have any legal binding force or whose binding force is weaker than that of traditional law.[142] The UN Guidelines on Business and Human Rights and the Organization of Economic Cooperation and Development (OECD)

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[135] *See id.*

[136] Daniel Castro, *Benefits & Limitations of Industry Self-Regulation for Online Behavioral Advertising*, INFO. TECH. & INNOVATION FOUND. 2,4 (Dec. 2011), https://itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf.

[137] *Id.* at 3 (citing Anil K. Gupta & Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational, and Political Analysis*, 8 ACAD. MGMT. REV. 416, 417 no. 3 (1983)).

[138] Adam Hayes, *Self-Regulatory Organization – SRO Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sro.asp (last updated Apr. 3, 2020).

[139] Castro, *supra* note 136, at 3, 7.

[140] Susan Margaret Hart, *Self-Regulation, Corporate Social Responsibility, & the Business Case: Do they Work in Achieving Workplace Equality & Safety?*, 92 J. BUS. ETHICS 585, 586 (2009).

[141] *See* Castro, *supra* note 136, at 4.

[142] Bryan H. Druzin, *Why Does Soft Law have any Power Anyway?*, 7 ASIAN J. INT'L L. 361, 361 (2017).

provide guidelines to follow.[143] The OECD's guidelines were promulgated by World Bank considering the human rights implications of the projects that it finances.[144] These pieces of soft law are however not legally binding and are disregarded by MNCs.[145] However, they can be used in formulating legally binding obligations against multinational companies.[146]

F. European Courts

European Courts have also decided cases against MNCs, and this should be an indication that African countries can succeed in prosecuting Multinationals.[147] In the case of *Chandler v. Cape Plc.*,[148] the claimant sued and succeeded for asbestosis contracted because of exposure to dust during his employment by the defendants' subsidiary.[149] The court further noted that national courts of the European Union do not have the power to halt the proceedings on the grounds of lack of jurisdiction in cases brought against European Union domiciled defendants.[150] In *Moses Fan Sithole and others v. Thor Chemicals Holdings Ltd.*, court awarded compensation to victims who had suffered from the mercury activities of the chemicals used by the defendant company in its work.[151] These cases show that it is possible for African courts to prosecute these MNCs and also the willingness to provide compensation to victims is a welcome remedy that can be adopted by African courts and the ICC, if they prosecute these cases.

Other jurisdictions have showed willingness and capability to prosecute MNCs through establishing written laws and empowering their

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[143] *Guiding Principles on Business & Human Rights: Implementing the United Nations "Protect, Respect & Remedy" Framework*, UN HUM. RTS. OFF. HIGH COMM'R (June 16, 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [OHCHR, *Guiding Principles*]; *Annual Report on the OECD Guidelines for Multinational Enterprises 2019*, OECD PUBL'G (Oct. 16, 2020), http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf [hereinafter OECD, *Annual Report*].

[144] OECD, *Annual Report*, *supra* note 143.

[145] Julianne Hughes-Bennett et al., *A Binding Treaty on Business & Human Rights? Still a way to go.*, HOGAN LOWELLS (Nov. 2, 2017), https://www.hlregulation.com/2017/11/02/a-binding-treaty-on-business-and-human-rights-still-a-way-to-go/#:~:text=By%20way%20of%20background%2C%20the,for%20either%20States%20or%20companies; *see* OECD, *Annual Report*, *supra* note 143.

[146] *See* Julianne Hughes-Bennett et al., *supra* note 145.

[147] *See, e.g.,* Chandler v. Cape Plc. [2012] EWCA (Civ.) 525 [70], [79]–[81] (UK).

[148] *Id.*

[149] *Id.* at [1], [3], [79], [82]–[84].

[150] *See id.* at [40].

[151] Moses Fan Sithole v. Thor Chem. Holdings Ltd. [2000] 2 AC 2894 (UK).

courts to prosecute these corporations.[152] Others have written laws that establish controls on the activities of MNCs.[153] Some jurisdictions also encourage more diplomatic systems like contracts and agreements.[154] However, the social economic and political conditions in Africa do not give room for internal controls.[155] This leaves the ICC as the best option to try MNCs, with regard to the salient features of all the above methods.

IV. BENEFITS OF PROSECUTING MULTINATIONAL CORPORATIONS BY THE INTERNATIONAL CRIMINAL COURT

MNCs are currently answerable to no authority in Africa.[156] However, this has been a recipe for disaster.[157] The role these corporations play in the prevalence of environmental crime and their economic crimes cannot be ignored.[158] The worldwide attention that has been given to environmental crimes recently shows that the time is right to make the decision to prosecute MNCs and environmental crimes.[159]

MNCs have been known to play a key role in the abuse of human rights through their activities.[160] They grab land, engage in acts of forced labor, dump harmful substances, engage in illegal trading of wildlife and corruption.[161] Although globalization has provided massively profitable

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[152] *See* Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 MICH. J. INT'L L. 491, 491–92 (2020) (citing OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORTISATION, ¶ 41 (2016)).

[153] *See* Akindele Babatunde Oyebode, *International Regulation of the Multinational Corporation: A Look at Some Recent Proposals*, 5 NAT'L BLACK L. J. 231, 232, 237 (1977).

[154] Ong, *supra* note 129, at 168, 171.

[155] *See* Eghosa Osa Ekhator, *Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?*, 20 INT'L CMTY. L. REV. 30, 30, 35 (2018).

[156] Hans Wetzels, *Countries Propose a Treaty to End Corporate Impunity,* UN AFR. RENEWAL (Apr. 9, 2019), https://www.un.org/africarenewal/magazine/april-2019-july-2019/countries-propose-treaty-end-corporate-impunity.

[157] *See id.*

[158] *See id.*

[159] *See* Irene di Valvasone, *Holding Multinational Corporations Accountable for the Commission of International Environmental Crime*, CTR. FOR AFRICAN JUST., http://centreforafricanjustice.org/holding-multinational-corporations-accountable-for-the-commission-of-international-environmental-crime/ (last visited Mar. 8, 2021).

[160] Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 L. & POL. AFR., ASIA & LAT. AM. 7, 7–8 no. 1 (2011).

[161] *See Multi-National Corporations' Land Grabbing in Africa*, AFR. FAITH & JUST. NETWORK, https://afjn.org/multi-national-corporations-land-grabbing-in-africa/ (last

opportunities to Multinationals, the opportunity to operate legally and abuse the weak regulatory structure so as to maximize profit makes native African inhabitants frequently continue to suffer.[162] Their role in making the environment less habitable cannot be ignored. This, therefore, means that bringing these corporations under the jurisdiction of the ICC will help to make them accountable for these atrocious acts.[163] It will help in promotion of human rights, respect for human dignity and the rule of law.

"One of the ways in which MNCs negatively impact developing countries is by lobbying the World Trade Organization and other international bodies for international trade policies that work in their favor and to the disadvantage of developing countries."[164] "An example of this is the infamous Structural Adjustment Programs (SAPs) imposed on developing nations by the International Monetary Fund (IMF) and the World Bank."[165] These programs have increased "poverty in developing nations as multinational corporations reap the benefits of said policies."[166] These companies command a lot of influence and prosecuting them will check their power and promote consideration of Africans in their decisions.[167] It will also ensure that the livelihood of Africans improves as these corporations will work with regard to human rights and the rule of law.

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visited Mar. 8, 2021); *see also* Christina Stringer & Snejina Michailova, *Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains*, 26 MULTINATIONAL BUS. REV. 194, 194–95 no. 3 (2018); *see also* Brandon Baker, *Report Exposes Companies That Dumped 206 Million Pounds of Toxic Chemicals Into U.S. Waterways*, ECOWATCH (June 23, 2014, 8:31 AM), https://www.ecowatch.com/report-exposes-companies-that-dumped-206-million-pounds-of-toxic-chemi-1881928242.html.

[162] Felix Ebruba Ayanruoh, *Corporate Responsibility & Human Rights Abuse in the Niger Delta*, GLOB. POL'Y F. (Nov. 2009), https://archive.globalpolicy.org/security-council/dark-side-of-natural-resources/oil-and-natural-gas-in-conflict/africa/48470-corporate-responsibility-and-human-rights-abuse-in-the-niger-delta.html.

[163] *See* Miguel Juan Taboada Calatayud et al., *The Accountability of Multinational Corporations for Human Rights' Violations*, 64–65 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 171, 179 n.20 (2008).

[164] Minda Magero, *Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries*, AFR. ON THE BLOG, https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/ (last visited Mar. 8, 2021).

[165] Minda Magero, Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries, AFRICA ON THE BLOG, https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/ (last visited Jan. 30, 2021).

[166] *Id.*

[167] *See* Qingxiu Bu, *Chinese Multinational Companies in Africa: The Human Rights Discourse*, 8 AFR. J. OF LEGAL STUD. 33, 84 (2015).

Prosecuting MNCs will help streamline the operations of these companies as well developing a legal regime to cater for any illicit acts.[168] "MNCs present specific regulatory problems to ensure socially responsible conduct, particularly when they operate in developing countries where the regulatory mechanisms are relatively weaker."[169] Countries will be able to set down laws that the MNCs will follow which are in conformity with the ICC provisions and there will be internationally recognized limits to the MNCs activities.[170] The recent United Nations guidelines on Business and Human Rights may act as a guide to enable prosecution of these companies.[171] It may also give the respective countries a chance to commence legal controls.[172] This will also help to streamline these companies' operations as set procedures will have to be followed. It will control the corruption and under hand methods these companies use to commence and carry-on operations in African countries.[173] Corporations "consider the entire world as their market."[174] "They organize production and marketing of products with little regard for national interest to maximize profits."[175] Prosecuting them will bring sanity in their operations and encourage focus on the social wellbeing of the people in the areas where they operate.[176] It will also promote rule of law as companies will be subject the laws in place.[177]

Prosecuting these corporations will equally improve the relationship between African states and the ICC in terms of being more relevant and closer to some of the key problems faced by the continent.[178] Currently,

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[168] *See* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Force Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERK. J. OF INT. L. 91, 96–97, 157–59 (2002).

[169] Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project*, 16 AFR. J. INT'L COMP. L. 83 (2008).

[170] *See* Ronald C. Brown, *Due Diligence Hard Law Remedies for MNC Labor Chain Workers*, 22 UCLA J. INT'L L. FOREIGN AFF, 119, 120–21 (2018); Office of the High Commissioner of Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/Pub/11/04 (2011), at 3–4 [hereinafter OHCHR, Guiding Principles].

[171] OHCHR, *Guiding Principles*, *supra* note 144, at 1, 4–5, 29.

[172] *Id.*

[173] *Forum: Tackling Fraud and Corruption in Africa*, FINANCIER WORLDWIDE, (Feb. 2019), https://www.financierworldwide.com/forum-tackling-fraud-and-corruption-in-africa#.YBiV7-hKhPY.

[174] Kema Iroghe, *Global Political Economy and the Power of Multinational Corporations*, 30 J. THIRD WORLD STUD. 223, 223 (2013).

[175] *Id.*

[176] *See* OHCHR, *Guiding Principles*, *supra* note 170, at 1.

[177] *Id.* at 3.

[178] Dominque Mystris, *Why a Regional Criminal Court for Africa is a Good Idea*, THE CONVERSATION (Sep. 29, 2019), https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650.

the ICC is involved in 13 investigations, 10 of which are all from Africa.[179] "As a result, some African leaders complained that the ICC has unfairly targeted Africans."[180] "The African Union has also referred the ICC as an impediment to peace, and has eventually called African ICC member States for non-cooperation with the Court."[181]

The relationship between Africa and the ICC has therefore been strained and there is animosity towards the court by African states, which constitute one of the largest percentages in terms of membership.[182] It was reported that African leaders "adopted a strategy calling for a collective withdrawal from the" ICC "behind closed doors near the end of an African Union summit."[183] Countries like Burundi, South Africa and The Gambia have all showed steps of leaving the court.[184]

Prosecuting MNCs will restore some relevance and respect of the ICC in Africa.[185] MNCs abuse people's rights and commit numerous crimes that directly affect Africans.[186] As discussed earlier, prosecuting MNCs will create a new working relationship between African states and the court.[187] Taking on these crimes by the ICC will fill the void and provide a permanent alternative to these atrocities and therefore represent a positive impact on Africans.[188] It is a win-win situation, as both the ICC and Africa benefit and unity as well as regard to human rights will prevail.

Prosecuting environmental and economic crimes will cultivate more respect for the environment through recognition of the impact of

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[179] INT. CRIM. COURT, *Situations Under Investigation*, https://www.icc-cpi.int/pages/situation.aspx (last visited Feb. 20, 2021).

[180] Alebachew Birhanu Enyew, *The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation*, 3 BAHIR DAR U. J.L. 110, 110 (2012).

[181] *Id.*

[182] *Id.* at 110-11.

[183] *African Leaders Plan Mass Withdrawal from International Criminal Court*, THE GUARDIAN (Jan. 31, 2017), https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court.

[184] *Id.*

[185] *See* Joanna Kyriakakis, *Corporations before International Criminal Courts: Implications for the International Criminal Justice Project*, 30 LEIDEN J. INT. L. 221, 232 (2017).

[186] *See* Nick Cummings-Brace, *Oil Companies May Be Complicit in Atrocities in South Sudan, U.N. Panel Says*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html (discussing "the continuing violence, the ensuing human suffering, and violations of international humanitarian law" in South Sudan).

[187] Kyriakakis, *supra* note 185.

[188] *See id.* at 231–32.

environmental crimes on the people and the community.[189] Observers mention wild animal trafficking, indiscriminate logging, electronic waste mismanagement, dumping in rivers and aquifers, illegal fishing as some of the most serious environmental crimes in Africa.[190] Currently, there is no hard law relating to environmental crimes and MNCs activities in Africa and therefore the coast is clear for these crimes to flourish.[191] Given the influence these MNCs have coupled with the high levels of ignorance among Africans concerning economic and environmental crimes, they merely increase daily.[192] The ICC should attach an international character to these crimes and raise the level of respect for laws against environmental misuse.[193] Such development may help create more awareness about these crimes and ease any investigations that would help to bring the guilty parties to book.[194] It will promote environmental conservation and help protect against degradation and any other crimes against the environment.[195] It will also be another way of addressing the challenges of climate change.

There has always been an accountability gap in the operations of MNCs and this has led to profit repatriation and many crimes going uninvestigated.[196] This has kept their operations out of touch with the public.[197] Transparency International has reported that "the world's biggest companies disclose little or no financial details about their operations outside their home countries."[198] They "warned that the biggest oil, gas and mining companies were not ready for the kind of transparency

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[189] *See* U.N. Environment Program & Interpol, *The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security* 7–9 (2016), https://reliefweb.int/sites/reliefweb.int/files/resources/environmental_crimes.pdf [hereinafter UNEP].

[190] *Top 5 Environmental Crimes*, SUSTAINABILITY FOR ALL , https://www.activesustainability.com/environment/crimes-against-the-environment/ (last visited Feb. 6, 2021).

[191] Elizabeth Barrett Ristroph, *How Can the United States Correct Multi-National Corporations' Environmental Abuses Committed in the Name of Trade*, 15 IND. INT'L & COMP. L. REV. 51, 51–53 (2004).

[192] *See Id.* at 52.

[193] *See* Alessandra Mistura, *Is There Space for Environmental Crimes Under International Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 COLUMBIA J. ENV'T L. 182, 214, 220 (2018).

[194] *Id.* at 214; UNEP, *supra* note 190 at 13, 26, 89.

[195] *See* Mistura, *supra* note 193 at 220.

[196] Menno T. Kamminga, *More Lawsuits Needed Against Multinationals*, BUS. & HUM. RTS. CTR. (July 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Menno-Kamminga-commentary.pdf.

[197] Clar Ni Chonghaile & Ami Sedghi, World's Top Companies Fall Short on Transparency, THE GUARDIAN (Nov. 5, 2014), https://www.theguardian.com/global-development/datablog/2014/nov/05/worlds-top-companies-fall-short-on-transparency.

[198] *Id.*

rules that will come into force across the EU."[199] This is a clear indication that MNCs do not do well in matters of accountability and instituting mechanisms of prosecution will help African countries to monitor these companies and promote accountability as governments will be in position to follow up on the activities of these companies and demand for compliance with laws and public policy.

IRENE reports that legal rulings on behalf of claimants won in recent years are "few in comparison with the number of cases where companies have escaped scot-free and the even greater number of violations reported to human rights organizations, trade unions and environmental organizations."[200] The numbers should therefore change to enable more victims' access justice and compensation where necessary. This will promote transparency in the operations of these companies since there will be laws to fall back on where there is no compliance.

Prosecuting MNCs will not only promote rule of law and respect for authority but also improve the livelihood of the people of Africa.[201] It will stamp the authority of the respective governments over the affairs of the respective countries.[202] It will also professionalize economic relations between these companies and the countries.[203] On the other hand, prosecuting environmental and economic crimes will boost environmental protection and promote the observance of human rights in business.[204] It will improve service delivery by governments and the general wellbeing of Africans.[205]

V. PROPOSED RECOMMENDATIONS

The Rome Statute should be amended to provide for environmental crimes as being under the jurisdiction of the ICC.[206] The statute currently provides for crimes against humanity, war crimes, genocide and the

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[199] *Id.*

[200] *Controlling Corporate Wrongs: The Liability of Multinational Corporations, Legal Possibilities, Initiatives, and Strategies for Civil Society*, INT. RESTRUCTURING EDUC. NETWORK EUR. (IRENE), http://www.indianet.nl/irene.html (last visited Feb. 10, 2021); *see* Calatayud, *supra* note 5 at 186.

[201] Bu, *supra* note 167 at 84; *see* Calatayud, *supra* note 5 at 186.

[202] *See* OHCHR, *Guiding Principle*s, supra note 170 at 4–6, 28–29.

[203] Kyriakakis, *supra* note 185 at 233–237; *see* Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 VERFASSUNG UND RECHT IN UBERSEE 7, 14–15 (2011) (Ger.).

[204] *See* UNEP, *supra* note 190 at 7–9.

[205] Rob White & Grant Pink, *Responding to Organised Environmental Crimes: Collaborative Approaches and Capacity Building*, SA CRIME Q., June 2017, at 37–38; *Prosecuting Economic and Environmental Crimes: USIP's Work in the DRC*, U.S. INST. PEACE (USIP), https://www.usip.org/publications/2016/12/prosecuting-economic-and-environmental-crimes (last visited Feb. 11, 2021).

[206] Mistura, *supra* note 194 at 221–22.

recently added crime of aggression, this limits the ICC to handling matters concerning only the afore mentioned crimes.[207] The Rome Statute should be amended to provide for economic and environmental crimes as this will add a force of international recognition of these crimes and give jurisdiction to the ICC to handle them.

The other recommendation is to make provision for corporate personality in international law.[208] The concept provides that a company is a person in law with capacity to sue and be sued.[209] Unfortunately, this concept is not recognized in international criminal law and therefore MNCs are not subject to criminal legal proceedings.[210] This explains why there is hardly any company that can be internationally held liable for environmental or economic crimes and any other illicit activities. This concept should be provided for under international law. This will contribute to accountability and respect of human rights by these organizations.

The United Nations Guidelines on Business and Human Rights should be incorporated in national laws so that enforcement can begin at the national level.[211] These guidelines set down regulations to be followed by MNCs in their operations, with strict regard to respect of human rights.[212] These guidelines can help in drafting laws and regulations that provide a framework to follow. This will give an opportunity for states to control activities of the MNCs and will also ease enforcement by international tribunals.[213]

African states should strive to work towards economic empowerment of their people so as to create an alternative to the work done by these MNCs. This will allow for companies owned by Africans to compete favorably with MNCs and thus make it easy to control their activities and protect the African population. It will also curb on the forces of neo colonialism that come with having MNCs operate on most parts of Africa.

Finally, there should be an intensive effort to sensitize the masses about the activities of MNCs and their limits. Additionally, the sensitization about economic and environmental crimes should also be undertaken, so that it is easy to track and investigate any illicit activities by the corporations, as well as any sort of commission of environmental

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[207] Rome Statute of the International Criminal Court art. 5, Jul. 17, 1998, 2187 U.N.T.S. 38544.

[208] David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARVARD INT. L. J. 35, 38–39 (2016).

[209] *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[210] *See* Scheffer, *supra* note 209 at 35.

[211] Office of the High Commissioner of Human Rights (OHCHR), *The Corporate Responsibility to Protect Human Rights*, U.N. Doc. HR/Pub/12/02 (2012), at 1–2 [hereinafter OHCHR, *Corporate Responsibility*].

[212] *Id.*

[213] OHCHR, *Guiding Principles, supra* note 170 at 1–8.

crimes. This will involve the ordinary people in promoting rule of law and reporting any illicit activities and thus encourage these companies to follow the set laws.[214]

In our view, the above recommendations can help the continent make strides in the fight against the impunity engineered by Multinationals and control the cases of environmental crime in Africa.

CONCLUSION

It has been a long time since MNCs commenced operations in Africa.[215] Over the years, many have joined the continent in search of investment opportunities, mostly in the extractive industry.[216] However, their activities have not been accounted for and regulated.[217] These companies have been implicated in several schemes and illicit activities that have led to human rights abuses, while disregarding the rule of law and the aspirations of the people.[218] These corporations have also played a vital role in the rate at which environmental and economic crimes have been committed over the years.[219] The role of MNCs in economic crimes and crimes against the environment cannot be ignored. Many have died, lost property, and have become disabled because of MNCs activities.[220] Environmental crimes have directly affected the backbone of the African continent, which is agriculture, because they have brought disease and under development.[221] Economic crimes have negatively impacted service delivery by governments and the economy generally.[222] There is a great

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[214] *See* UNEP, *supra* note 190, at 31.

[215] *See* Lord Aikins Adusei, Multinational Corporations: The New Colonisers in Africa, PAMBAZUKA NEWS (Jun. 4, 2009), https://www.pambazuka.org/governance/multinational-corporations-new-colonisers-africa (describing the history of colonialism in Africa and its culmination in MNCs).

[216] O. E. Udofia, *Imperialism in Africa: A Case of Multinational Corporations*, 14 J. BLACK STUD. 353, 355-57 (1984).

[217] *See Controlling Corporate Wrongs*, *supra* note 201.

[218] Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 VERFASSUNG UND RECHT IN ÜBERSEE 7, 7-9 (2011) (Ger.).

[219] *See* Ristroph, supra note 191 at 51–52.

[220] *See* Cummings-Brace, *supra* note 187; *Integrated National Disability Strategy*: *White Paper*, IND. LIVING INST. (last visited Mar. 13, 2021), https://www.independentliving.org/docs5/SANatlDisStrat1.html.

[221] *See, e.g., 50 Years of Environmental Governance and Sustainability in Africa*, NEW PARTNERSHIP FOR AFR.'S DEVELOPMENT at 8, http://www.nepad.org/aepp/index.php/themes/category/6-environmental-crime-and-corruption-in-africa?download=15:english-environmental-crime-and-corruption (last visited Feb. 13, 2021).

[222] Press Release, United Nations Congress on Crime Prevention and Criminal Justice, Consequences of Economic Crimes Affect People's Sense of Society's Fairness, Crime Congress' Committee 1 Told, U.N. Press Release SOC/CP/324 (Apr. 19, 2005).

need to bring an end to this impunity by establishing laws that will influence and demand change in this regard. It is also important to strengthen this effort by implementing a forum that can adjudicate over resulting disputes, and in our view, the ICC has the capacity to best serve this purpose.

RACE-SELECTIVE ABORTION BANS: A NEW WAY TO PREVENT ELIMINATION OF MINORITY GROUPS IN THE UNITED STATES

Tysharah Jones Gardner

INTRODUCTION

"Abortion has swept through the Black community like a scythe, cutting down
every fourth member."[1]

The Supreme Court should find that states have a compelling interest in preventing the use of abortion as a modern-day eugenics tool because Black people, especially women, have been the target of hidden eugenicists' agendas for years.[2] This Article addresses whether race-selective abortion bans infringe on a women's right to obtain an abortion when the state has a compelling interest in protecting against the elimination of a race through modern day eugenics. Section I discusses how abortion jurisprudence has developed over time. Section II discusses race-selective abortion bans. Section III examines and analyzes selective abortion bans, specifically race-selective abortion bans. Section IV presents numerous solutions for addressing the high abortion rate in different community settings and the prevention of abortion being used as a form of modern-day eugenics. The objective of this Article is to educate on the current status of race-selective abortion laws in the United States, and to place that knowledge in the context of the history of the eugenics movement.

Race-selective abortion bans are a fairly new concept.[3] Exploring and analyzing the different views on race-selective abortion bans is most instructive. This Article shows that state-enacted selective abortion bans are constitutional because the state has a compelling interest to prevent the advancement of eugenicists' goals through the use of abortion.[4] It will also argue that a state's goal in preventing abortions based on race is essential to the survival and expansion of minority groups, specifically the

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[1] Michael Novak, BLACK GENOCIDE.ORG (2012), http://www.blackgenocide.org/black.html.

[2] *See* CTR. FOR URB. RENEWAL & EDUC., THE EFFECTS OF ABORTION ON THE BLACK COMMUNITY, 3 (June 2015) https://docs.house.gov/meetings/JU/JU10/20171101/106562/HHRG-115-JU10-Wstate-ParkerS-20171101-SD01.pdf.

[3] *Infra* note 58.

[4] *See infra* Section III.

Black community, in the United States. Even if the Supreme Court finds race-selective abortion bans to be unconstitutional, minority groups should be educated on the fact that there is an overwhelming amount of Black women having abortions and our communities need to work to eradicate the problems that cause women to have abortions. This Article sets forth the legal issues surrounding whether race-selective abortions are constitutional while also addressing the pivotal peripheral cultural and human issues American civilization must face before moving forward.

I. ABORTION IN THE UNITED STATES

To determine whether race-selective abortion bans are constitutional, it is instructive to look at the history of the practice of abortion and the development of abortion laws over the years. Women have been terminating their unwanted pregnancies for centuries.[5] Until the nineteenth century, abortion was a fairly common and uncontroversial issue.[6] In fact, women in the eighteenth and early-nineteenth centuries often took drugs to end their unwanted pregnancies.[7] The drugs they took were often homemade remedies and accordingly caused lots of concern among doctors and slave owners.[8] Slave owners were particularly concerned with the use of these drugs by slave women, who terminated or prevented their pregnancies, because the slave owners would not be able to reap a profit from the slave women bearing children.[9]

Pursuant to the concerns, the concept of abortion became increasingly illegal in many states during the mid-to-late nineteenth century.[10] In fact, all but one state criminalized abortion, except when necessary, by 1910.[11]

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[5] *Roe v. Wade is Decided*, HISTORY (Jan. 22, 2020), https://www.history.com/this-day-in-history/roe-v-wade [hereinafter History].

[6] Sarah Handley-Cousins, *Abortion in the 19th Century*, NAT'L MUSEUM CIV. WAR MED. (Feb. 9, 2016), http://www.civilwarmed.org/abortion1/. Today, abortion is a topic that people are still battling over. In 2017, approximately half of Americans believed that having an abortion was morally wrong. *See* Michael Lipka & John Gramlich, *5 Facts About the Abortion Debate in America*, PEW RSCH. CTR. (Aug. 30, 2019), https://www.pewresearch.org/fact-tank/2019/08/30/facts-about-abortion-debate-in-america/; *see also* LYNN D. WARDLE, MARK P. STRASSER, LYNNE MARIE KOHM & TANYA M. WASHINGTON, FAMILY LAW FROM MULTIPLE PERSPECTIVES 313 (West Academic Publishing 2d 2019).

[7] History, *supra* note 5.

[8] Handley-Cousins, *supra* note 6.

[9] *Id.*; *see also* Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR POOR & UNDERSERVED, 274, 276 (1992). Ross argues that African-American women have always attempted to control their fertility. She points out that slave owners would often use African-American fertility for financial means and that the African-American women would often take contraceptives to resist slavery.

[10] Handley-Cousins, *supra* note 6.

[11] *History of Abortion*, NAT'L ABORTION FED'N, https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/ (last visited Sept. 14, 2020).

This criminalization of abortion did not survive for very long in all of the states.[12] Even though most states liberalized or repealed their criminal abortion laws, there was still a lot of concern as to how abortion should be regulated.[13] Even today, in the twenty-first century, there is still a constant debate on how abortion should be regulated in the United States.[14]

A. Right to Privacy and Abortion

Although the right to privacy is not explicitly mentioned in the Constitution, the Supreme Court has recognized this right in varying context since 1891.[15] In 1965, the Supreme Court found "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" and that those guarantees create "zones of privacy."[16] In *Griswold*, the Court held that a statute prohibiting the use of contraceptives by married persons violated the right to marital privacy.[17] This privacy right was soon expanded to include nonmarital persons.[18]

It did not take long for this right to privacy to cross over to the issue of abortion; the Supreme Court addressed the right to privacy in the context of obtaining an abortion in 1973.[19] The Court ruled that the right to privacy protected a woman's right to obtain an abortion.[20] According to the Court, this right to have an abortion fell under the Due Process Clause of the Fifth and Fourteenth Amendments.[21] Although *Roe v. Wade* gave women the right to obtain an abortion, the Court made it clear that the right was not absolute.[22] In fact, the Court held that the right to obtain an abortion "is not unqualified and must be considered against important

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[12] *Id.* "Between 1967 and 1973 one-third of the states liberalized or repealed their criminal abortion laws."

[13] *See id.*

[14] *See* Scottie Andrew & Caroline Kelly, *Dissatisfaction with Abortion Laws Rises on Both Sides of the Debate*, CNN POLITICS (Jan. 23, 2020), https://www.cnn.com/2020/01/23/politics/abortion-attitude-poll-roe-v-wade-anniversary-trnd/index.html.

[15] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[16] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[17] *Id.* at 485–86.

[18] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[19] *Roe*, 410 U.S. at 153.

[20] *Id.*

[21] *Id.* at 157, 164.

[22] *Id.* at 154.

state interests in regulation."[23] Therefore, states can regulate abortion but cannot deny women the right to obtain an abortion altogether.[24]

The *Roe* Court agreed with lower courts that "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."[25] Also, the *Roe* Court examined the word "person" in the Constitution and concluded that the application of "person" did not apply to the unborn.[26] However, the states at some point still have an interest in regulating abortion.[27] The Court attempted to strike a balance between a woman's right and the state's interest by setting a trimester framework.[28] According to the Court, the point at which the state gains a compelling interest is at the end of the first trimester.[29]

The Trimester framework set up in *Roe v. Wade* was re-examined by the Supreme Court less than 20 years later.[30] In *Planned Parenthood v. Casey*, the Court found that the trimester framework was unnecessary to ensure a woman's right to obtain an abortion against a state's compelling interest.[31] In this case there were five provisions that the court considered — 1) requirement that women give informed consent and that women be giving information 24 hours prior to the abortion being performed; 2) requirement that a parent give informed consent for a minor to obtain an abortion; 3) requirement that a married woman provide an affidavit stating that she has informed her husband of her decision to have an abortion; 4) medical emergency exception that excused these requirements; and 5) requirements on facilities providing abortion services.[32] The Court struck down the provision requiring a woman to inform her husband of her decision to have an abortion but upheld all the other provisions.[33] The Court reasoned that as long as the state's

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[23] *Id.*

[24] *Id.* at 153.

[25] *Id.* at 155.

[26] *Id.* at 158.

[27] *Id.* at 129, 150, 154–58.

[28] *Id.* at 162–63.

[29] *Id.* at 163–64. ("[T]he period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. . . With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

[30] Planned Parenthood v. Casey, 505 U.S. 833, 858, 872 (1992).

[31] *Id.* at 875–76.

[32] *Id.* at 844.

[33] *Id.* at 895, 901.

regulations are not an undue burden on the woman, the state could impose some burden on the woman trying to have an abortion.[34] Thus, states may regulate abortions as long as there is no undue burden placed on the woman's right to have an abortion. [35] An undue burden exists when the purpose or effect of the law "is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[36]

After *Casey*, it was clear that only three principles from *Roe* survived: 1) a woman has the right to choose to have an abortion; 2) states may restrict abortion after fetal viability; and 3) states have a legitimate interest to protect the health of the mother and life of the fetus.[37] It is important to note and reiterate that *Casey* did not do away with *Roe's* essential holding that states may not prohibit a woman from having an abortion prior to viability but only required that states may not impose an undue burden on the right to obtain an abortion at any point during the pregnancy.[38]

The Supreme Court has not heard many abortion related cases since *Casey*. [39] Because of this, states are constantly challenged with determining what laws to implement so that they are not placing an undue burden on a woman's rights to obtain an abortion.[40] The Supreme Court has added a small list of things, such as requirements that doctors have admitting privileges within thirty miles from where the abortion was performed and requirements that abortion facilities maintain minimum standards for ambulatory surgical centers,[41] to the undue burden list.[42]

The Court has also considered whether partial birth abortion bans place an undue burden on a woman's right to have an abortion.[43] In 2000, the Court in *Stenberg v. Carhart* found a Nebraska statute that prohibited partial-birth abortions to be unconstitutional.[44] The Court reasoned that the statute was unconstitutional because it failed to include an exception for the preservation of the health of the mother and because it imposed an undue burden on a woman's right to choose to have a Dilation and

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[34] *Id.* at 878.

[35] *Id.*

[36] *Id.*

[37] *See* Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 U. CIN. L. REV. 545, 550 (2018); s*ee also* Casey, 505 U.S. at 874–76, 879.

[38] Casey, 505 U.S. at 870, 879.

[39] Gooder, *supra* note 37, at 550.

[40] *Id.* at 550–52.

[41] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310–11, 2314–16, 2318 (2016).

[42] *Id.* at 2318.

[43] *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

[44] *Id.* at 929, 930.

Extraction procedure (D&E) as a means to get an abortion.[45] The Court reconsidered partial birth abortion bans just seven years later.[46] This time, however, the Court found the statute to be constitutional because, unlike the statute in *Stenberg*, the statute in this case was more specific and precise as to when the partial birth abortion bans applied.[47] In *Gonzalez v. Carhart*, the Court noted that the government has an interest in protecting the medical profession and can therefore

> [U]se its voice and its regulatory authority to show its profound respect for life within a woman. . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[48]

It is important to note that both of the statutes from *Stenberg* and *Gonzalez* addressed partial birth abortions in the later stages of pregnancy.[49] The Court provided extra insight on what constitutes an undue burden with these two cases by adding broad partial birth abortion bans that lack preservation of health exceptions to the undue burden list but ruling partial birth abortion bans that are specific and precise constitutional and not an undue burden on a woman's right to obtain an abortion.[50]

Further, some states have put bans on selective abortions[51] and the Supreme Court has yet to decide whether these bans are an undue burden on the women trying to procure an abortion.[52] Although the Court recently denied certiorari, Justice Thomas wrote a long concurrence about the selective bans that Indiana enacted.[53] His concurrence forced people to think about how the Court will rule on the issue of abortion — particularly

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[45] *Id.* at 930. (*Roe* and *Casey* made it clear that states may regulate abortion, but states cannot regulate abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.")

[46] Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

[47] *Id.* at 133.

[48] *Id.* at 157–58.

[49] *See id.* at 132–33.

[50] *Id.* at 147, 150, 156; *see Stenberg*, 530 U.S. at 930.

[51] *See* Gooder, *supra* note 37, at 553.

[52] *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019).

[53] *Id.* at 1782–83 (Thomas, J., concurring).

selective abortion — in the future.[54] One thing is very clear from these lines of cases: abortion jurisprudence today is very different than when *Roe* was decided.[55]

II. SELECTIVE ABORTION BANS

Every state in the United States has dealt with the issue of abortion in some way.[56] Many women decide to get abortions for many different reasons — such as resource limitations and lack of partner support.[57] Although there are many different reasons that women decide to get abortions, states do not place bans on abortions for all of these reasons. In fact, only a few states have enacted some form of law to prohibit or limit abortion based on sex, race, or genetic anomaly.[58] Currently, ten states have banned abortion for reasons of sex-selection.[59] Sex-selective abortions are abortions that are performed due to the sex of the unborn child.[60] Three states banned abortion for reasons of race, and three states banned abortion for reasons of genetic anomaly.[61] The Supreme Court has yet to rule on whether sex-, race-, or disability-selective abortion bans are unconstitutional.[62]

A. Race-Selective Abortion Bans

Only three states tried to use their regulatory power to prohibit abortions based on race.[63] Arizona was the first state to enact legislation prohibiting abortion providers from performing abortions when they know that the reason for getting an abortion is based on the sex or race of the unborn child.[64] The statute states "A person who knowingly does any of the following is guilty of a class 3 felony: 1. Performs an abortion knowing

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[54] *See id*. at 1790–93.

[55] Gooder, *supra* note 37, at 552.

[56] *See An Overview of Abortion Laws*, GUTTMACHER INST. (Nov. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

[57] Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112–17 (2005).

[58] *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Nov. 1, 2020), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [hereinafter *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*].

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019).

[63] *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, *supra* note 58.

[64] Gooder, *supra* note 37, at 553; s*ee also* ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (LexisNexis 2011).

that the abortion is sought based on the sex or race of the child or the race of a parent of that child." [65] Some Arizona legislators enacted the legislation to protect minority groups, such as African-Americans and Hispanics, from being targeted by abortion providers.[66] In the summer of 2009, a documentary, *Maafa 21*, about racial targeting and population control was released.[67] This documentary argues, amongst other things, that the primary consideration used to decide where to put population control facilities was the percentage of Blacks in the area. [68] This information and many other studies, showing the same results, likely had a strong impact on Arizona's legislators' decision to enact legislation to ban race-selective abortions to actually protect minority groups. In 2015, the Ninth Circuit upheld the Arizona statute prohibiting abortion based on race. [69] The court found that the Plaintiff's alleged injury — the stigmatizing effect of the statute on female members — lacked standing and was insufficient because they did not allege that they were personally denied equal treatment.[70] The results of this case would have been very different if someone who was personally affected by this statute came forward. It causes one to wonder whether no one came forward because women typically do not get abortions based on the race of their child. Research has not suggested that Black women, or women of any other ethnicity, obtain an abortion based on the race of their unborn children.[71]

The only other state to enact a law that banned abortion based on race was Indiana.[72] The statute states,

> (a) A person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus. (b) A person may not intentionally perform or attempt to perform an abortion after

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[65] ARIZ. REV. STAT. § 13-3603.02(A)(1).

[66] Gooder, *supra* note 37, at 553.

[67] Mark Crutcher, Carole Novielli, & Renee Hobbs, *Racial Targeting and Population Control*, LIFE DYNAMICS INC. 1 (2011), https://www.klannedparenthood.com/wp-content/themes/trellis/PDFs/Racial-Targeting-Population-Control.pdf.

[68] *Id.*

[69] NAACP v. Horne, 626 F. App'x 200, 201 (9th Cir. 2015).

[70] *Id.*

[71] *See* John Eligon, *When 'Black Lives Matter' is Invoked in the Abortion Debate*, N.Y. TIMES (July 6, 2019), https://www.nytimes.com/2019/07/06/us/black-abortion-missouri.html.

[72] *See* IND. CODE ANN. § 16-34-4-8 (LexisNexis 2016).

> viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.[73]

The Indiana statute prevents people from performing abortions before or after viability when they know that the person is seeking an abortion solely because of race.[74] Indiana's legislature also placed bans on sex- and disability- selective abortions.[75] Planned Parenthood of Indiana and Kentucky quickly challenged these provisions by asserting that the provisions violated the Due Process Clause of the Fourteenth Amendment by placing a substantial obstacle in the way of obtaining an abortion before viability.[76] The Seventh Circuit found the bans to be unconstitutional.[77] It was not long before the Supreme Court received a petition to review that ruling.[78] The Supreme Court quickly denied the petition and stated that it would follow its ordinary practice of waiting for other Courts of Appeals to consider the legal issues surrounding selective abortion bans.[79] Justice Thomas recognized that the Court will soon need to address the constitutionality of selective abortion bans due to the potential of abortion being used as a tool for "modern day eugenics."[80]

Out of the two states that enacted bans on race-selective abortion, only Arizona's statute survived.[81] It seems unlikely that other states will enact race-selective abortion bans. Research suggests that states seem to focus more on sex-selective abortion bans than race-selective abortion bans.[82] The reason that states seem to be avoiding race-selective abortion bans are unknown. Maybe state legislators fear the backlash that they will receive from the Black community. They may even fear that the bill

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[73] *Id.* § 16-34-4-8(a)(b).

[74] *Id.*

[75] *Id.* § 16-34-4-5; *Id.* § 16-34-4-7.

[76] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 194 F. Supp. 3d (S.D. Ind. 2016).

[77] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 888 F.3d 300, 302 (7th Cir. 2018).

[78] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

[79] *Id.* at 1782.

[80] *Id.* at 1783–84 (Thomas, J., concurring).

[81] ARIZ. REV. STAT. § 13-3603.02(A)(1) (LexisNexis 2011).

[82] By conducting a quick search on Google for "race-selective abortion bans", it is clear that sex-selective abortion laws or issues occur more often than race-selective abortion bans. *See Sex- or Race-Selective Bans Laws*, REWIRE NEWS GRP., https://rewirenewsgroup.com/legislative-tracker/law-topic/sex-or-race-selective-bans/ (last visited Oct. 17, 2020).

will not pass due to similar bills failing in other states.[83] Whatever the reason, it is unlikely that the Supreme Court will decide on whether race-selective abortions are constitutional in the near future, unless it is considered with other sex- or disability- selective abortion bans.[84]

The topic of race-selective abortion bans is a very sensitive one, and there are multiple perspectives on the bans.[85] Some people in the Black community support legal access to abortion but often feel as though it is morally wrong.[86] These sentiments play a vital part in understanding why some Blacks, often Christians, are against race-selective abortion bans but believe that abortion itself is morally wrong.[87] In fact, Mr. Clinton Stancil, a pastor and civil rights activist, stated "As much as I believe with all my heart about the killing, the taking of innocent lives, I also believe that I will never support giving white legislators, who have no interest in our community, the ability to tell our women what they can do with their bodies."[88] Stancil, like others in the Black community, believes that abortions are wrong but does not believe in allowing far-reaching restrictions, such as race-selective abortion bans, that would do away with abortion all together.[89] However, race-selective abortion bans will not do away with abortions altogether because they only infringe on a woman's right to have an abortion based on racial reasons.[90] It is clear that a woman who decides to have an abortion for any other reason, that is not regulated by the state, would be able to obtain an abortion.[91]

Others argue that banning abortion based on sex, race, or genetic anomaly stigmatizes pregnant people of color by questioning their motivation behind getting an abortion.[92] They further argue that "race-selective abortion bans are based on the idea that women of color are coerced into abortions or are complicit in a 'genocide' against their own community."[93] Women decide to get abortions for many different reasons

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[83] *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 22, 2020), https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly [hereinafter *Banning Abortions*].

[84] *See Box*, 139 S. Ct. at 1782.

[85] *See* Gooder, *supra* note 37, at 558–59, 568–69.

[86] Eligon, *supra* note 71; *see also* Emily Ward, *CDC: 36% of Abortions Abort Black Babies*, CNSNEWS (Nov. 28, 2018), https://www.cnsnews.com/news/article/emily-ward/blacks-make-134-population-36-abortions.

[87] Eligon, *supra* note 71; *see also* Ward, *supra* note 86.

[88] Eligon, *supra* note 71.

[89] *Id.*

[90] *See id.* (demonstrating that people acknowledge there are different purposes for abortion, and showing opinions to ban some abortions for some reasons compared with banning all abortions, thus acknowledging that banning abortion for one reason would not ban all abortions).

[91] *Banning Abortions*, *supra* note 83.

[92] *Id.*

[93] *Id.*

and evidence has not shown that modern-day Black women decide to get abortions simply because of the race of their unborn child.[94] On the opposite end, people argue that population control facilities are disproportionately placed in Black communities[95] and that race-selective abortion bans protect Blacks from the pressures of these organizations.[96] They even argue that Blacks and Hispanics have been targeted by programs and people with eugenicists' goals.[97]

Regardless of the different views on race-selective abortion bans, it is clear that women and babies of color would be impacted by race-selective abortion bans.[98] Black women make up less than fourteen percent [99] of the population in the United States, yet statistically Black women have some of the highest abortion rates.[100] According to the CDC, 36 percent of abortions abort Black babies.[101] Currently, 27.1 of every 1000 Black women have an abortion whereas only 10 of every 1000 white women get abortions.[102] Furthermore, other minority groups in the United States have extremely high abortion rates.[103] For example, in 2014, 18.1 of every 1000 Hispanic women received an abortion.[104] The chart below exhibits the fact that Blacks and Hispanics receive more abortions than other women in the United States.[105]

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[94] *Id.*

[95] Crutcher, Novielli, & Hobbs, *supra* note 67, at 1.

[96] Gooder, *supra* note 37, at 553; *See id.* at 22;

[97] Crutcher, Novielli, & Hobbs, *supra* note 67, at 1.

[98] *See* Eligon, *supra* note 71.

[99] *See Quick Facts United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219# (last visited Nov. 6, 2020).

[100] *See* Eligon, *supra* note 71.

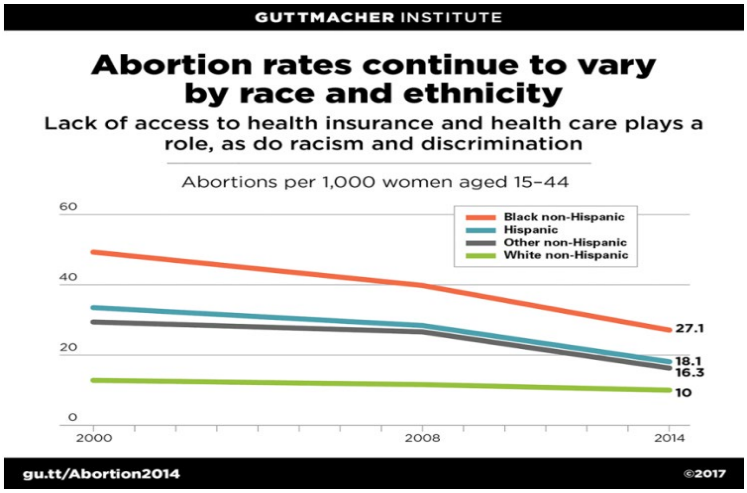
[101] Ward, *supra* note 86.

[102] Eligon, *supra* note 71.

[103] *See* Finer et al., *supra* note 57, at 112, 114–16.

[104] *Abortion Rates by Race and Ethnicity*, GUTTMACHER INST. (Oct. 19, 2017), https://www.guttmacher.org/infographic/2017/abortion-rates-race-and-ethnicity.

[105] *Id.* This chart was published by the Guttmacher Institute. Guttmacher Institute conducts research on sexual and reproductive health and rights.



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Although there is an overall decline in the rate of abortions, it is clear that minority groups continue to have higher rates of abortions.[107] The reason that minority women groups have more abortions than white women vary.[108] However, research has shown that population control facilities are often placed in areas where there is a disproportionate number of Blacks and Hispanics.[109] It is likely that the deliberate locations of these facilities have a large influence on the decisions of minority women to get an abortion.[110] If it is found or even speculated that these facilities are targeting minority groups, then the implementation of race-selective abortion bans may provide extra protection against these tactics.

III. ANALYSIS

Since *Planned Parenthood v. Casey*, the Supreme Court has considered the health of the mother, the potential life of the fetus, eradicating discrimination, and protecting the potential life from discrimination as compelling state interests.[111] Prior to Justice Thomas's concurrence in *Box v. Planned Parenthood*, Tori Gooder, former Human Rights Quarterly Senior Article Editor at the University of Cincinnati

[106] *Id.*
[107] *Id.*
[108] *See* Eligon, *supra* note 71.
[109] Crutcher, Novielli, & Hobbs, *supra* note 67, at 1, 22.
[110] *Id.* at 1; *see also Planned Parenthood Targets Minority Neighborhoods*, PROTECTING BLACK LIFE, https://www.protectingblacklife.org/pp_targets/index.html (last visited Nov. 6, 2020). This site offers an interactive map so that users may examine areas the relation between abortion clinics and minority communities.
[111] Gooder, *supra* note 37, at 556.

College of Law, argued that the prohibition of abortion as tool for eugenics may be a stronger compelling interest for states than even discrimination.[112] Gooder used the term "new compelling state interest" to describe a state's interest in preventing abortion from being a tool for eugenicists' agenda.[113] Justice Thomas focuses on this "new compelling state interest" in his concurrence in *Box v. Planned Parenthood*.[114] He argues that laws that ban selective abortions "promote a state's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[115] If states that have enacted race-selective abortion bans have done so to prevent abortion from being used as a tool for "modern day eugenics," then the Court should rule that the bans are constitutional.

A. Eugenics Movement

The United States has a fairly long and sometimes forgotten or untaught history with the eugenics movement.[116] Eugenics, a termed coined by Francis Galton in 1883, means "the practice or advocacy of controlled selective breeding of human populations (as by sterilization) to improve the population's genetic composition."[117] The eugenics movement, led by Charles Davenport, a prominent biologist, and Harry Laughlin, a former teacher and principal interested in breeding, began in the United States in the 20th Century.[118] Eugenicists looked at the race of people as a relevant factor in distinguishing between the fit and unfit.[119] They believed that white men fixed many of the issues that often kept the colored populations from increasing out of control.[120] Known eugenicists went as far as to say that the number of colored people in the world continued to increase while the amount of subsistence dwindled, which would create a problem for the white world.[121] Lothrop Stobbard, American historian, expressed his concern for the growing amount of

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[112] *Id.*

[113] *Id.* at 561.

[114] *See* Box v. Planned Parenthood of Ind. & Ky, Inc., 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring).

[115] *Id.* at 1783.

[116] Teryn Bouche & Laura Rivard, *America's Hidden History: The Eugenics Movement*, NATURE EDUC. (Sept. 18, 2014), https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444/. ("[A]sk the average person about the 'eugenics movement' and you are likely to get blank stares.").

[117] *Eugenics*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/eugenics (last visited Sept. 12, 2020).

[118] Bouche & Rivard, *supra* note 116.

[119] *Box*, 139 S. Ct. at 1785 (Thomas, J., concurring).

[120] *See id.*

[121] LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY 8–9 (1920).

colored people in the world and believed that "artificial barriers" were needed to prevent the white race from being overtaken by the increasing colored races.[122] Although he discussed many other colored people, Stobbard asserted that Black people were the "quickest of breeders" and "extremely susceptible to external influences."[123] Eugenicists recognizing the "fact" that Blacks were the "quickest of breeders," supported "artificial barriers" — such as forced sterilization, abortion, and birth control — to prevent the colored population from increasing.[124]

The reach of the eugenics movement goes far. So far in fact, that at one point in history, the Supreme Court and federal and state legislatures supported eugenics in their opinions.[125] The Supreme Court strengthened and supported eugenicists' agenda in *Buck v. Bell*, 274 U.S. 200 (1927).[126] In *Buck*, the Supreme Court upheld a forced sterilization law.[127] The court stated that:

> [S]he may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization. . . . We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.[128]

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[122] *Id.* at 302.

[123] *Id.* at 90, 92.

[124] *Id.* at 90, 302; s*ee also Box*, 139 S. Ct. at 1784–86 (Thomas, J., concurring).

[125] Gooder, *supra* note 37, at 561.

[126] Brittany Raymer, *Pro-Abortion Group Leader Admits that Abortion is Eugenics*, DAILY CITIZEN (Dec. 4, 2019), https://dailycitizen.focusonthefamily.com/pro-abortion-group-leader-admits-that-abortion-is-eugenics/.

[127] Buck v. Bell, 274 U.S. 200, 207 (1927).

[128] *Id.*

Throughout the 20th century, forced sterilization was used, in over 32 states, as a means of controlling an "undesirable" population.[129] This "undesirable" group consisted of "immigrants, people of color, poor people, unmarried mothers, the disabled, [and] the mentally ill."[130] Many eugenicists supported forced sterilization to protect the society from the offspring of those whom they deemed "inferior or dangerous."[131] The sad part is that Carrie Buck was not the only person to experience forced sterilization.[132] Since the Supreme Court's ruling in 1927, there have been over 70,000 forced sterilizations in the United States.[133] Blacks were significantly impacted by the use of forced sterilization in America. In Virginia, African-Americans made up twenty-two percent of those sterilized.[134] Not only were older Black women forcibly sterilized but young African-American girls were sterilized against their will and the will of their parents.[135] Many states have apologized for its sterilization programs[136] but one fact remains — it has been almost a century later and *Buck v. Bell* has not been overturned.[137]

The reach of the eugenics movement can be seen in many other places as well. Eugenics was so popular that many colleges and universities educated students on the movement and its merits.[138] Simply educating young people of the movement is actually not a bad idea; however, when some of the most influential eugenics thinkers are teaching those classes with a proactive objective rather than an objective position, an issue

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[129] Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/.

[130] *Id.*

[131] *Id.*

[132] *See id.*

[133] *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations.

[134] Lutz Kaelber, *Virginia*, UNIV. VT, https://www.uvm.edu/~lkaelber/eugenics/VA/VA.html (last visited Nov. 7, 2020).

[135] Ko, *supra* note 129. (Two poor mentally disabled black girls were sterilized after their illiterate mother signed paperwork that she believed authorized them to receive birth control shots.)

[136] Trevor Burrus, *How States Sterilized 60,000 Americans — And Got Away with It*, FOUND. FOR ECON. EDUC. (Jan. 28, 2016), https://fee.org/articles/how-states-got-away-with-sterilizing-60-000-americans/.

[137] Eric Metaxas, Commentary, *Eugenics Alive and Well in America: Sterilization Case Buck v. Bell Still Matters*, CNS NEWS (Nov. 17, 2017), https://www.cnsnews.com/commentary/eric-metaxas/eugenics-alive-and-well-america-sterilization-case-buck-v-bell-still-matters.

[138] Box v. Planned Parenthood of Ind. & Ky. Inc., 139 S. Ct. 1780, 1784–85 (2019) (Thomas, J., concurring).

arises.[139] Some professors taught a racial version of eugenics and undoubtedly influenced students to think that Blacks were inferior to whites.[140] Some even went as far as to say that the Black race was incapable of producing offspring with high mental or moral capabilities.[141]

This particular thinking played a huge role in the treatment of Blacks throughout the twentieth century.[142] Since most of the legislators, judges, and other law makers attended, or knew someone who attended, these schools that taught eugenics, the movement undoubtedly spread to other aspects of life such as marriage and immigration.[143] Some eugenicists were huge proponents of preventing interracial marriages and laws were soon enacted to prevent whites from marrying other races of people.[144] Our country has a dark history with the eugenics movement, and it is truly strange that this movement touched one of the most sacred tenets known to humankind — marriage.[145]

Furthermore, the eugenics movement touched on reproductive rights.[146] Justice Thomas argues that birth control and abortion became a tool to advance eugenicists' goals.[147] Gooder quickly mentions abortion and infanticide as eugenicists' tools but fails to analyze why or even how these became eugenicists' tools.[148] Gooder only focuses on the use of eugenics for the disabled[149] but it is important to analyze the history of racial eugenics to understand how the movement has played a huge role

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[139] *See* Adam S. Cohen, *Harvard's Eugenics Era: When Academics Embraced Scientific Racism, Immigration Restrictions, and the Suppression of "The Unfit",* HARV. MAG., Mar.–Apr. 2016, https://harvardmagazine.com/2016/03/harvards-eugenics-era.

[140] *Id.*

[141] *Id.*

[142] *See id.*

[143] Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle Over Abortion Rights*, JUSTIA VERDICT (June 25, 2019), https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights; *see also* Cohen, *supra* note 139 ("If Harvard's embrace of eugenics had somehow remained within University confines—as merely an intellectual school of thought—the impact might have been contained. But members of the community took their ideas about genetic superiority and biological engineering to Congress, to the courts, and to the public at large—with considerable effect.").

[144] Cohen, *supra* note 139.

[145] ToddS. Beall, *Seven Principles from Genesis for Marriage and Family*, ANSWERS IN GENESIS (Apr. 30, 2016), https://answersingenesis.org/family/marriage/seven-principles-from-genesis/. (Genesis 1 and 2 shows that marriage was created by God, not by men. Therefore, men should not have tried to regulate who married whom).

[146] Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y, 1, 1–2 (1996).

[147] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring).

[148] *See* Gooder, *supra* note 37, at 562.

[149] *See id.* at 554 *passim*.

in the high rate of abortions amongst Black women. As Ben Carson, US Secretary of HUD and anti-abortion advocate, stated,

> I know who Margaret Sanger is, and I know that she believed in eugenics, and that she was not particularly enamored with Black people. And one of the reasons that you find most of their clinics [Planned Parenthood] in Black neighborhoods is so that you can find way to control that population. And I think people should go back and read about Margaret Sanger, who founded this place.[150]

For this reason, it is extremely important to examine Margaret Sanger and Planned Parenthood's ties to the eugenics movement. Margaret Sanger, Planned Parenthood founder, openly endorsed the use of birth control for eugenics purposes.[151] She believed that birth control was needed to assist with many of the societal problems during her time.[152] Sanger targeted African-Americans in her campaign to provide birth control services to women.[153] She recognized that Black women wanted to control their fertility and took significant strides to ensure that Black women were provided birth control methods.[154] To some this may seem like a noble effort, but Sanger believed that birth control contained eugenic value.[155] She thought that people of her time would best serve the true interest of eugenics through birth control. [156] For this reason and many others, she was a huge proponent of educating the masses on birth control methods.[157] Although Sanger was a huge proponent of birth control, Sanger never endorsed the use of abortion, in fact she often distinguished between abortion and birth control.[158] However, Sanger's

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[150] *Dr. Ben Carson the GOP's New 'Prom King' After First Debate?,* FOXNEWS.COM (Aug. 12, 2015), https://www.foxnews.com/transcript/dr-ben-carson-the-gops-new-prom-king-after-first-debate.

[151] *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring).

[152] *Id.* at 1788.

[153] The Margaret Sanger Papers Project, *Birth Control or Race Control? Sanger and the Negro Project*, N.Y.U. (Fall 2001), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php.

[154] *Id.*

[155] Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL R., (Oct. 1921), at 5, https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=238946.xml.

[156] *Id.*

[157] *See id.*

[158] Margaret Sanger, *The Birth Control of a Nation*, N.Y.U. (1937), https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101878.xml.

arguments for birth control apply even more to abortion because babies with unwanted characteristics can easily be targeted through means of abortion and everchanging genetic technology.[159]

Even though Sanger did not support abortion, future Planned Parenthood presidents and abortion advocates supported abortion for eugenics reasons.[160] From its inception, Planned Parenthood has been actively involved with the eugenics movement.[161] The eugenics movement has touched almost every aspect of reproduction — marriage, birth control, etc. — and it is shocking that some still believe that abortion clinics do not carry a eugenics agenda — to control the population.[162]

The eugenics movement waned after being associated with the horrors of the Nazi regime in the 1940s.[163] That does not mean that eugenicist's agendas or ideas disappeared. Rather, while the term eugenics was tarnished by Hitler and his efforts, eugenicists still wanted to draw the distinction between the fit and the unfit.[164] So, they chose new words, such as genetics, to describe eugenics.[165] The main notion of limiting or eliminating the number of colored, disabled, and other "inferior" people is still alive today.[166] Although many others are undoubtedly negatively impacted by abortion, abortion poses a unique threat to Black families in America.[167] This threat is so unique because so many facilities are strategically placed in predominately Black neighborhoods.[168] It is no surprise that many family planning clinics, including Planned Parenthood, believed "that the most effective way they

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[159] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring).

[160] *Id.*; *see also* Rebecca R. Messall, Opinion, *Margaret Sanger and the Eugenics Movement,* DENVER POST (June 2, 2010), https://www.denverpost.com/2010/06/02/margaret-sanger-and-the-eugenics-movement/.

[161] *See Box*, 139 S. Ct. at 1783.

[162] *See id.*; *see also* Amita Kelly, *Fact Check: Was Planned Parenthood Started to 'Control' the Black Population?,* NPR (Aug. 14, 2015), https://www.npr.org/sections/itsallpolitics/2015/08/14/432080520/fact-check-was-planned-parenthood-started-to-control-the-black-population.

[163] Bouche & Rivard, *supra* note 116.

[164] Messall, *supra* note 160.

[165] *Id.*

[166] Gary L.Welton, Commentary, *Eugenics is Alive and Well in America*, CNSNEWS.COM (Jan. 22, 2019), https://www.cnsnews.com/commentary/gary-l-welton/eugenics-alive-and-well-america; Messall, *supra* note 160, ("The control of reproduction remained the primary goal of eugenics in order to improve the human gene pool.").

[167] P.R. Lockhart, *"Abortion as Black Genocide": Inside the Black Anti-Abortion Movement*, VOX (Jan. 19, 2018), https://www.vox.com/platform/amp/identities/2018/1/19/16906928/black-anti-abortion-movement-yoruba-richen-medical-racism.

[168] Crutcher, Novielli, & Hobbs, *supra* note 67 at 22.

could advance their agenda would be to concentrate population control facilities within targeted communities."[169]

On one hand, there are people like Justice Thomas who believe that the eugenicists used abortion and birth control as a means to advance their eugenics agenda.[170] On the other side, people argue that eugenicists never supported abortion as a way to control the population.[171] Regardless of the different perspectives on whether eugenicists supported abortion, it is clear that people of color are still being targeted by institutions with hidden eugenics agendas. In fact, "Planned Parenthood has been a key tool to reduce or eliminate births among Blacks, other minorities, and the disabled."[172] Planned Parenthood and other family planning clinics are strategically placed in Black or minority communities for this very purpose.[173] Even if one does not believe that family planning clinics are placed in predominantly African-American communities for reasons of population control, there is no denying that the number of abortion clinics in Black communities is a major contributor to the high rate of Black women obtaining abortions.[174] The eugenics movement, with a new face and name, is clearly still alive and its goals of eliminating or reducing the "inferior" have been carried out through the use of abortion clinics that are strategically placed in certain communities.[175]

To determine whether race-selective abortion bans are constitutional, the Court will look at whether the state has a compelling interest that outweighs a woman's right to an abortion.[176] A state's interest in preventing abortion from being used as a modern-day eugenics tool is a compelling state interest and the Court should rule that race-selective abortion bans are constitutional. Statutes, such as Indiana's race-selective abortion ban statute,[177] that regulate pre-viability abortions will likely face many arguments. In fact, *Casey* concluded that the line should be drawn at viability and any time before that a woman has the right to an abortion but it must be weighed against a state's interest in protecting unborn life.[178]

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[169] *The Effects Of Abortions on The Black Community*, *supra* note 2.

[170] *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring).

[171] Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/.

[172] Messall, *supra* note 160.

[173] *See Planned Parenthood Targets Minority Neighborhoods*, *supra* note 110.

[174] *The Effects of Abortions in the Black Community*, *supra* note 2.

[175] *See id.*

[176] *See* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992).

[177] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

[178] *See* Casey, 505 U.S. at 870–71.

Race-selective abortion bans before viability [179] should be held constitutional since abortion is being used as tool to annihilate and decrease the number of Black people in the United States. Race-selective abortion bans before viability should be upheld even more so than sex- or disability- selective abortion bans because a person generally knows the race of the child way before viability and can be targeted by abortion clinics during the early stages of pregnancy. Some have argued that there are many moral and ethical concerns with allowing individuals to decide which races are worth bringing to life. [180] Therefore, the Court can consider those moral and ethical concerns, as it did in Gonzalez, to conclude that the state has a compelling interest in preventing the use of abortion for modern day eugenics. [181]

Although a woman's right to abortion will be limited and some burdens will be imposed, there is no undue burden on the woman's right to obtain an abortion because the state has a compelling interest in protecting against racial discrimination. One thing is clear, colored people, specifically Blacks, have been targeted by eugenicists for years. [182] Some people do not agree with this notion and argue that eugenics thinking is long gone but, as Eric Metaxas stated, "Eugenics is a terrible idea that won't go away." [183] Black people have been subjected to hidden eugenics agendas for years and some truly believe that they are just exercising their constitutional rights to obtain an abortion. [184] Hopefully, the Court will recognize the prevention of abortion as a modern-day tool of eugenics as a compelling state interest and help expose the deeply hidden eugenicists' goals that many abortion clinics hold.

Even if the Court finds that race-selective abortion bans are constitutional, the high rate of women of color obtaining an abortion may remain. Even though legislators may be trying to protect against abortion being used as a tool for modern day eugenics, in practice the abortion bans will likely be ineffective. The statutes prohibit an abortion based on race but many women of color do not get an abortion based on the race of their child. [185] It is true that at one point in history, Black women prevented the birth of their children to prevent their babies from experiencing the horrors of slavery. [186] Today, women get abortions for so many different reasons, and it would be rather difficult for race-selective abortion bans to

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[179] *See* Gooder, *supra* note 37, at 562.

[180] *Id.* at 563.

[181] *Id.*

[182] Kaelber, *supra* note 134 (explaining the extent of forced sterilization laws); *see also The Effects of Abortions in the Black Community*., *supra* note 2 (explaining the placement of abortion clinics in the black communities).

[183] Metaxas, *supra* note 137.

[184] *The Effects of Abortions in the Black Community*, *supra* note 2.

[185] *Banning Abortions, supra* note 83.

[186] Ross, *supra* note 9, at 276.

prevent abortions from being used as modern day eugenics.[187] Another question to consider is how will doctors determine if a woman is aborting her child simply due to race or for some other reason? Doctors may simply look at all women of color and assume that race may play a factor in their decision to get an abortion. That will lead to more discrimination and problems in the Black community.

While this Article has focused on the impact of race-selective abortion bans on Black women, I would argue that white women would be affected as well. White women, who get pregnant by a man of a different race, may choose to abort the child because of the race. So now the question becomes will this law apply to them as well? There seems to be issues if the state does not adopt race-selective abortion bans as well as if the state chooses to adopt these bans. If the state does not adopt the abortion bans, then Black women are more likely to unwittingly participate in aborting their babies. By adopting race-selective abortion bans, states will likely increase the conversation, amongst the Black community, about the use of abortion as a tool for modern day eugenics. If states do adopt race-selective abortion bans, then Black women will likely continue to participate in aborting their babies because women generally do not abort their children based on race.[188] By adopting race-selective abortion bans, states may encourage unintentional discrimination.

B. Solutions

Whether the Court finds race-selective abortion bans constitutional or not, one issue remains — Black women have the highest abortion rates in the United States.[189] There are many solutions for addressing the high rates of abortion among Black women and minority groups, and for states to protect against eugenicists' agenda in the form of abortion. This Article proffers two different settings — legal and the Black community — and provides solutions for each.

1. Legal

First, legislators should be very careful how they construct statutes that ban race-selective abortions. Statutes should be narrowly tailored and prohibit abortions based "solely" on race of the unborn child.[190] The Indiana statute does use the "solely because of the race" language whereas the Arizona statute does not.[191] The Court may find that the "solely"

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[187] *See The Effects of Abortions in the Black Community*, *supra* note 2.
[188] *Banning Abortions*, *supra* note 83.
[189] *The Effects of Abortions in the Black Community*, *supra* note 2.
[190] Gooder, *supra* note 37, at 565.
[191] *Id.* at 553–54.

language is less of a burden on a woman's right to obtain an abortion because it allows other factors, such as lack of partner support, to be considered with the race factor. Another solution would be to focus on abortion facilities instead of imposing laws on a woman's right to obtain an abortion. States should work to limit the number of facilities in predominately Black and Hispanic communities by imposing laws that protect against racial targeting while still allowing women access to abortions. States may educate people in predominately Black and Hispanic communities on eugenics and the role it has played in abortion clinics.

In the end, the Supreme Court will play a very important role in constitutional interpretation of racial discrimination. The Supreme Court has avoided making a ruling on whether race-selective abortion bans are constitutional.[192] The Court is constitutionally required to protect against racial discrimination,[193] and it should address whether race-selective abortion bans are constitutional. If the Court were to take up the issue in the future, it should re-examine its rulings in *Roe v. Wade* and *Planned Parenthood v. Casey*. Many people are already speculating that the Court will overrule *Roe*.[194]

Some have argued that the Court should let states determine how it would like to regulate abortion instead of continuing to hold that abortion is a constitutional right.[195] The abortion laws that the Supreme Court has developed are not in the Constitution[196] and thus the Supreme Court should let states handle it. If *Roe* is overruled, State Legislatures should take steps to survey the community and develop laws that work well for their state. Even if the Court does not overrule *Roe* and *Casey*, the Court should consider giving more deference to state laws, such as race-selective abortion bans, because state legislators generally have a closer connection to the people than the Supreme Court.

2. The Black Community

Race-selective abortion bans may or may not affect the Black community. Black women generally get abortions for reasons outside of

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[192] Box v. Planned Parenthood of Ind. & Ky, Inc., 139 S. Ct. 1780, 1782 (2019).

[193] *See id.* at 1792.

[194] Scott Lemieux, *Supreme Court's New Abortion Case Shows Roe v. Wade's End Will Come Slowly. But It'll Come*, NBC NEWS (Oct. 7, 2019), https://www.nbcnews.com/think/opinion/supreme-court-s-new-abortion-case-shows-roe-v-wade-ncna1063361.

[195] Jessica Mason Pieklo, *The 'Let States Decide' Lie Conservatives Push on Abortion Rights*, REWIRE NEWS GRP. (Oct. 21, 2016), https://rewire.news/article/2016/10/21/let-states-decide-lie-conservatives-push-abortion-rights/.

[196] Box, 139 S. Ct. at 1793 (Thomas, J., concurring).

their race[197] and race-selective abortion bans will likely have a small impact because of that. Regardless of whether race-selective bans are enacted or upheld as constitutional, Black women continue to have the highest abortion rates and the community needs to come together to address this issue.[198] The right to obtain an abortion will eventually mean nothing if minority groups are eliminated through the use of abortion. Consider this:

> What if the mothers of these individuals had believed the lies — Dr. Martin Luther King, Jr., Nelson Mandela, Shirley Chisholm, Ida B. Wells, Madame C. J. Walker, Harriet Tubman, Dr. Charles Drew, Dr. Ben Carson, Garrett A. Morgan, you and me? Imagine the greatness that would have been lost![199]

Many Black women and men are actively involved in the abortion debate.[200] Many people in the Black community believe that race-selective abortion bans alone will not have a significant impact on the Black population because people need to understand the social forces that cause Black women to have abortions.[201] Addressing the social forces that cause Black women to obtain an abortion is extremely vital to limiting the number of Black women that get abortions each year. Black women obtain abortions for different reasons and they generally do not knowingly obtain an abortion based on the race of their child.[202] For that very reason, many race-selective abortion bans will not be effective. Some have proposed that the way to address abortion is to examine the quality of urban schools, the disproportionately high unemployment rates in the Black community, mass incarceration, and the racial disparities in health care.[203] A quality education would address many of the issues that affect the Black community.[204] However, many of the issues would need to be addressed in the home or through legislation.

Another solution to address the high rates of abortion in the Black community is to hold men more accountable. Less than 38.7 percent of

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[197] *See* Eligon, *supra* note 71.

[198] *The Effects of Abortions in the Black Community*, *supra* note 2.

[199] *Black Women Targeted for Abortion,* CONCERNED WOMEN FOR AM. LEGIS. ACTION COMM. (Sept. 13, 2018), https://concernedwomen.org/black-women-targeted-for-abortion/.

[200] *See* Lockhart, *supra* note 167.

[201] Eligon, *supra* note 71.

[202] *Banning Abortions*, *supra* note 83

[203] Eligon, *supra* note 71.

[204] *See Banning Abortions*, *supra* note 83.

Black children live in a two-parent household.[205] More than one third of Black children living in a single parent household lives with an unmarried mother.[206] There are numerous reasons, such as incarceration, why children live with their unmarried mothers.[207] Fathers who willingly choose not to be involved in their child's life undoubtedly influence a woman's decision on whether to obtain an abortion.[208] The community should place a heavy emphasis on marriage and accountability when it comes to having a child. As Benjamin Watson, former NFL football player and pro-life advocate, stated, "Many women would not be seeking abortions if the men involved in their lives were doing what they were supposed to be doing . . . that's a challenge to men everywhere to step up."[209] If the community took this approach of challenging men to take accountability, then the high abortion rates amongst Black women would likely decrease. The church can play a huge role as well in holding men more accountable.[210] The church can teach young men that being a father is important and that they should take any means necessary to ensure a healthy life for their child. After all the Bible does tell us to "Train up a child in the way he should go, and when he is old he will not depart from it."[211] The Black community, including the church, should teach accountability at a young age so that when men are older they can be protectors, providers, and prevent Black women from obtaining abortions.[212] Another solution would be for the community to encourage fostering and adoption when women decide that they do not want to keep a child.

Black influencers, such as rappers and celebrities, should educate themselves on the history of abortion and the eugenics movement. They can use this knowledge to speak out about abortion. Today, many people do not read or watch the news but they educate themselves on what's happening in the world through social media outlets.[213] How amazing

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[205] Zenitha Prince, *Census Bureau: Higher Percentage of Black Children Live with Single Mothers*, AFRO NEWS (Dec. 31, 2016), https://www.afro.com/census-bureau-higher-percentage-black-children-live-single-mothers/.

[206] *Id.*

[207] *See* Eligon, *supra* note 71.

[208] *See My Abortion: 'I Don't Want to be Eternally Attached to Someone I Do Not Love'*, THE JOURNAL.IE (May 27, 2017), https://www.thejournal.ie/readme/my-abortion-i-dont-want-to-be-eternally-attached-to-someone-i-do-not-love-3408331-May2017/.

[209] Sarah Taylor, *Former NFL Star Says Men are Responsible to Step Up and Prevent Abortion: 'Men are Protectors. We are Providers.'*, BLAZE (Feb. 7, 2019), https://www.theblaze.com/news/benjamin-watson-men-prevent-abortion.

[210] Eligon, *supra* note 71.

[211] *Proverbs* 22:6 (King James).

[212] *See* Taylor, *supra* note 209.

[213] Media Insight Project, *How Millennials Get News: Inside the Habits of America's First Digital Generation*, AM. PRESS INST., (Mar. 16, 2015),

would it be if popular Black celebrities brought attention to the fact that a disproportionate number of Black babies are aborted every year and that abortion clinics have targeted Blacks for years? It would be monumental even if they were able to just get people involved in the abortion debate.

Some Black celebrities, such as Nick Cannon, Benjamin Watson, and Kanye West, are doing just that.[214] Nick Cannon has boldly spoken out against Planned Parenthood and its founder. [215] Cannon argues that Planned Parenthood is a population control facility and that it carries out modern day eugenics.[216] He has used his platform, whether on social media or through song, to educate people on the abortion issue. Benjamin Watson, a pro-life professional football player, is set to release a documentary about abortion. [217] He has often expressed his sentiments towards abortion in the Black community and urges other celebrities and public figures to speak out about abortion.[218] If more people are involved in the abortion debate, then the community can address the issues that affect it and possibly bring awareness to the hidden eugenicist's agenda of many abortion clinics.

CONCLUSION

In sum, "It's a true crisis … that there are more African-American babies being aborted than born." [219] Abortion has become a tool for eugenicists to carry out their goal to control the population. The state's interest in preventing abortion from being used as a modern-day eugenics tool will outweigh a woman's right to abortion, even before viability. Although it will impose some burden on a woman's right to get an

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https://www.americanpressinstitute.org/publications/reports/survey-research/millennials-news/.

[214] NICK CANNON, CAN I LIVE (Sony BMG Music Ent. 2005), https://www.discogs.com/Nick-Cannon-Featuring-Anthony-Hamilton-Can-I-Live-/release/5883019; *See e.g.*, Taylor *supra* note 209; *Kanye West Speaks Out Against Abortion: "Thou Shalt Not Kill",* TEX. RT. TO LIFE (Dec. 28, 2019), https://www.texasrighttolife.com/kanye-west-speaks-out-against-abortion-thou-shalt-not-kill-2.

[215] *See Nick Cannon Lyrics "Can I Live",* AZ LYRICS, https://www.azlyrics.com/lyrics/nickcannon/canilive.html (last visited Nov. 3, 2020).

[216] Cavan Sieczkowski, *Nick Cannon Says Planned Parenthood s 'Population Control,' 'Eugenics',* HUFFPOST (Nov. 28, 2016), https://www.huffpost.com/entry/nick-cannon-planned-parenthood_n_583c41f5e4b000af95eed819.

[217] Mairead Mcardle, *Pro-Life New England Patriots Player Benjamin Watson to Release Abortion Documentary*, NAT'L REV. (Jan. 21, 2020), https://www.nationalreview.com/news/pro-life-new-england-patriots-player-benjamin-watson-to-release-abortion-documentary/.

[218] *See id.*

[219] Catholic Review, *Pro-Lifer Says Abortion is Leading Cause of Death in Black Community*, ARCHDIOCESE BALT. (Jan. 19, 2012), https://www.archbalt.org/pro-lifer-says-abortion-is-leading-cause-of-death-in-black-community/.

abortion, it will not impose an undue burden and thus race-selective abortion bans will be upheld. Race-selective abortion bans may help in some ways to address the high rate of abortion amongst minority groups, particularly African-Americans, who are being targeted by abortion clinics. However, race-selective abortion bans may not have an impact whatsoever because today's women of color do not generally obtain an abortion based on the race of their child. The idea to prevent abortion from being used as a tool for modern day eugenics is of utmost importance and states should enact some laws to protect against the use of abortion as a way to advance eugenicists' agendas.

This Article does not attempt to argue that Black women are participating in a genocide of their own babies but that some women have unwittingly been influenced by abortion clinics with hidden eugenics goals. Race-selective abortion bans and the high rate of abortions by colored women should be addressed both legally and within the community. Education and awareness are some of the major keys for the community. If more people become aware of the roots of birth control and abortion clinics, then hopefully they will realize that abortion clinics have targeted Black women for years. That needs to change now.

SOUTH KOREA'S PRE-ASSESSMENT AT THE PORT OF ENTRY UNDER THE NON-REFOULEMENT PRINCIPLE OF THE REFUGEE CONVENTION OF 1951

So Jin Kim†

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INTRODUCTION

The historical flow of refugees from all around the world has long been making its way to Europe, Australia, and the United States[1] ever since the establishment of the Convention Relating to the Status of Refugee of 1951 ("Refugee Convention")[2] and the Protocol Relating to the Status of Refugees of 1967 ("Refugee Protocol").[3] During the 1990s, Asian countries began joining the Refugee Convention, especially those Contracting States that were gaining economic stability within the international community.[4] The Republic of Korea ("South Korea") was one of those newly trending destination countries for the asylum seekers ever since it first acceded to the Refugee Convention and the Refugee Protocol in December 1992.[5] In 1993, South Korea added the definition of "refugee" into its Immigration Control Law[6] and then in 2012 it finally legislated its Refugee Act,[7] becoming the first signatory state in Asia to implement the Refugee Convention into its domestic law.[8] However, while there was a sharp increase in the number of asylum seekers to South Korea between 2013 and 2018, jumping from 1,574 to 16,173, only 57 in 2013 and 144 in 2018 were granted refugee status.[9] The Organization for Economic Co-operation and Development ("OECD") rated South Korea's refugee acceptance rate at less than 3%, which was below the average of 38%,

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[1] UNHCR Field Information and Coordination Support Section, UNHCR HISTORICAL REFUGEE DATA, http://data.unhcr.org/dataviz/ (last visited Sep. 21, 2020).

[2] Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259 [hereinafter Refugee Convention].

[3] Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Refugee Protocol].

[4] UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (April 2015), https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

[5] UNHCR, Fact Sheet: The Republic of Korea (Feb. 2016), https://www.unhcr.org/protection/operations/500019d59/republic-of-korea-fact-sheet.pdf; UNHCR & OECD, 2019 International Migration and Displacement Trends and Policies Report to the G20, https://www.oecd.org/migration/mig/G20-migration-and-displacement-trends-and-policies-report-2019.pdf.

[6] Chul-ibguggwanli beob [Immigration Control Law], amended by Ministry of Justice Decree No. 16344, Apr. 23, 2019, art. 2 (S. Kor.), *translated in* Korean Legislation Research Institutes online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

[7] Nanmin beob [Refugee Act], amended by Ministry of Justice Decree No. 14408, Dec. 20, 2016, arts. 2, 3, 5(6) (S. Kor.), *translated in* Korean Legislation Research Institutes online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

[8] KOREA IMMIGR. SERV., HANDBOOK FOR RECOGNIZED REFUGEES, HUMANITARIAN STATUS HOLDERS, AND REFUGEE STATUES APPLICANTS: REFUGEE STATUS DETERMINATION PROCEDURES IN KOREA 4 (2015).

[9] Korea IMMIGR. SERV., MONTHLY STATISTICAL REPORT OF KOREA IMMIGRATION SERVICE 34 (Jan. 2019), http://www.moj.go.kr/viewer/skin/doc.html?rs=/viewer/result/bbs/227&fn=temp_1566174851478100 [hereinafter KOREA IMMIGRATION STATISTICS].

ranking it as third in last among the Member States.[10] This low refugee acceptance rate was criticized as the outcome of the asylum seekers' inaccessibility to South Korea's refugee status determination ("RSD") procedure that carried an important role in assessing the *well-founded fear* of the asylum seekers upon entry.[11] Since the enactment of the Refugee Act, many scholars and asylum seekers were left disappointed at the reality of South Korea's RSD procedure.[12]

The United Nations High Commissioner for Refugees ("UNHCR")[13] previously made comments and gave suggestions to South Korea about its Refugee Act in 2013.[14] UNHCR suggested a revision of Article 8(5) of the Refugee Act that allowed direct repatriation of asylum seekers without the RSD procedure.[15] The provision justified such direct repatriation based on the seven factors provided under Article 5 of the Enforcement Decree of the Refugee Act ("Enforcement Decree"), which disqualified asylum seekers from accessing the RSD procedure if they satisfied even one of the seven factors.[16] One of the factors was "knowingly concealing facts . . . by submitting a false document."[17] The controversial nature of this one factor was that it was not assessing whether the claimed fear met the required standard of *well-founded fear* under the Refugee Convention.[18] The factor was merely testing the credibility of the asylum seekers based on their documents and interviews brought before the chief of immigration.[19] The assessment failed to recognize the asylum seekers' potential trauma induced by the persecution they were fleeing from and it failed to assess the essential factors to determine the existence of *well-founded fear*.[20] In reality, asylum seekers did not always have proper documents or understand the

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[10] Shin-wha Lee, *South Korea's Refugee Policies: National and Human Security Perspectives*, in HUMAN SECURITY AND CROSS-BORDER COOPERATION IN EAST ASIA 227, 231 (Carolina G. Hernandez, Eun Mee Kim, Yoichi Mine, Ren Xiao, eds., 2019).

[11] *Id.; Refugee Laws in South Korea: Issues & Controversies,* THE PENINSULA REPORT, (Dec. 12, 2019), https://thepeninsulareport.com/2019/12/10/refugee-laws-in-south-korea-issues-controversies/.

[12] Jieun Lee, *A Pressing Need for the Reform of Interpreting Service in Asylum Settings: A Case Study of Asylum Appeal Hearings in South Korea*, 27 J. REFUGEE STUD. 62, 63 (2014); Il Lee, *Koreas Landmark Case for Improving the Legal Process of Asylum Seekers*, 3 KOREAN J. INTL & COMP. L. 171. 172 (2015).

[13] UNHCR, Commissioner Antonio Guterres, https://www.unhcr.org/en-us/antonio-guterres-portugal-2005-2015.html (last visited Oct. 5, 2020).

[14] UNHCR, UNHCRs Comment on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea (2013).

[15] *Id.* at 10.

[16] Refugee Act, art. 8(5) (S. Kor.); Nanminbeob Sihaenglyeong [Enforcement Decree of the Refugee Act], *amended* by Presidential Decree No. 28870, May 8, 2018, art. 5 (S. Kor.).

[17] Enforcement Decree of the Refugee Act, art. 5(3) (S. Kor.).

[18] UNCHR Comment *supra* note 14, at 12.

[19] *See Id.* at 9–13.

[20] *Id.* at 12–13.

sophisticated administrative procedures that were provided in unfamiliar languages.[21] Given the new environment asylum seekers were arriving into after a long hard journey, the majority of the asylum seekers struggled to convey clear and precise recollection of their claim of a *well-founded fear* of persecution.[22]

As opposed to the seven factors in the Enforcement Decree, Article 1(A)(2) of the Refugee Convention provided five factors as part of the RSD procedure to help its Contracting States determine whether the asylum seekers had a *well-founded fear* of persecution to qualify as refugees.[23] The Refugee Convention emphasized that the purpose of assessing *well-founded fear* was to make sure the asylum seekers are not repatriated back to countries of origin where persecutions exist.[24] This *non-refoulement* principle makes the RSD procedure a minimal obligation or duty of the Contracting States. Unfortunately, South Korea's current pre-assessment before the RSD procedure seriously conflicts with the Refugee Convention's requirement of the RSD procedure.[25] South Korea's pre-assessment does not only fail to assess *well-founded fear*, but it also makes it difficult for asylum seekers to gain access to the RSD procedure that assesses *well-founded fear*.[26]

South Korea is not alone when it comes to varying RSD procedures that allow the Contracting States to practice state sovereignty when determining *well-founded fear*.[27] Many Western countries, such as the U.S. and Australia, were forerunners in establishing RSD procedures that varied.[28] A comparative study of these countries alongside South Korea will significantly expand the understanding of the core issues in South Korea's Enforcement Decree and RSD procedure. It will help examine whether South Korea is at risk of noncompliance with the Refugee Convention because of its pre-assessment at the port of entry, which fails to assess *well-founded fear* and honor the *non-refoulement* principle.

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[21] *See* Jeuin Lee *supra* note 12.

[22] *See* Jason Strother, *South Korea Faces Criticism Over Refugee Policy,* VOICE OF AMERICA (Aug. 5, 2016), https://www.voanews.com/east-asia-pacific/south-korea-faces-criticism-over-refugee-policy.

[23] Refugee Convention, *supra* note 2, art. 1(A)(2) ("[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.").

[24] UNHCR, Determination of Refugee Status, at 6–7 (1989).

[25] *See* Andrew Wolman, *Koreas Refugee Act: A Critical Evaluation under International Law*, 2 J. EAST ASIA & INT. L. 479, 487–488 (2013).

[26] *See* UNHCR, UNHCRs Comment on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea 11–15 (2013).

[27] See discussion *infra* Part COMPARING DIFFERENT REFUGEE STATUS DETERMINATION PROCEDURES at 23.

[28] *Compare* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *with Migration Act 1958* (Cth) s 5J (Austl.).

I. REFUGEE STATUS DETERMINATION PROCEDURE UNDER THE REFUGEE CONVENTION

Article 35 of the Refugee Convention grants the UNHCR supervisory responsibility,[29] subjecting the Contracting States to the monitory evaluations of the UNHCR upon accession to the Refugee Convention.[30] Article II of the Refugee Protocol requires the Contracting States to cooperate with the UNHCR by acknowledging its supervisory role[31] and follow the guidelines provided in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").[32] The UNHCR Handbook states that the Refugee Convention should be interpreted "with fundamentally humanitarian objectives."[33] Nevertheless, the Refugee Convention gives the Contracting States freedom and discretion in conducting their RSD procedures as long as they defer to the *non-refoulement* principle that bars forced repatriation of asylum seekers back to persecution.[34] In other words, while the "[f]reedom to grant or to refuse permanent asylum remains" with the Contracting States due to state sovereignty, they were not to deprive the asylum seekers of their right to the minimum protection of not being sent back into persecution.[35] Article 33 of the Refugee Convention prohibits forced repatriation of asylum seekers to countries where there exists a "direct threat to the refugee's life or freedom."[36] This comes into connection with the definition of a refugee provided under Article 1(A)(2) of the Refugee Convention.[37] Therefore, investigating and collecting evidence to determine whether the asylum seekers' *well-founded fear* of persecution exists is at the core of the RSD procedure.[38]

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[29] Refugee Convention, *supra* note 2, art. 35.

[30] GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 532 (3d ed. 2007).

[31] Refugee Protocol, *supra* note 3, art. II.

[32] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter UNHCR Handbook]; ATLE GRAHL-MAHDSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER 195-205 (1966).

[33] GOODWIN-GILL & MCADAM, *supra* note 30, at 54.

[34] Manuel Angel Castillo & James C. Hathaway, *Temporary Protection, in* RECONCEIVING INTERNATIONAL REFUGEE LAW 2 (James C. Hathaway ed., 1997).

[35] GOODWIN-GILL & MCADAM, *supra* note 30, at 416.

[36] Refugee Convention, *supra* note 2, art. 33; Executive Committee on International Protection of Refugees, Conclusions Adopted by the Executive Committee on the International Protection of Refugees on Its Fortieth Session, at 77, U.N. Doc. A/AC.96/737 (1989); UNHCR, NOTE ON INTERNATIONAL PROTECTION ¶ 11, U.N. Doc. A/AC.96/815 (1993); UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol ¶¶ 26–31 (2007).

[37] Refugee Convention, *supra* note 2, art. 1(A)(2).

[38] JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 373 (2nd ed. 2014).

A. Determining the Existence of Well-Founded Fear

In general, a migrant is a person who voluntarily left his or her state of origin "for reasons other than those contained in the definition"[39] to take up new residence in a different state. Because a migrant moves not based on fear but based exclusively on economic considerations, the person is not a refugee under the Refugee Convention.[40] The distinction between migrants and refugees is in many cases very blurry as it depends on how the state views the effects economic measures have on a person's livelihood.[41] Determination must be made as to how compelled a person was against his or her will to leave the state of origin because of an economic difficulty caused by a persecutor that amounted to a *well-founded fear* of persecution.[42] There could have existed some level of "racial, religious or political aims or intentions directed against a particular group" behind those economic measures being manifested as persecution.[43] And there were cases where these economic measures enforced by the state of origin "destroy[ed] the economic existence of a particular section of the population."[44] Victims of these economic measures would then become refugees that were forced to abandon their state of origin because economic measures made it difficult for them to continue residing there.[45]

Therefore, the Contracting States were given the discretion to identify whether an asylum seeker was a refugee or a migrant based on varying evidence through the RSD procedure.[46] The UNHCR guideline emphasized that the Contracting States should consider not only the objective factors but also the subjective factors of the asylum seekers to "ascertain and evaluate the relevant facts and the credibility of the applicant."[47] The asylum seekers carried the burden of proof to present evidence that would "suffice to establish the requisite intention" of the persecutor from whom the asylum seekers were escaping from as the cause of *well-founded fear*.[48] However, the asylum seekers were not in the best situation to meet the ideal standard of proof due to the challenges in the availability of documents, memory loss, cultural misunderstandings, language barriers, and other practical hindrances.[49] Hence, the guideline deemed evidence

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[39] *UNHCR Handbook*, *supra* note 32 at 22.
[40] *Id.*
[41] *Id.*
[42] GOODWIN-GILL & MCADAM, *supra* note 30, at 63.
[43] *UNHCR Handbook*, *supra* note 32 at 22.
[44] *Id.*
[45] *Id.*
[46] *See* HATHAWAY, *supra* note 38, at 385–86.
[47] GOODWIN-GILL & MCADAM, *supra* note 30, at 54.
[48] HATHAWAY, *supra* note 38, at 371–72.
[49] Oh Tae Kon, *Legal Implication about Refugee Recognition Issue*, 7 J. OF HUMAN. AND SOC. SCI. 431, 449 (2016).

that established favorable inferences sufficient.[50] And the country of asylum was then to carry the burden to rebut those inferences while detaining the asylum seekers at the border.[51]

The U.S. courts have consistently decided against adopting a strict standard when proving *well-founded fear* of persecution.[52] In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court held that the "'clear probability' standard of proof does not govern asylum applications under §208(a) [of the Immigration and Nationality Act]." [53] In *Mohammed v. Gonzales*, an asylum seeker from Somalia appealed the order of the Board of Immigration Appeals that rejected her motion to review her rejected refugee application.[54] The Ninth Circuit Court of Appeals looked into the issue of whether *well-founded fear* for future persecution continued to exist when the persecution, which was in the form of female genital mutilation ("FGM"), already occurred.[55] The court held in favor of the asylum seeker, concluding that FGM was a "'permanent and continuing' act of persecution" and that the "presumption of well founded fear in such cases cannot be rebutted."[56]

Because the Refugee Convention requires its Contracting States to comply with their duty to assess *well-founded fear*, all asylum seekers have at least the right of access to the RSD procedure.[57] In essence, the requirement for RSD procedure stems from the presumption that the asylum seekers are potential victims of a *well-founded fear* of persecution.[58] When the asylum seekers reach the port of entry, they are presumed as refugees with claims that are "declaratory, rather than constitutive."[59] Therefore, access to the RSD procedure is an obligation of the Contracting States to provide the asylum seekers at the port of entry rather than an option the asylum seekers must earn.[60]

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[50] *See* UNHCR Handbook, supra note 32 at 22–25.

[51] R. v. Governor of Brixton Prison, ex p. Ahson [1969] 2 QB 222, 233 (appeal taken from Eng.).

[52] Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060–61 (9th Cir. 2017) (en banc); INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999).

[53] INS v. Cardoza-Fonseca, 480 U.S. 421, 427–49 (1987); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. OF INTL L. 1, 7 (1997) ("In some respects, Justice Stevens opinion in *Cardoza-Fonesca* is a high-water mark among U.S. asylum cases in its attention to international norms.").

[54] Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005).

[55] *Id.* at 800.

[56] *Id.* at 801.

[57] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol ¶ 8 (2007).

[58] *UNHCR Handbook*, *supra* note 32 at 20–22.

[59] *UNHCR Handbook*, *supra* note 32, at 17; GRAHL-MAHDSEN, *supra* note 32 at 340.

[60] *See* HATHAWAY, *supra* note 38, at 34; *See* GOODWIN-GILL & MCADAM, *supra* note 30, at 394.

B. Non-Arrival Policies and the Non-Refoulement Principle

The *non-refoulement* principle is "not an absolute principle,"[61] given the possibility that the circumstances would change and the different public interests of the states. If the *well-founded fear* no longer exists, the states were given the discretion to disqualify and expel the asylum seeker that was granted refugee status.[62] Article 1(C) of the Refugee Convention provides six categories under which the refugee definition provided by Article 1(A) "cease to apply."[63] Also known as the *cessation clause*, Article 1(C) determines that the asylum seekers once recognized as refugees are no longer qualified to carry that status due to a change of circumstances.[64] Unlike the *cessation clause*, Article 1(F) provides an *exclusion clause*, where a state can determine that the asylum seeker does not deserve international protection based on a determination process.[65] The exclusion of such asylum seekers is "'with respect to whom there are *serious reasons* for considering' that they have committed a crime against peace, a war crime or a crime against humanity."[66] Lastly, asylum seekers who have been granted refugee status can become subject to repatriation under Article 33(2) of the Convention "whom there are reasonable grounds for regarding as a danger to the security of the country."[67] Under Article 32, or the *expulsion clause*, States are permitted to expel the refugee "on grounds of national security and public order."[68] Unlike the *cessation clause*, the *expulsion clause* revokes the granted refugee status because of the subsequent conduct of the refugee while within the territory of the State.[69]

Nevertheless, despite the viable exceptions to the *non-refoulement* principle, forced repatriation against the will of an asylum seeker is still prohibited as a direct violation of the prohibition of *refoulement*.[70] The threshold is harder to reach when it comes to disqualifying an asylum seeker of his or her refugee status in

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[61] GOODWIN-GILL & MCADAM, *supra* note 30, at 234.

[62] *Id.*

[63] Refugee Convention, *supra* note 2, art. 1(C).

[64] *UNHCR Handbook*, *supra* note 32, at 29 (The "cessation clauses" are provided under Article 1 (C)(1) to (6) of the Refugee Convention and it spells "out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.").

[65] Refugee Convention, *supra* note 2, art. 1(C); *UNHCR Handbook*, *supra* note 32, at 35–37.

[66] GOODWIN-GILL & MCADAM, *supra* note 30, at 165.

[67] Refugee Convention, *supra* note 2, art. 33(2).

[68] *Id.* at art. 32.

[69] Refugee Convention, *supra* note 2, arts. 1(F)(a) & (c); *UNHCR Handbook*, *supra* note 32, at 100.

[70] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol ¶¶ 7–8 (2007).

comparison to that of satisfying the refugee status definition.[71] In addition, the refugees are given the right to appeal those disqualifications, "except where compelling reasons for national security otherwise require."[72] In other words, once the asylum seekers are granted refugee status, the only way to repatriate them is through their voluntary departure.[73]

Because the Contracting States must meet the high threshold when they repatriate either an unqualified asylum seeker or a refugee already in the territory, their RSD procedures have developed overtime to filter out potential non-asylum seekers upon their arrival at the port of entry.[74] The purpose was mostly for efficiency in case of a mass influx of incoming asylum seekers.[75] Guy S. Goodwin-Gill criticized this regular practice among the Contracting States that classified asylum seekers either as "illegal immigrants" or "economic migrants" early on to avoid recognizing them as potential refugees upon their arrival.[76] This practice was also known as "interception," where the States would "prevent, interrupt, or stop the movement of people without the necessary immigration documentation from crossing their borders by land, sea, or air."[77] These measures that have long been practiced by the U.S. and Australia were heavily criticized as "denial of access," a tactic used by States that were "anxious to avoid the requirement to abide by certain peremptory obligations, such as *non-refoulement*."[78] Nevertheless, it was also difficult to clearly define these measures as a violation of the *non-refoulement* principle because the States were merely "deny[ing] admission in ways not amounting to the breach of the principle."[79]

Some efforts were made by the Contracting States to mitigate case-by-case complications with regards to asylum seekers isolated at sea.[80] The U.S. Supreme Court decided in favor of Haitian asylum seekers when the Federal Government attempted interception by blocking the Haitian asylum seekers from entering the country through the ocean by boat.[81] In *Sale v. Haitian Centres Council,*[82] the

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[71] *UNHCR Handbook*, *supra* note 32 at 29.

[72] GOODWIN-GILL & MCADAM, *supra* note 30, at 262.

[73] *UNHCR Handbook*, *supra* note 32, at 29.

[74] GOODWIN-GILL & MCADAM, *supra* note 30, at 370–371.

[75] *See Id.* at 267.

[76] *Id.* at 370–371.

[77] GOODWIN-GILL & MCADAM, *supra* note 30, at 371; Executive Committee of the High Commissioners Programme Eighteenth Meeting, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach,* ¶ 10, U.N. Doc. EC/50/SC/CRP.17 (Jun. 9, 2000).

[78] GOODWIN-GILL & MCADAM, *supra* note 30, at 370.

[79] *Id.* at 267.

[80] *Id.*

[81] *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).

[82] Sale, 509 U.S. at 165–166 ("We must decide only whether Executive Order

issue arose from the "Haitian interdiction programme" where the "U.S. Coast Guard was instructed to stop and board specified vessels."[83] The Coast Guard returned the boats to their country of origin after examining and concluding that the vessel and the passengers did not comply with the U.S. immigration laws.[84] The asylum seekers' noncompliance to the immigration laws of the destination country was considered a potential threat to the national security and public order under Article 33(2) of the Refugee Convention.[85] However, this did not negate the requirement for the assessment of *well-founded fear* of the asylum seekers, even if they failed to carry proper immigration documents with them.[86] Observing the facts in the case, the U.S. Supreme Court differentiated the immigration process from the exclusion process under Article 33(2) as a procedure that was meant to be applied to migrants, not asylum seekers.[87] It additionally concluded that the Haitian asylum seekers were not subject to the exclusion process because they were never physically present in the destination country when they were intercepted on the high seas.[88] This made the application of Article 33(2) premature and an"absurd anomaly."[89] In other words, the *non-refoulement* principle under Article 33(1) of the Refugee Convention was meant to apply at the frontier to the asylum seekers who have yet to enter into the territory to receive proper RSD.[90] The assessment of *well-founded fear* was required even before the arrival of the asylum seekers at the port of entry.[91]

The main issue is whether the *well-founded fear* of the asylum seekers was assessed either at sea or within the territory of the Contracting State.[92] The Refugee Convention allows some level of control in the movement of the asylum seekers in the form of "burden-sharing" among the Contracting States.[93] James C. Hathaway, a

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No. 12807, 57 Fed.Reg 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA."); *see* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely on the threshold of initial entry.").

[83] GOODWIN-GILL & MCADAM, *supra* note 30, at 271.

[84] *Id.*

[85] *Id.* at 372.

[86] Wolman, *supra* note 25, at 489.

[87] *Sale*, 509 U.S. at 179–183.

[88] *Id.* at 178–180.

[89] *Id.* at 179–180.

[90] See Refugee Convention, supra note 2, art. 33(1); see UNCHR, Safe Avenues to Asylum?: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests (2002).

[91] *See* UNCHR, supra note 70.

[92] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INTL L. J. 129, 165 (1990).

[93] *Id.*

scholar in international refugee law,[94] looked into how refugee protection was first characterized as a duty shared by the international community "as a whole" during post-World War II, especially in Europe.[95] The asylum countries responded to the overwhelming number of asylum seekers that could not be protected by a single nation.[96] Hathaway stated that the Refugee Convention was drafted to "construct a forward-looking system of refugee burden-sharing"[97] in times of war-like situations where massive flow of asylum seekers would be incurred.[98] This shows the flexibility of the Refugee Convention in times when the Contracting States are overburdened with the incoming asylum seekers. While there exists some flexibility within the Refugee Convention, the one non-negotiable duty of a Contracting State is to assess the *well-founded fear* of the asylum seekers and determine whether they are refugees with rights to *non-refoulement* protection.[99]

II. SOUTH KOREA'S REFUGEE ACT AFTER SIX YEARS

The current refugee status applications in South Korea were processed under the Ministry of Justice and its Refugee Division since 2013.[100] Once the asylum seekers enter South Korea, they must pass the pre-assessment process to become eligible to be examined by the RSD officers and become entitled to the protection and support provided under the Refugee Act.[101] The asylum seekers undergoing the RSD procedure are provided with humanitarian measures, such as a permission to stay and work and living expenses if separately applied for during the 90-day determination period.[102] Despite this supportive structure ready for the asylum seekers, the pre-assessment process that the asylum seekers encounter first is what gives rise to the issue of South Korea's compliance with the *non-refoulement* principle under the Refugee Convention.[103] The pre-assessment process gives the chief immigration officer the authority to determine whether the asylum seekers' applications are eligible to be referred to

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[94] *Faculty Bio: Hathaway, James C.*, UNIV. MICH. L. SCH., https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=jch (last visited Oct. 9, 2019).

[95] Hathaway, *supra* note 93, at 178.

[96] *Id.* at 179.

[97] *See* Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 300 (1998); Peter H. Shuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INTL L. 243, 246, 249, 253, 275 (1997).

[98] James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 170, 192 (1997).

[99] Anker, *supra* note 97, at 295, 297, 308.

[100] KOREA IMMIGRATION STATISTICS, *supra* note 9.

[101] *Id.*

[102] *Id.* at 12–13, 18.

[103] Wolman, *supra* note 25 at 489.

the RSD procedure.[104] The process takes place at the transfer zone in the airport based on the factors provided under Article 5 of the Enforcement Decree.[105] If the asylum seekers fail to pass this process, their applications will not be referred to the RSD procedure and they will be subject to repatriation.[106] Because the repatriation decision solely depends on the pre-assessment process, it becomes crucial that Article 5 of the Enforcement Decree assess *well-founded fear* in the pre-assessment process.[107] Otherwise, South Korea's pre-assessment violates the Refugee Convention.[108]

South Korea is not without understanding that the *non-refoulement* principle aims to prevent the repatriation of asylum seekers back to their place of *well-founded fear* of persecution.[109] South Korea actively has been reaching out to protect and receive North Korean defectors without a single record of repatriation.[110] It enacted the North Korea Refugees Protection and Settlement Support Act ("North Korean Refugee Act") in 1997[111] and allowed the defectors to enter South Korea and obtain citizenship.[112] The North Korean Refugee Act provided basic social welfare and naturalization services for North Korean defectors through the Settlement Support Center for North Korean Refugees (or *Hanawon*).[113] This resulted in a total of 32,476 North Korean defectors accepted as refugees and eventually citizens into South Korea from 1998 to 2019.[114] For North Korean defectors, exiting the Democratic People's Republic of Korea ("DPRK") was treason punishable by torture and imprisonment in labor camps (or *gulag*).[115] When they did succeed in escaping DPRK, they were met with the automatic repatriation policy in the People's Republic of China ("China").[116] The Chinese Ministry of Foreign Affairs issued a

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[104] *Id.*

[105] *Id.*; Enforcement Decree of the Refugee Act, art. 5 (S. Kor.).

[106] Wolman, *supra* note 25 at 488–489.

[107] Refugee Convention, *supra* note 2.

[108] Wolman, *supra* note 25 at 488–489.

[109] GOODWIN-GILL & MCADAM, *supra* note 30, at 234.

[110] *Id.*

[111] Bughan-italjumin-ui Boho Mich Jeongchagjiwon-e Gwanhan Beobyul [North Korean Refugees Protection and Settlement and Support Act], Act No. 5259, Jan. 13, 1997, *amended by* Act No. 16223, Jan. 15, 2019 (S. Kor.).

[112] Refugee Convention, *supra* note 2.

[113] Ash Abraham, *After Hanawon*, CARLETON UNIV. SCH. JOURNALISM & COMMCN (2019) https://cusjc.ca/mrp/strainedrelations/life-after-hanawon/.

[114] MINISTRY OF UNIFICATION, 2019 UNIFICATION WHITE PAPER 429 (2019).

[115] Hum. Rts. Council, Rep. of the Detailed Findings of the Commn of Inquiry on Hum. Rts. in the Democratic Peoples Republic of Korea [DPRK], A/HRC/25/CRP.1, at 113 (Feb. 7, 2014) [hereinafter *HRC Report on DPRK*]; DAVID HAWK & AMANDA MORTWEDT OH, THE PARALLEL GULAG: NORTH KOREAS "AN-JEON-BU" PRISON CAMPS VIII (2017) ("[W]e in the outside world, have come to know the gulags for what they are: instruments of fear and control by the leadership of the DPRK that has imposed on North Korea a huge system of detention that breaches United Nations law and universal, civilised standards.") [*hereinafter The Parallel Gulag*].

[116] *Id.* at 18.

letter to all its foreign embassies and consulates, stating that they did not have the right to receive asylum seekers according to the principles of international law.[117] It then required them to "inform the Consular Department of Chinese Ministry of Foreign Affairs in case the illegal intruders were found, and hand over the intruders to the Chinese public security organs."[118] In opposition to this demand, the South Korean embassies continued to protect the North Korean defectors by receiving them and granting them refugee status as well as citizenship in South Korea.[119]

The stark difference between South Korea's acceptance rate for asylum seekers from North Korea and its acceptance rate of other refugees clearly shows South Korea's discrimination towards the non-Korean asylum seekers.[120] While the North Korean defectors are automatically given access to RSD with automatic acknowledgment of their *well-founded fear*, the non-Korean asylum seekers are filtered through the pre-assessment at the port of entry, which is based on factors that focuses not on their *well-founded fear* of persecution but on the credibility of their presented evidence.[121] Such differentiated applications of South Korea's commitment to the Refugee Convention cannot be justified.

A. Article 5 of the Enforcement Decree and the Refugee Act

Pre-assessment is based on the stipulated grounds of rejection provided under Article 5(1) of the Enforcement Decree.[122] It ensures that "[t]he Minister may not refer a refugee status applicant to refugee recognition review procedures if a person falls under any of the following subparagraphs."[123] And as provided in the statistics, the most frequented stipulated grounds for rejecting access to the RSD procedure was the seventh ground, where the asylum seekers' reason for applying for refugee status is "made solely for economic reasons."[124] Through this simplified determination method, the process was easily complete within a limited period of seven days.[125] The third and fourth grounds for rejection were mostly incorporated with the seventh ground under Article 5(1) because they did not have much practical

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[117] *The Invisible Exodus: North Koreans in the Peoples Republic of China*, 14 HUM. RTS. WATCH 8(C), 35 (2002) [hereinafter THE INVISIBLE EXODUS].

[118] *Id.*

[119] *Id.* at 4.

[120] *Id.* at 31.

[121] *Id.* at 4, 31.

[122] Enforcement Decree of the Refugee Act art. 5(1) (S. Kor.).

[123] *Id.*

[124] *Id.* art. 5(1)(7); Choi Kae-young, *Asylum Procedure at Ports of Entry and the Due Process*, 55 ADMIN. L. J. 153, 162 (2018).

[125] *Id.*

function to determine asylum seekers as a non-refugee.[126] The third ground merely condemned asylum seekers who were "knowingly concealing facts, including, but not limited to, by submitting a false document."[127] This triggers a potential violation of Article 31 of the Refugee Convention that prohibits giving punitive measures against asylum seekers for their initial illegal entry before their refugee status determination.[128] In general, the asylum-seekers brought many various documents to prove *well-founded fear* without sufficient prior knowledge of what materials and documents the destination countries would require and acknowledge for credibility.[129] Given the circumstances of a genuine refugee, it would be unreasonable to negate the fundamental possibility of the existence of *well-founded fear* solely based on falsified documents or concealment of information.[130] These grounds limiting the application of refugee status did not seem to address the core issue the RSD procedure was meant to target and resolve, which was whether the asylum seeker was actually fleeing from a *well-founded fear* of persecution in the country of origin.[131]

The fourth ground for rejection under Article 5(1)(4) of the Enforcement Act is "[w]hen the person came from a safe country of origin or a safe third country, in which little possibility of persecution exists."[132] This is controversial as it provides no legal standard to help determine the definition of a "safe third country."[133] While *well-founded fear* claimed by the asylum seekers could apply to either that one individual or the entire community, to rely on a generalized observation that a country of origin is presumably "safe" overly simplifies the application of the *non-refoulement* principle.[134] Under the Refugee Act, forced repatriation of asylum seekers is broadly prohibited, even when the determination concludes that the refugee status did not apply.[135] And the Refugee Convention allows asylum seekers to claim asylum in the first country they set foot in

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[126] CHAE HYUN-YOUNG, UNHCR KOREA, *Keynote Address at the Judicial Policy Research Institute Seminar: Human Rights of Refugees and Private Law* (2017).

[127] Enforcement Decree of the Refugee Act, art. 5(1)(3) (S. Kor.); Choi, *supra* note 124.

[128] Refugee Convention, *supra* note 2, art. 31.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Enforcement Decree of the Refugee Act, art. 5(1)(4) (S. Kor.).

[133] *See* Incheon Jibangbeobwon [Incheon Dist. Ct.], June 17, 2016, 2016Gu-Hap326, (S. Kor.) (The Ministry of Justice expressed that the word safe country with regards to the fourth ground for rejection was prone to carry varying meanings based on different subjective interpretations. Therefore, it was difficult to apply such standard as an independent ground for rejection of refugee status); GOODWIN-GILL & MCADAM, *supra* note 18, at 392; Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT. J. REFUGEE L. 567 at 673–676 (2003).

[134] *Id.* at 673–75.

[135] *See* Refugee Act, arts. 2, 3, 5(6) (S. Kor.).

immediately after they leave their country of origin.[136] Despite these legal frameworks that exist to prevent asylum seekers from being criminalized for merely seeking asylum, many destination countries have associated qualification for refugee status with how many countries the asylum seekers passed through to reach theirs.[137] Such approach left a dent on the credibility of the asylum seekers' testimonies of *well-founded fear*.[138] The Refugee Convention recognizes that seeking asylum in more than one country is a reasonable phenomenon among asylum seekers who are compelled to do *asylum shopping*.[139] *Asylum shopping* is when the asylum seekers claim for asylum in more than one country because of preference towards the country's favorable reception, living condition, economic support specifically allocated for refugees, and other subjective reasons.[140] The United Kingdom ("UK") acknowledged *asylum shopping* to be reasonable and has a case law holding that an asylum seeker is still a refugee even if he or she reached the UK after passing through another safe third country.[141]

Canada has recently made efforts to end *asylum shopping* by proposing to amend its Refugee law to reject asylum claims made by those who already made the same in other countries, regardless of whether or not they were rejected.[142] Canada's reason for proposing this omnibus budget bill was in response to the mass number of asylum seekers arriving at its border from the U.S. after being rejected through the RSD procedure.[143] Canada believed that because their immigration system was similar to that of the U.S., it would have similarly rejected these asylum seekers.[144] The omnibus bill proposed additional provisions for the Immigration and Refugee Protection Act to "introduce a new ground of ineligibility for refugee protection if a claimant has previously made a claim for refugee protection in another country."[145] Bill Blair, the Border Security Minister of Canada, stated,

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[136] *See* Refugee Convention, *supra* note 2, art. 31.

[137] *Do Refugees Have to Stay in the First Safe Country They Reach?*, FULL FACT (Jan. 17, 2019), https://fullfact.org/immigration/refugees-first-safe-country/ [hereinafter FULL FACT].

[138] Refugee Convention, *supra* note 2.

[139] FULL FACT, *supra* note 137.

[140] *Migration and Home Affairs: Asylum Shopping*, EUROPEAN COMMN, https://ec.europa.eu/home-affairs/e-library/glossary/asylum-shopping_en (last visited Oct. 5, 2020).

[141] *See* FULL FACT, *supra* note 137.

[142] Charles Gallmeyer, *Canada Proposes Changes to Asylum Laws*, JURIST (April 10, 2019), https://www.jurist.org/news/2019/04/canada-proposes-changes-to-asylum-laws/.

[143] Mark Moore, *Canada Plans to End "Asylum Shopping" by Limiting Refugee Claims*, N.Y. POST (Apr. 10, 2019), https://nypost.com/2019/04/10/canada-plans-to-end-asylum-shopping-by-limiting-refugee-claims/.

[144] *See id.*

[145] An Act to Implement Certain Provisions of the budget tabled in Parliament on March 19, 2019 and other Measures, H.C.C. 2019, C-97 (Can.).

"There's a right way to come to the country to seek asylum and/or to seek to immigrate to this country, and we're trying to encourage people to use the appropriate channels and to disincentivize people from doing it improperly."[146]

B. Pre-Assessment at the Port of Entry

Taking the difficulties in gathering evidence into account, the Refugee Convention requires the Contracting States not to cast a strict burden of proof on the asylum seekers and repatriate them solely based on lack of evidence.[147] More deference should be given to the testimony of asylum-seeker based on the logic and consistency of the testimony."[148] Although the burden of proof is on the applicant, it must be the state's duty to lower the threshold or burden of proof and determine those evidence and look to inferences.[149] When retrieving evidence found in the testimonies of the asylum-seekers, there are various hindrances to take into account, such as trauma, memory loss, education level, shame, culture, competence based on age, mental health, and other aspects of human psychology.[150] When treating a victim, there are basic requirements for the standard of treatment and appropriate care. [151] This does not imply, however, that the testimonies of the asylum-seekers must be blatantly accepted without any degree of scrutiny. Detailed facts should be required from the testimonies of the asylum seekers "to satisfactorily establish refugee status according to the given standard" according to consistency and persuasiveness when corroborated with other evidence. [152] Not granting the asylum seekers the opportunity to present their evidence or oversimplifying the RSD procedure by adding a pre-assessment procedure would violate the Refugee Convention standard for evidence.[153]

The recent controversial entry of asylum seekers to South Korea occurred in 2018 when around five hundred Yemeni asylum seekers suddenly sought refuge in Jeju Island, South Korea.[154] The asylum seekers came not from their state of origin but from Malaysia, where

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[146] Moore, s*upra* note 143.

[147] Refugee Convention, *supra* note 2, art. 31.

[148] Daebeobwon [S. Ct.], July 24, 2008, 2007Du3930 (S. Kor.).

[149] *See* Refugee Convention, *supra* note 2, art. 31.

[150] *See* Daebeobwon [S. Ct.], Apr. 26, 2012, 2010Du27448 (S. Kor.).

[151] KOREA IMMIGR. SERV., *supra* note 8, at 4–5.

[152] See Daebeobwon [S. Ct.], Mar. 10, 2016, 2013Du14269 (S. Kor.).

[153] Chae Hyun-young, Associate Legal Officer, UNHCR KOREA, *Keynote Address at the Judicial Policy Research Institute Seminar: Human Rights of Refugees and Private Law* 61 (Sept. 12, 2017).

[154] Choe Sang-Hun, *Just 2 of More Than 480 Yemenis Receive Refugee Status in South Korea*, N.Y. TIMES (Dec. 14, 2018), https://www.nytimes.com/2018/12/14/world/asia/yemen-south-korea-refugees.html.

they had also sought asylum.[155] The asylum seekers relied on Malaysia's 90 days visa-free policy even though Malaysia was not a signatory state to the Refugee Convention.[156] Nevertheless, when 90 days were soon expiring, the asylum seekers had to move to another country with a similar visa-free policy to avoid deportation.[157] Within Asia, the asylum seekers found Jeju Island, South Korea, that allowed foreigners to enter the island visa-free for 30 days.[158] In 2000, Jeju Island, under Article 7(2) of the Immigration Act of South Korea, opened its borders visa-free to foreigners who were from countries other than the eleven listed countries, such as Iran, Syria, and Nigeria.[159] The leniency in the visa application process was aimed to attract many foreign tourists to the island.[160] Because flights were also available directly from Malaysia to Jeju Island and because there was already a "well-established Muslim community in places such as *Itaewon* after they were granted refugee status," the Yemeni asylum seekers immediately saw this trip as an opportunity for refuge.[161]

During the waiting period and the restricted stay within Jeju Island, the Yemeni refugee applicants were granted permission to stay for 90 days with the necessities promised under the Refugee Act.[162] On October 17, 2018, the Ministry of Justice granted 339 of the Yemenis asylum seekers one-year *humanitarian status holder* permits,[163] "acknowledging that their 'right to life and personal liberty' would be put at risk if they were deported."[164] Thirty-four were rejected refugee status on grounds for "criminal charges or were judged to have sought asylum for economic reason[s]," and eighty-five had their determination decision postponed.[165] Although not many were granted refugee status, South Korea has given all of the Yemeni

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[155] Se Jin Kim, *Failing to Protect Refugees: South Koreas Dismal Global Ranking,* 112 E. ASIA FOUND. POLY DEBATES 1, 3–4 (2019); Huh Ho-joon, *S. Korean Government Doesnt Recognize Single Refugee in 2nd Review of Yemeni Asylum Seekers*, HANKYOREH (Oct. 18, 2018), http://english.hani.co.kr/arti/english_edition/e_international/866408.html.

[156] Huh Ho-joon, *supra* note 155.

[157] Kim, *supra* note 155, at 1, 3.

[158] *Id.*

[159] Immigration Act, art. 7(2) (S. Kor.).

[160] *Id.*

[161] Se Jin Kim, *South Korea: Your Tired, Your Hungry, Your Yearning to Be Free Neednt Apply*, ASIA SENTINEL (Jan. 29, 2019), https://www.asiasentinel.com/society/south-korea-no-asylum-refugees/.

[162] *Id.* at 4.

[163] Min Joo Kim & Simon Denyer, *South Korea Denies Refugee Status to Hundreds of Yemenis Fleeting War*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/world/asia_pacific/south-korea-denies-refugee-status-to-hundreds-of-yemenis-fleeing-war/2018/10/17/5d554d1e-d207-11e8-8c22-fa2ef74bd6d6_story.html.

[164] *Id.*

[165] *Id.*; *Jeju Yemeni Refugee Recognition Rate 0.4%…Controversy Over Refugee Engagement Seems to be Fierce,* YUNHAP NEWS (Dec. 14, 2018), https://www.yna.co.kr/view/AKR20181214073200004.

asylum seekers access to the RSD procedure.[166] This itself was an obligation fulfilled by South Korea as a Contracting State with due respect to the due process rights of the asylum seekers.[167] At the same time, South Korea practiced state sovereignty as it investigated and determined refugee status with the gathered evidence differently from what UNHCR suggested.[168] The mere difference in how the determination was carried out did not amount to a Refugee Convention violation.[169]

South Korea's proper discretion in the RSD procedure and its violation of due process required under the Refugee Convention must be distinguished. This is because the *non-refoulement* decision and the preliminary entry rejection are legally different in content and effect.[170] Under the *non-refoulement* decision, the asylum seekers are rejected for refugee status through the RSD procedure and are given a chance to appeal the decision.[171] The courts in South Korea recognized this legal right of asylum seekers to appeal their rejected refugee status decision for revaluation under the Refugee Act.[172] However, the preliminary entry rejection occurs at the pre-assessment stage that disqualifies the asylum seeker from accessing the RSD procedure itself with no right to appeal that rejection.[173] From the language provided in Article 5 of the Enforcement Decree, the pre-assessment resonates with the underlying motivation to eliminate "economic migrants" from the RSD procedure completely for efficiency. There is no denying that even the Refugee Convention would not recognize economic migrants as refugees and economic migrants would categorize into an immigrant rather than a refugee."[174] However, the issue in South Korea's preliminary entry rejection raises a question as to whether the pre-assessment is enough to determine the *well-founded fear* of persecution of the asylum seekers within seven days solely based on the seven factors provided under Article 5 of the Enforcement Decree.[175]

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[166] YUNHAP NEWS, *supra* note 155.

[167] GOODWIN-GILL & MCADAM, *supra* note 30, at 531–32; Se Jin Kim, *supra* note 161.

[168] GOODWIN-GILL & MCADAM, *supra* note 30, at 531–32; Se Jin Kim, *supra* note 161.

[169] Se Jin Kim, *supra* note 161.

[170] GOODWIN-GILL & MCADAM, *supra* note 18, at 531–532; Wolman, *supra* note 25 at 488–489.

[171] KOREA IMMIGRATION STATISTICS, *supra* note 8, at 20, 31–33.

[172] Incheon Jibangbeobwon [Incheon Dist. Ct.], May 16, 2014, 2014Gu-Hap30385 (S. Kor.); Incheon Jibangbeobwon [Incheon Dist. Ct.], June 17, 2016, 2016Gu-Hap326 (S. Kor.).

[173] 2016Gu-Hap326 at 3.

[174] *See id.*

[175] *See* Enforcement Decree of the Refugee Act, art. 5(1).

III. COMPARING DIFFERENT REFUGEE STATUS DETERMINATION PROCEDURES

The Refugee Convention makes it clear that while the Contracting States have the freedom and discretion to conduct their RSD procedures, they are bound to abide by the essential requirement to assess the existence of *well-founded fear*.[176] If the asylum seekers were guaranteed the necessary procedure of determination of *well-founded fear*, the Contracting State would have honored its obligation even if the refugee acceptance rate drops. The U.S., Australia, and China are some of the Contracting States in possession of either the most innovative or controversial RSD procedures due to their unique ways of applying or not applying the *non-refoulement* principle and the *well-founded fear* assessment.[177] Comparing these RSD procedures with that of South Korea will help understand where the limitation lies when complying with the Refugee Convention. This comparative study will show why South Korea's pre-assessment falls short in its compliance with the principles upheld in the Refugee Convention.

A. The United States and its Refugee Screening Procedure

The U.S. Congress amended and incorporated the Immigration and Nationality Act of 1952 and the Migration and Refugee Assistance Act of 1962 into the U.S. Refugee Act of 1980 to "revise the procedures for the admission of refugees" and "establish a more uniform basis for the provision of assistance to refugees."[178] It ratified the Refugee Protocol in 1968 and established the definition for refugees "directly upon the language of the Protocol."[179] Thereafter, many of the refugee cases decided by the U.S. courts actively turned to the Refugee Protocol and the UNHCR's interpretation of the definition with a consistent goal to "bring United States refugee law into conformance" with it.[180] The RSD procedure was immediately translated into the U.S. Refugee Admission Program ("USRAP") as a safeguarding process with security screening and background checks of the incoming asylum seekers.[181] Currently, the U.S. Citizenship and

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[176] *See* Refugee Convention, *supra* note 2, art. 1(A)(1)–(2).

[177] *Id.*; STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, U.N. HIGH COMMR FOR REFUGEES (2015).

[178] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[179] S. Rep. No. 96-590, at 20 (1980); see H.R. Rep. No. 96-781, at 19 (1980); *Cardoza-Fonseca*, 480 U.S. at 437.

[180] *Cardoza-Fonseca*, 480 U.S. at 436–37; Fitzpatrick, *supra* note 53, at 6.

[181] *Refugee Security Screening Fact Sheet,* U.S. CITIZENSHIP & IMMIGR. SERV. 2 (June 3, 2020), https://www.uscis.gov/sites/default/files/document/fact-

Immigration Service ("USCIS") is responsible for the "immigration service functions of the federal government,"[182] including the RSD procedure. According to the USCIS, any asylum seeker who is "physically present in the United States" is eligible to apply for asylum in the U.S.[183] This extremely minimal requirement is strikingly different from what South Korea's pre-assessment requires from the asylum seekers, which is to pass a preliminary credibility test to be eligible for the RSD procedure.[184]

But in recent years, since 2017, the Refugee Admissions Ceiling that was usually set at 80,000 between 2008 and 2016 drastically dropped to 50,000, and continued to decrease down to 45,000 in 2018 and to 30,000 in 2019.[185] President Donald Trump signed the executive order in 2017 to put a halt on the refugee admissions program for 120 days as well as barring the entry of Syrian refugees[186] while lowering the Fiscal Year Refugee Admissions Ceiling.[187] Then through the Presidential Proclamation,[188] President Trump resumed the refugee program with "Enhanced Vetting Capabilities," where the USRAP assessed "any risks to the security and welfare of the United States that may be presented by the entry into the United States" among the asylum seekers.[189] It was a "specialized screening for refugee applicants who are nationals of certain high-risk countries."[190] After these executive orders were passed, the actual admission of

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sheets/Refugee_Screening_and_Vetting_Fact_Sheet.pdf; *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities (last visited Mar. 5, 2019).

[182] *Our History*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/about-us/our-history (last visited Oct. 9, 2019).

[183] *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states (last visited Sept. 22, 2020).

[184] KOREA IMMIGR. SERV., *supra* note 8, at 17.

[185] U.S. DEPT OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2019 7–8 (2018), https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf [hereinafter FISCAL YEAR 2019]; *An Overview of U.S. Refugee Law and Policy,* AM. IMMIGR. COUNCIL (Jan. 8, 2020), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy.

[186] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), *replaced* by Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

[187] AM. IMMIGR. COUNCIL, *supra* note 185.

[188] Exec. Order No. 13780, 82 Fed. Reg. 13209; *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, NATL SEC. & DEF. (Sept. 24, 2017), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/.

[189] Exec. Order No. 13815, 82 Fed. Reg. 50055 (Oct. 27, 2017); *see* Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, POLITICO (Oct. 24, 2017), https://www.politico.com/story/2017/10/24/refugee-nations-trump-administration-muslim-244135.

[190] FISCAL YEAR 2019, *supra* note 185, at 6.

refugees sharply decreased below the average of more than 50,000 to the lowest number of 18,000 in 2020.[191] Although the refugee acceptance rate was reduced, the enhanced screening assessment did not violate the *non-refoulement* principle, as it only tightened the standard for refugee status.[192] The asylum seekers were still screened as to whether they had a *well-founded fear* of persecution or were more of a threat to national security.[193]

In 2019, "Expedited Removal" was established by the U.S. Congress in compliance with the U.S. Supreme Court's holdings that "the government may exclude such aliens without affording them the due process protections that traditionally apply to persons physically present in the U.S."[194] The Department of Homeland Security ("DHS") was given the discretion to apply the procedure to certain foreigners entering the U.S. territory under the INA Section 235(b)(1).[195] And under the INA Section 212(a)(6)(C) and (a)(7), the DHS referred the asylum seekers to expedited removal based on the inadmissibility of their documents and statements.[196] However, under INA Section 235(b)(1), if the asylum seekers indicated "an intention to apply for asylum . . . or a fear of persecution," they were spared the expedited removal.[197] Instead, they were then moved to a secondary inspection called the "formal removal," where they would be subject to examination by an immigration officer[198] or the "Credible Fear Screenings."[199] The screening aimed to assess "credible fear of persecution," which was defined by the INA as "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility of asylum."[200] This "low screening standard"[201] was intended to only require "substantial and realistic possibility of success on the merits"[202] of the asylum seekers' claims. When the asylum seekers receive "negative credible

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[191] AM. IMMIGR. COUNCIL, *supra* note 185, at 3.

[192] Jaya Ramji-Nogales, *Non-Refoulement Under the Trump Administration,* 23 AM. SOCY INTL L., no. 11, 2019, https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration.

[193] *Id.*

[194] HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK (2019).

[195] *Id.* at 7, 9, 13.

[196] *Id.* at 11–12.

[197] 8 U.S.C. § 1225(b)(A)(i) (1990); 8 C.F.R. § 235.3(b)(4) (1998).

[198] 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(4); SMITH, *supra* note 194, at 18.

[199] SMITH, *supra* note 194, at 13; *Credible Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERV. (Sep. 26, 2008), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/credible-fear-screenings.

[200] 8 U.S.C. § 1225(b)(1)(B)(v) (2011).

[201] *See* 142 CONG. REC. S11491–02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

[202] SMITH, *supra* note 194, at 17.

fear finding," they were allowed to "request for reconsideration" before the immigration judge ("IJ") in compliance with the *non-refoulement* principle.[203] Because of its role as a safeguard for the asylum seekers who fail the screening, the "IJ review is a crucial stopgap in the expedited removal regime." [204] Overall, due to the exceptional procedures made available to the asylum seekers, the expedited removal and the credible fear screening of the U.S. continues to embody the principle of *non-refoulment* and the *well-founded fear* assessment in compliance with the Refugee Protocol. [205] Comparatively, South Korea's pre-assessment lacks even the exceptional procedures through which the rejected asylum seekers could request for revision and most crucially for the *well-founded fear* assessment.[206]

B. Australia's Interdiction of the Asylum Seekers at Sea

Australia was a signatory state to the Refugee Convention since 1954 and it has been named as a "failing state" with regards to its obligation to protect refugees.[207] Australia had the most number of asylum seekers from 1978 to 1983 and it maintained the number of around 300,000 asylum seekers during those six years.[208] Afterward, Australia had asylum seekers below the number of 100,000 seek asylum in its territory across the ocean.[209] However, 117,710 asylum seekers sought asylum in Australia in 2018, among which 56,933 were recognized as refugees, ranking Australia as the 14th country to receive the most asylum seekers among the Contracting States of the Refugee Convention. [210] Among those recognized refugees, 12,706 refugees were resettled in Australia, ranking it as the "third overall for resettlement (behind Canada and USA)." [211] However, despite

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[203] SMITH, *supra* note 194, at 19; 8 U.S.C. § 1225; 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see* 8 C.F.R. §§ 208.30(g)(2)(i), 1003.42(a)–(h), 1208.30(g)(2)(i)–(ii) (2017).

[204] Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 520 (2018).

[205] *See id.* at 473.

[206] *See* Shin-wha Lee, *South Koreas Refugee Policies: National and Human Security Perspectives,* RESEARCHGATE (Jan. 2019), https://www.researchgate.net/publication/327389786.

[207] Khalid Koser, *Australia and the 1951 Refugee Convention*, LOWY INST. (Apr. 30, 2015), https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention.

[208] *UNHCR Statistics: The World in Numbers*, UNHCR POPULATION STAT. DATABASE (June 30, 2017), https://unhcr.github.io/dataviz-popstats/dist/index.html.

[209] *Id.*

[210] *Global Trends: Forced Displacement in 2018,* UNHCR, 65 (June 20, 2019), https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.pdf.

[211] Refugee Council of Australia, *An Analysis of UNHCRs 2018 Global*

these outstanding refugee acceptance rates maintained by Australia, it has long struggled with the mass number of people increasingly making attempts to enter into the territory by boat.[212] These entrants at sea were termed as "Illegal Maritime Arrival" ("IMA")[213] after when they were "screened into a refugee status determination process."[214] Once the IMAs were determined based on their lack of valid visa, they were then provided with the choice to "apply for a three-year Temporary Protection Visa ("TPV") or a five-year Safe Haven Enterprise Visa ("SHEV")."[215] The number increased from 7,373 to 18,119 between 2012 and 2013.[216] When the entrants were asylum seekers, they were mandatorily screened through the RSD procedure, which then decided whether to provide permanent or temporary protection based on possession of a valid visa. Although Australia did apply assessment for "conflict and fear of persecution" as "push factors,"[217] the consistent findings and investigations of the IMAs "suggest[ed] that migrants are motivated by economic factors."[218] Australia has long been a popular destination for migrant smuggling from Southwest Asia since 2000[219] and this led Australia to drastically change its policy against the incoming boats carrying smuggled migrants.[220]

In 2013, then prime minister of Australia, Tony Abbott, established "Operation Sovereign Borders" ("OSB") that further protected the border of Australia against the incoming asylum seekers

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Refugee Statistics: How Generous is Australias Refugee Program Compared to Other Countries?, RELIEFWEB (July 10, 2019), https://reliefweb.int/report/australia/analysis-unhcr-s-2018-global-refugee-statistics-how-generous-australia-s-refugee.

[212] Koser, *supra* note 207.

[213] NICHOLAS HENRY, ASYLUM, WORK, AND PRECARITY: BORDERING THE ASIA-PACIFIC 85 (2018).

[214] *Id.*

[215] *Factsheet: Australias Refugee Policy: An Overview*, ANDREW & RENATA KALDOR CTR. FOR INTL REFUGEE L. (July 2020), https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australian%20Refugee%20Policy_Apr2019.pdf.

[216] AUSTL. GOV. DEPT IMMIGR. & BORDER PROT. [DIBP], ASYLUM TRENDS–AUSTRALIA: 2012–13 ANNUAL PUBLICATION 4 (2013), https://www.homeaffairs.gov.au/research-and-stats/files/asylum-trends-aus-2012-13.pdf.

[217] HENRY, *supra* note 213, at 85.

[218] *Id.*

[219] U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON SMUGGLING OF MIGRANTS 2018, at 122, U.N. Sales No. E.18.IV.9 (2018); U.N. OFFICE ON DRUGS & CRIME, MIGRANT SMUGGLING IN ASIA AND THE PACIFIC: CURRENT TRENDS AND CHALLENGES, Vol. II, at 39 (2018) https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/2018-2019/SOM_in_Asia_and_the_Pacific_II_July_2018.pdf [hereinafter MIGRANT SMUGGLING].

[220] MIGRANT SMUGGLING, *supra* note 219, at 39.

at sea.[221] The main concern of the Australian government was to discourage trafficking in person and smuggling of migrants across the sea borders under dangerous conditions.[222] To achieve this border protection, Regional Deterrence Framework was implemented to detect and intercept Suspected Illegal Entry Vessels ("SIEVs") to return the SIEV passengers to their country of origin or provide TPV to the asylum seekers who passed the RSD procedure.[223] According to the Australian government, this strict policy turning the boats back to where they came from in a form of interdiction effectively decreased the popularity in maritime smuggling routed to Australia.[224] However, this policy was criticized as an interception that was not in compliance with the Refugee Convention.[225] The UNHCR Regional Representation in Canberra commented that it "consider[ed] that actions to intercept and turn back boats carrying asylum-seekers are contrary to the spirit of the 1951 Refugee Convention."[226] Even if the RSD procedure was conducted, the repatriation process was forced instead of voluntary.[227]

In 2012, Australia began conducting RSD procedures in Nauru and Papa New Guinea as "offshore processing arrangements" for 4,183 asylum seekers sent to the island and 3,127 asylum seekers whose resettlement permit in Australia was rejected.[228] By 2019, more than 3,000 asylum seekers were sent to "remote offshore camps" located on either Papua New Guinea's Manus Island or the island nation

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[221] Shalailah Medhora. *Tony Abbott Sticks to "Stop the Boat" in Face of Claims People Smugglers Paid,* GUARDIAN (June 14, 2015), http://www.theguardian.com/australia-news/2015/jun/14/tony-abbott-sticks-to-stop-the-boats-in-face-of-claims-people-smugglers-paid.

[222] Elibritt Karlsen & Janet Phillips, *Developments in Australian Refugee Law and Policy: The Abbott and Turnbull Coalition Governments (2013–2016) 17* (Parliament of Austl., Research Paper Series 2017–18, Sept. 18, 2017), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5529931/upload_binary/5529931.pdf.

[223] THE COALITIONS OPERATION SOVEREIGN BORDERS POLICY, 7 (July 2013) https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf; *Outside Australia,* AUSTL. GOVT: OPERATION SOVEREIGN BORDERS, https://osb.homeaffairs.gov.au/outside-australia (last visited Oct. 9, 2019).

[224] MIGRANT SMUGGLING, *supra* note 219, at 39.

[225] Press Release, Statement by U.N. High Commissioner for Refugees Regional Representation in Canberra, Australia Should Not Coerce Vulnerable People to Return to Harm (Aug. 29, 2017), https://www.unhcr.org/en-us/news/press/2017/8/59a558104/australia-coerce-vulnerable-people-return-harm.html [hereinafter Statement by U.N. High Commissioner].

[226] Position Paper of UNHCR Regional Representation in Canberra, UNHCR Position: Interception and Turn Back of Boats carrying Asylum-Seekers (July 23, 2015), https://www.refworld.org/docid/5915a99b4.html.

[227] Statement by U.N. High Commissioner, *supra* note 225.

[228] *Offshore Processing Statistics*, REFUGEE COUNCIL AUSTL. (Oct. 25, 2020), https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/; *Offshore Processing,* ANDREW & RENATA KALDOR CTR. FOR INTL REFUGEE LAW, https://www.kaldorcentre.unsw.edu.au/projects/offshore-processing (last visited Nov. 3, 2020).

of Nauru. [229] This was criticized by the UNHCR as "prolonged mandatory detention of refugees and asylum seekers" because the asylum seekers whose applications for refugee status were rejected were stuck in Nauru.[230] However, Australia was not in violation of the *non-refoulement* principle due to its RSD procedures that assessed the *well-founded fear* of all its asylum seekers and did not repatriate them.[231] The criticism, therefore, was more concerned with the fact that the detention centers were lacking in "humane, fair reception conditions."[232] In other words, even if Australia properly carried out its obligation under the Refugee Convention to assess *well-founded fear* and avoid repatriation, it was constantly reminded of its further duties to satisfy the humanitarian standard of accommodating the asylum seekers.[233]

In response, Australia exercised its discretion to share the burden by establishing a bilateral agreement to relocate the asylum seekers with some of the countries of origin, such as Cambodia.[234] Through a bilateral agreement, Australia and Cambodia cooperated to return the Cambodian asylum seekers who failed the RSD procedure in Nauru back to Cambodia with a condition that they would be received back according to the humanitarian standard. [235] The UNHCR was concerned about this agreement and viewed it as Australia's attempt to transfer its international responsibility to Cambodia, where the

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[229] Elaine Pearson, *Trump Attack on Asylum-Seekers Was Made in Australia*, FOREIGN POLY (July 24, 2019), https://foreignpolicy.com/2019/07/24/trumps-attack-on-asylum-seekers-was-made-in-australia-png-manus-island-nauru-new-zealand-refugees-offshore-detention.

[230] Eliza Laschon, *United Nations Human Rights Commissioner Criticises Australias Asylum-Seeker Policies*, ABC NEWS (Oct. 9, 2019), https://www.abc.net.au/news/2019-10-09/un-bachelet-criticises-australia-asylum-seeker-policies/11588084?pfmredir=sm.

[231] *Asylum Seekers and Refugees Guide,* AUSTL. HUM. RTS. COMMN (Aug. 14, 2015), https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide.

[232] Amy Remeikis, *Australia Must Use Past Success to Reset Future Asylum Policy, Professor Says*, GUARDIAN (June 12, 2019), https://www.theguardian.com/australia-news/2019/jun/13/australia-must-use-past-success-to-reset-future-asylum-policy-professor-says.

[233] *See id.*

[234] *Cambodia Agreement,* ASYLUM SEEKER RES. CTR. [ASRC], https://www.asrc.org.au/resources/fact-sheet/cambodia-agreement/ (last visited Oct. 9, 2019); Memorandum of Understanding Between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia, REFWORLD (Sept. 26, 2014), https://www.refworld.org/docid/5436588e4.html.

[235] Lauren Crothers & Ben Doherty, *Australia Signs Controversial Refugee Transfer Deal with Cambodia*, GUARDIAN (Sept. 26, 2014), https://www.theguardian.com/world/2014/sep/26/australia-signs-refugee-deal-cambodia.

asylum seekers have fled from.[236] Nevertheless, UNHCR's concern does not amount to any violation of the Refugee Convention.[237] In comparison to South Korea's pre-assessment, Australia is a step further in its humanitarian efforts to properly receive and assess the asylum seekers in compliance with the Refugee Convention.[238]

C. China's Repatriation of North Korean Defectors

In 1982, China acceded to the Refugee Convention and the Refugee Protocol.[239] With the effort to implement its commitment to protecting the refugees, the Standing Committee of China's National People's Congress adopted a refugee provision into its Exit-Entry Administration Law in 2012.[240] Under Article 46 of the Exit-Entry Administration Law, all "[f]oreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificate issued by public security organs."[241] Once they were recognized as refugees, the refugees were allowed to stay in China temporarily with "an identity document issued by Chinese competent authorities."[242] This singular provision, along with Article 32 of the Chinese Constitution,[243] is the only Chinese law concerned with refugees.[244] And despite its refugee-friendly language, the provision was not practically implemented, making the UNHCR concerned with some of the asylum seekers who were not given the promised protection upon their entry to China.[245] UNHCR named three groups: the Indo-Chinese refugees, the Vietnam, Laos and Cambodia refugees, and the North Korean defectors.[246] The Chinese government allowed only the first and second refugee groups access to its RSD procedure, which the Macao Refugee Commission ("MRC")

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[236] Press Release, UNHCR, UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation (Sept. 26, 2014), https://www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html.

[237] *See generally id.*

[238] AUSTL. HUM. RTS. COMMN, *supra* note 231.

[239] *Fact Sheet: The Peoples Republic of China*, UNHCR (Dec. 2015), https://www.unhcr.org/protection/operations/5000187d9/china-fact-sheet.pdf; U.N. High Commissioner for Refugees Submission for the Office of the High Commissioner for Human Rights Compilation Report, *Peoples Republic of China and the Special Administrative Regions of Hong Kong and Macao,* (July 2018), https://www.refworld.org/topic,50ffbce5220,50ffbce5247,5b56ffde9,0,UNHCR,,CHN.html [hereinafter *UNHCR Submission on China*].

[240] *See* Exit and Entry Administration Law of the Peoples Republic of China (promulgated by the Standing Comm. Natl Peoples Cong., June 30, 2012, effective July 1, 2013), No. 57, *translated in* CLI.1.178090 (China).

[241] *Id.* art. 46.

[242] *See id.*; *UNHCR Submission on China*, *supra* note 239, at 1.

[243] XIANFA [CONSTITUTION] 1982, art. 32 (China).

[244] Lili Song, *China and the International Refugee Protection Regime: Past, Present, and Potentials*, 37 REFUGEE SURV. Q. 139, 147 (2018).

[245] *UNHCR Submission on China, supra* note 239, at 1.

[246] *Id.*

was responsible for conducting.[247] When the UNHCR observed that the MRC did not sometimes conduct the RSD procedure, the responsibility was transferred to the UNHCR Beijing Office through an agreement with China on cooperation in refugee status determination.[248]

Unlike many other Contracting States that conducted their RSD procedure, China stands out for having invited "UNHCR's involvement in the absence of hard evidence that those to be helped were not refugees."[249]

China was criticized for a long time for its blatant violation of the *non-refoulement* obligation under the Refugee Convention concerning the North Korean defectors.[250] China's justification for its treatment of the defectors was that it had an established alliance with the DPRK through the PRC-DPRK Escaped Criminals Reciprocal Extradition Treaty ("Repatriation Treaty").[251] China made serious effort to honor the bilateral agreement to repatriate North Korean defectors back to the DPRK by automatically categorizing them as illegal economic migrants, not refugees.[252] There were a few cases in which the North Korean defectors did "migrate to China seeking only economic opportunity."[253] However, the main problem with the automatic repatriation was presented when the defectors were repatriated back to the DPRK. Upon repatriation, a *well-founded fear* of persecution came into existence in the form of "post-repatriation imprisonment

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[247] *Id.* at 2.

[248] Agreement on the Upgrading of the UNHCR Mission in the Peoples Republic of China to UNHCR Branch Office in the Peoples Republic of China, China-UNHCR, art. 2–4, Dec. 1, 1995, 1899 U.N.T.S. 32371.

[249] GOODWIN-GILL & MCADAM, *supra* note 30, at 53.

[250] Yoonok Chang et al., *The North Korean Refugee Crisis: Human Rights and International Response,* U.S. COMM. FOR HUM. RTS. N. KOR., 7, 9, 11 (2006), https://www.researchgate.net/publication/40904757_The_North_Korean_Refugee_Crisis_Human_Rights_and_International_Response.

[251] *Chinas Repatriation of North Korean Refugees: Hearing before the Cong.-Exec. Comm'n on China*, 112th Cong. 1–2 (2012) (statement of Hon. Chris Smith, Chairman, Cong. Exec. Comm'n on China) [hereinafter *Hearing*]; *see* Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas China - N. Kor., art. 4, 9–10, Aug. 12, 1986, NKFREEDOM, http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf (agreement signed Aug. 12, 1986, providing the text of a Sino-North Korean bilateral treaty through which China promised to repatriate all unauthorized North Korean migrants in China).

[252] MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 157 (2015); Jeanyoung Jeannie Cho, *Systemizing the Fate of the Stateless North Korean Migrant: A Legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China*, 37 FORDHAM INTL L. J. 175, 184 (2013).

[253] Cho, *supra* note 252, at 214; THE INVISIBLE EXODUS, *supra* note 117, at 9–10.

and forced labor" in the gulag.[254] Because the North Korean defectors developed *well-founded fear* not immediately after leaving their country of origin but due to subsequent risk of persecution when repatriated, they became *refugee sur place*.[255] Unfortunately, China refused, and continues to refuse, to acknowledge the DPRK's gulags to which the repatriated North Korean defectors are sent to.[256] During the Security Council meeting in 2014, Mr. Liu Jieyi, the representative of China, continued to evade discussions concerning the agenda of whether to refer Kim Jong-un of the DPRK to the International Criminal Court based on the report drafted by the Human Rights Council on the crimes of torture committed in the gulags.[257] Liu criticized the report for distracting the purpose and objective of the Security Council, stating "We hope that the members of the Council and the relevant parties will place priority on the overall interests of deuclearization and the maintenance of peace and stability on the Korean peninsula."[258] In response, Samantha Power, the United States ambassador, emphasized that suggesting human rights are not worth trading for a nuclear deal is a false choice.[259]

To an extreme extent, China barred the UNHCR from monitoring the North Korean defectors under restrictive regulations.[260] Spokesperson Chunying Hua for the Ministry of Foreign Affairs of China spoke in defense of China's position.[261] He argued that the government was complying with the Refugee Convention because it allowed the UNHCR to conduct the RSD procedure in China to further proper implementation for the asylum seekers selectively.[262] Hua argued that the North Korean defectors were unlike those eligible asylum seekers, as they were illegal economic migrants who are not

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[254] DAVID HAWK, THE HIDDEN GULAG: THE LIVES AND VOICES OF "THOSE WHO ARE SENT TO THE MOUNTAINS" 112 (2d ed. 2012); *Hearing*, *supra* note 251, at 3 (statement of Hon. Edward R. Royce, Member, Cong. Exec. Comm'n on China).

[255] *UNHCR, Refugee Protection and International Migration,* UNHCR 5 (Jan. 17, 2007), https://www.unhcr.org/4a24ef0ca2.pdf.

[256] *See* U.N. SCOR, 69th Sess., 7353 mtg. at 2, 6, 8, 11, 16, U.N. Doc. S/PV.7353 (Dec. 22, 2014).

[257] *Id.* at 2 (statement of Mr. Liu Jieyi, Member of Sec. Council, Rep. of China to the UN) ("The Security Council should work more to facilitate dialogue and ease tensions and refrain from doing anything that might cause an escalation of tensions.").

[258] *Id.* at 16.

[259] *Id.* at 11.

[260] Kris Janowski, *UNHCR Seeks Access to North Koreans Detained in China*, UNHCR (Jan. 21, 2003), http://www.unhcr.org/3e2d81b94.html; Andrej Mahecic, *China: UNHCR Calls for Access to Myanmar Refugees*, UNHCR (Sep. 4, 2009), http://www.unhcr.org/news/briefing/2009/9/4aa108159/china-unhcr-calls-access-myanmar-refugees.html? query=kokang; Adrian Edwards, *UNHCR Reaches Kachins Sent Back from China*, UNHCR (Sep. 7, 2012), http://www.unhcr.org/5049cdba9.html.

[261] *China Rejects U.N. Criticism in North Korea Report, No Comment on Veto,* REUTERS (Feb. 18, 2014), https://www.reuters.com/article/us-china-korea-north/china-rejects-u-n-criticism-in-north-korea-report-no-comment-on-veto-idUSBREA1H0E220140218.

[262] *See id.*

entitled to the RSD procedure.[263] Nevertheless, China was continuously under criticism that it was indirectly supporting the crimes of "torture, arbitrary imprisonment and other gross human rights violations" through its "rigorous policy of forced repatriation of DPRK."[264] China's "active measures to ensure that DPRK nationals cannot get access to foreign embassies and consulates to seek protection or asylum" by punishing those who harbored the North Korean defectors has also been heavily criticized.[265] Already when the UNHCR had initial access to the North Korean defectors, before China could permanently bar any further association, the North Korean defectors were assessed and determined to be people of concern.[266] Only after such discoveries and initiatives to protect the North Korean defectors did China begin to prohibit the agency from going near the borders and monitoring the entry of North Korean defectors.[267] Overall, China only wanted to cooperate with the UNHCR and facilitate the UNHCR's functions selectively and deprived certain asylum seekers of their due process rights, no matter the proven evidence of *well-founded fear* of persecution.[268] Despite China's seemingly cooperative RSD procedures available for the asylum seekers, China is gravely in violation of the crucial *non-refoulement* principle under the Refugee Convention.[269]

CONCLUSION

The Refugee Convention first requires its Contracting States to provide fundamental protection to the asylum seekers at their borders with the RSD procedure and assess their *well-founded fear* of persecution.[270] In deference to state sovereignty, the Contracting States are also given discretion as to how to conduct the RSD procedure.[271] And various policies and methods have been demonstrated through the analysis of different RSD procedures in the U.S., Australia, and China that were either in compliance with or in violation of the Refugee Convention. Based on the comparative study, it is difficult to deny that South Korea's RSD procedure most resembles that of China, especially concerning its discriminatory application and difficult accessibility. While criticisms against South Korea's Refugee Act is concerned with its low refugee admittance rate,

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[263] *See id.*

[264] *HRC Report on DPRK*, *supra* note 115, at 127.

[265] *Id.* at 127–28.

[266] *Perilous Journeys: The Plight of North Koreans in China and Beyond,* ASIA REP. N. 122 (Intl Crisis Grp.), Oct. 26, 2006, at 30, https://www.refworld.org/pdfid/4565e3fa4.pdf.

[267] Cho, *supra* note 252, at 208–209.

[268] TAN, *supra* note 252, at 157.

[269] *Id.* at 156–58.

[270] Refugee Convention, *supra* note 2, at 13–14.

[271] *Id.* at 18.

the crucial point of noncompliance of South Korea with the Refugee Convention rises from its lack of *well-founded fear* assessment in its pre-assessment at the port of entry.[272] The U.S. and Australia understood how to comply with the Refugee Convention and its *non-refoulement* principle. Although their RSD procedures changed overtime and expanded in various ways, they never diverted from the requirement of the *well-founded fear* assessment.[273] Therefore, even under UNHCR's disapproval, they were still in compliance with the Refugee Convention. South Korea will have to similarly recognize the most basic procedural obligation set forth by the Refugee Convention to its Contracting States, which is to never deprive the asylum seekers of their right to access the *well-founded fear* assessment. South Korea will have to amend or abandon its pre-assessment so that even the asylum seekers with weak evidence could gain access to the RSD procedure, and most crucially its assessment of the existence of *well-founded fear* of persecution.

[272] *See* Gabriel Dominguez, *No Country for Refugees? Japan and South Koreas Tough Asylum Policies,* DW (Nov. 4, 2014), https://www.dw.com/en/no-country-for-refugees-japan-and-south-koreas-tough-asylum-policies/a-18037765.

[273] Ramji-Nogales, *supra* note 192; AUSTL. HUM. RTS. COMMN, *supra* note 231.

PROTECTING THE VULNERABLE: KEEPING CHILDREN SAFE WITH THE KELSEY SMITH ACT

Nicholas Johnson[*]

INTRODUCTION

Congress should pass a modified version of the Kelsey Smith Act, currently proposed before the Senate, to provide more safety measures for minors and aid in the search of abducted and runaway children by furthering the use of technological advancements.

Imagine being a parent of an average 16-year-old teenager. Now that she can drive, you've entrusted her with the keys to her own car and set a curfew of 11 P.M. They also have the newest smartphone, which they always keep nearby. On an ordinary day, she tells you she is going to the mall with some friends and will be home around five o'clock for dinner. As you go about your normal daily routine, you get a phone call from her, saying that she is leaving the mall and will be back shortly. Five o'clock comes and passes, and you start to get frustrated, wondering why she isn't home yet.

You call her cellphone, but there is no answer. Your mind starts jumping to conclusions about a horrific car accident. You and your spouse hop in your car to drive towards the mall to see if you see her car on the road nearby. You have no luck on the roads, so you head straight to the mall. As you pull up to the parking lot you see her car nearby. However, as you get closer, you realize two doors are left open, there are shopping bags thrown all around, and your child isn't there. You call the police and the search is on for your child. The police start their search for her and realize her cell phone is not in her car. The provider denies the request to ping your child's phone without a warrant. Within the next 48 hours, the police get the warrant to ping her location. Lo-and-behold, the ping registers just a few miles away from the mall. When the police arrive, it's too late.

Is there a solution which could help reunite kidnapped, trafficked, and endangered runaway children with their families? The Kelsey Smith Act,[1] if used exclusively for children, is a practical tool to provide safety for victimized children on a federal level. One of the concerns individual liberty advocates have with this act is the potential for it to be over-used

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[1] Kelsey Smith Act, S.273, 116th Cong. (2019) (proposed amendment to Communications Act of 1934).

and become a danger to Fourth Amendment rights.[2] With this valid concern in mind, this Note addresses the Kelsey Smith Act exclusively for minors (children).[3] As Robin Hayes, former Congressman of North Carolina,[4] put it, "[o]ur law enforcement must be given every tool available to protect children from predators. . ."[5] and it is possible that there are more tools readily available if given the chance to use them, such as the Kelsey Smith Act.

Part I of this Note addresses the background information on the Kelsey Smith Act, such as how and why it was implemented, what it does, the issue of child abductions and trafficking, and support for the Kelsey Smith Act. Part II of this Note addresses the legal implications of the act, such as: the constitutionality of the act, the Electronic Communications Privacy Act of 1986, and the Stored Communications Act. Part III addresses why and how this act may be implemented on a federal level and the application of this Act exclusively for children on a federal level. Congress should pass a modified version of the Kelsey Smith Act, currently proposed before the Senate, that exclusively applies to minors to further use technological advances in order to make it easier to find abducted or endangered runaway children. Using the Kelsey Smith Act exclusively for minors will provide a more direct channel to find and protect children, therefore reuniting hurting families who once did not think it this was possible.

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[2] *See* David Ruiz, *Undermining Mobile Phone Users' Privacy Won't Make Us Safer*, ELEC. FRONTIER FOUND. (July 17, 2018), https://www.eff.org/deeplinks/2018/07/undermining-mobile-phone-users-privacy-wont-make-us-safer (arguing Kelsey Smith Act's definition of "emergency" is too broad); *see also* Letter from Electronic Frontier Foundation on Kelsey Smith Act (May 21, 2016), https://www.eff.org/files/2016/05/21/kelsey_smith_vote_act_final_1.pdf (recommending amendment to Kelsey Smith Act due to Fourth Amendment concerns).

[3] Whether this act is too "powerful" or concerning for all adults is a topic for another discussion. If the Kelsey Smith Act gets passed, as currently proposed, this will settle the debate until the Act is questioned in court. However, due to the former drafts of the bill being rejected, there is reason to believe that a rejection is the most likely outcome for the current bill, which applies to both adults and minors.

[4] *Rep. Robin Hayes*, GOVTRACK, https://www.govtrack.us/congress/members/robin_hayes/400172 (last visited Sept. 19, 2020).

[5] Robin Hayes, *Protecting Children Quotes*, AZ QUOTES, https://www.azquotes.com/quotes/topics/protecting-children.html (last visited Sept. 14, 2020).

I. BACKGROUND ON THE KELSEY SMITH ACT

A. Why Was the Act Created?

On June 2, 2007, Kelsey Smith was abducted from a department store parking lot in Kansas.[6] Kelsey was taken from the parking lot to a wooded area, where she was raped and strangled to death.[7] After Kelsey was reported missing, the police went to her cell phone provider, Verizon, to retrieve her cell phone location.[8] However, Verizon did not comply with the request because the police came to them without a subpoena.[9] The subpoena was granted four days later, at which time Verizon complied with police and pinged Kelsey's location.[10] The police were able to find Kelsey's body within just forty-five minutes once the request was granted.[11] The police were able to determine that Kelsey was killed the same day that she was abducted.[12] It was believed that because of the short amount of time it took to find her body once the subpoena was granted, she likely could have been saved if the police did not have to go through the whole subpoena process.[13]

The tragedy that took place led Kelsey's parents to proposing the Act be implemented in the state of Kansas, which was signed into law on April 17, 2009.[14] Today, versions of the law have been adopted by twenty-three additional states (dates included): New Jersey (2010), Nebraska (2010), Minnesota (2010), New Hampshire (2010), North Dakota (2011), Tennessee (2012), Hawaii (2012), Missouri (2012), Utah (2013), West Virginia (2013), Colorado (2013), Nevada (2013), Rhode Island (2013), Oregon (2013), Oregon (2014), Pennsylvania (2014), Arkansas (2015), Iowa (2015), Washington (2015), Louisiana (2015), Delaware (2015),

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[6] *About Us*, KELSEY'S ARMY: KELSEY SMITH FOUND., https://kelseysarmy.org/#about-us (last visited Sept. 13, 2020).

[7] Diane Carroll et al., *From the Archives: Edwin Hall Guilty in Kelsey Smith Killing*, KAN. CITY STAR (Feb. 17, 2015), https://www.kansascity.com/news/local/article10539872.html.

[8] Tara Seals, *Privacy Advocates Say Kelsey Smith Act Gives Police Too Much Power*, THREAT POST (July 19, 2018), https://threatpost.com/privacy-advocates-say-kelsey-smith-act-gives-police-too-much-power/134142/.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] *Kelsey Smith Act*, KELSEY'S ARMY: KELSEY SMITH FOUND., https://kelseysarmy.org/#ks-act (last visited Sept. 14, 2020) (Hereinafter known as KELSEY'S ARMY).

Indiana (2016), Alabama (2017), and Kentucky (2019 – named the *Leah Carter Act*).[15]

B. What Does the Act Do?

Naturally, the Kelsey Smith Act, being adopted in twenty-seven different states, would have similar but slightly different versions across the board, however this Note focuses specifically on the version of the act that is currently before Congress.[16] The Kelsey Smith Act was reintroduced to the Senate by Senator Pat Roberts [R-KS] on January 30, 2019,[17] along with cosponsors Senator Jerry Moran [R-KS], Senator Roy Blunt [R-MO] and Senator Deb Fischer [R-NE].[18] Additionally, the Act also introduced to the House by Representative Ron Estes [R-KS] on March 18, 2019.[19]

Before the Kelsey Smith Act, law enforcement officials are required to get a warrant to obtain cell phone records from wireless providers.[20] The Kelsey Smith Act, however, requires that a telecommunications carrier and cell phone provider release the location information of their users in an emergency situation without a warrant.[21] To establish this, the Kelsey Smith Act would be amending the Communications Act of 1934.[22] Additionally, the Kelsey Smith Act also provides that "[n]o cause of action shall lie in any court . . . against a provider of a covered service . . . for providing location information or assistance" in regards to following the Act.[23] This is simply stating that the Act protects cell phone carriers and providers from being sued in any court for following providing the location requested by law enforcement officials.[24]

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[15] *Id.* (Kentucky has adopted the Leah Carter Act after the Kelsey Smith Act was reintroduced to both the House and the Senate. As of this time, it is unclear as to whether other states are considering the Kelsey Smith Act.).

[16] KELSEY'S ARMY, *supra* note 14 (last visited April 17, 2021).

[17] *Id.* (More recently, the Act has been reintroduced to the Senate by Senators Moran, Blunt, and Fischer on February 25, 2021.).

[18] *Senators Roberts & Moran Introduce the Kelsey Smith Act*, U.S. SENATOR DEB FISCHER FOR NEBRASKA (Jan. 31, 2019), https://www.fischer.senate.gov/public/index.cfm/2019/1/senators-roberts-moran-introduce-the-kelsey-smith-act.

[19] KELSEY'S ARMY, *supra* note 14.

[20] Carpenter v. United States, No. 16-402 U.S. 1, 18 (2018).

[21] Kelsey Smith Act, *supra* note 1.

[22] *Id.*

[23] *Id.*

[24] *Id.*

C. Missing Children Across the United States

In 2018, the Federal Bureau of Investigation (FBI) reported that there were 424,066 National Crime Information Center (NCIC) entries for missing children.[25] This number indicates the reports of missing children; this means that if a child runs away multiple times within the year, each instance would be counted separately.[26] This would also mean that any entry that is withdrawn and amended or updated would also be reflective of the yearly total.[27]

In 2018, the National Center for Missing & Exploited Children (NCMEC) assisted law enforcement with over 25,000 cases of missing children.[28] As encouraging as that may be, the FBI has reported that many of the children on the FBI's "Kidnappings & Missing Persons" webpage have still been missing.[29] As equally disturbing, of the more than 23,500 endangered runaways reported to the NCMEC in 2018, there was a one in seven chance that the child was a victim of child sex trafficking.[30] That number- one in seven- is exclusively for sex trafficking, which therefore would not include the additional forms of trafficking that take place.[31] Additionally, it is reported that every day in the United States, 46 children are taken and sold into child slavery.[32] If we broaden the scope away from child trafficking, a child becomes missing or is abducted every forty seconds in the United States.[33] In total, approximately 1,435 children are kidnapped each year.[34]

Contrary to popular belief, traffickers do not exclusively take endangered runaways; rather, they do not discriminate in who they

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[25] *About NCMEC*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., http://www.missingkids.com/footer/media/keyfacts (last visited Sep. 20, 2020).

[26] *Id.*

[27] *Id.*

[28] *Gone Without a Trace? Misery, Mystery Linger in These Alabama Missing Child Cases*, ADVANCE LOCAL (Nov. 12, 2019), https://www.al.com/news/birmingham/2019/11/gone-without-a-trace-misery-mystery-linger-in-these-alabama-missing-child-cases.html.

[29] *National Missing Children's Day 2019*, FBI (May 24, 2019), https://www.fbi.gov/news/stories/national-missing-childrens-day-052419.

[30] *Commercial Sexual Exploitation of Children*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/programs/commercial-sexual-exploitation-children (last visited Sept. 21, 2020).

[31] *Child Trafficking*, ERASECHILD TRAFFICKING, https://www.erasechildtrafficking.org/child-trafficking/ (last visited Oct. 2, 2020).

[32] *Id.*

[33] Karin A. Bilich, *Child Abduction Statistics for Parents*, PARENTS (Oct. 3, 2005) https://www.parents.com/kids/safety/stranger-safety/child-abduction-facts/.

[34] George Filenko, *Child Abductions. Are We Prepared?*, PATCH (Apr. 22, 2019), https://patch.com/illinois/grayslake/child-abductions-are-we-prepared.

abduct.[35] The locations in which children get abducted and trafficked varies across the board.[36] Children can be snatched in both poor and rich neighborhoods, as well as either rural or urban areas.[37]

There are primarily three categorical types of kidnappings that take place: kidnapping by a relative or "family kidnapping" (49 percent), kidnapping by an acquaintance (27 percent), and kidnapping by a stranger (24 percent).[38] Each category of kidnappers primarily focuses on different groups.[39] Family kidnappings, mainly done by parents, most frequently occurs in children who are under 6 years of age.[40] Acquaintance kidnappings are more likely to involve teenage girls and often come with other crimes, mainly sexual and physical assault.[41] The last category, stranger kidnappings, does not discriminate, but has a tendency to focus on both school-age and teenage females.[42]

Many people in the United States have become accustomed to seeing an alert by America's Missing: Broadcast Emergency Response (AMBER) Alert for an abducted child.[43] AMBER Alert is a system that coordinates with local police to send out emergency signals to help local abducted children.[44] Obviously, there must be a framework of exact criteria that must be met in order to issue an AMBER Alert. The summary of what criteria is required is listed as follows: (1) law enforcement must reasonably believe that there has been an abduction;[45] (2) law enforcement reasonably believes the abducted child is in "imminent danger of serious bodily injury or death";[46] (3) law enforcement has "enough descriptive information about the victim and the abduction" to aid in the recovery of the child;[47] (4) the abducted child is seventeen or

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[35] *Child Trafficking*, *supra* note 31.

[36] *See id.*

[37] *Id.*

[38] Bilich, *supra* note 33.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See About AMBER Alert*, DEP'T OF JUST., https://amberalert.ojp.gov/about (last visited Oct. 3, 2020).

[44] *Id.*

[45] *Guidelines for Issuing AMBER Alerts*, DEP'T OF JUST., https://amberalert.ojp.gov/about/guidelines-for-issuing-alerts (last visited Oct. 3, 2020).

[46] *Id.*

[47] *Id.* (The description requirement for AMBER Alerts is keyed in on the description of the child, but it also includes providing as much descriptive information on the suspected abductor and their vehicle. This would be a critical difference between the use of AMBER Alerts and the Kelsey Smith Act. The Kelsey Smith Act would ultimately provide law enforcement another possibility of finding a child, even if the descriptive information hasn't been met yet. This could lead to the potential overuse and abuse of the Kelsey Smith Act, which is why how the act is specifically worded could use work on

younger;[48] (5) "[t]he child's name and other critical data elements, including the Child Abduction flag, have been entered into the National Crime Information (NCIC) system."[49] Once it has been determined that a child has been abducted and the AMBER Alert criteria are met, law enforcement officials notify broadcasters and state transportation officials.[50] Upon notification, an alert interrupts regular programming on radio, television, Department of Transportation highway signs, etc.[51]

AMBER Alert plans are established in all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.[52] Additionally, in 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act was signed into law.[53] This act rejuvenated law enforcement's abilities to prevent, investigate, prosecute and punish violent crimes committed against children.[54] The use of AMBER Alert has played a significant role in reuniting families with their abducted child.[55] Unfortunately, AMBER Alerts are not issued for runaways, even if they are considered endangered runaways.[56]

The enactment of AMBER Alert and its subsequent legislation shows the importance that has been placed on protecting children. Realizing the significance for the protection of children, it is apparent that the combined

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clarifying some of the elements necessary. With that being said, it's apparent that there is a need for furthering law enforcement and families the tools that can be used to find abducted or missing children.).

[48] *Id.*

[49] *Id.*

[50] *Frequently Asked Questions*, DEP'T OF JUST., https://amberalert.ojp.gov/about/faqs (last visited Oct. 4, 2020).

[51] *Id.*

[52] *AMBER Alert*, DEP'T OF JUST., https://amberalert.ojp.gov/ (last visited Oct. 4, 2020) (Additionally, AMBER Alert is also present in thirty other countries.).

[53] PROTECT Act, Pub. L. No. 108-21,117 Stat. 650 (2003).

[54] *Id.*

[55] *See* Chloe Bradford, *What Should you do if your Child goes Missing?*, CBS19 (Jan. 13, 2020), https://www.cbs19.tv/article/news/local/what-should-you-do-if-your-child-goes-missing/501-c8d48e86-72af-43bc-b1fc-23fc198fbbf7 (As of September 2019, there have been 967 children rescued specifically because of AMBER Alert and 58 children have been rescued because of Wireless Emergency Alerts.); s*ee also Statistics*, DEP'T OF JUST., https://amberalert.ojp.gov/statistics (last visited Oct. 4, 2020) (As of September 2019, there are 86 AMBER Plans throughout the United States.).

[56] Chris Montaldo, *Guidelines for Issuing AMBER Alerts*, THOUGHTCO (Nov. 23, 2019), https://www.thoughtco.com/guidelines-for-issuing-an-amber-alert-972593 (discussing how not all missing children will receive an AMBER Alert because runaways do not receive the same treatment as abducted children. This could serve as one of the primary reasons why law enforcement should have the ability to search for a missing child, whether abducted or runaway, with the use of a cell phone ping. Allowing the Kelsey Smith Act to come in and rectify the lack of assistance for endangered runaways could serve as a vital tool.).

use of AMBER Alert and the Kelsey Smith Act could further provide protection that proponents are searching for.

D. Support for the Kelsey Smith Act

With twenty-seven states adopting the Kelsey Smith Act, it is clear to see that there is legitimate support for the law.[57] In fact, three of the twenty-seven states (Kentucky, South Dakota, and Wyoming) that implemented the act have done so after the Act went up before the Senate in 2019.[58] With this support for the Act growing, it can bring one to pose the question, "When will other states follow suit?" One important question that those states and the federal government need to address on their own is, "What can this act provide?"

Senator Roberts, one of the co-sponsors of the Act, has pointed out, "The Kelsey Smith Act is common sense legislation that will help save countless children's lives by making it easier for law enforcement to find children and loved ones who are abducted."[59] Further, based on more of Roberts comments about the Act,[60] it pushes one to realize that this Act in its original form, while applicable to all, is primarily focused on one group in particular: children.[61] Senator Moran has emphasized that this Act enables first responders the ability to use the necessary tools to find abducted children, resulting in more lives' saved.[62] Naturally, support for the Act also comes from the parents of Kelsey Smith, Greg and Missey Smith.[63] Missey Smith has even pointed out that the law does not require additional costs to implement.[64] One practical question that Kelsey Smith's parents have presented is, "If your child was missing would you not want law enforcement to have every tool available to find your child?"[65] This simple, yet profound question is quite simply at the root of this Act.

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[57] KELSEY'S ARMY, *supra* note 14.

[58] *Id.*

[59] *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18.

[60] *Id.* ("I've worked with my colleagues and the Smith family for years to pass this legislation, which is already law in 23 states. Expediting the process of locating a cell phone could have helped save Kelsey's life, and I hope we can pass this bill to save the lives of other innocent children who are abducted in the future.").

[61] *Id.*

[62] *Id.* ("This legislation will make certain first responders have the tools they need to locate children who have been abducted, and I urge my colleagues to support this sensible bill to help save children's lives.").

[63] *Id.*

[64] Sarah Fruchtnicht, *Parents of Murdered Teen Push for Kelsey Smith Act, Cell Phone Carriers to Release Customer Location to Authorities*, OPPOSING VIEWS (Mar. 1, 2018), https://www.opposingviews.com/category/parents-murdered-teen-push-kelsey-smith-act-cell-phone-carriers-release-customer.

[65] *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18

Law enforcement officials from states that have implemented the Act have expressed their support for the Act as well.[66] Officials have pointed out that with time being crucial in situations of missing persons, children or adults, the ability to use the tools the Act grants has been highly advantageous.[67] One officer, Major Scott Boden of Johnson County Sheriff's Office (NE) has called the Kelsey Smith Act "the single most important piece of legislation related to potentially saving lives of suicidal subjects, assisting endangered children and addressing life threats when cell phone location is necessary and seconds count."[68] This single statement alone should push proponents and opponents of the Act to stop and consider how this Act been effective as to date. Another officer has referred to their state having the Kelsey Smith Act in place as a privilege.[69] Furthermore, officers have pointed out that there have been success stories in the states that have already adopted the Act.[70]

Additionally, there are other individuals and groups throughout the country that have expressed their support for the Act.[71] John Walsh, the co-founder of the NCMEC has voiced his support in a letter to Senator Pat Roberts endorsing the Act.[72] Walsh's support stems from his family's own experience with their son's abduction and murder.[73] In that letter, Walsh similarly emphasizes the importance of time and how this Act can be effective in saving children's lives.[74] John Ryan, CEO of NCMEC, told Fox News in an email expressing his support for the Act, that "[t]ime is of the essence when a child is missing" and that this Act could help prevent delays to reaching children.[75] Verizon Wireless has also made note that they support the Smith family's effort in getting the Act passed.[76] Beyond those already mentioned, more additional groups support this Act, such as: CTIA – The Wireless Association, Sprint, the National District Attorneys Association (NDAA), the Federal Law Enforcement Officers Association (FLEOA), the Sergeants Benevolent Association (SBA), the

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Letter from John E. Walsh, Co-founder of The Nat'l Ctr. for Missing & Exploited Child., to Sen. Pat Roberts (R-Kan.) (Jan. 2019) (on file with receiver).

[74] *Id.*

[75] Bryan Bentley, *The Kelsey Smith Story– A Story of Heartache & Hope*, PATCH (May 21, 2013), https://patch.com/michigan/plymouth-mi/bp--the-kelsey-smith-story-a-story-of-heartache-hope.

[76] Cristina Corbin, *Mother of Murdered Teen Pushes for Law Forcing Cellphone Carriers to Release Life-Saving Information*, FOX NEWS (Dec. 20, 2015), https://www.foxnews.com/politics/mother-of-murdered-teen-pushes-for-law-forcing-cellphone-carriers-to-release-life-saving-information.

International Association of Chiefs of Police (IACP), the Major County Sheriffs of America (MCSA), the National Association of Police Organizers (NAPO), the Fraternal Order of Police (FOP), and the National Sheriffs' Association (NSA).[77] One important component to point out of the group of supporters mentioned above is that there are multiple groups that deal with law enforcement and the protection of others who support this Act.[78] Those groups are the ones who would directly be using this Act.

E. Opposition to the Kelsey Smith Act

Naturally, as it is with any Act brought up in Congress in this day and age, there will be some pushback. Arguably, the most recognized group to the Act is the American Civil Liberties Union (ACLU).[79] The ACLU has urged the House of Representatives to vote "NO" on the Kelsey Smith Act on multiple occasions.[80] The ACLU noted that the way the Act was introduced in 2016 to the House "exclude[d] key protections contained in a prior version of the bill and in other state emergency location disclosure laws."[81] Additionally, the ACLU stated more concerns with the 2016 version, such as: "If providers must turn over records any time law enforcement asserts an emergency there is a real danger of significant oversharing stemming from law enforcement's incorrect use of the emergency exception."[82] The ACLU has also made aware of their concern that the bill would not actually improve emergency response times, but rather would weaken the privacy rights of all.[83] Quite frankly, this issue

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[77] *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18.

[78] *See id.*

[79] Letter from Laura W. Murphy, Dir. of the Washington Legis. Off. for ACLU, & Christopher R. Calabrese, Legis. Couns. for ACLU, to Congressman Fred Upton (R-Mich.) & Henry A. Waxman (D-Cal.) (July 29, 2014) (on file with author) (addressing how the ACLU was against the adoption of the bill in 2014. While the ACLU has given their statements on past iterations of the bill, there has not been a statement addressing the current proposal of the Kelsey Smith Act.).

[80] *See id.*; *see also* Letter from Karin Johanson, Dir. of Washington Legis. Off. for the ACLU, & Neema Signh Guliani, Legis. Couns. for the ACLU, to the House of Reps. (May 23, 2016) (on file with author) (addressing how the ACLU was against the 2016 proposed drafting of the Kelsey Smith Act. Again, this does not clearly establish what the ACLU has as its official stance for the 2019 version of the Kelsey Smith Act that has been brought up again.).

[81] *See* Johanson, *supra* note 80 (differing now that there are in fact different provisions listed in the bill that is currently being presented).

[82] Justin Wingerter, *Liberals & Libertarians Sunk Kelsey Smith Act in the U.S. House*, THE TOPEKA CAPITAL-JOURNAL (May 28, 2016), https://www.cjonline.com/article/20160528/NEWS/305289765 (discussing the surprising collectivity between liberal and libertarian groups sharing a common goal of defeating the 2016 version of the Kelsey Smith Act in the House of Representatives).

[83] Jeremy Snow, *Privacy Concerns Threaten Emergency Response Bill*, FEDSCOOP (July 20, 2016), https://www.fedscoop.com/despite-a-7-year-fight-privacy-questions-still-hold-back-emergency-response-bill/.

for the ACLU comes down to the Fourth Amendment protections each American is guaranteed.[84]

Another notable opponent to the bill is the Electronic Frontier Foundation (EFF).[85] The EFF is one of the leading groups in the United States in regards to promoting the limiting of digital censorship and government surveillance.[86] One writer and policy analyst for EFF, David Ruiz, has stated that the bill is not unreasonable on its face, but maintains that there is no protection for someone if the police make a mistake or abuse their power under the bill.[87] Possibly the biggest concern would be the definition of "emergency" under the bill's language.[88] The EFF makes note that the 48 hour phone call to the police window is the possibly the most glaring issue in terms of what is categorized as an emergency.[89] The EFF's other primary concern is that the bill would "effectively bar providers from protecting their users."[90] Notably, the EFF does give recognition where it is due with the bill, that is has a commendable purpose.[91]

When the bill was introduced to the House of Representatives in 2016, a mixture of both liberal and conservative members voted against the bill.[92] An "ultra-conservative" group of conservatives, from the House Freedom Caucus cast twenty-six nays (the group consists of forty-one members).[93] Similarly, the House Liberty Caucus, a libertarian-leaning group of Republicans, had the majority of their members vote in opposition to the bill (only ten of its thirty-five members voted in favor of the bill).[94] A libertarian think-tank, the R Street Institute, referred to the Kelsey Smith Act as "another expansion of government surveillance power" in

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[84] *Id.*

[85] *See* Ruiz, *supra* note 2.

[86] *See A History of Protecting Freedom Where Law & Technology Collide*, ELEC. FRONTIER FOUND., https://www.eff.org/about/history (last visited Oct. 29, 2020) (stating how the EFF has played a vital role in protecting individual rights from over-censorship and government surveillance. The EFF was founded in July of 1990 with the mission to protect free speech. The EFF started out because of the E911 document, which comes from a raid by the United States Secret Service tracking distribution of illegally copied documents).

[87] *See* Seals, *supra* note 8. ("'On its face, [the point of the bill is] not unreasonable,' said EFF's David Ruiz, in a posting this week. 'But if the police make a mistake—or abuse their power—the bill offers almost no legal recourse for someone whose location privacy was wrongfully invaded.'").

[88] Ruiz, *supra* note 2.

[89] *Id.*

[90] *Id. (*Providing that the bill mandates the phone provider to handover the cell phone location).

[91] *Id.*

[92] *See* Wingerter, *supra* note 82.

[93] *Id.*

[94] *Id.*

their attempt to dissuade House members for voting for the bill.[95] Additionally, the House Progressive Caucus, the most liberal group in the House, also had the majority of their members vote against the bill (fifty-one out of their fifty-nine members voted against it).[96] Keeping these differing views on the Kelsey Smith Act and its various proposed drafts, there appears to be much more room for debate on how to implement the act or a similar type of law.

II. CELL PHONE TECHNOLOGY RELEVANT TO THE KELSEY SMITH ACT

How a cell phone "tracks" or "monitors" an individual is an important component to analyzing the Kelsey Smith Act.[97] Cell phones are supported through cell towers which are able to relay messages from one user to another.[98] In the traditional sense, there are two ways in which cell phones can identify one's location: (1) global positioning system (GPS) and assisted global positioning system (AGPS); and (2) cell-site location information (CSLI).[99]

A. Global Positioning System and Assisted Global Positioning System

The Global Position System is a constellation of twenty-eight Earth-orbiting satellites that was originally designed for military purposes.[100] In regards to cell phone usage, GPS technology uses four or more satellites to triangulate signals of a cell phone's location.[101] The GPS uses radio waves between the satellites and your phone; your phone actually receives data from the satellites that are orbiting to find your geolocation.[102] However, GPS has limitations, such as: (1) being slower than new

[95] *Id.*

[96] *Id.*

[97] *See* Kelsey Smith Act, *supra* note 1 (realizing that the simple fact that law enforcement will be going to the cell phone provider of a missing individual is what gets at the heart of the bill.).

[98] Hussain Kanchwala, *What are Cell Towers & How do They Work?*, SCIENCEABC, https://www.scienceabc.com/innovation/cell-tower-work.html, (last updated Oct. 16, 2019).

[99] Jerry Hildenbrand, *How does GPS Work on My Phone: Before Space Force, There was NAVSTAR*, MOBILE NATIONS (Aug. 24, 2018), https://www.androidcentral.com/how-does-gps-work-my-phone#:~:targetText=GPS%20is%20a%20radio%20navigation,that%20needs%20to%20use%20it.&targetText=Your%20phone's%20GPS%20receiver%20uses,and%20what%20time%20it%20is; Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d § 1.

[100] *See* Hildenbrand, *supra* note 99.

[101] *Id.*

[102] *Id.*

technology; (2) uses a lot of power on the receiver end (your cell phone); and (3) require an unobstructed view, which regularly becomes a problem because of the high rise buildings in many cities.[103]

However, the Assisted Global Positioning System goes a step further than the standard GPS by adding cellular location data to assist the geolocation.[104] The AGPS combines the standard GPS location with the use of a phone company's phone "pings" through cell towers.[105] AGPS uses "pinging" by sending out data from your phone in conjunction with receiving data the GPS satellites.[106]

B. Cell-Site Location Information

Cell-site location information (CSLI) is the information that is collected as a cell phone identifies its location to nearby cell towers.[107] When a phone is turned on, it shares its location, every seven seconds, on a continual basis with the nearby cell towers.[108] A cell phone can be located within about 200 feet by use of a single cell tower in an urban area.[109] However, one's location can be pinpointed even more precisely by "triangulating" the information from multiple cell towers.[110] To be able to locate a cell phone at a precise moment in time, the phone provider may "ping" that phone by calling and hanging up.[111] This is the "usual" way that law enforcement would be able to track an individual with the help of the phone provider.[112] There are two ways to look at CSLI: (1) historical CSLI, which refers to cell phone data that is used to track past most movements; and (2) real time, or prospective, CSLI which allows someone to track in real time.[113]

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[103] *Id.*

[104] *Id.*

[105] *Id.* (Cell phone "pings" will be analyzed more fully under cell-site location information where it is most used and the primary way in which it will be used with the Kelsey Smith Act).

[106] *Id.*

[107] Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d § 1.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Stephanie Lacambra*, Cell Phone Location Tracking or CSLI: A Guide for Crim. Def. Att'y,* ELEC. FRONTIER FOUND., https://www.eff.org/files/2017/10/30/cell_phone_location_information_one_pager_0.pdf (last visited Nov. 6, 2020).

III. CONSTITUTIONALITY OF THE KELSEY SMITH ACT

A. Fourth Amendment – Basic Framework

The Fourth Amendment of the United States Constitution protects against "unreasonable searches and seizures" and further states that "probable cause" is needed for warrants to be issued.[114] The Supreme Court has emphasized that the text of the Constitution makes clear that, "the ultimate touchstone of the Fourth Amendment is reasonableness."[115] "Reasonableness" under the Fourth Amendment is "predominantly an objective inquiry."[116] The Court lays out that when law enforcement officials conduct a search of criminal wrongdoing, "[R]easonableness generally requires the obtaining of a judicial warrant."[117] Furthermore, the Court has stated that "warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'"[118] The rationale behind the necessity in most cases for obtaining a warrant is to guarantee that the inferences used to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[119] As will be discussed later in this section, a warrantless search is only reasonable if it falls within a few of the categorical exceptions.[120]

Normally, a Fourth Amendment claim arises when a defendant in a criminal case claims that the police violated his/her constitutional rights.[121] This usually happens by way of an unreasonable search or

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[114] U.S. CONST. amend. IV.

[115] Riley v. California, 73 U.S. 373, 381 (2014).

[116] Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011).

[117] Riley, *supra* note 115, at 382.

[118] Carpenter, *supra* note 20 at 2221 (This comment by the Court is significant when considering that the use of the Kelsey Smith Act isn't to discover evidence of criminal wrongdoing. Rather, the act is aimed at protecting and preventing the continuance of a heinous wrongdoing on a victim. It's important to note that there's the potential implication that when this act may be used, the missing or abducted person (in the context of this note, children) are in the middle of a criminal activity when they are found. This will be discussed later in this note, under the section titled "Part IV. The Federal Application of the Kelsey Smith Act Exclusively for Children.").

[119] Riley, *supra* note 115, at 382.

[120] *Id.*

[121] Lee Arbetman & Michelle Perry, *Search and Seizure: The Meaning of the Fourth Amendment Today*, http://www.socialstudies.org/sites/default/files/publications/se/6105/610507.html#:~:targetText=The%20typical%20Fourth%20Amendment%20case,his%20or%20her%20constitutional%20rights.&targetText=If%20the%20evidence%20is%20deemed,Exclusionary%20Rule%20comes%20into%20play (last visited Oct. 28, 2020).

seizure of evidence by the police.[122] With that in mind, there is something drastically different between those typical cases and the Kelsey Smith Act: a defendant in a case involving the Kelsey Smith Act would not have any grounds to sue on Fourth Amendment claims because it would not be a search of their own possessions.[123] The idea that someone, who has kidnapped another person (in this case a child), would rely upon the Fourth Amendment for "protection" of that other person's possession is blatantly ignorant.

B. Electronics Communications Privacy Act of 1986

The Electronics Communications Privacy Act of 1986 (ECPA) was designed to update the Federal Wiretap Act of 1968, which provided protection for communications over "hard" telephone lines, but did not apply to any other subsequent forms of communication via technology.[124] The ECPA however further regulates the interceptions of other forms of communication via technology.[125] The ECPA, in its amended form, provides protection for wire, oral, and electronic communications while those communications are "being made, are in transit, and when they are stored on computers."[126] The ECPA provides this protection to email, telephone conversations, and electronically stored data.[127]

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[122] *Id.*

[123] Minnesota v. Carter, 525 U.S. 83, 92 (1998) (J. Scalia, Concurring) ("The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' U. S. Const., Amdt. 4 (emphasis added). It must be acknowledged that the phrase 'their . . . houses' in this provision is, in isolation, ambiguous. It could mean 'their respective houses,' so that the protection extends to each person only in his own house. But it could also mean 'their respective and each other's houses,' so that each person would be protected even when visiting the house of someone else. As today's opinion for the Court suggests, however, ante, at 473, it is not linguistically possible to give the provision the latter, expansive interpretation with respect to 'houses' without giving it the same interpretation with respect to the nouns that are parallel to 'houses' – 'persons, . . . papers, and effects'– which would give me a constitutional right not to have your person unreasonably searched. This is so absurd that it has to my knowledge never been contemplated. The obvious meaning of the provision is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.").

[124] Electronic Communications Privacy Act of 1986, JUSTICE INFORMATION SHARING, https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1285.

[125] 18 U.S.C. §§ 2510–2522, 2701–2712, 3121–3127 (2006).

[126] 18 U.S.C. §§ 2511.

[127] *See Electronic Communications Privacy Act of 1986*, *supra* note 124.

C. Stored Communications Act

The Stored Communications Act (SCA) is a federal statute that regulates historical cell site information cases.[128] The most relevant section to the Kelsey Smith Act is Section 2702(c)(4), which provides:

> A provider . . . may divulge a record or other information pertaining to a subscriber . . . (not including the contents of communications covered by [other subsections]) –
> . . .
> (4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death of serious physical injury to any person requires disclosure without delay of information relating to the emergency.[129]

An important case in which the Court analyzed the SCA is *United States v. Gilliam*.[130] The two primary questions that the court asked in this case were: (1) what is the meaning of "other information" in subsection 2702(c)(4)[131] and (2) whether the circumstances constituted "an emergency involving danger of . . . serious physical injury to any person."[132] This is a basic analytical framework for which to process the SCA with the Kelsey Smith Act and the types of cases that it would be applied to.

D. Warrant and Warrantless Searches Under the Fourth Amendment Relating to Cell Phones

As stated above, the general principle is that a search warrant is required for a search, unless it falls within one of the categorical exceptions.[133] One exception to a warrantless search is consent given by the individual or a third party who possesses "common authority" over the

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[128] 18 U.S.C. § 2702.

[129] United States v. Gilliam, 842 F.3d 801, 803 (2016) (quoting Stored Communications Act, 18 U.S.C. § 2702(c)(4)).

[130] *Id.*

[131] *Id.* (addressing how the court pointed to other cases to analyze what the "other information" meant. The court found that "other information" was intended to be information about the customer's use of the service, which would include the location the user's cell phone).

[132] *Id.*

[133] *See* Riley, *supra* note 115 at 382.

premise.[134] A second exception to a warrantless search is a search incident to a lawful arrest; specifically only a search pertaining to the person arrested and the surrounding area within his immediate control.[135] A third exception is the "plain-view" doctrine.[136] A fourth exception is the "stop and frisk" exception.[137] A fifth exception is the automobile exception.[138] A sixth exception is the "hot pursuit" exception.[139]

The primary warrantless search exception that would be applicable in situations requiring the use of the Kelsey Smith Act would be under the exceptions of exigent circumstances.[140] One recent case that sheds light on this situation is *Carpenter v. United States*.[141] In *Carpenter*, the defendant, Timothy Carpenter, was convicted of robbing charges after police had gathered cell phone location data after receiving a warrant.[142] The Court in this case spent a lengthy discussion on a "search" under the

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[134] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (This exception, specifically about a third party who has "common authority" will be discussed later within Part IV pertaining to parental consent of a minor's cell phone. This exception, while not listed as the primary exception pertaining to the Kelsey Smith Act is a close second in terms of the importance and significance it plays within the realm of not requiring a warrant for a situation in which the Kelsey Smith Act is necessary.).

[135] Arizona v. Gant, 556 U.S. 332, 338–39 (2009) (The primary purpose for this type of warrantless search is to provide safety for the arresting officer(s).).

[136] United States v. Rumley, 588 F.3d 202, 205 (4th Cir. 2009) ("Pursuant to this plain-view doctrine, an officer may, without a warrant, seize 'incriminating evidence when (1) the officer is lawfully in a place from which the object may be plainly viewed; (2) the officer has a lawful right of access to the object itself; and (3) the object's incriminating character is immediately apparent.'" (quoting United States v. Jackson, 131 F.3d 1105, 1109 (4th Cir. 1997)).

[137] *See* Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) ("If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy…."); *see also* Michigan v. Long, 463 U.S. 1032, 1049 (1983) (establishing that a police officer does not need to ignore contraband that is found).

[138] Collins v. Virginia, 138 S.Ct. 1663, 1669–70 (2018) (Discussing the two justifications for permitting this type of warrantless search. One reason is because a vehicle can be moved quickly out of the area before a warrant is obtained. The second justification is the regulation of vehicles on public highways. When these justifications are present, an officer may search a vehicle without a warrant if they have probable cause to do so.).

[139] United States v. Bass, 315 F.3d 561, 564 (6th Cir. 2002) (Stating that a warrantless entry of a home is justified when the police are in a hot pursuit of a fleeing felon.).

[140] Carpenter, *supra* note 20 at 2222 (2018) ("One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Kentucky v. King, 563 U.S. 452, 460 (2011)).

[141] *Id.*

[142] *Id.* at 2212.

third party consent doctrine.[143] In the Court's final ruling, the Court stated that regardless of whether the government is using its own technology or using the technology of a wireless carrier, "an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell-site location."[144] However, two of the most significant differences between *Carpenter* and the application of the Kelsey Smith Act are: (1) the "search" would be a search of the victim of a crime, not the suspect; and (2) the time-frame of which the "search" would be taking place during.[145] Additionally, the Court further analyzed that because the use of the cell phone information constituted a search, there was the possibility that the search could have been protected by one of the exceptions for a required warrant.[146]

Examples of exigencies include "the need to pursue a fleeing suspect, *protect individuals who are threatened with imminent harm*, or prevent the imminent destruction of evidence."[147] The Supreme Court has further established that contrary to incidences that require a search warrant for an arrest, "the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case."[148]

The *Gilliam* case also closely analogizes the substance of the Kelsey Smith Act, although not necessarily its use in practice.[149] In *Gilliam*, the

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[143] *Id.* at 2262-2264. (The third party consent doctrine is addressed under Part IV, when analyzing how parental consent may be used within the realms of the third party consent doctrine.).

[144] *Id.* at 2216.

[145] *Id.* at 2226 (analyzing how the police gathered data on Carpenter's location for over 100 days, that would not be the case with the Kelsey Smith Act. The Kelsey Smith Act would be limited in its use because it becomes applicable when someone has been identified as missing or 9-1-1 was called within the last 48 hours. This contrasts significantly from the 100 days used in Carpenter. Note, however, the Kelsey Smith Act as currently written doesn't expressly state how far back the police can use the cell phone data, which is something that should be addressed before any form of this bill is passed. If this portion remains unchecked, it could lead to the potential misuse and control that the opponents to the bill are so desperately trying to avoid).

[146] *Id.* at 2221 (The Court addressed the idea that the exceptions for a warrantless search would still hold true for a search by use of a cell phone. Again, this is highly significant because it leads way to the suggestion that the exceptions will hold true for cell phone tracking by the government).

[147] *Id.* (emphasis added).

[148] Riley, *supra* note 148, at 402. (This case, a "double case," was to determine whether or not police officers could search an individual's cell phone after they had been arrested without a warrant. While the Court ultimately held that in both cases the warrantless search was not permissive, the Court laid out some framework in which we can use to help guide our discussion. While the cases are not necessarily similar in a factual sense to this discussion, the application of the law and how to assess warrantless searches is conducive to this discussion on the Kelsey Smith Act.).

[149] *See* Gilliam, *supra* note 129, at 801.

defendant was appealing his conviction involving sex trafficking a minor, in which the authorities used the GPS of the Gilliam's phone to track him down.[150] During the investigation, the officer who contacted Gilliam's cell provider (Sprint) requested the GPS location because he was "'investigating a missing child who [was] . . .being prostituted'" and that this was "'an exigent situation involving . . . immediate danger of death or serious bodily injury to a person.'"[151]

The court ruled that the District Court was correct that exigent circumstances justified GPS tracking of Gilliam's cell phone.[152] The court found that the sexual exploitation of a minor has "often been found to pose a significant risk of serious bodily injury."[153] The court also turned to the Ninth Circuit's analysis that "prostitution of a child involves 'the risk of assault or physical abuse by the pimp's customers or by the pimp himself.'"[154]

The significance of the Second Circuit's rationale is that it gets at the very heart of what the Kelsey Smith Act is designed to do- protect individuals, especially children. While the Act does not exclusively apply to sex trafficked children,[155] the *Gilliam* case sheds light on the fact that exigent circumstances show a warrant is not required, and should not be required, in certain situations.[156]

Even though this note is aimed at the federal level, there is a state court case that points towards "pinging" a victim's cell phone.[157] The relevant facts from this case are: (1) the defendant was a suspect for murder, (2) the police discovered that the cell phone of the victim was no longer on his person, and (3) the police had pinged the victim's cell phone to find the defendant without a warrant.[158] The court reasoned that the

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[150] *Id.* at 802.

[151] *Id.* (It can also be noted that the abducted minor, Jasmin, called her mother while she was at Gilliam's apartment, however, it is unclear whose phone Jasmin was using when she made the call. While this is not the equivalent of calling 9-1-1 for which the Kelsey Smith Act has as an option, it could further lead to a parent being able to give evidence to the authorities that their minor child has been abducted.).

[152] *Id.* at 804.

[153] *Id.* (citing United States v. Daye, 571 F.3d 225, 234 (2d Cir. 2009), abrogated on other grounds by Johnson v. United States, --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); United States v. Curtis 481 F.3d 836, 838–39 (D.C. Cir. 2007)).

[154] *Id.*

[155] *See* Kelsey Smith Act, s*upra note* 1.

[156] *See* Gilliam, s*upra* note 129 at 804 (rationalizing that if a search warrant were required in all situations, there would be countless emergencies that the authorities would not be able to handle. Taking Jasmin's situation in United States v. Gilliam, if police were required to get a warrant to ping the phone, Gilliam may have moved Jasmin by the time the warrant was received. Additionally, looking towards the tragedy of Kelsey Smith's disappearance and murder, if no warrant was required by the police to have the phone provider ping her phone, there is the possibility that she could have been saved.).

[157] People v. Valcarcel, No. 02361, slip op. (App. Div. 3rd Dept. April 5, 2018).

[158] *Id.* at 1034–35.

defendant did not have a right to privacy based on the victim's phone, even though it was in the defendant's possession.[159] Additionally, the court noted that exigent circumstances existed that would allow police to "ping and track the victim's cell phone without a warrant."[160] The relevancy of this case is to point towards Justice Scalia's concurrence in *Minnesota v. Carter*, emphasizing the point that a defendant would only have an expectation to their *own* possessions.[161] Keeping that rationale in mind, it is a way to further provide that someone who would be the suspect in a case involving the Kelsey Smith Act would not be able to use the Fourth Amendment claim when it relates to another's cell phone.

In the case of using the Kelsey Smith Act, it should be blatantly obvious that it would be used to protect individuals who are threatened with imminent harm and ensuring that law enforcement is able to do their job to the fullest extent to help the community.

IV. THE FEDERAL APPLICATION OF THE KELSEY SMITH ACT EXCLUSIVELY FOR CHILDREN

The proposal of this Note is that Congress should adopt the Kelsey Smith Act exclusively for children. If Congress were to adopt the Kelsey Smith Act exclusively for children, there could potentially be more agreement on the potential implementation of the act.[162] This leads to multiple questions, such as: who is considered a minor? Or what fourth amendment rights do minors have? Or can a parent(s) or guardian(s) give consent on behalf of a minor for Fourth Amendment purposes? The answer to these questions is important when addressing the Kelsey Smith Act being applied exclusively to minors.

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[159] *Id.* at 1038.

[160] *Id.*

[161] *See* Carter, *supra* note 123 at 92 (Following the lead of Justice Scalia's wisdom, the possible use of Fourth Amendment claims by a defendant for an "illegal search" of cell phone that is not in fact theirs should not be given consideration to be a viable defense. In *Minnesota v. Carter*, the phone that was pinged was in fact the murder victim's cell phone. If the victim was not in fact murdered, but rather kidnapped and recovered, and in turn sues for an illegal search, it is possible that they would have a legitimate claim. However, the likelihood of something that extreme does not appear to be a likely course of action by a victim.).

[162] As discussed in Part I D and Part I E, arguably the primary disconnect between the proponents and opponents of the Kelsey Smith Act is the invasion of privacy and giving too much power to the authorities. This section of the note will be analyzing those concerns in terms of applying the act to minors only. While it is not entirely clear what each of the differing views would think of this proposal, it is something they could consider as a middle ground at the time being. This may in fact not be the most desired outcome by either side, but it could serve as a trial run for each side to see how the Kelsey Smith Act actually works on a federal level.

A. Who is Considered a Minor?

When analyzing who is federally considered a minor, there can sometimes be confusion due to the various age requirement laws.[163] The potential confusion most likely stems from the fact that the national drinking age is twenty-one years old,[164] while under labor law and child pornography, anyone under the age of eighteen is considered a minor.[165] Keeping consistent with who actually gets the label of a "minor," it would therefore fall in line that the Kelsey Smith Act, if being applied exclusively to minors would be applied to those who are under the age of eighteen years old.[166]

B. Can a Parent(s) or Guardian(s) Give Consent on Behalf of a Minor for Fourth Amendment Purposes?

The question then turns to whether a parent or guardian is able to give consent on behalf of their minor children. While there have been no Supreme Court cases directly on point, there are other Supreme Court consent cases along with other federal court decisions on the issue. federal courts dealing with issues that are similar in nature.[167] There have even been cases arising in which a parent is able to consent to a search for their adult children who live on the property under certain circumstances.[168]

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[163] *See* 23 U.S.C. § 158 (establishing that the minimum drinking age is twenty-one years of age in the United States.); *see also* 29 U.S.C. § 203 (establishing that the age of a minor for working is considered someone under the age of eighteen years of age in the United States.); *see also* 18 U.S.C. § 2256 (establishing that under federal law, when dealing with sexual exploitation of a child, a minor is someone who is younger than eighteen years old in the United states); (Keeping when weighing these different age groups, it seems to be apparent that even though the drinking age in the United States is twenty-one years, the general definition of someone who is a minor is someone under the age of eighteen years old).

[164] *See* 23 U.S.C.S. § 158.

[165] *See* 29 U.S.C. § 203; *compare* 18 U.S.C. § 2256.

[166] Turning the Kelsey Smith Act to be applied exclusively to minors would severely limit who the act is applicable to. This in turn would most likely not be the preferred course of action for the advocates of the act. However, as previously noted, this could be the stepping stone to see how it works on a federal level.

[167] *See* Georgia v. Randolph, 547 U.S. 103, 113–14 (2006) (discussing third party consent doctrine in relation to a husband and wife); *see also* Thomas v. Nationwide Children's Hospital, 882 F.3d 608, 615 (6th Cir. 2018) (dealing with parental consent on behalf of a minor child while at a hospital and reiterating that a parent may give consent on behalf of their "non-adult children").

[168] *See* United States v. Rith, 164 F.3d 1323, 1326–27, 1329–30 (10th Cir. 1999) (establishing that parent(s) may consent to a police search of adult child's bedroom if the room is under the control of the parents. In this case, the defendant, Rith, who was eighteen years old, lived in his parents' house and was not paying rent. The police came to search his room due to the believe that he was storing illegal firearms in his room. Upon

One test that need clarification is the third party consent doctrine, also known as the "common authority" consent doctrine, established by *United States v. Matlock*.[169] The defendant in *Matlock* wanted evidence suppressed due to it being obtained after consent of a third party, his wife, who lived on the premises with him.[170] The defendant and the third party (his wife) who gave consent shared a bedroom and portion of the house they were leasing.[171] The Supreme Court found that voluntary consent of one who possesses a "common authority" of the property is able to give consent and such evidence would be admissible in the trial.[172] The significance of *Matlock* in relation to the Kelsey Smith Act being applied exclusively to children is that the parental consent would be linked with the "common authority" or third party consent doctrine.

C. What Happens if the Minor is Found Doing an Illegal Act?

While the Kelsey Smith Act can be used to help find missing children, there is the possibility that those missing kids could be doing something illegal when they are found. One of the problems with this, particularly for sex-trafficked children, is that they can still be charged with a crime on a state level.[173] While progress has been made on these laws, the reality that children can still be prosecuted for sex crimes when they themselves were victims is something that should be changed.[174] It is worth noting that there have been cases that have pointed towards justice

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arrival, the police received consent from his parents to search his bedroom. It was apparent by the surrounding facts that his parents had the authority to give consent under the third party consent doctrine, or common authority. The court stated there was no rational way to find that his parents didn't have access and authority over his room.); *see also* United States v. DiPrima, 472 F.2d 550, 551 (1st Cir. 1973) (establishing that a parent can give consent on behalf of their twenty-two year old son, who was paying $10 a week for board and lodging, when the parent had full access to the bedroom. The court also found that the defendant did not give an objection to the search of the bedroom when he was within "earshot" distance.).

[169] United States v. Matlock, 415 U.S. 164, 169-71 (1974) (reiterating that a party may give consent on behalf of another if the third party possessed "common authority over or other sufficient relationship to the premises or effects sought to be inspected.").

[170] *Id.* at 166.

[171] *Id.*

[172] *Id.* at 170-71, 176-78.

[173] Sarah Bendtsen, *Progress Without Protection: How State Laws Are Punishing Child Sex Trafficking Victims*, SHARED HOPE INTERNATIONAL, June 2018, https://sharedhope.org/2018/06/13/progress-without-protection-how-state-laws-are-punishing-child-sex-trafficking-victims/ (last visited Oct. 28, 2020).

[174] *Id.*

and would not allow a child to be charged with sex related offences.[175] The hope would be that there could be further protection granted for victims who are prosecuted, through updated state laws[176] or the furtherance of the victim acts that President Trump has been pushing for.[177]

There are other crimes that children could be charged with besides solely sex related crimes.[178] Keeping theses all in mind, it should be noted that these are potential areas that the law could move forward and be considered with when promoting the Kelsey Smith Act. A proposed solution is that minors who are located using the Kelsey Smith Act who are "caught" doing something illegal could be granted immunity depending on the charge.

CONCLUSION

As of 2018, 89 to 95% of teenagers have a cell phone or access to one.[179] With these numbers in mind, it is logical to assume that many, if not most, would have their cell phone on them when they were abducted or ran away This makes it rational to conclude that the enactment of the bill would be very successful.

Upon reviewing the Kelsey Smith Act alongside the Fourth Amendment, the ECPA, and the SCA, it does not appear ~~as if~~ the act would be unconstitutional or barred by other statutes. Additionally, the courts have considered emergency situations as an exception to requiring a warrant to conduct a search under the Fourth Amendment. No matter where one falls on the political spectrum (conservative, libertarian, liberal, etc.), it should be apparent that a missing child, whether abducted or an endangered runaway, should be considered an emergency.

There is arguably tension between the Kelsey Smith Act and federalism. Infringing on state's rights is by no means a small concern. In fact, it is a rather significant concern that many could have (even though most of those opposed to the Kelsey Smith Act have focused exclusively on

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[175] In re B.W., 313 S.W.3d 818, 820–22 (Tex. 2010) (involving a case in which a thirteen-year old child was being prosecuted for "delinquent conduct" for prostitution. The Supreme Court of Texas came down with the ruling that a child under the age of fourteen-years old is not able to consent to sexual conduct and therefore should be punished for such an act.).

[176] *See* Bendsten, *supra* note 173.

[177] *President Donald J. Trump is Fighting to Eradicate Human Trafficking*, WHITEHOUSE.GOV (Jan. 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fighting-eradicate-human-trafficking/ (last visited Oct. 28,2020).

[178] These other potential crimes could be theft, burglary, assault, battery, drug related offences and numerous other punishable criminal acts.

[179] AMERICAN COLLEGE OF PEDIATRICIANS (May 2020), https://acpeds.org/position-statements/media-use-and-screen-time-its-impact-on-children-adolescents-and-families.

the Fourth Amendment). However, due to the power that Congress has, almost anything goes now for passing legislation.

This is an Act that should be adopted to further protect children. Applying the Act exclusively to minors is a practical way to alleviate the fear of the Act being abused (and overused) by law enforcement. On the other hand, the unfortunate part of limiting the scope of the Act's scope to strictly minors is that it limits the positive impact the Act could have. The fact that more and more states continue to adopt the Act since its inaugural adoption in Kansas shows that it Act as a valuable tool for law enforcement to better protect the community. Whether it is the current draft, this proposed idea of exclusive use for minors, or some other variation, the Kelsey Smith Act is something that can and should be used to keep more people safe and reunite loved ones with their families.


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