Notre Dame Journal of International & Comparative Law

Volume 13
Issue 2 *Volume 13, Issue 2*

Article 1

2023

Volume 13, Issue 2 - Full Issue

Journal of International & Comparative Law, Notre Dame Law School

UNIVERSITY of NOTRE DAME
The Law School

UNIVERSITY of NOTRE DAME

Notre Dame Journal of International & Comparative Law

Editorial Board 2022-2023, Vol. 13

LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers,

In this second issue of Volume 13 of the *Notre Dame Journal of International & Comparative Law*, the staff endeavors to publish noble scholarship on nuanced international law. The topics being published in this issue are novel and intricate.

Issue 2 of Volume 13 opens with an article from practitioner Mark Labaton. The article lives the "never forget, never again" mentality with regard to the Holocaust. Mr. Labaton calls for returning Nazi-looted art to its rightful owners, to advance the notion of transitional justice. The second article in the spring issue was written by Sarah Johns. She brings to light the displacement of the Êzidi people in the Middle East. Her article helps hold the international community accountable for failings related to asylum and intervention.

The Spring Issue closes with two Notes written by Notre Dame Law School students and members of the *Journal*. Their notes both discuss more procedural matters of law in European nations. Mike Kowalski discusses the differences between the U.S. and U.K. high courts, and the celebrity status afford, or not afforded to the members of both courts. Kirk Earl writes about the Swiss summary penalty order, a measure which allows prosecutors to sentence defendants with a fine, or imprisonment for six months or a monetary penalty in the equivalent. The measure is comparable to how American prosecutors use the plea-bargaining system.

As the volume comes to a close, I renew my gratitude, on behalf of the *Journal*, for all of the contributors to our publication. The Executive Board and Editorial Staff were indispensable to the publication process. Professors Roger Alford and Diane Desierto have continued to be reliable, kind, and helpful. I present to you Issue 2 of Volume 13, with great hope that the scholarship will be a force for good in the world.

In Notre Dame,

Michael Klein
Editor-in-Chief, Volume 13

MORE THAN A "DROP OF JUSTICE:" HOW NAZI-LOOTED ART CASES PROMOTE "TRANSITIONAL JUSTICE" AND WHY THESE CASES STILL MATTER

MARK I. LABATON*

INTRODUCTION

When it comes to Nazi looting, the past is not dead.[1] Nor should it be. Even now more than three-quarters of a century after the Holocaust, Nazi-looted art cases still provide direct justice to victimized families while also advancing broader historical redress known as "transitional justice," which since World War II has become a means to address mass atrocities through criminal trials, civil litigation, truth reconciliation commissions, memorials, and reparations.[2]

Before annihilating six million European Jews – two-thirds of the European Jewish population – the Nazis smeared Jews before dispossessing them of their civil liberties, citizenship rights, and property. This course of events makes Nazi-looted art cases central to Holocaust history. As memories of the Holocaust fade, the cases valuably memorialize important parts of this history.

Reichsfuhrer Heinrich Himmler implored that the Nazis "must kill *all* the Jews," because, he added, "if we don't kill them, their grandchildren will ask for their property back."[3] Nazi-looted art cases are still possible because the Nazis failed to kill *all* Jews; they also remain uniquely viable in only one nation, the United States. There are several reasons for this. They include:

- Congressional legislation particularly the Holocaust Expropriated Art Recovery Act (the "HEAR Act"), which preempts restrictive state statutes of limitation ("SOLs") and makes it possible to start cases decades after the Holocaust.
- The American civil justice system. That system historically has promoted groundbreaking cases of political and social import and enables claimants to bring lawsuits against well-heeled art collectors on a contingent basis, without having to post bonds, and does not require losing parties to pay the prevailing parties' legal fees. American law also allows claimants wide-ranging document and testimonial discovery rights

* MARK I. LABATON, practices law in Los Angeles. The author thanks Timothy Cornell for reviewing a draft of this article and providing thoughtful comments.

[1] William Faulkner said "the past was never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN, 73 (1951).

[2] *See generally*, Eric Posner & Adrian Vermuele, *Transitional Justice as Ordinary Justice* 117 HARV. L. REV. 762 (2003); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice* 87 WASH. UNIV. L. REV. 1043 (2010); Therese O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of The Medusa?* 22 EUR. J. OF INT'L L. 49 (2011).

[3] MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 295 (2005).

and litigation opportunities that claimants elsewhere lack. Such discovery is needed to build and develop complex cases as looting disputes often invariably are.

- American substantive law, which is far more favorable to claimants than foreign laws. For example, in most American jurisdictions, one who purchases stolen from a thief – even innocently as well as subsequent purchasers – does not acquire good title to such property; whereas in most European countries an "innocent" purchaser is the presumed owner of such property.[4]
- State and federal courts have been receptive to such lawsuits and have upheld jurisdiction even when the artwork at issue is in a foreign nation.

Only in America can such cases be fully and fairly litigated. This imposes a particular obligation to ensure cases brought are justly adjudicated here. These cases offer an avenue for justice for the heirs of Holocaust victims, many of whom are direct relatives of the victims of heinous Nazi atrocities. For them, lawsuits might provide what Senator Charles Schumer (D-NY), a co-sponsor,[5] described as "a drop of justice in an ocean of injustice."[6]

Still, those drops are important. Besides offering the possibility of familial redress, these cases further broader benefits of understanding and of transitional justice. In this way, they continue a noble tradition that began with 13 post-World War II Nuremberg War Crimes Trials later followed by the trial in Jerusalem of Adolph Eichmann, a key strategist of the Final Solution, the planned genocide of European Jews. Civil litigation of looted-art cases continues this tradition. Concerning the Nuremberg War Crimes Trial, chief allied trial counsel and Supreme Court Justice Robert H. Jackson, said:

> That four great nations, flushed with victory and stung with injury stayed the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.[7]

It was. Between 1945 and 1949, the Allies tried Nazi leaders for waging a war of aggression, upholding eugenic laws, and genocide.[8] But these trials did not address the earlier dispossession of Jews. Nazi-looted art cases do.

This article explores how and why more recent Nazi-looted art cases remain important and timely. It begins by describing the vast scope of Nazi

---

[4] *See, e.g., Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022). *See also, e.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000).

[5] Senators Ted Cruz (R-Texas), John Cornyn (R-Texas), and Richard Blumenthal (D-Conn) were the other co-sponsors.

[6] Schumer Announces Legislation to Help Recover Nazi-Confiscated Art Passes Judiciary Committee; Bill Now Heads to Senate Floor, Sen. Charles E. Schumer Press Release, Sept. 15, 2016.

[7] Justice Robert H. Jackson, Opening Address for the United States, (Nov. 21, 1945) in 1 NAZI CONSPIRACY & AGGRESSION 114 (1946).

[8] *Nuremberg Trials*, History.com, (Oct. 13, 2021) https://www.history.com/topics/world-war-ii/nuremberg-trials.

looting, continues by explaining the value of Nazi-looted art cases, then discusses why American courts are uniquely well qualified to adjudicate these cases and why alternative resolution mechanisms (while helpful) are insufficient. It concludes with a discussion of lessons learned from Nazi-looted art cases.

I. BACKGROUND: NAZI LOOTING AND POST-WORLD WAR II LOOTED ART RECOVERY EFFORTS

Through outright theft, forced duress sales (often under the color of law),[9] and other nefarious means, Nazi-driven theft and re-distribution of Jewish property included troves of Jewish-owned artworks currently valued at more than $5 billion.[10]

The scope of such theft is astounding. According to a Senate report, the Nazis "orchestrated a system of theft, confiscation, coercive transfer, looting, pillage, and destruction of objects of art and other cultural property . . . on an unprecedented scale."[11] From 1933 to 1945, the Nazis: "stole hundreds of thousands of artworks from museums and private collections throughout Europe. This systematic looting of the artwork and other cultural property of Jews has been described as the 'greatest displacement of art in human history.'"[12]

Numbers illuminate. Ruling Germany and Austria and occupying much of Europe, the Nazis stole or abetted the theft of 600,000 artworks, close to 20% of which has been repeatedly resold were never returned to that arts' rightful owners[13] or their heirs as masterpieces by Degas, Picasso, Renoir, Van Gogh, and other legendary artists crossed and recrossed national borders.[14]

---

[9] *See generally*, Jennifer A. Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 KAN. L. REV. 75 (2012); MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1995); JONATHAN PETROPOULOS, *Art Dealer Networks in the Third Reich and in the Postwar Period*, 52 J. CONTEMP. HIST. 546 (2016); *see also, e.g.,* S. Rep. No. 114-394 (2016); *see also, Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010); Ardelia R. Hall, *U.S. Program for Return of Historic Objects to Countries of Origin, 1944-1954*, 31 DEP'T ST. BULL. 493, 496 (Oct. 4, 1954); Ronald Lauder, *Helen Mirren Testify Before US Senate Committee on Nazi-looted Art*, WORLD JEWISH CONG. (June 8, 2016), htttp://worldjewishcongress.org/en.

[10] THERESE O'DONNELL, *supra* note 3.

[11] S. REP. NO. 114-394, at 1-2 (2016).

[12] S. REP. NO. 114-394, at 1 (2016), FRANCIS Henry Taylor, *Europe's Looted Art: Can it be Recovered?* N.Y. TIMES (Sept. 19, 1943) ("Not since…Napoleon Bonaparte has there been the wholesale looting…going on today").

[13] *See, e.g.,* William D. Cohen, *Five Countries Slow to Address Nazi-looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html.

[14] *See generally*, JENNIFER A. KREDER, *supra* note 10*;* MARY LANE, HITLER'S LAST HOSTAGES: LOOTED ART AND THE SOUL OF THE THIRD REICH (2019); *cf.* Martin Gayford, *Cracking the Case of Nazis' Stolen Art,* TELEGRAPH (Nov. 9, 2013), https://www.telegraph.co.uk/news/worldnews/europe/germany/10437728/Cracking-the-case-of-the-Nazis-stolen-art.html.

The proliferation of Nazi-looted art prompted *The New York Times* in 1943 to publish a front-page article titled "Europe's Looted Art: Can it be Recovered?" Today, much looted (and disputed) art remains scattered in Europe and America.

With Europe ravaged during and after World War II, dealers, collectors, and museum curators (often Americans) snatched up looted art at "bargain prices."[15] Reputedly, "[n]ot since…Napoleon Bonaparte has there been the wholesale looting…going on today."[16] But while the spoils Napoleon collected largely were concentrated in a few known places, the art the Nazis stole or effectively confiscated and redistributed was widely dispersed such that it continues to show up decades later in America, Europe, and elsewhere.[17] Because of its relative post-World War II wealth, much of this art found its way to America, where individual and museum collectors like Theodore Rousseau, curator of the Metropolitan Museum of Art, thought it "absurd" to resist the "fire sales" and "let the Germans have the paintings the Nazi bigwigs got."[18] So, American collectors, large and small, bought their fair share of such tainted artworks.

After World War II, American soldiers, known as the "Monuments Men," searched throughout Europe for hidden stolen artworks.[19] The Monuments Men recovered thousands of pieces of looted art in homes, bank vaults, warehouses churches, salt mines, caves, and other places.[20] Still, the Monuments Men could not locate many stolen artworks.[21] The United States then returned many such located artworks to the country of its pre-war "origin" rather than directly to rightful owners."[22] And by 1951, their efforts ended with many stolen artworks, referred to as the "last prisoners" of World War II, never returned to the families from whom that art was stolen.[23]

---

[15] *See, e.g.*, JENNIFER A. KREDER, *supra* note 10 ("Museums knowingly acquired or accepted donations of paintings that were—or very likely were—stolen directly from Jews or sold by Jews under duress. Not caring does not equate to not knowing. The law dictates that such transfers were and still are void.") (Citations omitted); *see also*, S. Rep. No. 114-394, at 1 (2016); *see also*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010); Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP'T ST. BULL, 337, 339 (1951); Ardelia R. Hall, *supra* note 10 at 496; Jonathan Petropoulos, *supra* note 10; *Ronald Lauder*, *supra* note 10..

[16] Francis Henry Taylor, *supra* note 13.

[17] *See, e.g.*, S. Rep. No. 114-394; MARY LANE, *supra* note 15; LYNN H. NICHOLAS, *supra* note 10.

[18] LYNN H. NICHOLAS, *supra* note 10 at 438-439.

[19] *Id.*

[20] *See, e.g.*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F. 3d 712, 716 (9th Cir. 2014) ("In 1946, the Allies returned much of the Goudstikker Collection to the Dutch government so that the artworks could be held in trust for their lawful owners: Desi, Edo and Emilie [Goudstikker]."); S. REP. NO. 114-394, at 2 (2016).

[21] *Id.*

[22] S. REP. NO. 114-394, at 2 (2016).

[23] Therese O'Donnell, *supra* note 3.

For decades thereafter, Holocaust victims rebuilt their broken lives while public attention drifted,[24] and families whose property the Nazis stole:

> [L]acked the information, resources, and sometimes wherewithal to locate and pursue litigation to obtain their property. Even for those with the resources, determining the provenance of Nazi-looted art proved to be extremely difficult since many changes of ownership went undocumented, and many of the transactions took place on the black market.[25]

Beginning in the 1990s, and led by the children, grandchildren, and other ancestors of Holocaust victims, efforts to recover Nazi-looted art resumed. But potential claimants faced enormous legal and practical obstacles in their recovery efforts some of which remain.[26] Nonetheless, encouraged by the Washington Principles on Nazi-Confiscated Art, non-binding principles to resolve disputes over confiscated artworks,[27] some European countries opened their archives and declassified World War II-era records[28] while new electronic registries and databases made it easier to locate stolen and disputed artworks.[29]

Looting victims, their heirs, journalists, and enterprising lawyers dug through these new records.[30] What they found enabled victims and their heirs to bring restitution, replevin,[31] and conversion cases,[32] and in approximately 250 instances resolve disputes through negotiations, mediations, and arbitrations.[33] But other potential claimants remained stymied because of lost and destroyed documents, false and incomplete records, black-market trafficking, and legal, financial, and practical difficulties getting their claims and/or court cases adjudicated[34] including forbiddingly strict state SOLs.[35]

In late 2016, Congress preempted these forbidding state SOLs through the HEAR Act with a six-year federal statute that only starts to run with the

---

[24] Julia Edwards, *"Monuments Men" veteran predicts more Nazi-seized art will surface*, REUTERS (Nov. 21, 2013), https://www.reuters.com/article/germany-art-monumentsmen/monuments-men-veteran-predicts-more-nazi-seized-art-will-surface-idINDEE9AK0D520131121.
[25] S. REP. NO. 114-394, at 3 (2016).
[26] SIMON GOODMAN, THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS, 15 (2015). (The author of this article represented Mr. Goodman in a confidential mediation involving a valuable artwork looted from his family).
[27] Off. of the Special Envoy for Holocaust Issues, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art.
[28] Jennifer Kreder, *supra* note 10 at 98.
[29] Katharine Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 677 (2013).
[30] *See generally*, LYNN H. NICHOLAS, *supra* note 10.
[31] A replevin claim seeks return of stolen property.
[32] A conversion claim seeks damages.
[33] Herrick Feinstein LLP, Resolved Stolen Art Claims, Herrick.com/content/uploads/2016/01/Resolved-Stolen-Art-Claims.pdf, 2015.
[34] Jennifer Kreder, *supra* note 10 at 75, 75-6, 83, 97-8, 100-01, 110, 115, 117 and 127.
[35] S. REP. NO. 114-394, at 5, n.23 (2016).

discovery of a potential claim.[36] Additionally, in recent years, American courts have increasingly asserted jurisdiction over cases even those involving artworks outside the United States.[37] And in 2022 the Supreme Court required the application of American substantive law, which is far more favorable to claimants than laws in Spain in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, a case involving a Camille Pissarro painting on display in a Spanish museum.[38] This and other recent court dispossessions are positive developments.

II. HOW NAZI-LOOTED ART CASES ADVANCE TRANSITIONAL JUSTICE

Besides potentially offering direct redress, Nazi-looted art cases give context and perspective to horrific events by detailing, humanizing, and building captivating personalized historical narratives that memorably document Holocaust atrocities.

Much like Anne Frank's DIARY OF A YOUNG GIRL, Elie Wiesel's biographical novel NIGHT, and Steven Spielberg's film SCHINDLER'S LIST,[39] fact-based accounts developed in litigation capture public imagination, humanize parties, educate, enlighten, and dispel falsehoods more than grim

---

[36] S. 2763, 114th Cong. § 6 (2016); H.R. 6130, 114th Cong. (2016). Senators Charles Schumer (D-NY), Richard Blumenthal (D-Conn.), Ted Cruz (R-TX) and John Cornyn (R-TX) sponsored the HEAR Act.

[37] *See, e.g.*, Nina Siegel, *Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis?* N.Y. TIMES (May 12, 2017) https://www.nytimes.com/2017/05/12/arts/design/are-the-dutch-lagging-in-efforts-to-return-art-looted-by-the-nazis.html ("the country's recent restitution efforts are coming under scrutiny as some international critics say Dutch policies for returning looted art have become stricter once again"); NINA SIEGEL, *Owner Withdraws Nazi-Looted Painting from Auction in Austria*, N.Y. TIMES (April 26, 2017), https://www.nytimes.com/2017/04/26/arts/design/owner-withdraws-nazi-looted-painting-from-auction-in-austria.html ("Anne Webber, founder, and co-chairwoman of the Commission for Looted Art in Europe. . . said that Austria was one of several countries in continental Europe, including Germany and Italy, where buyers get legal ownership at the point of sale even if the work is known to have been looted. The effect of the law, she said, is that someone can sell works at auction that have never been restored to their rightful owners, who do not have recourse to block the sale.") Catherine Hickley, *German Art Collectors Face a Painful Past: Do I Own Nazi Loot?* N.Y. TIMES, (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/arts/design/german-art-collectors-face-a-painful-past-do-i-own-nazi-loot.html ("Given German law, the heirs of the original Jewish owners must rely on the good will of private collectors. While museums are "honor" bound by the international Washington Principles – which require them to reach "just and fair solutions" with the heirs they have identify Nazi-looted art in their possession – those principles do not apply to corporate collections or private individuals."); Doreen Carvajal & Alison Smale, "*Nazi Art Loot Returned to . . . Nazis*," N.Y. TIMES (July 15, 2016), https://www.nytimes.com/2016/07/16/arts/design/nazi-art-loot-returned-to-nazis.html ("Years after World War II, American officials here entrusted more than 10,000 confiscated artworks to Bavarian authorities to return to the rightful owners, many of them Jews whose property had been plundered. But new research in the yellowing archives makes clear how relentlessly Nazi families pursued the Bavarian officials, badgering them, often successfully, to return art they brazenly continued to view as their property."); Debbie Maimon, *New Polish Law Blocks Holocaust Survivors from Reclaiming Stolen Property*, YATED NE'EMAN (Oct. 25, 2017), https://yated.com/new-polish-law-blocks-holocaust-survivors-reclaiming-stolen-property ("A new Polish restitution bill effectively disqualifies all Holocaust survivors living outside of Poland and the vast majority of their heirs from making claims to recover property stolen by the Nazis.").

S. 2763, 114th Cong. § 6 (2016); H.R. 6130, 114th Cong. (2016).

[38] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022).

[39] Much the same, at the Nuremberg trials prosecution, Thomas Dodd, an American prosecutor, effectively used a single deboned skull of a Holocaust inmate that a prison commandant kept as a paperweight to illustrate the mass murder of millions of Jews.

statistics. Specifically, these cases tell the story of the theft and re-distribution of Jewish property as part of the dehumanization of Jews that led to mass murder. History matters. And these cases provide vivid and detailed accounts of this history.

Explaining the importance of written histories generally, Nobel prize winner Isaac Bashevis Singer wrote: "[w]hen a day passes, it is no longer there. What remains of it? Nothing more than a story. If stories weren't told or books weren't written, man would live like the beasts, only for the day."[40]

Singer is right. Absent authoritative writings, chunks of history risk being distorted, forgotten, and effectively erased from public consciousness. When this happens, the consequences could be dire. With less than complete historical accounts, unscrupulous partisans can re-write the past to perniciously distort future understanding.

But true-life narratives call out and expose such gross historical lies. By analogy, the Nazis concealed their death camps at Auschwitz, Treblinka, Belzec, Buchenwald, and elsewhere. But the Allies found the Nazis' death camps. And they filmed their gruesome gas chambers and killing fields to publicize Nazi crimes and ensure those horrors were not diminished, denied, or forgotten.

Nazi-looted art cases serve comparable purposes. Before World War I, the Turks murdered more than a million Armenians living in the Ottoman Empire.[41] Yet, less than twenty-five years later, on the eve of the Nazi invasion of Poland, Hitler asked: "Who, after all, speaks today of the annihilation of the Armenians?"[42] The implication: history can forget Nazi victims too. There is a basis for such cynicism when history is not preserved. As President Harry S. Truman reminded the world after the Allies defeated the Nazis that it "is easier to remove tyrants and destroy concentration camps than to kill the ideas that gave them birth and strength."[43]

We live in an ahistorical Orwellian world dominated by spin, "fake news," propaganda, false narratives, suppression of "inconvenient truths" and even outright denials of reality. Better than any other modern writer, George Orwell called attention to such misuse of language and abuse of power in modern times most potently through the illiberal misuse of Leviathan-like governmental power.

---

[40] ISSAC BASHEVIS SINGER, NAFTALI THE STORYTELLER AND HIS HORSE, SUS AND OTHER STORIES (1973).
[41] *See, e.g.,* The Genocide Education Project, *Hitler and the Armenian Genocide*, https://genocideeducation.org/background/hitler-and-the-armenian-genocide/.
[42] *Id,*
[43] Harry S. Truman, President, U.S., Address to the United Nations Conference in San Francisco (April 25, 1945).

As Lord Acton noted, power corrupts and absolute power corrupts absolutely.[44] Echoing this, in 1984 Orwell wrote: "We know that no one ever seizes power with the intention of ever relinquishing it. Power is not a means: it is an end."[45] In the essay *Looking Back on the Spanish War,*[46] he described his experience fighting for the Republican side against the Fascists during the Spanish Civil War. There, after the Stalinists brutally crushed their "allies" to conceal their crimes, Orwell's "progressive" editors at *The New Statesman* refused to print his first-hand accounts of what he saw.[47] Criticizing this censorship of his eye-witness reportage, Orwell presciently later wrote:

> It will never be possible to get a completely accurate and unbiased account of the Barcelona fighting, because the necessary records do not exist. Future historians will have nothing to go upon except a mass of accusations and party propaganda. I myself have little data beyond what I was with my own eyes and what I have learned from other eyewitnesses whom I believe to be reliable…This kind of thing is frightening to me, because it often gives me the feeling that the very concept of objective truth is fading out of the world. After all, the chances are that those lies, or at any rate similar lies, will pass into history.[48]

Like Orwell, G.K. Chesterton foresaw the modern suppression of truth when he predicted that in the future battles will be fought over reality. "Fires will be kindled to testify that two and two make four," he said. "Swords will be drawn to prove that leaves are green in summer. . ."[49]At a time of Holocaust minimization and even denialism, such fires need rekindling. And litigation remains a means of rekindling.

Though imperfect, court cases enhance truth-finding by transparently emphasizing compellingly specific true-life stories that uncover, detail, and document facts juxtaposed in compelling ways and subjected to rigorous scrutiny. By memorializing Nazi atrocities, court cases embed and spread knowledge, becoming prophylactic guardrails and bulwarks against false accounts that devalue the dignity of Holocaust victims, rationalize Nazi crimes, and increase the likelihood of future horrific crimes against humanity.

The heirs of looting victims were able to sustain these cases because, often with outside help, they could marshal vast resources to litigate them. But

---

[44] *See*, Anton Institute, *Lord Acton Quote Archive*, ACTON INST., https://www.acton.org/research/lord-acton-quote-archive.
[45] GEORGE ORWELL, 1984, at 173 (1949).
[46] George Orwell, *Looking Back on the Spanish War* (1943) available at https://orwell.ru/library/essays/Spanish_War/english/esw_1.
[47] *Id*.
[48] *Id.*
[49] Sam Leith, *What does it mean when Giorgia Meloni quotes G.K. Chesterton*? THE SPECTATOR, Oct. 1, 2022.

this is only possible or a fraction of looting victims. As Elie Wiesel observed that the "duty to remember covers not only big accounts" including expensive art, but also small accounts of "merchants, cobblers, peddlers, schoolteachers, water carriers, beggars: the enemy deprived them of their pathetically poor possessions."[50] True, the Nazis and their beneficiaries not only robbed wealthy Jews but also middle-class and poor Jews whose ancestors (even when ascertainable) could not feasibly litigate court cases. Moreover, some European countries remain unwilling to restore looted property of either great or small objective value.[51] For the ancestors of all these victims, transitional justice, though imperfect, is the only attainable form of justice.

Although only a fraction of possible actions can be litigated, cases that often emblematically emphasize common atrocities and highlight shared suffering, commemorate communal experiences, connect dots, add to an incomplete historical record, further understanding, and rebut propaganda and other false narratives. And every case offers opportunities for redress and accountability based on particular and common events.

Successful cases can also partly restore pieces of lost cultural history. Noting this, Helen Mirren, who portrayed Maria Altmann, in the film *Woman in Gold*, testified before the Senate in 2016 in support of the passage of the HEAR Act by pointing out that art reflects memories that are shared across familial and cultural lines. She testified that: "When the Jewish people were dispossessed of their art, they lost some of their heritage. Memories were taken along with the art, and to have no memories is like having no family, and that is why art restitution is so imperative."[52]

III. REASONS WHY AMERICAN COURTS ARE UNIQUELY QUALIFIED TO ADJUDICATE NAZI-LOOTED ART CASES

The United States is not just the best place for litigation: it is the only nation where such litigation is even possible on more than a token basis if at all. There are good reasons for this. To start with, because of the HEAR ACT, the United States is alone in having a preempted SOL Act that allows claimants to pursue cases based on acts committed decades ago. Given the

---

[50] STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II at XI (2003).

[51] *See generally*, Mark Labaton, *Recovering Nazi-Looted Art*, LOS ANGELES LAWYER MAGAZINE, pp. 34–-41 (Jun. 2018) (particularly discussions of *Von Saher*, *de Csepel and Philip cases*; *see also*, *e.g.*, *Phillip v. Germany* 141 S.Ct. 703, (2021); Johanna Plucinska, Dan Fastenberg, *75 Years on, Holocaust survivors struggle to recover property in Poland*, REUTERS, (Jan. 20, 2020); Jo Harper, *Nationalized Jewish property: Warsaw's restitution problem*, DW (Jan. 27, 2020). Poland was one of 47 countries to sign the Terezin Declaration on Holocaust Era Assets and Related Issues, but the country has never followed up with legal regulations. Few believe US pressure will alter the situation; Max Minckier & Sylwia Mitura, *Roadblocks to Jewish Restitution: Poland's Unsettled Property*, HUMANITY IN ACTION, POLSKA at https://humanityinaction.org/knowledge_detail/roadblocks-to-jewish-restitution-polands-unsettled-property/.

[52] *Hearing Before the Subcomm. on the Constitution & Subcomm. On Oversight, Agency Action, Federal Rights and Federal Courts Comm. on the Judiciary*, US Senate (Jun. 7, 2016) (testimony of Dame Helen Mirren).

sunsetting of the HEAR Act in November 2036, though, the time to bring is limited. Squandering opportunities to bring worthy lawsuits in the meantime would be tragic.

Moreover, America's civil justice system uniquely enables litigants to bring tough cases that affect social and political policy. No other nation has a justice system, substantive and procedural law, and legal tradition that makes such cases feasible or even possible. As Yale Law School Professor Owen Fiss explained in his law review article entitled *Against Settlement*, litigation in America is beneficial in ways litigation abroad or alternative dispute resolution never can be.[53]

Just as they have done in settling great political and social issues, distinct features of the American civil justice system make American courts particularly well-suited to adjudicate Nazi-looted art cases. For example, the American legal system gives middle-class civil litigants incomparable access to courts, including the ability to pursue civil lawsuits contingently and without requiring litigants to post expensive bonds or pay prevailing parties' legal fees thereby eliminating chilling risks.[54]

Claimants seeking to recover Nazi-looted art in the United States benefit from the HEAR Act's SOL provisions, which make such litigation possible many decades after the Holocaust. Claimants also enjoy the advantage of substantive law in most American jurisdictions providing that one who purchases stolen art even innocently and all subsequent purchasers of such property acquire no legal title. The title remains with the true owner', while in most European countries an "innocent" purchaser is presumed to be the owner.[55] This difference in law substantially reduces the litigation burdens and risks placed on claimants in expensive high-stakes litigation.

The American civil justice system also gives litigants unmatched opportunities through civil document discovery and depositions to elicit facts, develop narratives, and generate transparent precedents based on a deliberative, adversarial process that affords both sides incomparable procedural and substantive rights –including the right to cross-examine adverse witnesses, the classic "engine" of truth that adds gravitas to most court dispositions.[56]

Federal and state rules of civil procedure afford litigants broad-ranging opportunities to discover, and document facts through document requests and interrogatories and depose under oath parties and non-parties including experts.[57] Such mechanisms are invaluable tools to find, develop, and test

---

[53] Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).
[54] This is known as the American Rule.
[55] *See, e.g., Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S.Ct. 1502 (2022). *See also, e.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000).
[56] *Id.*
[57] *See generally*, Fed. R. Civ. P.

facts, expose new information, reconstruct events in powerful narrative forms, create compelling narrative storylines, and shape history.

While rigorous, expensive, and time-consuming, American-style litigation aims at finding truth and dispensing justice and spreading and enhancing human knowledge. Although no legal system is perfect, ours is far better at achieving its noble aims with greater depth, perspective, and reliability than other systems and our system allows for a more accurate and complete record of events than mainstream or social media. The legal system is deliberative and in eliciting truth and countering falsehoods, our civil justice system is far less a product of bias, prejudice, partisanship, fear, and favor.

Hannah Arendt, known for her articles and books about war crimes noted in 1971 that tyrants rely upon "big lies" to pervert history and exercise their wills because:

> Lies are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear . . . Facts need testimony to be remembered and trustworthy witnesses to find a secure dwelling place in the domain of human affairs.[58]

American courtrooms are such a dwelling place. There, litigants have unparalleled access to source documents, and witnesses are subject to cross-examination. Additionally, to be usable, evidence must satisfy strict standards of admissibility, and claims must then be proven.[59] Facts verifiable through this rigorous crucible become trustworthy "stubborn things" because whatever one's inclinations or passions "they cannot alter the states of facts and evidence."[60] Listening to witnesses and reviewing admissible documentary evidence makes "one a witness" too.[61]

Parties carefully craft arguments based on facts and rules, not mere conjecture, opinion, and overt bias. Court narratives often become potent and lasting, adding perspective, specificity, context, clarity, and meaning to underlying events. Detailed, accurate, colorful, and captivating fact-based proceedings, decisions, and verdicts engage, create empathy, enhance understanding, shed noxious lies, and empower, shaping policy, behavior, and history. Although not often necessary litigants' explicit purpose, their cases can broaden public knowledge and understanding and sometimes even leave

---

[58] HANNAH ARENDT, *Lying in Politics*, in CRISES OF THE REPUBLIC (1971).
[59] *See, e.g.*, Fed. R. Civ. P.
[60] The quote is from John Adams in defending British soldiers accused – and acquitted – of murder because of what has been called the "Boston Massacre." *See Founders Online*, NAT'L HIST. PUBL'N, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.
[61] ARIEL BURGER, WITNESS: LESSONS FROM ELIE WIESEL'S CLASSROOM 1 (2018) (*quoting* Wiesel).

behind – as the cases discussed next have done – powerful and enduring specific historical accounts.

IV. EXEMPLARY CASES

Below are summaries of exemplary Nazi-looted art cases that illustrate the value of litigation. Step by step they trace the incrementally abusive policies directed at Jews preceding the implementation of the Final Solution, which included the theft of businesses and other property (*Altmann, Bondi, Cassirer, Reif, Von Saher*); the deprivation of Jew's citizenship rights in Germany and other countries controlled by the Third Reich (e.g., *Altmann, Bondi, Cassirer, Reif, Von Saher*); and the planned extermination of European Jews. (e.g., *Reif*, Guttmann). The cases enhance and give permanency to individual accounts – with universal appeal. They add to public understanding and discredit Holocaust-related false information and propaganda.

A. GUTMANN/GOODMAN AND MENZEL LITIGATION

> Pa had fought a bitter and often unsuccessful battle to recover the priceless artworks that had been stolen from his family – stolen first by the Nazis, and then, in effect stolen again by narrow-minded bureaucrats. Unscrupulous art dealers and willfully negligent auction houses, as well as museum directors and wealthy collectors, would all be a party to this theft long after the war [World War II].[62]

So wrote Simon Goodman describing his quest to recover dozens of master artworks that the Nazis stole from his grandparents before murdering them.[63] Since retiring as a Los Angeles record company executive three decades ago, Goodman recovered or received compensation for Degas, Cranach, Renoir, Botticelli and other prize paintings stolen from his grandparents along with other valuable artifacts, including an engraved Orpheus table clock from the 1500s depicting scenes from the mythical underworld.[64]

Goodman (an Anglicized version of Guttmann) was an early descendant of Holocaust victims who sought to recover looted familial art.[65] Goodman's grandfather, Fritz Gutmann, owned the Bank of Dresden and was president of the Wannsee Country Club in the shadow of the home where the Nazis planned the Final Solution.[66]

---

[62] SIMON GOODMAN, THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS, 15 (2015). (Several years ago, the author of this article represented Mr. Goodman in a confidential mediation involving a valuable artwork looted from his family).
[63] *Id.*at 23–27.
[64] GOODMAN, THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS (2015) at 323–33.
[65] *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
[66] GOODMAN, *supra* note 64. The author of this article successfully represented Mr. Goodman in a confidential, complex, multiparty mediation involving a paying valued at more than $10 million.

In *The Orpheus Clock*, Goodman described his efforts to recover a portion of the artwork his grandfather owned.[67] Those efforts included a 1997 lawsuit to recover an Edgar Degas painting entitled "Landscape with Smokestacks" possessed by Daniel Searle, heir to the Searle pharmaceutical fortune, a case settled on the eve of trial.[68]

Two years earlier, Goodman saw a description of this Degas painting in an art catalog, which listed it as belonging to Searle. The Nazis confiscated the painting in 1939 in Paris, where the Gutmann's sent it from a home they had in the Netherlands.[69] It changed hands several times after the war, moving through Switzerland to New York, where Mr. Seale, unaware of its history, purchased the painting in 1987 for $850,000.[70]

The settlement required Seale to donate the painting to the Chicago Art Institute denoting that the donation was a joint one from the Seale family and from Simon Goodman, Nick Goodman (Simon's brother), and Lili Gutmann, (Fritz's sister), family members who together received an undisclosed amount from the Searles representing half the appraised value of the painting.[71] It also required that the names of Friedrich and Louise Gutmann, who died in concentration camps, accompany Seale's, and be listed on the Institute's walls whenever the work was on display.[72]

Publicity from this case prompted 44 nations to adopt the Washington Principles on Nazi-Confiscated Art[73] and encouraged other families – including the Altmann family – to assert familial claims.[74] Along with Helen Mirren, who portrayed Ms. Altmann in a film about that family's case, Goodman testified before the Senate to promote the HEAR Act, which led to the generous federal SOL that made it possible to litigate dozens of these cases in the United States.[75]

Earlier still, in the 1960s, the Menzel family successfully sued in New York to recover a Marc Chagall painting, called *L'Echelle de Jacob* or *Le Paysan et l'Echelle* or *The Peasant and the Ladder* or *Jacob's Ladder*, sold under duress and characterized in a restitution action by the New York Supreme Court as akin to an armed holdup.[76] The painting was part of the Menzel art collection that the Nazis seized from the Menzels' apartment in Brussels in 1941 after that Jewish family fled the Nazis.[77]

---

[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 232–33.
[74] *Washington Conference Principles on Nazi-Confiscated Art*, https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ (last visited Mar. 28, 2023).
[75] The undersigned author of this article represented Goodman in a mediation involving one such valuable painting that sold at auction.
[76] *Menzel v. List*, 49 Misc.2d 300, 305 (1966).
[77] *Id.*

Erna Menzel first located the painting in an art catalog in 1962. She contacted the listed collector, Albert A. List, and informed him that the artwork had been seized by the Nazis from her collection and requested its return.[78] List, who said he had bought the painting from Perls Galleries in New York in 1955 and was unaware of its history, refused to return it.[79] In 1966, she obtained a favorable trial court ruling on her restitution claim and recovered the Chagall painting from List.[80]

B. MARIA ALTMANN V. REPUBLIC OF AUSTRIA LITIGATION

In 2000, Maria Altmann (nee Maria Bloch-Bauer) brought her epic case against Austria.[81] Seven years later, she recovered five Gustav Klimt paintings in Austria's possession, which the Nazis stole from her deceased uncle Ferdinand Bloch-Bauer, a Viennese and Czechoslovakian businessman.[82] The Klimt paintings included a portrait of Altmann's aunt, Adele, known as Austria's *Mona Lisa*.[83]

Altmann sued after Austria refused to negotiate with her.[84] Then a widow in her eighties, she made ends meet by selling women's clothing from her home.[85] She could not afford to sue in Austria, which required a pre-filing litigation bond of several hundred thousand dollars.[86] Represented contingently, she sued in Los Angeles, which required no bond.[87] A blockbuster film, starring Helen Mirren as Altmann, chronicled Altmann's journey.[88] Randol Schoenberg, the grandson of Arnold Schoenberg, the world-famous composer who fled Austria to avoid Nazi persecution, represented her.

---

[78] *Id.*
[79] *Id.*
[80] *Id.*; GOODMAN, *supra* note 64, at 15.
[81] *Altmann*, 541 U.S. 677.
[82] *Id.*; Sharon Waxman, *A Homecoming in Los Angeles for Five Klimts Looted by the Nazis*, N.Y. TIMES, (Apr. 6, 2006), https://www.nytimes.com/2006/04/06/arts/design/a-homecoming-in-los-angeles-for-five-klimts-looted-by-nazis.html.
[83] Anne-Marie O'Connor, *Maria Altmann dies at 94; won fight for return of Klimt portrait seized by Nazis*, L.A. TIMES, (Feb. 8, 2011), https://www.latimes.com/local/obituaries/la-xpm-2011-feb-08-la-me-maria-altmann-20110208-story.html.
[84] *See, e.g.*, Waxman, *supra* note 84; William Grimes, *Maria Altmann, Pursuer of Family's Stolen Paintings, Dies at 94*, N.Y. TIMES, (Feb. 9, 2011), https://www.nytimes.com/2011/02/09/arts/design/09altmann.html.
[85] *See* Grimes, *supra* note 86.
[86] *Id.*
[87] *Altmann*, 142 F.Supp.2d 1187. On a contingent basis, she retained Randol Schoenberg, the grandson of a close friend and of the emigrant composer Arnold Schoenberg to represent her.
[88] THE WOMAN IN GOLD (BBC Films 2015).

The backstory for this case began in March 1938 when Germany and Austria united.[89] Greeted enthusiastically, Hitler arrived in Vienna.[90] Non-Jewish Austrians like their German compatriots embraced the Nazis' Aryanization program coupled with their confiscation and redistributionist practices, which enabled non-Jewish Austrians with Nazi help to effectively steal the homes, businesses, bank accounts, securities, and other property of Jewish neighbors.[91]

Being a critic of the Nazis, Bloch-Bauer fled to Czechoslovakia and then Switzerland,[92] where he died in 1945 which was 13 years after the death of his wife Adele.[93]

The Nazis, Austrians, and Swiss stole his possessions, including his sugar beet factories, his artwork, his Prague castle, and much of his liquid wealth.[94]

Reinhard Heydrich, the Nazi dictator of Bohemia and Moravia (now part of Germany and the Czech Republic), and the architect of the Final Solution expropriated Bloch-Bauer's castle to use as his headquarters.[95] Czech freedom fighters assassinated Heydrich there.[96] Hitler and Goering divided up much of Bloch-Bauer's remaining property,[97] while the Swiss government confiscated his bank funds and securities – approximately $21 million of which Altmann recovered before she died in 2011 as part of a class action settlement.[98]

Years earlier in Vienna, she married opera star Fritz Altmann.[99] As a wedding present, her uncle Ferdinard gave her the diamond necklace Adele posed wearing for the "Woman in Gold" painting.[100] Later, the Altmanns fled

---

[89] The annexation of Austria by the Third Reich in March 1938 has been referred to as the Anschluss. Following the resignation of the Austrian Chancellor Kurt von Schuschnigg on March 11, the next day, March 12, 1938, Hitler accompanied German troops into Austria, "where enthusiastic crowds met them." *Germany annexes Austria*, HISTORY, (Feb. 9, 2010), https://www.history.com/this-day-in-history/germany-annexes-austria; Tony Paterson, *Anschluss and Austria's Guilty Conscience: Seventy Years After the Nazis' Annexation of Austria, Questions Remain Over Whether its Citizens Were Victims or Accomplices*, INDEPENDENT, (Mar. 13, 2008), https://www.independent.co.uk/news/world/europe/anschluss-and-austria-s-guilty-conscience-795016.html; *Anschluss*, BRITANNICA.COM, https://www.britannica.com/event/Anschluss; Steven Erlanger, *Vienna Skewered as a Nazi-Era Pillager of Its Jews*, N.Y. TIMES, (Mar. 7, 2002), https://www.nytimes.com/2002/03/07/world/vienna-skewered-as-a-nazi-era-pillager-of-its-jews.html.

[90] *See* Erlanger, *supra* note 91.

[91] *Id.*

[92] *Altmann*, 142 F.Supp.2d 1187.

[93] Peter Schjeldahl, *Golden Girl: The Neue Galerie's New Klimt*, THE NEW YORKER, (July 16, 2006), https://www.newyorker.com/magazine/2006/07/24/golden-girl-2; Anne-Marie O'Connor, *Fighting for Her Past*, LOS ANGELES TIMES, (Mar. 20, 2001), https://www.latimes.com/archives/la-xpm-2001-mar-20-me-40191-story.html.

[94] *See* O'Connor, *supra* note 95.

[95] *Reinhard Heydrich: In Depth*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/reinhard-heydrich-in-depth. Months before his assassination by Czech freedom fighters in June 1942, Heydrich mastermind "The Final Solution," the planned, systematic extermination of the Jews at the Wannse Conference outside Berlin.

[96] *Id*.

[97] *See* O'CONNOR, *supra* note 95.

[98] *See* Grimes, *supra* note 85.

[99] *Id*.; *see also* O'Connor, *supra* note 95.

[100] Alix Kirsta, *Glittering Prize*, THE TELEGRAPH, (July 10, 2006), https://www.telegraph.co.uk/culture/art/3653726/Glittering-prize.html.

Austria but not before the Gestapo confiscated that necklace, which Bloch-Bauer had previously given as a wedding gift to his niece Maria Altmann.[101] Goering would later give that stolen diamond necklace to his wife.[102]

To extort money from Fritz's brother, Bernhard, the Nazis imprisoned Fritz.[103] Bernhard had fled Nazi persecution by moving his cashmere sweater factory to Liverpool, England, and before leaving Austria secretly wired his receivables there.[104] After Bernhard paid the ransom, the Nazis released Fritz but placed him and Maria under house arrest.[105] Following three failed attempts, the Altmann's escaped through a back door during a dental visit.[106]

With help, they then flew to Cologne, Germany,[107] making "their way to the Dutch border, where, on a moonless night, a local farmer guided them across a brook, under barbed wire, and into Holland."[108] From there, they emigrated to San Diego and later moved to Los Angeles,[109] where Fritz took up work as an engineer in the defense industry.

In 1998 (four years after Fritz passed away),[110] facing pressure from a resurgent Green Party[111] Austria opened its archives.[112] Responding to press inquiries, an Austrian cabinet minister denied Austria possessed Nazi-looted art.[113] Suspecting that his representation was false, Austrian journalist Hubertus Czernin dug through Austrian archives and discovered the Bloch-Bauer Klimt paintings on display in Austria's Belvedere Palace had *not* been donated to Austria by the Bloch-Bauers as Austria represented.[114] Czernin gave Altmann this evidence, leading to her lawsuit.[115]

Austria contested jurisdiction based on the Foreign Sovereign Immunities Act ("FSIA").[116] The dispute wound through the courts before the Supreme Court held that a narrow exemption to FSIA potentially allowed for American jurisdiction though in limited circumstances.[117]

---

[101] *See* Grimes, *supra* note 85; *see also* O'Connor, *supra* note 95.
[102] *See* Kirsta, *supra* note 102.
[103] *See* Grimes, *supra* note 85.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See* Grimes, *supra* note 85.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Elisabeth Penz & Jon Thurber, *Hubertus Czernin, 50, Austrian Journalist Had Role in Return of Art Seized by Nazis*, LA TIMES (June 15, 2006), https://www.latimes.com/archives/la-xpm-2006-jun-15-me-czernin15-story.html; NEW YORKER, *Letter from Europe* (June 16, 2006), https://www.newyorker.com/magazine/letter-from-europe.
[112] *See* Waxman, *supra* note 83.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *See Republic of Austria*, *supra* note 66.

The parties then agreed to arbitrate and settled their dispute.[118] Altmann sold the recovered Klimt paintings for $325 million.[119] She shared those proceeds with her family, paid contingent lawyer fees, and made donations to the Los Angeles Holocaust Museum.[120]

Other families soon brought their own lawsuits. Most, though, were stymied by restrictive state SOLs, which the HEAR Act sought to remedy.[121] It preempts restrictive statutes with a uniform federal six-year statute triggered only when a claimant learns of a claim.[122]

Congress passed that legislation after concluding that the "unique and horrific circumstances of World War II and the Holocaust" made such SOLs too burdensome for claimants.[123] Enacted in December 2016, the Act expires in December 2026.[124]

C. UNITED STATES EX. REL. PORTRAIT OF WALLY

Lea Bondi, a Viennese art gallery proprietor, owned *Portrait of Wally*, an Egon Schiele painting of his lover Wally Neuzil,[125] which became the object of a dramatic, highly publicized lawsuit brought by the Department of Justice and later a documentary film.[126]

Forced under duress to sell her art gallery pursuant to Austrian's Aryanization program, Bondi agreed to sell her gallery to Frederick Welz, a Nazi, for $5,441 (today $91,245).[127] But even that was insufficient for Welz.[128] Fearing further persecution, Bondi and her husband, Alexander Sandor, left Austria.[129]

On the eve of their departure to London, Welz demanded that Bondi also give him *Wally*,[130] which was not part of Bondi's gallery.[131] But scared she

---

[118] Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html.
[119] *Id.*; *see also Republic of Austria*, *supra* note 66; *see also* Waxman, *supra* note 83.; *See* Grimes, *supra* note 85 (Austria had negotiated the right to purchase the artwork but then declined to do so).
[120] *See* Grimes, *supra* note 85 ("With money provided by the businessman and philanthropist Ronald S. Lauder, the Neue Galerie in Manhattan bought the earlier portrait of Adele for $135 million. At the time, it was the largest sum ever paid for a painting. The four other paintings were auctioned by Christie's for $192.7 million and went into private collections.").
[121] S. 2763, 114th Cong. (2016), *supra* note 37; H.R. 6130, 114th Cong. (2016), *supra* note 37.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *United States v. Portrait of Wally*, 663 F.Supp.2d 232 (S.D.N.Y. 2009).
[126] *Id.* at 238.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Judith H. Dobryzynski, "*The Zealous Collector—A Singular Passion for Amassing Art, One Way or Another*," N.Y. TIMES, (Dec. 24, 1997), https://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html (Dobrzynski relied partly on documents from Jane Kallir, who obtained those records from Otto Kallir, a dealer in Schiele paintings who died in 1978, and whom Bondi had earlier asked for help); *see also* Jane Kallir, *Austrian*

and her husband might be harmed if she refused Welz's demand, Bondi gave him the painting.[132]

Her fear was justified. In 1938, Welz coerced Dr. Heinrich Reiger, a Jewish dentist, to give him two Schiele paintings.[133] Still, the Nazis sent Reiger and his wife to their deaths in the Theresienstadt concentration camp.[134]

After World War II, the United States imprisoned Welz for war crimes,[135] and shipped *Wally* to Austria.[136] But rather than return *Wally* to Bondi's family, Austria kept it.[137] Bondi, who died in 1969, tried for the rest of her life to recover *Wally*.[138] During her search, she contacted Dr. Rudolph Leopold.[139] Pretending to help her, he located and acquired *Wally* by secretly trading another Schiele painting in exchange for *Wally*.[140] He later donated *Wally* to his Leopold Museum in Vienna.[141]

Years later, while *Wally* was on loan to the MoMA in Manhattan, Judith H. Dobryzynski exposed Dr. Leopold's secret acquisitions of Nazi-looted art.[142] Her 1997 article in *The New York Times* prompted the Manhattan District Attorney's Office to seize *Wally* as the MoMA was about to return it to Austria.[143] Assisted by Bondi's family, the Department of Justice pursued a forfeiture action while retaining *Wally* pending the outcome of that lawsuit.[144] Dr. Leopold and the Leopold Museum then battled the Department of Justice,[145] assisted by Bondi's family, before the parties settled.[146] The result: the defendants paid the Bondis $19 million (slightly more than the

Restitution Policy: Where Are We, and How Did We Get Here? GALERIE ST. ETIENNE (Oct. 1, 2015), https://gseart.com/gse-blog/2015/10/01/austrian-restitution-policy/.

[132] *See Wally*, *supra* note 126 at 238.

[133] *Id*. at 238 (Dr. Reiger approached Welz to negotiate the sale of his art collection to finance his emigration from Austria. Welz acquired Schiele drawings and paintings from Dr. Reiger in 1939 or 1940, just two years before his death at Theresienstadt.).

[134] *See Wally*, *supra* note 126 at 238-39.

[135] *Id.*

[136] *Id*. at 239-41.

[137] *Id*.

[138] *Id.* at 245.

[139] *See* Dobryzynski, *supra* note 132.

[140] *Wally*, *supra* note 126 at 239-45.

[141] *Id*.

[142] *See* Dobryzynski, *supra* note 132.

[143] RALPH E. LERNER & JUDITH BRESLER, ART LAW Vol. 1, 761 (4th ed. 2012); *Wally*, *supra* note 126 at 246. (Robert Morgenthau, the head of that office then, was the grandson of Henry Morgenthau, who as U.S. Ambassador to the Ottoman Empire lobbed tireless, though futilely, for the U.S. government to intervene on behalf of the Armenians as they were being massacred by the Turks and subject to a genocide in 1914-15); ROBERT D. MCFADDEN, Robert Morgenthau, *Longtime Manhattan District Attorney, Dies at 99*, N.Y. TIMES, July 21, 2019.

[144] *See Wally*, *supra* note 126 at 246.

[145] *Id*.

[146] *Id*.

value of the painting) to keep *Wally*,[147] and agreed to post signage whenever the painting was displayed telling its history.[148]

This settlement, in 2010, furthered multiple transitional justice purposes. The $19 million compensated Bondi's heirs; the signage court pleadings and decisions leave an important historical record constituting a form of transitional justice.

D. CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION

Claude Cassirer, a retired photographer, brought this action to recover a Camille Pissarro painting of a rain-swept Paris Street entitled "Rue Saint-Honoré, Après-Midi, Effet de Pluie."[149] Purchased in 1898, the painting remained in the Cassirer family for 40 years. It belonged to Claude Cassirer's grandparents Fritz and Lilly Cassirer, who fled Berlin in 1939 and gave the painting to the Gestapo in exchange for an exit visa to obtain safe passage to England.[150]

The Nazis appraised the painting – now valued at $30 million – to be worth the equivalent of $360. The family never received even that pittance as the Nazis placed those funds in a blocked account and auctioned the painting for an unrecorded amount.[151]

In 1976, Baron Hans Heinrich Thyssen-Bornemisza, a sophisticated art collector – whose uncle Fritz Thyssen, a German industrialist helped finance the Nazis' rise to power – brought the painting for $275,000 ($1.2 million today)[152] from the Stephen Hahn Gallery, [153] a New York gallery that trafficked in looted art.[154]

In 1993, Spain bought the TBC collection, which included the Pissarro painting, from the Baron for $327 million and converted its Villahermosa Palace Madrid into the Thyssen-Bornemisza Museum.[155]

---

[147] *Id*.
[148] *Id.*
[149] *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009).
[150] *Cassirer v. Kingdom of Spain*, 616 F. 3d 1019, 1022-23 (9th Cir. 2010).
[151] *Id*.
[152] *Fritz Thyssen, German Industrialist*, ENCYCLOPEDIA BRITANNICA, Feb. 4, 2019, https://www.britannica.com/biography/Fritz-Thyssen.
[153] *See* TILL VERE-HODGE, *Cassirer v Thyssen-Bornemisza: California Court revives claim to Pissarro yet again*, ART@LAW, Sept. 28, 2017, https://www.artatlaw.com/archives/archives-2017-jul-dec/cassirer-v-thyssen-bornemisza-california-court-revives-claim-pissarro-yet.
[154] *Id*.
[155] *Cassirer v. Kingdom of Spain*, 616 F. 3d 1019, 1023 (9th Cir. 2010).

In 1999, Claude Cassirer, Fritz and Lilly's grandson, a Southern Californian photographer, learned that the painting was on display in the Thyssen-Bornemiza museum.[156]

After unsuccessfully petitioning for its return, he sued in Los Angeles to recover it.[157] Represented by a team of lawyers, including David Boies, the family litigated the case for close to two decades.

Following Claude's death in 2010, his son David took control of the case.[158]

In 2022, after decades of no-holds-barred litigation including a bench trial, the Supreme Court overturned a district court termination of the case upheld by the Ninth Circuit, revived the lawsuit, and remanded it back to the district court. Specifically, the Supreme Court held that the district court erroneously relied on Spanish law instead of California law in adjudicating certain choice of law issues.[159] Writing for the Court, Justice Elana Kagan stated:

> The Cassirers sought our review, limited to a single issue: whether a court in an FSIA case raising non-federal claims (relating to property, torts, contracts, and so forth) should apply the forum State's choice-of-law rule, or instead use a federal one. We granted certiorari…because that question has generated a split in the Courts of Appeals. The Ninth Circuit stands alone in using a federal choice-of-law rule to pick the applicable substantive law. . .. All other Courts of Appeals to have addressed the issue apply the choice-of-law rule of the forum State. We agree with that more common approach, and now vacate the judgment below.[160]

Justice Kagan added, "Our ruling is as simple as the conflict over its rightful owner has been vexed."[161] This is an eloquent understatement.

E. PHILLIP V. GERMANY

In *Phillip v. Germany*, the heirs of a consortium of Jewish art dealers sued in the District of Columbia to recover a collection of ancient church artifacts (known as the Guelph Treasure) now worth $250 million, and once considered

---

[156] *Cassirer v. TBC*., No. CV 05-3459-JFW (EX), 2015 WL 12672087, at *2 (C.D. Cal. Mar. 13, 2015); *Cassirer v. TBC*, 862 F.3d 951, 957 (9th Cir. 2017).
[157] *Cassirer*, 862 F.3d at 957.
[158] *Id.* at 957 n.5.
[159] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S.Ct. 1502 (2022).
[160] *Id.* at 1510 (2022).
[161] *Id.*

the crown jewels of Prussia.[162] The dealers alleged that Goering acquired the Guelph Treasures through forced duress sales for one-third of their value.[163]

Early on, the District of Columbia Circuit upheld the dealer's right to bring the case against the German museums holding the Guelph Treasure, but not against the German government.[164] The Supreme Court, however, overturned the District of Columbia Circuit's holding on the ground that the German government acquired this property from German citizens before the Nazis took control of Germany. While the Supreme Court left open a narrow path for the plaintiffs to possibly continue their case if they could show the dealers were no longer German citizens at the time of the sales, they were unable to do so, but that possibility remains open in ongoing litigation.[165]

F. SIMON V. THE REPUBLIC OF HUNGARY

The Herzog family heirs sued in the District of Columbia to recover the family's collection of El Greco, Monet, Renoir, and other paintings.[166] The family's recovery efforts began after they fled Nazi-occupied Hungary in 1944, leaving their art behind.[167] Adolf Eichmann – the Nazi leader who oversaw the day-to-day logistics of the "Final Solution" – shipped some Herzog-owned paintings to Germany, leaving a substantial collection in Hungary.[168]

This longstanding case, *Simon v. the Republic of Hungary*, came to an abrupt end largely based on the Supreme Court decision in *Phillip*, heard and decided together.[169] In *Simon,* the Supreme Court reversed an earlier largely favorable D.C. Circuit court opinion *Simon v. Hungary* on the ground that Hungary confiscated property belonging to its own Hungarian citizens, which the Supreme Court held did not give the United States jurisdiction over this

---

[162] *Philipp v. Germany*, 2017 WL 1207408 at *2 (D. D.C. Mar. 31, 2017). The dealers were forced to deposit some of the funds into a blocked account subject to "flight taxes" that Jews paid to escape from Germany. *Id.* at * 1; MELISSA EDDY, *German Panel Says Medieval Treasure Should Not be Returned to Heirs of Jewish Owners*, N.Y. TIMES, March 20, 2014.
[163] *Philipp*, 2017 WL 1207408 at *2.
[164] *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018).
[165] *Phillip*, 141 S.Ct. ___, 703, __ (2021). Pursuant to this holding, cases might be brought in United States if the Nazi government had taken art or forced the duress sale of such art after the Nuremberg Laws went into effect and German Jews lost their citizenship rights. (The Supreme Court apparently did not want the United States to become home for cases in which communist and socialist nations aside from the Nazi regime nationalized or otherwise looted private property); BENJAMIN SUTTON, *Appeals court judges hear latest argument in Nazi-era Guelph Treasure restitution claim*, THE ART NEWSPAPER (April 20, 2023); *MDA UK receives renaissance sculpture looted by Nazis during World War II*, JEWISH NEWS (April 19, 2023).
[166] *Id.* at 1097.
[167] *Id.*
[168] LILY ROTHMAN, *Operation Finale Shows the Capture of Nazi Adolf Eichmann. But What Happened at His Trial Changed History, Too*, TIME, Aug. 29, 2018. In May 1960, The Israeli Mossad captured Eichmann in Buenos Aires and transported his to Israel where he was tried in Jerusalem for his crimes, prosecuted by the Jewish state of Israel, convicted, and hung.
[169] *de Csepel v. Republic of Hungary*, 859 F. 3d 1094 (D.C. Cir. 2017).

art (even though Hungary had effectively been under Nazi control at the time of the confiscations).[170]

Based on *Simon* and *Phillip,* the United States could only potentially serve as a forum for cases in which the Nazis government stole or abetted the theft of property owned by Jews after they lost their German citizenship, but not for governmental-abetted thefts while Jews still retained their full German citizenship rights.

The Supreme Court apparently did not want the United States to become a flood of cases where communist and socialist nations – aside from the Nazi regime – nationalized or otherwise confiscated and/or redistributed private property.

Phillip and *Simon* indicate that the Supreme Court viewed the Nazis' theft more than just typically nationalistic socialism but also as part and parcel of worse conduct namely state-sponsored confiscation and re-distribution of a persecuted and targeted minorities' property as a prelude to genocide.

G. VON SAHER V. NORTON SIMON MUSEUM

Von Saher v. North Simon Museum,[171] though also unsuccessful after years of litigation, has a rich history. This case involved a dispute over two life-size oil-on-panel paintings (the "Cranachs") by Lucas Cranach the Elder, painted around 1530.[172] The panels, "Adam" and "Eve," hang in Pasadena's Norton Simon Museum.[173] "Adam" stands under the Tree of Knowledge, cradling an apple, while beneath the same tree, "Eve" listens to a serpent and holds another apple in her upright hand.[174] They only wear fig leaves.[175]

The Nazis stole the panels from Jacques Goudstikker, who owned an Amsterdam gallery specializing in sixteenth and seventh-century European masters.[176] He bought a countryside castle and married Viennese opera star Desirée ("Desi") Von Halban-Kurz.[177] But their "charmed life" ended in 1940 after Nazi troops invaded Holland.[178] Fearing for their safety, the

---

[170] *See Philipp v. Federal Republic of Germany*, 894 F.3d 406, 410-14 (D.C. Cir. 2018).
[171] *Von Saher v. Norton Simon Museum of Art at Pasadena,* 754 F. 3d 712 (9th Cir. 2014).
[172] *Id*. at 715.
[173] *Von Saher,* 897 F.3d at 1143.
[174] *Id.*
[175] BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 255, 280 (2010).
[176] *Id*. at 276; *Von Saher*, 754 F. 3d at 276; ALAN RIDING, *Goering, Rembrandt and the Little Black Book*, N.Y. TIMES, Mar. 26, 2006.
[177] BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 255 at 277.
[178] *Von Saher*, 754 F.3d at 715.

Goudstikkers fled.[179] Without time to secure exit visas, they boarded the SS Bodegraven, a blacked-out Freightliner bound for South America.[180]

At sea, Goudstikker fell through an uncovered hatch in the ship's deck, broke his neck, and died.[181] He kept a black 4.7-by-7-inch leather notebook in his jacket pocket describing 1,113 artworks,[182] which enabled his heirs to recover a portion of looted art.[183]

With the Goudstikkers gone, Goering and Alois Miedl, a Nazi collaborator, divvied up the Goudstikkers' property.[184] Through sham sales, Goering paid $1.1 million (now $19 million) for 779 masterpieces, including the Cranachs and paintings by Rembrandt, Rubens, Van Dyck, and Van Gogh.[185] Miedl "purchased" 334 paintings, Goudstikker's canal-side gallery, his 12th-century castle (Nijenrode), his Amsterdam home, and his country estate in Amsterdam's suburbs for $307,000 (now $5.3 million), a fraction of the art and properties' value.[186] Despite lacking authorization, Goudstikker employees negotiated these sales.[187] Goering and Miedl retained a number of the paintings and sold others.[188]

After World War II, the Allies recovered four hundred of the artworks, which they gave to the Dutch government.[189] Instead of returning looted art and other property to the Goudstikker family, the Dutch government kept it.[190]

In 1946, Desi Goudstikker, then an American, returned to the Netherlands to "repurchase" a small percentage of her property, including her Amsterdam home and a fraction of her family's art, from the Dutch government.[191]

In 1966, the Dutch government sold the Cranach panels for an undisclosed price to a Russian citizen,[192] who five years later sold them to

---

[179] BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 2 at 276; BENJAMIN GENOCCHIO, *Seized, Reclaimed and Now on View*, N.Y. TIMES, Apr. 27, 2008.
[180] *Von Saher*, 754 F.3d at 715.
[181] *Von Saher*, 754 F.3d at 715-16; DEMARSIN, *supra* note _, at 277; RIDING, *supra* note __.
[182] *Von Saher*, 754 F.3d at 715.
[183] After Jacques' death, his wife, Desi, acquired the black notebook and later used its entries to restitute the Goudstikker collection. The notebook lists the Cranachs as part of their collection. *Von Saher*, 754 F.3d at 715.
[184] *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1144 (9th Cir. 2018).
[185] BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. at 277
[186] *Id.*; *Von Saher*, 897 F.3d at 1144.
[187] *Von Saher*, 754 F. 3d at 715.
[188] *Id*.
[189] *Von Saher*, 754 F. 3d at 716-17.
[190] *Id.* at 716. ("The Dutch government characterized the Göring and Miedl transactions as voluntary sales undertaken without coercion, Thus, the government determined that it had no obligation to restore the looted property to the Goudstikker family.").
[191] *Von Saher*, 754 F. 3d at 716-17.
[192] *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (SSX), 2016 WL 7626153, at *6 (C.D. Cal. Aug. 9, 2016), *aff'd*, 897 F.3d 1141 (9th Cir. 2018).

Norton Simon for $800,000 (now $4.8 million).[193] Currently, they are worth approximately $30 million.[194]

Since Desi Goudstikker's passing, and that of her son, Edo Von Saher (who took his stepfather's last name), Edo's wife, Marei Von Saher, a former Olympic figure skater, and her daughters, spearheaded efforts to recover the artworks the Goudstikkers lost.[195]

In 2006, the Dutch government returned 200 paintings (plundered by Goering) to Von Saher.[196] Following lengthy negotiations, the Dutch government concluded that it had wrongfully retained this art for decades based on a "restitution policy" that was "legalistic, bureaucratic, cold and often even callous" [197] – a decision made too late to recover the Cranach panels.

In 2007, after unsuccessful settlement negotiations, Von Saher sued the Norton Simon Foundation to recover "Adam" and "Eve" – entries 2721 and 2722 in Jacques Goudstikker's notebook.[198]

Following years of litigation, including a series of dismissals overturned by the Ninth Circuit, the district court dismissed that lawsuit based on the "act of state doctrine."[199] According to that doctrine, every sovereign state is bound to respect the independence of other sovereign states.[200]

The district court judge, John F. Walter, held that under applicable law the Netherlands properly held title to the painting when it conveyed it to the Russian citizen,[201] who, therefore, conveyed good title to the Norton Simon Museum.[202] In 2018, the Ninth Circuit upheld that decision.[203]

H. REIF V. NAGY

Heirs of Fritz Grunbaum, a Jewish Viennese cabaret performer, art collector and critic of Hitler,[204] brought *Reif* to recover two Egon Schiele paintings, "*Woman in a Black Pinafore* and *Woman Hiding Her Face*,"[205]

---

[193] *Id*.
[194] Carolina A. Miranda, *Court Rules Museum Can Keep Nazi-looted Adam and Eve Masterpieces with a Hidden Past*, L.A. TIMES, Aug. 22, 2016.
[195] *See* Benjamin Genocchio, *Seized, Reclaimed and Now on View*, N.Y. TIMES, Apr. 27, 2008.
[196] *Von Saher*, 754 F.3d at 718, 722-23.
[197] *Id.*
[198] Demarsin, *supra* note 177, at 280.
[199] *Von Saher*, 897 F.3d 1141, 1143 (2018).
[200] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory.").
[201] *Von Saher*, 897 F.3d 1141, 1143 (2018).
[202] *Id.*
[203] *Id*.
[204] *Id.*
[205] *Id.*

together worth approximately $5 million.[206] Grunbaum fled Austria in 1941 and moved to Czechoslovakia.[207] The Nazis captured him, imprisoned him in the Dachau concentration camp outside Munich then murdered him[208] along with his wife, Elisabeth, and stole their 449-piece art collection.[209]

Decades later, the Grunbaums' heirs filed suit in New York, where the trial court granted summary judgment in their favor,[210] a decision affirmed by New York's appellate court.[211] Both holdings meticulously describe how Nazi-looted art circulated throughout the world.[212] In granting the Grunbaums' heirs' motion for summary judgment, state Supreme Court Judge Charles E. Ramos rejected the defendants' statute of limitations and other defenses.[213] He wrote: "Although Defendants argue that the HEAR Act is intended to be inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue."[214]

In affirming, New York's Appellate Division concluded: "The tragic consequences of the Nazi occupation of Europe on the lives, liberty, and property of the Jews continue to confront us today."[215]

V. CONFINING DISPUTE RESOLUTIONS TO PRIVATE NEGOTIATIONS, MEDIATIONS, OR ARBITRATIONS IS WRONG

Such personal and historical accounts cannot be replicated outside courtrooms through alternative dispute resolutions. Nonetheless, critics of Nazi-looted art litigation contend that court cases should be barred. They are wrong. As critics see it, the rights of those who acquire "cultural property" are paramount.[216]

Based on this faulty logic, Nazi-looted art must be treated like ancient Greek artifacts have been handled. Thus, Norman Rosenthal, former Exhibitions Secretary of the British Royal Academy of Arts argued: "If

---

[206] Jason Grant, *Jewish Heirs' Worldwide Fight to Reclaim Nazi-Stolen Art Plays Out in Manhattan Courts*, NEW YORK LAW JOURNAL, Dec. 26, 2018, https://www.law.com/newyorklawjournal/2018/12/26/jewish-heirs-worldwide-fight-to-reclaim-nazi-stolen-art-plays-out-in-manhattan-courts/.s.
[207] *Reif v. Nagy*, No. 161799/15, 2019 WL 2931960 *1 (N.Y. App. Div. July 9, 2019).
[208] *Id.* at *3.
[209] *Id.* at *2.
[210] *Id*.
[211] *Reif v. Nagy*, 61 Misc.3d at 631; *Reif v. Nagy*, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).
[212] *Reif v. Nagy*, No. 161799/15, 2019 WL 2931960 at * 4-7 (2019).
[213] *Reif v. Nagy*, 61 Misc. 3d 319 at 323-30 (N.Y. Sup. Ct. 2018).
[214] *Id*. at 328.
[215] *Reif v. Nagy*, 106 N.Y.S.3d 5 at 24 (N.Y. App. Div. 2019).
[216] *See, e.g.*, Jason Barnes, *Holocaust Expropriated Art Recover (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593, 626 (2018); *see* Jonathan Jones, *Should All Looted Art be Returned*, GUARDIAN, Jan. 9, 2009, https://www.theguardian.com/artanddesign/jonathanjonesblog/2009/jan/09/looted-art-norman-rosenthal; *SPIEGEL Interview with British Art Expert: "We Must Live in the Present*," SPIEGEL, Apr. 9, 2009, https://www.spiegel.de/international/germany/spiegel-interview-with-british-art-expert-we-must-live-in-the-present-a-618399.html; Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. (1995).

valuable objects have ended up in the public sphere, even on account of terrible facts of history, then that is the way it is."[217]

Critics of litigation further argue that the Holocaust like other "crimes against humanity" should only serve to highlight shared collective moral lessons.[218] But these arguments ignore the unique evils of the Holocaust including the fact that the Nazis planned and nearly succeeded in carrying out a genocide of European Jews. They also ignore the realities that Nazi-looted art cases must be brought on behalf of identifiable victims, who bear heavy individual burdens of proof and often great financial and emotional costs in pursuing identifiable wrongs committed by identifiable parties.

Such critics seek to deny these victims of Nazi looting and their identifiable ancestors the opportunity for redress and foreclose simultaneous opportunities to advance broader transitional justice goals.

Additionally, while many Nazi-looted art disputes can be settled through private negotiations, mediations, and arbitrations,[219] not all can be resolved outside courthouses. This is particularly true for those claims asserted against well-heeled collectors determined at great cost to retain artworks in their possession.

Furthermore, a mosaic of cases litigated in courtrooms across America has particularly significant value. Not only do these cases enhance the historical record of Nazi genocidal policy. They also increase the probability such atrocities – and war crimes akin to them – are not relegated to a vague "memory bank" of mayhem and destruction, denying victims their due, allowing criminals to escape accountability, fostering a culture of impunity, and leading to future grave, mass criminality including genocides and "ethnic cleansings."

VI. LESSONS LEARNED FROM CENTURIES OF ANTI-SEMITISM AND MORE THAN A CENTURY OF SOCIALISM AS TO WHY NAZI-LOOTED ART CASES REMAIN TIMELY

Finally, alternative forms of dispute resolution are insufficient because Nazi-looted art cases remain both relevant to our time and timely.[220] Even

---

[217] Norman Rosenthal, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Nov. 30, 2008.

[218] *See, e.g.*, CLAUDIO CORRADETTI & NIR EISIKOVITS, THEORIZING TRANSITIONAL JUSTICE, 15 (2016).

[219] Herrick Feinstein LLP, *supra* note 34.

[220] In fact, Nazi-looted art remains today in 2023 a vibrant subject of much national and international public discussion, debate, and hotly contested political and legal disputes. *See, e.g.*, ASAF SHALEV, *Tel Aviv art museum cancels event with Christie's following auction of jewelry collection with Nazi ties*, JTA (July 2, 2023**);** *Art looted by Nazis in Belgium still in Dutch museums, government buildings*, N.Y. TIMES (June 22, 2023); JACKIE HAJDENBERG, *A German museum curator is personally returning art looted by the Nazis to the descendants of Holocaust victims*, JTA (June 14, 2023); GABY *WINE, Restituted art sale funds go to Holocaust survivors in 'completing of the circle,'* **The JC (June 14, 2023);** CATHERINE HICKLEY, *German Panel Says Kandinsky Painting Should Go Back to Jewish Heirs: The decisions of the government panel, which handles claims about art lost or looted in the Nazi-era, are not legally binding, but are nearly always followed*, N.Y. TIMES (JUNE 13, 2023);

MALCOLM GAY, *Hitler wanted this painting for his personal museum — now it's promised to the MF*A, THE BOSTON GLOBE (June 11, 2023); CATHERINE HICKLEY, German city restitutes a Renoir to the heirs of a Jewish banker and buys it back, THE ART NEWSPAPER (June 7, 2023); MONIKA SCISLOWSKA, *Priceless painting looted by Nazis during World War II returns to Poland from Japan*, THE ASSOCIATED PRESS, (May 31, 2023); *Works Looted By The Nazis: Unanimity In The [French] Senate To Facilitate Restitution Procedures***,** *AFP* (May 23, 2023); JENNIFER RANKIN, *Fears looted Nazi art still hanging in Belgian and British galleries*, THE GUARDIAN. (May 20, 2023);COLIN MOYNIHAN, *Sotheby's Provenance Disputed in Claim by Heirs for Art Lost in Nazi Era*, N.Y. TIMES **(**May 19, 2023); ISABEL VINCENT, *Questions linger about Nazi past of Klimt art that sold for $53M this week*, N.Y. POST (May 18, 2023); EILEEN KINSELLA, *The First Auction of Late Billionaire Heidi Horten's Controversial Jewelry Proves Wildly Successful, Raking in $156 Million: A late-breaking revelation that Horten's husband 'profited from the situation' of Jewish department store orders starting in 1036 did not hamper bidding*, ARTNET (May 11, 2023); CATHERINE HICKLEY, *Germany's museums buy back 'degenerate' artworks purged by the Nazis*, THE ART NEWSPAPER (May 10, 2023); ROBIN POGREBIN and GRAHAM BOWLEY, *After Seizures, the Met Sets a Plan to Scour Collections for Looted Art*, N.Y. TIMES, (May 9, 2023); RUPERT NEATE, Auction of £120m of jewels to go ahead despite Jewish groups' concerns, THE GUARDIAN (May 9, 2023); *Frankfurt returns painting to heirs of Jewish collector murdered in the Holocaust*, JNS (May 4, 2023); VINCENT NOCE, France's long-awaited restitution policy is finally here, THE ART NEWSPAPER (April 26, 2023); CATHERINE HICKLEY, *Dusseldorf settles with Jewish dealer's heirs on portrait that hung in mayor's office*, The Art Newspaper (April 21, 2023); BENJAMIN SUTTON, *Appeals court judges hear latest argument in Nazi-era Guelph Treasure restitution claim*, THE ART NEWSPAPER (April 20, 2023); *MDA UK receives renaissance sculpture looted by Nazis during World War II*, JEWISH NEWS (April 19, 2023); LESLIE KATZ, *Nazi-looted silver cup comes home to Bay Area descendant after 80 years The Jewish News of Northern California* (April 17, 2023); CATHERINE HICKLEY, *A major Estonian art collection looted by the Nazis is probably in Belarus, new report finds*: *With the help of Kyiv archives, a historian has investigated the fate of 5,000 works of art and 20,000 books owned by Julius Genss*, THE ART NEWSPAPER (April 12, 2023); MILTON ESTEROW, *Not Picassos, but Still Precious: Museums Return Silver Lost to the Nazis: Some German institutions have begun to give back cups, candlesticks, teapots and other items of crafted silver that Jews were forced to surrender during the reign of the Third Reich*, N.Y. TIMES (April 10, 2023); TOREY AKERS, *Christie's launches grant programme to support research of Nazi-era provenance*, THE ART NEWSPAPER (April 10, 2023); CATHERINE HICKLEY, *Has New York's law aimed at identifying Nazi-looted art in museums worked?: Recent legislation requires institutions to label works they display that was stolen by the Nazis, but some are still unwilling to publish their provenance research*, THE ART NEWSPAPER (April 7, 2023); DAVID CHAZAN, *Bernard Arnault in talks to offer compensation for Gustav Klimt painting looted by Nazis*, N.Y. TIMES **(**April 4, 2023); GARETH HARRIS, *Courbet painting—seized by the Nazis and owned by a reverend—to be returned to its original owners* THE ART NEWSPAPER (March 30, 2023); JAMES JACKSON, *Munich museum takes down Picasso portrait amid restitution dispute: The painting, Madame Older, was previously owned by the prominent collector Paul von Mendelsshon-Bartholdy in the* 1950s, The *Art Newspaper*, (March 30, 2023); LEE HARPIN, *Lord Pickles hosts emergency meeting on injustices over Holocaust property restitution: Envoys from America, Europe and Israel attend first meeting in London as Pickles admits 'We need to get a grip on this in the next five years or it will be too late,'* JEWISH NEWS (March 29, 2023); CANAAN LIDOR, *Art in spotlight as 9 countries' Holocaust envoys hold 1st gathering on restitution*, TIMES OF ISRAEL (March 29, 2023); OLIVER MOODY, Picasso portrait pulled from gallery wall in ownership row: Its original owner, a Jewish banker, was forced to give it up when the Nazis came to power, THE TIMES (March 28, 2023); Kunsthaus Zurich launches new strategy on Nazi looted art: The Kunsthaus Zurich museum says it is strengthening its provenance research and giving itself more resources to deal with the problem of ill-gotten cultural property, SWISSINFO (March 14, 2023): *Major Swiss art museum reviewing collection for Nazi-looted pieces*, AFP (March 14, 2023); SHIRYN GHERMEZIAN, Swiss Art Foundation Launches Probe to Discover if Items Were Stolen by Nazis From Jews, THE ALGEMEINER (March 9, 2023); OLIVER MOODY, German royal heirs give up on artworks taken in war, THE TIMES, (March 9, 2003); JULIA HITZ, *Picasso dispute: Is "Madame Soler' looted art? Paul von Mendelssohn-Bartholdy's heirs want the painting back, but the Bavarian State Painting Collections sees itself as the rightful owner. An unresolved case with a bitter aftertaste*, (March 2, 2023); ALEXANDRA TEMAYNE-PENGELLY, *A New York Law Requires Museums to Label Nazi-Looted Art. But Are They Following It?*: *A new bill requires New York museums to label artwork in their collections which were seized by the Nazis. But without a regulatory agency enforcing it, the law hasn't changed much*, NY OBSERVER (February 28, 2023); VINCENT NOCE, *Musée D'Orsay ordered by Paris court to return four masterpieces by Renoir, Cézanne and Gauguin stolen during Second World War,The works were owned by influential French dealer Ambroise Vollard and will be returned to his heirs*, THE ART NEWSPAPER (February 16. 2023); *Czech museums return Nazi-looted art to Jewish owner's descendants*, EXPATS.CZ (February 15, 2023); Superintendent Adrienne A. Harris Announces Three Paintings Returned to the Heirs of Dr.

though the Nazis murdered six million Jews and sought to annihilate all Europe Jews, that tragic history is being forgotten at a time of growing antisemitism and violence toward Jews, surging tribalism, socialism, fascism, and other forms of illiberalism. This was not supposed to happen.

In 1989, Francis Fukuyama predicted a flowering of liberal democracies and republics, ushering in a new era of tolerance, peace, democracy, and religious ethnic, and racial harmony. [221] This did not occur; instead, history returned with a vengeance such that today we are witnessing a rebirth of dark forces of tribalism, xenophobia, illiberalism, authoritarianism, and totalitarianism.[222]

Fukuyama contends that he underestimated identity or group politics.[223] He did. Though that is not all. Human nature remains the same. Taking advantage of economic, political, and social crises, ignoring Saint Augustine's

---

Ismar Littmann: Prussian Cultural Heritage Foundation (SPK) returns paintings by Pechstein, Schmidt, and Mense Heirs donate Mense Painting to the Nationalgalerie of the Staalichen Museen, NY Department of Financial Services (February 15, 2023); DAVID D'ARCY, *Art from persecuted Jewish dealer draws scrutiny at National Gallery of Art in Washington, DC: Findings about the provenance of three Old Master drawings in the museum's collection may best the pro-restitution stance recently adopted at US national institutions*, THE ART NEWSPAPER (February 15, 2023); COLIN MOYNIHAN, *Ronald S. Lauder Reaches Agreement on Klimt Painting with Jewish Heirs*, N.Y. TIMES (February 10, 2023); SARAH CASCONE, *A Prized Kandinsky Painting Recently Restituted to the Heirs of a Jewish Collector May Fetch $45 Million at Sotheby's: The Van Abbemuseum restituted the painting to the heirs*, ARTNET**,** (February 8, 2023); CATHERINE HICKLEY, *Is Nazi Loot Amid His 6,000 Oils, Some Grenades and Napoleon's Toothbrush?: The daughter of an eccentric Swiss collector has asked an independent panel to review whether items in his massive collection were stolen from Jews during World War II*, N.Y. TIMES (February 7. 2023); *Twice Expropriated: Poland and Spain misrepresent restitution of two paintings* COMMISSION FOR LOOTED ART IN EUROPE (February 4, 2023); GEORGINA ADAM, *New French restitution laws should benefit the market—and maybe force change in Britain too?* ART MARKET EYE (February 2, 2023); VINCENT NOCE, *French court orders Christie's to restitute a Nazi-looted painting sold in London: As the panel was looted n Paris, the magistrates claimed jurisdiction of the French courts over the High Court in London*, THE ART NEWSPAPER (February 1, 2023); ANNA SANSOM, *Christie's marks 25 years of the Washington Principles on Nazi-confiscated art*,THE ART NEWSPAPER (January 30, 2023); MARTIN BAILEY, *Was Van Gogh's olive grove landscape another Nazi-era 'forced sale'?*: *We uncover the tangled tale of the painting controversially sold off by New York's Metropolitan Museum of Art in 1972 and now in an Athens museum*, THE ART NEWSPAPER (January 27, 2023); Reclaiming lost history: 25 years of the Washington Principles on Nazi-Confiscated Art, CHRISTIE'S (January 26, 2023); MICHAEL HOROWITZ, *Virgin Mary sculpture sold under Nazi duress returned to Jewish owner's heirs: Germany finds 16th-century breastfeeding statuette was sold in19367 by collector Jakob Goldschmidt under unfair financial conditions*, TIMES OF ISRAEL (January 24, 2023); BEN BRACHFELD, *Descendants of Jewish refugees escaping Nazis sue Guggenheim Museum for $200M Picasso painting*, AMNY (January 22, 2023); DEVORAH LAUTER, France's Ministry of Culture Is Pushing Forward a Trio of Groundbreaking Laws That May Have Sweeping Effects on Restitution, ARNET (January 18, 2023); TYLER HAYDEN, *Santa Barbara Museum of Art Sued over Nazi-Looted Drawing*: Heirs of Jewish Cabaret Singer Killed in Concentration Camp Demand Return of Valuable Piece, SANTA BARBARA INDEPENDENT (January 17, 2023); ANNY SHAW, *Another monumental Munch painting once hidden from Nazis in a barn heads to the block: Heirs of Jewish art critic forced to sell the work estimated at $15m now set to benefit from Sotheby's auction*, THE ART NEWSPAPER (January 16, 2023); MARTIN BAILEY, *Van Gogh's Tokyo Sunflowers: Was it a Nazi forced sale? And is the painting now worth $250m?*: Bought for a Japanese museum in 1987, the masterpiece has just claimed by the heirs of a Jewish Berlin banker, THE ART NEWSPAPER (January 13, 2023); STUART DOWELL, *Art historian and TV host Magdalena Ogórek to set up Museum of Stolen Art*, THE FIRST NEWS (January 10, 2023)

[221] Francis Fukuyama, *The End of History*, NATIONAL INTEREST (1989).

[222] *See generally* FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT (2018).

[223] *Id.*

warning that "cursed is everyone who places his hope in changing the nature of man,"[224] and empowered by technology and social media, illiberal governments have mushroomed.[225] Their growth indicates that "every age has its own fascism,"[226] and that President Ronald Reagan had it right when he said: "Freedom is a fragile thing and it's never more than one generation away from extinction."[227]

Today, socialist, communist, and fascist, threats to freedom, individual civil rights, due process, civil liberties, and public safety come from multiple directions. These threats come from the Chinese Communist Party with its social credit system, and which has incarcerated millions of Muslim Uighurs and other minorities in "re-educate" concentration camps.[228] They come from neo-Nazis and white supremacists who marched with torch lights in Charlottesville, Virginia, chanting "Jews Shall Not Replace Us." And they come from so-called woke socialiasts and "progressives" who regressively censor, cancel, slander, slur, suppress, and blacklist fellow Americans – increasingly with help from the federal government and Big Tech social media giants – in a 21st Century form of "McCarthyism."[229] *Wall Street Journal* columnist Mary Anastasia O'Grady described growing illiberalism this way:

> In the past two decades, the institutions necessary to ensure political and ideological competition have been destroyed . . . The problem isn't any one election in which a politician who prefers socialism over individual freedom prevails. It's the extremist view – left or right – that an electoral victory is a mandate to dismantle the institutional framework that protects minorities and blocks the ambitions of absolutism. . . . Media, the arts, academia, science political activism, and the judicial system become illiberal weapons.[230]

Moreover, since the Holocaust, majorities have persecuted insular, envied, minorities leading to genocides in Cambodia, China, Rwanda, Bangladesh, East Timor, the Soviet Union, Guatemala, Bosnia, Kosovo, Serbia, Rwanda, Darfur, Myanmar, and elsewhere[231] while hatred directed at

---

[224] QUOTEFANCY, https://quotefancy.com/quote/906004/Saint-Augustine-Cursed-is-everyone-who-places-his-hope-in-changing-the-nature-of-man.

[225] *See generally*, GIDEON RACHMAN, THE AGE OF THE STRONGMAN: HOW THE CULT OF THE LEADER THREATENS DEMOCRACY AROUND THE WORLD (2022); Yuval Noah Harari, *Why Technology Favors Tyranny*, ATLANTIC (Oct. 2018).

[226] PRIMO LEVI, THE BLACK HOLE OF AUSCHWITZ, 31 (2005).

[227] Governor Ronald Reagan, Inaugural Address (Jan. 5, 1967), https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony.

[228] *See generally*, KAI STRITTMATTER, WE HAVE BEEN HARMONIZED: LIFE IN CHINA'S SURVEILLANCE STATE (2020).

[229] *See, e.g.*, ALAN DERSHOWITZ, CANCEL CULTURE: THE LATEST ATTACK ON FREE SPEECH AND DUE PROCESS (2020).

[230] Mary Anastasi O'Grady, *When Popularism Turns to Tyranny*, WALL ST. J., Dec. 27, 2021.

[231] *See, e.g.*, Scott Lamb, *Genocide Since 1945: Never Again*, SPIEGEL, http://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html; Editorial Board, *What is Happening in Myanmar is Genocide: Call It by Its Name*, WASH. POST, Aug. 29, 2018.

Jews and the Jewish nation of Israel and violence toward Jews has spread exponentially in the United States.[232]

Worldwide, on "any given issue – from economic inequality to the financial crisis to immigration and terrorism – old and new conspiracy theories blaming the Jews have gained new traction, abetted by the political polarization and general crisis of confidence permeating Western democracies."[233] Such antisemitism remains prevalent among a spectrum of political parties and ideologies.[234]

---

[232] Yaroslav Trofirmov, *The New Anti-Semitism: In Europe and the U.S., Rising Political Forces on Both the Right and the Left Have Revived Old Patterns That Scapegoat Jews For Society's Ills*, THE WALL STREET JOURNAL, July 12, 2019; *see also, e.g.*, BARI WEISS, HOW TO FIGHT ANTI-SEMITISM (2019); Ariel Ben Solomon, *Supremacists and Jihadis Form 'Two-Pronged Attack' Threatening Jews in US,"* ISRAEL HAYOM, Aug. 6, 2019; Joe Heim and Samantha Schmidt, *Anti-Semitism In America: Rising Hate Speech Turns to Terror*, THE WASHINGTON POST, Oct. 28, 2018; Bridget Johnson, *The Hate Spewed in Charlottesville Helps ISIS and al-Qaeda: A Culture of Anti-Semitism Breeds Extremism and Terrorist Sympathizers*, OBSERVER, Aug. 16, 2017; Jon Henley, *Anti-Semitism Rising Sharply Across Europe, Latest Figures Show: France Reports 74% Rise in Offenses Against Jews and Germany Records 60% Surge in Violent Attacks*, THE GUARDIAN, Feb. 15, 2019; JO BECKER, *How Nationalism Found A Home Sweden: A Global Machine Fuels the Far Right's Rise*, N.Y. TIMES, Aug. 11, 2019; *see also* James Angelos, *The New German Anti-Semitism*, N.Y. TIMES MAGAZINE, May 21, 2019 (forty-one percent of the most serious incidents directed at Jews in Germany stemmed from the conduct of "someone with a Muslim extremist view.");Even more so anti-Semitism pervades the Islamic world. *See, e.g.*, Ayaan Hirsi Ali, *Can Ilhan Omar Overcome Her Prejudice?* WALL STREET JOURNAL, July 12, 2019. Hirsi, who grew up in Somalia, writes:

> Most Americans are familiar with the classic Western flavors of anti-Semitism: the Christian, European, white-supremacist and Communist types. But little attention has been paid to the special case of Muslim anti-Semitism. That is a pity because today it is anti-Semitism's most zealous, most potent, and most underestimated form. . . Muslim anti-Semitism has a broader base, and its propagators have had the time and resources to spread it widely.

[233] *See* Trofirmov, *supra* note 233.

[234] *See, e.g.*, Bret Stephens, *Anti-Semitism and What Feeds It*, N.Y. TIMES, October 26, 2020; *e.g.*, Will Carless, *White Supremacist Propaganda Hit an all-time high in 2020, New Report Says*, USA TODAY, March 17, 2021; ANDY NGO, UNMASKED: INSIDE ANTIFA'S RADICAL PLAN TO DESTROY DEMOCRACY (2021); *See, also e.g.*, Editorial, *Anti-Semitism Rises Anew in Europe*, N.Y. TIMES, May 27, 2019. (citing November 2018 CNN poll); William Echikson, *Viktor Orban's Anti-Semitism Problem*, POLITICO, May 13, 2019; JO BECKER, *How Nationalism Found A Home Sweden: A Global Machine Fuels the Far Right's Rise*, N.Y. TIMES, Aug. 11, 2019; *Labour anti-Semitism: Corbyn announces plan to speed up expulsions*, BBC July 22, 2019) https://www.bbc.com/news/uk-politics-49064771; *see also e.g.*, BARI WEISS, How to Fight Anti-Semitism (2019); YAROSLAV TROFIRMOV, *The New Anti-Semitism: In Europe and the U.S., Rising Political Forces on Both the Right and the Left Have Revived Old Patterns That Scapegoat Jews for Society's Ills*, THE WALL STREET JOURNAL, July 12, 2019; Bret Stephens, *Anti-Semitism and What Feeds It*, N.Y. TIMES, October 26, 2020; Ayaan Hirsi Ali, *Can Ilhan Omar Overcome Her Prejudice?* WALL STREET JOURNAL, July 12, 2019; Ariel Ben Solomon, *Supremacists and Jihadis Form 'Two-Pronged Attack' Threatening Jews in US,"* ISRAEL HAYOM, Aug. 6, 2019; Joe Heim and Samantha Schmidt, *Anti-Semitism In America: Rising Hate Speech Turns to Terror*, THE WASHINGTON POST, Oct. 28, 2018; Bridget Johnson, *The Hate Spewed in Charlottesville Helps ISIS and al-Qaeda: A Culture of Anti-Semitism Breeds Extremism and Terrorist Sympathizers*, OBSERVER, Aug. 16, 2017; Jon Henley, *Anti-Semitism Rising Sharply Across Europe, Latest Figures Show: France Reports 74% Rise in Offenses Against Jews and Germany Records 60% Surge in Violent Attacks*, THE GUARDIAN, Feb. 15, 2019; RUTH WISSE, *Anti-Semitism Isn't Merely Another Kind of Hatred*, WALL STREET JOURNAL, August 9, 2021.

This anti-Semitism has in some instances been reflected in law. One example of this is that a new law bars Jews from reclaiming or receiving restitution for property that Poles stole from Jewish citizens of Poland during World War II, and a Neo-Nazi's rally in Warsaw drew 60,000 European demonstrators. *See generally* Daniel Schatz, *Poland must deal with its past – and return stolen property*. NEWSWEEK (May 23, 2019), https://www.newsweek.com/poland-ww2-stolen-property-compensation-restitution-jews-447-1433764.

In short, efforts to tarnish Jews and the Jewish religion have dramatically escalated, among persons of all classes and political persuasions, in the Western world.[235] While in the Islamic world, the long-standing effort to destroy the Jewish state of Israel is increasingly supported by Marxism in its many mutated forms.[236]

Another source of illiberalism – gravely endangering the freedom and lives of envied successful minority groups including but not limited to Jews – is the resurgent affection for socialism under its various mutating forms – a modern-day tool of authoritarianism and totalitarianism.[237]

For under the guise of socialism, Nazism, communism, and fascism, the "welfare of the people has always been the alibi of tyrants. . . giving the servants of tyranny a good conscience."[238] These have been rival ideologies, but in practice and application share much in common.

Writing in *Commentary* magazine, Gary Dreyer notes that Communist violence has been inspired by politics of group theft and re-distribution as well as ethnic persecution. [239] The same can be said of the Nazis, a race-obsessed "national socialist" party. Specifically, Nazism was a caste-based form of socialism mixed with fascism that viewed politics and economics through the lens of race and religion more than class. (Fascism itself is a nationalistic derivative of socialism mainly adopted by former socialists like Benito Mussolini.[240] These socialists made the modest conversion to fascism because

---

[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 101(1960)). Like Orwell and others who have been on the battlelines opposing tyrants, Camus came to realize that modern social "revolutions" are led by Pied Pipers falsely promising the utopian myth of heaven on earth to disaffected, disgruntled, malcontented masses. These false prophets of hope and purveyors of untold violence foment class and other tribal divisions and exploit human desires and desperation for a better life such as envy, particularly during times of crisis. Such leaders also ineluctably have carried out brutal atrocities in the name of the masses while claiming, as Lenin famously did, that those masses themselves do not understand their own class-conscious interests.

Posing as self-appointed societal saviors, such charlatans are largely elitist, power-hungry, dictatorial, greedy, brutal, bloodthirsty evil thugs who know no limits in their pursuit of absolute power and privilege only to wreak untold death and destruction. Modern-era nihilistic, anarchistic, socialistic, Marxist power-hungry opportunistic groups led by such despotic and totalitarian evildoers include not just the Nazis and Fascists but also the Red Army Faction (Germany), Red Brigade (Italy), Weather Underground (America), Sandinistas (Nicaragua), Communist Party of Cuba, Communist Chinese Party and Maoists, Bolshevik Party (Russia), Chavistas (Venezuela) and Khmer Rouge (Cambodia). These destroyers of civil society for their own benefit and deniers of individual civil liberties harken back even further to the Jacobins during the French Revolution, who despite their bloody, destructive reign-of-terror perversely have become the heroes for some on the far-left today and who even started a popular magazine dedicated to these malefactors. In short, Nazism, like other forms of extreme socialism including Communism, is "the religion of the malcontent. The malcontent is drawn to this religion because it promises him power. Power to take what isn't his. Power to exact vengeance on the neighbor who has what he wants. Power to satisfy whatever sadistic desires he feels compelled to carry out." JESSE KELLY, THE ANTI-COMMUNIST MANIFESTO (2023).
[239] Gary Dreyer, *Why and How to Revive American Anti-Communism: A new museum, new legislation, and a renewed moral imperative*, COMMENTARY MAGAZINE, SEP. 2022 at 40.
[240] Mussolini, for example, was the editor-in-chief of Avanti! (Forward), Italy's leading socialist newspaper.

they saw nationalism rather than internationalism as a unifying force in World War I.)[241]

In socialist nations, the centralized government controls the economy, politics, culture, and all other aspects of life. Mass dependency coupled with governmental control of the means of distribution and production (by a bureaucratic and a single party ruling class), which is the essence of socialism, invariably leads to control over all other aspects of social and political life and suppression of dissent referred to as counterrevolution expression. In fascist nations, social control is more diffuse when exercised by an alliance of big-government working hand-in-glove with big business. (Thus, for example, as China has become more fascistic and less Maoist since the 1970s, it has become more authoritarian and less totalitarian).

By his own admissions and policies, Hitler (like Karl Marx)[242] was a lifelong committed self-described socialist[243] and a virulent antisemite whose Nazi party institutionalized antisemitic and socialist policies as jointly laid out in the Nazis' platform.[244]

---

[241] Unlike the Nazis, Mussolini was not virulently antisemitic *See, e.g.*, Mussolini, Benito – Yad Vashem available at https://www.yadvashem.org ("Mussolini was not strongly antisemitic. He had close ties to Italian Jews. He was a committed Marxist and Leninist who founded the Fascist party largely because after World War I he saw a nationalistic form of socialism and alliance with big business as more effective than internationally oriented socialism. *See generally* JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF CHANGE (2007).

[242] As with much else, Marx predicted that in a communist world the Jewish religion would become irrelevant or disappear, and therefore there was no need for violence specifically targeted toward Jews. Still, though of Jewish ancestry Marx's language toward Jews was hateful and vicious. *See, e.g.*, Karl Marx, *On the Jewish Question*, (1843); KAI STRITTMATTER, WE HAVE BEEN HARMONIZED: LIFE IN CHINA'S SURVEILLANCE STATE (2020);PAUL JOHNSON, INTELLECTUALS: FROM MARX AND TOLSTOY TO SARTRE AND CHOMSKY, 52-81 (1990) (quoting Marx); *accord* DOUGLAS MURRAY, THE WAR ON THE WEST, 176-79; PAUL JOHNSON, *Marxism vs. the Jews*, COMMENTARY MAGAZINE (April 1, 1984); BERNARD LEWIS, SEMITES AND ANTI-SEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE, 112 (1999); MARVIN PERRY AND STEVEN SCHWEITZER, ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT, 154-57 (2005).

[243] "Hitler was a Socialist," "The Nazis Hated Capitalism," "The Nazism Didn't Believe in Private Property," and "Socialism Encourages Eugenics." *See* RAND PAUL, THE CASE AGAINST SOCIALISM, 139-61 (2019). Hitler's own words bolstered this conclusion. He linked socialism, nationalism, and antisemitism and promised: "A time will come when it will be obvious that socialism can be realized only in conjunction with nationalism and antisemitism. *See* GOTZ ALY, WHY THE GERMANS? WHY THE JEWS? 120 (2011). *accord* CHRIS TALGO, *Hitler Was a Socialist Who Learned from Karl Marx. Here are the Quotes to Prove It*, *1818 Magazine*, July 6, 2020 at https://the1818.com/2020/07/hitler-was-a-socialist-who-learned-from-karl-marx-here-are-the-quotes-to-prove-it/. *Cf.* Recognizing the strong affinity between Nazism and Communism, Hitler said, "we National Socialists wish precisely to attract all socialists, even the Communists; we wish to win them over from their international camp to the national one." *Id.* Echoing this, Nazi Propaganda Minister Joseph Goebbels said: "give me a fully committed communist and I'll make him a Nazi inside a month." *See* DAVID MAMET, RECESSIONAL: THE DEATH OF FREE SPEECH AND THE COST OF A FREE LUNCH, 108 (2022).

[244] The Nazis' Twenty-Five point platform forbid Jews from being citizens, and called for: the nationalization of major industries; termination of national trusts; government control of banks and credit sources; prohibitions on charging of bank interest; breaking up of large corporations; the closure of all national banks; confiscation of "war profits;" profit sharing of the proceeds of nationalization and of large corporate income; seizure of land without compensation for "communal benefit;" communal work programs; confiscation and regulation of "unpatriotic" profits; full equality of all non-Jewish Germans; force employment of all citizens for the communal benefit; ruthless war against enemies of the community; replacement of "materialist" law with "communalist" law; communalization of all department and large stores; state control of all culture; state control of all

Socialist demonizing rhetoric is binary. Socialist leaders promote class envy and warfare – rich versus poor, haves versus have-nots, exploited versus exploiter. Nazism aimed to be a white, supremacist Aryan First, Jew-hating, identity-politics, intersectional, ethnically hierarchical, caste-system based combination of socialism and fascism.

Professor and journalist, Gotz Aly, deftly explored this interplay in a series of award-winning books. Aly saw Nazism as exploiting a desire for German national cohesiveness coupled with the sinister socialistic exploitation of envy, jealousy, vengeance, and scapegoating Jews. And *In Why the Germans? Why The Jews?: Envy, Race Hatred, and the Prehistory of the Holocaust*, he wrote:

> The rise of a social anti-Semitism rooted in Gentile Germans' envy of their Jewish fellow citizens was accompanied by the increasing dominance of collective nodes of thought. The tendency to prioritize the native collective over the rights of individuals made it more difficult for leaders within the social-democratic and liberal movements to recognize the danger of anti-Semitism and to combat it effectively. The anxiety that the German majority felt about the disproportionately successful Jewish minority produced not only hatred on the social fringes but also a dangerous indifference within the social mainstream to attacks on Jews.[245]

In a binary Marxist way, popular during the tough economic times and national humiliation, prioritizing collectivism over individual rights of life, liberty, and property became Nazi policy such that Nazi and Communist hard-core base support came from the largely interchangeable increasingly dependent proletariat and working-class bases leading Aly to conclude:

> The political platform of the Nazi Party was rooted in two nineteenth-century ideas with revolutionary connotations that could easily be combined with anti-Semitism. One was the concept of an ethnically homogeneous nation: the other was the idea of social equality. The Nazis promised the lower classes greater social acknowledgment and better opportunities for social advancement.[246]

By combining elements of nationalism, socialism, fascism, and identity politics Nazism resembled other socialistic, tribalistic movements of the Twentieth and Twenty-first Centuries. Thus, in *Hitler's Beneficiaries:*

---

education; state control of all healthcare; breaking up of corporations; agrarian reform including re-distribution of farmlands for "communal purposes;" and forbidding land speculation. *See* Yale Law School Library, *The Avalon Projects: Documents in Law, History, and Diplomacy*, at https://avalon.law.yale.edu/imt/nsdappro.asp

[245] ALY, *supra* note 244, at 122.

[246] *Id.* at 120.

Plunder, Racial War and the Nazi Welfare State, Aly wrote that the "Nationalist Socialist German Workers Party was founded on a doctrine of inequality between races, but it also promised Germans greater equality among themselves."

In practice, Aly added, this goal "was achieved at the expense of other groups, by means of a racist war of conquest." "That" he continued, "was the key to the Nazis' popularity, from which they derived the power they needed to pursue their criminal aims. The ideal of the *Volksstaat* (a state of and for the people) was what we would now call a welfare state for Germans with the proper pedigree."[247] In modern parlance, this was identity group politics-based socialism.

For Aly, Nazi state-organized and abetted theft and redistribution of Jewish businesses and property, more than "anti-Semitic predilections" or nationalism, accounted for the popularity of tyrannical Nazi rule in Nazi-occupied Europe.[248] A key attraction of Nazism, he contends, was the material economic benefits it afforded Hitler's Aryan "beneficiaries,"[249] who turned a blind eye to Nazi atrocities directed at Jews in exchange for short-term economic and other tangible favored ethnic group benefits. Profiting from the dispossession of Jews,[250] increasingly inured Hitler's beneficiaries to Jewish suffering and Nazi atrocities.

Such constituted much of the mob appeal of national socialism. Socialist playwriter George Bernard Shaw's observed that any "government who robs Peter to pay Paul can always depend on the support of Paul."[251] But with the Nazis, as with other socialist movements led by Mao, Pol Pot, Mugabi, and others, the robbery merely proceeded incrementally to mass murder. Driven by class division or more modern forms of identity politics, the theft and re-distribution of targeted minorities' property have often been a path to absolute, or near absolute, single-party power.

As Aly explained, such "enthusiasm" can "be observed wherever a part of society claims the right to nationalize other people's property, justifying that act with the rationale that the beneficiaries make up a homogeneous and theretofore underprivileged majority, the 'people' itself.'"[252]

But in claiming such a right, the Nazis also fomented and exploited a millennium-long history of antisemitism. In the years before and after World War I, following Jewish European emancipation and overcoming centuries of

---

[247] *See* GOTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 13 (2007).
[248] *Id.* at 6.
[249] *See generally id*.
[250] *Id.* at 183-333.
[251] BERNARD SHAW, EVERYBODY'S POLITICAL WHAT'S WHAT? 263 (1944)
[252] *Id.*

persecution, German and Austrian Jews disproportionately moved into the middle class and even prospered.[253]

While many German and Austrian gentiles - particularly shopkeepers, small business owners, artisans, retirees, clerical workers, government employees, and trade workers saw their economic and social status sharply diminished.[254]

Pensions were wiped out, and savings evaporated.[255] Many citizens on fixed incomes became dependent on charitable and government handouts or resorted to begging on the streets.[256] Inflation became so rampant, due mainly to excessive government spending and printing of money, that wheelbarrows filled with Deutschmarks were needed to buy groceries and everyday necessities.[257] Out-of-control inflation undermined two pillars of bourgeois-capitalist, liberal society: "respect for property and trust in the monetary system,"[258] dire conditions described by Nobel Prize-winning economist John Maynard Keynes this way:

> Germany's pre-war capacity to pay an annual foreign tribute has not been unaffected by the almost total loss of her colonies, . . . by the cession of ten percent of her territory and population, of one-third of her coal and of three-quarters of her iron ore, by two million casualties. . . by the starvation of its people for four years, by the burden of a vast war debt, by the depreciation of her currency to less than one-seventh its former value, . . . by Revolution at home and Bolshevism on her borders, and by the unmeasured ruin in strength and hope of four years of all-swallowing war and final defeat.[259]

These harsh conditions became fertile ground for National Socialists, Communists, anarchists, and other radicals. With faith in traditional western liberal institutions and Enlightenment values shattered, Y.B. Yeats poetically described this era as *The Second Coming* when "things fell apart, the center failed to hold."[260] An economic, political, and societal breakdown opened a power vacuum that the Nazis exploited to ratchet up and later fully institutionalize illiberal, antisemitic, and racist policies that Hitler promoted

---

[253] ALY, *supra* note 244, at 13-41.
[254] *See, e.g.*, ROBERT O. PAXTON, EUROPE IN THE 20TH CENTURY, 217-18 (2nd Ed.) (1985).
[255] *Id.*
[256] *Id.*
[257] *Germany's Hyperinflation-Phobia: Germany's Dangerously Patchy Recollection of Interwar Economic History*, THE ECONOMIST, NOV. 15, 2013.
[258] ALY, *supra* note 244, at 120.
[259] JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION 7 (1963) (originally published in 1919 as THE ECONOMIC CONSEQUENCES OF THE PEACE).
[260] WILLIAM BUTLER YEATS, "The Second Coming," Poetry Foundation, available at https://www.poetryfoundation.org/poems/43290/the-second-coming (1915).

in his autobiography *Mein Kampf (My Struggle)*.[261] Yet, according to Aly, "while antisemitism:"

> was a necessary precondition for the Nazi attack on European Jews, it was not a sufficient one. The material interests of individuals first had to be brought together with anti-Semitic ideology before the great crime we now know as the Holocaust could take on its genocidal momentum.[262]

Profiting from corrupt bargains, Hitler's beneficiaries would have few qualms about moving into a neighbor's stolen apartment or home or buying a neighbor's business or artwork for a song after Nazi policy forced that Jewish neighbor to flee his or her homeland or Nzai thugs shipped that Jewish neighbor to a concentration or death camp to be enslaved or murdered or both.\

According to Aly, the opportunistic desire to share in a massive state-orchestrated theft and re-distribution windful of free or virtually free stolen confiscated property and businesses owned by Jews stolen had a mass appeal and also helped "stabilize" Germany's economy.[263] "The decisions between 1933 and 1941 that progressively stripped Jews – initially in Germany and later of their rights and property," Aly explained:

> [W]ere made by various institutions and individuals, first and foremost, of course, by Hitler. Both the individuals and the institutions were guided by ideological group hatred, material interest, and political calculations. Nonetheless, to turn those plans into reality, the decision-makers needed both the approval of the minority of Germans who were politically active and the silent tolerance of the majority. . . The majority of Germans profited materially in either direct or indirect fashion from the expropriation of Jews. Allowing ordinary people to benefit from discrimination made it easier for them to accept their role as tacit accomplices.[264]

But such theft and redistribution had to be rationalized and justified. And, so, it was. Nazi ideology of entitlement, like socialist ideology generally, inured Germans and Nazi collaborators throughout the Third Reich to the theft and redistribution of property which the Nazis and their allies stole from Jews. The Nazis stole art and other valuable possessions owned by Jews living under the Third Reich without due process and justified Nazi theft (as well as the re-distribution of such property) on the basis of what they contended to be Aryan privilege and Aryan-group entitlement and to settle what they wrongly felt to be historical identity-based grievance based on a perverted Nazi sense of

---

[261] *See generally* ADOLPH HITLER, MEIN KAMPF (1925).
[262] ALY, *supra* note 248, at 6.
[263] *See generally id*.
[264] ALY, *supra* note 244, at 205.

justice and hierarchical, intersectional-based order where Jews as group represented "lesser" human beings than Aryans as a group.

Given their distorted worldview, the Nazis sought to reshape and rebalance European society to be controlled by elite Nazi politicians and bureaucrats and to benefit Nazis and more broadly Aryans above and beyond other identity and social groups whom the Nazis in tribalistic-fashion viewed as inferior. While generally striving to pursue Marxist and other socialist policies and agendas, the Nazis did not look at individuals on an individual basis but rather as identity groups. Much like Hugo Chavez in Venezuela, though even more brutally, the Nazis practiced a form of what in modern parlance be referred to as identity-based socialism/fascism.

Just as the Communists relied on class warfare, the Nazis' shaming and shunning of Jews would foreshadow Nazi-supported boycotts of Jewish businesses and soon thereafter riots destroying synagogues and Jewish stores (Kristallnacht).[265] Laws barring Jews from government and academic jobs led to laws barring Jews from marrying non-Jews (Nuremberg Laws) and to the further dehumanization of Jews. Laws forcing Jews to register property, and compelling Jews to emigrate led to laws coercing Jews to sell businesses and property for nominal amounts to Aryan Germans and Austrians and to the annihilation of millions of Jews in the death camps of Auschwitz, Belzec, Buchenwald, and Treblinka and to acclimating non-Jews to "ethnic cleansing" of Jews.

Nazi policy included: a) state-encouraged and institutionalized smearing and persecution of Jews; b) socialist-style concentration of all state power in the hands of an autocratic executive; [266] c) deprivation of citizenship and property rights of Jews; d) abridgment of civil liberties; e) theft and socialist-style confiscation and redistribution of Jewish property to those compliant with the Nazi agenda, and f) exterminating Jews to justify the deprivation of Jewish liberty and the dispossession of Jews.

Beware. History might not repeat but it does tend to follow certain patterns and has been said to rhyme such that there have been tribal wars, ethnic cleansings and genocides carried out in in the years after the Holocaust. Ominously, too, today's resurgence of antisemitism, tribalism, identity-politics socialism, and efforts to create false historical narratives come as civil liberties and minority rights come faced sustained attacks during tough economic times from authoritarians, demagogues, and mobs as memories of

---

[265] *See generally* MICHAEL BERENBAUM, "Kristallnacht," in Encyclopedia Britannica. Also known as Night of Broken Glass or November Pogroms. From November 9-10, 1938, more than 1,000 synagogues were burned or damaged, 7,500 Jewish businesses ransacked, Jewish hospitals, homes, schools, and cemeteries vandalized, and an estimated 30,000 Jewish men arrested. Acting on a telegram from Heinrich Müller that "These [acts] are not to be interfered with," police arrest victims and fire officials stood by as synagogues burned.

[266] The Enabling Act gave legislative and executive power to the Nazi party. The Nuremberg War Crimes Trials included a trial of German judges for blindly carrying out Nazi eugenic and other policies.

the Holocaust fade and become distorted by by modern-day "blood libels" and propaganda as the last generation that remembers the Holocaust passes.[267]

Such are dangerous times for Jews and other minorities because as Douglas Murray warned, "people with malign intent can run an awfully long way awfully fast."[268] By heightening awareness and understanding of where dark forces lead, as Nazi-looted art cases do, such malign intent can be checked to form a guardrail against the dangerous, deadly, evil forces threatening humanity.

CONCLUSION

The Nuremberg War Crimes Trials marked a historical turning point, where victorious Allies sought transitional justice in courtrooms. Litigation of Nazi looted art cases continues that honorable tradition at a time of imperative need.

[267] *Two-Thirds of Millennials, Gen Z Don't know that 6 Million Jews were Killed in the Holocaust, Survey finds*, USA Today, Sept. 16, 2020; Maggie Astor, *Holocaust is Fading from Memory Survey Finds*, N.Y. TIMES, April 12, 2018 ("Forty-one percent of Americans and 66 percent of millennials, cannot say what Auschwitz was. And 52 percent of Americans wrongly think Hitler came to power through force.").

[268] DOUGLAS MURRAY, THE WAR ON THE WEST, 81(2022).

THE LONG TERM-FAILINGS OF INTERNALLY DISPLACED PERSON STATUS: A CASE STUDY OF THE ÊZIDI PEOPLE[1]

SARAH A. JOHNS*

TABLE OF CONTENTS

INTRODUCTION

Never has the term limbo been so appropriately used in modern history than as applied to the current situation of the Êzidi internally displaced persons (IDPs). As Dante's first circle of hell, limbo separates its residents from God, leaving them in a state of eternal suffering and sadness.[2] This in-between place is saved for just individuals who did not receive Christ as required in Catholic theology and are now doomed to reside forever in a place of separation from God's presence.[3] Limbo is a state of punishment that seemingly freezes one's ability to progress or enjoy future happiness.[4]

Eight years after the desperate plight from their homes in Sinjar, the Êzidi people remain largely abandoned as the international community moves forward without them.[5] Nearly 200,000 Êzidis are still trapped in the squalor

* J.D. Candidate, Brigham Young University, J. Reuben Clark Law School
[1] WhatsApp interview with Dr. Mamou Othman (Sep. 27, 2022) (Êzidi (or Yazidi as they are popularly known) is the preferred term for this people as discovered in a personal interview with Dr. Mamou Othman, a representative for the Êzidi people).
[2] *The Divine Comedy: Inferno*, CLIFFNOTES, https://www.cliffsnotes.com/literature/d/the-divine-comedy-inferno/summary-and-analysis/canto-iv.
[3] *Id.*
[4] *See id.*
[5] Jane Arraf, *With No Options, Displaced Iraqi Yazidis Return To Homes Destroyed In Isis Fight*, NPR, (Dec. 3, 2020), https://www.npr.org/2020/12/03/941976085/with-no-options-displaced-iraqi-

of IDP camps with little hope of change in the future.[6] It is now the responsibility of the international community to recognize the shortcomings of using IDP camps as a long-term solution for displaced persons because the long-term conditions brought about by these camps violate the Êzidis' legally established human rights.[7] In recognizing this shortcoming, the international community can better uphold the human rights sustained in the UN's universal declaration on the topic and made law in the International Covenant for Civil and Political Rights.[8]

This paper argues that IDP status is not a viable long-term solution to internal displacement and that the international community should intervene to adopt the laws necessary to prevent the prolonging and occurrence of IDP status. In Part I, this paper will provide background on the Êzidi IDPs and on the evolution of IDP status in the international community. In Part II, this paper will discuss the myriad of challenges that currently separate the Êzidis from escaping their IDP limbo. These challenges include Iraq's sovereignty as a state and how this key concept of international law has thus far prevented meaningful international intervention, the barriers the Êzidis face in attempting to gain asylum, especially in the forms of cost and uncertainty, as well as barriers to the Êzidis' return to Sinjar. In Part III, this paper will discuss Iraq's legal obligations to ensure the human rights of the Êzidi people and how Iraq has failed to meet these obligations.[9] Part IV will then discuss the possible legal interventions that can be made to hold Iraq accountable for its failings to meet its legal obligations to the Êzidis. These interventions include individual complaints by Êzidis to the Human Rights Committee and ICCPR member State complaints requesting Êzidis' rights be enforced.[10] In Part V, this paper will discuss the impact of these findings on other internally displaced populations and grapple with the moral difficulties brought about by constraints on the resources of international intervention. Lastly, Part VI will discuss the future of internal displacement and how this future will require greater care from the international community to ensure that IDP status remains a temporary intervention. Here, the Guiding Principles on Internal Displacement will be suggested as a possible legal solution to address the increasing number of IDPs worldwide.

I. BACKGROUND

A. THE EVOLUTION OF PROTECTIONS RELATING TO INTERNAL DISPLACEMENT

yazidis-return-to-homes-destroyed-in-isis-fight#:~:text=Thousands%20of%20women%20were%20taken,or%20too%20poor%20to%20return.

[6] *Id.*

[7] *See International Covenant on Civil and Political Rights*, OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[8] *See id.*

[9] *See id.*

[10] *Id.*

Though today internal displacement is well understood by the international community as an important issue, legal frameworks for dealing with internal displacement have yet to be adopted into widespread international law. Internal displacement became a global issue in the early 1990s and has since become better defined through a series of frameworks and protocols.[11] In 1998, one of the first milestones toward developing standards for protecting internally displaced people was adopted.[12] This milestone, known as the Guiding Principles, established thirty principles covering the following topics: protection against displacement, protection during displacement, frameworks for humanitarian assistance, protections during return, resettlement in other parts of the country, and assisting IDPs in becoming integrated in the locations where they have been displaced.[13] The Guiding Principles affirm the need for national authorities to ensure IDPs have access to all rights, including a right to seek asylum in other countries.[14] Additionally, the Guiding Principles make clear that national authorities should accept international intervention if they are unable to provide for the rights of their IDPs.[15]

In 2006, the International Conference on the Great Lakes Region (ICGLR) adopted the Protocol on the Protection and Assistance to Internally Displaced Persons, which was the first legally binding authority to incorporate the above mentioned General Principles into international law.[16] The framework became binding in 2008 to the eleven member states of the ICGLR, all of which belong to the continent of Africa.[17] Also in 2008, the Internal Displacement Monitoring Centre along with the International Refugee Rights Initiative published a guide for all civil societies to use the Protocol on the Protection and Assistance to Internally Displaced Persons to further the rights of all IDPs.[18] In 2012, the Kampala Convention was created, binding its African government parties to provide protections for IDPs.[19]

The year 2018 marked the 20th anniversary of the General Principles at which time UN representatives launched the GP20 Multi-stakeholder Plan of Action for Advancing Prevention, Protection and Solutions for Internally Displaced Persons.[20] This three-year plan focused on four issues: "the

---

[11] *An Institutional History of Internal Displacement*, IDMC, https://www.internal-displacement.org/internal-displacement/history-of-internal-displacement.
[12] *Guiding Principles on Internal Displacement*, IDMC, https://www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *An Institutional History of Internal Displacement*, *supra* note 11.
[17] *Id. (ICGLR* member states include: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia).
[18] *Id.*
[19] *Id. (ICGLR* member states include: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia).
[20] *Multi-stakeholder Plan of Action for Advancing Prevention, Protection and Solutions for Internally Displaced Persons (GP20)*, United Nations Human Rights Office of the High Commissioner,

participation of internally displaced persons in programmes and decision-making processes affecting them, national law and policy on internal displacement, data and analysis on internal displacement, and addressing protracted displacement and securing durable solutions."[21] The product of the three-year GP20 was the GP20 Compilation of National Practices to Prevent, Address and Find Durable Solutions to Internal Displacement which discussed twenty-two promising internal displacement practices but created no legally binding standards for dealing with internal displacement.[22]

From the early 1990's to today, it is clear that the international community has become increasingly aware of the difficult plight of IDPs but has simultaneously been unable to create enforceable international standards of protection. It is with this background in mind that we move forward to dissect the plight of the Êzidi IDPs and how their current IDP status violates their legally established human rights.

B. UNDERSTANDING THE ÊZIDI PLIGHT

In northern Iraq lies the city of Sinjar, a former haven for the peaceful followers of one of the Middle East's minority religions, the Êzidis. Sinjar is home not only to the Êzidi people, but to many of their holy sites, including many temples.[23] For hundreds of years, the Êzidis have shirked assimilation to the dominant religions surrounding them,[24] and because of their resistance to Islamic conversion, Al-Qaeda declared the Êzidis to be infidels, making them targets for ISIL's aggression.[25] In August of 2014, ISIL sought to stamp out this faith group in a brutal attack against the Êzidis, which acts have been officially declared a genocide by the UN Human Rights Panel.[26] By the end of the day, on August 3rd, 2014, ISIL brought the Êzidi home of Sinjar under their control.[27] The ISIL conspirators began by capturing Êzidi families and then separating the women from the men.[28] After the men and women were separated, the men were forced to either convert or face execution.[29] Those willing to convert to Islam were then taken to ISIL work camps and young boys, aged seven and up, were taken to ISIL conversion camps, where they

---

https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/multi-stakeholder-plan-action-advancing-prevention-protection-and-solutions-internally-displaced.

[21] *Id.*

[22] *Id.*

[23] *List of Yazidi holy Places*, WIKIPEDIA (2022), https://en.wikipedia.org/wiki/List_of_Yazidi_holy_places.

[24] *Why did Isis attack the Yezidi people?*, CBS NEWS (May 8, 2016, 6:35 PM)), https://www.cbsnews.com/news/60-minutes-overtime-why-did-isis-attack-the-yezidi-people/.

[25] *Who are the Yazidis and Why is Isis Hunting Them?*, THE GUARDIAN (2014), https://www.theguardian.com/world/2014/aug/07/who-yazidi-isis-iraq-religion-ethnicity-mountains.

[26] *ISIL crimes against Yazidis constitute genocide, UN Investigation Team finds*, UNITED NATIONS: UN NEWS, (May 10, 2021), https://news.un.org/en/story/2021/05/1091662.

[27] *Iraq/Yazidi*, *Genocide Studies Program*, Yale University, https://gsp.yale.edu/case-studies/iraq-yazidi.

[28] *The gendering of genocide: Isis's crimes against the Yazidis*, RELIEFWEB (2016), https://reliefweb.int/report/syrian-arab-republic/gendering-genocide-isis-s-crimes-against-yazidis.

[29] *Id.*

faced forced conversion and were given new identities and names.[30] All captured women aged nine years old and older were taken to holding sites where they are abused and sold into sexual slavery; the sexual assaults waged against the Êzidi women are viewed by ISIL fighters as spiritually beneficial and virtuous acts.[31]

Since the August 3rd attack, an estimated 5,000 Êzidis have been murdered by ISIL while 3,000 remain slaves to their captures who have continually required that the Êzidis "convert (to Islam) or die."[32] Those Êzidis that are still living and free have either escaped to the mountains nearby Sinjar to live in IDP camps in that region, or have fled Iraq under the asylum protections of other nations.[33]

The genocide against the Êzidis in Sinjar is especially significant because it could have extinguished the Êzidi faith completely, as Êzidism does not have a central text but is passed down orally.[34] These orally transmitted texts require that there be Êzidi survivors who are able to pass down the religion to budding Êzidis. Additionally, Êzidism is an ethno-religious faith as the faith requires its members not mix with non-Êzidis.[35] Therefore, if ISIL had been successful in wiping out the Êzidi believers, it would have erased both a religion and an ethnicity of people.

The Êzidi religion, Êzidism, is a monotheistic faith that centers on the belief that God interacts with mankind through seven angels. One of these seven angels, the peacock angel, Melek Taûs, is believed to have convinced Adam to leave the garden of Eden.[36] Due to other faiths attributing Adam's departure from the garden to the devil, Melek Taûs has been widely and erroneously confused with the devil, a concept that Êzidism fully rejects.[37] Much of the persecution that the Êzidis have faced has come from the erroneous view that they are devil worshippers, stemming largely from the peacock parade that the Êzidis hold as a way to show respect to the angel, Melek Taûs.[38] As a religion that fully rejects the concept of a devil, Êzidism teaches one to focus on the concepts of right and wrong through a greater focus on correct practice than on correct belief.[39] Part of this correct practice includes the use of sacred hymns to communicate messages of faith and devotion; these hymns also play a central role in the Êzidis' ability to pass down the religion orally.[40] Overall, Êzidism encourages only peaceful practice

---

[30] *Id.*
[31] *Id.*
[32] *Why did Isis attack the Yezidi people?*, *supra* note 24.
[33] *Id.*
[34] *Id.*
[35] WhatsApp interview with Dr. Mamou Othman (Sep. 29, 2022).
[36] ReligionForBreakfast, *Yazidi Religion Explained*, YouTube (Sept. 10, 2020), https://www.youtube.com/watch?v=QRB9e9Ol4Hs.
[37] *Id.*
[38] ReligionForBreakfast, *supra* note 36.
[39] *Id.*
[40] *Id.*

from its believers and though largely misunderstood and persecuted, the Êzidis continue to forward their faith of peaceful devotion to God.[41]

Though the followers of Êzidism have persevered in the face of ISIL's relentless attacks against them, IDP living is hardly the prize the Êzidi survivors deserve. In tent homes the size of regular car parking spots with only a PVC floor separating them from the dirt below, the Êzidis new living conditions remain far less than ideal.[42] Abandoning the Êzidis to remain indefinitely in IDP conditions, due to barriers the IDPs face in both attempting to return or obtain asylum, as discussed below, will require constant humanitarian intervention just to meet the Êzidis' basic survival needs. After eight years in this brutal environment, it is time that the international community recognize the human rights violations brought about by the Êzidis' long-term IDP status and create legal frameworks to ensure that these violations be ended and prevented.

II. CHALLENGES TO ESCAPING IDP STATUS

Widely recognized as a foundational principle of international law is the concept of state sovereignty and the necessity of protecting state's rights.[43] Because state sovereignty is a priority, the assistance and protection of internally displaced persons (IDPs) currently remains the primary responsibility of the state in which the IDPs reside.[44] This unfortunate reality furthers the limbo conditions of the Êzidi people as it allows the international community to view their predicament with a "hands-off" attitude while their homeland continues to offer them no protection. Thus, the Êzidis are currently left to solve the issue of their continuing IDP status themselves. The two main solutions to self-led escape of IDP status are to seek asylum in another State, or to return to one's home.[45]

A. Asylum

Though asylum offers incredible relief to many IDPs across the globe, this form of relief is not a viable option for the Êzidi IDPs because of cost constraints. International refugee law, via the 1951 Convention Relating to the Status of Refugees (of which two neighboring nations to Iraq, Turkey and Iran, have ratified)[46] provides protections to individuals who:

---

[41] *Id.*

[42] Kristina Schlick, *Yazidis still displaced in their own country*, DW (June 11, 2021), https://www.dw.com/en/yazidis-still-displaced-in-their-own-country/a-59725928.

[43] Chris McGrath, *Principles of sovereignty under international law*, Envlaw.com.au (Dec. 10, 2018), http://envlaw.com.au/wp-content/uploads/handout_sovereignty.pdf.

[44] *About internally displaced persons*, OHCHR, https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/about-internally-displaced-persons#:~:text=Once%20persons%20have%20been%20displaced,freedom%20of%20movement%20and%20residence%2C.

[45] *Id.*

[46] *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR, United Nations High Commissioner for Refugees, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

- "[Have] a well-founded fear of being persecuted because of his or her: Race; Religion; Nationality; Membership of a particular social group; or Political opinion.
- [Are] outside his or her country of origin or habitual residence;
- [Are] unable or unwilling to avail him- or herself of the protection of that country, or to return there, because of fear of persecution; and
- [Are] not explicitly excluded from refugee protection or whose refugee status has not ceased because of a change of circumstances."[47]

Internationally, asylum is generally noted as the status available to those who have not yet, but are in the process of, achieving refugee status.[48] ISIL is the perpetrator of the Êzidi genocide, and though Iraq declared ISIL defeated in November of 2017 after a long battle against them, "thousands of fighters, affiliates, and sympathizers of the decentralized [ISIL] organization remain[] at large."[49] Thus, although Iraq is clearly willing to control ISIL, they have been unable to completely stamp out all ISIL threats against the Êzidis. Therefore, the Êzidis would qualify for refugee and thus asylum help because they meet all of the required elements. The Êzidis are in fear of persecution based on their ethnicity and religion, they have been unable to avail themselves of Iraq's protections due to Iraq's inability to snuff out all ISIL threats against them, and there is nothing specifically excluding them from obtaining refugee status.[50] With this understanding, many Êzidis have been able to obtain asylum abroad.

Why then are not all of the Êzidis' fleeing their IDP camps for international asylum protections? In a personal interview with Dr. Mamou Othman, an Êzidi professional living in Germany and working to represent the needs of his people abroad, Dr. Othman stated that "most of [the Êzidi people] want to immigrate but it is [too] expensive. They [feel] hopeless and [] not secure."[51] The expense of asylum is too great for the Êzidis who have been without regular work for the last eight years and whose resources were greatly destroyed in the ISIL attacks against them. By way of example, the cost for a family of Syrian refugees to escape to the U.S. was about $5,000 for travel expenses alone.[52] If a similar cost is applied to the 200,000 Êzidi IDPs hoping to escape their current conditions, their travel expenses will cost

---

[47] FRANCES NICHOLSON & JUDITH KUMIN, INTER-PARLIAMENTARY UNION AND UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS, 18 (2017).
[48] *Id.* at 17.
[49] *ISIL outside of Iraq and Syria*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant/ISIL-outside-of-Iraq-and-Syria#ref335211.
[50] *About internally displaced persons*, *supra* note 44.
[51] Othman, *supra* note 35.
[52] Hannan Adely, *For refugees, escape to U.S. comes with a cost*, NorthJersey.com), (Oct. 12, 2017, 12:00 PM), https://www.northjersey.com/story/news/2017/10/12/refugees-escape-u-s-comes-cost/695033001/.

around $167,000,000,[53] and of course, this does not include the costs of asylum applications, attorney fees, or the costs of settling in a new place. Clearly, the cost of obtaining asylum is an immense barrier for the Êzidi IDPs.

Additionally, it is a sad reality that many nations reject refugees. This rejection can be done on the grounds that states cannot admit these persons due to economic and political concerns.[54] The uncertainty of admission is therefore another large barrier to the Êzidis on their journey toward asylum as they must know not only that they will be able to afford to flee, but that spending this money will not be in vain due to the possibility of rejection or forced repatriation.

B. Return

The second road to self-led IDP status termination, return, also fails as a viable option for the Êzidi IDPs due to a lack of safety and infrastructure in Sinjar. Return to Sinjar is a preferred and important solution for the Êzidi IDPs as Sinjar is home to many of the Êzidis' religiously significant holy sites.[55] Dr. Othman shared that in 2020, 25% of the Êzidi IDPs attempted to return to their homes in Sinjar but soon after returned to the IDP camps because of the lack of infrastructure, employment, and safety in Sinjar.[56] Even though ISIL threats in Sinjar may no longer be as greatly pronounced, other militant groups have moved into the area, creating new security threats, which make Êzidi return largely impossible.[57] Sinjar remains a war zone with the following groups remaining in the area: the Kurdistan Workers Party backed People's Protection Units (YPG) which has been "recognized by the US and the EU as a terrorist organization;"[58] the Defense Units of Sinjar (YBŠ), the Iran-supported Popular Mobilization Forces; "the peshmerga, the Kurdish branch of the Iraqi forces; and numerous other representatives of the Iraqi army."[59] Additionally, Turkey bombs the Sinjar area regularly in an effort to fight against some of the Kurdish insurgent groups living there.[60] Observing the situation, Jan Jessen, a German development aid worker and journalist stated that, "[t]he people coming back [to Sinjar] do not have jobs. The infrastructure is broken, and the security situation is difficult."[61] It is unclear whether Iraq has made efforts to clean up the security situation in Sinjar, but the eight year period in which the Êzidis have been unable to return home would hint that Iraq is, at the very least, unable to eliminate these threats to a level sufficient for the safe return of the Êzidis.

---

[53] Calculation based on the cost of moving a family of six persons at a rate of $5,000.
[54] *Rejection of refugees*, THE ENCYCLOPEDIA OF WORLD PROBLEMS & HUMAN POTENTIAL, http://encyclopedia.uia.org/en/problem/rejection-refugees.
[55] *See List of Yazidi holy places*, *supra* note 23.
[56] Othman, *supra* note 35.
[57] Schlick, *supra* note 42.
[58] *Id.*
[59] *Id.*
[60] *See id.*
[61] *Id.*

Though return and asylum are both options for IDP status termination, the barriers of cost, uncertainty, and unsafe return conditions have made these avenues impossible to travel. The Êzidis are thus left to remain in their IDP limbo until other interventions can be made. We now turn our focus to the human rights violations brought about by the inescapable IDP conditions of the Êzidis.

III: IRAQ'S LEGAL OBLIGATIONS TO THE ÊZIDI IDPS

The nation of Iraq is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which obligates Iraq to ensure all individuals within its territory the rights laid out in the ICCPR.[62] Discussed below are the numerous ways in which Iraq has failed to ensure the human rights that it is legally bound to provide to the Êzidi IDPs. These failed rights include: prosecuting ISIL for the crime of genocide, allowing the Êzidis to pursue their economic, social, and cultural development, protecting Êzidi rights to choose their residence, allowing Êzidis to participate in elections, and allowing them to develop their culture and practice their religion. Iraq's failings largely display how long-term IDP living conditions inevitably lead to violations of IDP human rights because many of Iraq's violations stem from the fact that long-term IDP conditions are in and of themselves violative of human rights.

The first of Iraq's violations comes from its failing to try ISIL for the crime of genocide. Though this violation of the Êzidis' human rights does not speak directly to the human rights violations brought about by long-term IDP living, it speaks to one of the reasons that the Êzidis cannot yet safely escape their IDP lifestyle. The UN announced in May of 2021 that its investigations into ISIL's actions against the Êzidis displayed "clear and convincing evidence of genocide."[63] According to Article VI of the Genocide Convention, of which Iraq is a party, "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed."[64] Thus, Iraq is obligated to try ISIL for the crime of genocide committed against the Êzidi people. These obligations are further enforced in article 6.3 of the ICCPR which requires parties to the Convention to not to derogate from the obligations laid out in the Genocide Convention.[65] The ICCPR also requires, in Article 2.3(a), that an effective remedy be provided to any individual whose ICCPR rights have been violated, and the genocide against the Êzidis clearly marks such a violation.[66] Iraq has failed to meet these legal obligations to the Êzidis because "[a]s of July 2019 . . . [a]lthough ISIS has been officially defeated [in Iraq], not a single conspirator or perpetrator of the genocide has been brought to justice – and hardly any

[62] Article 2, Section 2.
[63] 1UN news, *supra* note 26.
[64] G.A. Res. 260 A (III), Convention of the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).
[65] *International Covenant on Civil and Political Rights*, *supra* note 7.
[66] *Id.*

[have] even [been] tried."[67] Without their destroyers brought to justice, the Êzidis cannot safely return to Sinjar, as the culprits of their genocide may still be at large, posing a great threat to Êzidi safety.

Additionally, Iraq's inability to provide the necessary infrastructure to remove the Êzidi IDPs from their IDP camps leads to the violation of Article 1.1-2 of the ICCPR which guarantees the right of all people to freely pursue their economic, social, and cultural development as well as the right against deprivation of one's own means of subsistence.[68] As stated in a May 2019 report on the situation of Êzidi IDPs, the socio-economic conditions of the IDPs are deteriorating, poverty is increasing among the IDPs, and the already limited humanitarian assistance they depend on is ever decreasing.[69] This harsh reality reveals that the foundation needed to support the Êzidis' ability to realize their economic and social rights is quickly crumbling. The Êzidis will remain unable to obtain these rights until they are able to access infrastructure that can support them as they pull themselves out of poverty and seek to meaningfully contribute to and participate in greater society. The Êzidis' inability to develop economically, socially, or culturally is largely attributable to their continued existence in IDP camps, as these camps cannot provide the long-term infrastructure needed for development.

The Êzidis' economic development conditions are especially precarious as finding employment that can cover the basic costs of living in IDP camps has been, at best, unstable.[70] Most work available to the Êzidis comes in the form of casual daily labor that cannot provide regular income.[71] Further, the Êzidis struggle to find employment because they widely lack the necessary documentation and skills needed to obtain jobs outside of construction or agriculture.[72] Due to these difficulties, it has been reported that many Êzidis have been forced to "incur[] debts, [participate in] child marriage and forced marriage, send[] children to work and reduc[e] food intake."[73] Clearly, the current conditions of Êzidi IDP living violate the Êzidis' ICCPR right to economic, cultural, and social development, which Iraq is legally obligated to provide. [74] If Iraq removes the Êzidis from their IDP camps, these violations will be greatly resolved as it is the long-term conditions of IDP living that create these violations.

Next, Article 25(a-b) of the ICCPR establishes the right of individuals to "(a) take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by

---

[67] *Iraq/Yazidi | Genocide Studies Program*, *supra* note 27.
[68] *International Covenant on Civil and Political Rights*, *supra* note 7.
[69] *Coi Note on the Situation of Yazidi idps in the Kurdistan ...*, REFWORLD, (2019), https://www.refworld.org/pdfid/5cd156657.pdf.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *International Covenant on Civil and Political Rights*, *supra* note 7.

secret ballot, guaranteeing the free expression of the will of the electors."[75] Reports have shown that though Êzidis have been provided with representation in parliamentary elections and have been able to vote in their IDP camps, due to their inability to obtain new documentation, none of their votes were counted in a recent election.[76] The lack of access to the documentation required to participate in state elections is a clear violation of the Êzidis' Article 25 right to vote and displays an obvious failing by the state of Iraq to guarantee such a right.[77] This failing also brings additional weight to the loss of the Êzidis' Article 1.1 right to freely pursue their economic, social, and cultural development, as robbing one of the capacity to vote in elections removes the ability to impact the result of those elections, and elected officials then make decisions that impact individuals economic, social, and cultural development.[78] Here, the separateness of IDP camps from the rest of society has proved to create conditions that lead to human rights violations.

Article 27 of the ICCPR guarantees additional rights to members of ethnic and religious minorities, of which the Êzidis certainly are.[79] The text of Article 27 reads that "persons belonging to such [ethnic, religious or linguistic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[80] Due to the unique oral and ethnic nature of the Êzidi faith, it is important that the Êzidis be able to congregate and live together so that intermarriage and the oral sharing of the faith are possible.[81] As discussed above, the Êzidis are forbidden from marrying outsiders to the faith, so it is essential that they be able to live together in mass so that marriage and family options are available to faithful Êzidis.[82] With their homeland of Sinjar destroyed and without the state of Iraq removing the above mentioned barriers to return, the Êzidis must either separate to seek asylum or choose to forgo the comfort of their human rights by remaining in IDP camps. The Êzidis' Article 27 rights would be best ensured if the state of Iraq would assist the now-impoverished Êzidis in rebuilding their homeland for a mass, triumphant return, which would protect the culture and religious practice of the Êzidis.

Iraq's only defense for not providing these rights comes from the excuse laid out in Article 4.1 of the ICCPR which allows a party to the Covenant to derogate from their Covenant responsibilities in a state of emergency.[83] ISIL's violent attacks throughout the state of Iraq certainly created a state of emergency, but this state of emergency necessarily ended when ISIL was

[75] *International Covenant on Civil and Political Rights*, *supra* note 7.
[76] Dengê Êzdiya, *How Yazidi votes are lost in elections in Iraqi Kurdistan and Iraq*, Yazidis.az (2022), https://yazidis.info/en/news/4044.
[77] *International Covenant on Civil and Political Rights*, *supra* note 7.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Why did Isis Attack the Yezidi people?*, *supra* note 24.
[82] Othman, *supra* note 35.
[83] *Id.*

defeated by Iraq in 2019.[84] Since that time, Iraq's obligations to ensure and protect the rights of the Êzidi people have resumed and cannot therefore be excused. Providing for the Êzidis' rights will require that the Êzidis be removed from their IDP camps as many of Iraq's violations stem directly from camp conditions themselves. It is with this need for enforcement in mind that we must now consider the possible avenues for legally enforcing the Êzidis rights against the state of Iraq.

IV: LEGAL INTERVENTION ON BEHALF OF THE ÊZIDI IDPS

A. SUIT BY THE ÊZIDIS

Because their human rights were violated by the State of Iraq, the Êzidis may attempt to sue the State for the enforcement of these rights. [85] Individuals are permitted to file complaints under the Optional Protocol to the ICCPR, but must meet a certain number of standards before this remedy becomes available.[86] The first of these standards is that the Êzidi IDPs must exhaust all of the domestic remedies available to them before attempting to bring suit before the Human Rights Committee.[87] This means that the Êzidi IDPs would need to obtain legal representation in Iraq and then proceed to go through all domestic suit processes against the state.[88] The Êzidis only option to shirk the domestic remedy requirement would arise if those processes are "unreasonably prolonged."[89] If domestic remedies are exhausted or if they can be excused, the Êzidis may file a complaint with the Human Rights Committee.[90] Sadly, because of a large number of filings, the Committee has made clear that there may be a delay of several years before a final decision is made.[91]

Barriers to the Êzidis obtaining justice via a personal suit come mostly from the cost and time required to obtain justice. Having already been impoverished for many years, the Êzidis have limited resources with which they can obtain representation and undergo the long domestic process of filing suits and appealing them through all of the required domestic authorities. A possible solution to the issue of cost arises from the ability of NGOs to help fund the law suit or help the Êzidis obtain adequate representation.[92] But, even if these cost barriers are removed, the Êzidis must still face the long process of seeking justice while remaining in the squalor of their IDP camps. As

---

[84] *Iraq/Yazidi | Genocide Studies Program*, *supra* note 27.
[85] *Individual Complaint Procedures under the United Nations Human Rights Treaties*, OHCHR, https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.2.pdf.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Human Rights Activism and the Role of NGOs, MANUAL FOR HUMAN RIGHTS EDUCATION WITH YOUNG PEOPLE*, https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos.

mentioned above, even if the Êzidis reach the Human Rights Committee, they may still be required to wait several years for a decision to be issued.[93]

Though obtaining justice via the enforcement of human rights or compensation would greatly benefit the Êzidi IDPs, the barriers to reaching this outcome are great. It is likely that the Êzidi IDPs would need an NGO to intervene on their behalf in order to afford the costs of representation, but this representation cannot quickly pull the Êzidis out of their IDP limbo.[94] The scars of their genocide and IDP limbo will remain for years to come, but it is essential that the Êzidis be removed from their IDP conditions so that they can access their human rights and begin to heal from the PTSD and other traumas that they have suffered.[95]

B. SUIT ON BEHALF OF THE ÊZIDI IDPS BY A MEMBER STATE

As discussed above, the conditions created by the Êzidis' long-term IDP lifestyle violate their human rights. The UDHR preamble states that "every individual and every organ of society . . . shall strive . . . by progressive measures, national and international, to secure [the] universal and effective recognition and observance [of these rights], both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[96] Iraq being a member state of the UN should encourage the greater United Nations to take necessary and even progressive measures to ensure that the rights of the Êzidi people are observed.

Because of Iraq's failings, Article 41 of the ICCPR allows for another member State to submit a communication to the Human Rights Committee regarding Iraq's failure to meet its ICCPR obligations.[97] With the limited resources available to the impoverished Êzidis, intervention on their behalf by an ICCPR member State is likely the most realistic solution to the Êzidis' loss of human rights.

In order to bring this matter to the Human Rights Committee, the intervening member State must first submit a written communication to the State of Iraq, bringing the matter to Iraq's attention.[98] At this point, Iraq would be given three months to respond to the member State with an explanation clarifying the remedies pursued and the relevant domestic procedures.[99] Then, if six months have passed from the initial communication to Iraq and the matter has not been resolved to both Iraq and the member State's satisfaction, the issue may then proceed to the Human Rights Committee.[100] When reviewed by the Committee, the issue will be pursued until the satisfaction of

---

[93] *Individual Complaint Procedures under the United Nations Hum...*, *supra* note 85.
[94] *Human Rights Activism and the Role of NGOs*, *supra* note 92.
[95] Othman, *supra* note 35.
[96] *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[97] *International Covenant on Civil and Political Rights*, *supra* note 7.
[98] *Id.*
[99] *Id.*
[100] *Id.*

both parties can be reached, even if this requires the issue be moved to an ad hoc Conciliation Commission.[101] Whatever the mutually agreeable resolution may be, the Êzidis' rights will be better protected with international intervention in this form.

Though intervention on behalf of the Êzidi IDPs is not required of any State party to the ICCPR, the preamble of the ICCPR recognizes that "the inherent dignity and . . . equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[102] The preamble then recognizes that "these rights derive from the inherent dignity of the human person."[103] Therefore, member States should intervene on behalf of the Êzidi IDPs not only to protect their individual rights but to safeguard freedom, justice, and peace in the world.[104]

V: THE IMPACT OF THESE FINDINGS ON OTHER DISPLACED POPULATIONS

With the understanding that long-term IDP conditions violate the legally established human rights of the Êzidi IDPs, it is essential to consider the other long-term IDPs living across the globe. Primarily, if groups like the Palestinian IDPs (who have been displaced since the 1940s) [105] exist, one must query how international intervention can be equitably distributed amongst all of these groups in need? Due to constraints on available resources, it is concluded that offering prioritization to certain groups is not only palatable but is essential for effective intervention.

International intervention on behalf of the Êzidis is justified due to member States' call to safeguard human rights for the protection of the international community. Similar to the Êzidis, the Palestinian IDPs, for example, lack many of their human rights, especially the ability to vote and the right to move freely and choose their residence.[106] Rather than flushing out all of the human rights violations brought about by the long-term IDP status of the Palestinian IDPs, it is sufficient to say that not all of their legally established human rights are available to them, and these missing rights have not been available for a very prolonged period of time.[107] Thus, intervention for the Êzidis creates a moral dilemma, as human rights violations do not exist for them alone.

In truth, the ICCPR recognizes the inherent dignity of every human being and would therefore support intervention until every person can access the full spectrum of the ICCPR rights supporting this dignity.[108] If then, all people are deserving of being granted access to their human rights, how can the

---

[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *What you need to know about Palestinian Refugees and Internally*, BADIL Resources Center, 4 (2011), https://badil.org/phocadownloadpap/Badil_docs/publications/Q&A-en.pdf.
[106] *See generally id.*
[107] *See e.g. id* at 29.
[108] *International Covenant on Civil and Political Rights, supra* note 7.

international community intervene first on behalf of the Êzidis before assisting the Palestinians who have been IDPs since the 1940's? In a perfect world, the international community could and would provide this type of intervention, but with volatile international politics and limited resources, asking that action be taken for all people, all at once, is painfully unrealistic. As any action by the international community is not obligatory and would thus be voluntary, international actors retain discretion to determine where intervention is most appropriate. Therefore, although all people deserve to obtain protection of their human rights, prioritization of certain groups must be given if any action is to be taken.

In the case of the Êzidis, the ethno-religious aspect of Êzidi identity merits prioritized intervention to prevent the extinction of both an ethnicity and a religion.[109] If intervention is not taken to protect the human rights of the Êzidis, it is possible that the world may stand to see Êzidism fade from existence. As was stated previously, the Êzidis must be gathered together in order to pass down the Êzidi faith orally and to be able to intermarry within the faith.[110] The continued presence of the Êzidi people in disease sponsoring IDP camps greatly threatens the remaining Êzidi population in Iraq. For these reasons, though international intervention should be made in all long-term IDP situations in order to protect human rights, the Êzidi IDPs should be given priority in receiving protection.

VI: THE FUTURE OF INTERNAL DISPLACEMENT

The future of internal displacement looks to see larger numbers of IDPs arising all across the globe.[111] The unstable nature of our global political climate looks to a future of likely conflict and therefore larger numbers of IDPs fleeing such conflicts.[112] Even if world peace is achieved in the near future, climate change will surely create numerous IDPs in years to come.[113] With ocean levels rising and natural disasters hastening due to an ever-warmer climate, human beings are likely to lose their homes all across the world to these disasters, and when they do, they will need to seek internal and external protections.[114] For these and other reasons, the international community should begin to brace for larger numbers of IDPs around the world and should do what is necessary to ensure that IDP status remains a temporary intervention. Without preparing for these future IDPs, the world will likely see the collapse of thousands of individuals' abilities to access their human rights.

---

[109] *Why did Isis attack the Yezidi people?*, *supra* note 24.
[110] *Id.*
[111] United Nations Secretary-General's High-Level Panel on Internal Displacement, Shining a Light on Internal Displacement, 5-6 (2021), https://www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/idp_report_web.pdf.
[112] *See id.* at 2.
[113] *See id.* at 5-6.
[114] *See id.* at 51.

Article 2, Section 2 of the ICCPR states that "each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[115] As the rights recognized in the ICCPR are greatly violated in long-term IDP conditions, adopting laws that can prevent and improve these conditions should be a priority and even an obligation of member States. The Guiding Principles on Internal Displacement represent such a law.[116]

The Guiding Principles on Internal Displacement, if they would have been applied to the Êzidi IDPs, would have protected them from many of the human rights violations they have been experiencing. The guiding principles ensure that internal displacement takes place for a time that is no longer than what is absolutely necessary.[117] The Guiding Principles, if incorporated into international law, would require that IDPs be provided with proper documentation, medical care, education, water, shelter, clothing, and sanitation.[118] But, even more important than its protections against the symptoms of IDP status, the Guiding Principles require states to take necessary steps to reduce the possible causes of internal displacement.[119] This important protection would require nations to be aware of volatile situations and be better prepared to prevent internal displacement, or better plan for internal displacement when it occurs.[120] Additionally, the Guiding Principles also establish standards for States to follow in terms of return to home and emphasize the importance of creating conditions that would make return possible.[121] The Guiding Principles, if adopted into international law, would require that States create frameworks of protection that would boost IDP access to human rights and to return.

The Guiding Principles have been adopted into international law in specific regions of Africa via the Protocol on the Protection and Assistance to Internally Displaced Persons (hereafter the "Protocol") which was adopted into law by the parties to the 2006 International Conference on the Great Lakes Region.[122] This Protocol, as an example for the rest of the international community to follow, reveals the benefits and challenges of adopting the Guiding Principles into international law.[123] Key benefits to the Protocol implementing the Guiding Principles are that the Protocol "provid[es] measures aimed at protecting the physical safety and material needs of the

---

[115] *International Covenant on Civil and Political Rights*, *supra* note 7.
[116] United Nations High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, UNHCR (1998), https://www.unhcr.org/43ce1cff2.
[117] *See id.* (Principle 7).
[118] *See id.* (Principles 18, 20, and 23).
[119] *See id.* (Principle 5).
[120] *See id.* (for example, Principle 7).
[121] *Id.* (Principles 28-30).
[122] *An Institutional History of Internal Displacement*, *supra* note 11.
[123] *See generally* Walter Kälin, *The Great Lakes Protocol on Internally Displaced Persons: Responses and challenges*, BROOKINGS (2016), https://www.brookings.edu/on-the-record/the-great-lakes-protocol-on-internally-displaced-persons-responses-and-challenges/.

displaced, and creat[es] obligations to prevent and address the root causes of displacement."[124] This holistic approach aims to solve the issues of displacement from all sides. The main challenges to implementing the Protocol are:

- Solving issues regarding competing property claims. Due to the unsteady nature of displacement, individuals may have legitimate competing claims over the same properties, making restitution during the return process difficult.[125]
- Providing for both justice and reconciliation. As the causes of IDP status are often related to conflict, it is important that victims be provided with justice. This important need for justice may compete with the need for the formation of peace agreements, which can end the conflict and allow for the beginning of the process of return.[126]
- Including IDPs in the process of discovering durable solutions. The Guiding Principles call for the participation of IDPs in the process of developing durable solutions.[127] Though this inclusion of IDP voices is incredibly important, organizing and defining the roles of contributors has proved difficult in the implementation of the Protocol.[128]
- Finding funding for both humanitarian and development assistance. Gaps between the methods of funding humanitarian and development aid make it "extremely difficult to fund early recovery activities" as these activities "must go hand in hand in order to find durable solutions for internally displaced persons."[129]

With the challenges of implementing the Protocol in the Great Lakes Region better understood, it is clear that the benefits of implementing the Guiding Principles into international law still outweigh the possible costs and challenges of doing so. Though the few aforementioned issues are certainly challenging, creating an overall framework that can better prepare the world to prevent, care for, and assist in the return of IDPs is still a better option than choosing to leave the Guiding Principles outside of international law.

It is not enough for the international community to legally enforce the human rights of those already living in long-term IDP conditions. With the warming of the climate and the constant threat of conflict in our volatile world, the international community must begin to create frameworks for the prevention and protections of internally displaced persons before the situations requiring individuals to seek IDP status occur, as there will certainly be more to come. The Guiding Principles on Internal Displacement are a well-researched collective of standards that would help to accomplish these aims

---

[124] *Id.*
[125] *See id.*
[126] *See id.*
[127] *Guiding Principles on Internal Displacement*, *supra* note 12 (Principal 28, Section 2).
[128] *See* Kälin, *supra* note 123.
[129] *Id.*

and should therefore be adopted as a sweeping international effort to address internal displacement at both the source and the symptoms.

CONCLUSION

The peaceful followers of Êzidism have been the victims of a terrible genocide at the hands of ISIL fighters.[130] After fighting for their lives and escaping to the mountains nearby their homeland of Sinjar, the Êzidis have been left to face a new battle against the squalor of IDP camps. After eight years in the limbo of internal displacement, the legally protected human rights of the Êzidi IDPs have been greatly violated.[131] Iraq has not met its legal obligations to protect the human rights of the Êzidis as laid out in the ICCPR and should thus be held accountable for its failings. Lack of access to justice against the perpetrators of their genocide have left the Êzidis in fear of returning to their homes in Sinjar.[132] Additionally, the Êzidis rights to economic, social, and cultural development have been greatly violated as IDP camp conditions see a consistent deterioration of humanitarian aid and lack access to meaningful work.[133] Êzidis' ICCPR protected right to vote has also been stolen from them as their lack of proper identification cards has led to their votes not being counted in recent elections.[134] Additionally, the Êzidis' right as a minority religion to profess and practice their religion and to enjoy their culture cannot be fully realized until they are able to once again gather in mass in their homes in Sinjar for the sharing of their oral religion and the intermarrying of their people. Lastly, the Êzidis' right to life and choice of residence have also been lost as camp conditions threaten the lives of the IDPs and broken infrastructure has trapped the Êzidis in their disease filled camps.

Without the financial resources to seek asylum with other nations and without the infrastructure and safety necessary for the Êzidis to return to Sinjar, intervention will be required if the Êzidis are to have any hope of escaping their IDP status. Individuals can file claims with the Human Rights Committee, giving the Êzidis the option to sue Iraq for the enforcement of their human rights.[135] Though this option could allow for greater protections for the Êzidi IDPs, large barriers of cost and time constraints stand to limit the effectiveness of this remedy. The ICCPR additionally enables member States to intervene when other States fail to meet their obligations under the Covenant and this type of intervention is likely the Êzidis' best hope for legal recourse against the State of Iraq.[136]

Looking to the situation of the Palestinian IDPs, it is clear that long-term IDP conditions violate established human rights, regardless of the identity of

---

[130] *Iraq/Yazidi | Genocide Studies Program*, *supra* note 27.
[131] *Id.*
[132] *Id.*
[133] *Coi Note on the Situation of Yazidi IDPs in the Kurdistan ...*, *supra* note 69.
[134] Êzdiya, *supra* note 76.
[135] *Individual Complaint Procedures Under the United Nations...*, *supra* note 85.
[136] *International Covenant on Civil and Political Rights*, *supra* note 7.

the long-term IDPs.[137] With this understanding, equity would require that intervention be made on behalf of all long-term IDPs whose human rights have been violated. But, because of the limited resources available for such interventions, prioritization of certain groups is not inappropriate. The Êzidi IDPs deserve prioritized intervention because of their ethno-religious status and the need that status creates to prevent the ethnicity and religion from reaching extinction.

Lastly, it is important that the international community recognize the increasing numbers of IDPs across the globe due to conflict and climate change. With this recognition, the international community should adopt the laws necessary to protect future IDPs from facing long-term IDP status and the human rights violations that follow those conditions. Adopting such laws is an obligation of ICCPR member States.[138] It is recommended that member states to the ICCPR adopt the Guiding Principles on Internal Displacement in order to prevent internal displacement, protect IDPs who face internal displacement, and end internal displacement as quickly as possible. The protections laid out in the Guiding Principles would help to create a needed international legal standard for creating these important protection frameworks.

IDP status and accessing IDP camps is a helpful temporary solution for those who face internal displacement, but this study has shown that when these conditions are required in the long-term, they fail to provide for the human rights of the IDPs. All people are deserving of having their human rights ensured and safeguarded by their Nation and by the Nations of the world. Thus, IDP status should not be seen as a viable long-term solution to internal displacement and the international community should intervene and adopt such laws as are necessary to prevent the prolonging of IDP status.

Limbo, the first circle of hell, freezes one's ability to progress or enjoy future happiness.[139] The IDP conditions that the Êzidis have been battling for the last eight years have similarly frozen their progress by thrusting them into poverty and revoking many of their essential human rights. The ethno-religious status of this group makes the Êzidis especially vulnerable to extinction and so they must be offered quick protections. Therefore, the Êzidi IDPs should be prioritized as a group needing immediate intervention in order to remove them from the tragedy of their limbo.

---

[137] *What you need to know about Palestinian Refugees Internally...*, *supra* note 105.
[138] Article 2, Section 2.
[139] *The Divine Comedy: Inferno*, *supra* note 2.

WHY THE U.S. SUPREME COURT IS MORE POLITICIZED THAN ITS U.K. COUNTERPART

MIKE KOWALSKI*

INTRODUCTION

President Joe Biden's nomination of then-Judge Ketanji Brown Jackson to the United States Supreme Court (the "Court") conjured up all too fresh memories of just how politicized the Court, and the candidate selection process, has become. Not long before now-Justice Jackson's nomination, the recent nomination and confirmation of Justice Amy Coney Barrett to the Court received significant media attention, both within the United States (U.S.) and internationally.[1] On the same day of her swearing-in ceremony, the BBC, a public news organization headquartered in the United Kingdom (U.K.), found it relevant to publish an article describing seemingly mundane features of Justice Barrett's life.[2] For example, BBC journalist Vicky Baker noted that "Judge Barrett lives in South Bend, Indiana, with her husband, Jesse, a former federal prosecutor who is now with a private firm. The couple have seven children, including two adopted from Haiti. She is the oldest of seven children herself."[3] Moreover, that February, American essayist Margaret Talbot published an article in *The New Yorker* in which she claims Justice Barrett "isn't just another conservative—she's the product of a

* Graduate of Notre Dame Law School, 2023. The author would like to thank Professors Stephen Tierney and Penny Darbyshire of the Notre Dame London Law Programme and Professor Samuel Bray of Notre Dame Law School for their inspiration and insights into British constitutional law and American constitutional law, respectively. Gratitude is also expressed to Professor Michael Addo, Director of the Notre Dame London Law Programme, and Notre Dame Law School Dean G. Marcus Cole for respectively leading and investing in the program where much of the inspiration for this Note was garnered.

[1] Ed Pilkington & David Smith, *Amy Coney Barrett confirmed to supreme court in major victory for US conservatives*, GUARDIAN (Oct. 27, 2020), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-confirmed-supreme-court-justice-vote ("The US Senate has confirmed Amy Coney Barrett to the supreme court, delivering Donald Trump a huge but partisan victory just eight days before the election and locking in rightwing domination of the nation's highest court for years to come."); Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html ("It was the first time in 151 years that a justice was confirmed without the support of a single member of the minority party, a sign of how bitter Washington's war over judicial nominations has become."); Li Zhou, *Amy Coney Barrett has officially been confirmed as a Supreme Court* justice, VOX (Oct. 26, 2020), https://www.vox.com/2020/10/26/21529619/amy-coney-barrett-confirmed-supreme-court ("Barrett has the potential to roll back the Affordable Care Act, undo *Roe v. Wade*, and expand the interpretation of the Second Amendment as a member of the court."); Sahil Kapur, Julie Tsirkin, & Rebecca Shabad, *Senate confirms Amy Coney Barrett, heralding new conservative era for Supreme* Court, NBC NEWS (Oct. 26, 2020), https://www.nbcnews.com/politics/congress/amy-coney-barrett-set-be-confirmed-supreme-court-monday-n1244748 ("The addition of Barrett could solidify the right's advantages on issues like campaign finance and gun rights while threatening progressive issues like abortion rights, voting rights and health care regulations.").

[2] Vicky Baker, *Amy Coney Barrett: Who is Trump's Supreme Court pick?*, BBC (Oct. 27, 2020), https://www.bbc.co.uk/news/election-us-2020-54303848.

[3] *Id.*

Christian legal movement that is intent on remaking America."[4] Notwithstanding the specifics of Ms. Baker and Ms. Talbot's commentary on Justice Barrett, it is clear that the news media saw nearly everything about her life as relevant and that they were keen on predicting the impact she may have on American politics.

This acute interest in the lives of U.S. Supreme Court justices and fear of their power was not unique to Justice Barrett. In 2017, there was similar fanfare surrounding Justice Neil Gorsuch's nomination and confirmation to the Court.[5] NBC News correspondent Leigh Ann Caldwell described the time between Justice Gorsuch's nomination and his confirmation as "weeks of brutal political fighting which deepened congressional divides and changed the nature of high court appointments in the future."[6] Further, few Court nominations received as much media attention and scrutiny as Justice Brett Kavanaugh's nomination. Mired in a sexual assault allegation,[7] Justice Kavanaugh's nomination and confirmation hearing were covered with acute interest by media outlets.[8] Even Saturday Night Live, a popular late-night television show, covered the events with a comedic portrayal by actor Matt Damon.[9] Justices like the late Justice Antonin Scalia, whose vacancy Justice Neil Gorsuch filled in the Court, and the late Justice Ruth Bader Ginsberg, have even attained celebrity status in American popular culture.[10] Clearly,

---

[4] Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game.

[5] Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html ("President Trump ...nominated Judge Neil M. Gorsuch to the Supreme Court, elevating a conservative in the mold of Justice Antonin Scalia to succeed the late jurist and touching off a brutal, partisan showdown at the start of his presidency over the ideological bent of the nation's highest court."); *Trump picks Neil Gorsuch as nominee for Supreme Court*, BBC (Feb. 1, 2017), https://www.bbc.co.uk/news/world-us-canada-38813137 (speculating on, at the time, Judge Gorsuch's positions on divisive issues in American politics and whether Democrats could successfully prevent him from becoming a justice on the Court).

[6] Leigh Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option'*, NBC NEWS (Apr. 7, 2017), https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766.

[7] Ronan Farrow & Jane Mayer, *A Sexual-Misconduct Allegation Against The Supreme Court Nominee Brett Kavanaugh Stirs Tension Among Democrats in Congress*, NEW YORKER (Sept. 14, 2018), https://www.newyorker.com/news/news-desk/a-sexual-misconduct-allegation-against-the-supreme-court-nominee-brett-kavanaugh-stirs-tension-among-democrats-in-congress ("Senate Democrats disclosed that they had referred a complaint regarding President Trump's Supreme Court nominee, Judge Brett Kavanaugh, to the F.B.I. for investigation. The complaint came from a woman who accused Kavanaugh of sexual misconduct when they were both in high school, more than thirty years ago.").

[8] Demetri Sevastopulo & Kadhim Shubber, *Brett Kavanaugh hearings: key moments*, FIN. TIMES (Sept. 28, 2018), https://www.ft.com/content/b3b4f3ae-c24d-11e8-8d55-54197280d3f7 (describing dramatic moments in, at the time, Judge Kavanaugh's confirmation hearing, including his retorts to the sexual assault allegation).

[9] Saturday Night Live, *Kavanaugh Hearing Cold Open – SNL*, YOUTUBE (Sept. 30, 2018), https://www.youtube.com/watch?v=VRJecfRxbr8.

[10] Tyler Aquilina, *The Notorious R.B.G.: How Ruth Bader Ginsburg became an unlikely pop culture icon*, ENT. WKLY. (Sept. 19, 2020), https://ew.com/celebrity/ruth-bader-ginsburg-pop-culture-icon-notorious-rbg/ ("Ginsburg's iconic status was truly galvanized by Donald Trump's election in 2016. As the oldest justice on the bench and the de facto leader of the Court's left-leaning faction, Ginsburg became a champion for liberals who dreaded Trump's potential to shape the future of the Court. She was no longer merely a judicial hero; she was a symbolic barrier against a decades-long conservative Supreme Court majority. Her workout routine to stay fit and healthy soon became another part of the

there is significant interest in, and sometimes adoration of, U.S. Supreme Court justices.

Compare this situation with that in the U.K. Before 2009, there was not even a distinct Supreme Court there with its own building in London.[11] Instead, the U.K.'s court of highest appeal in all civil and criminal matters outside of Scotland was shrouded in the Palace of Westminster in the House of Lords[12] as the mere Appellate Committee.[13] It was not until the Constitutional Reform Act of 2005 that the Supreme Court of the U.K. found its own place nestled within the other institutions that form the state.[14] While even the British seem to be keenly interested in the U.S. Supreme Court, there is comparatively little such interest in the political nature of the newly-created Supreme Court of the U.K. Although some may suggest that the U.S. Supreme Court garnering such attention and being more political than the Supreme

---

R.B.G. mythos. For her part, Ginsburg—typically soft-spoken and reserved in public, despite her fiery dissents—usually spoke of her newfound status with demure amusement. 'I haven't seen anything that isn't either pleasing or funny on the website,' she told Katie Couric of the "Notorious" Tumblr in 2014. 'I think she has created a wonderful thing with Notorious R.B.G. I will admit I had to be told by my law clerks, what's this Notorious, and they explained that to me, but the website is something I enjoy, all of my family do.' That same year, the justice said she had 'quite a large supply' of 'Notorious R.B.G.' T-shirts, and that she gave them out as gifts.");
Sara Aridi, *How Ruth Bader Ginsburg Lives on In Popular Culture*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html?
(describing that Justice Ruth Bader Ginsburg's life and career have been popularized in books, such as *Notorious RBG: The Life and Times of Ruth Bader Ginsburg*, *I Dissent: Ruth Bader Ginsburg Makes Her Mark*, and *The RBG Workout: How She Stays Strong … and You Can Too*; in television shows, like "The Late Show With Stephen Colbert" and "Saturday Night Live;" and in films, including *RBG* and *On the Basis of Sex*); *see Ruth Bader Ginsburg I Dissent Socks Funny Socks Crazy Socks Meme Socks Dress Socks*, Etsy, https://www.etsy.com/uk/listing/987329405/ruth-bader-ginsburg-i-dessent-socks?gpla=1&gao=1&&utm_source=google&utm_medium=cpc&utm_campaign=shopping_uk_en_gb_-clothing&utm_custom1=_k_Cj0KCQiAmeKQBhDvARIsAHJ7mF7AwJt7EGltubk9k5ohBMISDNvokSiH4OzgTBaXboLXMLvnYGW4jVwaAvKFEALw_wcB_k_&utm_content=go_14821442085_125173007262_549119977881_pla-360912201277_c__987329405engb_486539498&utm_custom2=14821442085&gclid=Cj0KCQiAmeKQBhDvARIsAHJ7mF7AwJt7EGltubk9k5ohBMISDNvokSiH4OzgTBaXboLXMLvnYGW4jVwaAvKFEALw_wcB (last visited Feb. 25, 2022) (showing an example of socks with Justice Ruth Bader Ginsburg's likeness being sold online as a testament to her larger-than-life status in American popular culture); *see also* Bonnie Faller, *Antonin Scalia*, HOLLYWOOD LIFE, https://hollywoodlife.com/celeb/antonin-scalia/ (last visited Feb. 25, 2022) (listing Justice Antonin Scalia as a celebrity and thus placing his public image in the same category as Hollywood actors).

[11] PENNY DARBYSHIRE, DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM 116 (Thomson Reuters ed., 13th ed. 2020).

[12] *Id*. ("The problem with the law lords, [the colloquial term for Lords of Appeal in the Appellate Committee of the House of Lords] apart from their being led by the Lord Chancellor, a government minister, was their location in the legislature and consequent perceived danger that they could be involved in debates on Bills which they might later have to interpret and apply in court. Further, despite the constitutional convention that law lords should not take part in political debates in the House of Lords chamber, some law lords had done so, albeit very rarely. In 2003, the Government was persuaded by the reform campaigners, the radical and outspoken intellectuals, law lords Bingham and Steyn. Lord Steyn invoked the words of the famous constitutionalist Walter Bagehot, that the 'the Supreme Court of the English people … ought not to be *hidden beneath the robes* of a legislative assembly.'" He was alarmed at the *confusion of functions in the eyes of the public and foreign observers*." (emphasis added)).

[13] *Id.*

[14] Constitutional Reform Act 2005 c.4 (U.K.) (detailing that there should be a Supreme Court of the U.K. with no more than 12 full-time judges).

Court of the U.K. boils down to the difference in appointment processes or the outwardly political opinions of the U.S. Court's members, the real reason lies with the underlying constitutional differences upholding each court.[15] While the U.S. Supreme Court is granted power to interpret the U.S. Constitution in a way that directly impacts individuals and thus makes political decisions for the entire U.S., the doctrine of parliamentary sovereignty prevents the Supreme Court of the U.K. from making any such determinations. In this way, regardless of how justices or judges are appointed to each court and despite their political leanings, the U.S. Supreme Court is bound to be more political than its U.K. counterpart solely because of this constitutional difference.

I. U.K. SUPREME COURT: HINDERED BY PARLIAMENTARY SOVEREIGNTY

The U.K. is unique in that it is one of the only countries with an uncodified constitution.[16] Rather than laying out the entire confines of its constitution in a single, coherent document, the U.K.'s institutions are guided by various principles, unwritten traditions, and scattered collections of parliamentary acts.[17] Among the most important of these principles and traditions is parliamentary sovereignty, or parliamentary supremacy.

The birth of Parliament, in the sense of officially using that term to describe the meetings of representatives from around England, is said to begin with King John signing the Magna Carta in 1215.[18] However, the tradition of

---

[15] Richard Hodder-Williams identifies six notions of "political" when discussing the U.S. Supreme Court. Richard Hodder-Williams, *Six Notions of 'Political' and the United States Supreme Court*, BRITISH J. POL. SCI., Jan. 1992, at 1, 2 uses his first notion: "The first notion is essentially definitional. Although there is no universal agreement over what constitutes the essence of politics, there is a general acceptance that politics in the state is the process through which competing choices over public policy are made and which legitimates the exercise of state power to enforce those choices."

[16] Other countries with uncodified constitutions include Israel, New Zealand, Saudi Arabia, and Sweden. Jo Eric Khushal Murkens, *A Written Constitution: A Case Not Made*, 41 OXFORD J. L. STUD. 965, 965 (2021).

[17] HOUSE OF COMMONS, THE UK CONSTITUTION: A SUMMARY, WITH OPTIONS FOR REFORM 5 (2015). ("The United Kingdom constitution is composed of the laws and rules that create the institutions of the state, regulate relationships between those institutions, or regulate the relationship between the state and the individual. These laws and rules are not codified in a single, written document. Constitutional laws and rules have no special legal status.").

[18] *Magna Carta (1215) to Henry IV (1399)*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/keydates/1215to1399/ (last visited Mar. 30, 2022) (outlining a timeline of key dates concerning Parliament); In part, Magna Carta sets out the following:

> "To all free men of our kingdom we have…granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:
>
> …
>
> For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood.
>
> …
>
> In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.
>
> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor

a national council occasionally meeting to aid the king in administering the country goes back even further to the beginning of the 10th century.[19] Evolving over several centuries in response to practicality and tangible demands rather than an ideologically-driven plan, Parliament came to be the sole legislative power in England and Wales, and later in Scotland and Ireland. This power dynamic came about following the Glorious Revolution of 1688-89 (the "Glorious Revolution" or "Revolution").[20] Prior to the Revolution, England and Wales were ruled by a monarchy with significant power over their lives, notwithstanding the liberties granted by Magna Carta. However, during the Glorious Revolution, during which there was a planned change of the reigning monarch, the new co-monarchs acceded to their position only on the express condition that they have certain limitations to their power. These limitations were expressed in the Declaration of Rights, now referred to as the English Bill of Rights, which the new co-monarchs both signed. [21]

In relevant part, the English Bill of Rights provides:

> will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
> To no one will we sell, to no one deny or delay right or justice.
> …
> To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgment of his equals, we will at once restore these.
> …
> Since we have granted all these things for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:
> The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.
> If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us – or in our absence from the kingdom to the chief justice – to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us."

English translation of Magna Carta, BRITISH LIBRARY (July 28, 2014) https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[19] John Maddicott, *Parliament of England to 1307: Origins and Beginnings to 1215 in* A SHORT HISTORY OF PARLIAMENT: ENGLAND, GREAT BRITAIN, THE UNITED KINGDOM, IRELAND & SCOTLAND 3, 3 (Clyve Jones, ed. 2009).

[20] *See* J.D. van der Vyver, *Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights*, 99 S. AFR. L.J. 557, 560, 563 (1982); *see* Dr. Edward Vallance, *The Glorious Revolution*, BBC https://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml (last visited Mar. 30, 2022) (explaining that the Glorious Revolution comprised England inviting William of Orange and his wife Mary to depose James II and replace him as co-monarchs with limited powers).

[21] van der Vyver, *supra* note 21, at 560.

> That the pretended power of suspending the laws or execution of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal; … That election of members of Parliament ought to be free; [and] [t]hat the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court of place out of Parliament.[22]

Following this new power arrangement, the Earl of Shaftesbury declared in 1689 that "[t]he Parliament of England is that supreme and absolute power, which gives life and motion to the English Government."[23]

By the late Victorian era, the doctrine of parliamentary sovereignty came to be defined by renowned English constitutional scholar A.V. Dicey in absolutist terms. Comprised of the House of Lords[24] and the House of Commons,[25] Parliament can pass any law on anything physically possible without legal restraint.[26] Although technically bills require royal assent by the reigning monarch to become Acts of Parliament, the last time royal assent was refused was in 1708.[27] However, although royal assent is merely a formal requirement, it is a requirement nonetheless, and Parliament is consequently construed to mean the Crown in Parliament.[28] In other words, when discussing

---

[22] *English Bill of Rights 1689: An Act Declaring the Rights and liberties of the Subject and Settling the Succession of the Crown*, YALE LAW SCHOOL: THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/england.asp (last visited Mar. 30, 2022).

[23] *See* Andrew Mansfield, *The First Earl of Shaftesbury's Resolute Conscience and Aristocratic Constitutionalism*, HIST. J., 2021, at 969, 981.

[24] DONALD SHELL, THE HOUSE OF LORDS 85 (Manchester Univ. Press. Ed., 2007) ("The House of Lords makes a substantial contribution to the work of the British parliament. Though unquestionably the junior chamber, and not since the 1909-11 constitutional crisis showing any serious sign of forgetting that fact, it is nevertheless constitutionally part of parliament, and must therefore approve all legislation. Though its powers are constrained both by the Parliament Acts and by convention, it shares in the responsibility of parliament to scrutinise all draft legislation. In practice the House is responsible for a great many of the changes made as legislation wends its way through parliament, much of this the result of persuasion rather than through the exercise of power. The House also takes part in the classic scrutiny functions exercised by parliament, through affording opportunities for government spokesmen to be questioned and for debate to take place. Through select committee inquiries too the House contributes to the parliamentary function of holding the executive to account.")

[25] Comprised of 650 elected Members of Parliament (MPs), the House of Commons is responsible for considering and proposing new laws and scrutinizing government policies. *Parliamentary business: House of Commons*, UK PARLIAMENT, https://www.parliament.uk/business/commons/ (last visited Mar. 30, 2022); *see* UK Parliament, *Prime Minister's Questions (PMQs) – 23 February 2022*, YOUTUBE (Feb. 23, 2022), https://www.youtube.com/watch?v=jfHJpMuyJxg for an example of the House of Commons scrutinizing government policies during Prime Minister's Questions, a weekly event during which the Prime Minister must answer questions MPs put forth and thus hold himself accountable to the people of the United Kingdom.

[26] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 3 (Macmillan ed., 8th ed. 1915).

[27] *Key dates of the Glorious Revolution: 1689-1714*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/keydates/keydates1689-1714/ (last visited Dec. 1, 2021) ("1708: Queen Anne refused to assent to the Scottish Militia Bill, the last time the royal veto was used.").

[28] DICEY, *supra* note 27, at 3.

parliamentary sovereignty, scholars like Dicey assume that Parliament will be granted royal assent.[29]

> To this end, Dicey provides that:
>
> > The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. A law may, for our present purpose, be defined as "any rule which will be enforced by the Courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, *will be obeyed by the Courts*. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament[.][30]

It follows that the constitutional limitations, in terms of which laws may be passed, are whatever Parliament defines them to be. Not even a current Parliament can bind a future one.[31] Importantly, under this arrangement, there is no room for courts in the U.K. to stop Parliament from doing whatever it likes. As Dicey stated, Acts of Parliament must "be *obeyed* by the Courts."[32]

Put in these explicit terms, parliamentary sovereignty may seem a bit frightening to an American jurist, or even the casual reader. In the U.S., sovereignty is largely understood to rest with the people. The same arrangement holds true in the U.K., and Dicey defines this as *political* sovereignty.[33] Parliament, on the other hand, retains *legal* sovereignty.[34] In other words, the people of the U.K. have the political sovereignty to elect, or not elect, whomever they would like and to ultimately hold Parliament accountable. In this way, Parliament cannot pass *any* law it likes. Rather, it may only pass those laws palatable to a large swath of British society. The institution still faces political checks, even if there are no legal ones to speak of. Thus, "Parliament has the theoretical power to [even] legislate in a way

---

[29] If the monarch did not grant such assent today, a constitutional crisis would likely ensue in which the requirement for royal assent is revoked.
[30] DICEY, *supra* note 27, at 3-4 (emphasis added).
[31] *Id.* at 21-23.
[32] *Id.* at 4 (emphasis added).
[33] *Id.* at 27-32.
[34] *Id*; Stephen Tierney characterizes this distinction as one between legislative *supremacy*, what this paper refers to as legal sovereignty, and a holistic conception of sovereignty that situates Parliament's ability to legislate in light of political and constitutional constraints. Stephen Tierney, *Parliament and the Brexit Process: The Battle for Constitutional Supremacy in the United Kingdom*, 12 NOTRE DAME J. INT'L & COMP. LAW 1, 2-4.

that infringes … fundamental rights,"[35] but the people of the U.K. still stand as a vanguard against them doing so.

However, some doubt whether the seemingly Victorian era relic of parliamentary sovereignty, even in a purely legal sense, holds true today. One of parliamentary sovereignty'spurpoted chinks in its armor lies with an event that occurred more than 300 years ago: the very creation of the U.K. itself. Following a failed attempt of creating a colony in modern day Panama, Scotland's economy nearly went bankrupt.[36] Partially as a result of this financial disaster, Scotland decided to enter into a political union with England and Wales through the Treaty of Union 1707.[37] Although it is settled that parliamentary sovereignty existed in England beforehand, some contend that this doctrine was nonexistent in Scotland.[38] Scottish nationalist politician Sir Neil MacCormick contends that Scotland was dominated by the idea of sovereignty resting with the people.[39] However, as Dicey explained, Parliament has *legal* sovereignty, not political sovereignty.[40] Thus, political sovereignty still resides with the people of the U.K., just as it arguably did with the people of Scotland before 1707. Notwithstanding the sovereignty argument, others may say that Parliament is bound by the provisions found in the Acts of Union 1707, since, as the pieces of legislation that brought the Treaty of Union 1707 into force, that is seemingly the source of Parliament's legal authority.[41] Yet Parliament "can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections."[42]

Another attack often levied against parliamentary sovereignty is that Parliament did not retain its sovereignty whilst the U.K. was a member of the European Union.[43] Most notably, the *Factortame* case confirmed that

---

[35] TOM BINGHAM, THE RULE OF LAW 168 (Penguin Books Ltd. ed., 2011).
[36] Allan Little, *The Caribbean colony that brought down Scotland*, BBC (May 18, 2014), https://www.bbc.co.uk/news/magazine-27405350.
[37] *Id.*
[38] In *obiter dicta*, Lord President Cooper of the Court of Session stated: The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. … Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done." *See* MacCormick v. Lord Advocate (1953) SC 396, 411 (Scot.).
[39] Dan Sharp, *Parliamentary Sovereignty: A Scottish Perspective*, 6 CAMBRIDGE STUDENT L. REV. 135, 138-39.
[40] DICEY, *supra* note 27, at 27-32; *but see* Dan Sharp, *Parliamentary Sovereignty: A Scottish Perspective*, 6 CAMBRIDGE STUDENT L. REV. 139 (2010) ("[I]t seems perverse to argue that popular sovereignty was the norm in pre-Union Scotland, given that Scotland … was also pre-democratic—or at the very least an aristocratic polity with a limited franchise, within which any conception of 'the people' as collective political agent would perhaps have been largely rhetorical.").
[41] *See* Union with England Act 1707 c. 7 ("That the United Kingdom of Great Britain be Represented by one and the same Parliament to be stiled the Parliament of Great Britain.").
[42] DICEY, *supra* note 27, at 5.
[43] The U.K. officially joined the European Union through the European Communities Act 1972 c. 68 (repealed).

European Union law would take precedence over U.K. laws that it conflicted with, and that courts in member states must adhere to this hierarchy.[44] However, "whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely *voluntary*."[45] In other words, U.K. courts would only accept that European Union law was superior to U.K. law "because Parliament, exercising its legislative authority … told them to. If Parliament, exercising the same authority, told them not to do so, they would obey that injunction also."[46] Further, when Parliament was no longer content with this arrangement,[47] it simply ended it.[48] In this way, Parliament retained its sovereignty throughout the entire time the U.K. was a member of the European Union. Parliament always held on to the option to leave the European Union and was completely within its legal right to exercise such an option.

An even weaker argument against the modern validity of parliamentary sovereignty derives from the devolved parliaments in Scotland, Wales, and Northern Ireland. Following referendums in the late 20th century, Parliament granted certain devolved powers to each of these respective nations within the U.K.[49] Within each of these arrangements, these nations are able to legislate on certain matters, like COVID restrictions, while the U.K. Parliament reserves the power to legislate on other matters, like defense spending.[50] However, Parliament retains the legal right to legislate on any devolved powers.[51] It simply chooses not to. In fact, the devolved parliaments derive their powers solely from Acts of Parliament, which Parliament could legally revoke at any time.[52] In this way, the devolved parliaments are properly understood as "any other statutory body … [that] must work within the scope of … [their] powers."[53]

Yet another criticism of the legal validity of parliamentary sovereignty is more recent, and it rests with the Human Rights Act 1998. Related to this Act of Parliament, the European Convention on Human Rights came into force in 1953.[54] Following the governmental abuses preceding and during the Second

---

[44] R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] I A.C. 603.
[45] R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] I A.C. 603 (emphasis added).
[46] BINGHAM, *supra* note 36, at 164.
[47] To be more precise, the people of the U.K., acting through a referendum, no longer wished to be part of the European Union. Parliament chose to abide by the results of the referendum, but it had no legal obligation to do so.
[48] *See* European Union (Withdrawal Agreement) Act 2020 c. 1.
[49] *Devolved Parliaments and Assemblies*, UK PARLIAMENT, https://www.parliament.uk/about/how/role/relations-with-other-institutions/devolved/ (last visited Mar. 31, 2022).
[50] *See id.*
[51] *Id.*
[52] Scotland Act 1998 c. 46; Northern Ireland Act 1998 c. 47; Government of Wales Act 2006 c. 32 (since amended by the Wales Act 2014 c. 29 & Wales Act 2017 c.4); BINGHAM, *supra* note 36, at 164.
[53] Whaley v. Lord Watson (2000) SC 340, 348 (Scot.).
[54] *European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/pages/home.aspx?p=basictexts#:~:text=of%20the%20Court-,European%20Convention%20on%20Human%20Rights,force%20on%203%20September%201953. (last visited Mar. 31, 2022).

World War, in addition to the growing threat of Stalinism,[55] the European Convention on Human Rights was drafted to include a litany of rights, including freedom of thought (Article 8), right to a fair trial (Article 6), and right to marriage (Article 12).[56] Starting in 1965, the European Court of Human Rights in Strasbourg could hear individual complaints from U.K. citizens.[57] The Human Rights Act 1998, however, allowed individuals in the U.K. to lodge complaints stemming from the European Convention on Human Rights in *domestic* courts.[58] Under the Human Rights Act 1998 (HRA), government ministers have a duty to inform Parliament whether legislation under review will violate the rights found in the European Convention on Human Rights.[59] However, Parliament remains within its right to pass the legislation in question regardless of what the ministerial report says. More germane to the discussion at hand:

> If judges determine that legislation is inconsistent with Convention rights, judicial censure can take an interpretive form under section 3 of the HRA, by altering the scope or effects of legislation through a judicial interpretation that strives to render legislation compatible with Convention rights, or it can take a more explicit form by declaring that the legislation is not compatible with Convention rights under section 4 of the HRA.[60]

Yet even when a court makes a declaration of incompatibility, Parliament does not, legally, have to alter the legislation whatsoever.[61] Parliament could even repeal the Human Rights Act entirely.[62]

Perhaps the best case made against parliamentary sovereignty seems to have come from the Supreme Court of the U.K. itself, although this criticism misses the nuances of the issue. In 2017, the Supreme Court of the U.K. issued a decision on *R (Miller) v. Secretary of State for Exiting the European Union* ("Miller I").[63] Shortly afterwards, they decided *R (Miller) v. The Prime Minister and Cherry Advocate General for Scotland* ("Miller II").[64] Miller I,

---

[55] *See* ROBIN C. A. WHITE & CLARE OVEY, JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1-3 (Oxford Univ. Press ed., 7th ed. 2021); *see also* European Convention on Human Rights.
[56] European Convention on Human Rights.
[57] Vaughne Miller, *Parliamentary Sovereignty and the European Convention on Human Rights* (Nov. 6, 2014), https://commonslibrary.parliament.uk/parliamentary-sovereignty-and-the-european-convention-on-human-rights/#:~:text=The%20UK%20at%20the%20European,in%20relation%20to%20individual%20complaints.
[58] Human Rights Act 1998 c. 42.
[59] Janet L. Hiebert, *Human Rights Act: Ambiguity about Parliamentary Sovereignty*, 14 GERMAN L.J. 2253, 2254 (2013).
[60] *Id.*
[61] *Id.*
[62] *See Press release: Plan to reform Human Rights Act*, MINISTRY OF JUSTICE (Dec. 14, 2021), https://www.gov.uk/government/news/plan-to-reform-human-rights-act (briefly explaining current plans by the Conservative Government in power to reform the Human Rights Act).
[63] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5.
[64] R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland [2019] UKSC 41.

as its long-form name suggests, concerned the U.K. government attempting to unilaterally withdraw from the European Union without parliamentary approval.[65] Because leaving the European Union concerned domestic, individual rights of U.K. citizens, the Supreme Court of the U.K. held that an Act of Parliament was required for the U.K. to legally withdraw.[66] In this way, the Supreme Court of the U.K. directed the *Government* as to what it could and could not do, not *Parliament.* In this way, the U.K. Supreme Court reinforced parliamentary sovereignty.

In Miller II, the Supreme Court of the U.K. was considering the legality of the Government proroguing Parliament in the midst of the withdrawal from the European Union.[67] In light of parliamentary sovereignty, the Supreme Court of the U.K. stated:

> For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[68]

In this case, no such reasonable justification existed, and therefore the prorogation was void.[69] Once again, the Supreme Court of the U.K. limited the power of the Government, but not of Parliament. The two institutions are intertwined in that the Prime Minister is also a Member of Parliament, but the two bodies are legally, distinctly separate.

Having shown that parliamentary sovereignty remains alive and well, it naturally follows that this doctrine precludes the Supreme Court of the U.K. from making any political decisions that Parliament could not make itself. Further to this point, although the Supreme Court of the U.K. can sometimes adjudicate disputes between the other branches of government, such as in Miller II, it is not called upon to decide relations between the government and individuals in the U.K., like defining their individual rights. For example, the Supreme Court of the U.K. will not make policy decisions that cannot be overruled by Parliament, such as by proclaiming whether individuals have a right to an abortion. In the U.S., on the other hand, as will be seen shortly, the U.S. Supreme Court may make such determinations. If a certain law is unconstitutional, then Congress simply cannot pass another law to that effect

---

[65] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5.
[66] *Id.*
[67] R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland [2019] UKSC 41.
[68] *Id.* at para. 50.
[69] *Id.* at para. 70.

without amending the U.S. Constitution itself. In this way, the Supreme Court of the U.K. is inherently not political in the policy-oriented sense that this paper uses.[70]

Nonetheless, some may contend that the apolitical nature of the appointment procedure of the Supreme Court of the U.K. maintains that court's relative neutrality in the political arena. The appointment procedure for judges of the Supreme Court of the U.K. is governed by the Constitutional Reform Act 2005, the same legislation that created the court itself.[71] The Constitutional Reform Act outlines certain professional criteria judges must possess, ensuring a certain degree of quality for candidates.[72] If an individual meets these criteria, then she may be recommended for the position by the Prime Minister.[73] However, unlike the procedure in the U.S., the Prime Minister may only recommend individuals chosen by an independent selection commission, which is convened by the Lord Chancellor whenever a vacancy on the court arises.[74] The members of this independent selection commission will include the President of the Supreme Court, a non-Supreme Court senior judge, and at least one non-lawyer.[75] The independent selection commission will then go through a number of rounds of consultations with senior politicians and various U.K. judges.[76] If the candidate makes it through this rigorous, largely apolitical process, and the selection commission recommends her, then the Lord Chancellor may send this recommendation to the Prime Minister.[77] Once the reigning monarch provides her formal approval, the individual becomes a member of the Supreme Court of the U.K.[78]

While this appointment procedure is well and fine, it is not determinative in making the Supreme Court of the U.K. a relatively apolitical body. A different procedure would not make the Supreme Court of the U.K. any more political than it already is in terms of its constitutional power to make political decisions for the country. Consider the following hypothetical scenario. Instead of the appointment procedure outlined by the Constitutional Reform Act 2005, the Prime Minister nominates a candidate who is then approved or rejected by a simple majority vote in the House of Commons.[79] By the nature

---

[70] *See* Hodder-Williams, *supra* note 16, at 2.
[71] Constitutional Reform Act 2005 c. 4.
[72] Constitutional Reform Act 2005 c. 4, pt. 3, s 25 ("(1) A person is not qualified to be appointed a judge of the Supreme Court unless he has (at any time)— (a) held high judicial office for a period of at least 2 years, (b) satisfied the judicial-appointment eligibility condition on a 15-year basis, or been a qualifying practitioner for a period of at least 15 years.)".
[73] *Id.*, s. 25.
[74] *Id.*; *Appointments of Justices*, THE SUPREME COURT, https://www.supremecourt.uk/about/appointments-of-justices.html (last visited Mar. 31, 2022).
[75] *Appointments of Justices*, *supra* note 75.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] In fact, such a procedure has indeed been called for in the U.K. In response, Lady Hale, an extremely well-respected justice previously on the Supreme Court of the U.K., urged the government not to appoint judges based on their personal political, as is done in the U.S. Owen Bowcott, *Lady Hale warns UK not to select judges on basis of political views*, GUARDIAN (Dec. 18, 2019, 5:47 PM),

of how prime ministers are selected,[80] this majority in the House of Commons will likely approve of the Prime Minister's selection because the candidate will align with the members ideologically. This reformed process would be strikingly similar to the appointment process for U.S. Supreme Court justices, as will be further explained in more detail later on. These justices in the U.K. may further be outwardly political, and their personal views well known. Yet any interpretation of a given law could in every single case could be "overturned" by Parliament, simply passing a new law that is in better accordance with its wishes. There is no constitutional "backstop" for the Supreme Court of the U.K. to fall back on to then tell Parliament that it cannot pass a certain type of law. The doctrine of parliamentary sovereignty, which is alive and well today, prohibits such behavior by the courts.

In this way, all political decisions regarding passing new Acts of Parliament or repealing existing legislation, all debates concerning the constitution of the U.K., the general structure of government, and the forum for potentially extinguishing rights are in Parliament. Thus, the U.K. public need not place any pressure nor care very much whether their Supreme Court justices have personal views on an issue like individual rights. The public will always have a means of redressing any injustices by the Supreme Court of the U.K. by having their representatives in Parliament resolve the issue. In any chain of events, the logical progression leads to Parliament, and not the courts, making political decisions. In contrast, the only body that can overturn a decision handed down by the U.S. Supreme Court is the Court itself. That dynamic is what makes the Court in the U.S. inherently more political than not only the Supreme Court of the U.K., but any other conceivable court of highest appeal in the U.K. — barring an alteration of the doctrine of parliamentary sovereignty.[81] The exceptionally polite nature of the U.K. Supreme Court justices and their commendable adherence to not discussing personal political views with colleagues and the public alike,[82] while admirable and welcomed, is ultimately not what is stopping them from

---

https://www.theguardian.com/law/2019/dec/18/lady-hale-warns-uk-not-to-select-top-judges-on-basis-of-political-views.

[80] *General elections*, UK PARLIAMENT, https://www.parliament.uk/about/how/elections-and-voting/general/ (last visited Mar. 30, 2022) ("The Prime Minister is appointed by the monarch. The monarch's appointment of the Prime Minister is guided by constitutional conventions. The political party that wins the most seats in the House of Commons at a general election usually forms the new government. Its leader becomes Prime Minister.").

[81] Lady Hale disagrees, fearing the Supreme Court of the U.K. could become as politicized as its U.S. counterpart, but her remarks about the politicization of the court are merely surface level concerns and do not touch constitutional issues nor matters of policy:

> Judges have not been appointed for party political reasons in this country since at least the second world war. We do not want to turn into the supreme court of the United States – whether in powers or in process of appointment. On the other hand, we do have an idea of one another's approach to judging and to the law. But we are often surprised. Everyone is persuadable.

Bowcott, *supra* note 80.

[82] *Id.* (Lady Hale was also quoted as stating that "[t]hey are so open-minded and so unpredictable. We go into our post hearing deliberations not knowing what the others are going to say. Well sometimes. We do not know one another's political opinions – although occasionally we may have a good guess – and long may that remain so").

becoming involved in a political theater as is seen in the U.S. surrounding its own Supreme Court justices.

II. U.S. SUPREME COURT: A COURT OF FINAL APPEAL ON CONSTITUTIONAL MATTERS

The U.S. shares significant legal and constitutional traditions with the U.K.[83] However, an obvious point of departure lies with the U.S. Constitution providing for a legislature with only enumerated powers. Originally setting out only to amend the Articles of Confederation, which governed the U.S. between independence from the U.K. and the adoption of the U.S. Constitution, the Framers produced a written constitution in 1789 out of both ingenuity and necessity. Operating within a still new country that had just broken away from the U.K., the U.S. could not merely adopt all the unwritten constitutional conventions and principles as their own. Instead, they explicitly defined the contours of the newly devised federal government in a single document.

This federal government was created to have three separate branches that were meant to check and balance one another. The U.K. Constitution also has three branches of government,[84] but their power dynamic is drastically different from branches of the U.S. federal government. Article I of the U.S. Constitution details the first branch of the federal government, or the legislature. Unlike the legislature of the U.K., Parliament, the American legislature, known as Congress, does not have legislative supremacy. Rather, Congress is severely limited in its legislative powers in Section 8 of Article I by being confined to an explicit list of enumerated powers.[85] In this way,

---

[83] Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 U. PA. L. REV. . 553, 553 (1882) ("The most casual student of the jurisprudence of the several states comprising the Federal Union will observe that our whole system is predicated upon a body of laws not found in any books published on this side of the Atlantic").

[84] These three branches include: (1) the executive, comprised of the Crown and Government; (2) the legislature, *i.e.*, Parliament; and, (2) the judiciary, operating through the court system.

[85] Explicit enumerated powers granted by art. I, § 8 provide:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the Untied States;
> To borrow Money on the credit of the United States;
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
> To establish Post Offices and post Roads;
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
> To constitute Tribunals inferior to the supreme Court;
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Congress can only pass legislation in connection to one of these enumerated powers—a position reinforced by the Tenth Amendment of the U.S. Constitution, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[86]

Having established Congress's limited powers in Article I, the Framers then define the role of the judiciary of the federal government in Article III. Rather vaguely, Section 1 of Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[87] Article III goes on to define the jurisdiction of this mentioned "judicial [p]ower" in Section II,[88] but does not offer a description of what power the judiciary was to have in relation to Congress.

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

[86] U.S. CONST. amend. X.

[87] U.S. CONST. art. III, § 1.

[88] This section provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been

During the ratification process of the U.S. Constitution debates raged over various topics concerning the newly developed document, including arguments over the proper role of the judiciary. In Brutus XI, an anti-Federalist, using "Brutus" as a pen name, espoused his fear over the vast power the U.S. Supreme Court would have:

> They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorized by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them.[89]

In this way, Brutus envisioned the judiciary as some sort of tyrannical ruler that could ultimately establish whatever laws it would like for the U.S.. Opposed to the Parliament of the U.K., it would be the Supreme Court of the U.S. that would be the most powerful branch of government.

Yet, avid Federalist and defender of the U.S. Constitution Alexander Hamilton attempted to assuage Brutus's fears in Federalist Paper No. 78. Hamilton saw the judiciary as the *least* dangerous of all the branches, in part because it would rely on another branch, the executive, to enforce any of its judgements.[90] Moreover, Hamilton argued that a court such as the U.S. Supreme Court was not only valuable, but essential in a political and legal system governed by what he refers to as a "limited constitution," or a constitution in which the legislature is limited in its lawmaking capacities.[91] If Congress shall be limited in what laws it can implement in accordance with the confines established by the U.S. Constitution, then there must be an independent body to interpret whether Congress is abiding by those confines.[92] In fulfilling this role, Hamilton frames the U.S. Supreme Court not as the dangerous usurper of power from the legislature, but as the defender of the people of the U.S. and their expressed will, found within the U.S.

> committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2.

[89] Unknown, *Brutus Essay XI*, (Jan. 31, 1788) https://www.consource.org/document/brutus-xi-1789-6-16/ (last visited Feb. 22, 2023).

[90] Hamilton, *The Federalist Papers: No.* 78, YALE LAW SCHOOL: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited Feb. 22, 2023).

[91] *Id.*

[92] *Id.*

Constitution.[93] In this way, the judiciary is not superior to the legislature, but rather the people are superior to both.[94] "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[95]

However, neither Brutus's nor Hamilton's view was solidified by the judiciary itself until the landmark 1803 U.S. Supreme Court case *Marbury v. Madison*. In *Marbury*, the U.S. Supreme Court held that not only could it decide which law would prevail in the event of a conflict of laws, but also that the Court could strike down legislation as unconstitutional.[96] In this way, the judiciary affirmed for itself that it could limit Congress's power—a drastically different situation than that found between Parliament and the Supreme Court of the U.K.. Moreover, the Court did so not by relying on a purely textual argument, but by emphasizing the mere fact that the U.S. Constitution is a written one with enumerated legislative powers.[97]

This view of judicial supremacy did not go unchallenged. In the 1858 Lincoln−Douglas presidential debates, the two candidates argued extensively over whether the *Dred Scott v. Sanford* decision, which sought to settle the slavery debate by declaring that no black person could ever be a citizen of the United States, was binding in perpetuity on the nation. While Douglas advocated the view that the U.S. Supreme Court's decisions are final,[98] Lincoln argued that the Court's decision may bind Dred Scott in that particular case, but not Congress, the President, or the other branches of the federal government, in their future actions.[99]

The view associated with Lincoln's argument has become known as "departmentalism," and was further advocated by states in the American South following the decision in *Brown v. Board of Education* in 1954 that held racial segregation in public schools as unconstitutional under the 14th Amendment.[100] The Court responded to the southern states' resistance, however, by reaffirming its stance from *Marbury* in yet another decision, *Cooper v. Aaron*. In *Cooper*, Chief Justice Marshall, with the support of a unanimous Court, proclaimed that "[i]f legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."[101] Yet, although the courts have settled the question of

---

[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Marbury v. Madison*, 5 U.S. 137, 180 (1803).
[97] *Id.* ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument").
[98] Stephen Douglas, *Speech at the Third Lincoln-Douglas Debate* (1858).
[99] Abraham Lincoln, *Speech at the Sixth Lincoln-Douglas Debate* (1858).
[100] *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).
[101] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

departmentalism and judicial supremacy in favor of the latter, the debate continues to live on in academic literature.[102]

Nonetheless, this debate predominantly exists only in academic circles, and a majority of justices of the U.S. Supreme Court have not espoused a position in favor of "departmentalism" since the debate was settled, for the judiciary at least, in *Marbury*. In this way, the U.S. Supreme Court remains, functionally, a court of last resort and of highest appeal for constitutional issues. The Court offers binding decisions that proliferate throughout the U.S. via precedent. Thus, the U.S. Supreme Court makes political decisions that affect the entire country.

> It just does not make sense, therefore, for anybody to claim that the Court should not be political, should not disturb the current distribution of power and rights. In a centralized, party-dominated state, such as in China or the Soviet Union in years past, or in some Third World autocracy, the courts may indeed be expected to forgo the 'prerogative of choice' by towing the government line. But that is not possible in the United States. Legitimate authority is so widely diffused, between the individual states and the federal government and between the several parts of the federal government itself, that it is impossible for justices merely to 'take the government line' and act as nothing more than a formal agency of legitimation. Even the Court's harshest critics do not imagine that the Court can properly become a political eunuch in this way.[103]

Barring an adoption of "departmentalism," which, if done, would raise questions as to how Congress's powers would be checked to stay within the confines estabslihed by the U.S. Constitution, the U.S. Supreme Court will remain inherently more political than its U.K. counterpart. Even changing the appointment procedure to the U.S. Supreme Court would not alter this dynamic. Currently, as required by the U.S. Constitution, the President nominates candidates who are then either approved or rejected by the U.S. Senate.[104] Taking this power away from the President and giving it to, say, an independent judicial commission, would not change the fact that U.S. Supreme Court justices would still make major political decisions once on the Court. In this way, the U.S. Supreme Court being more political than the Supreme Court of the U.K. boils down to the former deriving its power from a written constitution providing for a legislature with only enumerated powers, while the latter is severely limited by parliamentary sovereignty. The fact that recent nominations to the U.S. Supreme Court have become

---

[102] *See* Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 THE WM. & MARY L. REV. 1713, 1715-749 (2017) (offering an argument in support of departmentalism over judicial supremacy).
[103] Hodder-Williams, *supra* note 15, at 3.
[104] U.S. CONST. art. II, § 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the Supreme Court").

increasingly contentious in the Senate is likely because congressmen have fully realized the political capacity of the Court and value the achievement of certain policy goals over a sense of unity in the U.S. If anything, the Senate has changed, not the Court. Thus, notwithstanding a drastic alteration to the U.S. Constitution, U.S. citizens should seek a path forward that accepts and better manages the inherently political nature of the Court, rather than simply criticizing the institution on those grounds.

CONCLUSION

Commentators frequently remark that the U.S. Supreme Court is more political than its counterpart in the U.K. However, notwithstanding the personal politics of justices in the U.S. or the appointment procedure they must endure to obtain their current positions, the enumerated legislative powers in the U.S. Constitution are to blame—if blame can be an accurate characterization at all for the politicization of the U.S. Supreme Court as contrasted to the Supreme Court of the U.K. The enumerated powers place a duty on the U.S. Supreme Court to interpret the U.S. Constitution against any potential transgressions against it by Congress. If there was not a referee to demarcate these boundaries, then there would be little point in having them whatsoever. Congress could simply do whatever it likes, irrespective of the power limitations set on it by the U.S. Constitution. Thus, the U.S. Supreme Court *must* make inherently political decisions about the U.S. federal government in relation to both the states and the people of the U.S.

In the U.K., the political machinery could not be more different in this arena. The legislative branch of Parliament is legally sovereign in absolutist terms; it knows no legal bounds. In this way, the Supreme Court of the U.K. is in no constitutional position to make political decisions for the country they serve— this task is simply left to Parliament. Thus, even though an independent appointment procedure or the apolitical culture of justices in the U.K. may create a more congenial work environment, these aspects of the Supreme Court of the U.K. do nothing in the way of preventing it from becoming politicized like the U.S. Supreme Court. Only a constitutional amendment could accomplish this task. Therefore, it behooves us to realize that, to a point, comparisons drawn between the U.S. Supreme Court and the Supreme Court of the U.K. are a relatively fruitless task unless the people of one or both of these countries are considering a dramatic alteration of their system of governance. Perhaps that is a desired outcome, but it is beyond the scope of this paper to determine with convincing finality.

SWITZERLAND'S "SUMMARY PENALTY ORDER" SYSTEM: SHOULD A SIMILAR SYSTEM BE USED FOR AMERICA'S MINOR CRIMES?

KIRK EARL*

INTRODUCTION

Jack Ford did not think he was committing a crime when his girlfriend let him spend the night with her at a house in Baltimore.[1] However, what Ford did not know was that the owner of the house had not given permission for the couple to stay there.[2] Ford was arrested and charged with burglary in the fourth degree,[3] which is a misdemeanor in the state of Maryland.[4] Ford's attorney believed that Ford would have a strong case at trial because he did not know that he was not allowed in the house, so there was no intent to commit a crime.[5] After a month in jail, the prosecution offered a plea to Ford: plead guilty to the burglary charge and leave jail immediately.[6] Ford wanted to prove his innocence, so he refused to take the plea.[7] Ford remained in jail as he waited for his trial, and he faced further delay as the prosecution struggled to bring the homeowner, the state's only witness, to court.[8] Eventually, Ford realized that a guilty plea would be the only way to get out of jail in the immediate future, so he admitted to committing a crime that he did not actually commit.[9]

Misdemeanors in the United States are not nearly as exciting as the gruesome felonies that get reported in local newspapers, but they represent 80 percent of the state criminal dockets around the country.[10] Additionally, a whopping 94 percent of convictions at state courts come from plea bargains rather than traditional trials.[11] While it is hard, if not impossible, to know how many innocent people plead guilty to crimes, there has been a significant increase in recent years of defendants being exonerated after having pleaded

* Juris Doctor, Notre Dame Law School, 2023; Bachelor of Arts in International Relations, Brigham Young University, 2018. Special thanks to Professor Marc Thommen of the University of Zurich for providing so much information on Swiss criminal procedure.

[1] ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 87 (2018). Note that Jack Ford is the pseudonym used by the author to protect her real identity.

[2] *Id*.

[3] *Id*.

[4] MD. CODE ANN., CRIM. LAW § 6-205 (West 2021).

[5] NATAPOFF, *supra* note 2 at 87.

[6] *Id*. at 87-88.

[7] *Id*. at 88.

[8] *Id*.

[9] *Id*.

[10] Jordan Smith, *How Misdemeanors Turn Innocent People into Criminals*, INTERCEPT (Jan. 13, 2019), https://theintercept.com/2019/01/13/misdemeanor-justice-system-alexandra-natapoff.

[11] Clark Neilly, *Prisons are Packed because Prosecutors are Coercing Plea Deals. And, Yes, It's Totally Legal*, NBC NEWS (Aug. 18, 2019), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201.

guilty.[12] And while the punishment of innocent misdemeanor defendants may seem less critical than, say, the potential death sentences or decades-long prison sentences risked by defendants in murder cases, those who plead guilty to misdemeanor offenses suffer from heavy court costs and barriers to accessing work, housing, and even custody of their children.[13]

While the obvious answer to the punishment of innocent individuals accused of misdemeanors may appear to be mandating trials or banning plea bargaining, there are several reasons why both of those solutions would also present problems. One problem in particular is the high cost of jury trials; in addition to requiring prosecutors and defense attorneys to put in significant effort, jury trials require significantly more time in front of a judge than plea bargains.[14] With state judiciaries facing regular significant budget cuts in recent years, it is unlikely that a budget increase necessary to support more criminal trials will pass.[15] In addition to the cost on legal workers, trials also require defendants to come to court multiple times, which may not be desirable to those who wish to resolve their cases quickly without contesting their guilt. Even the most strident opponents of the contemporary plea bargaining system recognize that the basic plea bargaining system is not going away, and the goal now should simply be to make it "less awful."[16]

For these and other reasons, America is not unique in having the vast majority of its criminal defendants convicted without receiving a full trial. However, the system used in these other countries is often very different from the American plea bargaining system. In Switzerland, prosecutors do not have an explicit right to offer plea bargains to defendants.[17] Instead, 90 percent of criminal cases are settled by a "summary penalty order" rather than a trial.[18] This system is defined in the Swiss Criminal Procedure Code as allowing a prosecutor to sentence a defendant with a fine, or either imprisonment for six months or a monetary penalty equivalent to six months of imprisonment.[19]

---

[12] THE NATIONAL REGISTRY OF EXONERATIONS, *Exonerations in 2015* 8 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/documents/exonerations_in_2015.pdf.

[13] INNOCENCE PROJECT, *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign* (Jan. 23, 2017), https://innocenceproject.org/guilty-plea-campaign-announcement/.

[14] Beth Schwartzapfel et al., *The Truth About Trials*, MARSHAL PROJECT (Nov. 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials.

[15] Ian Ward, *Concerns Over Budget Cuts to Save Court System Amid Massive Case Backlog*, GOTHAM GAZETTE (Nov. 13, 2020), https://www.gothamgazette.com/state/9904-legislature-hearing-budget-cuts-new-york-state-courts.

[16] Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 707 (Summer 2013).

[17] FLORIAN BAUMANN ET AL., BUSINESS CRIME LAWS AND REGULATIONS – SWITZERLAND, Chapter 14 (Jun. 10, 2021). https://iclg.com/practice-areas/business-crime-laws-and-regulations/switzerland.

[18] Susanne Wenger, *When Justice Gives Short Shrift*, HORIZONS MAGAZINE (May 3, 2020), https://www.horizons-mag.ch/2020/03/05/penalty-orders-going-straight-to-jail/. While this term has different translations in English, the names used in the Swiss Criminal Procedure Code for this term in the country's official languages are 'Strafbefehl,' 'oronnance pénale,' 'decreto d'accusa,' and 'mandat penal.' The term used in the English translation of the Swiss Criminal Procedure Code is 'summary penalty order,' so that will be used throughout this Note.

[19] SCHWEIZERISCHE STRAFPROZESSORDNUNG [STPO] [SWISS CRIMINAL PROCEDURE CODE] Oct. 5, 2007, SR 312.0, art. 352. Note that an English translation is also provided by the Swiss government, but it does not have the same legal force as the versions written in German, French, Italian, and

Penalty orders similar to this are used throughout Europe to fulfill the same functions accomplished by plea bargaining in the United States.[20] However, while Switzerland is not unique in having a system to administer criminal justice without going through a full trial for every defendant, it is unique in giving prosecutors the ability to sentence a defendant without any judicial involvement.[21]

This Note will provide a comparative analysis Swiss summary penalty order system and contrast it with the American plea-bargaining system. First, this Note will explain the history and application of the Swiss summary penalty order. Second, this Note will explain the similarities and differences between Swiss summary penalty orders and American plea bargaining. This will include a discussion on each system's impact on defendants' rights and the impact on judicial economy. Finally, this Note will explain how aspects of the Swiss summary penalty order system could be implemented in the United States.

I. OVERVIEW OF SWISS SUMMARY PENALTY ORDER SYSTEM

For most of Switzerland's modern history, there was no unified criminal procedure code. Instead, the twenty-six cantons that make up the country each had their own criminal procedure codes, with German-speaking cantons being more influenced by the legal system in Germany and French-speaking cantons being more influenced by the legal system in France.[22] While the specific rules in each canton differed slightly, there were four primary models of criminal prosecution: Examining Magistrate model I, where an independent examining magistrate directed the investigation of a crime before allowing prosecutors to bring charges and prosecute the crime in court; Examining Magistrate model II, where the examining magistrate and the prosecutors investigated crimes together before, in general, allowing prosecutors to bring charges and prosecute the case in court; PPS model I, where the prosecutors had sole responsibility for investigating crimes before bringing in an independent examining magistrate to examine suspects and witnesses, after which the prosecutors could bring charges and prosecute the case in court; and PPS model II, where there was no examining magistrate and prosecutors had full control over the entire proceedings.[23] The cantons using the French language followed the Examining Magistrate I and PPS model I systems while the cantons using the German and Italian languages tended to use examining

---

Romansch. To keep sources limited to two languages, this Note will only refer to the German version of official documents.

[20] Gwladys Gilliéron and Martin Killias, *Strafbefehl und Justizirrtum: Franz Riklin hatte Recht! [Summary Penalty Order and Miscarriage of Justice: Frank Riklin was Right!], in* FESTSCHRIFT FÜR FRANZ RIKLIN 379, 380 [COMMITMENT TO FRANZ RIKLIN] (José Hurtado Pozo et al. Ed., 2007).

[21] Sibilla Bondolfi, *Swiss Prosecutors Have Power to Hand Down Verdicts*, SWI, SWISSINFO.CH (May 4, 2018), https://www.swissinfo.ch/eng/grand-inquisitors-_swiss-prosecutors-have-power-to-hand-down-verdicts/44093914.

[22] Laura Macula, *The Potential to Secure a Fair Trial Through Evidence Exclusion: A Swiss Perspective*, 74 IUS GENTIUM 15, 17 (2019).

[23] Daniel Kettiger and Andreas Lienhard, *The Position of the Public Prosecution Service in the New Swiss Criminal Justice Chain*, 50 IUS GENTIUM 51, 52 (2016).

magistrate model II and PPS model II.[24] In addition to the different cantonal criminal procedure codes, there were separate criminal procedure codes in each canton to deal with juvenile crimes, a federal criminal procedure code for the military, and two other nationwide criminal procedure codes.[25]

This dizzying array of different rules for criminal procedure between cantons became increasingly difficult to maintain by the end of the Twentieth Century, so a group of experts were brought together in 1994 to determine what a comprehensive criminal procedural system could look like.[26] This commission released a report in 1997 proposing that the 26 existing cantonal criminal codes of procedure and 3 federal codes be joined into one federal code of criminal procedure.[27] On March 12, 2000, the Swiss people voted overwhelmingly in support of the drafting of a Swiss criminal procedure code.[28] However, while the concept of a comprehensive criminal procedure code was not particularly controversial, the Swiss people disagreed on what roles examining magistrates and prosecutors should play in the new system.[29] By 2005, the government decided to adopt a system that dispensed completely with the examining magistrate role (PPS model II),[30] which was based on the code used in the canton of Zürich.[31] The new Swiss Criminal Procedure Code was passed on October 5, 2007, and it came into effect on January 1, 2011.[32]

The Swiss Criminal Procedure Code clearly details how an alleged offense can cause a person to be charged with a summary penalty order. First, preliminary proceedings commence when a person is suspected of committing a crime.[33] These preliminary proceedings involve inquires by the police and an investigation by the public prosecutor.[34] When the prosecutor decides to conclude the investigation, she may choose to bring formal charges against the accused, abandon the proceedings, or issue a summary penalty order.[35] The prosecutor may only issue a summary penalty order if the accused has admitted to committing the offense or if his responsibility has been satisfactorily proven.[36] The summary penalty order must contain, among other things, the name of the authority issuing the order, the name of the accused, a description of the act committed by the accused, the offense resulting from the act, the penalty or punishment prescribed by the prosecutor, an explanation of how the summary penalty order can be rejected, and the consequences of

[24] *See Id.* at 52 nn. 3, 5-7; Adam Nowek, *Swiss Cantons: A Guide to Switzerland's Regions*, EXPATICA (June 2, 2021), https://www.expatica.com/ch/living/gov-law-admin/swiss-cantons-102106/.
[25] MARC THOMMEN, INTRODUCTION TO SWISS LAW 397 (Marc Thommen, 2nd ed. 2018).
[26] *Id.* at 399.
[27] *Id*.
[28] *Id.* at 398.
[29] *Id*. at 400.
[30] *Id*.
[31] *See* Bondolfi, *supra* note 22.
[32] THOMMEN, *supra* note 26.
[33] STPO art. 299, para. 2.
[34] STPO art. 300, para. 1.
[35] STPO art. 318, para. 1.
[36] STPO art. 352, para. 1.

not rejecting the order.[37] If the accused, like 90 percent of those served with summary penalty orders,[38] chooses not to reject the order, then the summary penalty order becomes a final judgment without any judicial involvement necessary.[39]

If the accused does not wish to accept the terms of the summary penalty order, he must give a written rejection to the prosecutor within 10 days of the order's issuance.[40] The prosecutor then must gather more evidence to determine how to deal with the rejection.[41] After examining the evidence, the prosecutor may either stand by the summary penalty order, abandon the proceedings, issue a new summary penalty order, or bring charges to court and forget the summary penalty order.[42] If the prosecutor chooses to stand by the original summary penalty order, then she must immediately send the files to the court.[43] If, when ruling on the summary penalty order, the court chooses to invalidate the order, then the prosecution may carry out new preliminary proceedings.[44] The accused can decide at any time to withdraw his rejection,[45] and his rejection will also be withdrawn if he fails to show up for either the examination hearing or the main hearing.[46] While nationwide statistics are not currently available, analysis of the penalty orders rejected by defendants in the canton of St. Gallen has found that prosecutors dismissed charges in less than 15 percent of cases, issued new penalty orders in about 25 percent of cases, and brought cases to court in just 20 percent of cases.[47]

In Switzerland, anyone accused of a crime is allowed to have legal representation at any stage of the proceedings, which includes every part of the summary penalty order proceedings.[48] This right comes with a duty of the court to appoint defense lawyers to defendants who risk serious punishment or cannot properly represent themselves,[49] but this rarely applies to defendants who receive summary penalty orders because cases that will result in less than 4 months of imprisonment are generally regarded as minor.[50] The court looks at individual factors to determine whether a defendant needs to have a government-funded lawyer to protect his rights.[51] The result is that only 7 percent of people in the canton of St. Gallen had legal counsel during

---

[37] STPO art. 353, para. 1.
[38] THOMMEN, *supra* note 26 at 415.
[39] STPO art. 354, para. 4.
[40] STPO art. 354, para. 1.
[41] STPO art. 355, para. 1.
[42] STPO art. 355, para. 3.
[43] STPO art. 356, para. 1.
[44] STPO art. 356, para. 5.
[45] STPO art. 356, para. 3.
[46] STPO art. 355, para. 2; STPO art. 356, para. 4.
[47] Wenger, *supra* note 19 (while it is not explicitly stated in the article, the other 40 percent of cases are presumably upheld by the prosecutor as that is the only other option available).
[48] STPO art. 129, para. 1.
[49] STPO art. 130; BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 29, para. 3.
[50] STPO art. 132, para. 3.
[51] E-mail from Anna Coninx, Professor, University of Lucerne, to author (Feb. 25, 2022, 2:09 AM) (on file with author).

summary penalty order proceedings.[52] The inability for poor people to hire lawyers to review summary penalty orders makes it more likely that they will fail to reject the order and suffer the punishment that a wealthier person could avoid.[53]

Additionally, the summary penalty orders are much more difficult to understand for those who do not speak the official cantonal language. Summary penalty orders use technical language that may be hard for non-native speakers to understand, and most orders are not translated into other languages.[54] Because 77 percent of summary penalty orders are sent through the postal service, most recipients will not get a chance to consult with the prosecutor about the precise details of the order.[55] This is particularly concerning in a country where 23.1 percent of permanent residents consider an unofficial language to be their main language.[56] Of course, because each canton uses its official language or languages to issue summary penalty orders,[57] even people who speak one of the four Swiss languages can have trouble understanding their orders. For example, in 2016, a French-speaking woman in Basel-Stadt was given a summary penalty order written in German sentencing her to one and a half months in jail, and she was unable to challenge it in time due to her poor command of the German language.[58] In 2020, the Federal Supreme Court of Switzerland ruled in the defendant's favor, and Basel-Stadt became the first canton to translate summary penalty orders, but other cantons still risk violating the European Convention on Human Rights when they fail to translate summary penalty orders.[59]

A related concern with Switzerland's summary penalty orders concerns the right to be heard. Under the Swiss Federal Constitution, every party to a case, including criminal defendants, has a right to be heard.[60] However, there is no requirement for the prosecutor to meet with accused persons before issuing a summary penalty order, even if a prison sentence is given, unless the defendant objects to the order.[61] Of the summary penalty orders sent out in Switzerland, 67 percent are given after police interrogate the recipient of the order, 8 percent are given after a prosecutor has a chance to speak directly

---

[52] Wenger, *supra* note 19.
[53] *Id.*
[54] THOMMEN, *supra* note 26, at 419.
[55] MARC THOMMEN, PENAL ORDERS AND ABBREVIATED PROCEEDINGS 10 (Edward Elgar Publishing, forthcoming), https://www.ius.uzh.ch/dam/jcr:e4c10d2c-d6e6-43c7-95b6-4fbaf4e552e7/Marc%20Thommen%20-%20Penal%20Orders%20and%20Abbreviated%20Proceedings_30.10.2021_final%20eingereicht.pdf [https://perma.cc/9GNU-R8NQ].
[56] FED. STAT. OFF., LANGUAGES (2022), https://www.bfs.admin.ch/bfs/en/home/statistics/population/languages-religions/languages.html.
[57] STPO art. 67.
[58] Marc Thommen, *muss die Staatsanwaltschaft Strafbefehle übersetzen?*, PLÄDOYER (Apr. 14, 2021), https://www.plaedoyer.ch/artikel/artikeldetail/marc-thommen-muss-die-staatsanwaltschaft-strafbefehle-uebersetzen/, https://www.ius.uzh.ch/dam/jcr:1dc601ff-812e-468e-9ff7-1045e915459e/16-PL-0221-DIE-FRAGE.pdf.
[59] *Id. See also* European Convention on Human Rights art. 6 para. 3(a), Nov. 4, 1950, E.T.S. No. 005.
[60] BV, art. 29, para. 2.
[61] THOMMEN, *supra* note 56, at 6.

with the recipient, and 25 percent are given to recipients who do not have a chance to speak with anyone from the government before receiving the order.[62] Some drafters of the current criminal procedure code added a provision guaranteeing a hearing between defendants and prosecutors when a prison sentence was proposed, but this was later taken out.[63] The justification for this removal was that defendants could always object to orders to force hearings with the prosecutor.[64]

Another aspect of the right to be heard involves the right to understand the reasons the defendant is being punished. In addition to the difficulties listed above about defendants who are unable to understand their summary penalty orders because of language issues, 70 percent of penalty orders simply fail to state the reasons for the punishment, of which 36 percent ignore even the statutorily required statement of reasons.[65] Because prosecutors have an inquisitorial role under the Swiss system, it is vital that they have a chance to speak with the accused.[66] Without the ability to be heard, Swiss defendants may neither speak to nor hear from the institution deciding their punishment.

Of course, if a person fails to receive their summary penalty order, they may not even know that they are being convicted of an offense regardless of how good their language skills are. In Switzerland, a summary penalty order is considered to have been served even if the accused person does not receive the order in three cases: if the order was served to a household member, if the order was not collected from the post office within seven days of attempted delivery, and if the whereabouts of the person cannot be determined.[67] If a person cannot be located, the government may publish the summary penalty order in the Official Gazette, but this is not necessary.[68] Service is successful most of the time, but approximately 8 percent of summary penalty orders are not directly delivered to the people they are intended for.[69] However, the summary penalty orders are still enforced in these cases even though the recipients never have a chance to challenge the orders.[70]

A controversial aspect of summary penalty orders is the increased privacy they give to those accused of crimes. Criminal trials are, with very few exceptions,[71] conducted nearly entirely in public.[72] However, preliminary proceedings and summary penalty order proceedings are not held in public.[73] It is still possible to get information about summary penalty orders, but it can

---

[62] *Id*.
[63] *Id*. at 5-6.
[64] *Id*. at 6.
[65] *Id*.
[66] *Id*; THOMMEN, *supra* note 26, at 410.
[67] THOMMEN, *supra* note 56, at 10-11.
[68] *Id*.
[69] *Id*. at 11.
[70] *Id*.
[71] STPO art. 69, para. 1.
[72] STPO art. 70.
[73] STPO art. 69, para. 3.

be a long, difficult procedure for journalists and others.[74] This can sometimes be highly appealing to defendants who want to remain private about the offense they commit.[75] However, this appeal can also lead to innocent people accepting their summary penalty orders rather than have their accusation become publicly available, such as with teachers falsely accused of illegal pornographic possession.[76]

Prosecutors in Switzerland have an obligation to prosecute any offense that they reasonably suspect to have happened in their jurisdiction.[77] This means that offenses should be prosecuted if there are substantiated suspicions justifying charges, the conduct fulfills the elements of an offense, there are no grounds justifying the conduct, there are no procedural obstacles preventing prosecution, and there is no other statute giving prosecutorial discretion.[78] This rule was put in place to prevent prosecutorial discretion that would lead to different outcomes for people who commit similar crimes.[79] However, the criminal procedure code requires prosecutors to waive prosecution under three exemptions in the Swiss Criminal Code.[80] These exemptions occur when the level of culpability and consequences of the offense are negligible,[81] the offender has sufficiently repaired the damage he caused or made every reasonable effort to right the wrong he caused,[82] and if the effect on the offender by his own actions was so serious that no more punishment is needed.[83] Additionally, unless a private claimant's interests would be unduly harmed, then prosecution should also be waived if the offense will have a negligible impact on the total sentence and penalty received by the offender, and prosecution should be waived if a person has received an equivalent sentence for the same offense in a foreign country.[84] It is important to note, though, that these are narrow exceptions to the general expectation that all offenses will be fully prosecuted.

While the focus of this Note is Switzerland's usage of the summary penalty order rather than the country's entire criminal procedure system, it is important to recognize some of the aspects of the system that could influence whether a person chooses to accept or reject a summary penalty order. One of these features is the rarity of jury trials in Switzerland today.[85] Like many features of Switzerland's criminal justice system, the decision on whether to use juries or judges to decide criminal cases has been traditionally left to the

---

[74] Bondolfi, *supra* note 22.
[75] *See Id.*
[76] Wenger, *supra* note 19.
[77] STPO art. 7, para. 1.
[78] STPO art. 319, para. 1.
[79] THOMMEN, *supra* note 26, at 411.
[80] STPO art. 8, para. 1.
[81] SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [SWISS CRIMINAL CODE] Dec. 20, 1937, SR 311.0, art. 52.
[82] STGB art. 53.
[83] STGB art. 54.
[84] STPO art. 8, para. 2.
[85] THOMMEN, *supra* note 26, at 398.

cantons to decide.[86] Juries were especially common in French-speaking cantons of Switzerland due to influence from Napoleonic France, but by 1997, only 5 of Switzerland's cantons retained the jury system.[87] Additionally, all cantons using juries other than Geneva decided in the late 1800s to reduce the role of jurors from the exclusive right to determine guilt to a more "collaborative" model that had them work with professional judges to make decisions.[88] With the introduction of the Swiss Criminal Procedure Code, jury trials, while not necessarily banned, became significantly more difficult to apply under the rules primarily taken from German-speaking Switzerland. The only canton that retains the jury system is Italian-speaking Ticino.[89]

Another important feature of Swiss trials is the ability of private claimants to participate in the proceedings. A private claimant is a person who suffered harm because of the alleged actions of the defendant.[90] To participate in the proceedings, a private claimant must make a declaration to a criminal justice authority.[91] Just like the defendant, the private claimant may be represented by legal counsel in proceedings.[92] Through this procedure, the private claimant's civil claims relating to the offense can be decided at the same time as the defendant's guilt.[93] A summary penalty may either include the accused person's acceptance of these civil claims or refer them to civil proceedings.[94]

Finally, it is important to note how fees are split after a trial is concluded. If the defendant is convicted of a crime, then he will have to pay the procedural costs.[95] The private claimant's fees are paid by the accused person only if he has the means to do so,[96] the private claimant if the civil claim is not decided in their favor,[97] or the government if the private claimant does so as part of a settlement with the prosecutor.[98]

It is interesting to note that summary penalty orders are officially labeled as "special procedures," but they are actually much more common than the "principal proceedings" that go through the court system.[99] As will be seen below, Switzerland is not unique in having the most-common criminal procedure be the method that works around the more structured process.

---

[86] Gwladys Gilliéron, Yves Benda, and Stanley L. Brodsky, *Abolition of Juries: The Switzerland Experience*, JURY EXPERT (Aug. 28, 2015), https://www.thejuryexpert.com/2015/08/abolition-of-juries-the-switzerland-experience/.
[87] *Id*.
[88] *Id*.
[89] *Id*, and THOMMEN, *supra* note 26, at 398.
[90] STPO art. 118, para. 1.
[91] STPO art. 118, para. 3.
[92] STPO art. 127, para. 1.
[93] STPO art. 126, para. 1.
[94] STPO art. 353, para. 2.
[95] STPO art. 426, para. 1.
[96] STPO art. 426, para. 4.
[97] STPO art. 427, para. 1.
[98] STPO art. 427, para. 3.
[99] THOMMEN, *supra* note 26, at 419.

II. COMPASSION WITH THE AMERICAN PLEA BARGAINING SYSTEM

It is important to begin this section by recognizing that the United States is similar to pre-2011 Switzerland in that each state has its own criminal justice system that may also be different from the system used in federal criminal prosecutions. Therefore, it is impossible to talk about an American plea bargaining system that applies identically throughout the country. To simplify the comparison between Switzerland and the United States, this Note will focus on the plea-bargaining procedures most commonly used in the United States with a particular focus on limitations placed by Congress and the Supreme Court of the United States. Jurisdictions with particularly noteworthy deviations from the norm may be used to further explore the differences between Switzerland's system and what is used in the United States.

America's plea bargaining system is the result of several centuries of legal changes. It has been possible for a defendant to confess his guilt since before the Norman Invasion of England.[100] However, from this point up until the 1800s, the vast majority of criminal charges were tried, and judges even discouraged defendants from pleading guilty.[101] At that time, some of the first plea bargains were made in Massachusetts by a prosecutor dealing with unlicensed liquor sales.[102] This act was extremely controversial at the time, and the prosecutor had to defend himself in front of the state legislature, but he was able to convince the legislature that dismissing some charges in exchange for guilty pleas for other charges served the public interest by helping him move more quickly through his heavy case load.[103] However, plea bargaining remained extremely unpopular among the general public.[104] It was only in the early 1900s that crime commissions uncovered how common plea bargaining had become in American cities.[105] During this time, there was some doubt about whether the Supreme Court considered plea bargaining to be constitutional, but the court explicitly ruled in 1970 that guilty pleas were voluntary even when made to avoid the death penalty.[106] The following year, the Supreme Court ruled that not only was plea bargaining acceptable but worth encouraging by requiring prosecutors to uphold plea agreements.[107] This has led to a further increase in the number of federal criminal trials avoided through bargaining, from 81 percent in 1970 to 97 percent by 2018.[108]

If plea bargaining was so disfavored by the general public and judges, it may seem strange that it became so dominant in criminal courts around the country. One answer is that criminal trials are costly for both the prosecution

---

[100] Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 7 (1979).
[101] *Id*; CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL 15 (2021).
[102] HESSICK, *supra* note 102, at 16.
[103] *Id*.
[104] *Id*. at 17.
[105] *Id.* at 18; Alschuler, *supra* note 101, at 26-27.
[106] HESSICK, *supra* note 102, at 21.
[107] *Id*. at 22; *Santobello v. New York*, 404 U.S. 257, 262 (1971).
[108] HESSICK, *supra* note 102 at 24.

and the defense, so it is more economically efficient for the parties to agree on an outcome that is acceptable to both sides.[109] The more cynical answer is that the government does not provide enough resources to try every criminal case, so plea bargaining has become necessary to keep the criminal justice system working. This theory is bolstered by the fact that criminal prosecutions increased by 70 percent at the end of the 20th century while "judicial staffing increased by only 11 percent and public defense lawyer staffing increased by only 4 percent."[110] In modern times, both prosecutors and public defenders claim to be overworked and unable to handle their caseloads even with so few cases going to trial.[111] However, as former Supreme Court Chief Justice Burger said, "An affluent society ought not to be miserly in support of justice, for economy is not an objective of the system."[112] Economic costs should certainly be considered, but it would be immoral to sacrifice justice for quicker, cheaper outcomes.

There are also non-economic rationales to explain this movement towards a plea bargaining system. One of these explanations is the increased lack of confidence in jury verdicts. By the end of the 1800s, the Progressive movement was pushing for a stronger government to improve people's lives.[113] This conflicted with the idea of trusting ordinary people to decide whether defendants were guilty or innocent, and prominent legal professionals, including former President and Supreme Court Chief Justice William Taft, derided jury trials as "a disgrace to our civilization" and "lawless."[114] This criticism of jury trials still exists today, with scholars noting that juries may either require only a preponderance of the evidence standard for guilt (as opposed to the 'beyond a reasonable doubt' standard that actually exists in criminal trials) or require proof of guilt beyond any "possible doubt whatsoever."[115] Other contemporary concerns about jury trials include the potential for racially biased jurors,[116] jurors selected for discriminatory reasons,[117] and groupthink that can lead to incorrect verdicts.[118] When jury

---

[109] Dylan Wash, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[110] *Id*. at 23-24.
[111] Richard A. Oppel Jr. and Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html.
[112] *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971).
[113] HESSICK, *supra* note 102 at 26.
[114] *Id*. at 27.
[115] John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1188-1189 (Summer, 2002).
[116] William Morris, *Judge: No New Trial for Waterloo Man After Alleged Racist Jury Remarks*, DES MOINES REGISTER (Feb. 5, 2021, 7:33 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2021/02/05/jury-racism-claims-shooting-wont-result-new-trial-judge-rules/4387078001/.
[117] Elizabeth Hambourger, *NC Case Shines Rare Light on Sexism in Death Penalty Jury Selection*, NC COAL. FOR ALT. TO DEATH PENALTY (Oct. 9, 2019), https://nccadp.org/death-penalty-sexism-jury-selection/.
[118] Marcia Clark, *Casey Anthony Trail: The Sequestered Jury Fell Prey to Idiotic Groupthink*, DAILY BEAST, (Jul. 13, 2017, 7:07 PM), https://www.thedailybeast.com/casey-anthony-trail-the-sequestered-jury-fell-prey-to-idiotic-groupthink.

trials have problems of their own, it makes it easier to accept the plea bargaining system instead.

However, this does not fully explain why plea bargaining still exists today, even as the basic concept of the jury trial has become more positive in contemporary legal circles.[119] For prosecutors eager to get convictions, new tools developed during the 1970s, like pretrial detention, mandatory minimums, and limited transparency rules, made plea deals more enticing to defendants who would likely be found not guilty at a fair trial.[120] Interestingly, though, the American Civil Liberties Union, while criticizing the measures that give prosecutors the upper hand in plea negotiations, also recognizes that plea bargains "can be beneficial to all sides and promote justice and public safety."[121] Public defenders may be unhappy about the pressures plea bargains put on their clients, but they generally recognize that plea bargains offered by prosecutors serve the interests of their clients better than taking their cases to court in most cases.[122] The COVID-19 Pandemic has further increased the number of defendants pleading guilty rather than going to trial due to the lengthy wait times for court proceedings and the danger of contracting COVID-19 in jail before a trial could be held.[123] It seems highly unlikely that plea bargaining will end any time soon in American courtrooms.

In the United States, there are currently three categories of plea bargaining: charge bargaining, sentence bargaining, and count bargaining.[124] Charge bargaining allows a defendant to plead guilty to a crime that is less serious than the one she is originally accused of committing (such as a person pleading guilty to voluntary manslaughter instead of second-degree murder).[125] Sentence bargaining allows a defendant to plead guilty to the original charge but with a reduced sentence compared to what would be likely if found guilty at trial, which can most easily be seen when an alleged murderer pleads guilty to avoid the death penalty.[126] Finally, count bargaining allows a defendant to plead guilty to a charge in exchange for the dismissal of other charges.[127] Different states may use these categories to different extents as required by state law. For example, Indiana requires a factual basis to be

---

[119] HESSICK, *supra* note 102 at 28-29.
[120] Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU NEWS AND COMMENT. (Jan. 13, 2020), https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/.
[121] *Id*.
[122] *See* KATHRYNE M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL 32-33 (2018).
[123] Shi Yan et. al, *Pandemic Pushed Defendants to Plead Guilty More Often, Including Innocent People Pleading to Crimes They Didn't Commit*, CONVERSATION (Aug. 2, 2021, 8:38 AM), https://theconversation.com/pandemic-pushed-defendants-to-plead-guilty-more-often-including-innocent-people-pleading-to-crimes-they-didnt-commit-165056#:~:text=Guilty%20pleas%20are%20a%20necessity,bargaining%20power%20than%20defense%20attorneys.
[124] Jon'a F. Meyer, *Plea Bargaining*, BRITANNICA (Feb. 26, 2020), https://www.britannica.com/topic/plea-bargaining.
[125] *Id*.
[126] *Id*.
[127] *Id*.

shown when a person pleads guilty to a crime, so it is impossible to use the "charge bargaining" technique unless the offender also shows that they could be convicted of the lesser charge.[128] Alternatively, a state may restrict the ability to drop charges for "charge bargaining" or "count bargaining" under certain circumstances, such as how Arizona forbids prosecutors from dismissing charges in DUI cases except when there is an insufficient legal or factual basis to prosecute the case.[129]

One clear difference between the American plea bargaining system and the Swiss summary penalty order system is the level of punishment that can be given out and the crimes that can be subject to the system. In the United States, there is no maximum sentence that can be offered in a plea agreement other than the legal limit established for an offense, but Swiss prosecutors can only issue summary penalty orders that require a maximum of six months in jail or an equivalent penalty.[130] This Note has attempted to narrow the potential comparison somewhat by limiting the focus to misdemeanor plea bargaining in the United States, but summary penalty orders are not limited to the Swiss version of misdemeanors. First, it is important to note that while federal courts in the United States list any offense that has a maximum sentence of one year in prison as a felony,[131] Switzerland draws the line at three years of imprisonment.[132] However, it should be noted that Switzerland places limits on summary penalty orders' *actual* sentences rather than their *potential* sentences. This means that while the original intention was to use summary penalty orders for minor crimes like shoplifting or vandalism, they are now used for more serious crimes.[133] For example, encouraging or helping another person commit suicide is a felony in Switzerland,[134] but there is no minimum sentence attached to the crime, so a prosecutor may issue a summary penalty order to an offender as long as the penalty does not exceed six months of imprisonment. Even crimes that have an official minimum incarceration requirement higher than the six-month threshold could be sentenced through summary penalty orders if, for example, the offender has an unsound mind.[135]

Another interesting comparison is the information needed by the prosecutor to justify either a summary penalty order or a plea offer. While Swiss prosecutors may only issue a summary penalty order when either the defendant accepts responsibility or the investigation satisfactorily shows that he committed the offense,[136] American prosecutors only need to have probable cause that the defendant committed a crime regardless of whether

[128] *State v. Cooper*, 935 N.E.2d 146, 150 (Ind. 2010).
[129] ARIZ. REV. STAT. ANN. § 28-1387(I) (2022).
[130] STPO art. 352 art. 1(d).
[131] 18 U.S.C. § 3559
[132] STGB art. 10.
[133] Bondolfi, *supra* note 22.
[134] STGB art. 115.
[135] Bondolfi, *supra* note 22.
[136] STPO art. 352 art. 1.

the defendant claims to be guilty or innocent.[137] However, this looser standard given to American prosecutors is limited by the requirement that defendants affirmatively accept the plea bargains offered to them before they can be valid.[138] This essentially requires American defendants to satisfy the second prong of the Swiss summary penalty order requirement, though defendants in the United States may plead guilty while also asserting their actual innocence.[139] The biggest difference appears to be that American prosecutors can offer a plea offer to an unrepentant defendant without first conducting an investigation satisfactorily showing the defendant committed the offense while Swiss prosecutors would appear to need to put more work in first.

A related difference is that American plea bargaining is much less explicitly regulated than Swiss summary penalty order creation. Plea bargaining in the United States is generally left to the prosecutor and defendant, though some states require victims of certain crimes to be given an opportunity to contribute to the plea bargaining process.[140] Rather than relying on codes detailing the steps that must be taken, as seen in Switzerland, American prosecutors essentially act without any significant limits or written standards.[141] This lack of rules also allows defense lawyers to play a more active role in determining what agreement comes out at the end of the process,[142] though they may be incentivized to encourage their clients to take unfavorable deals.[143] In Switzerland, though, only prosecutors may issue summary penalty orders.[144] Moreover, if a defendant chooses to reject a summary penalty agreement, then the Swiss prosecutor is required to gather more evidence to assess the rejection.[145] It is not unusual for an American prosecutor to offer several different plea offers during negotiations with the defendant,[146] but Swiss prosecutors only return a rejection with a different summary penalty order 25 percent of the time,[147] and they can only offer one summary penalty order at a time for a crime.[148] While it is impossible to determine how many proposed deals are renegotiated in the United States, it can be estimated that only 2.5 percent of Swiss summary penalty orders at most are changes from the original orders.

---

[137] MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983) (saying prosecutors must drop charges not supported by probable cause).
[138] *Brady v. United States*, 397 U.S. 742, 755 (1970).
[139] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).
[140] *How Courts Work*, AM. BAR ASS'N. (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/#:~:text=Plea%20bargaining%20usually%20involves%20the,follow%20the%20prosecution%20s%20recommendation.
[141] Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COL. L. REV. 1303, 1305 (2018).
[142] Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179 (1975).
[143] *Id.* at 1180.
[144] STPO art. 352, para. 1.
[145] STPO art. 355, para. 1.
[146] *See Missouri v. Frye*, 566 U.S. 134, 138-139 (2012).
[147] Wenger, *supra* note 19.
[148] STPO art. 352, para. 1.

One criticism of the American method is the unreliability of convictions. This unreliability is especially problematic in jurisdictions that use charge bargaining to induce guilty pleas. For example, the author of this Note was an intern at a prosecutor's office in Colorado where driving offences were often pleaded down to charges that bore no relation whatsoever to the original charge, such as "defective vehicle" instead of "careless driving." These plea bargains were generally acceptable for both prosecutors and defendants, but they would make it harder for anyone in the future to understand what had actually happened in the defendant's situation. This unreliability makes the general public more cynical towards the criminal justice system, especially when major crimes are officially charged as something less objectionable.[149] Additionally, this mislabeling makes Americans more attentive to arrest records instead of convictions,[150] which can, even when not accompanied by a conviction, affect what job a person can get,[151] where they can live,[152] and even whether a non-citizen can remain in the United States.[153] This level of unreliability is inconceivable under the Swiss system as Swiss prosecutors may only issue summary penalty orders for offenses discovered through investigation.[154]

Of course, even more damaging is the potential for the unreliability caused when innocent defendants are punished for an act they did not commit. Unfortunately, this is a potential outcome in both countries' systems. False convictions, including false convictions resulting from false confessions, have resulted from Swiss summary penalty orders.[155] A major cause of innocent people pleading guilty in the United States is the "trial penalty," where defendants receive significantly worse sentences if they exercise their right to trial rather than pleading guilty.[156] This ability to essentially coerce defendants into taking pleas to avoid severe sentences at trial has been endorsed by the Supreme Court,[157] and it is very difficult to establish prosecutorial vindictiveness when additional charges are attached to a defendant after a rejected plea deal.[158] In fact, defendants who refuse to enter guilty pleas may be considered mentally ill because it is so unthinkable to choose to try a case

---

[149] John H. Langbein, *Torture and Plea Bargaining*, 45 U. CHI. L. REV. 3, 16 (1978).
[150] *Id*. at 16-17.
[151] Michael Gaul, *Employment Screening FAQ Series: Can We Consider Arrest Records in Hiring Decisions?*, PREFORMA SCREENING SOLUTIONS (Apr. 4, 2019) (showing 31 percent of respondents would consider an arrest without a conviction in hiring decisions), https://www.proformascreening.com/blog/2019/04/04/arrest-records-hiring/.
[152] Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (Spring 2005).
[153] Rachel M. Kane, *Proof of "Good Moral Character" on Part of Applicant for Naturalization*, 161 AM. JURIS. PROOF FACTS (2017).
[154] STPO art. 352, para. 1.
[155] Christof Riedo and Gerhard Fiolka, *Der Strafbefehl: Netter Vorschlag oder ernste Drohung? [The Summary Penalty Order: Nice Suggestion or Serious Threat?]*, FORUMPOENALE (June 9, 2011).
[156] Susan J. Walsh and Norman L. Reimer, *How the Trial Penalty Drives Injustice*, N.Y. DAILY NEWS (Apr. 6, 2021), https://www.nydailynews.com/opinion/ny-oped-how-the-trial-penalty-drives-injustice-20210406-gwcl6osvabcznbap7l7qsfmwgq-story.html.
[157] *See Brady* at 756 (1970).
[158] *See U.S. v Goodwin*, 457 U.S. 368, 381 (1982) ("There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting.")

in court rather than accept the prosecutor's offer.[159] There are some who argue that there really is not a significant trial penalty problem in America's criminal justice system,[160] but the general consensus supports the idea that defendants face worse outcomes if they are found guilty at trial rather than pleading guilty.[161]

The trial penalty concept would not appear to apply to Switzerland's summary penalty orders because of how the process is set up. The only ways the offense justifying a summary penalty order ends up in court are if a defendant rejects the order and the prosecutor chooses to stand by her decision or if the prosecutor simply moves the entire case to court.[162] Unlike the American system, there is not an automatic upgrade in expected punishment simply because the case has progressed to court. Also, unlike the American system, a Swiss defendant can always undo his rejection of the summary penalty order when challenging it in court until the main hearing is held.[163]

In addition to this theoretical idea that a trial penalty should not exist to the same degree in Switzerland as it does in the United States, analysis of summary penalty orders challenged in the canton of St. Gallen between 2012 and 2016 confirms that there is likely no trial penalty under the Swiss system. Swiss researchers focused only on the summary penalty orders that mandated prison time for this analysis because they are easier to assess than those that only required the payment of a fine.[164] While there were originally more than one-hundred cases to analyze, only cases that the court made a decision on were used, which resulted in exactly fifty cases.[165] Out of these fifty cases, five resulted in complete acquittals, nineteen resulted in shorter sentences, twenty-eight remained unchanged, and only two resulted in a longer sentence than that originally offered in the summary penalty order.[166] Additionally, the challenged summary penalty orders that only required defendants to pay a fine never once resulted in a prison sentence being added by a judge.[167] However, there are some limitations to this research. First, there is one group of defendants that is likely to face a trial penalty when challenging their summary

---

[159] Clark Neily, *The Trial Penalty*, CATO INSTITUTE (Feb. 9, 2018, 9:51 AM), https://www.cato.org/blog/trial-penalty; *United States v. Tigano*, 880 F.3d 602, 607 (2nd Cir. 2018).
[160] David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 785 (2013).
[161] *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty*, 84 MISS. L.J. 1195, 1199 (2015) (finding that defendants who take their cases to trial face an expected 64 percent increase in their sentence compared to defendants who plead guilty); Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/.
[162] STPO art. 356, para. 1 (though it should be noted that in the second case the order itself is not tried but the offense is).
[163] STPO art. 356, para. 3.
[164] Marc Thommen and David Eschile, *Was Tun Wir Juristinnen Und Juristen Eigentlich, Wenn Wir Forschen?* [*What Do We Lawyers Actually Do When We Research?*], 12 (Julia Meier et. al. 2020), https://www.ius.uzh.ch/dam/jcr:52bb16ed-b399-486b-a700-65577432df4d/Was%20tun%20wir%20Juristen%20eigentlich%20wenn%20wir%20forschen.pdf [https://perma.cc/PJS9-T74R].
[165] *Id*.
[166] *Id*. at 14.
[167] *Id*. at 13.

penalty orders. If a defendant accepts their guilt but argues that the fine charged by the prosecutor is too high, then the defendant may pay more in procedural fees even though the procedure was only necessary due to the prosecutor's error.[168] These procedural fees, as mentioned earlier, do not need to be paid if the defendant is found not guilty.[169] Second, this research only covered the canton of St. Gallen; even though all cantons are subject to the same criminal procedure code, it is still possible that there are unexpected variations between cantons.[170] Finally, only fifty cases were examined. Despite this final limitation, though, the researchers found a p-value of less than 0.001, indicating that the lower sentences given by St. Gallen judges compared to the original summary penalty orders are almost certainly not simply due to chance.[171]

In addition to the trial penalty, defendants in the United States are required to personally appear for more proceedings than their Swiss counterparts. In most states, even a person intending to plead guilty is required to appear at a courthouse at a time chosen by the government.[172] Any defendant who fails to appear will have a warrant issued for their arrest, further limiting their liberty.[173] While some of these defendants may be intentionally ignoring their duty to appear in court, others may be subject to a warrant because they were never informed of the charges, were not properly informed of when they need to come to court, or were prevented from coming to court due to unavoidable circumstances, like an illness or accident.[174]

Another criticism the Swiss have of the American system is the powerful discretion given to prosecutors to decide whether to try a case or not. American prosecutors are generally able to decline prosecution for any reason, and courts are rarely willing to order prosecutors to file charges against anyone.[175] These reasons are often unrelated to the strength of the case and can include, person, political, or moral considerations.[176] This is starkly different from the Swiss perspective that all people who commit offenses should be treated equally.[177] Some efforts have been made to restrict judicial

[168] *Id*. at 15.
[169] STPO art. 426, para. 1.
[170] Thommen and Eschile, *supra* note 165, at 15.
[171] *Id*. at 14.
[172] *See, e.g.*, Ariz. R. Crim. P. 3.2(b)(1); Fla. R. Crim. P. 3.125(a).
[173] *See, e.g.*, Fla. R. Crim. P. 3.125(h); Ind. Code Ann. § 9-30-3-8.
[174] Abraham Abramovsky and Jonathan I. Edelstein, *Prosecutorial Readiness, Speedy Trial and the Absent Defendant: Has New York's 25-Year Dilemna Finally Been Resolved?*, 15 TOURO L. REV. 25, 28 (Fall, 1998).
[175] *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).
[176] David Schwendiman, *The Charging Decision: At Play in the Prosecutor's Nursery*, 2 BYU J. PUB. L. 35, 36 (1988).
[177] Thommen, *supra* note 26, at 411.

discretion,[178] but prosecutorial discretion remains nearly untouchable in the United States.[179]

III. APPLYING SWISS SUMMARY PENALTY ORDER RULES TO AMERICA'S CRIMINAL JUSTICE SYSTEM

It would be unrealistic to expect the entire Swiss code explaining summary penalty orders to be added to American law, so this Note will examine only the features that represent significant improvements or changes to the current system. The features that could be an improvement over the American system of plea bargaining in misdemeanor cases are the following: a communication to defendants offering a sentence, a method of allowing defendants to accept responsibility for their actions without coming to court, a sentence offered by the prosecution that will not substantially rise if taken to trial, and a requirement for prosecutors to charge defendants with the exact offenses they committed. These factors will be examined individually to determine how they could be implemented.

The easiest answer for how to implement any of these features into the American criminal justice system is through one or more amendments to the Constitution of the United States. After all, by definition, an amendment can be used to justify any action. However, amendments are very difficult to pass,[180] and it has been nearly three decades since the most recent amendment was passed.[181] Therefore, this Note will only propose changes that are possible without amending the Constitution.

There is generally no legal problem with American prosecutors sending plea deals directly to defendants before trial. However, because all states have adopted rules similar to the Model Rules of Professional Conduct,[182] it would be inappropriate for prosecutors to give a plea deal directly to a defendant if the defendant is represented by an attorney.[183] This means that accused persons who retain legal counsel would need to have their summary penalty orders sent to their lawyers rather than receiving them directly. While this is a change from the Swiss system, it would be neutral or even beneficial to achieving the desired aims of an American summary penalty order system.

While the Supreme Court does not currently require in-court interpreters, Congress and many state legislatures require courts in their jurisdictions to

---

[178] *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994).
[179] Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 4 (2009).
[180] Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html.
[181] U.S. Const. amend. XXVII.
[182] *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (last visited Mar. 30, 2022), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.
[183] MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR ASS'N 1983).

provide interpreters.[184] Courts have not required guilty pleas to be translated into other languages, though they generally require them to be explained to defendants in a language they understand.[185] Regardless of whether interpretation in court is required or not, it would clearly serve the interests of justice to help defendants understand the meaning of any summary penalty order they receive, especially when 8.3 percent of American residents do not speak English well.[186] To help as many defendants as possible navigate the language barrier, American summary penalty orders should use the same criteria as Section 203 of the Voting Rights Act, which directs states and counties to provide language assistance if more than 5 percent of voting-aged citizens (or more than 10,000 voters for counties) are members of a single-language minority group and do not speak English adequately.[187] By automatically translating these orders to any defendants who live in a jurisdiction covered by Section 203, a significant number of non-English speakers will be able to understand their summary penalty orders without putting too high of a burden on jurisdictions. Additionally, a telephone number for an interpretation service should be offered to any defendant who does not understand his summary penalty order.

Switzerland's requirement for defendants to affirmatively reject their summary penalty orders appears difficult to implement in the United States, but it does not seem to be expressly barred. Under Supreme Court precedence, a guilty plea may only be accepted if the accused person was fully aware of the direct consequences of the plea and if there were no threats, misrepresentation, or improper promises.[188] It would appear that the information already required in the Swiss system would satisfy these requirements; after all, the Swiss summary penalty order lists the exact punishment the defendant will face without needing to threaten the defendant with a potentially stiffer penalty at trial.[189] Surprisingly, while many states require defendants to personally make their pleas in open court,[190] there appear to be no cases relying on federal law that require defendants to affirmatively accept plea bargains in person. However, it does appear that judges may only accept guilty pleas when there is "an affirmative showing that [they are] intelligent and voluntary," [191] which would usually be most easily satisfied by having the defendant personally accept his plea in open court. This could potentially also be satisfied, though, by serving summary penalty orders personally to defendants as that would make it harder for defendants to claim that they did not voluntarily choose to accept the deal

[184] Kate O. Rahel, *Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter*, 99 IOWA L. REV. 2299, 2303 (June, 2014).
[185] *See Bautista v. State*, 163 N.E.3d 892, 900 (Ind. App. 2021).
[186] *People That Speak English Less Than "Very Well" in the United States*, U.S. CENSUS BUREAU (Apr. 8, 2020), https://www.census.gov/library/visualizations/interactive/people-that-speak-english-less-than-very-well.html.
[187] 52 U.S.C.A. 10503(b)(2)(A) (West).
[188] *Brady*, 397 U.S. 742 at 755.
[189] STPO art. 353, para. 1.
[190] *See, e.g.*, Cal. Penal Code § 1018 (West); Tex. Code Crim. Proc. Ann. Art. 1.13 (West).
[191] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

offered by the state. There must also be a process for defendants to challenge summary penalty orders if the defendants can prove that they were unable to accept their summary penalty orders voluntarily and intelligently for any reason.[192]

Alternatively, if a state would like to avoid the intense litigation that such a system would create, a state wishing to implement a summary penalty order system could require defendants to affirmatively accept their orders. This would present a slightly greater burden for defendants and be a significant departure from the Swiss system, but it would eliminate the problem seen in Switzerland where many defendants fail to hear about their summary penalty orders.[193] As an improvement over the current American system that generally requires misdemeanor defendants to show up to a court on a specific day at a specific time, defendants could be allowed to personally present themselves at a time of their choosing within a range of dates to accept the order. In many ways, this is not a radical departure from current American practice; after all, petty offenses, which are slightly less serious than misdemeanors, are often dealt with this way.[194]

Perhaps the most consequential change would be a requirement that plea offers from American prosecutors be set to the same level that a judge would likely determine independently if the case were brought to trial. Of course, this change would have an extremely negative effect on defendants if current sentencing laws remained unchanged in this new system. Sentencing laws in the United States, after all, are set artificially high to encourage defendants to accept plea bargains instead.[195] However, if sentencing laws can be adjusted, then this change would prevent defendants from taking deals simply because they are afraid of receiving significantly worse sentences if found guilty at trial.

The best way to accomplish this would be to add modified regulations similar to those used in Switzerland for summary penalty orders. First, American prosecutors would need to wait until either the investigation satisfactorily proves the defendant's guilt, or the defendant wishes to take responsibility for the crime. This will prevent prosecutors from offering pleas before a proper investigation can be carried out in cases where the defendant is not ready to admit fault. Second, prosecutors would be required to search for more evidence if the defendant rejects the order. The results of this investigation would be used to determine whether the order should be sustained or modified or whether the case as a whole should be dismissed or

---

[192] *See Wilson v. McGinnis*, 413 F.3d 196, 199 (2nd Cir. 2005).
[193] Thommen, *supra* note 56 at 11.
[194] Jeffrey Johnson, *What are the Differences Between Petty Offenses, Misdemeanors, Infractions, and Felonies?*, FREE ADVICE LEGAL (Jul. 16, 2021), https://www.freeadvice.com/legal/what-are-the-differences-between-petty-offenses-misdemeanors-infractions-and-felonies/.
[195] Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html.

brought to trial. If the prosecutor chose to sustain the summary penalty order, then a judge would hear the case solely to rule on whether the order is acceptable or not. A similar system has been proposed,[196] but it would be preferable to use the Swiss system of determining payment, which is that defendants pay the fee only if the summary penalty order is sustained by the court.[197] This payment structure would encourage both defendants and prosecutors to properly approach the process because prosecutors would only be comfortable offering summary penalty orders that are likely to be sustained by the courts while defendants will feel comfortable rejecting unjust orders without automatically rejecting acceptable orders. Finally, a feature that would improve the transition from the plea bargaining system, though it does not appear to be part of the Swiss system, is a limit on how many summary penalty orders can be adjusted by prosecutors. As noted earlier, Swiss prosecutors very rarely change their summary penalty orders after they are issued, so American prosecutors could need additional support to encourage them to not simply return to the previous plea bargaining process. There could either be a limit placed on each individual case (such as two offers total) or a limit placed on all cases heard by a prosecutor (such as prohibiting prosecutors from changing more than 50 percent of the orders given).

Related to this change would be the equally consequential, but likely more controversial, step of removing nearly all discretion held by prosecutors to dismiss well-grounded charges or change the level of crime a person is accused of committing. This would eliminate count bargaining as prosecutors would be unable to agree to the dismissal of charges that are substantiated by evidence. It would also reduce charge bargaining because defendants would only be able to plead guilty to crimes they actually committed. Just like the previous change, though, this reform would negatively affect defendants without significant sentencing reform. It should also be noted that even Switzerland recognizes that some acts may be charged as different kinds of crimes depending on the situation,[198] so prosecutors should be given the power to decide what charge is correct. What is most important is that prosecutors be bound by the actual facts of the case and not simply whether they can induce defendants to abandon their right to trial by offering a substantially better deal.

CONCLUSION

In conclusion, this Note does not provide the solution to every woe facing misdemeanor defendants and those involved in their prosecutions. Jack Ford, the alleged burglar from earlier in this Note, would clearly not have all of his difficulties fixed through this one change. This Note does not address the

---

[196] Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CAL. L. REV. 1415, 1419-1420 (2019) (note that this system would require defendants to pay a fee to request a court's adjudication of the rejected plea offer only).
[197] STPO art. 426, para. 1.
[198] *See* Thommen, *supra* note 26 at 419 (noting that private claimants can help prosecutors determine what kind of charge is most appropriate in cases affecting them).

lengthy pre-trial incarceration suffered by many misdemeanor defendants, the long sentences given to defendants who plead guilty, or the deplorable conditions that often exist in American prisons. It does not address various other differences between the American criminal justice system and Switzerland's system, such as the different evidentiary standards, differences in how investigations are conducted, and differences in how trials are conducted. Those can be dealt with by other authors. However, this Note does offer a solution that could help lighten the burden on the judicial system in obvious cases while allowing defendants who assert their innocence a chance to properly have their claims investigated. It would also help reduce the severe trial penalty that exists in the United States and protect the integrity of the criminal justice system.

Additionally, this Note does not propose a solution to felony plea bargaining in the United States. The same problems that apply to misdemeanor plea bargaining also apply to felony plea bargaining in most cases, but these cases should require more work by prosecutors and defense attorneys to protect the integrity of the process. This is often accomplished in Switzerland by holding accelerated proceedings when defendants accept responsibility in cases where the sentence is less than five years,[199] but another author can examine that procedure. Reducing the burden on misdemeanor defendants alone will help the vast majority of those involved in the criminal justice system.

[199] STPO art. 358.