University of Hawai'i Law Review

Volume 42 / Number 2 / Spring 2020

Tribute

Articles

COMMENT

ISSN: 1942-9223

Dean Aviam Soifer: '*Ohana* Writ Large

Fran Miller*

Avi Soifer served as Richardson's Dean for 17 years, more than a third of the Law School's time on this planet, and the man personifies the '*ohana* he has built there. He has spent a lifetime creating vibrant physical (and virtual, in the pre-COVID-19 sense of that word) families around himself and the people and institutions he touches. Richardson is a prime example. The school has flourished under his special brand of leadership because Avi cared so deeply about fostering a welcoming, richly inclusive, and diverse sense of community within it.

Avi's scholarship reflects his focus on groups; the title to his great book, *Law and The Company We Keep*,[1] attests to the centrality of that guiding principle. As a legal historian, Avi is forever looking at historical materials for their intrinsic value, but also for their bearing on the kinds of questions that keep us all up at night. So often the past can look forbidding, not something we would want to retrieve as a roadmap for today. But that's not what Avi has in mind. His favorite one-liner articulates his position: *the past should have a voice, but never a veto*. He is convinced that if we look hard enough we can find historical thinking that, properly analyzed, can support enlightened problem-solving for the present.

Avi reminds us not only of our connection with those who came before us, but also our responsibility to shape the legacy we ourselves leave to future generations. So, it's not that we should look to the past and feel constrained, but that the past forms the basis for his optimistic and elastic sense of community going forward, full of promise. We just need to study history and take from it whatever will support a thriving society for today and tomorrow, while explicitly rejecting the parts that do not. Admittedly that may be hard to do in the depressing spring of 2020, but Avi would never concede that the task is impossible.

Avi and I have been friends since the late '70s, when he joined me on the faculty of Boston University's Law School shortly before I came up for tenure. He reached out immediately, with none of the awkwardness characterizing my relationships with my senior male colleagues. Many of

---

* Visiting Professor of Law, William S. Richardson School of Law, and Professor of Law Emerita, Boston University School of Law. Professors Hazel Beh, Melody Kapilialoha MacKenzie, Calvin Pang and Kapua Sproat of Richardson, Bob Smith of Suffolk, and Larry Yackle of Boston University all made valuable contributions to this tribute, as did Neil Motenko, Esq.

[1] AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

them had taught me and had a hard time getting their minds around the idea of letting a woman share status, most particularly at a time when only two of us had integrated the faculty of forty. Avi radiated genuine interest and an easy warmth, characteristics intrinsic to his personality, so I trusted him from the get-go. I also knew he was a gifted writer, because I had been on the Appointments Committee that recommended his hiring. So when he asked to look at my almost-finished "tenure piece" (on antitrust applied to the health sector), I took a big gamble and let him see what I'd been too afraid to show anyone else.

He read it, then paid me the ultimate compliment of an honest scholarly opinion: "You obviously know what you're talking about, Fran, but this isn't good enough. Now put this draft in a drawer and write the article telling me what you *think* about the legal dilemma you've described." I went home in tears, knowing in my heart he was right. I took his painful advice, and that thoroughly revised article became the showpiece of my tenure file. I relate this story only to illustrate that Avi is a true *mensch*, willing to risk a relationship to salvage impending disaster for a friend. And his friendships are legion, not least because he has a special affinity for mentoring young faculty. He nurtures them all for years on end as members of his extended family. I am just one of the many whose lives he has touched in important ways.

I have watched Avi's career as a law dean in the years since he left BU, first at nearby Boston College, and then at Richardson, where I have had the enormous good fortune to teach spring semesters for the past thirteen years. The academic reputations of both institutions rose significantly during Avi's stewardship, owing in a degree to his wide national network of academic friendships. These were formed in the process of giving innumerable scholarly presentations, and serving on countless AALS, ABA, and other professional committees. Both law schools also expanded their physical plants during his tenure, thanks in no small part to his cheerful, unstinting, and relentless advocacy promoting the institutions he loved. BC opened a new library and faculty wing under his aegis, and Avi spent countless hours lobbying Hawaii's legislature to help finance Richardson's beautiful new clinical building. It opened last year as a fitting capstone to his deanship here.

Avi's other achievements at Richardson are legendary, and many of them center on expanding the Law School community's reach with the same focus on societal welfare that animated his own law school career. His commitment to public interest and social justice evidenced way back then has expanded exponentially throughout the years. For example, his support of Richardson's twenty clinical offerings, including the Medical Legal Partnership and the Refugee & Immigration Law Clinic, has been

unwavering. They, along with the Elder Law and Child Welfare Clinics, to name a few particularly relevant in these increasingly chaotic and trying times, bring Richardson's crucial professional expertise to the state's legally underserved residents.

Avi's vision in supporting creation of Ka Huli Ao Center for Excellence in Native Hawaiian Law, and in continuing to strengthen the Ulu Lehua Scholars Program, gives further evidence of his passion for ensuring that a wide-range of voices will be heard in his communities. By reaching out to the larger world beyond Richardson, Avi has always sought to draw that greater world into the orbit of the Law School's, and thus his own, 'ohana.

No discussion of Avi's passion for community would be complete without a reference to his beloved Red Sox. After almost two decades away from Boston, he still belongs to a group that holds season tickets for two choice seats at Fenway Park, right behind the catcher. The catcher metaphor as field general is apt[2], for Avi has always had his eye on what works for the game as a whole, and had the confidence based on long experience to call the plays as he thought best.

Avi hasn't used those treasured Fenway Park seats lately, but he maintains them as yet another link to the baseball fraternity he loves. In the words of his friend and former BU colleague Larry Yackle, "He loves the Sox, but also the game, and its attendant community that includes all the players on all the teams. And the people in the stands. An eclectic lot. Noisy, physical townies out from Charlestown and Southie, office workers and professionals with their ties undone, kids everywhere. Everyone watching on TV, listening while riding the MTA, and reading the box scores next morning in the *Boston Globe*." All of them are focused on something that links them, win or lose, in yet another of Avi's cherished 'ohanas. He may be stepping down from Richardson's deanship, but Richardson will always be an essential element of his family DNA. And since Avi will continue teaching at Hawaii, new generations of the Law School's students will still have the benefit of his valuable connection to both the past and the future – and the pleasure of The Company He Keeps.

---

[2] *Leadership- A Catchers Most Important Skill*, BASEBALL-CATCHER.COM, http://www.baseball-catcher.com/guide/leadership.htm (last visited July 6, 2020).

Bridging Divides in Divisive Times: Revisiting the Massie-Fortescue Affair

Stewart Chang*

This Article revisits the infamous Massie-Fortescue rape and murder cases that occurred in Hawai'i during the 1930s, in order to challenge the methods by which race scholars have previously analyzed the case by relying on gender hierarchies. Thalia Massie, a white woman, accused five "Hawaiians" of gang raping her, even though they were of various Asian Pacific ethnic identities. The rape case ended in a hung jury, and so her relatives resorted to vigilante murder of one of the defendants. The subsequent murder trial resulted in convictions, but the 10-year prison sentences for the white defendants were commuted to one-hour by the governor. The case was central in coalescing ethnic solidarity and racial coalitions on Hawai'i. Though the misidentifying of all five defendants as racially monolithic originated with the white oligarchy, the cases solidified what it meant to be "local" in spite of ethnic divides between the various Asian and native groups.

Asian Pacific American Studies scholars have focused on the racial injustices perpetuated on the five who were accused, largely by attacking the credibility of the victim, Thalia Massie. Yet in so doing, they end up resorting to the same questionable strategies used by accused rapists to defend their actions, such as raising the sexual history of the victim and otherwise attacking her character. This Article is the first to suggest that race scholars should consider the ways in which the five accused had much more in common with Thalia Massie, as all six became pawns in a system that ultimately served the white male power structure. What happened in the cases resonates with what also happened with Emmett Till, Vincent Chin, and Chanel Miller, and demonstrates the ways in which oppression cuts equally across race and gender. In the same way that the Massie-Fortescue affair inspired coalition building between previously fractured ethnic groups on the island, now, at a moment when xenophobic essentialism and marginalization has again retaken center stage in American political discourse, is not the time for disenfranchised groups to focus on what divides us, but rather look to what unites us to each other.

---

* Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law. I am grateful to Ian Bartrum, Frank Rudy Cooper, Eve Hanan, Sheldon Lyke, Elizabeth MacDowell, Dustin Marlan, Sarudzayi Matambandzo, Manoj Mate, Jouet Mugambi, Addie Rolnick, Kathryn Stanchi, Jean Sternlight, Victoria Tokar, Christian Turner, and Seval Yildirim for their helpful conversation and feedback.

INTRODUCTION

In 2006, the American Bar Association hosted its annual convention in Honolulu, Hawai'i. Approximately 5,000 attorneys descended upon the shores of Waikīkī, swapping their dark suits and briefcases for hibiscus print shirts and bright yellow beach bags.[1] Interspersed between tanning their thighs and sipping mai tais on the Sheraton beachfront, the attendees would occasionally traipse to the Hawai'i Convention Center to listen in on a panel or two on practitioner ethics in dispute resolution or the effects of changes in the tax code on fractional ownership of real estate, many of them lured by the promise of earning some CLE credits. Among the offerings that year was a historical trial reenactment sponsored by the General Practice, Solo and Small Firm Division.[2] Those who packed into the meeting room on that balmy Thursday mid-morning were brought back to the 1930s, at a time before Hawai'i became a state, to preside as mock jurors in a case that roiled the community and shaped race relations on the island from thence forth: the infamous Massie rape case.

The year was 1931, and the United States was in the midst of the Great Depression. Scores of white Americans left the mainland for the island paradise, some allured by the exoticism of the new island territory, others to seek new fortunes when old ones were lost on the mainland.[3] It was a warm September night when Navy Lieutenant Thomas Massie and his wife Thalia Massie attended a party at the Ala Wai Inn, the very site where the Hawaiian Convention Center currently stands, and where the mock trial was occurring. Sometime late that night, Thalia left the party without her husband to take a walk. Later, when Tommie, as he was known to his friends, called home to check on her, Thalia exclaimed "something awful

---

[1] Dahlia Lithwick, *No Man Is An Island*, SLATE (Aug. 7, 2006), https://slate.com/news-and-politics/2006/08/no-man-is-an-island.html.

[2] AMERICAN BAR ASSOCIATION, 2006 ANNUAL MEETING PROGRAM BOOK 51 (2006), https://www.yumpu.com/en/document/read/10364307/2006-aba-annual-meeting-program-book-honolulu-hawaii.

[3] EDWARD JOESTING, HAWAII: AN UNCOMMON HISTORY 290–92 (1972).

has happened" and demanded that he rush home.[4] She stated that she had been abducted and raped by five "Hawaiians."[5]

The police immediately arrested five local men: Ben Ahakuelo, Henry Chang, Horace Ida, Joseph Kahahawai, and David Takai.[6] Though the evidence against them was weak, the prosecution proceeded to charge the five and put them on trial for rape. The case gained great publicity and notoriety on the mainland, reinforcing racial stereotypes depicting white women as unwitting prey to the savage lust on men of color, which demonstrated the need for increased regulation and control of the ethnic population.[7] When the case resulted in a hung jury, the white population on the island was incensed, as well as those on the mainland, who complained that the local justice system had failed to protect white women from native men and called for martial law.[8]

It was also the era of Jim Crow on the mainland, where lynching was a common response to even slight allegations of transgressions against white women by minority men.[9] Thus, before a new trial could commence, Tommie and Thalia's mother, Grace Fortescue, took matters into their own hands.[10] They, along with two of Tommie's navy protégées, Edward Lord and Deacon Jones, kidnapped and murdered one of the defendants, Joseph Kahahawai.[11] The subsequent murder trial created another public spectacle, garnering national publicity and bringing high-profile defense attorney Clarence Darrow to the island to litigate what would become the last case of his storied career. Despite Darrow's appeal to the jurors of an "unwritten law" that justified a husband's actions in avenging his honor when another man defiles his wife, the jury convicted all four white defendants of manslaughter and the judge sentenced them to ten years of hard labor.[12] This result further enflamed outrage among the white population on the island and the mainland, reigniting calls for the mainland government to step in and impose martial law.[13] Bowing to pressure coming at him from

---

[4] PINKERTON NATIONAL DETECTIVE AGENCY, INC., "ALA MOANA" CASE 8 (1932) [hereinafter PINKERTON REPORT].

[5] *Id.*

[6] JOHN ROSA, LOCAL STORY: THE MASSIE-KAHAHAWAI CASE AND THE CULTURE OF HISTORY 1 (2014).

[7] *See* DAVID E. STANNARD, HONOR KILLING: HOW THE INFAMOUS "MASSIE AFFAIR" TRANSFORMED HAWAI'I 229 (2005).

[8] *Id.* at 217–24.

[9] Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. OF CRIM. L. & CRIMINOLOGY 1571, 1571 (1996).

[10] *See id.* at 241.

[11] *Id.*

[12] *Id.* at 380–81.

[13] *Id.* at 382–87.

multiple sources, the governor of Hawai'i called for the four convicted to be brought into his office, where he commuted their sentences to the one-hour they would spend in his office.[14]

For the ethnic community on the island, the final result clearly defined the dominant racial dichotomy and hierarchy, both on the island and on the mainland: whites and non-whites. Though the five men accused of raping Thalia Massie were from various ethnic backgrounds, two being Japanese, one Chinese, and two native Hawaiian, they were monolithically cast as "Hawaiians" by not only their accuser but also the white population at large.[15] Similarly, they were being treated no differently from African Americans on the mainland, who could be lynched with impunity and with little recourse for even the slightest perceived transgressions against the white majority.[16] The Massie-Fortescue trials became the lynchpin in coalescing ethnic solidarity on the island, particularly among the native population and the various Asian ethnic groups. Thus, the cases were crucial in early formations of local identity through coalition building and activism among Asian Pacific American groups on the island.

The Massie-Fortescue affair became emblematic of how people of color would continue to be treated in the United States in general, resonating with what would later happen to Emmett Till,[17] the Central Park Five,[18] and Vincent Chin.[19] As a result, the Massie-Fortescue cases have become a significant topic of scholarly inquiry among race and ethnic studies scholars, particularly in Asian Pacific American Studies. Many of the scholarly endeavors have focused on piecing together a more accurate history of what actually happened, much of which is based on the investigations of the Pinkerton National Detective Agency that ultimately exonerates the five who were accused of raping Thalia Massie.[20] This was the evidence presented during the reenactment of the Massie rape trial in 2006, and at the close of the proceedings, the mock jurors in the audience "voted unanimously to give the defendants the acquittal they probably deserved all along in real life."[21]

---

[14] *Id.* at 389–90.

[15] ROSA, *supra* note 6, at 1, 4.

[16] Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 62 (1996).

[17] STEPHEN WHITFIELD, DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988).

[18] SARAH BURNS, THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY'S MOST INFAMOUS CRIMES (2011).

[19] Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1928 (1993); *see also* United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986).

[20] STANNARD, *supra* note 7, at 429; *see generally* PINKERTON REPORT, *supra* note 4.

[21] James Podgers, *When Change Arrived*, 92 A.B.A. J., Oct. 2006, at 64.

However, the strategy employed by the defense team during the mock trial—and embraced by subsequent public opinion about the Massie-Fortescue cases as evidenced in the majority of scholarship—has focused on impeaching the credibility of the victim by attacking her character. Whereas the findings of the Pinkerton report establishing an alibi where the five accused were on another part of the island when the rape allegedly occurred would be enough to exculpate them,[22] much more of the attention over the years has been paid to Thalia Massie's moral character and conduct in order to question whether the any rape happened at all. These are the same strategies employed in many rape trials, where often the victim becomes the object of scrutiny and judgment as much as, if not more than, the accused.

Though the task of achieving posthumous racial justice is an admirable enterprise, this Article suggests that the quest for racial justice in the Massie-Fortescue cases have overly relied upon and therefore perpetuate the same mechanisms of oppression and prejudice that created the injustice in the first place, though from a gendered rather than racialized angle. Indeed, rather than focus on the racism underlying the vigilante murder of Kahahawai and the underlying structural reasons for the commuting of the sentences for the four white defendants who murdered him, scrutiny and blame has been cast primarily against the accusing woman.[23] In the same way that portrayals of Thalia Massie during the trials as an innocent and honorable white woman justified racial violence and solidified the dominance of white patriarchy on the island, so too does her current vilification as a lying drunkard who possibly made the whole thing up to cover up her infidelities mask and perpetuate the racial and gender hierarchies that created the problem in the first place. Protection of white patriarchy is not seen as responsible for the oppression and murder of an innocent ethnic man, but the lies of a conniving jezebel is blamed entirely.

In this respect, this Article suggests that the defendants in the Massie rape case had more in common with Thalia Massie than not, and that further critical inquiry into the case should focus on the ways in which the five ethnic men and she are both victims of a system created to preserve the dominance of white men. The five men of color were demonized as bestial savages to foment a demand for more regulation and control on the island by the white male power structure, and Thalia Massie was extolled as the

---

[22] PINKERTON REPORT, *supra* note 4, at 261 (finding "there was not opportunity for the accused to commit the kidnapping and rape of Mrs. Massie [ ] at the time alleged by her, or at other times within this period. For such to have been possible it would be necessary for many witnesses to have willfully made false statements and to have perjured themselves at the trial of the accused.").

[23] STANNARD, *supra* note 7, at 401.

paragon of white feminine virtue so that she could be protected by the power of white men. Victim and accused alike served as pawns in a system that ultimately perpetuated the control of minorities and women by the white patriarchy on both the island and the mainland.

In the same way that the Massie-Fortescue cases spurred coalition building and local solidarity among the various Asian and Pacific ethnic groups on the island, this Article proposes that the Massie-Fortescue cases can similarly coalesce alliances between Asian Pacific Americans and other oppressed groups, such as women and other minorities. Part I analyzes and critiques the ways in which local Hawaiian perspectives and scholarly literature on the Massie-Fortescue affair have evolved in a way that primarily focuses on Thalia Massie's role in producing the injustice. Part II provides a broader assessment of how the Massie-Fortescue cases fit into a larger systemic scheme that supports and maintains white patriarchy. Part III recounts the role of the Massie case in coalescing local identity among the different ethnic groups on the islands and evaluates the current need to remember and revisit the lessons learned from the Massie case. Part IV discusses how, in the same way that the Massie-Fortescue affair inspired coalition building between previously fractured Asian Pacific American groups on the island, that now, at a moment when xenophobic essentialism and marginalization has again retaken center stage in American political discourse, is not the time for disenfranchised groups to focus on what divides us, but rather look to what unites us to each other.

I. HISTORY, LEGEND, AND HOW HER STORY WAS TOLD

What motivated Thalia Massie to accuse the five men of raping her has long been a topic of local speculation and conjecture, though almost all local Hawaiians agree that the five men were not responsible.[24] Some believe that Tommie Massie battered his wife that night, while others theorize that Thalia had been having an affair.[25] The story has grown to one of local legend that is not always grounded in what really happened.[26] Despite the differing opinions and their accuracy, most also share the common belief that the local boys were the victims and Thalia Massie was

[24] STANNARD, *supra* note 7, at 140 (declaring at the end of his study that "[t]he only thing known for certain is that the truth was far more prosaic than the story she cooked up. Someone took Thalia for a ride and punched her. Perhaps Tommie added to her injuries before calling the police, perhaps not. But she was not raped. And the men she accused had never seen her before and had nothing to do with her at all.").

[25] PETER VAN SLINGERLAND, SOMETHING TERRIBLE HAS HAPPENED 81 (1966); PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 216 (1997).

[26] *See* ROSA, *supra* note 6, at 3.

the villain. In local lore, she has been cast into a modified caricature of the lying, vindictive shrew who fabricated a story of rape and ruined the lives of five innocent youths.[27]

Little critical treatment of the cases appeared for decades following the commutation of the murder sentences by the governor and after the Massie-Fortescue family left Hawai'i and returned to the mainland. Thalia's family was once prominent and powerful on the mainland, as they were distantly related to Teddy Roosevelt, and they threatened defamation lawsuits against anyone who dared cast a critical eye to their role in the sordid affair.[28] It was not until three years after Thalia Massie died and the threat of legal action had subsided that critical analyses of the Massie-Fortescue trials began to emerge. In 1966, three journalistic treatments of the Massie-Fortescue cases appeared almost simultaneously: *Something Terrible Has Happened* by Peter Van Slingerland,[29] *Rape in Paradise* by Theon Wright,[30] and *The Massie Case* by PeterPacker and Bob Thomas;[31] though all three have been criticized as incomplete for their inaccuracies, and somewhat catering to sensationalist sensibilities.[32] They also evidence a myopia to the gender dynamics involved; as Paul Harris writes, "[n]or did the authors understand how the Massie murder trial was an expression of a male-dominated view of the world."[33] Another book, *Hawaii Scandal* by Cobey Black[34] was published in 2002, which is deemed more accurate than the previous three, largely because Black had access to navy records that the others did not.[35] Much of her research was done decades earlier, around the same time of the other three, but publication of her work was delayed because publishers thought the market to already be oversaturated with books about the subject.[36]

---

[27] *See generally* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 590–91 (2009); Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1053 (2018).

[28] John Berger, *Trial By Theater: A Play on the Massie Case Will Finally See Light After Being Shelved for More Than 30 years*, HONOLULU STAR BULLETIN, (Jan. 8, 2004), http://archives.starbulletin.com/2004/01/08/features/index.html ("It was Peter Van Slingerland, author of a 1966 book about the Massie case, who warned Carroll that Thomas Massie, Thalia's husband at the time of the incident, might take legal action.").

[29] VAN SLINGERLAND, *supra* note 25.

[30] THEON WRIGHT, RAPE IN PARADISE (1966).

[31] PETER PACKER & BOB THOMAS, THE MASSIE CASE (1966).

[32] Charles Hunter, *Murder, Rape, and Carpetbaggers: An Essay-Review of Three Recent Books on the Massie Case*, 58 PAC. NW. Q. 151, 152 (1967).

[33] HARRIS, *supra* note 25, at 219.

[34] COBEY BLACK, HAWAII SCANDAL (2002).

[35] STANNARD, *supra* note 7, at 429.

[36] ROSA, *supra* note 6, at 96.

The most comprehensive study to date on the Massie-Fortescue cases is *Honor Killing: Race, Rape, and Clarence Darrow's Spectacular Last Case*, published by historian David Stannard in 2005.[37] In addition to combing through archival records, he extensively interviewed local residents who were finally willing to talk about both the cultural climate of the day and their impressions of the events.[38] However, whereas Stannard focuses on the racial injustice perpetuated on the five who were accused of raping Thalia Massie, he also does not engage in the nuances of gender hierarchies. More recently, John Rosa published *Local Story: The Massie-Kahahawai Case and the Culture of History* in 2014,[39] but he focuses on issues of race from the perspective of the defendants and the non-white community. Though this portion of this Article considers the entire critical history of the Massie-Fortescue affair, it concentrates on Stannard's work not only because it is now the primary source relied upon by scholars for its exhaustiveness and accuracy, but also because it presents the veiled sexism of local accounts and attitudes about Thalia Massie.

Stannard narrates the story in a way that is consistent with how the community had always questioned Thalia's moral and sexual history. Even before delving into the details of the incident, Stannard sets the temporal context of Hawai'i as a destination where, according to locals, privileged women from "prominent families with lots of money" come to the island "to go crazy for the time being" and get "a marvelous thrill out of these beach boys."[40] It is in this backdrop that Stannard situates Thalia Massie, as an entitled descendant of a prominent and once wealthy family from the mainland who reluctantly followed her military husband to the far reaches of the earth, needing some means of distraction from the boredom of life on the remote island.[41] Stannard points out how "[o]ther acquaintances and neighbors commented on Thalia's custom of coming to the front door or walking around the yard half naked—'looking like a prostitute.'"[42] He goes on to describe how heavily she drank and how, according to the maid, "when Tommie was away on sea duty, Thalia frequently entertained men who were friends of the couple . . . . When Tommie was gone it was not unusual for one or the other to spend the night—in one instance for an entire week—or for Thalia to go to the beach with one of them and not return for several days . . . ."[43] Stannard continues then to discuss the

---

[37] STANNARD, *supra* note 7.

[38] *See* ROSA, *supra* note 6, at 95–98 (describing Stannard's interviewing process).

[39] *Id.* at 4–5.

[40] STANNARD, *supra* note 7, at 26 (quoting an unnamed local Hawaiian matron).

[41] *Id.* at 35.

[42] *Id.* at 36.

[43] *Id.* at 36–37.

psychological effects of her behavior on her husband Tommie, which paints him in an almost sympathetic light.[44] Before the central events have unfolded, Thalia is cast as the villain of the story, even though Tommie was more directly responsible for the kidnap and murder of Joe Kahahawai.[45]

Stannard describes how on that fateful evening on Saturday, September 12, 1931, Tommie and Thalia attended a party at the Ala Wai Inn with other naval officers and their wives.[46] As the evening progressed, Thalia felt increasingly neglected by her husband, so around midnight she left the premises for a walk in the nearby streets.[47] Stannard accounts how eyewitnesses in the area at the time report seeing an intoxicated white woman seemingly heading towards "Submarine alley," described by locals as a "risqué area" where "loose" sexual encounters were known to occur.[48] Witnesses accounted that there was a white man following not far behind her.[49] The implication, here, is that Thalia was either with the man or that he was following her and possibly the one responsible for the rape, and that they were both headed towards a more salacious part of town.

During the rape trial, the defense attorneys had called the witnesses who had seen Thalia walking past them on John Ena Road at around 12:10 a.m. to establish an alibi for the defendants who were seen by witnesses miles away in downtown Honolulu around 12:15 a.m., and had gotten involved in an altercation with another motorist at around 12:35 a.m. in the same area.[50] According to the defense, it would have been impossible for the defendants to have committed a rape that far away in that amount of time.[51] The defense brought the witnesses who saw Thalia walking past them at 12:10 a.m. to refute the prosecution's position that the rape happened between 11:10 p.m. and 12:30 a.m.[52] All the witnesses testified that they had seen a white woman, wearing a dress similar to the one Thalia Massie had on that night, stumbling past them, with a white man following close behind her.[53] Stannard reports that according to one of the witnesses, George Goeas:

> The woman appeared to be drunk . . . and it was difficult to tell if she and the man were together, because the man always seemed to be a step or two

---

[44] *Id.*

[45] ROSA, *supra* note 6, at 29–31.

[46] STANNARD, *supra* note 7, at 45.

[47] *Id.* at 51.

[48] *Id.* at 53.

[49] *Id.* at 52.

[50] PINKERTON REPORT, *supra* note 4, at 249.

[51] STANNARD, *supra* note 7, at 190.

[52] *Id.* at 208–11.

[53] *Id.* at 191–93.

> behind or in front of her. Goeas guessed that they were a couple that had had an argument.[54]

Regardless of whether Thalia was with the man or not, the defense had introduced the witnesses only to place her at a certain location at a certain time. However, this evidence provoked a popular theory that she was with this other man and that he may have been the one who attacked her.[55]

The defense was proving the simple fact that even if Thalia Massie had been raped, it was not the defendants who were responsible. However, the public sentiment that formed as a result of the evidentiary inquiry extended into whether the rape happened at all, regardless of the identity of the perpetrator.[56] The medical examination indicated that there was no physical evidence of rape.[57] The examining physician found no injuries below the waist, and his notes stated "[v]aginal examination of hymen was old, lacerated at 5 and 7 o'clock position. No other abrasions or contusions noticeable."[58] When asked if he thought this to be odd, the doctor explained that Thalia was "a married woman [and] the vagina opened quite a bit."[59] The popular conclusion was that Thalia had not been raped at all, and if she did have sex that night, it was consensual.[60] What is often overlooked, however, is the fact that she did have injuries on other parts of her body that indicated she had indeed been attacked.[61]

Although the defense in the Massie case was focusing on establishing an alibi for the accused, the subsequent local rumor and lore that emerged after the trial engage in the culture of victim blaming in cases of rape.[62] The demonization of Thalia Massie in local opinion mirrors the victim blaming that happens to rape victims during their trials. Kimberley Peterson writes about what happened to Chantel Miller during the Brock Turner rape trial, "the defense painted [Miller] as a party girl, someone who drank too much and was willing to sleep with anyone, using her memory loss from the night of her rape against her."[63] Peterson argues that the Brock Turner rape trial

---

[54] *Id.* at 191–92.

[55] *Id.* at 410.

[56] VAN SLINGERLAND, *supra* note 25, at 81–82.

[57] STANNARD, *supra* note 7, at 84.

[58] *Id.*

[59] *Id.*

[60] *See id.* at 410.

[61] ROSA, *supra* note 6, at 26.

[62] *See generally* Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127 (1992); Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999).

[63] Kimberly Peterson, *Victim or Villain?: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims*, 53 VAL. U. L. REV. 467, 470–71 (2019).

was emblematic of "[s]ome of the most prominent myths regarding the rape victim [which] include: (1) victims often lie about being raped; (2) victims invite rape by their behaviors and actions . . . ."[64] Both of these myths have prevailed in the way that the Massie rape has been treated. As commonly occurs when women report sexual assault,[65] the popular theory is that Thalia fabricated the entire story of her rape, an assumption that is typically bolstered by general aspersions of her character and conduct.

Though she was cast as the pure and innocent victim during the actual trial and the defense did not engage in any character assassination at the time, the more recent efforts to exonerate the defendants posthumously have painted Thalia in the same way as Brock Turner's attorneys portrayed Chantel Miller: as a party girl, someone who drank too much and was willing to sleep with anyone and whose memory loss from the night of the rape should be used against her.[66] It seemed to be local knowledge that Thalia was a habitual drunk, and according to the witnesses who saw her, she was drunk the night of the alleged rape.[67] Before even describing her injuries, the medical report starts with a description that Thalia "had an alcoholic breath" and "was under the influence of liquor."[68] Victims of rape are often blamed when they are intoxicated.[69] One implication is that intoxication makes women more receptive to sex, which is a myth and untrue.[70] The other implication is that they were too drunk to remember what actually happened and are thus unreliable as witnesses.[71]

---

[64] *Id.* at 475.

[65] Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 628 (2000) ("The term 'Cassandra curse' has been used most frequently in legal scholarship to describe the situation (and treatment) of female victims of sexual harassment and sexual assault who find themselves and their credibility in question when they dare speak about their attacks or attackers."); *see also* Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123, 130 (1997).

[66] Peterson, *supra* note 59, at 470–71.

[67] STANNARD, *supra* note 7, at 191–92.

[68] *Id.* at 84.

[69] *See generally* Valerie Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407 (2004); Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOK. L. REV. 1031 (2017); Emily Finch & Vanessa Munro, *The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants*, 16 SOC. LEGAL STUD. 591 (2007).

[70] Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 121 (1994).

[71] *Id.* at 139 (describing how a defense attorney argued in closing argument that it was incredulous to believe that a victim could "have been in an alcoholic stupor, and yet

Much attention has been paid to Thalia's inconsistencies between what she said the night of the alleged rape and what she said later to deduce that she was fabricating the entire story. When Thalia was discovered battered and bruised in the face by a passing car, she said that she had been dragged into a car and attacked by a group of "five or six Hawaiian boys" who "had beaten her up and thrown her out of the car."[72] Rather than be driven to the hospital or the police station, she asked to be taken home.[73] When asked "[h]ave you been hurt in any other way?" she said no and "asked us not to ask any more questions as her jaw was hurt so badly."[74] Only later at home would she elaborate to her husband that the men had dragged her into some bushes and violently raped her six or seven times.[75] She also protested against her husband calling the police.[76] The fact that Tommie was the one who called the police rather than his wife has led to the local belief that he was in fact the one who had beaten her, and that the story of the rape was fabricated to cover it up.[77]

Another popular local theory is that Thalia was lying to cover up a pregnancy from an affair. For example, native Hawaiian activist Ku'umeaaloha Gomes' description of the events reflects the popular misconception that "[a]t the hearings it was found out that she had been having an affair and wanted to cover it up because she got beaten up."[78] Concealing infidelity is commonly viewed as a motive for false allegations of rape.[79] Thalia testified that she had become pregnant after the alleged incident and underwent an abortion.[80] When asked during trial whether the child could have been her husband's, Thalia testified, "'my husband and I had not had intimate relations' since the time of her last menstrual cycle

---

remember so many details.").

[72] STANNARD, *supra* note 6, at 54.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 55.

[76] *Id.*

[77] *See* HARRIS, *supra* note 25, at 216.

[78] ROBERT MAST AND ANNE MAST, AUTOBIOGRAPHY OF PROTEST IN HAWAI'I 427 (1996); *see also* ROSA, *supra* note 6, at 87–88 (suggesting that Gomes may have been misinformed by a fictional novelization of the events).

[79] Lesley McMillan, *Police Officers' Perceptions of False Allegations of Rape*, 27 J. GENDER STUD. 9 (2018); *see also* André De Zutter et al., *Motives for Filing a False Allegation of Rape*, 47 ARCHIVES OF SEXUAL BEHAVIOR 457 (2018).

[80] A hospital report from the procedure that Thalia had done, however, suggests that she was not actually pregnant, though the prosecutor Jack Kelley did not challenge the veracity of her statements. WRIGHT, *supra* note 30, at 234–35 (detailing the hospital report findings, "Cervix old bilateral tear. Contents of uterus negative. No enlargement."); *see also* STANNARD, *supra* note 7, at 168.

prior to the rape, 'nor have we had any since.'"[81] Indeed, Tommie and Thalia had been going through marital difficulties prior to the incident.[82] They had stopped having sexual relations, and there were local rumors that she was seeing other men.[83] According to Tommie, Thalia was constantly trying to make him jealous by talking about other men, and on one occasion when she was riding in a car with another naval officer, he followed them, punched the other man, slapped Thalia, and dragged her away.[84] In August 1931, a month before the alleged rape, Tommie threatened to divorce Thalia and relented only after she agreed in writing to go on "probation" where she had to "mend her ways or be sent home to her family."[85] After this, Thalia no longer dared go out with other men or have them over when Tommie was away.[86] A pregnancy during this "probationary" period, where the couple was still not having sex with each other, would evidence her infidelity. Thus, the rumor arose that she fabricated the story of rape to cover up her adulterous indiscretions.[87] There was even a rumor that Thalia might have been having an affair with one of the five suspects.[88]

Nested in the theory of adultery is the implication that a woman's sexual mores affect her credibility when she makes allegations of rape. Prior to rape shield laws, a victim's sexual history could be used by defendants to prove that she was lying. A number of scholars have noted how historically "evidence that a woman was unchaste was thought relevant to prove that she was also a liar."[89] Though the defense in the Massie rape trial did not employ such tactics, questions of Thalia's sexual history have pervaded judgments about her in the court of public opinion. The central question that has permeated the entire Massie-Fortescue affair has always concerned Thalia's motivation for lying, which is seen as setting off the entire chain of

---

[81] STANNARD, *supra* note 7, at 168.

[82] *Id.* at 36–37.

[83] *Id.* at 36, 39.

[84] *Id.* at 37–38.

[85] *Id.* at 40.

[86] *Id.*

[87] Russell Owen, *Mrs. Massie in Court Tears Up Evidence of a Domestic Rift*, N. Y. TIMES, Apr. 23, 1932, at 1.

[88] VAN SLINGERLAND, *supra* note 25, at 80.

[89] Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to A Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 715 (1995). *See also* Michèle Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent & Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim Is Non-Traditional*, 17 AM. U. J. GENDER SOC. POL'Y & L. 41, 68–69 (2009) (describing challenges in prosecuting rape cases which have "victims who are labeled by society as promiscuous because of a history of adultery or evidence of more than one sexual partner").

events that led her husband to murder Joe Kahahawai. Focus is taken off of the structural racism involved and blame is centralized in the lies of one woman.

Furthermore, the focus on Thalia's rape allegation shifts attention away from Tommie's agency and responsibility for the murder. In fact, this had been Darrow's defense strategy all along, which was to claim that Tommie had temporarily gone insane when he heard Kahahawai allegedly confess to the rape of his wife. Tommie claimed that he blacked out and went insane when Kahahawai confessed "Yes, we done it."[90] Yet this was a lie. As the prosecutor Jack Kelley attempted to explain to the jury in his closing argument, "we done it" was not the way a native Hawaiian would confess in the vernacular, but rather "he would have said 'We do it' or 'We been do it.' That is the Hawaiian vernacular. There is no past tense in the Hawaiian language and they don't use that vernacular, which is common on the mainland."[91] In fact, the defense of insanity was entirely premised on lies. Deacon Jones would later confess that he pulled the trigger,[92] and so the elaborate story of a confession and Tommie going temporarily insane was fabricated in order to cover up the true motivations for the murder, which was most likely race. Yet public attention has not homed in on Tommie's lies, or Deacon Jones' lies, or anyone else's lies except Thalia's. Thalia becomes the primary villain in the story, and the men merely ancillary pawns.

In perhaps the most dramatic and memorable point of the Fortescue murder case, Thalia was on the witness stand being cross-examined by prosecutor Jack Kelley. Kelley handed Thalia a report of a psychological evaluation that she had undergone and asked "[h]as your husband always been kind to you?"[93] The New York Times reported in spectacular detail how at that instant, "there came a transformation from the pathetic looking figure into a woman who, with low voice but blazing face, turned on him as he produced a paper statement containing statements regarding her feeling toward her husband before the assault."[94] Thalia ignored the prosecutor's question and snapped back, "Don't you know this is a confidential communication between doctor and patient?" and proceeded to rip the document into shreds and threw the pieces to the ground to the applause of her supporters in the gallery.[95] After the judge reinstated order in the courtroom, Kelley, with his face and neck red with anger as he stared at her,

---

[90] ROSA, *supra* note 6, at 72.

[91] *Id.*

[92] VAN SLINGERLAND, *supra* note 25, at 318.

[93] STANNARD, *supra* note 7, at 357.

[94] Owen, *supra* note 87, at 1; *see also* STANNARD, *supra* note 7, at 357.

[95] Owen, *supra* note 87, at 1.

blurted out, "Thank you, Mrs. Massie, at last you have shown yourself in your true colors."[96] At the close of questioning, Thalia ran from the witness stand to her husband, and as the New York Times article describes, "Throwing her arms around him, she cried loudly and hysterically: 'What right has he got to say that I don't love you? Everybody knows I love you!'"[97]

Though his statement was ultimately stricken from the record and theoretically shielded from the jurors, Kelley's remark about Thalia "showing her true colors" had the effect of denigrating her character in the public eye for all posterity.[98] Darrow had Thalia testify as to how devoted Tommie was to her to bolster his defense that her rape had thrown him over the edge.[99] Though Kelley likely intended to produce the psychological report only to rebut the rosy picture that she painted of her and Tommie's relationship and to therefore cast doubt on the theory that Darrow was suggesting, his angry reaction produced a different result as it became one of the most memorable moments of the trial that was eaten up by the public. The Massie case was one of the most hotly followed stories for two years, garnering as much public attention as the Lindbergh baby.[100] The fact remains, however, that when this episode occurred, Thalia was not on trial. Even though Tommie was the one on trial for murder, she was the one came off as conniving and culpable. This may not have been prosecutor Kelley's initial intent when he was cross examining Thalia on the stand, but this ultimately was the effect, especially for locals on the island who came to blame Thalia for the whole affair.

If Tommie was not as in love and deeply devoted to Thalia as he says he was, then there must be some other motive for the murder. Even if he did not actually love his wife, he may have viewed her as his property and her rape, whether true or not, would have been an assault against his masculinity.[101] Thus, he needed to avenge his position as a man. Another theory could be that as a white Southerner, he could not abide a rape of any white woman by a non-white man, let alone any type of sexual relationship

---

[96] *Id.*

[97] STANNARD, *supra* note 7, at 358.

[98] Owen, *supra* note 87, at 1.

[99] *Id.* at 337.

[100] HELEN GERACIMOS CHAPIN, SHAPING HISTORY: THE ROLE OF NEWSPAPERS IN HAWAI'I 152 (1996).

[101] *See* Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009); Joseph Vandello & Dov Cohen, *Male Honor and Female Fidelity: Implicit Cultural Scripts that Perpetuate Domestic Violence*, 84 J. PERSONALITY & SOC. PSYCH. 997, 998 (2003).

between a white woman and non-white man.[102] Thus, he participated in what amounted to a lynching in order to protect white racial purity. Perhaps even more likely, his motivation for the murder could have been a combination of both. Even if Tommie was no longer in love with Thalia, he was still possessive of her. He was obsessed with rumors that she was having an affair and went so far as assault another white man whom he had seen her with.[103] However, what finally pushed him to participate in murder was the possibility that a non-white man had dared transgress this sexual boundary.[104]

Yet Kelley's comment about Thalia's true colors undermines this. Rather than being seen as an instrument used to advance the dominance of white masculinity, Thalia is seen as a malicious woman whose lies begin a sequence of events that ultimately result in Joe Kahahawai's murder. Stannard similarly makes Thalia almost entirely accountable for everything that transpires, saying in his conclusion, "[b]ut what Thalia unleashed changed Hawai'i—permanently."[105] Despite his extensive exposition into the racial hierarchies, political tensions, and other structural causations for the murder of Joe Kahahawai and the releasing of his murderers, Stannard's conclusion, which is perhaps shared by much of the local community, suggests that injustice reduces down to the actions of one woman. John Rosa rightly proposes that Thalia's voice was taken from her and she became a surrogate for white womanhood that required the vengeance and protection of white men, but at the same time, critical treatments of the case have made it all about her story, her lie, and her individual culpability for the murder of Joe Kahahawai rather than the collective responsibility of a racist and sexist superstructure that ensured the unjust result.

II. THE ROLE OF HER STORY IN THE HISTORY OF OPPRESSION

Alleged rape of white women has often been used as an instrument of oppression against populations of color. According to Floyd Weatherspoon, "[b]lack males have historically been the victims of false allegations of rape,"[106] and the criminal justice system disproportionately punishes black

---

[102] *See* DORA APEL, IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB (2004).

[103] STANNARD, supra note 7, at 38.

[104] *See* HARRIS, *supra* note 25, at 218–19.

[105] STANNARD, *supra* note 7, at 410.

[106] Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 28 n.33 (1994).

men who are accused of rape, especially when the victim is white.[107] However, in the American South where many of the principals in the cases came from, including Tommie Massie and Grace Fortescue, extrajudicial murder was a common response to allegations that a white woman had been raped by a black man. Barbara Holden-Smith describes how "Southern apologists for lynching argued that the mob acted in order to protect the virtue of white Southern womanhood from black men who were incapable of controlling their desire for white women."[108] During the Massie rape trial, Thalia Massie was presented as the paragon of white womanhood. At the same time, the five accused were demonized as lustful savages, representative of a depraved ethnic population on the islands that needed to be dominated and controlled. Joe Kahahawai was one of the two native Hawaiians who were accused, who also happened to be the darkest skinned of the five defendants, and he was specifically targeted to make a statement to the non-white community about sexual boundaries.

The Massie-Fortescue cases served colonialist interests by portraying the local population as savage criminals, which required discipline and subjugation. The mainland press and the mainstream, white-owned Hawaiian press was quick to frame the rape within the narrative of racialized moral panic where the integrity of white morality was being threatened by perverse sexual proclivities of the native population. Immediately after the alleged rape, the *Honolulu Advertiser* ran the headline *Gang Assaults Young Wife: Kidnapped in Automobile, Maltreated By Fiends*.[109] As Helen Geracimos Chapin suggests, "from the 1850s on, the mainstream papers, backing the legal system, demanded the control of dangerous sexual proclivities of the non-white underclass."[110] In regard to previous rape cases by non-whites on the island, the *Advertiser* had previously described the perpetrators as "brutes . . . reeking of bestiality," and declared that the "honor of womanhood and the sanctity of virtue" were at stake.[111] In the Massie case, the *Advertiser* referred to the non-white suspects as "gangsters," "degenerates," and "thugs" while describing Thalia Massie as "a white woman of refinement and culture" and "a young married woman of the highest character."[112]

As Paul Harris suggests, "Thalia Massie was made into a symbol: the loyal, faithful wife of a bereaved, justifiably angry husband. She was held

---

[107] *Id.* at 47.
[108] Holden-Smith, *supra* note 9, at 1571.
[109] GERACIMOS CHAPIN, *supra* note 100, at 152.
[110] *Id.* at 153
[111] *Id.* at 154.
[112] *Id.*

up as the symbol of 'decent white women.'"[113] As a symbol of white womanhood, Thalia Massie could be recast as pure and virginal, in need of defense and protection even if she was a drunk and a cheat. Kimberlé Crenshaw points out that "while it was true that the attempt to regulate the sexuality of white women placed unchaste women outside the law's protection, racism restored a fallen white woman's chastity where the alleged assailant was a Black man."[114] In this respect, the stakes for the rape trial loomed much larger than individual justice for Thalia or any of the defendants. It became a defense of white womanhood in general against an unruly ethnic local population. As John Rosa argues, Thalia's story became no longer her own, and it was told for her "in the context of a pattern of white dominance imported from the continent, a history of haole oligarchy in the islands since the late nineteenth century, and a general but unwritten rule affirming the status of whites over nonwhites throughout the United States."[115] Because Thalia stood for more than herself, her honor had to be redeemed at all costs.

Upon first learning news of the rape, Admiral Yates Stirling, the commanding officer at Pearl Harbor where Tommie Massie was stationed, declared "our first inclination is to seize the brutes and string them up in trees."[116] Stirling saw the alleged attack as an affront social hierarchy of the islands, and believed that "quick action . . . and adequate punishment" was necessary "[f]or the sake of preserving 'the prestige of the whites' in the islands."[117] Though patience and faith in the justice system temporarily prevailed, the eventual hung jury would, in the minds of the white population, demonstrate the failure of the legal system to defend white prestige, so it was in the hands of the populace at large to carry out justice. In December 1931, a month after the rape trial, a group of men from the naval base kidnapped and beat Horace Ida.[118] One month later, Tommie Massie and Grace Fortescue kidnapped and murdered Joe Kahahawai. In his memoirs, Stirling made clear that he had intended to incite extrajudicial lynching, as he commented about his reaction to Joe Kahahawai's murder, "I had half expected, in spite of discipline, to hear that one or more [of the

---

[113] HARRIS, *supra* note 25, at 218.

[114] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157–158.

[115] ROSA, *supra* note 6, at 43.

[116] Virginia Heffernan, *Racism, Mayhem and Madness in Paradise*, N. Y. TIMES, Apr. 18, 2005, https://www.nytimes.com/2005/04/18/arts/television/racism-mayhem-and-madness-in-paradise.html.

[117] STANNARD, *supra* note 7, at 105.

[118] *Id.* at 224–26.

Kauluwela Boys] had been found swinging from the trees by the neck . . . ."[119]

The murder of Joe Kahahawai mirrored what was happening on the mainland and operated towards the same purpose of racialized dominance and control. Tommie Massie was a Southerner from Kentucky, where for decades under Jim Crow, extralegal murder of non-whites for alleged sexual transgressions against white women was commonplace. Henry Barber explains that "[t]he most commonly used excuse to justify this extra-legal punishment in the South was 'in defense of southern white women.'"[120] In fact, Grace Fortescue, when initially asked why she felt justified in killing Kahahawai, "said that she came from the South and that in the South they had their own way of dealing with niggers."[121] As Barbara Holden-Smith argues, "execution of black men for allegedly raping white women is a defining characteristic of the history of race relations in the South . . . [where l]ynching served primarily as a means to control black people in a white supremacist culture."[122] There were many Southerners in Hawai'i, particularly in the military, who according to historian Gavan Daws were "unable to see Hawaiians as anything but exotic Negroes, Orientals as little brown men indistinguishable one from the other, and 'local boys,' especially those of mixed blood, as the embodiment of all that was worst in human nature."[123] Thus, rooted in the vigilante kidnapping of Horace Ida and murder of Joe Kahahawai by military personnel was a Southern disdain for any type of miscegenation and a desire to maintain racial purity.

Most of the white population believed that the killing was justified as a "code of honor" slaying.[124] As an "honor killing," the murder of Joe Kahahawai reinforced notions that white men alone held rights to sexually access white women.[125] His slaying sought to ensure that the same racial hierarchies that existed on the mainland would also apply in Hawai'i. Though the defense strategy in the Fortescue murder case had hinged upon temporary insanity of Tommie Massie, in his closing statement to the jury, Clarence Darrow appealed to the unwritten code where a man whose wife

---

[119] ROSA, *supra* note 6, at 51.

[120] Henry E. Barber, *The Association of Southern Women for the Prevention of Lynching, 1930-1942*, 34 PHYLON 378, 378 (1973).

[121] STANNARD, *supra* note 7, at 301.

[122] Holden-Smith, *supra* note 9, at 1571.

[123] GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 319 (1968).

[124] WRIGHT, *supra* note 30, at 204.

[125] *See* Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight against Race and Gender Ideology, 1829-1920*, 3 UCLA WOMEN'S L.J. 1, 8 (1993).

was raped was bound by duty to avenge her honor.[126] Though it would have been uncharacteristic for Darrow to appeal to racial hierarchies given his previous work on behalf of minority clients,[127] most of the popular sentiment from the white population on the island and on the mainland nevertheless believed that the killing was defensible as a means of regulating and disciplining a population that had been stereotyped as godless, barbaric, and beneath the whites. According to John Rosa, "the belief in white superiority linked many haoles, old and newly arrived, in their support of Thalia Massie and in defense of 'white womanhood.'"[128]

In fact, Darrow did his best to conceal the racial undertones of the murder. Paul Harris describes how "[i]n total contrast to his defense in the Sweet trials, in the Massie case Darrow did not allow any 'question of race' to be discussed in the trial because he felt 'it would have been fatal to our side to let anything of that sort creep in.'"[129] Though it was later revealed that Deacon Jones was the person who actually pulled the trigger, Darrow strategically placed the gun in Tommie's hands.[130] Under the defense strategy, Tommie Massie specifically was the one who murdered Joe Kahahawai because he had raped *his* woman, and not because he had raped a white woman. Though in the public realm the murder was understood as a lynching aimed at keeping the ethnic population in line, in the closed realm of the courtroom, the murder of Joe Kahahawai needed to be personal and individualized, a vendetta between one man and another.

After beginning his closing argument with the statement that he "never had any prejudice against any race on earth," and that he had "no racial feeling against the four or five men who committed this crime upon Mrs. Massie," Darrow beseeched the jury "to forget race and look upon this as a human case."[131] Darrow's appeal relied on the myth, which he very well might have truly believed in, that colorblindness would lead to racial justice.[132] This might explain why Darrow, who had previously been known for being an advocate for underrepresented minorities, found himself embroiled in an overtly racist murder case. However, as Cynthia Lee points out, "[t]he problem with colorblindness is that it ignores reality.

---

[126] ARTHUR WEINBERG, ATTORNEY FOR THE DAMNED 104–118 (1957).

[127] HARRIS, *supra* note 25, at 223.

[128] ROSA, *supra* note 6, at 33.

[129] HARRIS, *supra* note 25, at 221.

[130] STANNARD, *supra* note 7, at 402–03; *see also* VAN SLINGERLAND, *supra* note 25, at 318.

[131] STANNARD, *supra* note 7, at 372.

[132] Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 163 (1994).

Even if we believe that race should not matter, the fact is that it does matter."[133] The fact remains that the Massie-Fortescue cases were all about race, and to deny the societal racism involved is to mask the deeper systemic problems. The "honor killing" was not to preserve the honor of an offended husband, but to preserve the dominance of white masculinity as the sole possessor of access to white women. The killing was not a personal crime of passion, but a public spectacle intended to make a statement to the ethnic population and to control them through terror.

In addition, the protection of white womanhood from the threat of native sexuality was deployed to justify military dominion of the island from the mainland. Looming throughout the whole process, across both trials, was the threat of commissioned law and martial law being imposed from the mainland. The *American* published an article with the title *Martial Law Needed to Make Hawaii a Safe Place for Decent Women*.[134] The rape of a white woman by local men of color evidenced that the island was a place of lawlessness that demanded forced imposition of the rule of law. Then, the repeated failure of the local justice system to produce results that satisfied the white power structure reemphasized the need for intervention from the mainland. In this respect, the Massies were convenient players, as Tommie's position as a naval officer made Thalia's rape an issue of honor not just for the white population, but for the American military as well.

Commissioned rule of the islands was threatened twice: first immediately after the hung jury in the Massie rape trial, and then again after the conviction and sentencing of the four white defendants in the Fortescue murder trial.[135] In the mind of whites in the navy, on the islands, and on the mainland, the Hawaiian territorial government structure had proven itself incapable of delivering justice and was therefore unworthy of autonomous rule. Thus, in addition to calling for lynching after the acquittals of the five accused rapists, Admiral Stirling also called on the mainland to intervene and order commissioned rule and martial law over the islands.[136] Claiming a broken system of justice and declaring "[t]he large number of people of alien blood in the Hawaiian islands is a matter of the gravest concern . . . ."[137] Stirling wrote to Assistant Attorney General Seth Richardson demanding:

---

[133] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1610 (2013).

[134] HARRIS, *supra* note 25, at 218–19.

[135] STANNARD, *supra* note 7 at 231, 384.

[136] VAN SLINGERLAND, *supra* note 25, at 230.

[137] *Id.*

> [A]ctual control of the laws—their inception, promulgation, and enforcement—should be by the national government. Should the logic of the situation decide for a government of limited suffrage with a considerable measure of control by the National Government, the constitution of such controlling government, though predominantly civil, should include an officer of the United States Army and an officer of the United States Navy . . . .[138]

Stirling wanted to capitalize upon fears of insurrection from the ethnic population and the danger it posed to the chastity of white women.[139]

Stirling was clear in his desire to stoke racist stereotypes to politically disenfranchise the majority ethnic population and place power solely in the hands of a minority of "men primarily of the Caucasian race; by men who are not imbued too deeply with the particular atmosphere of the islands."[140] Pursuant to a resolution adopted by the United States Senate to determine the necessity of commissioned rule, Richardson was dispatched to the island by the Department of Justice prior to the commencing of the Fortescue murder trial to investigate and report.[141] Though Richardson's findings did not support the imposition of commissioned rule, Stirling found that his inflammatory letter, which had been published within Richardson's report, drew sympathizers from "the outraged American media, most of Congress and the military, popular opinion throughout the United States, and Hawai'i's old guard haole elite."[142] Upon release of the report, Walter Dillingham, the most powerful businessman on the islands, also wrote to Washington and opined that a "radical change in government" might be necessary, but not yet.[143]

Immediately upon news of the convictions and sentencing in the Fortescue murder trial, those forces on the mainland mobilized. The Hearst newspapers ran a column lambasting Washington for not earlier ordering a "complete militarization of all the islands under a military commission," and included cut-out cards for readers to mail their senators and representatives demanding action.[144] The column claimed no less than "American womanhood and decency in Hawai[']i" were at stake.[145] Again,

---

[138] *Id.*

[139] *See* CATHERINE HALL, WHITE MALE AND MIDDLE CLASS: EXPLORATIONS IN FEMINISM AND HISTORY 283–285 (1992) (describing how rape of white women during native insurrections in India in 1857 and Jamaica in 1865 were evoked by colonizers to justify colonial use of force).

[140] VAN SLINGERLAND, *supra* note 25, at 230.

[141] STANNARD, *supra* note 7, at 277–78.

[142] *Id.* at 322.

[143] *Id.*

[144] *Id.* at 384–85.

[145] *Id.* at 384.

the protection of white womanhood was invoked as the justifier for colonial domination. Yet even before those cards were sent, over a hundred congressmen signed a petition expressing Congress' "deep concern for the welfare of Hawai[']i" and demanding a pardon of the convicted defendants.[146] Governor Lawrence Judd conceded that the threat of martial law was a significant motivator for him to commute the sentences of the four who were convicted of Joe Kahahawai's murder, saying "[h]ad I not acted as I did, I believe Congress might have changed our form of government and placed us under a commission."[147]

Only ten years later, as the United States entered World War II, Hawai'i indeed came under martial law.[148] The justification was overtly racial, as a reaction to the threat of Japanese invaders both inside and outside the islands. For fifteen months military rule suspended all civil rights and liberties on the islands, including the right to a jury trial and habeus corpus, effectively replacing the dual system of justice with a provost court.[149] Martial law would not be entirely removed until October 1944, more than two years after the Battle of Midway, which experts believe to have effectively ceased the threat of future invasion of the United States by Japan.[150] What the unprecedented four years of military rule demonstrated to the ethnic populations on the island was the easy use of racist xenophobia to strip them of their rights, and thus the urgency of political mobilization in order to campaign for full statehood.

III. THE ROLE OF HER STORY IN THE HISTORY OF RESISTANCE

The 2006 mock trial was presided by Lieutenant Governor James R. "Duke" Aiona, Jr. as judge, who understood the significance of the Massie-Fortescue affair in building political influence for the Asian Pacific American community on the island through coalition building and solidarity. As ABA reporter James Podgers accounts:

> Aiona noted in a follow-up interview after the program, "the case really divided opinions between haoles—whites—and other groups," including the large Chinese, Japanese and Filipino communities. "It galvanized those

---

[146] *Id.* at 385.

[147] Chuck Frankel, *"Pressured" in Massie Case, Says Ex-Governor*, HONOLULU STAR BULL. A-1, Feb. 13, 1967.

[148] Duncan v. Kahanamoku, 327 U.S. 304, 307–08 (1946) ("On December 7, 1941, immediately following the air attack by the Japanese on Pearl Harbor, the Governor of Hawai[']i by proclamation undertook to suspend the privilege of the writ of habeus corpus and to place the Territory under 'martial law.'").

[149] Walter Armstrong, *Martial Law in Hawai'i*, 29 A.B.A. J. 698, 699 (1943).

[150] *See* WILLIAM H. REHNQUIST, ALL LAWS BUT ONE 211, 214 (1998).

> communities and unified them with local Hawaiians." That budding political influence "led them to gain strength and power to take over their own state."[151]

Indeed, even though as individuals non-whites who live in Hawai'i might still subcategorize themselves based on their individual ethnicities, such as native Hawaiian, Chinese, Japanese, Filipino, or Korean, they identify collectively as "locals" rather than Asian Pacific American.[152] John Rosa describes how "the Massie case could now serve as an origins story for local identity—as an example of injustice against working class peoples of color in the islands."[153]

The Massie-Fortescue affair further deteriorated the tenuous relationship between native Hawaiians and the white elite. Joe Kahahawai was one of their own, and his slaying at the hands of white perpetrators with little recourse was a watershed moment for the native Hawaiian community. Reverend Robert Ahuna, who conducted the committal service, declared to the crowd in attendance, "[w]ithin the bounds of our birthplace, such a thing has never been heard of," emphasizing how much the white minority oligarchy regarded them as a racial undercaste in their native home.[154] Kahahahwai's murder became a rallying cry for native Hawaiians. His funeral brought together an unprecedented crowd from all reaches of the islands, typically reserved for the death of royalty. Lydia Lum, who compares Joe Kahahawai to Emmett Till, describes how "Kahahawai's funeral drew thousands of Hawaiians and initiated a previously rare strategy session between leaders of Japanese, Chinese, Filipino, and Hawaiian communities."[155] Rosa argues that Kahahawai's murder was the tipping point that caused "Hawaiians to see more clearly that as a racialized group, they had more in common with working-class immigrants of color."[156]

The Massie case thus also brought together previously fractured Asian ethnic groups on the island, who despite being a numeric majority on the island, had lacked political power and still subsisted under the rule of the minority white oligarchy.[157] Indeed by 1920, sixty-two percent of the population of Hawai'i were from Asian backgrounds, with native Hawaiians representing sixteen percent and whites representing less than

---

[151] Podgers, *supra* note 21, at 64.

[152] Jonathan Y. Okamura, *Why There Are No Asian Americans in Hawai'i: The Continuing Significance of Local Identity*, 35 SOC. PROCESS IN HAW. 161 (1994).

[153] ROSA, *supra* note 6, at 76.

[154] *Id.* at 52.

[155] Lydia Lum, *A Dishonorable Killing*, 23 DIVERSE ISSUES IN HIGHER EDUC. 32, 33 (2006).

[156] ROSA, *supra* note 6, at 64.

[157] *Id.* at 58.

eight.[158] Part of the fracturing of the various ethnic groups had to do with their migration patterns, as most Asian immigrants during the late nineteenth century were recruited to work the growing plantation industry in Hawai'i and they were segregated into ethnically separate camps when they arrived.[159] As Ronald Takaki notes, "[t]he organization of camps into different nationalities supported the planters' strategy of dividing and controlling their workforce."[160] Though there had been some coalition building among the various groups in respect to labor rights on the plantations,[161] the groups did not coalesce as a political constituency until after the Massie case. Such political mobilization significantly changed the landscape of the islands, and as Takaki continues, "[b]y their numerical preponderance, they had greater opportunities to weave themselves and their cultures into the very fabric of Hawaii and to seek to transform their adopted land into a society of rich diversity where they and their children would no longer be 'strangers from a different shore.'"[162]

Leaders in the Asian community began to build alliances with native Hawaiians. Though several Asian candidates had previously run for public office, it was not until 1930 that two of them finally succeeded, Andy Masayoshi Yamashiro and Tasaku Oka, who were both elected to the Territorial House of Representatives.[163] Yamashiro was especially vocal about the need for coalition building during the Massie-Fortescue affair. Hiromi Minobe describes how, in response to Admiral Stirling's call for a commissioned government, Yamashiro "repeatedly us[ed] the word 'we' . . . to mobilize and unify the entire island population, regardless of race, ethnicity, social class, or political ideology, in an attempt to organize a fight against a mutual 'enemy': a grave threat to Hawai'i's self-governance from the continental United States."[164] Yamashiro, who was a Democrat, was committed to building bridges with the native Hawaiian population. He had been politically groomed under the tutelage of native Hawaiian stateman David Trask, and as a territorial representative he would often collaborate with other native Hawaiian representatives in advancing native Hawaiian interests.[165] In 1930, when Yamashiro was first elected, native

---

[158] RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 132 (1989).

[159] *Id.* at 157.

[160] *Id.* at 156–57.

[161] SUCHEN CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 84–86.

[162] TAKAKI, *supra* note 158, at 176.

[163] STANNARD, *supra* note 7, at 78.

[164] Hiromi Monobe, *From "Vanishing Race" to Friendly Ally: Japanese American Perceptions of Native Hawaiians During the Interwar Years*, 23 JAPANESE J. AM. STUD. 73, 90 (2012).

[165] *Id.* at 88–89.

Hawaiians were resentful of the fact that the first Japanese Americans had won public offices.[166] Only two years later, in the election of 1932, the native Hawaiian vote became a crucial element in propelling more Japanese Americans to elected offices on the islands.[167]

For the first time on the island, ethnic divides began to dissolve, and a new term, "local," emerged as common identifier.[168] The one thing "local" meant was not white. As Stannard relates, "beginning in the fall of 1931, people of color in Hawai'i took to describing the accused young men—who individually were Hawaiian, Japanese, and Chinese—by the collective term 'local' to distinguish them from their haole accuser and her supporters."[169] The Republican party had been aligned with the navy during the Massie-Fortescue affair, and the new coalition of ethnic voters turned out en masse to vote them out of office.[170] In the election of 1932, the Massie case became a rallying cry for a Democratic shift in power.[171] That year, an unprecedented number of over 90 percent of the electorate showed up to vote.[172] Roger Bell accounts "[t]he swing toward the Democrats in Honolulu after this event as well as the election of a Democrat, Lincoln McCandless, as delegate to Congress in 1932 confirmed the growing dissatisfaction with the Republican party."[173]

More importantly, the Massie case became a catalyst for statehood. Bell accounts how "[t]he reaction of Congress to the Massie case also revealed the vulnerability of the islands to outside interference. This further strengthened the demand for full-fledged local autonomy under statehood."[174] Indeed, the involvement of the mainland in pressuring territorial Governor Judd to commute the sentences was troubling for the local population. Even though for Judd the commutation of the sentences was less racially motivated than politically expedient, the pressures from the mainland were heavily steeped in racist hysteria, which was then being imposed on the islands. As Rosa describes:

> [W]hat angered locals most was not necessarily the racist rhetoric of the navy or other continental groups; rather, it was that the territory's own judicial system had succeeded, only to have its executive branch succumb to federal

---

[166] STANNARD, *supra* note 7, at 412.

[167] *Id.*

[168] ROSA, *supra* note 6, at 5.

[169] STANNARD, *supra* note 7, at 413.

[170] *Id.* at 411.

[171] *Id.* at 412.

[172] *Id.* at 411.

[173] RODGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 60 (1984).

[174] *Id.* (footnote omitted).

> pressure. Locals seemed more upset at the failure of the territorial government to stand up for itself.[175]

Rather than adhering to the rule of law, the territorial government had aligned itself with extralegal tactics of Southern whites. John Reinecke, in an op-ed to the *Honolulu-Star Bulletin*, views the Massie case as the first time "the people of Hawai[']i were brought up flatly and traumatically against the power of American racialism, reinforced by ignorance of Hawai[']i."[176] Reinecke also interprets the aftermath of the Massie case as a warning of "how precarious political liberties were without statehood."[177]

There was, however, heavy resistance on the mainland to grant full statehood to the islands. Whereas the Massie case made it clear for locals on the island the need for equal representation in mainland politics, the extensive coverage of the case on the mainland stoked xenophobic stereotypes of native and ethnic groups as savages who needed government to be imposed upon them. These fears were exacerbated by anti-Japanese sentiments during World War II, when martial law finally was imposed, though notably without the mass internment that occurred on the mainland due to the political alliances that were forged.[178] It would not be until after World War II that the push for Hawaiian statehood would come to fruition.[179] As Bell further relates:

> [I]n large part these new forces, which ultimately achieved statehood, were identified with the burgeoning Democratic party. Supported largely by the descendents [sic.] of Asian immigrants, who had long been denied equality in island life, the Democrats fervently believed that equality as a state in the Union would pave the way for genuine democracy and equality of opportunity at home.[180]

By 1938, a quarter of the thirty-nine elected officials for Hawai'i were Asian Pacific American, and in 1954 the Asian Pacific American constituency was largely responsible for pushing the Democrats into power in what is often called Hawai'i's "Democratic revolution."[181] As the Democrats pushed Hawai'i into statehood in 1959, former Speaker of the

---

[175] ROSA, *supra* note 6, at 63.

[176] *Id.* at 89.

[177] *Id.*

[178] STANNARD, *supra* note 7, at 416 ("What is often overlooked, however, is that in the islands, in stark contrast to what occurred on the mainland, an exceptionally aggressive anti-internment movement arose among the non-Japanese. Not surprisingly, in light of the multiracial union and political struggles that had emerged during the past decade, this movement included Hawaiians and other nonwhites.").

[179] BELL, *supra* note 173, at xii–xiii.

[180] *Id.* at xii.

[181] CHAN, *supra* note 161, at 171.

territorial House Hiram Fong became the first Asian American elected to the United States Senate.[182] That same year, former majority leader of the territorial House Daniel Inouye was elected to the United States House of Representatives and would be elected to serve alongside Fong in the United States Senate in 1962, where he would serve until his death in 2012.[183]

This political collectivism, however, has not been without its problems, as not all local Hawaiians feel as though their interests are being represented. Indeed, whereas the Massie case stimulated coalitions between native Hawaiians and Asian groups, those bonds have again fractured with time. Particularly in respect to the issue of native sovereignty and land rights, there are activists who are critical of Asian settler colonialism and view Asian immigrant groups as a significant contributor to the disenfranchisement of native Hawaiians.[184] As Dean Itsuji Saranillio points out, "Hawai'i statehood, narrated as a liberal antiracist civil rights project, facilitated and normalized projects of both settler colonialism and empire."[185] Their critique of the way in which "local" identity has played out politically is that it primarily serves the interest of the Asian immigrant population and obfuscates the rights of native Hawaiians who are subsumed into the larger ethnic monolith. For them, the myth of Hawai'i as a multiethnic paradise is cut from the same cloth as the myth of colorblindness that Clarence Darrow used to justify his involvement in the defense of Joe Kahahawai's murder and therefore perpetuates racial injustices.

For example, after the Supreme Court struck down the blood quantum rule that limited voting rights to native Hawaiians in respect to elections of

---

[182] *See id.* at 172.

[183] *Id.*

[184] Haunani-Kay Trask, *Settlers of Color and "Immigrant" Hegemony: "Locals" in Hawai'i*, 26 AMERASIA 1, 2 (2000) ("Our Native people and territories have been overrun by non-Natives, includ- ing Asians. Calling themselves 'local,' the children of Asian settlers greatly outnumber us. They claim Hawai'i as their own, denying indigenous history, their long collaboration in our continued dispossession, and the benefits therefrom. Part of this denial is the substitution of the term 'local' for "immi- grant," which is, itself, a particularly celebrated American gloss for 'settler.'"); Candace Fujikane, *Introduction: Asian Settler Colonialism in the U.S. Colony of Hawai'i, in* CANDACE FUJIKANE AND JONATHAN OKAMURA, ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAI'I 5 (2008).

[185] Dean Itsuji Saranillio, *Colliding Histories: Hawai'i Statehood at the Intersection of Asians "Ineligible to Citizenship" and Hawaiians "Unfit for Self-Government,"* 13 J AS. AM. STUD. 283, 287 (2010). *See also* MARI MATSUDA, WHERE IS YOUR BODY? 187 (1996) ("Sometimes when Hawai'i Japanese go to school on the mainland, they run into the Asian-American movement, and they are confused because they do not think of themselves as 'Asian.' They think of themselves as 'local.'").

trustees to the Office of Hawaiian Affairs, which was responsible for administering programs for native Hawaiians, in *Rice v. Cayetano*,[186] there were a rash of cases challenging special entitlements and compensatory benefits reserved for native Hawaiians as unconstitutionally discriminatory on the basis of race.[187] In these cases that seemed a precursor to the current Harvard Affirmative Action case, the plaintiffs included ethnically Asian locals who evoked the language of equality and civil rights to erase legally-recognized differences between native Hawaiians and non-Hawaiians, even though those differences were put in place to recognize and compensate native Hawaiians for the role the United States government played in the overthrow of the Hawaiian crown and the dispossession of its native people.[188] In this respect, there remains resentment from some native Hawaiians against Asian settlers whom they see as participating in the same regime of oppression as the white settlers.

There are scholars, however, who call for healing of the fractures that have developed. Mari Matsuda recognizes, "[t]here is a tension between Hawaiians and Japanese that arises from a history of colonialism in these islands that overthrew their government and brought our poverty-stricken ancestors to work the land the missionaries took." [189] Yet she hopes that "our common histories make us inevitable allies in the effort to save what is special about Hawai['i]."[190] Natsu Taylor Saito furthermore suggests that understanding the interconnectedness of the histories of immigrant and indigenous populations, "help us better understand the persistence of race-based injustices and disparities, the ways in which the subordination of so-called racial minorities is rooted in the displacement of Indigenous peoples, and the need to give primacy to Indigenous struggles for self-determination."[191] Hearkening to the inter-ethnic coalition building from Hawaiian history, Matsuda urges her fellow Asian Pacific Americas who hold some political power to act in solidarity for the interests of all who are

---

[186] 528 U.S. 495 (2000).

[187] *See e.g.*, Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006); Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002).

[188] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[189] MATSUDA, *supra* note 185, at 188.

[190] *Id.*

[191] Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U.L. REV. 1, 30 (2014) (footnote omitted).

"local,"[192] and to focus on what unites rather than what distances and divides.[193]

IV. CONNECTING HER STORY TO CONNECTED HISTORIES

The Massie case inspired the disparate ethnic communities of Hawai'i to reflect upon their shared histories of oppression and suffering under the ruling white regime. Both on the islands and on the mainland, racist stereotypes of non-whites as savages have been repeatedly deployed to justify domination, exclusion, and control of immigrants, indigenous populations, and other people of color.[194] While Matsuda and Saito urge the rebuilding of racial alliances, this Article encourages race scholars to go a step further and seek alliances across gender lines. There is need to recollect an interconnectedness between gender and oppression when reevaluating the legacy of coalition-building in the Massie case. In the same way that the common experience of oppression in the Massie case brought together disparate ethnic groups on the island towards a common interest of fighting oppression, a reevaluation of the Massie case can also serve as a medium of coalition building between populations of color and women who have been similarly oppressed for the benefit of white patriarchy. Thalia Massie, and white women generally, must no longer be viewed as the enemy of populations of color.

The threat of lynching when coupled with a rape culture that assumes women can effortlessly make false accusations of rape,[195] breeds a suspicion of white women in communities of color. False allegations of rape by a white woman historically had the power of life and death over a person of color, whether through a racist justice system as in the cases of the Groveland Four[196] and the Scottsboro Boys,[197] or through extrajudicial

---

[192] MATSUDA, *supra* note 185, at 186–188.

[193] *Id.* at 186.

[194] *See e.g.*, Carrie L. Rosenbaum, *Crimmigration-Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 46 (2018) ("The 'civilizing mission' of colonialism, intended to 'redeem[] the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe,' could just as readily describe the way in which voluntary or involuntary Chinese migrants to the U.S. were described at the time of the Chinese Exclusion Act.") (footnotes omitted).

[195] *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 369 (1975).

[196] *See generally* GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2013).

[197] John E. Mays & Richard S. Jaffe, *History Corrected – The Scottsboro Boys Are Officially Innocent*, CHAMPION, March 2014, at 28, 29 ("Ruby Bates recanted her previous testimony in Scottsboro. Bates testified that she was never raped and that she and Victoria Price made up the whole story to keep from being arrested for vagrancy.").

lynchings as in the cases of Joe Kahahawai and Emmett Till. Carolyn Bryant, whose claims that Emmett Till grabbed her and made lewd remarks to her have always been in dispute,[198] later admitted that these allegations were false.[199] Like Thalia Massie, Carolyn Bryant's allegation against Emmett Till was viewed as the motivating factor that caused her husband and J.W. Milam to kidnap and kill the fourteen-year old. Taken together, these women form the basis for a modified version of the lying, vindictive shrew stereotype,[200] who is not motivated by jealousy or revenge, but by racism. The white lying shrew not only holds the ability to mobilize lynching, but also has the support of a broken justice system. In this respect, rape law is often viewed by communities of color as designed to protect only white women. Indeed, Kimberlé Crenshaw identifies a problem with "[t]he singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror."[201]

Though Crenshaw brings this up to argue the need for an intersectional analysis of rape and to consider the perspective of black women raped by white men,[202] her analysis of rape as a weapon of racial terror underscores the need to consider the ways in which rape has been deployed as method of controlling both women and populations of color. It is necessary, in this respect, to consider Thalia Massie not simply as the villainous white woman in the story of ethnic oppression on the islands, but another subject of oppression. Brande Stellings sees commonality between the experiences of white women and populations of color, where "[t]he ways in which whites used racially and politically motivated violence as a weapon to enforce blacks' subordinate status mirrors the way sexual violence against women operates as a form of social control."[203] Thus, rather than be viewed as being on opposite ends of a hierarchy based purely on race, white women and populations of color may actually stand on more equal footing.

---

[198] See Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1130 (2017); Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2132 n.3 (2005).

[199] Richard Pérez-Peña, *Woman Linked to 1955 Emmett Till Murder Tells Historian Her Claims Were False*, N. Y. TIMES, Jan. 27, 2017, https://www.nytimes.com/2017/01/27/us/emmett-till-lynching-carolyn-bryant-donham.html.

[200] Gruber, *supra* note 27, at 591.

[201] Crenshaw, *supra* note 114, at 158.

[202] *See also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598–99 (1990).

[203] Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 210 (1993).

They both stand at the feet of a system designed to keep white men at the top.

This proposition, however, runs the danger of suggesting that the oppression is equal. Crenshaw critiques such a conflation of racial and gender oppression as "both feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women."[204] While their experiences may not be shared, they are intertwined. Though Crenshaw is extremely critical of her, Susan Brownmiller, who famously popularized the notion that rape has never been about sex and has always been about control,[205] understood the interconnectedness between sexual domination and racial domination, specifically in the practice of lynching. She writes, "from slavery onward the black man's fortune was inextricably and historically linked to the white woman's reputation for chastity, a terrifying imbroglio that the black man and the white woman neither created nor controlled."[206] The defense of white womanhood against sexual threat by men of color is not a defense of womanhood at all, but is intended to protect white masculinity above all.[207]

As Brownmiller suggests, rape is a systemic act that preserves male dominance in society by keeping all women in a constant state of terror.[208] Rape culture, which includes the propensity of women to be disbelieved and blamed when they make accusations of rape, contributes to that terror and encourages silence.[209] Even when women do speak out, the uneven prosecution for rape[210] and disproportionate punishment for rape based on

---

[204] Crenshaw, *supra* note 114, at 152.

[205] BROWNMILLER, *supra* note 191, at 377; CARMEN WARNER, RAPE AND SEXUAL ASSAULT: MANAGEMENT AND INTERVENTION 94 (1980) ("It is now generally accepted by criminologists, psychologists, and other professionals working with rapists and rape victims that rape is not primarily a sexual crime, it is a crime of violence."); *but see* Craig T. Palmer, *Twelve Reasons Why Rape Is Not Sexually Motivated: A Skeptical Examination*, 25 J. SEX RES. 512 (1988).

[206] BROWNMILLER, *supra* note 191, at 221. This is not to say that Brownmiller's analysis is not without its flaws, particularly when she evokes the Emmett Till murder as an illustration. *See* Kimberlé Crenshaw, *A Black Feminist Critique Of Antidiscrimination Law And Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 207 (1990) (David Kairys ed.) ("Brownmiller's remarkable insensitivity to the horror of the Till case illustrates how centering the perspective of white women in feminist discourse can operate to minimize racial oppression and to alienate Black women.").

[207] BROWNMILLER, *supra* note 195, at 217.

[208] *Id.* at 15; *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1302 (1991); Gruber, *supra* note 27, at 581.

[209] Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027, 1046 (2016).

[210] Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 460 (2018) (identifying statistics and "literature on sexual assault

the race of the perpetrator,[211] suggests that the justice system is not intended to remove that terror and make women completely free of rape, only free of rape by men of color.[212] By inference, this suggests that women remain available to rape by white men.[213] Even as populations of color disproportionately bear the brunt of the responsibility for rape, both legally and extralegally, the threat of rape is never removed.

Meanwhile, men of color are constructed into boogiemen for white women to focus their fear on to deflect responsibility and blame away from the structures that allow for rape to occur. Kimberlé Crenshaw ties the practice of lynching for rape to the control of women as property; she identifies a sexual stratification thesis where "[w]omen are viewed as the valued and scarce property of the men of their own race," and therefore, "[t]he sexual assault of a white [woman] by a black [man] threatens both the white man's 'property rights' and his dominant social position. This dual threat accounts for the strength of the taboo attached to interracial sexual assault."[214] Yet the taboo goes only one way. Whereas men of color are not permitted to transgress racial boundaries, white men are, which is reinforced by unequal application of rape law and by the culture of lynching.

The murder of Joe Kahahawai functions symbolically as a lynching intended not to avenge or protect Thalia Massie, but to avenge and protect white masculinity. The subsequent legal defense in the trial for his murder adopted a strategy designed to protect that same interest. In this respect, John Rosa is correct that Thalia's voice, and in fact the voice of women

---

investigations around the country, which reveal a pervasive failure of law enforcement and prosecutors' offices to pursue reported sexual assaults"); Stellings, *supra* note 203, at 207.

[211] Lisa M. Saccomano, *Defining the Proper Role of "Offender Characteristics" in Sentencing Decisions: A Critical Race Theory Perspective*, 56 AM. CRIM. L. REV. 1693, 1731 (2019) (discussing the role of race, class, and privilege in sentencing); Jack Greenberg, *Capital Punishment As A System*, 91 YALE L.J. 908, 912 (1982) ("Almost 90% of those executed were black men convicted for the rape of white women.").

[212] See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 454 (1996) ("The courts joined in the lynching, often applying special rules to cases charging black on white rape, allowing juries to consider the respective races of defendant and victim in deciding what a defendant intended in attempted rape cases. A black defendant/white victim combination alone entitled a jury in some courts to draw the inference beyond a reasonable doubt that the defendant intended rape.") (footnotes omitted).

[213] *See* Kathleen Tierney, Comment, *The "Leniency Epidemic": A Study of Leniency Granted to Convicted Rapists in America and Australia*, 6 PENN ST. J.L. & INT'L AFF. 342, 344 (2018).

[214] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1276 n.118 (1991).

generally, is subsumed by the interests of white men.[215] The National Women's Party attempted to intervene in the case and advocate the need for Grace Fortescue to be tried by a jury of her peers, thereby highlighting the case as a women's rights issue, but ultimately the defendants elected to go with Darrow.[216] His defense strategy did not advocate women's rights at all, but accomplished quite the contrary, by appealing to the unwritten law that was premised on a man's right over his woman, which Lawrence Friedman and William Haverman describe as "reinforce[ing], at least symbolically, the power of men to control the lives and sexual behavior of their women."[217] The unequal application of rape laws and extralegal lynchings against populations of color, however, polices who is allowed to maintain the power of control. In other words, the rape and murder trials have never been about Thalia Massie, but rather have always been about Tommie Massie and the patriarchal superstructure that supports him.

In this respect, focus must be taken off Thalia Massie and she must be separated from the stereotype of the lying, vindictive white woman who is responsible for ruining the lives of innocent men of color. Regardless of whether she blatantly lied or mistakenly misidentified the suspects, her role in the injustice is secondary. Unlike the Groveland Four or the Scottsboro Boys, her accusations did not lead to convictions. The Hawaiian territorial justice system functioned in the Massie rape case insofar as it did not produce convictions where the burden of proof was not met under the existing statute.[218] The murder of Joe Kahahawai was initiated not by her, but by Tommie Massie and Grace Fortescue based on their Southern sensibilities regarding race and sexual boundaries. Unlike the Emmett Till case, the Hawaiian territorial judicial system functioned again insofar as it produced convictions and hard sentences for the murderers, though ultimately the governor bowed to racially motivated pressures from the mainland. The amount of distrust of Thalia that emerged in the aftermath is disproportionate to her role, in comparison to the mainland press, the

---

[215] Rosa, *supra* note 6, at 29–30.

[216] Richard F. Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Right*, 9 AM. U. J. GENDER SOC. POL'Y & L. 97, 111–12 (2001).

[217] Lawrence M. Friedman & William E. Havemann, *The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts*, 61 BUFF. L. REV. 997, 1043 (2013).

[218] The rape statute at the time mandated that the victim's word alone was not enough to convict. It read, in part, "no person shall be convicted of rape, seduction or abduction, upon the mere testimony of the female uncorroborated by other evidence direct or circumstantial." REV. LAWS HAW. § 4156 (1925). Immediately following the mistrial in the Massie case, the legislature moved to amend the rape statute to eliminate the corroboration requirement, as well as make rape a capital offense. Rosa, *supra* note 6, at 42.

United States Congress, Tommie, her mother, and their Southern upbringing.

At the end of the day, what is often obscured is the fact that Thalia Massie was a victim of assault. It may not have been Ben Ahakuelo, Henry Chang, Horace Ida, David Takai, or Joe Kahahawai, but someone did assault Thalia Massie, and she was indeed a victim. Yet when we talk of the injustice that occurred in the Massie-Fortescue affair today, it is primarily from the lens of racial injustice. We fail to appreciate Thalia's victimization by the same forces that victimized Joe Kahahawai and the four others who were accused. Catherine MacKinnon contends that "[b]eneath the trivialization of the white woman's subordination implicit in the dismissive sneer 'straight white economically-privileged women' . . . lies the notion that there is no such thing as the oppression of women as such."[219] She argues that, when talking about oppression, race scholars tend to disassociate with white women,[220] and most of the critical analysis of Thalia Massie is consistent with MacKinnon's conclusion. This Article seeks not to rehabilitate Thalia Massie, but to suggest that critical attention has for too long focused on the wrong culprit. Though Crenshaw is herself critical of white feminism, she also finds that the "male-centered vision of antiracism has largely escaped the critical scrutiny [by critical race feminists] that is directed against MacKinnon's feminism."[221] By seeing Thalia Massie with a more sympathetic eye, it is easier to take the focus off her and onto the true malefactor that has largely persisted in the background but not borne the brunt of the blame: white patriarchy.

CONCLUSION

Though the Massie-Fortescue affair is nearly nine decades old at the time of this Article, it still has relevance today. Stereotypes of people of color, particularly immigrants, as lustful savages have again been deployed to justify their continued exclusion and disenfranchisement from the political process.[222] President Donald Trump capitalized on racist fears of "Mexican rapists,"[223] to vault himself into office, and continues to capitalize upon

---

[219] Catharine A. MacKinnon, *From Practice to Theory, or What Is A White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 20 (1991).

[220] *Id.* at 22.

[221] Kimberlé Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 154 (2010).

[222] *See generally* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 577 (2019).

[223] Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASHINGTON POST (Oct. 20, 2016), https://www.washingtonpost.com/news/the-

these stereotypes. Mike Kagan observes concerning the current political climate:

> [T]here has been a concerted effort to connect immigrants with crime--Mexican rapists, Salvadoran gang members, and so on. This is a direct appeal to xenophobia. Third, railing against sanctuary cities is a way of seeming to defend rule of law, and to portray the other side as proponents of lawlessness and chaos.[224]

From the Muslim ban to the border wall, we are again living in a time when policy is being shaped by xenophobic fear that is often sexualized.[225]

Much responsibility for the 2016 election has been unfairly placed at the feet of white women, particularly with the popular but technically inaccurate statistic that fifty-two percent of white women voted for Trump.[226] The blame that is placed on white women has continued to fracture the relationship between activists of color and feminist activists, who are viewed as predominantly representing the interests of white women.[227] Consistent with MacKinnon's assessment, white women have

---

fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/.

[224] Michael Kagan, *What We Talk About When We Talk About Sanctuary Cities*, 52 U.C. DAVIS L. REV. 391, 403 (2018).

[225] David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 637 (2019) ("Today, we live in a time of racially inflected immigration bans and border walls. These bans and walls are said to be necessary to keep at a distance racialized groups of people that are alleged threats to the very foundation of the United States.").

[226] LaToya Baldwin Clark, *On Confirmation*, 26 UCLA WOMEN'S L.J. 21, 27 n.10 (2019) (noting that the often-cited 52% statistic "is technically inaccurate; the correct statistic should read, 'according to exit polls, 52% of white women who turned out voted for Trump' . . . . A more accepted study out of the Pew Research Center finds that of the white women who voted, 47 percent of them voted for Trump, compared to 45 percent who voted for Clinton") (citations omitted).

[227] *See* Jessica Watters, *Pink Hats and Black Fists: The Role of Women in the Black Lives Matter Movement*, 24 WM. & MARY J. WOMEN & L. 199 (2017); *see also* Alia E. Dastagir, *Why This Women's March Photo Is Such a Big Deal*, USA TODAY (Jan. 25, 2017), https://www.usatoday.com/story/news/nation/2017/01/25/angela-peoples-womens-march-washington-viral-photo/97062400 (showing an African American woman holding a sign that reads "Don't Forget: White Women Voted For Trump"); Jenna Wortham, *Who Didn't Go to the Women's March Matters More Than Who Did*, N. Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/magazine/who-didnt-go-to-the-womens-march-matters-more-than-who-did.html (commenting on that same picture); *See e.g.*, Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 U. TOL. L. REV. 537, 538 (2018) ("On March 8, 2018, the guerrilla feminism account on Instagram posted this message: 'happy international women's day except to the 53% of white women who voted for Trump.'").

indeed become despised and seen as the enemy of racial justice.[228] What is forgotten is that an overwhelming majority of white men voted for Trump,[229] and they had the most to gain from his election. In the same way that the demonization of Thalia Massie distracts from the interests of white patriarchy at play, so too does blaming white women not offer constructive solutions for progressives in the Trumpian era.

As the Massie-Fortescue affair demonstrates, however, there comes a time when civil rights and liberties are at stake that necessitates the putting aside of differences and the building of bridges to combat oppression. The Massie-Fortescue affair showed the people of Hawai'i how vulnerable they were to martial law. Thus, ethnic populations that had previously been divided and conquered by the white ruling elite found common ground to politically mobilize and fight for the autonomy of their government. So too, at a point in history where our civil rights and freedoms are similarly vulnerable, is the time for oppressed groups to set aside mistrust and blame to build bridges to prevent the erosion of rights.

---

[228] Pruitt, *supra* note 222, at 594–97 (noting the propensity to call white women who support Trump "racist.").

[229] *See For Most Trump Voters, 'Very Warm' Feelings for Him Endured*, PEW RESEARCH CENTER, 11, 22 (Aug. 9, 2018) (showing sixty-two percent of white men voted for Trump in the 2016 general election).

Suffering Matters: NEPA, Animals, and the Duty to Disclose

David N. Cassuto* & Tala DiBenedetto**

---

* Professor of Law, Elisabeth Haub School of Law at Pace University, Class of 1946 Visiting Professor of Environmental Studies, Williams College, Senior Counsel for International Affairs, Animal Legal Defense Fund; J.D. University of California, Berkeley Boalt Hall School of Law; Ph.D, Indiana University, B.A., Wesleyan University

** Research Assistant to Professor Cassuto and J.D. and Environmental Law Certificate Candidate at Elisabeth Haub School of Law at Pace University, Class of 2020. I would like to thank Professor Cassuto for his guidance and support, and for being a fierce advocate for animals.

Treat everyone you meet like God in drag. – Ram Dass[1]

I. INTRODUCTION

The National Environmental Policy Act (NEPA)[2] requires the federal government to disclose potential environmental harms arising from agency actions. Animal suffering is an environmental harm, yet no court has ruled that its infliction triggers a reporting obligation under NEPA. This Article argues that animal suffering should be a cognizable environmental harm under NEPA, that considerations of animal suffering should factor into whether an agency must prepare an EIS—and should be discussed in the content of the EIS.

Part II of this Article introduces and explains the procedural requirements of NEPA. Part III discusses animal suffering—how it is defined, how laws deal with or fail to deal with issues of animal cruelty, and outlines the ways animals suffer as a result of federal actions. Part IV offers examples of major federal actions that cause animal suffering—including federal loan guarantees for Concentrated Animal Feeding Operations (CAFOs) and wildlife management practices, such as depredation, carried out by federal Wildlife Services (WS). Part V establishes that animals are a part of the "human environment" as defined by NEPA and that the harms inflicted on animals resulting from major federal actions constitute a "significant impact," that should trigger NEPA review and warrant discussion in an Environmental Impact Statement (EIS). Finally, we argue that even if animal suffering alone were insufficient to trigger NEPA review, that suffering in conjunction with the various other environmental impacts associated with activities that cause animal suffering should trigger NEPA review regardless.

---

[1] Ram Dass (@BabaRamDass), TWITTER (June 25, 2018, 8:40 PM), https://twitter.com/BabaRamDass/status/1011439008163991553.

[2] 42 U.S.C. §§ 4321–4370m–12 (2018).

II. THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

A. Background

NEPA was enacted in 1970 to encourage harmony between humans and the environment, and to promote efforts that minimize environmental harms.[3] In enacting the law, Congress recognized the profound impact of humans on the natural environment[4] and the need to, among other things, "create and maintain conditions under which man and nature can exist in productive harmony[.]"[5] Rather than direct government actors to do or refrain from doing a particular harmful act, NEPA instead compels all federal agencies to perform a thorough assessment any time it seeks to undertake an action that is likely to "significantly affect the *human environment*."[6] NEPA is a flexible statute, capable of incorporating a wide range of environmental harms, including animal welfare.[7]

B. NEPA Procedure

Under NEPA, any "major" agency action that could significantly affect the human environment must be preceded by an EIS. These include actions with effects that may be major, and which might be "potentially subject to federal control and responsibility."[8] "Actions" also include "circumstances where responsible officials fail to act[,]"[9] and that failure to act constitutes a reviewable "agency action" under the Administrative Procedure Act[10] (APA) or other applicable law.[11] Actions may also include new and continuing activities, projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.[12] This includes, for example, issuance of permits,[13]

---

[3] 42 U.S.C. § 4321.

[4] 42 U.S.C. § 4331(a).

[5] *Id.*

[6] Sierra Club v. Babbitt, 65 F.3d 1502, 1505 (9th Cir. 1995) (emphasis added).

[7] Lars Johnson, *Pushing NEPA's Boundaries: Using NEPA to Improve the Relationship Between Animal Law and Environmental Law*, 17 N.Y.U ENVTL. L.J. 1367, 1395 (2009).

[8] 40 C.F.R. § 1508.18 (2019).

[9] *Id.*

[10] 5 U.S.C. § 551(13) (2018) ("An 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

[11] Delta Smelt Consol. Cases v. Salazar, 686 F. Supp. 2d 1026, 1034 (E.D. Cal. 2009).

[12] 40 C.F.R. §§ 1508.18 (common categories of "agency actions" include: adoption of federal policy, adoption of formal plans, adoption of programs, approval of specific

approval of projects,[14] and promulgation of rules.[15]

In determining whether to prepare an EIS, the federal agency must first determine whether the action falls under the "Categorical Exclusion Criteria."[16] The Council on Environmental Quality (CEQ), which is itself a creation of NEPA,[17] has excluded certain types of agency actions from NEPA review because the actions do not individually or *cumulatively* have a significant effect on the human environment.[18] However, as a practical matter, many actions that fall under Categorical Exclusions (CE) do have significant environmental impacts. For example, oil drilling[19] and timber harvesting enjoy CE exemptions[20] even as their environmental impacts have often proven extensive.[21]

If a federal agency determines that an action might have a significant impact and does not meet the Categorical Exclusion Criteria, the agency must prepare an Environmental Assessment (EA). The EA is a preliminary study done to determine whether a longer, more extensive assessment is required.[22] If the EA yields a Finding of No Significant Impact (FONSI),

---

projects).

[13] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (challenging the Forest Service's issuance of a special use permit for development and operation of a ski resort on national forest land).

[14] N.C All. for Transp. Reform, Inc. v. U.S. Dep't of Transp., 151 F. Supp. 2d 661 (M.D.N.C. 2001) (challenging the approval of a beltway construction project).

[15] Humane Soc'y of U.S. v. Johanns, 520 F. Supp. 2d 8 (D.D.C. 2007) (challenging a final rule allowing for a fee-for-service ante-mortem horse inspection program).

[16] 40 C.F.R. § 1501.4(a) (2019).

[17] 42 U.S.C. § 4321.

[18] 40 C.F.R. § 1508.4 (2019) (emphasis added).

[19] 42 U.S.C. § 15942 (2018).

[20] Allows harvest of live trees not exceeding seventy acres with no more than half a mile of temporary road construction. National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44598-01 (Jan. 23, 2003).

[21] United States v. Dixie Carriers, Inc., 736 F.2d 180, 182 (5th Cir. 1984) (the federal government brought action to recover cleanup costs after a barge spilled approximately 1,265,000 gallons of oil spilled into the Mississippi River); In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010, 21 F. Supp. 3d 657, 667 (E.D. La. 2014) (the United States federal government, Louisiana, Alabama, and numerous private individuals and businesses brought action against the leaseholder of a deepwater oil drilling site, the owner and operator of Deepwater Horizon drilling rig, cementing and mudlogging services contractor, and the manufacturer of the right's blowout preventer in relation to blowout at rig, which caused rig to capsize, discharging millions of gallons of oil into the Gulf of Mexico over eighty-seven days); Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1561 (S.D. Ind. 1996) (a resident brought suit challenging a United States Forest Service decision to cut down fifty acres of forest for timber sale in the Hoosier National Forest).

[22] EPA, *National Environmental Policy Review Process* (last visited Aug. 30, 2019), https://www.epa.gov/nepa/national-environmental-policy-act-review-process.

the assessment process ends.[23] If there is no FONSI, the agency undertakes an EIS. The EIS must document the environmental impact of the proposed action, any unavoidable adverse impacts, alternatives to the proposed action (including not undertaking the action at all), the relationship between the short-term uses of the environment and the maintenance/enhancement of long term productivity, and any irreversible and irretrievable commitments of resources that would be required.[24] EISs form powerful tools for improving environmental outcomes by forcing discovery and disclosure of expected consequences of agency actions.[25] In addition to promoting agency transparency and accountability, EISs serve as important catalysts for public participation in pressing environmental issues.[26]

C. "Significantly Impacts the Human Environment" Under NEPA

The CEQ has enumerated ten factors to be used in determining whether an action significantly[27] impacts the human environment:

1. Impacts that may be both beneficial and adverse;

2. The degree to which the proposed action affects public health and safety;

3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;

4. The degree to which the effects on the quality of the human environment are likely to be highly controversial;

---

[23] *Id.*

[24] 42 U.S.C. § 4332(C).

[25] *See* SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984) (concluding that NEPA disclosure has forced agencies to confront and anticipate environmental concerns, resulting in a "relatively inexpensive environmental mitigation" in many cases).

[26] *See Disaster Averted: California's Bolinas Lagoon*, PROTECT NEPA (Nov. 27, 2017), https://protectnepa.org/disaster-averted-californias-bolinas-lagoon. The US Army Corps of Engineers proposed dredging nearly 1.4 million cubic yards from the Bolinas Lagoon, a major habitat for several endangered species, in order to prevent silting. *See id.* EIS showed that the Lagoon was not in danger of silting and that the proposed project would increase siltation and degrade water quality. *See id.* The EIS protected the habitat, water quality, and saved taxpayers approximately $133 million. *See id.* EIS conducted for a bridge replacement project showed threats to thirteen endangered fish. *See id.* As a result of the EIS, agencies developed innovative technology that drastically reduced impacts to fish species.

[27] The word "significantly" requires considerations of both *context* and *intensity* of the impact. *See* 40 C.F.R § 1508.27 (2019).

> 5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;
>
> 6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;
>
> 7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significant cannot be avoided by terming an action temporary or by breaking it down into small component parts;
>
> 8. The degree to which the action may adversely affect districts sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;
>
> 9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act ("ESA");
>
> 10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.[28]

The CEQ regulations that guide compliance with NEPA note that "[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment."[29] The CEQ defines "effects" to include ecological, aesthetic, historic, cultural, economic, and social impacts.[30]

Few would contest that animals comprise an essential part of the human environment. As outlined below, their suffering implicates many of the CEQ criteria for significant impact. Activities that produce animal suffering tend to occur near areas of cultural and ecological significance, are likely to involve uncertain or unknown risks, have precedential effect, be highly controversial, threaten endangered and threatened species, and have substantial cumulative impacts. They also can significantly affect human health and safety and create a precedent for future, similar actions.

---

[28] 40 C.F.R § 1508.27(b).

[29] 40 C.F.R. § 1508.14 (2020).

[30] *See* 40 C.F.R. § 1508.8 (2020).

III. ANIMAL SUFFERING

A. Suffering Generally

All animals can and will suffer at some point in their lives. However, avoiding unnecessary suffering is a goal shared by humans and nonhumans alike.[31] When humans impose needless suffering on animals, that act is often categorized as "animal cruelty."[32] One can inflict cruelty through affirmative acts like shooting, burning, or beating, or through some failure to act, such as failure to provide necessary care—like food, water, or veterinary attention.[33]

Federally, the Animal Welfare Act sets no uniform standard for the "humane" treatment of animals and only applies to animals like cats, dogs, and primates, excluding rats, mice, and birds used for research and testing, and all animals used for food like cows, pigs, fish, and chickens.[34] The Humane Methods of Livestock Slaughter Act (HMLSA), which declares a policy of "prevent[ing] needless suffering"[35] merely requires that animals be "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut [. . .]" Notably, these requirements apply only to livestock (cattle, calves, horses, mules, sheep, swine).[36] They offer no protection for other animals that feel pain, such as chickens, turkeys, rabbits, and fish. None of these laws are fundamentally concerned with whether or how much an animal suffers, but rather with creating standards that arise from the manner in which the animals are used.

For example, in *New Jersey Society for Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*,[37] the plaintiffs collectively challenged New Jersey's "humane" standards.[38] In assessing whether the standards set forth in the regulations were humane, the Court acknowledged that its criteria were not based on what might constitute "humane" by any

---

[31] According to Black's Law Dictionary, suffering means "[t]o experience or sustain physical or emotional pain, distress, or injury." *Suffer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[32] *See e.g.* WASH. REV. CODE ANN. § 16.52.207(1)(a) (2020); GA. CODE ANN. § 16-12-4 (2020); TEX. PENAL CODE ANN. § 42.09(b)(2) (2019); FLA. STAT. ANN. § 828.12(2) (2019); ALASKA STAT. ANN. § 11.61.140(a)(1) (2019).

[33] Sonja A. Soehnel, Annotation, *What Constitutes Offense of Cruelty to Animals—Modern Case*, 6 A.L.R. 5th 733 (1992).

[34] 7 U.S.C. § 2131 (2018).

[35] *Id.* § 1901 (2018).

[36] *Id.* § 1902(a) (2018).

[37] 955 A.2d 886 (N.J. 2008).

[38] *See id.* at 905–06.

objective measurements, but rather on a number of other factors. The court declared that:

> [T]he dispute before this Court has nothing to do with anyone's love for animals, or with the way in which any of us treats our pets; rather, it requires a balancing of the interests of people and organizations who would zealously safeguard the well-being of all animals, including those born and bred for eventual slaughter, with the equally significant interests of those who make their living in animal husbandry and who contribute, through their effort, to our food supply.
>
> In the end, our focus is not upon . . . whether we deem any of the specifically challenged practices to be, objectively, humane. To engage in that debate would suggest that we have some better understanding of the complex scientific and technical issues than we possibly could have . . . .[39]

The New Jersey court recognized the existence of "complex scientific and technical" criteria for assessing whether certain practices are humane and yet chose not to apply them.[40] Instead, it balanced the interests of humans wishing to protect animals with the interests of those who make their living from animals.[41] As the court saw it, "humane" treatment must mitigate animal suffering only to the degree possible without interfering with producers' bottom lines.[42]

Few would deny that animals, including wild animals and farm animals, are capable of experiencing suffering and that they do suffer on factory farms and at the hands of federal agencies tasked with harassing or killing wildlife. However, the relative importance attached to animals' experience varies with human attitudes and norms. It was once commonly assumed that animals did not suffer the way humans do.[43] That notion has not withstood scientific scrutiny.[44] Yet, little has been done to reconcile law and policy with the reality that deliberately inflicted animal cruelty constitutes a cognizable harm both to the animal and to the ecosystem.[45]

---

[39] *Id.* at 889.

[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *See* David N Cassuto & Amy M O'Brien, *You Don't Need Lungs to Suffer: Fish Suffering in the Age of Climate Change with a Call for Regulatory Reform*, 5 CAN J. COMP. CONTEMP. L. 1, 3 (2019).

[44] Liz Langley, *The Surprisingly Humanlike Ways Animals Feel Pain*, NAT'L. GEOGRAPHIC (Dec. 3, 3016), https://news.nationalgeographic.com/2016/12/animals-science-medical-pain.

[45] That animal cruelty is itself an actionable harm is borne out by the fact that all fifty states and the federal government have animal cruelty laws. *See, e.g.*, TEX. PENAL CODE

Human suffering covers a broad range of emotional states including fear, boredom, exhaustion, pain, grief, thirst, and hunger.[46] Yet, the legal threshold of "suffering" for nonhuman animals is much higher.

The strongest anti-cruelty laws tend to be reserved for companion animals,[47] while in the agricultural realm, the few legal protections that animals have are routinely ignored with little to no consequence. In fact, a number of states have enacted laws designed to prevent and limit accountability for animal cruelty violations.[48]

The suffering agricultural animals endure is so severe that its exposure spurs widespread public outrage and calls for accountability.[49] However, rather than address the methods themselves, many states have instead enacted laws protecting animal production facilities from public scrutiny. These "Ag-Gag" laws prohibit recording, photographing, or other reporting

---

ANN. § 42.09 (2019); N.M. STAT. ANN. § 30-18-12 (2020); COLO. REV. STAT. ANN. § 18-9-202 (2020); OHIO REV. CODE ANN. § 959.13 (2020); Devan Cole & Allie Malloy, *Trump Signs Animal Cruelty Act into Law*, CNN (Nov. 26, 2019), https://www.cnn.com/2019/11/26/politics/donald-trump-animal-cruelty-act-signed-trnd/index.html. That animals form part of the environment is hardly debatable on any front. Thus, the notion that animal harm is an environmental harm seems a well-nigh undeniable truth. *See infra* Part V.A. The only real question is whether that harm rises to the level of a "significant" impact. *See infra* Part V.B.

[46] Marian Stamp Dawkins, *The Science of Animal Suffering*, 114 ETHOLOGY 937, 938 (2008), http://courses.washington.edu/anmind/M%20Dawkins%20-%20science%20of%20animal%20suffering%20-%20Ethol%202008.pdf.

[47] "[M]ost state anti-cruelty statutes discriminate between those individuals who harm a domesticated or companion animal and those who injure non-domesticated animals. Thus, the killing of a rodent with a mousetrap inside private property is generally not considered a crime. However, causing the death of a pet hamster is. Another salient feature of modern anti-cruelty statutes is the tendency to afford heightened legal protection to dogs and cats." Luis E. Chiesa, *Why Is It A Crime to Stomp on A Goldfish? - Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 10 (2008).

[48] In addition to Ag-Gag laws designed to protect farmers and punish whistleblowers attempting to expose cruelty, some states limit potential liability by not requiring veterinarians to report signs of abuse. *See, e.g.*, CAL. PENAL CODE § 597f(b) (1998); FLA. STAT. ANN. § 828.12(3) (2000); IDAHO CODE § 25-3514A (2000). In Kentucky, veterinarians are prohibited by law from releasing information concerning a client's animal without a court order or the client's consent, meaning that veterinarians are prohibited from reporting instances of animal abuse or neglect. KY. REV. STAT. ANN. § 321.185(3)(b) (2016).

[49] "Each video—all shot in the last two years by undercover animal rights activists—drew a swift response: Federal prosecutors in Tennessee charged the horse trainer and other workers, who have pleaded guilty, with violating the Horse Protection Act. Local authorities in Wyoming charged nine farm employees with cruelty to animals. And the egg supplier, which operates in Iowa and other states, lost one of its biggest customers, McDonald's, which said the video played a part in its decision." Richard A. Oppel Jr., *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES (Apr. 6, 2013), https://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html.

of conditions at these facilities. Lawmakers will often baldly state that the statute's purpose is to stop animal activists from exposing the treatment of animals at industrial-scale farms.[50] A number of such laws have been found unconstitutional[51] and others are currently under challenge.[52]

While a close analysis of the constitutionality[53] of these laws lies outside the purview of this Article, we do note the irony that under some Ag-Gag laws, the penalty for exposing animal cruelty is more severe than the penalty for committing it.[54] The secrecy of the industry and the favorable regulatory environment lead to few prosecutions.

One needs probable cause to enter a facility, but because CAFOs are so carefully isolated and guarded, it is difficult, if not impossible to acquire. Consequently, much illegal cruelty goes undiscovered, undocumented, and unpunished. Those few instances where animal cruelty is prosecuted[55] do nothing to address the systemic cruelty within animal agriculture.

It bears emphasizing that not all cruelty is illegal. As long an economic justification can be found, many cruel acts are permitted under various

---

[50] Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10964 (2012).

[51] *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

[52] People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018).

[53] *See generally* Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377 (2013); Bollard, *supra* note 50; Bruce Friedrich, *Ag-Gag Laws Are Un-American and Unconstitutional*, HUFFINGTON POST (Jul. 21, 2014), https://www.huffingtonpost.com/bruce-friedrich/ag-gag-laws_b_4936998.html.

[54] In Idaho, the penalty for cruelty to animals is a fine up to $5,000 and imprisonment of not more than *six months*, while Idaho's ag-gag law provides for a fine of up to $5,000 and up to *one year* in prison in *addition* to paying restitution in the amount of *twice* the value of damages resulting from their investigation. *See, e.g.*, IDAHO CODE ANN. § 25-3520A(1) (2020); IDAHO CODE ANN. § 18-7042(3), (4) (2020). In Montana, undercover investigators could be liable for an amount of "an amount equal to three times all actual and consequential damages" along with court costs and attorney fees. *See* MONT. CODE ANN. § 81-30-104 (2019). The maximum penalty for cruelty to animals is up to one year in prison and a $1,000 fine along with veterinary costs. A person convicted of the offense of cruelty to animals shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. *See* MONT. CODE ANN. § 45-8-211(2), (3) (2019). Excluded from the provisions of this law are "the use of commonly accepted agricultural and livestock practices on livestock." *See id.* § 45-8-211(4)(b).

[55] Laura Bitner, *Seven Convicted of Animal Cruelty at Tyson Chicken Farms in Virginia*, COURTHOUSE NEWS (Aug. 30, 2017), https://www.courthousenews.com/seven-convicted-animal-cruelty-tyson-chicken-farms-virginia.

statutes that govern the treatment of animals.[56] However, we do not here argue that only illegal acts that cause suffering and are linked to federal agency actions are relevant under NEPA. Rather, since animals, whether on farms or in the wild, are part of the environment, harming them constitutes harm to the environment. The legality of the actions that cause the suffering is neither dispositive nor necessarily relevant for purposes of NEPA (or, at the state level, for the so-called "Baby NEPAs").[57]

Under NEPA, what matters is that cruel treatment causes animals to suffer. That suffering, while not currently legally cognizable, remains an environmental harm. Examples of such harms are numerous and well documented. The following sections offer an overview of suffering-based environmental harms and their relevance to the triggering criteria for NEPA review.

B. Farmed Animals

For reasons already noted, animal suffering is prevalent in the industrial agricultural system. Animals in industrial facilities (factory farms) are excluded from federal protection under the Animal Welfare Act[58] or any other federal law. Some animals are minimally protected under the HMLSA[59] and the Federal Meat Inspection Act,[60] but these laws are of little consequence, both because they apply only at the end of the animals' lives, and because they exempt most animals used for food, including fish and birds.[61] The laws provide no guidelines as to how farm animals should be treated during the rest of their lives.[62]

The vast majority of agricultural animals are kept in CAFOs, in which they are confined in closed quarters and unsanitary conditions.[63] Cruel and

---

[56] DAVID S. FAVRE & MURRAY LORING, ANIMAL LAW 122 (1983) (noting that because animals are considered personal property, interference with an owner's property interest is only justified when the animal has some economic value to society, as well as to the owner).

[57] *See, e.g.*, N.Y. ENVTL. CONSERV. LAW §§ 8-0101–0103 (2020); GA. CODE ANN. §§ 12-16-1–3 (2020); MASS. GEN. LAWS ANN. CH. 30, §§ 61–62I (2020); MD. CODE ANN., NAT. RES. §§ 1-301–1- 305 (2020); D.C. CODE ANN. §§ 8-109.01–109.10 (2020).

[58] 7 U.S.C. §§ 2131–60 (2018).

[59] 7 U.S.C. §§ 1901–07 (2018).

[60] 21 U.S.C. §§ 601–26 (2018).

[61] *See* 7 U.S.C. § 1902.

[62] *Id.*

[63] Between 1982 and 1997 there was a 26% reduction in animal population on small farms, while there was a 58% increase in large farm operations. *See* ENVTL. PROTEC. AGENCY, DRAFT PROCEEDINGS OF THE WORKSHOP ON EMERGING INFECTIOUS DISEASE AGENTS AND ISSUES ASSOCIATED WITH ANIMAL MANURES, BIOSOLIDS AND OTHER SIMILAR BY-PRODUCTS (June 4, 2001). In 2017 there were 19,961 CAFOs in operation in the United

inhumane treatment and conditions are not limited to CAFOs, however, or only to the food system. Factory farming has moved beyond the exploitation of traditional farm animals such as cows, sheep, and pigs. Many other species, including deer, rabbit, ostrich, pheasant, quail, duck, frog, snail, lobster, fish, turtle, alligator, black bear, goose, kangaroo, rattlesnake, silkworm, chinchilla, fox, mink, and other wild animals are now factory-farmed.[64]

1. Housing and Living Conditions

Animals used for agriculture are generally subject to cramped, filthy living conditions in which they cannot engage in normal behaviors (turning around, standing, or sitting) or social activities (socializing, breeding normally, interacting normally with other members of their species).[65] In addition, they are often neglected, with little to no access to adequate veterinary care. Tens of thousands and sometimes millions of animals compete for space, food, and water; breathe contaminated air; and live in their own waste.[66]

Laying chickens, for example, are kept in semi-darkness; most never see sunlight.[67] They live in battery cages stacked on top of one another, in cages so small that they cannot spread their wings or turn around.[68] Broiler chickens are confined in sheds in such large numbers that the air quality quickly deteriorates.[69] The dearth of effective monitoring and the desultory veterinary care provided means that birds suffering from illness, broken limbs (because their limbs cannot support their oversized torsos),[70] wounds, infections, or any of the many other health and safety hazards, are left in misery up until the moment of slaughter.[71] As a result, chickens on factory farms endure dehydration, respiratory disease, bacterial infections,

---

States. *See id.*

[64] DR. MICHAEL W. FOX, EATING WITH CONSCIENCE: THE BIOETHICS OF FOOD 164–65 (1997).

[65] *See* Paige Michele Tomaselli, *Paving the Way: Are Half Measures in Animal Factory Farm Legislation Ethical?* 54 S. TEX. L. REV. 513, 515 (2013).

[66] *See id.*

[67] *Id.*

[68] Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned from the Hallmark Meat Packing* Case, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008).

[69] MSPCA-ANGELL, *Farm Animal Welfare: Chickens* (last visited Mar. 8, 2019), https://www.mspca.org/animal_protection/farm-animal-welfare-chickens.

[70] W. Bessei, *Welfare of Broilers: A Review*, 62 WORLD'S POULTRY SCI. J. 455 (2006).

[71] PETA, *The Egg Industry* (last visited Mar. 8, 2019), https://www.peta.org/issues/animals-used-for-food/factory-farming/chickens/egg-industry.

heart attacks crippling limb fractures, painful skin conditions, respiratory problems, pulmonary congestion, swelling, hemorrhage, and blindness.[72]

Similarly, cows and pigs in industrial facilities are often kept in small iron crates to maximize space and reduce maintenance.[73] Veal calves are raised in near total isolation, in narrow crates that inhibit virtually all movement[74] The pork industry confines pregnant and nursing pigs in, "gestation crates," which restrict them from even turning around.[75] Since they are repeatedly impregnated until they can no longer bear young, sows spend anywhere from three to five years in these small, cramped crates.[76] Those pigs not confined to gestation crates fare little better. A single football-field-sized hog house can contain up to 10,000 hogs.[77] This confinement not only restricts them physically, but isolates them socially, and can lead to "insanity"-type behaviors such as pawing, biting, chewing the bars of their cages, etc.[78]

2. Procedures

Agricultural animals also undergo painful bodily invasions. These procedures are considered standard husbandry practices and thus exempt from most states' cruelty laws.[79] For example, cows, pigs, and sheep are commonly castrated without anesthetic. "Either a rubber ring is placed at the top of the scrotum to kill the tissue and cause the testes to fall off; a clamp is used to crush the spermatic cord so that it can no longer supply the scrotum; or the scrotum is cut open and the testes are removed by tearing, cutting, or twisting."[80] Unsurprisingly, this results in physical and

---

[72] *See* Perry, *supra* note 68, at 118–19.

[73] *See id.*

[74] Gwendellyn Io Earnshaw, *Equity as a Paradigm for Sustainability: Evolving the Process Toward Interspecies Equity*, 5 ANIMAL L. 113, 141 (1999).

[75] *Id.*

[76] *Id.*

[77] Jeff Tietz, *Boss Hog: The Dark Side of America's Top Pork Producer*, ROLLING STONE (Dec.14, 2006), https://www.rollingstone.com/culture/culture-news/boss-hog-the-dark-side-of-americas-top-pork-producer-68087.

[78] *Id.*

[79] Kelly Levenda, *Science-Based Farmed Animal Welfare Laws for the U.S.*, 13 J. ANIMAL & NAT. RESOURCE L. 93, 109 (2017) ("Most states' anti-cruelty statutes exempt all 'accepted,' 'common,' 'customary,' or 'normal' farming practices." (citing DAVID J. WOLFSON & MARIANN SULLIVAN, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW Directions 205, 208–09 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. REV. 69, 77–78 (1999).

[80] *Id.*

psychological impacts, including kicking, rolling, stamping, restlessness, increased cortisol levels, chronic pain, inflammation, and infection, with some animals exhibiting abnormal behaviors up to 41 days later.[81]

These same animals are also frequently have their tails docked. This means the animal's tail is cut off using either a tight rubber ring that kills the tail and causes it to fall off, an electric docking iron that cuts and cauterizes the tail, an emasculator that cuts and crushes it, or a knife.[82] Operators argue that this practice is required for hygiene and to protect the cows from fly strikes. However, the hygiene issues primarily concern farmers and workers who handle the cows and who don't want to be hit in the face by "wet and nasty" tails.[83] In the case of pigs, tail docking deters biting, a stress-induced behavior resulting from intensive confinement.[84] Tail docking of sheep is also common and can lead to rectal prolapse.[85] Cows and sheep raised for consumption often have their horns or horn buds removed by hot irons, caustic chemicals, cryosurgical tools, or just a knife or scoop.[86] This, too, causes severe discomfort.[87]

Branding is another common procedure that has been practiced for thousands of years.[88] It involves using a hot iron burn the skin, leaving a permanent scar. Branding can also include ear tags, ear notches, back tags, neck chains, tail tags, freeze brands, and other methods.

Poultry birds are subject to a different set of procedures.[89] Birds, like chickens, are very social and establish a pecking order. That order is disrupted when the birds are forced out of their natural social groups and

---

[81] *Id.*

[82] *See id*; Mark Peters, *Dairies Curtailing Cow-Tail Cutting*, WALL STREET JOURNAL (Sep. 3, 2012), https://www.wsj.com/articles/SB10000872396390444082904577605232264741806.

[83] Levenda, *supra* note 79, at 109.

[84] *Id.*

[85] AVMA, *Welfare Implications of Tail Docking of Lambs* (Jul. 15, 2014), https://www.avma.org/KB/Resources/LiteratureReviews/Pages/Welfare-Implications-of-Tail-Docking-of-Lambs.aspx.

[86] *Id.*; AVMA, *Literature Review on the Welfare Implications of the Dehorning and Disbudding of Cattle* (Jul. 15, 2014), https://www.avma.org/KB/Resources/LiteratureReviews/Documents/dehorning_cattle_bgnd.pdf.; K.J. Stafford & D.J. Mellor, *Dehorning and Disbudding Distress and its Alleviation in Calves*, 169 VETERINARY J. 344–46 (Feb. 15, 2004), https://perma.cc/34RX-YEJ5.

[87] *See* Stafford & Mellor, *supra* note 86, at 344–46.

[88] Levenda, *supra* note 79, at 111; AVMA, *Literature Review on the Welfare Implications of Hot-Iron Branding and Its Alternatives* (Apr. 4, 2011), https://www.avma.org/KB/Resources/LiteratureReviews/Documents/hot-iron_branding_bgnd.pdf.

[89] *Id.*

into overcrowded situations.[90] In order to prevent them from pecking at each other, operators remove parts of their beaks.[91] They generally do this using hot-blades, electrically or with the use of infra-red technology. Other techniques such as lasers, freeze-drying, and chemical retardation have also been used but are less common. "Beak trimming" can lead to long-term pain in the stump of the beak as well as pinched nerves. The American Veterinary Medical Association ("AVMA") has acknowledged that the procedure is acutely painful[92] yet the practice continues.

3. Handling

Many farmed animals are fed in ways that substantially impair their health and result in suffering. They are overfed or force-fed or starved.[93] These practices save farmers time and money by speeding up growth, laying, or simply by fattening the animals to increase their yield. To produce foie gras, factory farmers force-feed ducks and geese by shoving a metal pipe down their throats two or three times each day. The practice of force-feeding can cause painful bruising, lacerations, sores, and organ rupture. The birds also become diseased; their livers swell up to ten times their normal size, making it difficult for them to move comfortably or walk.[94]

4. Breeding

Roosters have little value to producers so male chicks often are discarded. One common practice involves throwing them into a meat

---

[90] The stress of overcrowded situations can also lead to cannibalism among chickens. *See* Tom Tabler, *Feather Pecking and Cannibalism in the Backyard Flock*, MISS. STATE UNIV. EXTENSION SERV. POD-05-19 (2019), http://extension.msstate.edu/sites/default/files/publications/publications/p2848_web.pdf.

[91] Beak clipping involves the removal of approximately one-quarter to one-third of the upper beak, or both upper and lower beak, of a bird. *See id.*

[92] *Id.*; Levenda, *supra* note 79, at 116.

[93] Paul Greenberg, *Genetically Engineered Fish and the Strangeness of American Salmon*, THE NEW YORKER (Dec. 2, 2015), https://www.newyorker.com/business/currency/genetically-engineered-fish-and-the-strangeness-of-american-salmon; CORNELL ALLIANCE FOR SCIENCE, *British Scientists Develop GE Plant That Could Make Fish Farming More Sustainable* (Mar. 5, 2015), https://allianceforscience.cornell.edu/blog/2015/03/british-scientists-develop-ge-plant-that-could-make-fish-farming-more-sustainable.

[94] *See* Susan Adams, *Legal Rights of Farm Animals*, MD. B.J. Sept.–Oct. 2007, at 19, 21.

grinder, typically while they are still alive.[95] Approximately 200 million male chicks are culled in this manner annually.[96]

Dairy cows spend their lives in a constant cycle of breeding in order to keep them lactating. Calves are taken away within the first twenty-four hours after birth and used for veal, beef, or dairy.[97] The cows are then milked multiple times a day until they are re-impregnated, continuing the cycle until the animal is spent. Once they no longer produce milk, the animals are slaughtered, usually for hamburger or pet food.[98] In addition to the obvious physical toll, the emotional anguish experienced by mothers who have their babies taken away is substantial.[99] Dairy cows often cry for days for their absent children.[100]

5. Transportation and Slaughter

Transporting livestock is habitually done under brutal conditions. Pigs are especially prone to severe stress, but all animals can suffer overheating or freezing or dehydration from long transport.[101]

Pigs and cows are also often subject to problematic slaughter processes, in which they are sometimes conscious as they are shackled, hoisted and skinned.[102] Although the HMLSA requires that livestock be rendered

---

[95] *Id.*

[96] *Id.*

[97] PETER SINGER, ANIMAL LIBERATION 136–37 (3d ed. 2002); Kathrin Wagner et al., *Effects of Mother Versus Artificial Rearing During the First 12 Weeks of Life on Challenge Responses of Dairy Cows*, 164 APPLIED ANIMAL BEHAV. SCI. 1 (2015).

[98] "Across the globe, spent milk cows make up an important proportion of beef supply and it is in producer interests to maximise cull value." THE CATTLE SITE, *When Dairy Cows Become Beef Cows* (Jun. 3, 2014), http://www.thecattlesite.com/articles/3941/when-dairy-cows-become-beef-cows.

[99] *Id.*

[100] BBC, *'Some Mothers Will Bawl for Days'* (Sep. 10, 2018), https://www.bbc.com/news/av/uk-scotland-45439303/some-mothers-will-bawl-for-days (video showing a dairy farmer saying "[t]he mother, well it varied. Sometimes they just walk over to the silage feed and started eating and you thought they hadn't even noticed. Then there's others that would bawl for days. And that was probably the distressing side of it."); Ameena Schelling, *Devastated Mother Cow Chases Truck Taking Her Baby Away*, THE DODO (Sep. 21, 2015), https://www.thedodo.com/mother-cow-chases-baby-1360693533.html; Mary Bates, *The Emotional Lives of Dairy Cows*, WIRED (Jun. 30, 2014), https://www.wired.com/2014/06/the-emotional-lives-of-dairy-cows.

[101] *See generally* GAIL A. EISNITZ, SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY (2007).

[102] *Id.*

"insensible to pain", the increased mechanization and speed of the slaughter line has led to imprecision and error.[103]

Animals used for fur are also face problematic means of execution. One investigation of American fur farms showed animals killed by "neck-breaking; anal electrocution; gassing with hot, unfiltered truck exhaust, and stomping on the animals' chests to crush their rib cages and cause suffocation."[104]

Outside of the cruelty inherent in standard procedures, frequent, well-documented instances of deliberate mistreatment go largely ignored and unpunished. These are not isolated incidents perpetrated by reckless employees, but rather a logical outgrowth of a system wherein animals have no meaningful legal protections. Undercover investigations have revealed downed dairy cows being jabbed with forklifts,[105] workers stomping, kicking, neck twisting, and slamming chickens against walls, and many other such practices.[106] In sum, the cruelty experienced by animals used in farming is not limited to each individual process or procedure, but compounded in one large system that ignores and rewards abuse.

C. Wildlife

1. Wildlife Management and Predator Control on Federal Lands

Farmed animals are not the only animals that suffer as a result of anthropogenic behavior. Wildlife is often abused, tortured, starved, and poisoned at the hands of humans. Like the suffering experienced by farm animals, these abuses go largely unnoticed.

Between 2000 and 2016, Wildlife Services killed at least two million mammals and fifteen million birds, primarily for predator control.[107] The

---

[103] FARM SANCTUARY, *Beef Production on Factory Farms* (last visited Feb. 14, 2019), https://www.farmsanctuary.org/learn/factory-farming/cows-used-for-beef; David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 L. & CONTEMP. PROBS. 59, 66 (2007).

[104] Sandra Lewis Elizabeth Swart, *Nothing Humane About Fur Farms*, The NEW YORK TIMES (Feb. 20, 1991), https://www.nytimes.com/1991/02/20/opinion/l-nothing-humane-about-fur-farms-956191.html; Gwendellyn Io Earnshaw, *Equity As A Paradigm for Sustainability: Evolving the Process Toward Interspecies Equity*, 5 ANIMAL L. 113, 141 (1999).

[105] Katie Cantrell, *The True Cost of a Cheap Meal*, 31 TIKKEN 20, 20 (2016).

[106] PETA, *Thousands of Chickens Tortured by KFC Supplier* (Feb. 19, 2019), http://www.kentuckyfriedcruelty.com/u-pilgrimspride.asp.

[107] *See* Rachael Bale, *This Government Program's Job is to Kill Wildlife*, NAT'L GEOGRAPHIC (Feb. 12, 2016), https://www.nationalgeographic.com/news/2016/02/160212-Wildlife-Services-predator-control-livestock-trapping-hunting (The Wildlife Services has

agency describes its work in Orwellian terms, declaring that its mission is to "provide Federal leadership and expertise to resolve wildlife conflicts to allow people and wildlife to *coexist*."[108] Wildlife Services uses controversial practices to carry out its culls, including poisoned bait, neck snares, leghold traps,[109] aerial gunning, and cyanide traps.[110] These methods often kill non-target species such as dogs, cats, and endangered species including bald eagles, salmon, and ocelots.[111]

Traps, which are commonly used as a means of predator control on federal lands, cause serious and sometimes fatal injuries, including joint dislocations, severed tendons and ligaments, broken bones and gangrene.[112] As the animals struggle against the trap, they may break their teeth right down to the jawbone from biting the device, or chew off their limbs while attempting to escape.[113] Additionally, non-target animals caught in leghold traps and then released may be so severely injured that they cannot survive.[114]

Recently, the Trump administration reauthorized M-44 cyanide bombs for use in wildlife culls.[115] These bombs kill thousands of animals every year including 6,579 animals in 2018 alone, more than 200 of which were non-target species.[116] Following complaints and pressure from conservation

---

killed animals for other purposes as well, such as curbing bird populations near airports).

[108] U.S. DEP'T OF AGRIC., *Wildlife Damage* (last visited Mar. 15, 2019), https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage (emphasis added).

[109] Leg traps are regulated or banned in 108 jurisdictions worldwide. *See* LIBRARY OF CONG., LAWS ON LEG-HOLD ANIMAL TRAPS AROUND THE WORLD (2016), https://www.loc.gov/law/help/leg-hold-traps/leg-hold-traps.pdf.

[110] Bale, *supra* note 107.

[111] Jimmy Tobias, *The Government Agency in Charge of Killing Wild Animals is Facing Backlash,* PACIFIC STANDARD (Jun. 24, 2019), https://psmag.com/environment/the-government-agency-in-charge-of-killing-wild-animals-is-finally-facing-backlash.

[112] *Refuge from Cruel Trapping Act*, *Trapped Animals* (last visited Aug. 19, 2019), https://awionline.org/sites/default/files/publication/digital_download/trapped_animals_brochure_pdf.pdf.

[113] "A study conducted at the University of Minnesota Raptor Research and Rehabilitation Center showed that 21 percent of all eagles admitted to the center over an 8-year period had been caught in leghold traps. Of these birds, 64 percent had sustained injuries that proved fatal. Survivors typically require amputation of the trapped limb." *Id.*

[114] *Id.*

[115] ENVTL. PROTEC. AGENCY, SODIUM CYANIDE: INTERIM REGISTRATION REVIEW DECISION CASE NUMBER 8002 (2019).

[116] U.S. DEP'T OF AGRIC., PROGRAM DATA REPORT G - 2018: ANIMALS DISPERSED / KILLED OR EUTHANIZED / REMOVED OR DESTROYED / FREED OR RELOCATED (last visited Aug. 20, 2019), https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/pdr/?file=PDR-G_Report&p=2018:INDEX.

organizations, EPA withdrew its reauthorization application.[117] However, four months later, the agency announced that it would move forward with reauthorization with only a few minor additional restrictions.[118]

IV. MAJOR FEDERAL ACTIONS THAT CAUSE ANIMAL SUFFERING

No standards precisely define when "federal participation transforms a state or local project into a NEPA-triggering federal action."[119] Generally, courts consider: "(1) the degree to which the given action is funded by the federal agency, and (2) the extent of the agency's involvement and control in the action."[120] Thus, major federal actions extend beyond direct actions taken by federal agencies (as in the case of wildlife management). They encompass an array of activities that indirectly produce environmental harms including funding and permitting local, state or private projects.

The courts recognize that but for these affirmative acts by the federal government, many projects could not come to fruition. However, many of those activities also indirectly (proximately) cause animal suffering. Some of these are discussed below.

A. Loan Guarantees for CAFOs

The Farm Service Agency (FSA), a part of the United States Department of Agriculture (USDA), helps farms obtain loans from specific USDA-approved commercial lenders.[121] While the lender is technically the FSA's customer, the FSA reimburses lenders in the event that the lender suffers a

---

[117] Neil Vigdor, *E.P.A. Backtracks on Use of 'Cyanide Bombs' to Kill Wild Animals*, N.Y. TIMES (Aug. 16, 2019), https://www.nytimes.com/2019/08/16/us/epa-cyanide-bombs.html.

[118] ENVTL. PROTEC. AGENCY, *EPA Announces Revised Interim Decision for M-44 Predator Control Devices* (Dec. 5, 2019), https://www.epa.gov/newsreleases/epa-announces-revised-interim-decision-m-44-predator-control-devices. Those restrictions include a 600-foot buffer around residences (unless there is written permission from the landowner), increasing the buffer from public pathways and roads, and one additional sign within 15 feet of a device.

[119] Almond Hill Sch. v. U.S. Dep't of Agric., 768 F.2d 1030, 1039 (9th Cir. 1985) (citation omitted); *see generally* 40 C.F.R. § 1508.18 (providing guidelines and examples for "major" federal actions).

[120] Cascadia Wildlands v. U.S. Dep't of Agric., 752 F. App'x 457, 458 (9th Cir. 2018) (citing Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960 (9th Cir. 2002))

[121] *See* U.S. DEP'T. OF AGRIC., *Guaranteed Farm Loans* (last visited Jan. 14, 2020), https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/guaranteed-farm-loans/index.

loss.[122] Other loans are funded directly by the FSA. Those funds come directly from annual Congressional appropriations as part of the USDA budget.[123] Courts have previously held that the FSA's participation in the process through which an agricultural producer secures loans constitutes a major federal action under NEPA.[124]

Even the regulatory language that explains FSA involvement in obtaining loan guarantees reflects the government's support of animal agriculture. The FSA claims that its lending practices are consistent with the agency's goals of "providing economic opportunity through innovation, helping rural America thrive; [and] promoting agriculture production;"[125] and aligns with its mission of "fostering a market-oriented, economically, and environmentally sound American agriculture . . . ."[126] If an agency action forms an integral component of its ability to fulfill its mission, it seems beyond dispute that such an action could and should be susceptible to NEPA review. The question then becomes whether such actions have significant effects on the environment. Courts have concluded that they do.

In *Buffalo River Watershed Alliance v. Department of Agriculture*,[127] environmental groups claimed that the FSA and the Small Business Administration (SBA) guaranteed loans to C & H Hog Farms without adequately assessing the proposed facility's environmental impact.[128] After the Arkansas Department of Environmental Quality approved C & H for 6,500 hogs,[129] the company applied for approximately $3.6 million in loans from Farm Credit Services of Western Arkansas.[130] Farm Credit required further assurances before making the loans, so it and C & H applied for loan guaranties from two federal agencies.[131] "First, the Small Business Administration guaranteed roughly seventy-five percent of $2.3 million" in loans "without evaluating the impact the farm might have on the

---

[122] *See id.*

[123] *See id.*

[124] *See* Buffalo River Watershed All. v. U.S. Dep't of Agric., No. 4:13-CV-450-DPM, 2014 WL 6837005, at *5 (E.D. Ark. Dec. 2, 2014) ("The Administration's lack of hard look violated the NEPA.").

[125] Environmental Policies and Procedures; Compliance With the National Environmental Policy Act and Related Authorities, 81 Fed. Reg. 51,274, 51,281 (Aug. 3, 2016).

[126] *Id.*

[127] No. 4:13-CV-450-DPM, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014).

[128] *Id.* at *1.

[129] The next largest farm had roughly 400. *Id.*

[130] *See id.*

[131] *Id.*

environment."[132] Then, the FSA considered backing a second loan but first undertook an EA.[133]

The FSA consulted with FWS about the potential impacts of the project on endangered species in the area. FWS "responded that the endangered Gray Bat lived in caves and foraged" near the site.[134] It suggested potential mitigation measures and highlighted areas for further investigation, cautioning that its response was purely informational and not "a blessing."[135] The FSA completed its EA without any proposed alternative locations and no mention of the bat. It concluded without explanation that mitigation measures were not required.[136] The EA was used as the basis for FSA's FONSI, and the agency subsequently "guaranteed ninety percent of another $1.3 million loans from Farm Credit to C & H."[137] Environmental groups brought suit, alleging that the agencies failed to take the requisite hard look at the environmental impacts under NEPA.[138]

While the FSA argued that it did not have to undertake an EIS because guaranteeing a loan need not trigger NEPA review, the Court held otherwise.[139] It found that NEPA did indeed require the SBA to look hard at environmental issues before guaranteeing such loans.[140] The Court noted that "[t]he legal premise of each guaranty was that C & H couldn't otherwise obtain financing on reasonable terms."[141] "C & H had to, and did, borrow $3.6 million to start this farm. These statutes, coupled with the necessity of the large loans, [made] it substantially unlikely that C & H would have come into being absent the guaranties." "Without the guaranties, there would've been no loans. Without the loans, no farm."[142] Consequently, FSA's loan guarantee for C & H constituted a major federal action, and FSA had an obligation to consider the environmental impacts of the CAFO on the community and the surrounding environment.

This precedent was recently modified by a Trump Administration rule categorically excluding FSA funding of medium-sized CAFOs.[143] Prior to 2016, FSA performed environmental analyses to assess the impact of

---

[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* at *2.
[137] *Id.*
[138] *See id.*
[139] *See id.* at *5.
[140] *Id.*
[141] *Id.* at *2 (citing 15 U.S.C. § 636; 7 U.S.C. § 1983).
[142] *Id.*
[143] 81 Fed. Reg. at 51274.

government loans or loan guarantees to medium CAFOs[144] *before* loans or loan guarantees were approved.[145] The new rule excluding FSA funding from NEPA review has been challenged by environmental groups who argue that performing environmental analyses before approving loan guarantees provides a necessary "check on the negative externalities of industrial animal feeding operations."

It further provides important information regarding risks and allows for public participation prior to the loan's disbursement.[146] Guaranteeing loans for CAFOs containing 124,999 chickens is no less a major federal action than guaranteeing loans for CAFOs containing 125,000. These facilities produce major environmental impacts and significantly impact humans, animals, and other components of the natural environment.[147]

B. Wildlife Management on Federal Lands

Courts have similarly found that agency actions to control wildlife are subject to NEPA review. Wildlife management practices including predator control programs are carried out by Wildlife Services (not to be confused with the U.S. Fish and Wildlife Service), a federal agency within the U.S. Department of Agriculture.[148] Although some instances where the agency had limited involvement and control were not subject to NEPA review,[149] courts generally have found that culls carried out by Wildlife Services constitute major federal actions and require an EIS.

For example, in *Wildlands v. Woodruff*,[150] a Washington district court held that Wildlife Service's participation in a wolf depredation program in Washington state constituted a "major federal action," and that the agency

---

[144] FSA currently defines "medium CAFO" by cross-referencing EPA Clean Water Act regulations. Thus, a "medium CAFO" is a facility that confines the following number of animals per species indoors for 45 days or more each year: 200 to 699 mature dairy cows, 300 to 999 cattle other than mature dairy cows, 750 to 2499 pigs over 55 pounds, 16,500 to 54,999 turkeys, and (at non-liquid manure management facilities) 37,500 to 124,999 chickens other than laying hens. *See* 40 C.F.R. § 122.23(b)(1), (6).

[145] Complaint at *3, Dakota Rural Action v. U.S. Dep't of Agric., No. 18-2852, 2018 WL 6521807 (D.D.C. Dec. 5, 2018).

[146] *Id.*

[147] *Id.*

[148] *See* Bale, *supra* note 107.

[149] *See* Cascadia Wildlands v. U.S. Dep't of Agric., 752 F. App'x 457, 460 (9th Cir. 2018) ("Because the district court correctly concluded that Wildlife Services' participation in the Oregon Wolf Plan is not a 'major federal action,' NEPA does not apply.").

[150] 151 F. Supp. 3d 1153 (W.D. Wash. 2015).

failed to observe its NEPA obligations by not preparing an EIS.[151] Wildlife Services argued that it had little discretion and therefore no EIS was necessary. However, the court found that the agency did have the discretion to decide whether and under what circumstances to engage in wolf removal. Consequently, the agency's participation in the Wolf Management Program constituted a major federal action that significantly impacted the environment and merited an EIS.[152]

While the scope and nature of agency involvement is always a relevant factor, agency participation in activities that negatively impact animal populations can clearly trigger NEPA review. Yet to be determined, however, is whether animal suffering is a cognizable negative impact. In the section that follows, we argue that it is (or should be).

V. ANIMAL SUFFERING SIGNIFICANTLY IMPACTS THE HUMAN ENVIRONMENT

A. Animals are a Part of the Human Environment

The phrase "human environment" in NEPA is sufficiently expansive to encompass animal welfare and for impacts to farmed animals and wild animals to trigger the need for an EIS. Animals' very existence, whether on farms, in cages or in the wild, is inextricably linked to the economic, social, and ecological landscape. Animals form part of both what is traditionally understood as the natural environment (i.e. forests, oceans, or other areas considered "wilderness"), and of the environment that humans construct (domesticated or non-domesticated animals living in structures made by humans).[153] It follows that regulation of animals has historically fallen under the purview of environmental law.

---

[151] *Id.* at 1167 (evaluating the ten factors set forth in 40 C.F.R. § 1508.27(b) to determine whether the agency's actions significantly impacted the human environment).

[152] *Id.* at 1164–65 (evaluating the ten factors set forth in 40 C.F.R § 1508.27(b) to determine whether the agency's actions significantly impacted the human environment).

[153] *See* Hendrickson v. Wilson, 374 F. Supp. 865, 881 (W.D. Mich. 1973) ("The element of the human or natural environment could be any of three categories: biological; including such sub-categories as human, animal, plant, and aquatic; physical and chemical, which would include factors associated with impacts on water, air, and land; and social, including impacts on community as well as individuals.") (emphasis added); *see also* Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1049 (2d Cir. 1983) (halting a project that would impact several species of fish due to an inadequate EIS); U.S. FISH & WILDLIFE SERV., NATIONAL ENVIRONMENTAL POLICY ACT, ENDANGERED SPECIES ACT, AND HABITAT CONSERVATION PLANS (2012) ("NEPA considers the impacts of a federal action on the human environment, for example: . . . nonlisted species as well as ESA-listed fish and wildlife.").

Agencies including the United States Department of Agriculture (USDA), the Animal and Plant Health Inspection Service (APHIS), FWS, the National Oceanic and Atmospheric Administration (NOAA), and the BLM[154] regulate the management of both farm animals and wildlife. While wild animals more often form the subject of NEPA litigation, farm animals are no less a part of the environment. Harm to any animals—domestic or wild--is harm to the environment and should be recognized as such under NEPA.

B. Actions that Cause Animal Suffering Significantly Impact the Human Environment

Agency actions that cause animal suffering under the CEQ's own criteria. First, activities that produce animal suffering tend to occur in close proximity to areas of cultural and ecological significance.[155] Human contemplation of that suffering constitutes aesthetic harm, a judicially recognized trigger for NEPA review.[156] Second, these actions likely involve uncertain or unknown risks, particularly with respect to the impacts of declining genetic diversity on the continued survival of animal species used in agriculture.[157] Third, activities that facilitate animal suffering, such as providing federal loan guarantees for CAFOs, can have precedential effects and can prove highly controversial.[158] Many wildlife management practices

---

[154] *See, e.g.*, *Animal Welfare*, ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/home (last visited Jan. 14, 2020); *About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE, SERV., https://www.fws.gov/help/about_us.html (last visited Jan 14, 2020); *About Our Agency*, NAT. OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/about-our-agency (last visited Jan 14, 2020); *How We Manage*, U.S. BUREAU OF LAND MANAGEMENT, https://www.blm.gov/about/how-we-manage (last visited Jan. 14, 2020).

[155] *See infra* Part V.B.1.i & Part V.B.2.i.

[156] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) (holding that "the desire to use or observe animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes."); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (holding that plaintiffs demonstrated that they suffered injury-in-fact through the lessening of their "aesthetic and recreational values"); WildEarth Guardians v. Ashe, No. CV-15-00019-TUC-JGZ, 2016 WL 3919464, at *5 (D. Ariz. May 16, 2016) (holding that plaintiffs Plaintiff organizations have asserted a valid recreational, aesthetic, and scientific interest in observing and studying the Mexican gray wolf in the wild, which are clearly "cognizable" for the purposes of establishing injury in the environmental context).

[157] *See infra* Part V.B.1.ii.

[158] *See infra* Part V.B.1.iii.

are also controversial, have uncertain effects, and cause aesthetic harm as well.[159]

In the case of wildlife management, we also see considerable dispute as to the efficacy of the practices[160] while also placing endangered and threatened species at risk.[161] All of the above-mentioned practices have cumulative impacts, including biodiversity loss and climate change. Finally, the animals themselves have substantial cultural importance, which means that their harm alone can be a significant impact.

1. Farm Animals

i. Proximity to cultural/ecologically critical areas

Agency actions that produce animal suffering are often close to areas of cultural and ecological significance. Harassment, harm, killing, or removal of animals from these areas causes obvious physical harm to the animals and aesthetic harm to the humans that witness it. As noted previously, aesthetic harms are cognizable under NEPA.[162] Courts have found aesthetic injury based on harm to animals.[163] When that harm occurs in areas of cultural, historic, or ecological significance, it compounds the negative impact to the human environment. While cases acknowledging contemplation of animal suffering as an aesthetic harm most often pertain to wildlife,[164] the reasoning is equally applicable to factory farms. The

---

[159] *See infra* Part V.B.2.ii.

[160] *Id.*

[161] Wildlife trapping techniques employed by wildlife services such as use of M-44 cyanide bombs and body-gripping traps are dangerous and indiscriminate, often catching non-target species such as humans, companion animals, and endangered species. *Id.*

[162] *See* Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1113–14 (9th Cir. 2002); Coalition for the Env't v. Volpe, 504 F.2d 156, 166–68 (8th Cir. 1974); Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 431–32 (D.C. Cir. 1998).

[163] Humane Soc'y of the U.S. v. Babbitt, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (quoting Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977)) (recognizing "the right to view animals free from . . . 'inhumane treatment'"); Animal Legal Def. Fund v. Espy, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) ("Our own cases have indicated a recognition of people's interest in seeing animals free from inhumane treatment."); Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396–97 (9th Cir. 1992) (recognizing standing based on the "psychological injury" the Fund's members suffered from viewing the killing of bison—according to Federal plan to control bison populations outside of national parks—because the injury arose from a "direct sensory impact of a change in [the plaintiff's] physical environment").

[164] *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998); Fund For Animals v. Norton, 281 F. Supp. 2d 209, 220 (D.D.C. 2003) (citing Fund for Animals v, Clark, 27 F. Supp. 2d 8, 14 (D.D.C.1998)).

harm (suffering) is identical and there is no credible argument that these facilities do not form part of the human environment.

ii. Likely to Involve Uncertain or Unknown Risks

An EIS "is mandated where uncertainty may be resolved by further collection of data . . . or where the collection of such data may prevent speculation on potential . . . effects."[165] For agricultural animals, suffering is not just inflicted through mistreatment and poor living conditions. It is also the byproduct of years of selective breeding practices that physically transform the animals in harmful ways and jeopardize the survival of the species.[166] For example, overbreeding and dwindling genetic diversity limits the ability of farm animals to adapt to environmental changes.[167] This decreased resilience endangers their continued existence, particularly in light of the looming threat of climate change.[168]

---

[165] Wildlands v. Woodruff, 151 F. Supp. 3d 1153, 1165 (W.D. Wash. 2015) (citing Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005)).

[166] Today, because of specialized breeding, chickens weigh about two-thirds more than they did in the 1960s. *See* Jeanine Bentley, *U.S. Per Capita Availability of Chicken Surpasses That of Beef*, USDA (Sep. 20, 2012), https://www.ers.usda.gov/amber-waves/2012/september/us-consumption-of-chicken (the average chicken weighs 5.8 pounds versus 3.4 pounds in 1960). 90% of broiler chickens have trouble walking as a result of selective breeding and spend up to 95% of their lives sitting down because their legs cannot support their tremendous weight. *See* Werner Bessei, *Welfare of Broilers: A Review*, 62 WORLD'S POULTRY SCI. J. 455 (Sep. 2006), https://www.cambridge.org/core/journals/world-s-poultry-science-journal/article/welfare-of-broilers-a-review. We have also seen this sort of genetic engineering in turkeys. The American turkey has been bred to weigh an average of thirty pounds, while in 1929 the average turkey only weighed 13.2 pounds. *See* Eliza Barclay, *Can Breeders Cure What Ails Our Breast-Heavy Turkeys?*, NPR (Nov. 27, 2014), https://www.npr.org/sections/thesalt/2014/11/27/366850401/could-turkey-breeders-cure-the-ailments-of-our-big-breasted-birds. Like in chickens, selective breeding has resulted in difficulty standing to support their immense weight in addition to other skeletal and heart problems. *See* POULTRY SCI. ASS'N, *Turkey Genome Sequencing Project is Providing an Important Tool for Poultry Industry and Basic Research* (Nov. 24, 2014), https://www.poultryscience.org/pr112414.asp.

[167] Jan Overney, *Dwindling Genetic Diversity of Farm Animals is a Threat to Livestock Production*, PHYS ORG (Oct. 16, 2016), https://phys.org/news/2015-10-dwindling-genetic-diversity-farm-animals.html.

[168] A reduction of genetic diversity is coupled with a reduction of the species' capacity to adapt to new diseases, warmer temperatures, or new food sources. *Id.*

iii. Precedential Effect

Another important factor in determining whether a federal action significantly impacts the human environment is "[t]he degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration."[169] The Trump administration rule excluding loan guarantees to medium CAFOs from NEPA review has a clear precedential effect. It applies to all future approvals for medium CAFOs, irrespective of potential environmental impacts.

While precedential effect alone "is generally insufficient to demonstrate a significant environmental impact unless approval of the project is binding on future decisions regarding other actions[,]" non-binding precedential effects can still support the need for an EIS.[170] Federal loan guarantees for large CAFOs creates precedent for future loan approvals, thereby facilitating future significant environmental impacts, including animal suffering.

2. Wild Animals

i. Proximity to cultural/ecologically critical areas

In the case of wildlife, witnessing human-inflicted animal suffering in the animals' habitats constitutes aesthetic injury under NEPA. In *Fund for Animals v. Norton*,[171] plaintiffs brought suit under NEPA, the Migratory Bird Treaty Act, and the APA regarding the issuance of a permit by FWS to the State of Maryland that allowed the killing of 525 mute swans in and around the Chesapeake Bay.[172] Plaintiffs asserted irreparable harm premised on the violation of their procedural rights under NEPA.[173] The Court granted plaintiffs' motion for a preliminary injunction, finding that they had sufficiently established that the actions of FWS would cause irreparable aesthetic harm by stripping them of their ability to view, interact with, study, and appreciate mute swans.[174] The court relied on *Fund for Animals v. Clark* and *Fund for Animals v. Espy*.[175]

---

[169] 40 C.F.R. § 1508.28(b)(6).

[170] Anderson v. Evans, 371 F.3d 475, 493 (9th Cir. 2004).

[171] 281 F. Supp. 2d 209 (D.D.C. 2003).

[172] *Id.* at 219.

[173] *Id.*

[174] *Id.*

[175] *See id.* at 220–21.

In *Clark,* the Court's issued a preliminary injunction in part due to plaintiffs' having demonstrated irreparable harm arising from defendants' "failure to comply with NEPA and the aesthetic injury the individual plaintiffs would suffer from seeing *or contemplating* . . . bison being killed in an organized hunt."[176] The Court additionally held that Plaintiffs raised "substantial questions" with respect to whether the lethal take of the swans would have significant "[i]mpacts that may be both beneficial and adverse," that FWS failed to consider.[177]

In *Espy,* the court enjoined the *removal* of bison from the herd because the aesthetic harm the plaintiffs would suffer resembled the way "a pet owner enjoys a pet, so that the sight, *or even the contemplation,* of [mis]treatment in the manner contemplated . . . would inflict aesthetic injury."[178]

The plaintiffs in *Norton* claimed the harm arose from FWS's failure to take a "hard look" and not sufficiently enabling public involvement in environmental decision-making.[179] The Court agreed, finding that FWS provided sparse information regarding the proposed action or its potential environmental impacts and insufficient time to comment on the Draft EA.[180]

These cases establish that animal suffering in areas of important cultural or ecological significance constitutes a cognizable harm under NEPA. Indeed, animals are often the reason an area has cultural or ecological significance.

ii. Likely to be Highly Controversial

An action is "highly controversial" under the CEQ's NEPA intensity factors when a dispute exists as to the size, nature, or effect of the federal action, and/or the evidence casts doubt on the reasonableness of the agency's conclusions.[181] Wildlife culls are controversial not only because of the strong opposition to them, but also due to widespread disagreement among experts as to their efficacy. For example, killing an adult male mountain lion "tends to lead to more rather than fewer attacks on

---

[176] *Id.* at 220 (citing Fund for Animals v. Clark, 27 F. Supp 2d 8, 14 (D.D.C.1998)).

[177] *Id.* at 233.

[178] *Id.* (citing Fund for Animals v. Espy, 814 F.Supp. 142, 151 (D.D.C.1993)).

[179] *Id.* at 226.

[180] *Id.*

[181] In Def. of Animals v. U.S. Dep't of Interior, 751 F.3d 1054 (9th Cir. 2014) (citing 42 U.S.C. § 4332(2)(C)); 40 C.F.R. § 1508.27(b)(4); Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 1193 (9th Cir. 1988).

livestock."[182] Culling wolves and black bears lead to similar results. In the case of coyotes, studies show that culls lead to greater numbers of pups surviving in their litters. Thus, though "Wildlife Services has killed nearly a million coyotes in the past decade," coyote populations rarely decrease.[183] Given these results and the surrounding controversy, it is not surprising that courts have found culls controversial and worthy of an EIS.[184]

iii. May Threaten Endangered or Threatened Species (ESA)

In addition to generating controversy, actions that cause animal suffering can threaten endangered or threatened species. Controversial methods of wildlife culling, including leg traps, engender substantial criticism for many reasons, including the threat they pose to endangered species. According to Senator Cory Booker, who introduced a bill that would ban the use of body-gripping traps in National Wildlife Refuges[185]:

> The use of body-gripping animal traps in federal wildlife refuges is contrary to the very mission and purpose of these protected areas. These cruel traps don't distinguish between targeted animals and protected animals, endangered species or pets, and are a safety hazard to people. It's past time to remove this antiquated and inhumane practice from federal wildlife refuges.[186]

Currently, steel-jaw leghold traps (which are banned in over 100 countries), strangulation snares, and "other body-hold devices" are used on the "vast majority" of Federal Wildlife Refuge Lands. These areas are meant to protect and conserve wildlife and provide a home to 300 endangered and threatened species.[187] There have been numerous cases of endangered species, such as bald eagles,[188] wolves,[189] and lynxes[190] getting

---

[182] *See* Bale, *supra* note 107.

[183] *Id.*

[184] Wildlands v. Woodruff, 151 F. Supp. 3d 1153 (W.D. Wash. 2015).

[185] Refuge from Cruel Trapping Act, S. 1081, 114th Cong. (2015).

[186] *Trapping*, BORN FREE U.S.A, https://www.bornfreeusa.org/campaigns/trapping (last visited Aug. 19, 2019).

[187] *Refuge from Cruel Trapping* Act, ANIMAL WELFARE INST., https://awionline.org/content/refuge-cruel-trapping-act (last visited Aug. 19, 2019) [hereinafter *Refuge from Cruel Trapping Act*].

[188] Ameena Shelling, *4 Million Animals Die In Traps Every Year. And That Number Is About To Get Even Higher*, THE DODO (May 15, 2015), https://www.thedodo.com/sportsmens-act-trapping-bill-1145577159.html.

[189] N.Y. WOLF CONSERVATION CTR., *Endangered Mexican Gray Wolf Trapped and Killed on Federal Land* (Feb. 12, 2019), https://nywolf.org/2019/02/endangered-mexican-gray-wolf-trapped-and-killed-on-federal-land; Defenders of Wildlife, *Leg-Hold Traps Are Killing Endangered Mexican Gray Wolves*, MEDIUM (Feb. 12, 2019), https://medium.com/wild-without-end/leg-hold-traps-are-killing-

caught in traps. Since harming an endangered species amounts to a statutory harm under the Endangered Species Act and is illegal absent a federally issued take permit, it follows that it would qualify as a significant environmental harm under NEPA as well.[191] It also follows that takes of endangered species constitute significant environmental impacts requiring NEPA review.[192]

iv. Cumulative Impacts

Cumulative impacts on the environment "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions[.]"[193] In determining whether a project will have a "significant" impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts,.[194] If so, the agency must pursue an EIS.[195]

Predator control and wildlife culls diminish biodiversity and weaken the overall ecological health of communities. Predators like wolves are essential to the maintenance of biodiversity and ecosystem health and resilience.[196], Wolves help maintain healthy ungulate populations by

---

endangered-mexican-gray-wolves-640ff6a91c95.

[190] WildEarth Guardians v. U.S. Fish & Wildlife Serv., 342 F. Supp. 3d 1047 (D. Mont. 2018), *appeal dismissed*, No. 18-36091, 2019 WL 1423695 (9th Cir. Feb. 6, 2019); Ctr. for Biological Diversity v. Otter, No. 1:14-CV-258-BLW, 2018 WL 539329, at *2 (D. Idaho Jan. 24, 2018).

[191] 16 U.S.C. § 1538(a)(1) (2018) (makes it unlawful for any "person" to take or harm a listed species without a permit. The definition of person under the ESA includes "any officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. § 1532(13) (2018)).

[192] Wildlife Services is directed to refrain from using M-44 devices in areas where federally endangered or threatened species might be adversely affected (determined in consultation with FWS) unless it has been addressed by FWS in "special regulations" pursuant to the ESA, requirements imposed in incidental take permits, or any other agreement with FWS. ANIMAL & PLANT HEALTH INSPECTION SERV., M-44 USE & RESTRICTIONS 5–6 (Feb. 27, 2018), https://www.aphis.usda.gov/wildlife_damage/directives/pdf/2.415.pdf. However, for reasons outside the scope of this Article, Wildlife Services is not held to account for the harm its practices cause to endangered species on the federal level. *See id.* Nevertheless, the environmental harm is undeniable. *See id.*

[193] 40 C.F.R. § 1508.7.

[194] 40 C.F.R. § 1508.27(b)(7).

[195] *See* Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998).

[196] *See* Tala DiBenedetto, *Wolf Delisting is Premature and not Based in Science*, DEFENDERS OF WILDLIFE (Jul. 12, 2019), https://defenders.org/blog/2019/07/wolf-delisting-

preying on the weak and diseased. Their presence also helps prevent overgrazing, which improves habitat and facilitates biodiversity.[197] When culls decrease predator numbers, prey populations increase. This leads to erosion, vegetation loss, overpopulation, and other impacts.[198] It again seems clear that these agency actions are worthy of NEPA review.

v. Wildlife is A Cultural Resource

In addition to their economic and ecological value, animals have historic and cultural value as well. Animals are inextricably woven into American culture. We see this in the traditions of indigenous tribes,[199] popular culture—which uses animals to represent everything from sports teams (*e.g.* the Denver Broncos) to America itself (the bald eagle). NEPA specifically includes cultural and historic properties as part of the human environment and the CEQ has released guidance on how to coordinate NEPA review with review under the National Historic Preservation Act (NHPA).[200] The NHPA provides for NEPA-like review of federal undertakings that affect any "district, site, building, structure, or object that is included, *or eligible for inclusion*, in the National Register."[201]

Courts have acknowledged that wildlife can qualify for protection under the NHPA as "historic property."[202] In *Dugong v. Rumsfeld*,[203] plaintiffs brought an action to enjoin the construction of a U.S. military base in Okinawa that threatened dugong habitat.[204] Plaintiffs sued under the NHPA instead of NEPA because NEPA cannot be applied extraterritorially.[205] The

---

premature-and-not-based-science.

[197] *Id.*

[198] *See id.*

[199] *See* Complaint at 29, Hopi Tribe v. Trump, No. 17-CV-2590 (TSC), 2019 WL 2494161 (D.D.C. Mar. 20, 2019) (a group of Native American tribes challenged the Trump administration's decision to decrease the size of the Bears Ears National Monument). "As a people whose culture is derived from a deep connection to the Monument lands, and to the animals that share that land, the Navajo people have remained dedicated participants in the creation of the Monument." *Id.* at *6.

[200] COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, & ADVISORY COUNCIL ON HISTORIC PRES, NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 12 (2013), https://www.energy.gov/sites/prod/files/G-CEQ-NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

[201] 16 U.S.C. § 470(f) (2018) (emphasis added).

[202] *See* Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *7 (N.D. Cal. Mar. 2, 2005).

[203] No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

[204] *Id.* at *1.

[205] *See* NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 468 (D.D.C. 1993).

court denied defendants' motion to dismiss because it determined that under the NHPA, dugongs could be considered "cultural property."[206]

Since animals qualify as a cultural resource under NHPA, there is no basis to deny a similar classification under NEPA as well. Furthermore, because Section 106 of NHPA is an independent statutory requirement, compliance with NEPA through a Categorical Exclusion would be insufficient to satisfy NHPA.[207] Consultations under NHPA could be used to determine whether there would be an adverse effect to historic properties, which would trigger the need for an EA or EIS, either alone or in combination with other environmental effects.[208]

Dugong did not rely on the ecological or monetary value of wildlife; it rather focused on the animals' cultural importance. Such recognition when applied domestically should prompt consideration of the cultural significance of wildlife as one of several factors favoring the preparation of an EIS for actions threatening wildlife.

C. Connected Actions

When preparing an EA or an EIS, agencies must consider all "connected actions," "cumulative actions," and "similar actions."[209] Actions are "connected" if they trigger other actions, cannot proceed without previous or simultaneous actions, or are "interdependent parts of a larger action and depend on the larger action for their justification."[210] Even if animal suffering alone is insufficient in certain circumstances to trigger NEPA review, that suffering considered in conjunction with the many other concurrent ecological impacts that accompany it to make clear the need for an EIS.

1. Farm Animals

The environmental impacts of large-scale animal agriculture are vast and well-documented,[211] as are its impacts on human health and welfare.[212] As

---

[206] *Dugong*, 2005 WL 522106, at *8.

[207] COUNCIL ON ENVTL. QUALITY, *supra* note 200, at 18–19.

[208] *Id.* at 19; *see* Tala DiBenedetto, Dugong v. Rumsfeld: Using the NHPA to Strengthen Protection of Wildlife Under NEPA (May 21, 2019) (unpublished comment) (on file with author).

[209] 40 C.F.R. § 1508.25(a) (2020).

[210] *Id.*

[211] *See, e.g.*, Nat'l Pork Producers Council v. U.S. E.P.A., 635 F.3d 738 (5th Cir. 2011); Dakota Rural Action v. U.S. Dep't of Agric., No. CV 18-2852 (BAH), 2019 WL 144013 (D.D.C. Apr. 1, 2019); Nicholas A. Fromherz, *From Consultation to Consent: Community*

discussed previously, such operations often rely on or result from agency actions. What follows is a brief overview of some of the environmental impacts of industrial agriculture."

i. Air Pollution

Industrial agriculture is responsible for approximately one-third of all human-caused greenhouse gas production.[213] Methane, which is produced by ruminants (such as cows, sheep, and goats), traps heat in the atmosphere twenty times more effectively than CO2,[214] and a single adult cow can emit 176 to 242 pounds of methane per year.[215] Manure produced by pig production also results in GHG emissions.[216] The decomposing manure also emits high levels of volatile organic compounds, particulate matter, methane, ozone, ammonia, and hydrogen sulfide, all of which cause harmful health and environmental impacts.[217]

ii. Water Pollution

CAFOs contribute significantly to water pollution. Runoff carries waste into waterways, contaminates groundwater, and overflows into rivers. During flooding, decomposing animal carcasses render rivers uninhabitable

---

Approval As A Prerequisite to Environmentally Significant Projects, 116 W. VA. L. REV. 109 (2013); Reagan M. Marble, *The Last Frontier: Regulating Factory Farms*, 43 TEX. ENVTL. L.J. 175 (2013); Erica Hellerstein & Ken Fine, *A Million Tons of Feces and an Unbearable Stench: Life Near Industrial Pig Farms*, THE GUARDIAN (Sep. 20, 2017), https://www.theguardian.com/us-news/2017/sep/20/north-carolina-hog-industry-pig-farms; Kendra Pierre-Louis, *Lagoons of Pig Waste Are Overflowing After Florence. Yes, That's as Nasty as It Sounds*, THE NEW YORK TIMES (Sep. 19, 2018), https://www.nytimes.com/2018/09/19/climate/florence-hog-farms.html.

[212] *See* NAT. ASS'N OF LOCAL BD. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (Mark Schultz ed., 2010) https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [hereinafter UNDERSTANDING CONCENTRATED].

[213] David N. Cassuto & Sarah Saville, *Hot, Crowded, and Legal: A Look at Industrial Agriculture in the United States and Brazil*, 18 ANIMAL L. J. 185, 189 (2012).

[214] ENVTL. PROTEC. AGENCY, INVENTORY OF US GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2009, at 6–2 (2011), www.epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Complete_ Report.pdf.

[215] Cassuto & Saville, *supra* note 213, at 190.

[216] FOOD AND AG. ORG. OF THE U.N., *Animal Production and Health: Pigs and Environment* (last visited Mar. 25, 2020), http://www.fao.org/ag/againfo/themes/en/pigs/Environment.html.

[217] *Id.*

for aquatic life and toxic to humans.[218] Runoff from CAFO pollution releases nitrates, arsenic, and antibiotics into drinking water, which can cause serious public health issues. Any of these impacts would be significant either by themselves or in tandem.[219]

iii. Land Degradation

Animal agriculture also causes significant land degradation. Overgrazing, compaction, and erosion are common, while conversion of grasslands to monoculture crops for animal feed further diminishes biodiversity.[220] Notably, of the more than one-third of U.S. land used for pasture, twenty-five percent is administered by the federal government.[221] Once again, the environmental impacts are clear and the federal involvement undeniable.

iv. Climate Change

Emissions from large-scale animal agriculture form one of the main drivers of climate change.[222] EPA statistics attribute approximately nine percent of GHG emissions to agriculture.[223] However, former U.S. Secretary of Energy Steven Chu has noted that the aggregated emissions caused by animal agriculture, including emissions from fertilizer use, soil disruption, and land-use changes, when weighted for lifetime and potency, exceed those of the energy sector.[224]

---

[218] *See id.*; UNDERSTANDING CONCENTRATED, *supra* note 212; ENVTL. PROT. AGENCY, LITERATURE REVIEW OF CONTAMINANTS IN LIVESTOCK AND POULTRY MANURE & IMPLICATIONS FOR WATER QUALITY (2013); Michael Graff, *Millions of Dead Chickens and Pigs Found in Hurricane Floods*, THE GUARDIAN (Sep. 22, 2018), https://www.theguardian.com/environment/2018/sep/21/hurricane-florence-flooding-north-carolina.

[219] *Id.*

[220] *See* FAO, LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES & OPTIONS 73–77 (2006), http://www.fao.org/3/a-a0701e.pdf.

[221] Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land,* BLOOMBERG (Jul. 31, 2018), https://www.bloomberg.com/graphics/2018-us-land-use.

[222] ENVTL. PROT. AGENCY, INVENTORY OF US GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2009, at 6–2 (Apr. 15, 2011), http:// www.epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Complete_ Report.pdf.

[223] ENVTL. PROT. AGENCY, SOURCES OF GREENHOUSE GAS EMISSIONS (last visited Jan. 14, 2019), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (noting that GHG emissions from agriculture "come from livestock such as cows, agricultural soils, and rice production").

[224] Jeff McMahon, *Meat And Agriculture Are Worse For The Climate Than Power Generation, Steven Chu Says*, FORBES (Apr. 4, 2019), https://www.forbes.com/sites/jeffmcmahon/2019/04/04/meat-and-agriculture-are-worse-for-the-climate-than-dirty-energy-steven-chu-says.

v. Financial Impacts and Environmental Justice

Negative impacts from actions that cause animal suffering extend to human communities as well.[225] CAFOs generate toxic odors[226] and cause insect populations to vector.[227] Property values often drop, undermining the financial stability of communities. These impacts are often borne by low-income communities, and primarily people of color. Such environmental justice concerns can and should trigger NEPA review.[228]

All of the above-mentioned impacts happen in tandem with enormous animal suffering. While that suffering alone merits NEPA review, the accompanying effects further underscore the importance of a full NEPA review.

VI. CONCLUSION

Animals and their wellbeing are a crucial part of the human environment, whether in the wild or in industry. Simply stated: harm to animals is harm to the environment. And that harm constitutes an environmental impact worthy of NEPA review. Even if considerations of animal welfare alone were insufficient, the cumulative impacts of industrial agriculture and wildlife control rise to the level of significant impact.

Finally, if those who inflict needless suffering on animals were required to disclose their actions as well as potential alternatives to them, the American public would confront a long-obscured, ugly reality. Past disclosures of animal mistreatment galvanized public pressure for reform. However, those past disclosures were limited to single instances at specific sites. If the scale and ubiquity of such practices were revealed, it could catalyze important reforms to practices that can only be described as barbaric. We believe such reforms are both morally and environmentally urgent. NEPA may well provide a way forward.

---

[225] *See* Labrayere v. Bohr Farms, 458 S.W.3d 319 (Mo. 2015).

[226] One study found that 92.2% of those living near and 78.9% of those living far from CAFOs believed the odor from manure was a problem. *See* UNDERSTANDING CONCENTRATED *supra* note 212, at 3.

[227] *Id.*

[228] *See* Wendee Nicole, *CAFOs and Environmental Justice, the Case of North Carolina*, 121(6) ENV. HEALTH PERSPECTIVES 182, 182 (2013); Christine Ball-Blakely, *Cafos: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL'Y 1, 4 (2017).

Bullying Litigation: An Empirical Analysis of the Dispositional Intersection Between Inconclusive Rulings and Ultimate Outcomes

Diane M. Holben* & Perry A. Zirkel**

I. INTRODUCTION

The news reports of bullying are frequent and frightening. A 12-year-old girl takes her own life after relentless bullying by classmates, which culminated in one student asking her in public when she was going to kill herself.[1] Another 13-year-old victim dies by suicide after months of relentless bullying on the school bus concerning his weight and

* Diane Holben, Ed.D., is assistant professor at East Stroudsburg University.
** Perry A. Zirkel, Ph.D., J.D., LL.M., is university professor emeritus at Lehigh University.

[1] *School Accused of Doing Nothing to Stop Bullying of Girl Who Took Her Life*, CBS: NEWS (Jun. 21, 2018), https://www.cbsnews.com/news/mallory-grossman-death-parents-bullied-girl-sue-new-jersey-school-district-after-suicide-copeland-middle-school/.

appearance.[2] For yet another victim, cyber-bullying continues even after he enrolls in a new school to escape his tormentors.[3] These examples, coupled with student survey data self-reporting an annual bullying victimization rate of approximately one fifth of U.S. students aged 12–18,[4] highlight the serious effects of bullying victimization.[5]

In response, legislators in all fifty states have enacted anti-bullying statutes that primarily provide reporting, investigation, and policy requirements for school districts.[6] Additionally, federal agencies have issued proactive policy guidance under relevant civil rights laws.[7] Finally, Congress has provided funding incentives for school district anti-bullying prevention efforts through the Every Student Succeeds Act.[8]

Despite these efforts, an increasing number of victims and their families look to the courts to address harm caused by peer-to-peer bullying. Illustrating this trend, a previous systematic analysis of court decisions specific to bullying victimization revealed increases in the frequency of both cases and claim rulings,[9] which is a more precise unit of analysis than

---

[2] Stephen Sorace, *Michigan Boy, 13, Kills Himself After Being Bullied on School Bus, Mom Says*, FOX NEWS: US (Feb. 6, 2019), https://www.foxnews.com/us/michigan-boy-13-kills-himself-after-being-bullied-on-school-bus-report.

[3] Erica Breunlin, *Bullying Forced Student to Leave Farragut High; Parents Say Knox County Schools Did Nothing to Help Him*, KNOXVILLE NEWS SENTINEL: EDUC. (Nov. 29, 2018), https://www.knoxnews.com/story/news/education/2018/11/29/bullying-knox-county-schools-farragut-high-student/1920550002/.

[4] INST. FOR EDUC. SCI., NAT'L CTR. FOR EDUC. STAT., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY T1.1 (2016), http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2017015.

[5] Common effects of prolonged bullying victimization include chronic absenteeism, mental health concerns such as depression and anxiety, and suicidal ideation. *See, e.g.*, Sandra Graham, *Victims of Bullying in Schools*, 55 THEORY INTO PRACTICE 136, 137–38 (2016); Erin Grinshteyn & Tony Yang, *The Association Between Electronic Bullying and School Absenteeism Among High School Students in the United States*, 87 J. SCH. HEALTH 142 (2017).

[6] The Department of Health and Human Services maintains a website that provides access to all fifty states' anti-bullying statutes and summarizes their key components. *Laws, Policies & Regulations*, STOPBULLYING.GOV, https://www.stopbullying.gov/laws/index.html (last visited Apr. 19, 2020). For a comparative analysis of state anti-bullying statutes, *see* Maryellen Kueny & Perry A. Zirkel, *An Analysis of School Anti-Bullying Laws in the United States*, 43 MIDDLE SCH. J. 22 (Mar. 2012).

[7] *See, e.g.*, CATHERINE E. LHAMON, ASSISTANT SEC'Y FOR CIVIL RIGHTS, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: RESTRAINT & SECLUSION OF STUDENTS WITH DISABILITIES (Dec. 28, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf.

[8] 20 U.S.C. § 7118(5)(C)(iii) (2018).

[9] Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical*

the case,[10] across the twenty-year time period from 1992 to 2011.[11] "Claim ruling" refers to the court's adjudication of each legal basis that the plaintiff advanced, such as Fourteenth Amendment substantive due process or equal protection, Section 504/ADA or IDEA, or negligence, with the added refinement of separation when the outcomes differed between the two defendant categories—institutional or individual. The outcomes of these claim rulings were analyzed using a five-category scale (conclusive for defendant, inconclusive for defendant, split, inconclusive for plaintiff, and conclusive for plaintiff)[12] with the skew in favor of district defendants but including a significant proportion of inconclusive rulings.[13] Because cases with at least one inconclusive claim ruling proceed, an aggregate outcomes frequency that includes all claim rulings can be a misleading indicator of plaintiff success. For example, a case may incorporate five separate claims. If just one claim ruling is inconclusive and the other four are conclusive for the defendant, the case will proceed based upon the single inconclusive

---

Analysis of the Case Law, 47 AKRON L. REV. 299, 313 (2014) [hereinafter *School Bullying Litigation*]. More specifically, for the twenty-year time period from January 1, 1992 to December 31, 2011 the trajectory was consistently upward for the cases but was particularly steep during the most recent four-year interval for claim rulings, with 2008–2011 accounting for just over a third of the cases and claim rulings. *Id.*

[10] *Id.* at 309 nn.72–73. For previous uses of this unit of analysis, see, for example, Susan C. Bon & Perry A. Zirkel, *The Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPEC. EDUC. LEADERSHIP 1 (2014); *School Bullying Litigation*, *supra* note 9; Perry A. Zirkel, *Bullying and Suicidal Behaviors: A Fatal Combination?* 42 J.L. & EDUC. 633 (2013); Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323 (2011).

[11] *School Bullying Litigation*, *supra* note 9, at 313.

[12] *Id.* at 311. For previous use of this five-category scale, see, for example, Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 367–68 (2008).

[13] *School Bullying Litigation*, *supra* note 9, at 314. Specifically, the outcomes distribution for the 742 claim rulings was as follows: conclusively for district defendants – 62%; inconclusive for the defendant – 10%; split ruling – 5%; inconclusive for the plaintiff – 21%; and conclusive for plaintiff students – 2%. The inconclusive for defendant category consisted largely of dismissals without prejudice. Similarly, the inconclusive for plaintiff category consisted largely of denials of motions for dismissal or summary judgment. *Id.* at 324 n.140. Rulings considered as inconclusive included, for example, (a) granting a dismissal motion based on failure to exhaust administrative remedies (because the plaintiff potentially could return to court after doing so) and (b) dismissing without prejudice based on either a federal court's discretionary declining to address state law claims (because the plaintiff could potentially bring them in state court) or contingent upon addressing missing elements within a very limited time (because the plaintiff had the opportunity to correct the deficiency). Conversely, we did not include as inconclusive the possibility of appeal.

ruling. When converted to a best-for-plaintiff basis,[14] an approach that uses the most plaintiff-favorable claim ruling in the case as the outcome for this overall unit of analysis, the outcomes distribution displayed a more pro-plaintiff skew, with a higher frequency of inconclusive rulings and a proportionally lower frequency of rulings conclusive for district defendants.[15] Consequently, these results supported the use of the "spaghetti strategy,"[16] where plaintiffs file multiple claims to increase the odds of at least one claim moving forward, thus increasing the likelihood of a settlement or favorable verdict.

Illustrating the tradeoff of the spaghetti litigation strategy, a follow-up analysis of bullying cases revealed that both parent plaintiffs and school district defendants invest significant time[17] and expense[18] in the litigation process. Additionally, because these best-for-plaintiff inconclusive rulings are for largely pretrial motions,[19] they only represent progress toward a final disposition, not the ultimate outcome of the case.[20] The ultimate outcome is the final disposition of the case, resolving all outstanding claims other than attorneys' fees. The various categories of the final disposition are conclusive decision for plaintiff or defendant, settlement, and

---

[14] Zirkel & Lyons, *supra* note 10, at 344.

[15] *School Bullying Litigation*, *supra* note 9, at 320. The outcomes distribution, on a best-for-plaintiff basis representing the 166 cases, was as follows: conclusively for district defendants – 41%; inconclusive for the defendant – 15%; split ruling – 5%; inconclusive for the plaintiff – 34%; and conclusive for the plaintiff – 5%. For similar patterns using a simplified three-point outcomes scale conflating the three inconclusive outcomes categories, see Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of the Case Law*, 20 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 133 (2018) [hereinafter *Bullying of Students with Disabilities*], and Diane M. Holben & Perry A. Zirkel, *School Bullying Case Law: Frequency and Outcomes for School Level, Protected Status, and Bullying Actions*, 18 ETHICAL HUMAN PSYCHOL. & PSYCHIATRY 111 (2016) [hereinafter Holben & Zirkel (2016)], and *infra* text accompanying note 39.

[16] Zirkel & Lyons, *supra* note 10, at 346.

[17] On average, parties litigated bullying cases for 2.01 years prior to the most recent inconclusive claim ruling and an additional 0.77 years after the ruling until final disposition for a total of just under three years of litigation. Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Ultimate Outcomes of Inconclusive Rulings*, 46 J.L. & EDUC. 195, 210 (2017).

[18] Although ascertaining the total cost of litigation for each was difficult, the publicly available settlements with monetary compensation for this sample of cases ranged from $4,250 to $4,800,000. *Id.* at 212 n.96. For some of the cases with settlement agreements that specified the allocation for attorneys' fees, this amount exceeded the net payment to the plaintiff students. *Id.*

[19] Most commonly, court opinions for pretrial motions available in electronic subscription databases, such as Westlaw or LexisNexis, address either of the successive motions for dismissal or summary judgment.

[20] Zirkel & Holben, *supra* note 17, at 198 and 206.

abandonment or withdrawal. To explore the possible relationship between inconclusive rulings and plaintiff-favorable ultimate outcomes, a subsequent analysis traced the ultimate outcome of each case within an updated twenty-year time period, finding that approximately two-thirds of the best-for-plaintiff inconclusive claim rulings resulted in a settlement.[21] However, this analysis did not examine whether the ultimate outcomes frequency varied according to specific factors in the courts' disposition of these inconclusive rulings.[22]

As the next step in this exploration of the inconclusive claim rulings and their possible relationship to ultimate outcomes, a recent analysis of those bullying cases specific to plaintiff students with disabilities for the period 1998–2017 provided a tentative taxonomy of the dispositional factors for these inconclusive claim rulings.[23] More specifically, this taxonomy consisted of two factors. The first factor is the court's identified reason or "gravamen,"[24] for the rulings within two subcategories—(a) threshold adjudicative prerequisites, such as jurisdiction, exhaustion, and statute of limitations, and (b) the merits, divided into essential elements of and defenses to the claim. The second factor is the plaintiff's approximate adjudicative progress toward a verdict within three successive levels in relation to the successive pretrial steps—(a) remote (e.g., dismissal without prejudice contingent upon a very limited period for rectification and no subsequent ruling in the case); (b) intermediate (e.g., denial of motion for dismissal based on the merits), and (c) proximate (e.g., denial of defendant's motion for summary judgment).[25] The results for this

---

[21] The categories of the ultimate outcome and the percentages for each one among the 352 bullying claim rulings were as follows: conclusive for plaintiff (via subsequent court decision) – 1%; settlement – 61%; withdrawal/abandonment – 20%; conclusive for defendant (via subsequent court decision) – 11%; and unknown – 6%. *Id.* at 210. The settlement rate is closer to the two-thirds approximation upon omitting the unknown dispositions.

[22] For an initial identification of these factors, see Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of Court Claim Rulings*, 361 EDUC. L. REP. 498, 499 n.13 (2019) [hereinafter *Bullying of Students with Disabilities: An Empirical Analysis*].

[23] *Id.*

[24] In a recent decision in the education context, the Supreme Court explained that "gravamen" is "legal-speak" for the crux, or fulcrum. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 755 (2017). However, there the referent was the plaintiff's claim, whereas here the referent is the court's ruling.

[25] *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22, at 499 n.13. For inconclusive claim rulings yielding more than one identified disposition, we used the one closest to a verdict. For this purpose, we used the latest documented disposition as of September 1, 2019 available in the Westlaw History feature (allowing for any lag in publication), the PACER or state electronic database dockets. These dispositions ranged

exploratory analysis were approximately evenly split between the threshold prerequisites and the merits, with those based on threshold prerequisites skewed toward the more defendant-favorable progress level whereas those based on the merits were skewed toward the more plaintiff-favorable intermediate and proximate progress levels.[26]

However, this most recent exploration did not extend to the larger pool of bullying cases and to the disaggregation of claim rulings within the inconclusive outcomes category. The purpose of this article is to address gaps via a refined typology to explore the dispositional factors, specifically the overall bases and progress levels, for the inconclusive rulings and their interactions with the ultimate outcome for the rulings.

II. FRAMEWORK

Contrary to public perception, judicial outcomes in education[27] and other contexts[28] extend beyond the corresponding limited empirical categorization of winning or losing a case.[29] Similar to an iceberg,[30] many layers lie below the surface of a published[31] court decision or verdict,

---

from a combination of the reason category of threshold prerequisites and a progress level of remote at the farthest end to a combination of the reason category of merits and the progress level of proximate on the closest end.

[26] *Id.* at 503.

[27] *E.g.*, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012) (using a seven-category outcomes scale for special education cases not only reported in Westlaw but also "below the surface," i.e., only available in the PACER system).

[28] *E.g.*, Robert A. Mead, *"Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 L. LIBR. J. 589 (2001); Peter Siegelman & John Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990) (analyses comparing outcomes of private sector cases above and below the surface of official publication).

[29] *E.g.*, Richard Arum & Irene R. Beattie, *How Judges Rule*, *in* RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 88 (2003) (pro-district and pro-student based on unclear statistical explanation); Elwood M. Clayton & Gene S. Jacobsen, *An Analysis of Court Cases Concerned with Student Rights 1960–1971*, 58 NASSP BULL. 49 (1974) (student won or student lost without explanation); MELINDA MALONEY & BRIAN SHENKER, THE CONTINUING EVOLUTION OF SPECIAL EDUCATION LAW 1980 TO 1995 (LRP Publications 1995) (parents won and schools won without explanation).

[30] Zirkel & Machin, *supra* note 27.

[31] "Published" here refers to decisions appearing in the primary legal databases, whether appearing in an official reporter series or not. For the differences, see, for example, Ellen Platt, *Unpublished vs. Unreported: What's the Difference*, 5 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 26 (1996) (discussing the respective criteria for the courts' designation of officially published opinions and the electronic databases' selection among

resulting in a more nuanced outcomes categorization that includes and differentiates between inconclusive rulings. Often, the ultimate outcome of a legal claim is an unpublished order or docket entry that documents a subsequent disposition, with the access via the Westlaw or LexisNexis legal research databases limited by the comprehensiveness of the user's subscription.[32] The Public Access to Court Electronic Records (PACER), provides expanded access to federal court case documents for a per page fee, but lacks the keyword search tools present in commercial databases.

A continuing line of research within the K–12 education context has led to more refined and in-depth outcomes analysis via three successive steps: (a) identifying the claim ruling unit of analysis; (b) using an outcomes scale that includes categorization of inconclusive rulings; and, most recently, (c) initiating the exploration of the dispositional factors for the inconclusive rulings. Canvassing the line of research for these successive steps provides a foundation for a more fine-grained analysis of the dispositional factors for the inconclusive claim rulings on a best-for-plaintiff basis,[33] the ultimate outcomes of the case, and their intersection.

Inconclusive Claim Rulings

The claim ruling is a more precise and practicable unit of empirical analysis of litigation outcomes than the case, consisting primarily of the legal basis of the claim, and, secondarily upon different outcomes, the type of defendant. For the limited foundational research, the categorization of legal bases was within two broad groupings—state and federal. For bullying-related litigation, the federal legal bases predominated, with the most common ones being Title IX, Fourteenth Amendment substantive due process, and Fourteenth Amendment equal protection.[34] Within the less

---

the remaining opinions).

[32] David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 691-693 (2007) (noting the incomplete collection of orders and opinions in both the Westlaw and LexisNexis databases, as compared to court document availability through electronic docketing databases); Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 480 (2004) (noting the wide discretion of judges in determining which orders and opinions to submit for inclusion in the Westlaw and LexisNexis databases).

[33] Zirkel & Lyons, *supra* note 10, at 344.

[34] *School Bullying Litigation*, *supra* note 9, at 316 (finding that the federal legal bases accounted for 485 of the 742 claim rulings for the time period 1992–2011, with the top three by far being Title IX (n=118), Fourteenth Amendment substantive due process (n=112), and Fourteenth Amendment equal protection (n=111)).

frequent state group, the most common legal bases were negligence, intentional torts, and state civil rights laws.[35]

Successive subsequent analyses of the claim rulings found a pronounced skew toward defendant-favorable outcomes moderated by a significant segment of inconclusive outcomes, both on the original five-category basis and on a subsequent customized three-category basis.[36] Moreover, disaggregated analysis revealed higher proportions of inconclusive rulings for some federal and state legal bases, suggesting that inconclusive rulings may differ due to factors such as (a) the ability to demonstrate specific elements of a prima facie case for federal claims; (b) failure to meet threshold requirements for pursing a claim, such as statute of limitations or standing requirements; or (c) the reluctance of federal courts, upon rejection of all federal claims, to retain their discretionary supplemental jurisdiction of state claims. More specifically, several previous analyses noted frequencies of inconclusive claim rulings exceeding forty percent for federal claims under Title IX, IDEA, and 504/ADA, and for state claims of negligence, intentional tort, and state civil rights law claims. [37]

Additionally, court decisions resulting in one or more inconclusive claim rulings provide plaintiffs with increased leverage for a favorable ultimate outcome either via settlement or verdict. Plaintiff's inconclusive success at the pretrial stages implicate two of the contributing factors to settlement—probabilities of conclusive success and the extent of transaction costs. However, settlement also depends on various other factors, which in the school district context include public relations, the individual parties'

---

[35] *Id.* at 318 (finding that the state legal bases accounted for 257 of the 742 claim rulings, with the leading three being negligence (n=81), state civil or anti-bullying laws (n=54), and intentional infliction of emotional distress (n=38)).

[36] *Bullying of Students with Disabilities*, *supra* note 15, 145 (finding for the 600 claim rulings during the period 1998–2017 an outcomes distribution of 55% conclusively for defendant, 44% inconclusive, and 1% conclusively for plaintiff); *Bullying of Students with Disabilities*, *supra* note 15, 121 (finding for the 1016 claim rulings during the period 1995–2014 an outcomes distribution of 63% conclusively for defendant, 35% inconclusive, and 2% conclusively for plaintiff). Across broader school law analyses, the proportion of inconclusive outcomes varies widely based upon (1) the unit of analysis, (2) the scope of the subject matter, and (3) the size, or skew, of the other outcome categories. *E.g.*, Bon & Zirkel, *supra* note 10 (41%); William H. Lupini & Perry A. Zirkel, *An Outcome Analysis of Education Litigation*, 17 EDUC. POL'Y 257, 261 (2003) (19%); Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 58 (2014) (10%); Perry A. Zirkel, *Revocation or Suspension of Educator Certification: A Systematic Analysis of the Case Law*, 44 J.L. & EDUC. 539, 553 (2015) (18%).

[37] *School Bullying Litigation*, *supra* note 9, at 322–23; *Bullying of Students with Disabilities*, *supra* note 15, at 132; Zirkel & Holben, *supra* note 17, at 502.

perceptions and relationship, and the local culture.[38] As a result, when analyzing plaintiff progress toward a verdict, conflation of claim rulings within a case on a best-for-plaintiff basis provides a more accurate approximation of the outcome than the case unit of analysis. This approximation aligns with the spaghetti strategy for litigation and facilitates tracing the inconclusive to the ultimate outcome.

Ultimate Outcomes

The continuing line of outcomes analyses of education litigation has been largely limited to the claim rulings of published[39] court opinions as the sole data source.[40] The results have included a notable proportion of inconclusive outcomes, particularly for the bullying litigation, representing a continuum of plaintiff or defendant success for each individual claim ruling. This outcome category is only a limited measure of plaintiff success as of the pretrial steps of the litigation process, subject to revision upon the final disposition, or ultimate outcome, of the case.

Overall, the professional literature restricted analyses of the ultimate outcomes of court decisions, mostly limited to settlements outside the education context.[41] The springboard for the present analysis not only was within the education context but also extended to final disposition beyond settlements.[42]

---

[38] For a recent illustration arising from IDEA claims, see, for example, Kristin Taketa, *Expensive Legal Fights Ensure When Families Say They Are Not Getting the Right Special Education Services*, SAN DIEGO UNION TRIB., Oct. 5, 2019, https://www.sandiegouniontribune.com/news/education/story/2019-10-05/expensive-legal-fights-ensue-when-families-say-theyre-not-getting-the-right-special-education-services.

[39] For the broad meaning of "published" here, *see supra* text accompanying note 31.

[40] *School Bullying Litigation*, *supra* note 9; *Bullying of Students with Disabilities*, *supra* note 15; Zirkel & Lyons, *supra* note 10; Chouhoud & Zirkel, *supra* note 12.

[41] *E.g.*, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. ECON. & ORG. 898, 11 (2012) (finding that the frequency of settlement represented about two-thirds of ultimate outcomes in a five year sample of federal district court veil-piercing corporate cases); Kathryn Moss, Michael Ullman, Jeffrey Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 305 (2005) (reporting that 58% of ADA Title I cases analyzed ended in a settlement, with the majority of the remaining outcomes favoring the defendants).

[42] For an earlier foray that used the PACER docketing database for special education litigation but only partially extending to final dispositions, see Zirkel & Machin, *supra* note 27, at 504 (for the 127 relevant cases with sufficient information to determine the issue outcomes, 25% ended in settlement, 25% were ongoing, and 50% reached a court decision).

Dispositional Factors

As cases progress through the litigation process, the parties' success on pretrial motions may influence the likelihood of obtaining a favorable final disposition.[43] To explore this potential interaction, the most recent previous exploration of ultimate outcomes in education posited a two-dimensional conception of dispositional factors, "reason" and "progress," finding that inconclusive dispositions based on the merits yield more proximate progress for plaintiffs.[44]

The immediately earlier exploration, which tentatively identified and applied two overlapping dimensions of dispositional factors, suggested the need for more extensive analysis of the relationship between dispositional factors for inconclusive claim rulings and the ultimate outcome of the case.[45] This follow-up investigation provided three methodological adjustments: (a) a broader sample of bullying litigation; (b) disaggregation by legal basis for the outcomes of the claim rulings, and (c) inferential statistical analysis of the differences between the dispositional factors for the best-for-plaintiff inconclusive rulings and the ultimate outcomes for the cases.

III. METHODOLOGY

The purpose of this follow-up analysis is to explore the dispositional factors, specifically the overall bases and progress levels, for the inconclusive rulings and their intersection with the ultimate outcome for the rulings. The specific research questions are as follows:

1. What is the distribution of the dispositional factors for the inconclusive claim rulings, both overall and disaggregated by dispositional factor, with respect to:
   a. reason category (threshold prerequisites or the merits)
   b. progress level (remote, intermediate, or proximate)
2. What is the distribution of the ultimate outcomes (conclusive for defendant, abandonment/withdrawal, settlement, or conclusive for plaintiff) for the inconclusive rulings, both overall and for each legal basis?

---

[43] Boyd & Hoffman, *supra* note 41, at 921–22 (concluding that the filing of substantive, non-discovery motions and subsequent plaintiff-favorable rulings influences the likelihood and timing of settlements for veil-piercing corporate cases).

[44] *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22.

[45] *See supra* text accompanying note 25.

3. What is the intersection between the dispositional factors for the best-for-plaintiff inconclusive claim rulings and the ultimate outcomes of the cases with respect to:
   a. reason category (threshold prerequisites or the merits)
   b. progress level (remote, intermediate, or proximate)

Case Selection

The chronological scope includes the thirty-year time period from January 1, 1989 to December 31, 2018. Within this period, the authors identified an initial pool of 539 published[46] cases, first from previous analyses of student-to-student bullying in public schools[47] and second via a Boolean search of the Westlaw database using a subscription that included not only federal trial and appellate court decisions and state appellate court decisions but also trial court orders and a set of jury verdicts and settlements. Consequently, the limitations of the subscription excluded any cases litigated only at the state trial court level or that resolved without a published court opinion.[48] This search extended not only to the additional years but also identified, via a Westlaw subscription upgraded from that used in the initial study, additional cases within the original period that met the selection criteria. Consistent with the previous analyses, this search employed the alternate terms of "bullying," "harassment," "teasing," or "hazing," combined with the terms "school," "student," and/or "peer," and the selection within the resulting cases was limited to the following combination of criteria: (1) the bully and the victim were K–12 public school students; (2) the plaintiff was a student and/or the student's parents; (3) the defendant was a school district and/or its individual employees; (4) the bullying occurred on the school campus or at an off-campus school-sponsored event; and (5) the factual description, generally the allegations from a pretrial motion ruling interpreted in the light most favorable to the nonmoving party, with the alleged negative conduct in question fitting within the generally accepted uniform definition of bullying developed by

[46] For this context, "published" refers broadly to cases in the Westlaw database rather than the narrower meaning of the smaller segment of cases selected for official publication.

[47] *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22 (disability-related bullying cases from 1998–2017); *Bullying of Students with Disabilities*, *supra* note 15 (disability-related bullying cases from 1998–2017); Zirkel & Holben, *supra* note 17 (all bullying-related cases with inconclusive claim rulings from 1992 to 2014); *Bullying of Students with Disabilities*, *supra* note 15 (all bullying-related cases from 1995–2014); *School Bullying Litigation*, *supra* note 9 (all bullying-related cases from 1992–2011).

[48] For limitations on court document availability, see Hoffman et al., *supra* note 32, and Gerken, *supra* note 32.

the Centers for Disease Control (CDC). This uniform definition identifies the three elements of bullying victimization as (a) unwanted aggressive behaviors toward a victim; (b) an observed or perceived power imbalance; and (c) repetition or a high likelihood of repetition of the aggressive behaviors.[49] The most frequent exclusions were bullying cases where (a) the student plaintiffs were enrolled in non-public schools;[50] (b) the bully was an adult, not a student peer; [51] or (c) the case was not congruent with one or more of the bullying uniform definition criteria.[52]

The final selection among the 539 cases resulted from a two-step screening procedure first to identify those with at least one inconclusive claim ruling and then, via initially examining the dockets for these decisions,[53] to determine whether the case had reached an ultimate

---

[49] R. MATTHEW GLADDEN, ALANA M. VIVOLO-KANTOR, MERLE E. HAMBURGER, & COREY D. LUMPKIN, BULLYING SURVEILLANCE AMONG YOUTHS: UNIFORM DEFINITIONS FOR PUBLIC HEALTH AND RECOMMENDED DATA ELEMENTS 4–5 (2014), https://www.cdc.gov/violenceprevention/pdf/bullying-definitions-final-a.pdf. Primarily referencing the seminal work of Dan Olweus in identifying the key attributes of bullying incidents, this uniform definition excludes aggression between siblings or dating partners. *See generally*, DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993).

[50] *See, e.g.*, Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 519 (3d Cir. 2011); N.K. v. St. Mary's Springs Academy of Fond du Lac Wis., Inc., 965 F. Supp. 2d 1025, 1028 (E.D. Wis. 2013); Bass *ex rel.* Bass v. Miss Porter's Sch., 738 F. Supp. 2d 307, 311 (D. Conn. 2010).

[51] *See, e.g.*, Cockrell v. Lexington Cty. Sch. Dist. 1, No. 3:11-CV-2-42-CMC, 2011 WL 5554811 (D.S.C. Nov. 15, 2011); H.M. v. Kingsport City Sch. Bd. of Educ., No. 2:05-CV-273, 2009 WL 2986606 (E.D. Tenn. Sept. 10, 2009); D.B. *ex rel.* C.B. v. Jersey City Bd. of Educ., No. A-2095-17T2, 2018 WL 6424126 (N.J. Super. Ct. Dec. 7, 2018).

[52] *See, e.g.*, Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000) (victim engaged in self-defense); A.B. v. Clarke Cty. Sch. Dist., No. 3:08-CV-041-CDL, 2009 WL 902038 (M.D. Ga. Mar. 30, 2009) (defendant lacked intent to harm the victim); Halladay *ex rel.* A.H. v. Wenatchee Sch. Dist., 598 F. Supp. 2d 1169 (E.D. Wash. 2009) (action was an isolated incident).

[53] The Westlaw Jury Verdicts and Settlements feature included in the subscription utilized for this study provides access to summaries of ultimate outcomes of cases in their federal-level and state-level reporters. However, the database coverage itself is limited by the sources of the reported verdicts and settlements, which generally are jury verdict publishers as opposed to electronic court databases. This limitation necessitates the use of other, fee-based electronic court databases as primary sources for the ultimate outcomes. For the remaining federal cases, we located the docket for the case in the PACER database, which is organized by the type of federal court and is searchable by the docket number, party name, or attorney name. Additionally, documents under seal are barred from access. *See* Hoffman et al., *supra* note 32 and accompanying text. For the remaining state cases, including those potentially re-filed or remanded from federal court, we searched each state's electronic court filing system, which range widely from statewide integrated systems to disconnected systems at the county court level. The state court databases also vary in their depth of information available to the public.

outcome. The exclusions during this procedure were for cases in which (a) the bullying behavior was not the primary focus of the adjudicated claims;[54] (b) the aggressive behavior represented a physical or sexual assault that was unrelated to prior or subsequent bullying actions;[55] (c) the court decision lacked sufficient facts to determine alignment with the uniform bullying definition or the nexus between the bullying and the claims;[56] or (d) an ultimate outcome had not been reached as of September 1, 2019.[57] This screening procedure yielded a sample of 247 cases meeting these criteria, which contained 515 claim rulings. Per the procedure in the previous analyses and for cases that were subject to more than one court decision, the selection was limited to the most recent relevant decision for each claim ruling.[58]

Case Coding

For each of the 247 cases, the first step was coding the inconclusive claim rulings, primarily in terms of the legal basis. The categorization of legal basis followed the template of the corresponding previous analyses. The overall "federal" and "state" categories in this context refer to the source of the legal basis (for example, U.S. Constitution or state statute), not the forum for litigation (for example, U.S district court or state appellate court). The jurisdiction of these two forums overlap, causing a high but far from complete correlation between the category of legal basis and that of the judicial forum.[59] Additionally, cases were coded by the defendant type for the relatively few cases where the outcome differed between the individual and institutional defendants.[60] The second step was the coding of the dispositional factors for the inconclusive claim rulings. Modifying the template in the preceding exploratory analysis,[61] we made two adjustments to facilitate statistical analysis: (a) separating the two factors of dispositional reason category and dispositional progress level, and (b)

---

[54] *E.g.*, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015).

[55] *E.g.*, Lockhart v. Willingboro High Sch., 170 F. Supp. 3d 722 (D.N.J. 2015).

[56] *E.g.*, Tawes v. Bd. of Educ. of Somerset Cty., No. RDB-17-2375, 2017 WL 6313945 (D. Md. Dec. 11, 2017).

[57] As of the date of the final selection, 23 cases were in this open, or pending, category. *E.g.*, Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ., No. 1:15-cv-787, 2018 WL 4539440 (S.D. Ohio Sept. 21, 2018).

[58] *Supra* text accompanying note 47.

[59] For the legal bases in these two respective categories, see *infra* Table 1.

[60] *School Bullying Litigation*, *supra* note 9, at 316–18.

[61] *Supra* text accompanying notes 24–25.

conflating the several reason subcategories into the two over-arching categories of threshold prerequisites and the merits.[62]

The third step was to ascertain the ultimate outcome for each identified case using the four coding categories as follows:

(a) conclusively in favor of defendant – verdict for the defendants or a dismissal of claims with prejudice;

(b) abandonment/ withdrawal – dismissal of claims without prejudice followed by lack of plaintiff actions to further pursue litigation, default judgment order for lack of prosecution of claims, or an order voluntarily withdrawing the claim in the absence of a settlement;

(c) settlement – joint stipulation to dismiss claims based on a settlement or mediation agreement, docket notation of a successful settlement conference, or court-approved minor's compromise;[63] and

(d) conclusively in favor of plaintiff – verdict for the plaintiffs or granting of summary judgment motion for the plaintiffs.

Based on the aforementioned Westlaw, PACER, and state court electronic data sources, we obtained the ultimate outcomes for all but five of the cases that contained inconclusive rulings. For this remaining small segment of cases, we directly contacted the court clerk and the listed party attorneys with a request for the category of the ultimate outcome. This process identified the ultimate outcome for all but one case that was removed from the analysis due to a lack of access to the state trial court documents and a lack of response when contacting the parties' attorneys for clarification, yielding a final sample of 246 cases and 513 claim rulings. Because the corresponding third research question required a comparison between two different units of analysis, namely the claim ruling level for dispositional factors and the case level for ultimate outcomes, we employed the best-for-plaintiff claim ruling conflation process to identify the ultimate outcome and its dispositional factors at the case level.[64]

---

[62] In contrast, we retained the three subcategories of progress (remote, intermediate, and proximate), because their more limited number allowed for sufficient cell size for statistical significance analysis.

[63] If the docket noted a joint stipulation for dismissal of claims without any clarifying notation, we contacted the parties to inquire which ultimate outcome category applied, as per the process described *supra* note 74.

[64] For the occasional case in which the court opinion identified multiple dispositional reason factors for the same best-for-plaintiff inconclusive ruling, we used the reason factor closest to a verdict.

Data Analysis

Finally, via use of a statistical database software program,[65] we obtained results for the research questions. More specifically, for research questions one and two, the results were in the form of frequency distributions. For research question three, we employed a chi-square test for independence, a nonparametric inferential test that determines whether differences in frequency distributions for two or more categorical variables in the sample are significant, and thus generalizable, to the overall population. Using the frequencies of cases entered into a contingency table, this test measures whether the distribution of the data likely represents a significant relationship between the ultimate outcomes and the dispositional factor variables, as opposed to random chance.[66] We considered frequency distribution differences significant at a probability of $p < .05$.[67]

IV. RESULTS

Research Question 1

Table 1 presents the disaggregated frequency distribution of the two dispositional factors—reason category and progress level—for the 513 inconclusive claim rulings within the 246[68] cases reaching an ultimate outcome in the time period 1989–2018. The disaggregation is by the legal basis of the inconclusive claim ruling, listed in descending order of frequency for federal and state claims, respectively.[69]

---

[65] The software used for analysis was the Statistical Program for the Social Sciences (SPSS) Version 25, a robust statistical analysis application.

[66] MEREDITH D. GALL ET AL., EDUCATIONAL RESEARCH: AN INTRODUCTION 325–27 (2007). The data set met the requirement that at least 80% of expected cell counts in the table are a minimum of five. DAN YATES, DAVID S. MOORE & GEORGE MCCABE, THE PRACTICE OF STATISTICS 734 (1999).

[67] A probability (p) calculation less than .05 represents a 95% probability that the distribution of the results were not due to random chance. DAVID C. HOWELL, FUNDAMENTAL STATISTICS FOR THE BEHAVIORAL SCIENCES 357–63 (2004).

[68] Of these 246 cases, 92% arose in federal court and only 8% in state court; however, a few of these cases moved between the two judicial systems based on removal or discretionary ancillary jurisdiction. *E.g.*, Lamberth v. Clark Cty. Sch. Dist., 2015 WL4760696 (D. Nev. Aug. 12, 2015), *aff'd*, 698 Fed. Appx. 387 (9th Cir. 2017), *remanded*, No. A-14-708849-C (Clark Cty. Ct. Feb. 22, 2019) (originally filed in state court, removed to federal court, and ultimately settled after remand back to state court).

[69] The disaggregation omits legal bases with frequencies of less than five. As a result, five miscellaneous federal claim rulings (four based on Fourteenth Amendment procedural due process and one based on sections 1985/1986) and seventeen miscellaneous state claim rulings (ten unspecified beyond generically characterized as state claims, two based on state

Table 1. Disaggregated Distribution of Dispositional Reasons for Inconclusive Claim Rulings

Legal Basis	n	Reason Category		Progress Level		
		Threshold Prerequisites	Merits	Remote	Intermediate	Proximate
Federal Claim Rulings						
Title IX	80	5%	95%	11%	43%	46%
Am. XIV Equal Protection	53	15%	85%	28%	30%	42%
Am. XIV Sub. Due Process	47	11%	89%	30%	30%	40%
Section 504/ADA	45	36%	64%	33%	45%	22%
IDEA	25	80%	20%	56%	32%	12%
Title VI	19	5%	95%	16%	21%	63%
Am. I Free Speech/Retaliation	13	0%	100%	16%	46%	38%
Total Federal[70]	287	19%	81%	26%	36%	38%
State Claim Rulings						
Negligence	110	47%	53%	43%	26%	32%
State Civil Rights Law	32	31%	69%	26%	32%	42%
Intentional Tort	30	60%	40%	63%	23%	13%
Gross Negligence	14	57%	43%	50%	36%	14%
Assault/battery	6	83%	17%	67%	16%	16%
State Constitution	6	80%	20%	60%	0%	40%
State Education Code	6	83%	17%	33%	67%	0%
State Anti-Bullying Statute	5	100%	0%	100%	0%	0%
Total State[71]	226	50%	50%	47%	26%	27%
TOTAL	513	33%	67%	35%	31%	34%

Table 1 provides successive layers of findings. On an overall, or bottom-line, level, the reason category of these 513 inconclusive claim rulings was largely (67%) a matter of the merits, and the progress was rather evenly distributed among the three levels. As for the "n" column, the majority

mental health statutes, two based on child abuse statutes, and one each based on civil hazing, breach of implied contract, and concussion protocol statutes) are not listed, because their dispositional factors percentages would be meaningless.

[70] The percentages for this total include the miscellaneous five rulings.

[71] The percentages for this total include the miscellaneous seventeen rulings.

(247=56%) of the rulings were for federal claims, but the most frequent legal basis was for simple negligence, which accounted for 20% of the total. Next, within the two respective legal basis groups, the gravamen for the vast majority (81%) of federal claims was in the merits category, whereas the state claims were evenly split between the threshold prerequisites and merits categories. As an overlapping matter, the progress toward a verdict was more advanced for the federal than the state claims. For both the reason category and the progress level, the highest frequency of decisions on the merits at a proximate level were Title IX for federal claims and state civil rights acts for state claims. Conversely, legal bases with high frequencies of decisions on technical adjudicative prerequisites at the remote level included IDEA and, to a lesser extent, Section 504/ADA federal claims and all other state claims except negligence.

Research Question 2

Table 2 provides the corresponding distribution of the ultimate outcomes for the 513 inconclusive claim rulings by legal basis. Consistent with the results display for question 1, the table's sequence is descending frequencies for federal and state claims separately, with omission of the miscellaneous claims with n's of less than five.

Table 2. Disaggregated Distribution of Ultimate Outcomes for Inconclusive Claim Rulings

		Ultimate Outcomes			
	n	Conclusively for District	Abandonment/ Withdrawal	Settlement	Conclusively for Plaintiff
Federal Claim Rulings					
Title IX	80	10%	10%	76%	4%
Am. XIV Equal Protection	53	11%	15%	72%	2%
Am. XIV Substantive Due Process	47	6%	11%	81%	2%
Section 504/ADA	45	9%	20%	67%	4%
IDEA	25	16%	28%	52%	4%
Title VI	19	5%	21%	74%	0%
Am. I Free Speech	13	0%	8%	77%	15%
Total Federal[72]	287	9%	15%	73%	4%
State Claim Rulings					
Negligence	110	9%	26%	58%	6%
State Civil Rights Law	32	9%	13%	78%	0%
Intentional Tort	30	10%	37%	53%	0%
Gross Negligence	14	7%	36%	57%	0%
Assault/battery	6	17%	50%	33%	0%
State Constitution	6	0%	0%	100%	0%
State Education Code	6	0%	33%	67%	0%
State Anti-Bullying Statute	5	0%	60%	40%	0%
Total State[73]	226	8%	29%	59%	4%
TOTAL	513	9%	21%	67%	3%

Table 2 shows that the predominant proportion (67%) of inconclusive claims ended in settlement. This trend was moderately more pronounced for the federal claims, with the corresponding reduction being almost entirely in the abandonment/withdrawal category. Among the most frequent legal bases, the proportion of settlements was particularly high for substantive due process and particularly low for IDEA and common law tort claim rulings.

[72] For the omitted, miscellaneous claims in the federal category, see *supra* note 69.

[73] For the omitted, miscellaneous claims in the state category, see *supra* note 71.

Research Question 3

Tables 3 and 4 display the intersection between each of the two factors of the dispositional factors on a best-for-plaintiff basis and the ultimate outcomes of the case. Table 3 provides the frequency distribution and chi-square analysis of ultimate outcomes for the two overall categories of dispositional factors. Within this table, the order of the ultimate outcomes moves from the most district-favorable to the most plaintiff-favorable.[74]

Table 3: Intersection Between the First Dispositional Factor and Ultimate Outcome

Reason Category	n	Ultimate Outcomes				Chi-Square
		Conclusively For District	Abandonment/ Withdrawal	Settlement	Conclusively For Plaintiff	
Threshold Prerequisites	77	7 (9%)	43 (56%)	27 (35%)	0 (0%)	$\chi^2 = 87.747$ $df = 3$ $p < .001$
Merits	169	16 (10%)	8 (5%)	132 (78%)	13 (8%)	
Total	246	23 (9%)	51 (21%)	159 (65%)	13 (5%)	

Table 3 that the ultimate outcomes distribution was significantly different at a very high level of probability ($p < .001$) between the two reason categories. Visual inspection suggests that the tendency for the inconclusive claims based on threshold prerequisites is to end with abandonment/withdrawal, whereas those based on the merits tend to end with settlement.

Table 4 provides the frequency distribution and chi-square analysis of the ultimate outcomes for the three progress levels. As within Table 3, the sequence of the ultimate outcomes is in approximate order of favorability for the parent.

[74] This sequence is only approximate, because (1) abandonment/withdrawal may be regarded as equivalent to a verdict conclusively in favor of the defendant, and (2) the specific terms of the settlement, which are often difficult to ascertain, vary widely from between the two polar positions.

Table 4: Intersection Between the Second Dispositional Factor and Ultimate Outcomes

	n	Ultimate Outcomes				Chi-Square
		Conclusively for District	Abandonment/ Withdrawal	Settlement	Conclusively for Plaintiff	
Remote	71	7 (10%)	43 (61%)	21 (30%)	0 (0%)	$\chi^2 =$ 107.133 $df = 6$ $p < .001$
Intermediate	77	4 (5%)	5 (7%)	66 (65%)	2 (3%)	
Proximate	96	11 (12%)	3 (3%)	71 (74%)	11 (12%)	
Total	246	23 (9%)	51 (21%)	159 (65%)	13 (5%)	

Table 4 reports a significant difference with a similarly high probability for the ultimate outcome distributions among the three successive progress levels. More specifically, inspection of the respective distributions reveals the dispositions resulting in remote progress tended to end with abandonment/ withdrawal, whereas those resulting in intermediate or proximate progress tended to end in settlement.

V. DISCUSSION

Research Question 1

The first question sought the frequency distribution of the two dispositional factors for the inconclusive claim rulings, both overall and by legal basis. The predominant proportion overall (67%) was on the merits, as compared with threshold prerequisites. This result supersedes the earlier finding of an almost even split between the two categories, because the previous analysis was for a smaller subset of bullying cases in terms of both subject matter and time period.[75] The preponderance (56%) of inconclusive rulings with federal legal bases is a disaggregated element not in the previous analyses and is likely attributable to (1) the lack of a private right to sue under state anti-bullying statutes;[76] (2) the difficulties, including

[75] The earlier analysis was limited to bullying cases where the victim was a student with disabilities and for a twenty-year period within the thirty-year period of the present analysis. *Bullying of Students with Disabilities: An Empirical Analysis, supra* note 22 and accompanying text.

[76] *E.g.*, Kueny & Zirkel, *supra* note 6. New Jersey is a limited exception to the extent

sovereign immunity,[77] that impede successful state tort liability claims;[78] and (3) the wider federal availability of civil rights statutes and constitutional provisions that generally provide for attorneys' fees[79] and higher verdicts for prevailing plaintiffs in federal court.[80] Discretionary abstention in federal courts for state claims and the overlapping barriers of governmental and official immunity for common-law tort claims were the likely primary reasons for the predominance of threshold prerequisites for the state claims. Conversely, the more advanced progress levels of the federal claims were likely due to their overlapping high frequency for the merits category.

With respect to specific legal bases, the high frequency of Title IX claims resolved on the merits at an intermediate or proximate progress level may reflect courts' evolving interpretations of whether harassment based on perceived sexual orientation is actionable as gender stereotyping under Title IX.[81] State civil rights law claims displayed, to a lesser extent, a similar pattern, possibly due to the overlap with Title IX in cases in which the

---

that its Law Against Discrimination, which is a generic civil rights, rather than specific anti-bullying law, explicitly provides for victims to file a complaint in Superior Court. N.J. STAT. ANN § 10:5-13 (West 2019). *E.g.*, L.G. *ex rel.* L.W. v. Toms River Reg'l Sch. Bd. of Educ., 915 N.E.2d 535 (N.J. 2007) (affirming modified money damages award for victim of gender-based bullying). In contrast, New Jersey's extensive anti-bullying law, like its counterparts in other states, does not provide a private cause of action. N.J. STAT. ANN. §§ 18A:37-13–18A:37-37 (West 2019). *E.g.*, D.B. *ex rel.* C.B. v. Jersey City Bd. of Educ., 2018 WL 6424126 (N.J. Super. Ct. App. Div. Dec. 7, 2018) (dismissing plaintiff's claim under the state's anti-bullying law based on the comprehensive enforcement jurisdiction of the commissioner of education).

[77] *E.g.*, Peter Maher, Kelly Price, & Perry A. Zirkel, *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?* 19 KANS. J.L. & PUB. POL'Y 234 (2010) (canvassing the considerable cumulative scope of tort immunity for school districts and their employees across the 50 states).

[78] *E.g.*, Daniel B. Weddle, *Bullying in Schools: The Disconnect between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 687–96 (2004) (reviewing requirements to demonstrate foreseeability as barriers to liability findings in bullying-related tort litigation).

[79] *E.g.*, Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980) (reviewing the courts' discretion to award attorney's fees in federal civil litigation).

[80] *E.g.*, Theodore Eisenberg, John Goert, Brian Ostrom, & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 438 (1996) (finding that jury awards in federal court trials greatly exceed those in state court trials).

[81] *See generally* Adele P. Kimmel, *Title IX: An Imperfect But Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006 (2016) (reviewing courts' application of Title IX to gender stereotyping claims on behalf of LGBTQ+ students).

plaintiffs raised claims on both of these legal bases.[82] Conversely, the higher frequency of IDEA and, to a lesser extent, Section 504/ADA claims resolved on threshold prerequisites at a remote level may be attributable to their applicable requirement for exhaustion of administrative remedies prior to adjudication on the merits.

Research Question 2

Question 2 targeted the frequency distribution of the ultimate outcomes for the inconclusive claim rulings, both overall and by legal basis. Overall, the prevalence (67%) of settlements was slightly higher and generally more representative than the corresponding proportion in the previous analysis of a subsample of cases.[83] The similar distribution for the remaining categories, particularly the 21% for abandonment/withdrawal, is striking when compared to the common conception that the parties ultimately settle.[84] The more pronounced proportion of settlement of federal claims and the conversely high rate of abandonment/ withdrawal of state claims may be attributable to differences in the correlative judicial forum. For inconclusive federal claims, the congestion[85] of federal courts and the resulting judicial pressure for party negotiations may explain the higher settlement rate. Conversely, given the high frequency of bullying-related cases filed in federal court,[86] the effect of the federal courts' discretionary

---

[82] In the event of a dispute over an eligible student's educational program, the IDEA requires the exhaustion of administrative remedies, such as mediation or due process, prior to litigation. 20 U.S.C. § 1415(i)(2)(A)(B) (2018). To the extent that a student plaintiff's Section 504/ADA claims overlap with provisions of the IDEA, the requirement to exhaust administrative remedies applies. 20 U.S.C. § 1415(*l*) (2018).

[83] *See supra* note 17 (61% but with 6% in a residual unknown category not counted in the present analysis).

[84] Although stated settlement rates may quote frequencies as high as 95%, empirical evidence of observed settlement rates rarely supports these figures. *E.g.*, Theodore Eisenberg & Charlotte Lanver, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (concluding that empirical evidence rarely supports the common conception of a 95% settlement rate); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STANFORD L. REV. 1339, 1339–40 (1994) (noting that quoted settlement rates of 85%–95% are misleading); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases,* 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004) (citing the conventional wisdom that, if 5% of cases go to trial, the remaining 95% must have settled).

[85] *See generally* Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency,* 55 N.D. LAW. 648 (1980) (discussing Congressional action leading to caseload increases in federal courts).

[86] *Supra* note 72 and accompanying text.

declining of ancillary jurisdiction for state claims may explain the higher rate of abandonment/withdrawal for state law claims. It may be that many plaintiffs in the wake of such dismissals without prejudice opt not to refile them in state court in light of the loss of the more potent federal claims[87] and the increasing transaction costs of continuing the litigation in another forum.

Upon disaggregation by specific legal basis, the higher settlement rate for Fourteenth Amendment substantive due process claims may be attributable to the particularly high "shocks the conscience" standard for surviving pretrial motions.[88] For the relatively few cases that meet this hurdle, the leverage for settlement may be higher due to the requisite flagrancy of the district's actions or inactions. The similar but slightly lower settlement rate for inconclusive Title IX and state civil rights law claim rulings may reflect the leverage arising from plaintiff success in arguing the prima facie elements of a discrimination claim at the pretrial motion stage. Conversely, the relatively low settlement rate for inconclusive IDEA claims may be attributable to the effect of the exhaustion doctrine, which shifts such cases from federal courts to the forum of due process hearings. Although due process hearings may result in settlements, the outcomes of such hearings are not reported in the court record and therefore not reflected among the ultimate outcomes data. Additionally, the low settlement rate for state tort claims may reflect the relatively high frequency of federal courts declining supplemental jurisdiction of state claims. Upon remand to state court, plaintiffs may face immunity defenses that significantly increase the odds of a defendant-favorable ruling.

However, the disaggregation of legal bases for this purpose faces a major limitation. Many of the cases with inconclusive outcomes have more than one claim with such an outcome. In such cases, it is not known which claim was the impetus for the settlement.

Research Question 3

To extend the exploration of potential patterns among inconclusive claim rulings,[89] question 3 analyzed the alignment between each of the

---

[87] The federal claims include the possibility of attorneys' fees, the prospect of generally higher damage awards, and the much lower scope of governmental immunity.

[88] *E.g.*, Bryan v. Clark Cty. Sch. Dist. (CCSD), 2017 WL 3386551, No. 14A700018 (Nev. Dist. Ct. Jun. 27, 2017) (denying summary judgment on substantive due process claims based upon failure to investigate known ongoing physical assaults and homophobic slurs against two students as required by both Title IX and Nevada state law).

[89] The predecessor analysis not only was limited to a smaller sample of disability-based bullying cases but also did not extend to an inferential statistical analysis of the possible

dispositional factors and the ultimate outcomes for the cases. On a best-for-plaintiff approach for conflating claim rulings to cases,[90] the chi-square analysis found a significant difference in ultimate outcomes between the two reason categories and among the three progress levels. Although correlated, these two dispositional factors are not at all the same because (a) each reason category may reach a final, inconclusive ruling at either the dismissal or the more proximate summary judgment stage, and (b) the reason subcategories of inconclusive rulings within both threshold issues (e.g., exhaustion doctrine or ancillary jurisdiction v. statute of limitations) and the merits (e.g., prima facie factors v. defenses) vary in terms of their resulting progress level. Nevertheless, the overall strong and differential probability for inconclusive rulings to end in settlement when they are based on the merits and progress to the intermediate or proximate levels is useful for parties and their attorneys in determining the most cost-effective approach for dispute resolution.

A limitation on the interpretation of this question 3 analysis is the lack of any disaggregation by legal basis. The aforementioned disaggregation for questions 1 and 2 suggests that the alignment between the technical prerequisites reason category, the remote progress level, and an ultimate outcome of abandonment/withdrawal would include a large proportion of cases with a best-for-plaintiff claim based upon the IDEA, negligence, or intentional torts. Conversely, the alignment between the merits reason category, the intermediate and proximate progress levels, and an ultimate outcome of settlement is suggestive of a large proportion of cases with a best-for-plaintiff claim based upon Title IX, Fourteenth Amendment substantive due process, or state civil rights law. However, further research is needed to confirm these possible relationships.

VI. CONCLUSIONS

As previously described, the multiple layers of the litigation iceberg yield ultimate outcomes beyond the polar extremes of conclusive rulings for each party. Expanding upon the original exploratory study,[91] the factors of this refined dispositional taxonomy are a meaningful mechanism for disaggregating inconclusive claim rulings. The nuances of the dispositional factors for inconclusive claims—reason category and progress level—are useful in forecasting ultimate outcomes.

---

relationship between the two dispositional factors. *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22, at 204–09.

[90] *Supra* note 14.

[91] *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22.

The variations in findings among specific legal bases warrant additional research to further explore the alignment between the dispositional factors and the ultimate outcomes. For example, using a larger sample of cases would facilitate conducting the chi-square analysis for disaggregated variables such as the legal basis. Further exploration of this dispositional taxonomy also should replicate and refine the methodology and terminology[92] with case samples representing other types of education litigation, such as special education or sexual harassment cases. Continued empirical exploration of the subsurface strata of the glacial mass of litigation will assist both student plaintiffs and district defendants in their planning of litigation strategies to maximize outcomes while minimizing cost.

[92] Illustrating this movement, we have refined the wording of the dispositional factors from the predecessor article. *Id.* at 501 (replacing the previous descriptor of "nature" with the term "reason" and the previous descriptor of "effect" with the term "progress level" to more accurately describe each factor).

The Law of First Contact: Did Captain Cook Commit Crimes in Hawai'i?

Noah Kupferberg*

In our highly interconnected world, in a time of international tension, it is helpful to consider how we got here. What happened during our first contacts with one another over the past 500 years, and what do these incidents teach us about our present and possible future relationships? This article considers perhaps the most famous of first contacts, the unforeseen arrival of Captain Cook and his two British ships in the Hawaiian Islands in 1778-79. This paper asks whether Cook committed crimes under the European international law of his day when he: (1) sailed to Hawai'i, came ashore, and traded with the native Hawaiians; (2) made any claims to Hawaiian territory in the name of England; and (3) attempted to take King Kalani'ōpu'u hostage in order to secure the return of a stolen longboat. This article concludes that, under European international law of the time: (1) Cook had the right to sail to Hawai'i, and broke no law when he came ashore and traded with the Hawaiians because he was enthusiastically invited to do so; and (2) Cook made no claims to Hawaiian territory. However, (3) Cook clearly broke international law as it stood in 1779 when he attempted to take the King hostage—a crime he paid for with his life. By recognizing and acknowledging the crimes associated with first contact—and later colonization—it is hoped that we may accept the past and move forward with justice in our new, highly interconnected world of contrasting cultures and societies.

INTRODUCTION

Hundreds of books and countless articles have been written about the events surrounding the unanticipated arrival of Captain James Cook and his two ships in the Hawaiian Islands in 1778. But to my knowledge, no author

* A.B. Harvard University, 1993; J.D. Columbia Law School, 2009.

has yet considered the legal implications of these dramatic events—or indeed of first contact in general. That is the aim of this paper.

As in all criminal matters, the first question that arises is under which law we ought to judge the accused. In the exceptional situation of trying a man 240 years dead, this question extends into matters of era. It would seem both less informative and arguably less appropriate to judge Captain Cook by the laws of the present. In examining territorial titles, international law has—for better or worse—come to the same conclusion. The so-called "intertemporal rule" judges such titles "from the perspective of the international law 'in force at the time the title[s were first] asserted and not by the law of today.'"[1] To put it another way, under the intertemporal rule, one judges the legal significance of an action "according to the law that prevailed at the time of the act."[2] Although such an approach is not without legitimate controversy,[3] it is appropriate for the purposes of the present study, the goal of which is to determine whether Captain Cook committed crimes even his contemporaries would have recognized during first contact in Hawai'i.

The next issue is jurisdictional. If we agree that we should examine Cook's actions under the laws of 1778, the question remains: whose laws of 1778? It would no doubt be provocative and more than a little edifying to consider how the Hawaiians might have interpreted Cook's acts under their own law.[4]

---

[1] Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. 1, 2 n.3 (2011) (quoting JOHN DUGARD, INTERNATIONAL LAW—A SOUTH AFRICAN PERSPECTIVE 128 (3d ed. 2005)).

[2] Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 644 (2016). The "intertemporal rule" is thus structured in contrast to principles such as "dynamic interpretation," *see, e.g.*, Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 688 (1998), or the "evolutionary principle" as examined in, *e.g.*, James M. Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of A Shifting Supreme Court Majority?*, 36 CUMB. L. REV. 245, 271 (2006).

[3] *See, e.g.*, Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT'L L. 503, 511 (2008) ("To validate and legitimize an acquisition, international law brings into play the intertemporal rule, which buffers actions committed in previous eras from the scrutiny of more modern norms and principles. In this way, international law is precluded from raising legal questions and seeking self-correction with regard to the well-documented woes of colonialism.").

[4] Indeed, as one scholar notes in a different context, the legal stories of the dominant culture may in and of themselves reinforce that domination:

> By incorporating stories that justified subjugation, judicial opinions such as those in *Dred Scott* and *Plessy v. Ferguson* institutionalized the racism of the day. But it is equally important to recognize how the legal stories that are *not* told serve—by their very absence from the record—to perpetuate structures of racial or economic domination.

This is especially true considering that, according to one of the leading modern international law scholars, "a national of one state who comes within the territorial jurisdiction of another, whether as a transient or as a permanent resident, becomes thereby subject generally to the legal regime applicable to nationals of that state," meaning that the alien "does not carry with him the rights and protections he may enjoy under the law of the state of his nationality."[5] However, the examination and application of Hawaiian law is outside the scope of the present study. It would be striking indeed to apply the pioneering work on Hawaiian law of Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat,[6] Sally Engle Merry,[7] Maivan Clech Lam,[8] and others to the events surrounding Cook's arrival in Hawai'i and to first contact generally, and I strongly encourage others to take up this theme. For now, we will examine Cook's actions under international law as it was understood in Europe circa 1778.[9]

The final question is which acts exactly we ought to examine? Many of Captain Cook's decisions and actions over the course of his three monumental voyages remain at the very least problematical from a criminal

---

David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & C.R. L. REV. 1, 22 (2006) (emphasis added).

[5] LOUIS HENKIN ET AL., INTERNATIONAL LAW 1040 (2d ed. 1987).

[6] *See, e.g.*, Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 522–27 (2017) (challenging Western justifications for the American overthrow of Hawai'i's last queen).

[7] *See, e.g.*, Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 589–91 (1998) (describing Hawaiian law and its relation to religious and political authority in the years immediately following discovery and initial white settlement).

[8] *See, e.g.*, Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 237–52 (1989) (describing the cultural, ideological, physical, agricultural, economic, political, and legal shocks associated with the arrival of whites in Hawai'i and the resulting ambivalence and contradictions in the origins and development of early modern Hawaiian law).

[9] One of the leading scholars of Hawaiian political history herself supports an international focus on such questions:

> Civil rights must be subsumed under human rights; land claims, language transmission, and monetary compensation must be understood and argued in terms of our human rights as indigenous people rather than merely as citizens of the United States or the state of Hawai'i. Given that Hawaiians were once self-governing under the Kingdom of Hawai'i and given that the United States, through its diplomatic and military offices, played a central role in the overthrow of that Kingdom, our historical injury involves violations of international law. Thus the context of the U.S. constitution is too small a framework . . . . An international frame of reference, one that involves universal human rights, must be the context for discussion.

HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 38–39 (1999).

perspective; for example: his savage punishment of Tongan natives for theft,[10] his punitive march through Mo'orea, burning homes and canoes in an effort to retrieve a stolen goat,[11] and his taking formal possession unilaterally of Queen Charlotte Sound in the name of George III.[12] However, Hawai'i is the focus of this study, and the acts which will be examined here are the three major acts of that encounter, namely: (1) Cook's initial travel to and landing in Hawai'i and his trade with the native Hawaiians; (2) Cook's claims with respect to future English rights and authority in Hawai'i; and (3) Cook's attempted kidnapping of Kalani'ōpu'u, the King of the Island of Hawai'i, as a means of ensuring the return of a stolen longboat. From a bird's-eye perspective, the first may be deemed an examination of Exploration, the second of Discovery, and the third of Sovereignty.

I. EXPLORATION

In 1775, after Cook's return to England from his second voyage to the Pacific, and throughout the early part of 1776, the British Admiralty began to plan a third voyage, this one with the primary goal of discovering a Northwest passage from the Pacific Coast of North America to the Atlantic Ocean.[13] Cook was to advise the Admiralty in their preparations, and was supposed by all to be retired at 47 after spending six of the past seven years in strenuous adventures at sea, until he stood up at the end of a strategy dinner at the Admiralty and announced, "I will myself undertake the direction of this enterprise if I am so commanded."[14] There was no better man. And so Cook would lead a third voyage to the Pacific, one that would lead him inexorably to Hawai'i. Were these voyages legal?

It has long been established that all nations have the right to sail the seas, and such was certainly the rule in Cook's time.[15] As the Swiss jurist and

---

[10] George Gilbert, an 18-year-old midshipman on the *Resolution*, described one such incident in some detail:

> This [thieving], which is very prevalent here, Captain Cook punished in a manner rather unbecoming of a European, viz by cutting off their ears, firing at them with small shot, or ball, as they were swimming or paddling to the shore; and suffering the people as he rowed after them to beat them with the oars, and stick the boat hook into them . . . .

GEORGE GILBERT, CAPTAIN COOK'S FINAL VOYAGE: THE JOURNAL OF MIDSHIPMAN GEORGE GILBERT 33 (Christine Holmes ed., 1982); RICHARD HOUGH, CAPTAIN JAMES COOK 299 (1997).

[11] HOUGH, *supra* note 10, at 304–05.

[12] *Id.* at 130.

[13] *Id.* at 269–71.

[14] *See id.* at 270–71.

[15] *See, e.g.*, EMER DE VATTEL, THE LAW OF NATIONS, 125 (Joseph Chitty ed., Cambridge Univ. Press 2011) (1758).

international law scholar Emer de Vattel (1714-1767) put it in his 1758 work *The Law of Nations*:

> The open sea is in its own nature not to be possessed, nobody being able to settle there so as to hinder others from passing . . . . It is manifest that the use of the open sea . . . is innocent and inexhaustible; that is, that he who navigates, or fishes in it, does no injury to any one, and that the sea, in these two respects, is sufficient for all mankind . . . . No nation has then a right to lay claim to the open sea, or to attribute the use of it to itself to the exclusion of others.[16]

Thus, in Cook's time all nations had the right to sail the open seas, and that of course included England. Cook therefore broke no international laws when he sailed south from Plymouth for the third time on July 12, 1776.[17]

With respect to coming ashore, from as far back as Francisco de Vitoria (1483-1546), the Spanish theologian and jurist, scholars of international law have held that travellers "have the right to travel and dwell in [foreign] countries, so long as they do no harm to the [native population], and cannot be prevented by them from doing so."[18] Whether such a right to travel includes the right to dock in a foreign harbor is less clear. Vitoria, writing in the 16th Century, tells us that such landings are the right of any seafaring nation, in that "by natural law . . . ports are the common property of all, and by the law of nations ships from any country may lawfully put in anywhere; by this token these things are clearly public property from which no one may lawfully be barred . . . ."[19] However, there are indications that this understanding may have changed by Cook's time, judging by Vattel's analysis of the matter, some 220 years later:

> The banks of the sea belong incontestably to the nation that possesses the country of which it is a part . . . . The ports and harbours are manifestly a

---

[16] *Id.*

[17] *See* J.C. BEAGLEHOLE, THE LIFE OF CAPTAIN JAMES COOK 507–08 (1974).

[18] Francisco de Vitoria, *On the American Indians*, *in* VITORIA: POLITICAL WRITINGS 231, 278 (Anthony Pagden & Jeremy Lawrance eds., 1991) (1539). To be sure, many of Vitoria's proofs would not be accepted in a modern courtroom; not only does he cite the New Testament (as might be expected of a Catholic philosopher given to praising Torquemada) but also St. Augustine, Virgil, and supposed cultural customs in the time of Noah. *Id.* It should also be noted that Vitoria's own student Melchor Cano questioned this line of analysis, asking with some reason, "who would have described Alexander as a 'traveller'?" *Id.* Modern international law too recognizes each nation's right to control what is essentially the immigration of foreign nationals. *See, e.g.*, HENKIN ET AL., *supra* note 5, at 1040 ("Under ordinary circumstances and in the absence of an international agreement to the contrary, a state is under no duty to admit nationals of another state into its territory and incurs no international responsibility if it deports them. If aliens are admitted, they may be subjected to restrictions on the duration of their stay, where they may travel, and the activities they may engage in.").

[19] Vitoria, *supra* note 18, at 278.

> dependance, and even a part of the country, and consequently are the property of the nation . . . . [Further,] [a] bay whose entrance may be defended,[20] may be possessed and rendered subject to the laws of the sovereign, and it is of importance that it should be so, since the country may be much more easily insulted in such a place, than on the coast open to the winds, and the impetuosity of the waves.[21]

Thus, the Hawaiians of 1778-79 arguably had the right to deny the *Resolution* and *Discovery* permission to harbor in Kealakekua Bay, and to refuse the landing of Englishmen on their shores. However, in the actual event, the Hawaiians did no such thing, instead permitting Master William Bligh's initial survey[22] and then explicitly inviting Cook and his officers to shore for an elaborate ceremony.[23] Therefore, since the Hawaiians never blocked or objected to the English presence in any way (until perhaps the final fatal moments of this unhappy tale), Captain Cook cannot be said to have broken international law by harboring in Kealakekua Bay or disembarking on the beaches of Hawai'i.

As for trade, Vitoria is clear that, with respect to the Spanish and the natives of the New World—whose relations formed the basis of his most celebrated lecture, *On the American Indians Lately Discovered*—"the Spaniards may lawfully trade among the barbarians, so long as they do no harm to their homeland . . . and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians."[24] As to enforcement, Vitoria goes so far as to say that "if the barbarians attempt to deny the Spaniards . . . from trading and the rest, the Spaniards ought first to [attempt] reasoning and persuasion . . . . [but] if war is necessary to obtain their rights, they may lawfully go to war."[25] This may be another interpretation of international law that changed over the centuries, since Vattel's analysis diverges considerably:

---

[20] Such as, for example, Kealakekua Bay on the Big Island of Hawai'i, in which all the relevant events recounted in the present analysis took place.

[21] VATTEL, *supra* note 15, at 129.

[22] HOUGH, *supra* note 10, at 333–34.

[23] *Id.* at 335–36.

[24] Vitoria, *supra* note 18, at 279–80 (emphases omitted). Vitoria's proof for this proposition is significantly weaker even than that regarding a nation's right to sail the seas. First, he simply and circularly repeats that "the law of nations is clearly that travellers may carry on trade so long as they do no harm to the citizens." *Id.* Then he claims that, "in the same way it can be proved [though he apparently does not attempt the proof] that this is lawful in divine law." *Id.* He concludes by quoting Ovid and citing the golden rule. *Id.*

[25] *Id.* at 281–83 (citing TERENCE, EUNUCHUS (161 B.C.) and THOMAS AQUINAS, SUMMA THEOLOGICA (1485)).

> We have seen that besides the right, it is a nation's duty to judge whether it be expedient to join in a trade proposed, or not; therefore it may close with, or refuse any commercial overtures from foreigners, without giving them a right to accuse it of injustice, or to demand a reason for such refusal, much less to make use of compulsion. It is free in the administration of its affairs, without being accountable to any other.[26]

We may take Vattel, who published his *Law of Nations* eight years before Cook's first voyage of discovery, to be the better contemporaneous interpreter of international law—although our trade analysis would reach the same conclusion under Vitoria, because the Hawaiians never refused any "commercial overtures" from Cook and his men. In fact, although they may have been under no obligation to trade, the Hawaiians did so with exceptional eagerness, including everyone from Kalani'ōpu'u, the King of Hawai'i, to the humblest Kānaka Maoli.[27]

Therefore, because: (1) all nations have the right to sail the seas; (2) the Hawaiians did not object to the ships' anchoring, and in fact invited the English ashore; and (3) trade between the Hawaiians and the English was consensual and enthusiastic, Captain Cook broke no contemporaneous international law with respect to Exploration.

II. DISCOVERY

English claims to the sovereign territory of other nations, including the wholesale annexation of North America and Australia,[28] have been the cause of countless tragic events over the centuries, and remain deeply divisive. Were any such claims by Cook with respect to the Hawaiian Islands legal under the international law of that time?

The Doctrine of Discovery is a tenet of international law that grew out of the canon law of the Catholic Church[29] and was further developed by

---

[26] VATTEL, *supra* note 15, at 144.

[27] *See* BEAGLEHOLE, *supra* note 17, at 639–40 ("Nails, bits of iron, even iron tools, the only things that could be used for trade, were exchanged . . . for roots and small pigs.").

[28] Cook himself claimed Australia for England in August 1770. *See* HOUGH, *supra* note 10, at 157–58. Cook writes:

> I now once more hoisted English colours and in the name of His Majesty King George the Third took possession of the whole eastern coast . . . by the name of New South Wales, together with all the bays, harbours, rivers and islands situated upon the said coast. After this we fired three volleys of small arms, which were answered by the like number from the ship, followed by three cheers.

Id. (citation omitted).

[29] *See* Miller & D'Angelis, *supra* note 1, at 9–11 ("Commentators have traced . . . the Doctrine, to early medieval times and, in particular, to the Crusades to the Holy Lands in 1096-1271. . . . In 1240, the canon lawyer Pope Innocent IV wrote a legal commentary on the rights

Portugal[30] and Spain[31] in the years immediately preceding and following the discovery of the New World.[32] The Doctrine held that Europeans who arrived first in non-European countries "automatically acquired specific property rights in the lands of Indigenous peoples, and various sovereign, political, and commercial powers over them without their knowledge or consent."[33] In the words of one scholar, the Doctrine "had its genesis in medieval, feudal, ethnocentric, religious, and even racial theories,"[34] and was developed "to

---

of non-Christians [in which he] asked whether it is 'licit to invade a land that infidels possess or which belongs to them?' He answered yes because the Crusades were 'just wars' fought for the 'defense' of Christianity . . . . In justifying invasions of non-Christian countries to 'defend' Christianity, Innocent borrowed from the writings on holy war by St. Augustine. . . . [Augustine himself] claimed the right of Christians to wage war on nations that practiced cannibalism, sodomy, idolatry, and human sacrifice, for example, as also being a defense of Christianity, to 'acquire peace' and a 'work of justice.'").

[30] With respect to Portugal:

> In 1436, Eugenius IV issued the papal bull *Romanus Pontifex* and authorized Portugal to convert the Canary Islanders and to control the islands on behalf of the papacy. . . . In addition, in 1455, Pope Nicholas V granted Portugal title to lands in Africa that Portugal had "already acquired . . . and those which shall . . . be acquired in the future . . . ," and authorized Portugal "to invade, search out, capture, vanquish, and subdue all Saracens and pagans," and place them into perpetual slavery and to seize all their property. These bulls demonstrated the definition of Discovery at that time because they recognized the papacy's "paternal interest" to bring all humans "into the one fold of the Lord," and authorized Portugal's conversion work [as well as granting] Portugal title and sovereignty . . . .

Id. at 14.

[31] In the case of Spain:

> After Columbus' successful voyage to the New World, Isabella and Ferdinand sought papal ratification of their discoveries. In May 1493, Pope Alexander VI issued the bull *Inter caetera* ordering that the lands, which were "not hitherto discovered by others," and were found by Columbus, now belonged to Ferdinand and Isabella, along with "free power, authority and jurisdiction of every kind."

Id. at 15.

[32] Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 2 (2005).

[33] Miller & D'Angelis, *supra* note 1, at 4–5 (citing Johnson v. M'Intosh, 21 U.S. 543, 588–97 (1823)). Further, as these authors note:

> Discovery is part of international law today and is still being used in [Brazil,] Australia, Canada, Chile, New Zealand, and the United States, as well as in other settler/colonial societies. Very recently, China and Russia evoked the Doctrine when they planted flags on the floors of the South China Sea and the Arctic Ocean to claim sovereign rights and economic assets. Canada and Denmark have also contested claims to an island off Greenland by planting flags and using other Discovery rituals.

Id. at 2–3.

[34] Miller, *supra* note 32, at 2 (citing ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–28 (1990); ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE

control and maximize European exploration and colonization in the New World and in other lands of non-European, non-Christian people."[35]

To the Doctrine as established by Portugal and Spain, with the blessing of the Catholic Church, were added new notions introduced by rising European colonial players, including France and the Protestant nations of England and the Netherlands—who naturally had no reason to blindly follow Roman Catholic canon law of centuries past. Queen Elizabeth I and her court, for example, argued that a European nation could only claim a non-Christian land that they actually occupied or possessed.[36] The Dutch, whose burgeoning colonial empire stretched from the New World to Southeast Asia, adopted the same notion, and even used England's own theory against them to justify Holland's extensive North American claims—stretching at one time from the Chesapeake to Narragansett Bay—based on the fact that England did not actually occupy that territory.[37] The French and English later developed a new theory known as *terra nullius*, which held that unoccupied lands or, more significantly, lands occupied by non-Europeans but used in a non-European way, such as for hunting grounds or for seasonal nomadic occupation, were waste or vacant land, available in full to the first-arriving European nation.[38]

Thus, numerous theories were posited, adopted, abandoned, and exchanged over the centuries to justify European possession of non-European lands.[39] And although the various colonial powers certainly had

---

c.1500–c.1800 8 (1995); *M'Intosh*, 21 U.S. at 588–97).

[35] Miller, *supra* note 32, at 2.

[36] Miller & D'Angelis, *supra* note 1, at 22–23 (citing Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 450–54 (1935)).

[37] *Id.* at 23–24 (citing VII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 30–31 (Alden T. Vaughan & Barbara Graymont eds., 1998); FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST 132 (1975)).

[38] Miller, *supra* note 32, at 18–19 (noting that "France and England, and later the American colonies and the United States, often used this argument against American Indians when they claimed Indians were using land only as hunting grounds and leaving it as wilderness."). The doctrine of *terra nullius* was utilized to cruelest effect in New South Wales, discovered by Cook in 1770 and settled by the British starting in 1788; the doctrine would not be renounced in Australia until more than two centuries later, in 1992. Nisha Bhakta, *A Clash Between Culture and Law: A Comparative Look at the Conflict Between Quiet Title Actions in Hawaii, the Kuleana Act of 1850, and the Displacement of Indigenous People*, 49 CAL. W. INT'L L.J. 137, 147–48 (2018) (citing Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95, 95 (2005)).

[39] As a leading scholar of the Doctrine of Discovery bluntly puts it, "[t]he Doctrine was motivated by greed and by the economic and political interests of European countries to share to some extent the lands and spoils to be gained in the New World, instead of engaging in expensive wars." Miller, *supra* note 32, at 7.

disputes with one another in the course of their empire-building, "one principle they never disagreed about was that the indigenous people and nations lost sovereign and real property rights immediately upon their 'discovery' by Europeans."[40]

By Cook's time, the Doctrine of Discovery was well established and, in general outlines, accepted by every European nation.[41] The most expansive and cogent contemporaneous statement of the Doctrine was laid out in one of the key opinions of the early United States Supreme Court, *Johnson v. M'Intosh*.[42] This case nominally addressed the disputed title to a piece of land in the new state of Illinois.[43] The plaintiffs were the successors in interest to a 1775 private purchase directly from the Piankeshaw Indians,[44] while the defendant, M'Intosh, held a federal land patent, which he had purchased directly from the federal government in 1818.[45] The Court held that "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States"[46] because the exclusive power to grant lands lay in the crown and its successor, the United States government, and "[t]he validity of the titles given by either has never been questioned in our Courts."[47]

But what of the European right to settle in America in the first place?[48] Chief Justice John Marshall evaded that question with great shrewdness and

---

[40] *Id.* at 21.

[41] This is not to say that they agreed on all of its mechanisms or implications. Further, it must never be forgotten that "[t]his transfer of political, commercial, and property rights was accomplished without the knowledge nor the consent of the [native] people." *Id.* at 5.

[42] Johnson v. M'Intosh, 21 U.S. 543, 543 (1823).

[43] *Id.*

[44] *Id.* at 555–58.

[45] *Id.* at 558–60.

[46] *Id.* at 604–05.

[47] *Id.* at 587–88.

[48] With respect to this question, the founding fathers apparently harbored no doubts whatsoever. For example,

> the advice Gen. George Washington gave Congress in 1783 about the Indian nations accurately reflected Discovery doctrine principles . . . . Washington advised Congress that the United States did not have to raise taxes and armies to fight tribes to ultimately acquire their lands and assets. Instead, he foresaw that "the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire" and that Indian lands would pass naturally to the United States, and far more cheaply by purchase than by warfare. Furthermore, in 1803, President Thomas Jefferson wrote three private letters and expressed his intention to remove all tribes to the west, and later he even wrote that the United States would have to drive Indians "into the Stony [Rocky] mountains" and to extinction.

Robert J. Miller, *American Indian Nations and the International Law of Colonialism*, 63-FEB FED. LAW. 8, 9 (2016) (citing GEORGE WASHINGTON WRITINGS 536–41 (John Rhodehamel ed., 1997)) [hereinafter Miller, *American Indian Nations*]; ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND

some reason, concluding in a famous passage that his court simply could not question the rights of the conqueror:

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.[49] Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted . . . . The title to a vast portion of the lands we now hold, originates in [the British assertion of sovereignty]. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.[50]

This explanation of course is more than a little convenient for the Chief Justice, who with this simple paragraph washes his hands of any obligation to consider the justice of the original act.[51] But he does not stop there, instead taking a moment or two to malign the native inhabitants: "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."[52]

MANIFEST DESTINY 78, 86–94 (2006).

[49] Here Justice Marshall refers obliquely to the ancient, prejudicial, and scientifically debunked notion of a hierarchy of civilizations, with those at the bottom lacking the right to the same laws and protections. As one scholar describes:

> The subordination of Indigenous peoples on the basis of fictionalised constructions of their lower place on the so-called scale of civilisation is not a very constructive idea on which to build countries. It does not foster morally or politically healthy relationships, and thus is greatly inferior to treaty expressions that aspire to create peace, friendship and respect.

John Borrows, *Ground-Rules: Indigenous Treaties in Canada and New Zealand*, 22 N.Z. U. L. REV. 188, 208 (2006).

[50] *M'Intosh*, 21 U.S. at 588–89.

[51] As Professor Robert J. Miller notes:

> A close look at the origins and development of this "legal" doctrine does leave one thinking more of the adage "might makes right" than of the principled development of law . . . . In fact, a "cynic" might conclude that the legalistic, international law Doctrine of Discovery was nothing more than an attempt to put a patina of legality on the outright confiscation of almost all the assets of the people of the New World.

Miller, *supra* note 32, at 7–8.

[52] *M'Intosh*, 21 U.S. at 589.

Marshall makes it clear that religion[53] and civilization too played a role in the underlying "legitimacy" with which the conqueror staked his claim:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.[54]

Putting aside for the moment these gratuitous and unfortunately typical slanders,[55] the true significance of the case—especially for our purposes—

---

[53] As noted above, Christianity played an enormous role in Spanish and Portuguese imperial adventures, but even English colonial enterprises were steeped in religious aims and rhetoric. For example,

> James I alleged in the charter for the Virginia colony in 1606 that he had established the colony for "propagating of *Christian* Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages . . . to human Civility." He also granted the 1620 charter for the colony of New England "to advance the in Largement [sic] of Christian Religion, to the Glory of God Almighty . . . [and for] the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion."

Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 906–07 (2011) (quoting the First Charter of Virginia (Apr. 10, 1606), *in* 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1698 (W. Keith Kavenagh ed., 1973) [hereinafter Miller, *International Law of Colonialism*]; Patent of New England Granted by James I (Nov. 3, 1620), *in* 1 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 22, 34 (W. Keith Kavenagh ed., 1973)).

[54] *M'Intosh*, 21 U.S. at 572–73. As a group of contemporary scholars puts it, the Doctrine of Discovery

> came to be understood as a means by which to contrast and compare Indigenous and non-Indigenous humanity in order to arrive at a privileging approach to rights determination. Settler rights and settler governments, in order to rationalize the unjust 'taking' of Indigenous lands . . . had to legitimize settler authority by ostensibly delegitimizing Indigenous authority.

ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 100 (2010).

[55] There are others as well. The Chief Justice tells us, in a twisted compliment, that:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

M'Intosh, 21 U.S. at 590). He then throws up his hands, asking what else the Europeans could

lies in its clear-as-day pronouncement of the contemporary state of the Doctrine: "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments . . . [while those] relations which were to exist between the discoverer and the natives, were to be regulated by themselves."[56]

How did the Doctrine of Discovery play out in Hawai'i? To start with, King George III instructed Captain Cook directly, before his second voyage to the Pacific, to find uninhabited land and "take possession of it for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors."[57] Further, prior to his first voyage in 1768, and again in 1776, before his third voyage,[58] the Admiralty ordered Cook "with the consent of

---

possibly have done:

> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Id. Naturally, they chose the sword.

[56] *Id.* at 573. Today, the Doctrine is far from dead. In fact,

> the doctrine has had a significant impact on the rights and powers of American Indian nations and indigenous peoples around the world. The impact continues today, because the doctrine plays a significant role in American Indian law and policies and still restricts American Indians and their governments in the exercise of property, governmental, and self-determination rights. The cultural, racial, and religious justifications that created the doctrine raise serious doubts about the validity of continuing to apply the doctrine and *Johnson v. M'Intosh* in the modern day.

Miller, *American Indian Nations*, *supra* note 48, at 9. However, some colonial nations do appear to be reconsidering, if cautiously, their past positions. For example, Canada's Royal Commission on Aboriginal Peoples as far back as 1996 recommended governmental recognition that the doctrine of discovery and concepts such as *terra nullius* were "factually, legally and morally wrong." Borrows, *supra* note 48, at 206–07 n.125 (citing REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES: LOOKING FORWARD AND LOOKING BACK, vol. 1, 696, recommendation 1.16.2 (1996)). Finally, none of the foregoing is meant to imply that any legal theory alone led to the domination by Europe of aboriginal peoples the world over. In point of fact, as Robert Williams, Jr., notes:

> Power, in its most brutal mass-mobilized form as will to empire, was of course far more determinate in the establishment of Western hegemony in the New World than were any laws or theoretical formulations on the legal rights and status of American Indians. But the exercise of power as efficient colonizing force requires effective tools and instruments . . . [and] law and legal discourse were the perfect instruments of empire for Spain, England, and the United States in their colonizing histories, performing legitimating, energizing, and constraining roles in the West's assumption of power . . . .

Barnard, *supra* note 4, at 20 (quoting WILLIAMS, JR., *supra* note 34, at 7–8).

[57] Miller, *supra* note 32, at 122 n.65 (citing Heydte, *supra* note 36, at 460–61).

[58] Miller, *International Law of Colonialism*, *supra* note 53, at 886.

the Natives to take possession, in the Name of the King of Great Britain, of convenient Situations in such Countries as you may discover, that have not already been discovered or visited by any other European Power . . . ."[59]

Cook was, therefore, explicitly commanded to take possession of new lands he might discover. However, for whatever reason, Cook never claimed any part of the Hawaiian Islands for England.[60] Perhaps it was because they were clearly not "uninhabited," as the King's instructions dictated, or perhaps the "consent of the Natives," in the Admiralty's words, was clearly absent from any such scheme. Perhaps Cook to a certain extent respected Hawaiian sovereign rights because Hawai'i, unlike many other non-European nations of the time, possessed large-scale organized government and highly developed agriculture.[61] Or maybe he saw the islands as simply a way station and supply depot for his dangerous journeys over enormous expanses of open sea. Or perhaps he simply had no opportunity to make such a claim. But whatever the reason, Captain Cook never asserted any right to Hawaiian territory or title, and therefore certainly did not break with any of the prevailing principles of the Doctrine of Discovery during his time in Hawai'i.

III. SOVEREIGNTY

Captain Cook and his men first sighted the Hawaiian Islands on January 18, 1778.[62] They landed at Waimea on Kaua'i two days later, and after two weeks of shifting anchorages and extensive trade—thereby renewing their supplies of food and water—the ships sailed north on February 2, towards Alaska.[63] They returned to the Islands in November, intending to winter there

---

[59] *Id.* at 867 (quoting THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY: THE VOYAGE OF THE RESOLUTION AND DISCOVERY 1776–1780 ccxxiii (J. C. Beaglehole ed., 1967)).

[60] The one arguable exception was the wooden grave marker erected on Hawaiian soil by Cook and his men after the burial of old William Watman, a veteran crewman who died of a brain hemorrhage at the end of January 1779. The Hawaiian priest Koa invited Cook to bury Watman at the *morai*, or native temple, above Kealakekua Bay. The English marker read: "Georgius tertius Rex 1779; Hic jacet Gulielmus Watman." HOUGH, *supra* note 10, at 338–39. However, there is no evidence that this mention of King George III was intended for any other purpose than to identify Watman's nationality, and neither Cook nor any other British authority appears to have made a claim to any part of Hawai'i on this basis.

[61] *See, e.g.*, Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC'Y REV. 273, 280–84 (2005) (describing Hawaiian land use and arguing that the incontrovertible fact of native Hawaiian farming handicapped typical European arguments that a pre-agricultural society has no enforceable claim to the land it occupies).

[62] BEAGLEHOLE, *supra* note 17, at 574.

[63] *Id.* at 574–77.

before heading north to search once more for the fabled and, as it turned out, non-existent Northwest passage.[64] After a strenuous and trying six-week route clockwise from the northeast to the southwest of the Island of Hawai'i, the ships finally made anchor in Kealakekua Bay on January 17, 1779.[65] As elsewhere on Cook's travels, one of the Captain's main concerns when coming into contact with the native population was theft—understandable to a group of soldiers and sailors 13,000 nautical miles from home, although the punishments Cook meted out were extremely and unnecessarily harsh.[66] After weeks of generally good relations, simmering grievances on the part of certain ill-treated Hawaiian chiefs led to the daring theft of the *Discovery*'s large cutter on the night of February 13.[67] Furious, and recognizing the magnitude of the loss,[68] Cook determined not only to blockade Kealakekua Bay but, as he told his first lieutenant John Gore, "I shall bring back with me the King [Kalani'ōpu'u, King of the Island of Hawai'i] to detain him on board . . . . I believe it necessary to act swiftly . . . . Fetch my double gun, and look sharp."[69] Within two hours, Cook and his crew would attempt the abduction of this royal hostage.[70]

There is no dispute that the *Discovery*'s cutter was stolen on the night of February 13, 1779, by native Hawaiians of unknown identity. But what is the remedy under international law for a crime against a visitor in a foreign nation? May that visitor hold the leader of the nation[71] responsible for the crime, as Cook intended to do? Vattel plainly says no, writing:

> as it is impossible . . . for [even] the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects . . . it would be unjust to impute . . . to the sovereign all the faults of the citizens. We ought not then to

---

[64] HOUGH, *supra* note 10, at 329–30.

[65] BEAGLEHOLE, *supra* note 17, at 638–47.

[66] For example, Cook punished one alleged thief in Tonga "by ordering one of our people to make two cuts upon his arm to the bone one accross [sic] the other close below his shoulder"—a grievous and likely permanent maiming. GILBERT, *supra* note 10, at 33.

[67] *See* HOUGH, *supra* note 10, at 347.

[68] *See* GAVIN KENNEDY, THE DEATH OF CAPTAIN COOK 38 (1978) ("The *Discovery*'s large cutter was the biggest boat it had and extremely valuable . . . . This was by far the most serious theft on the Third Voyage so far, and meant inestimable damage to the expedition, because of the heavy reliance placed on the ships' boats in near-shore work, and in manoeuvring among ice-packs in northern waters. Loss of a boat could seriously hamper the effectiveness of the expedition when they returned for another look for a northern passage above the Bering Straits.").

[69] HOUGH, *supra* note 10, at 347–49.

[70] KENNEDY, *supra* note 68, at 56.

[71] I refer here to Kalani'ōpu'u, who was at this time ali'i nui, or high chief, of the island of Hawai'i. Other high chiefs controlled the other islands of the archipelago until Kamehameha I united the Hawaiian islands under his rule some years later.

> say in general, that we have received an injury from a nation, because we have received it from one of its members.[72]

Further, the sovereign is the seat of order in every country, and the dignity of the nation requires that s/he be treated with ultimate respect, especially within the kingdom:

> The sovereign is the soul of the society; if he be not held in veneration . . . and in perfect security, the public peace, and the happiness and safety of the state are in continual danger. The safety of the nation then necessarily requires, that the person of the prince ought to be sacred and inviolable . . . . Whatever a prince may be, it is an enormous crime against a nation to deprive the people of a sovereign, whom they think proper to obey.[73]

Any breach of these principles would be legitimate cause for a vigorous and lawful response, since "the right of a just defence . . . belongs to every nation; or the right of making use of force against whoever attacks it, and its privileges."[74]

In the actual event, recognizing stern Hawaiian resistance, Cook abandoned the attempt to bring Kalani'ōpu'u back to the *Discovery* as a hostage, but by the time he made that decision, the die was cast. As later described by David Samwell, Assistant Surgeon on the *Resolution*:

> Captain Cook . . . was observed making for the pinnace, holding his left hand against the back of his head, to guard it from the stones, and carrying his musket under the other arm. [A Hawaiian] was seen following him, but with caution and timidity; for he stopped once or twice, as if undetermined to proceed. At last he advanced upon him unawares, and with a large club, or common stake, gave him a blow on the back of the head, and then precipitately retreated. The stroke seemed to have stunned Captain Cook: he staggered a few paces then fell on his hand and one knee, and dropped his musket. As he was rising, and before he could recover his feet, another [Hawaiian] stabbed him in the back of the neck with an iron dagger. He then fell into a bit of water about knee deep, where others crowded upon him, and endeavored to keep him under: but struggling very strongly with them, he got his head up, and casting his look towards the pinnace, seemed to solicit assistance. Though the boat was not above five or six yards distant from him, yet from the crowded and confused state of the crew, it seems, it was not in their power to save him. The [Hawaiians] got him under again, but in deeper water; he was, however, able to get his head up once more, and being almost spent in the struggle, he naturally turned to the rock, and was endeavouring to support himself by it,

---

[72] VATTEL, *supra* note 15, at 144.

[73] *Id.* at 23. This section primarily considers the assassination of a prince by internal forces, but it demonstrates the enormous importance of the person of the sovereign in Vattel's international law structure.

[74] *Id.* at 143.

> when a savage gave him a blow with a club and he was seen alive no more. They hauled him lifeless on the rocks, where they seemed to take a savage pleasure in using every barbarity to his dead body, snatching daggers out of each others hand, to have the horrid satisfaction of piercing the fallen victim of their barbarous rage.[75]

Considering the sanctity of a nation's sovereign as outlined by Emer de Vattel, author of *The Law of Nations*, it seems clear that in attempting to kidnap Kalani'ōpu'u, the King of the Island of Hawai'i, Captain Cook did indeed commit a serious crime under the accepted international law of the time—a crime he promptly paid for with his life.

CONCLUSION

Despite the great promise of justice under the law, it is no exaggeration to say that law has also been used, and continues to be used, as a wide-ranging instrument of cultural control.[76] In certain ways, as one professor notes, perhaps this is beginning to change:

> History once written by the victors is now being reconsidered from the perspective of the disadvantaged and re-interpreted through the language of international law and human rights. Human rights groups and the media are forcing many members of the international community to respond to new questions of morality regarding treatment of minority groups, including indigenous peoples, by predecessor majority-controlled governments or colonizing nations.[77]

Nonetheless, as the Hawaiian scholar and attorney Mililani B. Trask cautions, we must "[r]emember that native peoples are culturally distinct and

---

[75] KENNEDY, *supra* note 68, at 79–80 (1978) (quoting DAVID SAMWELL, A NARRATIVE OF THE DEATH OF CAPTAIN JAMES COOK, TO WHICH ARE ADDED SOME PARTICULARS CONCERNING HIS LIFE AND CHARACTER; ALSO OBSERVATIONS RESPECTING THE INTRODUCTION OF VENEREAL DISEASE INTO THE SANDWICH ISLANDS (1786)). It must be noted that Samwell was not a true eyewitness to these events, since he was not ashore with Cook, and therefore must have based his narrative at least in part on information from others. *Id.*

[76] *See* Barnard, *supra* note 4, at 22 (quoting THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS 134 (1996) ("The basic tool for subjugation was law and the law's necessary coherence came from narratives and assumptions that were in an inescapable sense chosen and not merely received. They were chosen because they worked for the dominant race, even though they propped up a social structure that humiliated and subjugated innocent human beings."); *see also id.* at 41 ("I have argued that the U.S. justice system is structurally and systematically biased against the claims of Native Hawaiians, and perhaps against the claims of other indigenous peoples as well. The workings of narrative in the law render the law itself an instrument of colonial domination.").

[77] Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 387 (2002).

insular minorities. There is a great danger in allowing others to tell native peoples what constitutes their rights. Only native peoples can define for themselves their rights."[78] And yet, as this paper demonstrates, even under the European International Law of 1779, Captain Cook committed a crime when he attempted to kidnap the king Kalani'ōpu'u—though there surely would have been no trial at the Old Bailey had Cook returned alive.

[78] Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 95 (1991).

The Rogue One: Trump's Space Force and the Threat of a New Cold War

Lauren Hauck*

INTRODUCTION

"America cannot have an empire abroad and a Republic at home."

– Mark Twain[1]

On August 9, 2018, President Donald Trump used the popular social media platform Twitter to tweet, "Space Force all the way!"[2] While

* Staff Member, University of Hawai'i Law Review, Juris Doctoral Candidate, degree anticipated 2020, University of Hawai'i at Mānoa, William S. Richardson School of Law, MSEd. The author would like to thank her editors, Molly Olds and Katie Smith, the University of Hawai'i Law Review, and Professors Susan Serrano and Vicki Szymczak for their guidance and expertise.

[1] MARK DAVID LEDBETTER, AMERICA'S FORGOTTEN HISTORY PART III: A PROGRESSIVE EMPIRE 441–42 (2014).

President Trump initially introduced the science fiction moniker 'Space Force' in June 2018 at a meeting with the National Space Council,[3] his tweet breathed life into something formerly shrouded in uncertainty. Like many of President Trump's policies, Space Force became a national topic of discussion via Twitter.[4] Inciting almost immediate responses from supporters and opponents, the possibility of a national Space Force raises questions regarding the legality of the militarization and weaponization of space.

In March 2019, the United States Department of Defense ("DoD") submitted a legislative proposal to Congress calling for the creation of the Space Force.[5] For many, the very phrase 'Space Force' conjures images of spaceships, aliens, and lightsabers. While a seemingly fantastical proposition straight out of a science fiction movie, the Space Force proposal reflects a shift in U.S. space policy that threatens to escalate global tensions, potentially setting the stage for a new world war. From conception of space as a "final frontier,"[6] to the more modern international conflicts of recent years, the potential for Earth's wars to be taken outside the atmosphere has presented an ongoing international question for some time. In the age of Trump-era Twitter politics, the possibility of a swift and devastating use of force in outer space is even more possible than it was during the Cold War.[7]

Included in the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2020 as a new title identified as "Title XVII – Space Force,"[8] the proposal called for the implementation of a sixth branch of the U.S.

---

[2] Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 9, 2018, 12:03 P.M. EST), https://twitter.com/realDonaldTrump/status/1027586174448218113.

[3] Remarks on Signing a Memorandum on National Space Traffic Management Policy, 2018 DAILY COMP. PRES. DOC. 430, 4 (June 18, 2018).

[4] Throughout his presidency, Trump has used the popular social media platform, Twitter, to discuss his political views, including controversial topics such as the government shutdown(s), immigration policies, and the appointment of Justice Kavanaugh. *See* Shontavia Johnson, *Tweeter in Chief: How Donald Trump Tweeted His Way into the White House*, THE NATIONAL INTEREST (Feb. 29, 2020), https://nationalinterest.org/blog/buzz/tweeter-chief-how-donald-trump-tweeted-his-way-white-house-128392.

[5] U.S. DEPT. OF DEFENSE, LEGISLATIVE PROPOSAL TO ESTABLISH THE U.S. SPACE FORCE (Mar. 1, 2019), https://media.defense.gov/2019/Mar/01/2002095010/-1/-1/1/UNITED-STATES-SPACE-FORCE-LEGISLATIVE-PROPOSAL.PDF [hereinafter SPACE FORCE PROPOSAL].

[6] *See, e.g.*, STAR TREK: THE MAN TRAP (NBC 1966).

[7] *See* Gregory Niguidula, *Trump's Space Force is a Strategic Mistake*, BULL. OF THE ATOMIC SCI. (Jan. 21, 2019), https://thebulletin.org/2019/01/trumps-space-force-is-a-strategic-mistake/.

[8] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 951-61.

armed forces—the first military branch established since 1947.[9] Space Force was signed into law as part of the NDAA on December 20, 2019,[10] and General John W. Raymond was appointed as the first Chief of Space Operations.[11] In addition to the obvious budgetary ramifications of expanding the American military, the Space Force evinces a larger national push toward space weaponization and militarization. While outer space has arguably been militarized for decades due to the presence of satellites with targeting capabilities, the ongoing discussions of placing weapons in outer space echoes a presumed bygone era of the Cold-War arms race.[12]

In the eyes of the U.S. government, the weaponization of space is inevitable. Extolling the rhetoric of "national security," the new proposal for a Space Force highlights the growing international question of the parameters of militarization in space. This paper posits that under international space law, specifically the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty"),[13] the passage of the Space Force legislation is illegal. The current body of law that governs space weaponization derives from international treaties, international customary law, domestic law, and declarations of the United Nations ("U.N."). This paper will largely rely on the body of international law promulgated by the U.N., which includes a number of treaties and international agreements.[14] The Outer Space Treaty is the most widely accepted space treaty with 89 signatories and 109 state parties.[15] Accordingly, the 1967 Outer Space Treaty will be the central starting point

---

[9] SPACE FORCE PROPOSAL, *supra* note 5, at 71.

[10] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 951-61.

[11] *Leadership: General John W. "Jay" Raymond*, U.S. SPACE FORCE, https://www.spaceforce.mil/Biographies/Article/2040592/general-john-w-jay-raymond (last visited Jan. 15, 2019).

[12] *See* discussion *infra* Part III.

[13] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967) [hereinafter Outer Space Treaty].

[14] Cassandra Steer, *Sources and Law-Making Processes Relating to Space Activities*, *in* ROUTLEDGE HANDBOOK OF SPACE LAW 3, 4 (Ram S. Jakhu & Paul Stephen Dempsey eds., 2017).

[15] Comm. On the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Fifty-Eighth Session, U.N. Doc. A/AC.105/C.2/2019/CRP.3 (2019); *Status of Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.N. OFF. FOR DISARMAMENT AFF., http://disarmament.un.org/treaties/t/outer_space (last visited Mar. 1, 2020).

for the assessment of whether the United States has a legal basis for the Space Force legislation.

The efforts of the United States to enact such legislation is not only a violation of international law but also an imperial venture under the guise of the long-held dogma of national security.[16] Thus, this paper also argues the Space Force proposal is a manifestation of American imperialism.[17] Utilizing the Frontier Thesis as an analytical framework, this paper explores the historical process of imperialism implemented throughout U.S. history.[18] Coined by American historian Frederick Jackson Turner in 1893, the Frontier Thesis became the driving force for American expansionism throughout the late 19th and 20th centuries.[19] Guided by the conviction that the United States was uniquely qualified to dominate world affairs, the Frontier Thesis represents the persistent attitude of exceptionalism employed by American policymakers.[20] When analyzed through this lens, the Space Force proposal represents an attempt to assert dominance and secure American interests in space. In articulating itself as the leader of space enterprise, U.S. space policy seeks to maintain dominance and influence, thus constituting imperial action. Finally, this paper argues that under international law, this imperialism is an unlawful act of national appropriation.[21]

Part I explores the development and history of space law, contextualizing it within the larger body of international law. Part II examines the legality of the militarization and weaponization of space under international law, particularly under the 1967 Outer Space Treaty. Part III looks specifically at the development of domestic space law in the United States and traces its evolution. This section also critically examines the Space Force legislation[22] and concludes that the legislation violates international law. Finally, Part IV explores the ways in which the Space Force legislation is an embodiment of imperialist-nationalism in space through the lens of the Frontier Thesis.[23]

---

[16] Outer Space Treaty, *supra* note 13, at art. I; Steer, *supra* note 14 at 207–08.

[17] *See* discussion *infra* Part IV.

[18] *See* discussion *infra* Part IV.

[19] William Appleman Williams, *The Frontier Thesis and American Foreign Policy*, 24 PAC. HIST. REV. 379, 381 (1955).

[20] *See id.*

[21] *See* discussion *Infra* Part IV.

[22] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 951-61.

[23] *See* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1921).

I. IN A GALAXY NOT SO FAR FAR AWAY: CONTEXTUALIZING INTERNATIONAL SPACE POLICY

"The Earth is a cradle of humanity, but one cannot remain in the cradle forever."

– Konstantin E. Tsiolkovsky, 1896[24]

Space law operates primarily as a branch of international law. While scientists noted the emerging necessity of space law as early as the late 19th century, the topic became one of global importance in the 1950s.[25] As space travel became a reality in the mid-20th century, so too did the necessity of establishing a body of law that regulated the actions of states.[26] Space presented unique obstacles for lawmakers as it was—and still is—relatively unknown. Thus, when the international community first began to approach the topic, they analogized it to other places that no single state may control, such as Antarctica and the sea.[27] In this sense, space law attempts to apply an international framework to an area that states have shared access to. This section investigates the development of space law within the international community and details the modern sources of international law that govern space.

A. Origins of Space Law

In 1952, American[28] Professor Oscar Schachter, gave a speech entitled *Who Owns the Universe?* in which he posited that the free and equal use of outer space would foster community, peace, and world security:

> A legal order would be developed on the principle of free and equal use, with the object of furthering scientific research and investigation. It seems to me that a development of this kind would dramatically emphasize the common heritage of humanity and serve, perhaps significantly, to strengthen the sense

---

[24] *Konstantin E. Tsiolkovsky*, NASA (Sep. 22, 2010), https://www.nasa.gov/audience/foreducators/rocketry/home/konstantin-tsiolkovsky.html (quoting Konstantin E. Tsiolkovsky).

[25] Lorenzo Gradoni, *What on Earth is Happening to Space Law?*, EJIL (Jul. 31, 2018), https://www.ejiltalk.org/what-on-earth-is-happening-to-space-law-a-new-space-law-for-a-new-space-race/. For the purposes of this article, "state" will refer to countries rather than subnational entities of the United States.

[26] *Id.*

[27] *Id.*

[28] "U.S.," "United States," and "America" are employed interchangeably throughout this paper to avoid redundancy.

> of international community which is so vital to the development of a peaceful and secure world order.[29]

Schacter's hope for the future uses of outer space are emblematic of the language used in the Outer Space Treaty, which was entered into force on October 10, 1967, "a date now regarded as the birthday of international space law."[30] Yet, the exploration of space as both a new frontier for human exploration as well an inevitable legal hurdle came decades before outer space was navigable.

The discourse on outer space law began long before technology made space travel even remotely possible. Dating back to 1883, Russian scientist Konstantin Tsiolkovsky largely initiated the discourse on anti-gravity.[31] Thereafter, in 1910, Belgian lawyer Emil Laude recognized that the law "needed to cope with 'locomotion' in the layer of 'breathable air.'"[32] However, the term 'law of space' was not formally coined until 1926 when V.A. Zarzar, a member of the Soviet[33] Aviation Ministry, argued that there was a legally definable separation between airspace and outer space.[34] However, while Zarzar understood that outer space occupied a unique body of legal discourse, he declined to offer an opinion about the point at which air and outer space become separate entities.[35] Finally, in 1932, Czechoslovakian Vladimir Mandl published the first work entirely dedicated to the field of space law.[36] In Mandl's monograph, *The Space Law: A Problem of Space Flights,* he argues that state sovereignty did not exist beyond the atmosphere directly above a nation, and the area "which is no longer Earth appurtenant . . . is therefore, free of any terrestrial state power, *coelum liberum.*"[37] As Mandl and Zarzar's work made clear, the prospect of space travel necessarily raised questions of state sovereignty, particularly as it relates to the atmospheric limits.

---

[29] Oscar Schacter, *Who Owns the Universe?*, COLLIERS, Mar. 22, 1952, at 36, 70.

[30] GENNADY ZHUKOV & YURI KOLOSOV, INTERNATIONAL SPACE LAW 1 (Boris Belitzy trans., 1984).

[31] GLENN H. REYNOLDS & ROBERT P. MERGES, OUTER SPACE: PROBLEMS OF LAW AND POLICY 1 (1989).

[32] FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 5 (2009).

[33] Russia formally became a part the United Soviet Socialist Republics (Soviet Union) in December 1922 until its dissolution in December 1991, thus the nation's name changes at points throughout this paper.

[34] STEPHEN E. DOYLE, THE ORIGINS OF SPACE LAW AND THE INTERNATIONAL INSTITUTE OF SPACE LAW OF THE INTERNATIONAL ASTRONAUTICAL FEDERATION 2 (2002).

[35] *Id.*

[36] *See* LYALL & LARSEN, *supra* note 32, at 5.

[37] STEPHAN HOBE, PIONEERS OF SPACE LAW: A PUBLICATION OF THE INTERNATIONAL INSTITUTE OF SPACE LAW 63 (2013) (quoting VLADIMIR MANDL, RECHTSANWALT IN PILSEN, DAS WELTRAUM-RECHT, EIN PROBLEM DER RUAMFAHRT 33 (1932)).

In 1951, John Cobb Cooper, the first Director of the Institute of International Air Law at McGill University, again posed the question: where does state sovereignty end and where does a free outer space begin?[38] Yet throughout the ponderings of scholars and jurists worldwide, neither the legal nor the scientific community could define where or what 'outer space' truly was. Throughout the 1950s, intellectuals argued ceaselessly about the legal parameters of space, some believing the discussion should focus on the boundary of air and space while others sought to articulate the nature of space activities.[39] Even today, there is no internationally accepted definition of the boundary. The Fédération Aéronautique Internationale, the global recordkeeper for aeronautic and astronautic records, recognizes the Kármán Line as the theoretical boundary.[40] Named after Hungarian-American scientist, Theodore von Kármán, the Kármán Line is a constructed boundary sixty-two miles above sea level where "atmosphere becomes too thin to provide enough lift for conventional aircraft to maintain flight. At this altitude, a conventional plane would need to reach orbital velocity or risk falling back to Earth."[41] In response to evolving science, the United States now positions the boundary twelve miles below the Kármán Line at fifty miles above sea level.[42] The debate over the ambiguities of outer space are far from resolved, however the Soviet launch of the *Sputnik I* satellite in 1957 raised more immediately pressing questions regarding the nature of international space operations.

When the Soviet Union successfully launched the first man-made satellite, *Sputnik I,* into orbit on October 4, 1957, the international community listened.[43] The launch of *Sputnik I* highlighted the pressing need for global regulation in outer space. Additionally, because the satellite represented early Soviet success in space, the launch catalyzed a competition between the United States and Soviet Union that represented far more than merely a scientific achievement. Ideologically, the space race became a symbol of the ever-growing growing desire for global dominance.

---

[38] Vladimír Kopal, *Evolution of the Doctrine of Space Law, in* SPACE LAW: DEVELOPMENT AND SCOPE 17, 19 (Nandasiri Jasentuliyana ed., 1992).

[39] *See id.* at 20.

[40] *Where is Space?*, NOAA (Feb. 22, 2016), https://www.nesdis.noaa.gov/content/where-space.

[41] *Id.*

[42] *Id.* In July 2018, Astrophysicist Jonathan C. McDowell published a study articulating the inaccuracy of the Kármán Line. He argued that that for decades scientists have improperly interpreted orbital data. *See generally* Jonathan C. McDowell, *The Edge of Space: Revisiting the Kármán Line*, 151 ACTA ASTRONAUTICA 668 (2018).

[43] Kopal, *supra* note 38, at 20.

Moreover, the modern body of international space law—from its scientific conception to its legal framework—was a transnational process, and a process that called for an international solution.

Founded in 1945, the U.N. was an obvious choice to tackle the complex issue of regulating outer space. Under Article 13, paragraph 1 of its Charter, the U.N. is authorized to foster "international co-operation in the political field and encouraging the progressive development of international law and its codification[.]"[44] Further, "[t]hrough its Committee on the Peaceful Uses of Outer Space, it has played a major rule in the elaboration of international space law."[45] Established through Resolution 1472, the Committee on the Peaceful Uses of Outer Space ("COPUOS") has authored the five cornerstone space treaties that largely entrust spacefaring nations to the treaty's specific legally binding terms.[46] At its inception, COPUOS was comprised of twenty-four member states, a number which grew to ninety-two in 2018.[47]

B. Modern International Law—A Framework for Space Policy

In its broadest sense, space law encompasses all laws that dictate outer space activities. Unlike other more clearly defined bodies of law, space law is a law of place rather than a law of subject—meaning that unlike the law of contracts or the law of torts, it is necessarily derived from a massive body of interrelated legal genres.[48] Space law cannot be understood without an understanding of international law, as it is inherently an international activity. Thus, many of the broader principles of international law necessarily apply to the regulation of space.

---

[44] U.N. Charter art. 13, ¶ 1(a).

[45] Kopal, *supra* note 38, at 23.

[46] G.A. Res. 1472 (XIV), at 5 (Dec. 12, 1959).

[47] Member states are Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belgium, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chad, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Hungary, Ghana, Greece, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Lebanon, Libya, Luxembourg, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Senegal, Sierra Leone, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Ukraine, Uruguay, Venezuela and Vietnam. *Id.*

[48] *See* LYALL & LARSEN, *supra* note 32, at 2.

International law is paradoxical in nature, as it both presumes the sovereignty of states and binds them to an international legal "standard," for which violations are punishable.[49] Further, "there is no international legislature that makes laws for the nations of the world. Notably absent also is the force of binding precedent. The rulings of ad hoc tribunals with ever-changing panels of judges do not make possible adherence to the doctrine of stare decisis."[50] Unlike domestic law, international law is not effective because it is constitutionally-empowered to execute binding laws, but instead because it is driven by the consent of the States.[51] However, especially in the field of space law, the presence of non-state actors is increasingly important.[52]

Given that there is no single international judiciary body, the International Court of Justice ("ICJ") derives its authority from four main sources: treaties, customary international law, general principles of law "recognized by civilized nations," and judicial decisions.[53] Established at the end of World War II, the ICJ is the central judicial body of the U.N. "and was established to offer a peaceful means of dispute resolution between states so as to avoid resorting to sanctions or the use of force."[54] Article 38 of the Statute of the ICJ categorizes the sources of international law:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

---

[49] *See* Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations - A Study*, 10 UCLA L. REV. 1041, 1054 (1963).

[50] *Id.*

[51] Steer, *supra* note 14, at 4.

[52] *See* George D. Kyriakopoulos, *Legal Challenges Post by the Action of Non-State Actors in Outer Space*, *in* CONFLICTS IN SPACE AND THE RULE OF LAW 273, 274 (Maria Manoli & Sandy Belle Habchi eds., 2017).

[53] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

[54] Steer, *supra* note 14, at 5.

> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[55]

Sections (a), (b), and (c) of paragraph (1) delineate that international conventions—also known as treaties—international customs, and general principles of law are the authoritative bodies of law; whereas (d) describes a "law-determining source that can be used by the Court in a search for, or determination of, evidence or existence of the rules of international law[.]"[56]

International conventions are generally legally binding treaties that states voluntarily enter into. Treaties denote an international obligation between the states that are parties to them. While binding on the states that choose to sign via the rule of *pacta sunt servanda*,[57] there is no requirement for a nation to sign a treaty and thus the "law" established by it is limited to the signatories. For States that sign a treaty, the terms are binding because they are explicitly negotiated and signed at conventions, but often do not come into force until enough states have signed.[58]

In the context of international space law, there are five central treaties that are largely recognized by spacefaring nations: the 1967 Outer Space Treaty,[59] 1968 Rescue Agreement,[60] 1972 Liability Convention,[61] 1974 Registration Convention,[62] and the 1979 Moon Agreement.[63] While it emerged as the cornerstone of international space law, the Outer Space Treaty evolved out of the 1963 Declaration of Legal Principles Governing

---

[55] ICJ Statute, art. 38.

[56] Ram S. Jakhu & Steven Freeland, *The Sources of International Space Law*, 56 PROC. INT'L INST. SPACE L. 461, 462 (2013).

[57] *Pacta sunt servanda* is Latin for "agreements must be kept," which generally means that parties are legally obligated to uphold the terms of a treaty to which they are a party. *See* W. Paul Gormley, *The Codification of* Pacta Sunt Servanda *by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U. L.J. 367 (1969).

[58] Steer, *supra* note 14, at 6.

[59] Outer Space Treaty, *supra* note 13.

[60] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Rescue Agreement] (entered into force on Dec. 3, 1968).

[61] Convention on the International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention] (entered into force with respect to the United States on Oct. 9, 1973).

[62] Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention] (entered into force on Sep. 15, 1976).

[63] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Agreement] (entered into force on July 11, 1984).

the Activities of States in the Exploration and Use of Outer Space.[64] The Outer Space Treaty concentrates on the requirement that space be free to all and used only in a peaceful manner, two notions that are often paradoxical in reality. With 109 party nations, the Outer Space Treaty is the most widely accepted space law treaty.[65] Additionally, it laid the general framework for the later Rescue Agreement and Liability Convention, which propound a right to rescue for astronauts in emergency situations and establishes liability for the damage inflicted by space objects, respectively.[66] The Registration Convention, "requires launching states to register their launched objects . . . [and] also calls upon states possessing space monitoring and tracking facilities to provide assistance in the identification of space objects which cause damage."[67] Lastly, the Moon Agreement, which seeks to protect the moon and its resources, "requires [states] to establish an international regime to govern the exploitation of the moon's natural resources . . . ."[68] Notably, the Moon Agreement has been signed by only eighteen parties and does not include the United States.[69]

The second source of international law authorized under Article 38 is customary international law, a seemingly nebulous term that in fact imposes strict guidelines[70] Customary international law requires two essential elements: "State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*)."[71] This requires that a states' practice in the specific area of law be nearly unchanging and uniform in practice, *and* that the practice is mandated by *jus cogens*, thus making it a fundamental and irreversibly compelling law.[72] Moreover, the presence of customary international law as a source of binding legal authority plays a unique role in situations where "a large number of states agreeing upon a treaty

---

[64] G.A. Res. 1962 (XVIII), at 15 (Dec. 13, 1963).

[65] As of 2019, the Outer Space Treaty has 109 State parties and 89 signatories, whereas the Moon Agreement has 18 state parties and 11 signatories, the Registration Convention has 69 state parties and 25 signatories, the Rescue Agreement has 98 state parties and 23 signatories, and the Liability Convention has 96 state parties and 19 signatories. *See* Outer Space Treaty, *supra* note 13; Moon Agreement, *supra* note 63; Registration Convention, *supra* note 62; Rescue Agreement, *supra* note 60; Liability Convention, *supra* note 61.

[66] Stephen Gorove, *Sources and Principles of Space Law*, *in* SPACE LAW: DEVELOPMENT AND SCOPE 45, 47 (Nandasiri Jasentuliyana ed., 1992).

[67] *Id.* at 48.

[68] *Id.*

[69] Moon Agreement, *supra* note 63.

[70] ICJ Statute, art. 38.

[71] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES xxxviii (2009).

[72] *See id.*

provision[.] If those and other states subsequently apply the treaty provision especially where they are not parties to the treaty—then it can quickly become part of customary international law."[73] Within the realm of space law, this means that in addition to being a treaty binding on the 109 parties who have formally signed it, the Outer Space Treaty is also compulsory for the nations who have not signed.[74] Further, "[w]hereas treaties are binding in a contractual sense only on states which have signed them, customary law has a broader reach, since it comes into being as a slow process of acquiescence and agreement among all states over time with respect to a specific norm."[75]

Perhaps the most ambiguous source of international law delineated in Article 38, the 'general principles of law' provision acts as a catchall for any shortcomings in the previously mentioned bodies of law.[76] Per the ICJ, "[t]hese include: the fundamental principle of humanity;the principle that no State should knowingly allow its territory to be used by others contrary to the rights of third States; and the principle of self-determination."[77]

While not a consideration explicitly stated in Article 38, the international community has come to accept 'soft law' as a persuasive source. Generally, soft law is an indistinct term that encompasses non-binding sources of authority.[78] Soft law can be viewed as a precursor to customary law as it functions on the concurrence of nations through the production of codes of conduct or guidelines by international bodies. For example, UN General Assembly resolutions may be regarded as soft law because the General

---

[73] CHRISTOPHER GREENWOOD, SOURCES OF INTERNATIONAL LAW: AN INTRODUCTION 3 (2008).

[74] Steer, *supra* note 14, at 8.

[75] *Id.*

[76] Jakhu & Freeland, *supra* note 56, at 467.

[77] Steer, *supra* note 14, at 9–10; *see also e.g.*, Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32, ¶ 32–33 (Feb. 5). In this case, the Court held that there were obligations states owed "to the international community as a whole." These *erga omnes* obligations include "the basic rights of the human person." *Id.* Further, in *Corfu Channel* the Court held that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Corfu Channel (U. K. v. Alb.), Merits, 1949 ICJ Rep. 22 (Apr. 9). Moreover, in an advisory opinion issued on February 25, 2019, the ICJ concluded that the state of Mauritius did not lawfully decolonize in 1968. *See e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 Rep. (Feb. 25). The first question the Court examined was the scope of self-determination, specifically in regard to Resolution 1514 (XV), which affirms that "[a]ll peoples have the right to self-determination." Here, the Court held that Resolution 1514 (XV) recognized the right of self-determination as a general principle of international law. *Id.*; *see* G.A. Res. 1514 (XV), ¶ 2 (Dec. 14, 1960).

[78] *Id.* at 19.

Assembly is a recommending body.[79] Furthermore, as was the case with the Outer Space Treaty, General Assembly resolutions have the power to evolve into treaties or customary law as the consensus among nations "can have a very strong normative value."[80]

In assessing the sources of international law in relation to space policy, the 1967 Outer Space Treaty is by far the most controlling document. However, while the Outer Space Treaty establishes a framework for the acceptable uses of space, "[i]t neither creates any organisation [sic] for its implementation and monitoring compliance, nor is capable of making invalid other treaties that are and will be inconsistent with its provisions."[81] As technology advances, the line between acceptable and forbidden action in space is increasingly blurred. In many ways, the treaty seems to raise more questions than it answers regarding human activities in space, especially those involving states' military presence. Further, the lack of specificity in the treaty regarding the placement of conventional (nonnuclear) weapons in space has triggered an ongoing debate about the legal implications of the militarization and weaponization of space.[82]

II. THE FORCE AWAKENS: THE LEGALITY OF SPACE WEAPONIZATION

"Peace cannot be kept by force, it can only be achieved by understanding."

– Albert Einstein, 1930[83]

In July 1969, American astronaut Neil Armstrong became the first human to set foot on the moon.[84] Armstrong and his *Apollo 11* crewmembers made international history as the live-broadcast landing represented a win for the United States in its effort to surpass Soviet advancements in space.[85] The *Apollo 11* crew left a lunar plaque on the moon that stated: "Here men from the planet Earth first set foot upon the Moon July 1969, A.D. We came in peace for all mankind."[86] This plaque,

---

[79] *Hard Law/Soft Law*, EUROPEAN CTR. FOR CONST. & HUM. RTS., https://www.ecchr.eu/en/glossary/hard-law-soft-law/ (last visited Apr. 24, 2020).

[80] *Id.* at 21.

[81] Jakhu & Freeland, *supra* note 56, at 465.

[82] *See* Michael Mineiro, *The United States and the Legality of Outer Space Weaponization: A Proposal for Greater Transparency and a Dispute Resolution Mechanism*, 33 ANNALS AIR & SPACE L. 441, 449 (2008).

[83] ALICE CAPRICE, THE NEW QUOTABLE EINSTEIN 158 (2005) (quoting Albert Einstein).

[84] Apollo 11 *Mission Summary*, SMITHSONIAN NAT'L AIR & SPACE MUSEUM (2013), https://web.archive.org/web/20130819180342/http://airandspace.si.edu/explore-and-learn/topics/apollo/as11/a11sum.htm.

[85] *Id.*

[86] Joyce Dejoie & Elizabeth Truthlova, *The* Apollo 11 *Memorial on the Moon*, NASA

embodied the sentiments of the 1967 Outer Space Treaty that outer space be used "exclusively for peaceful purposes."[87] Yet as space becomes militarized by nation states, the question of what constitutes a 'peaceful purpose' necessarily arises. This section explores the legality of space militarization, and subsequent weaponization under the Outer Space Treaty. As discussed below, the ambiguities in the interpretation of the peaceful purposes clause has given rise to the ongoing militarization and weaponization of space.

A. We Came in Peace

The Outer Space Treaty does not explicitly state that military presence in space is *per se* illegal, but rather establishes a vague framework for the acceptable use of space. Many states, including the United States, utilize space for a myriad of military purposes. From satellite systems for intelligence and reconnaissance to communication and geolocation, space technologies are an integral element of U.S. military functionality.[88] Consequently, "U.S. space systems and capabilities are considered critical to the nation's military effectiveness."[89]

While seemingly clear on specific activities parties to the treaty *may not* engage in, the Outer Space Treaty is notably silent on what nations are *permitted* to do in space. Article IV specifically mandates the parameters of space militarization:

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
>
> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited. [90]

(May 14, 2018), https://starchild.gsfc.nasa.gov/docs/StarChild/space_level2/apollo11_plaque.html.

[87] Outer Space Treaty, *supra* note 13, at art. IV.

[88] Mineiro, *supra* note 82, at 449.

[89] *Id.* at 447.

[90] Outer Space Treaty, *supra* note 13, at art. IV.

Article IV mandates three specific provisions for space militarization. First, two specific types of military presence are made *per se* illegal under the Outer Space Treaty: the placement or use of weapons of mass destruction—including nuclear weapons—and the erection of military bases on the 'moon and other celestial bodies.'[91] Second, Article IV commands that states utilize the moon and other celestial bodies exclusively for 'peaceful purposes.'[92]

However, is the definition of 'peaceful purposes' found within the Outer Space Treaty? Given the lack of definitions provided within the text of the treaty, signatories have largely filled in the gaps with their own definitions of the term.[93] In the early years of the space era, the Soviet Union advanced the view that peaceful always meant non-military, however "due no doubt to their own heavy military involvement in space, [they] no longer emphasize such a definition."[94] From its inception, the United States has averred "that 'peaceful' means 'non-aggressive' and not 'non-military[.]'"[95] This definition posits militarization as inherently passive in nature.[96] However, militarization and weaponization of space are two distinct ideas.[97]

B. The Best Defense is a Good Offense

While militarization merely denotes a state's military interest and inhabitance in space, weaponization demands a much more active role. Under the Outer Space Treaty, neither militarization nor weaponization are *per se* illegal.[98] At most, Article IV limits the kinds of weapons that can be used and disallows the presence or implementation of space weapons on the "moon and other celestial bodies."[99] The determination of what is and is not a space weapon is further complicated by the dual nature of many spacecraft that are designed for obviously non-aggressive purposes, but could nonetheless be utilized in an aggressive manner.[100] For example, in

---

[91] *Id.*

[92] *Id.*

[93] Robert L. Bridge, *International Law and Military Activities in Outer Space*, 13 AKRON L. REV. 649, 657–58 (1980).

[94] *Id.* at 658.

[95] Bin Cheng, *The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use*, 11 J. SPACE L. 89, 99 (1983).

[96] Emily Taft, *Outer Space: The Final Frontier or the Final Battlefield?*, 15 DUKE L. & TECH. REV. 362, 370 (2017).

[97] Mineiro, *supra* note 82, at 449.

[98] Mineiro, *supra* note 82, at 452.

[99] Outer Space Treaty, *supra* note 13, at art. IV.

[100] Mineiro, *supra* note 82, at 447.

2008, NASA contracted with SpaceX[101] to design the Dragon spacecraft to deliver supplies to the International Space Station ("ISS").[102] By design, autonomic spacecrafts like the Dragon are "capable of maneuvering to satellites and physically interacting with satellites," and thus could easily act as an anti-satellite technology ("ASAT") weapon.[103]

The term 'space weapon' is not defined in the Outer Space Treaty, nor is it defined in subsequent treaties or any other source of international law.[104] Under Article IV, weapons of mass destruction are forbidden in space, however the treaty neglects to provide further explanation.[105] Space weaponry is particularly difficult to define as most space technologies have multiple uses.[106] Thus, a space weapon is:

> Any device, whether based on Earth, in outer space, or in any other location, designed or modified to inflict physical or operational damage to an object in outer space through the projection of mass, the projection of energy, or through direct physical contact; or, any device based in outer space designed or modified to inflict physical or operational damage to targets on the Earth through the projection of mass, the projection of energy, or through direct physical contact.[107]

Given this definition, states—namely the United States, Russia, and China—have expended significant time and capital in designing space weapons.[108] In fact, almost immediately after launching the first satellites into space, the United States sought the capability to bring them down.[109] The power to inhibit a state's satellites "could devastate a society that increasingly relies on satellites for daily functions critical to the civilian and economic well-being, which could in turn trigger a military retaliation."[110] As an essential element of global infrastructure, satellites are an obvious target for military exploitation.[111]

---

[101] SpaceX is a private aerospace company founded by Elon Musk in 2002. *See About SpaceX*, SPACEX.COM https://www.spacex.com/about (last visited Mar. 1, 2019).

[102] Josh Byerly, *NASA Awards Space Station Commercial Resupply Services Contract*, NASA (Dec. 23, 2008), https://www.nasa.gov/home/hqnews/2008/dec/HQ_C08-069_ISS_Resupply.html.

[103] Mineiro, *supra* note 82, at 447.

[104] *Id.* at 446.

[105] Outer Space Treaty, *supra* note 13, at art. IV.

[106] *See* Mineiro, *supra* note 82, at 447.

[107] *Id.* at 448.

[108] *See* Mitchell Ford, *War on the Final Frontier: Can Twentieth-Century Space Law Combat Twenty-First-Century Warfare*, 39 HOUS. J. INT'L L. 237, 243 (2017).

[109] *See id.* at 248.

[110] Blair Stephenson Kuplic, *The Weaponization of Outer Space: Preventing an Extraterrestrial Arms Race*, 39 N.C. J. INT'L L. & COM. REG. 1123, 1138 (2014).

[111] *See* Ford, *supra* note 108, at 246.

Anti-satellite technology refers to space weaponry used to either disable or destroy a states' satellites.[112] Generally, kinetic energy,[113] co-orbital,[114] and directed energy[115] ASATs operate to completely demolish a satellite, whereas "soft-kill"[116] ASATs reduce or completely eliminate a satellite's capabilities for a given period of time.

Thus far, states have not used ASAT technology against another state, however testing of ASAT technology is prevalent. In 2007, "China successfully tested an ASAT missile by destroying a Chinese weather satellite orbiting at 500 miles altitude, which is the same altitude at which many U.S. spy satellites orbit."[117] Then in 2014, China tested another ASAT missile, reaching the geosynchronous orbit, "where Air Force missile warning and nuclear command and control satellites are located."[118] ASAT technology undeniably falls within the purview of weaponization, as it involves the creation and discharge of a space weapon.[119]

ASAT technology seems inherently aggressive in nature, as its intended purpose is to use space technology to exert power over another state.[120] Turning to the U.N. Charter—appurtenant via Article III of the Outer Space Treaty[121]—Article 2(4)[122] "requires that all members refrain from the threat or use of force in their international relations against the territorial integrity or political independence of any state."[123] Generally, the international community interprets this to mean that states are forbidden from using force against another state except in self-defense.[124] Thus, while ASAT technology may become aggressive if deployed against another state, it is not inherently aggressive if placed "in space as a defensive maneuver."[125]

---

[112] Kuplic, *supra* note 110, at 1138.

[113] Kinetic energy ASATs are earth-based, utilizing kinetic energy to destroy satellites through the ejection of an object. *Id.* at 1138.

[114] Co-orbital ASATs detonate missiles at a satellite to destroy it. *Id.* at 1139.

[115] Directed energy ASATs discharge a blast of sub-atomic particles to destroy a satellite's capabilities. *Id.* at 1139.

[116] Soft-kill ASATs do not destroy a satellite but handicap it for a period of time. A common form of soft-kill ASAT technology is jamming a satellite's signal. *Id.* at 1139.

[117] *Id.* at 1141.

[118] Ford, *supra* note 108, at 247.

[119] Mineiro, *supra* note 82, at 449.

[120] Jackson Nyamuya Maogoto & Steven Freeland, *Space Weaponization and the United Nations Charter Regime on Force: A Thick Legal Fog or a Receding Mist?*, 41 INT'L LAWYER 1091, 1110 (2007).

[121] Outer Space Treaty, *supra* note 13, at art. III.

[122] U.N. Charter art. 2, ¶ 4.

[123] Bridge, *supra* note 93, at 659.

[124] Kuplic, *supra* note 110, at 1154.

[125] Taft, *supra* note 96, at 370.

The right to self-defense operates as a counterbalance to the prohibition of force found in Article 2,[126] acknowledging the right of a state to respond to an aggressor.[127] Under U.N. Charter Article 51, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense."[128] As such, Article 51 insures the right of states to respond to an "armed attack," although the response must be proportional.[129] Furthermore, "[a]n armed attack clearly implies the use of arms or military force and constitutes an action of an offensive, destructive, and illegal nature."[130] By this definition, interference with another state's satellites could feasibly constitute an aggressive state activity thus warranting the victim-state's right to self-defense per Article 51 of the U.N. Charter.[131] While the Outer Space Treaty—empowered by the U.N. Charter—would likely authorize a state to respond proportionally to an act of force, the dual-use of most satellites for both military and non-military purposes severely limits the legal use of ASAT technology.[132] Additionally, the right to self-defense may *only* be triggered by a use of force, and thus any pre-emptive strikes are by definition aggressive in nature.

When interpreted within the broader U.N. Charter, the Outer Space Treaty approach to militarization and weaponization make manifest that while militarization and weaponization of space may not be *per se* illegal, actions taken by states must be non-aggressive in nature. Within this definition, states are bound by international law to refrain from the use of force against another state except in self-defense. However, within the broad parameters of international law, each state develops domestic space policy prioritizing its own interests over the maintenance of global equality and fairness.

III: THE EMPIRE STRIKES BACK: THE RAMIFICATIONS OF U.S. SPACE POLICY

"[T]he American energy will continually demand a wider field for its exercise."

– Frederick Jackson Turner[133]

---

[126] U.N. Charter art. 2, ¶ 4

[127] Kuplic, *supra* note 110, at 1155–56.

[128] U.N. Charter art. 51.

[129] U.N. Charter art. 51.

[130] Maogoto & Freeland, *supra* note 120, at 1113.

[131] *See* U.N. Charter art. 51.

[132] *See* Kuplic, *supra* note 110, at 1138.

[133] TURNER, *supra* note 23, at 37.

Domestic space law in the United States reflects the ebb and flow of foreign policy throughout the last seven decades. While international space law largely developed out of the shared interests of security and peace, domestic space law blossomed largely out of the need for global superiority.[134] Often contradictory in nature, the goals of superiority and world peace present a unique issue when assessing whether a state's domestic policies comport with the broader body of international law. This section traces the trajectory of U.S. domestic space policy throughout its history and examines the legality of the Space Force proposal under the Outer Space Treaty.

A. Racing Against the Reds: The Cold War Context of U.S. Space Policy

Space policy developed beneath the looming shadow of the Cold War, a period of animosity between the United States and the Soviet Union from roughly 1947 to 1991.[135] While described as a 'cold' war due to the lack of formal fighting, the nations engaged in a lengthy arms and space race to establish global hegemony. The Soviet Union gained the upper hand in the burgeoning space race in 1957 with the successful launch of *Sputnik I*. Following the launch, the U.S. Rocket and Satellite Research Panel submitted a proposal "calling for a National Space Establishment not dependent upon direct military appropriations."[136]

The National Space Establishment was codified in 1958, when Congress passed the National Aeronautics and Space Act, which established the National Aeronautics and Space Administration ("NASA").[137] In part, NASA developed as a non-military entity due to its facially unrelated goals and jurisdictional concerns, however the civilian nature of NASA reflected the larger policy concern to obtain dominance over the Soviets in space.[138] Despite NASA's interest in achieving scientific preeminence over the Soviet Union accomplished another notable first in the space race, sending Yuri Gagarin to space in 1961.[139] In a flight that lasted just 108 minutes,

---

[134] *See* P.J. Blount, *Renovating Space: The Future of International Space Law*, 40 DENV. J. INT'L L. & POL'Y 515, 520 (2011).

[135] *See* Jonathan F. Galloway, *Space Law in the United States*, *in* SPACE LAW: DEVELOPMENT AND SCOPE 71, 71 (Nandasiri Jasentuliyana ed., 1992).

[136] *Id.*

[137] National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (current version at 51 U.S.C. §§ 20101–20164 (Supp. IV 2010)).

[138] *See,* John Krige, *NASA as an Instrument of US Foreign Policy*, *in* SOCIETAL IMPACT OF SPACE FLIGHT 207, 209 (Roger D. Launius & Steve J. Dick eds., 2007).

[139] *Early Manned Spaceflight*, NATIONAL GEOGRAPHIC (last visited Feb. 28, 2019),

Gagarin completed a single orbit of the Earth in *Vostok I*.[140] In classic Cold War style, American Alan Shepard, Jr. embarked on a 15-minute trip out of Earth's atmosphere just months later,[141] although it took until 1962 for American John Glenn to complete the first Earth orbit by an American.[142]

When Ronald Reagan took office in 1981, he introduced a new era of defense-based policies. In March 1983, President Reagan formally announced the Strategic Defense Initiative ("SDI"), to "embark on a program to counter the awesome Soviet missile threat with measures that are defensive."[143] Colloquially referred to as 'Star Wars,' Reagan's introduction of 'defensive' space technology eschewed a new era of weaponry, "including beam, kinetic, electronic, and laser weapons into the space environment . . . ."[144] Reagan's SDI cooled down relatively quickly, but the growing dependence on space technologies throughout the 1980's and 90's nevertheless served as a constant reminder of the increasing reliance on space technology worldwide.[145]

In establishing a facially non-military space program, "the overriding goal of U.S. space policy during the pre-Outer Space Treaty era was to gain international recognition of the legality of reconnaissance satellites while simultaneously discouraging military space activities that threatened those assets."[146] Drawing the spotlight away from militaristic concerns, and focusing solely on scientific advancement, the United States framed Cold War space policy as a period of development and forward thinking rather than a contest for global dominance.[147]

B. National Security or National Superiority?

The fall of the Soviet Union in 1991 eliminated the communist specter that had fueled U.S. space policy for decades and allowed the United States to take a more aggressive stance on space developments without fear that

---

https://www.nationalgeographic.com/science/space/space-exploration/early-manned-spaceflight/.

[140] Nola Taylor Redd, *Yuri Gagarin: First Man in Space*, SPACE.COM (Oct. 12, 2018), https://www.space.com/16159-first-man-in-space.html.

[141] *Id.*

[142] *Who Was John Glenn?*, NASA (Dec. 8, 2016), https://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/who-is-john-glenn-k4.html.

[143] Address to the Nation on Defense and National Security, 1 PUB. PAPERS 437 (Mar. 23, 1983).

[144] Maogoto & Freeland, *supra* note 120, at 1096.

[145] *See id.*

[146] *Id.* at 1100.

[147] *See id.* at 1096.

the Soviets would act in turn.[148] Framing superiority as a necessary element of national security, the Bush Administration introduced an aggressive approach to space policy.[149]

Specifically, in 2006, President George W. Bush codified this policy of superiority through the thinly veiled guise of 'defense' in a new National Space Policy that took a notably aggressive approach to the right of the United States to defense capabilities in space.[150] This new National Space Policy reiterated the longstanding international rhetoric about the dedication to peaceful uses of space, but notably reserved the right for the United States to respond to a space-based adversary.[151] Bush's Space Policy effectively called for space weaponization, claiming that "the United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space."[152]

In contrast to the Bush Administration's unilateral approach to space policy, the Obama Administration's space policy, implemented in 2010, emphasized global cooperation.[153] While the Bush policy opened the door for unfettered militarization and "rejects any limitations on the fundamental right of the United States to operate in and acquire data from space,"[154] — particularly through the proliferation of ASAT technology—[155]the Obama policy took the position that space militarization should be limited. Specifically, the policy stated that the United States would "consider proposals and concepts for arms control measures if they are equitable, effectively verifiable and enhance the national security of the United States and its allies."[156] While the Obama Administration's approach was more amicable to international use of outer space, any progress was quashed by the heavy handed policies of the Trump Administration.

Since taking office in January 2017, President Donald Trump has continuously expressed and ongoing interest in space policy, focused on

---

[148] *See id.*

[149] Taft, *supra* note 96, at 368.

[150] *See* OFF. OF SCI. & TECH. POLICY, EXEC. OFF. OF THE PRESIDENT, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 2 (Aug. 31, 2006) [hereinafter 2006 SPACE POLICY].

[151] *Id.*

[152] *Id.*

[153] *See* OFF. OF SCI. & TECH. POLICY, EXEC. OFF. OF THE PRESIDENT, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 2 (June 28, 2010) [hereinafter 2010 SPACE POLICY].

[154] *See* 2006 SPACE POLICY, *supra* note 150, at 2.

[155] William J. Broad & Kevin Chang, *Obama Reverses Bush's Space Policy*, N.Y. TIMES, (Jun. 28, 2010), https://www.nytimes.com/2010/06/29/science/space/29orbit.html.

[156] *See generally* 2010 SPACE POLICY, *supra* note 153.

ushering in "a new era of American supremacy in space."[157] Harkening back to the Cold War-era of global supremacy and calling upon the looming threat of outside attacks, Trump's space policy takes an adversarial approach, positing the United States against the named and unnamed global threats that seemingly challenge the nation's desire for hegemony.

On June 30, 2017, within six months of taking office, Trump issued Executive Order 13803, reinstating the National Space Council for the first time since 1993.[158] The National Space Council, originally established during the Reagan Administration, "was tasked with advising and assisting the President regarding national space policy and strategy."[159] The council, chaired by Vice President Mike Pence, has met seven times with the goal of assessing space policy concerns and proposing solutions. [160] Thus far, the council's discussions have yielded four national policy directives signed into force by President Trump.[161] While not dubbed 'executive orders,' presidential policy directives bear the same weight. According to the Department of Justice Office of Legal Counsel, "there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order."[162]

C. Big Stick Ideology: The Road to Space Force[163]

The path to Space Force evolved over an eight-month period from June 2018 to March 2019. At a meeting with the National Space Council June 18, 2018, President Trump stated: "We are going to have the Air Force and

---

[157] *Remarks by Vice President Pence at the Fourth Meeting of the National Space Council,* WHITEHOUSE.GOV (Oct. 23, 2018), https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-fourth-meeting-national-space-council/.

[158] Exec. Order No. 13803, 82 Fed. Reg. 31429, 31429 (June 30, 2017).

[159] *Id.*

[160] As of May 19, 2020, the National Space Council has convened seven times. *Secretary Ross Remarks to National Space Council, May 2020*, OFF. OF SPACE COM. (May 19, 2020), https://www.space.commerce.gov/secretary-ross-remarks-to-national-space-council-may-2020/.

[161] Space Policy Directive-1 of December 11, 2017, 82 Fed. Reg. 59501 (Dec. 14, 2017); Space Policy Directive-2 of May 24, 2018, 83 Fed. Reg. 24901 (May 30, 2018); Space Policy Directive-3 of June 18, 2018, 83 Fed. Reg. 28969 (June 21, 2018); Space Policy Directive-4 of February 19, 2019, 84 Fed. Reg. 6049 (Feb. 25, 2019).

[162] *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 OP. OFF. LEGAL COUNS. 29, 29 (2000).

[163] Big Stick ideology refers to President Theodore Roosevelt's famous quote, "[s]peak softly, and carry a big stick," which reiterated the idea that America should be prepared to use force if necessary, even if peace was the original goal. *See Big Stick Diplomacy,* GALE ENCYCLOPEDIA OF U.S. ECONOMIC HISTORY (Jan. 22, 2020), https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/big-stick-diplomacy.

we are going to have the Space Force—separate but equal."[164] This directive to the DoD initiated a multi-step process culminating in the March 1, 2019 legislative proposal submitted to Congress[165] that was signed into law on December 20, 2019.[166]

On December 18, 2018, President Trump issued a memorandum to the Secretary of Defense, Jim Mattis mandating the establishment of a "Space Command."[167] The new Space Command ("USSPACECOM"), which would function as a Functional Unified Combatant Command ("UCC"), would operate as an inter-military organization, and authorized via the Unified Command Plan ("UCP").[168] Per the DoD, the UCP is an executive document that the Chairman of the Joint Chiefs of Staff prepares. The UCP is generally reviewed on a two-year cycle; however, it can be updated at the president's discretion.[169] Creation and implementation of the UCP is governed by Title 10 of the United States Code.[170] The UCP establishes UCCs that are either functional or geographic in nature.[171] As a functional UCC, the USSPACECOM would take on "the space-related responsibilities previously assigned to the Commander, United States Strategic Command; and . . . the responsibilities of Joint Force Provider and Joint Force Trainer for Space Operations Forces."[172]

The previous Space Command, in effect from 1985 to 2002, was ultimately incorporated into the larger U.S. Strategic Command under the direction of President George W. Bush.[173] The establishment of a separate Space Command marks a significant step in the development of militarized

---

[164] Remarks on Signing a Memorandum on National Space Traffic Management Policy, 2018 DAILY COMP. PRES. DOC. 430, 4 (June 18, 2018).

[165] SPACE FORCE PROPOSAL, *supra* note 5.

[166] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 951-61.

[167] Memorandum on the Establishment of the United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65483 (Dec. 21, 2018).

[168] *See* U.S. JOINT CHIEFS OF STAFF, JOINT PUBL'N. 1-02, DEP'T. OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (November 8, 2010, as amended through May 15, 2011), 384–85.

[169] *Id.*

[170] 10 U.S.C. §§ 161 et seq. (1986).

[171] ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS 15 (2013), https://fas.org/sgp/crs/natsec/R42077.pdf.

[172] Memorandum on the Establishment of the United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65483 (Dec. 21, 2018).

[173] Sandra Erwin, *President Trump Issues Order to Create U.S. Space Command*, SPACE NEWS, Dec. 18, 2019, https://spacenews.com/president-trump-issues-order-to-create-u-s-space-command/.

space policy. As Air Force Lieutenant General John Thompson[174] explained in a media call with Air Force Secretary Heather Wilson, "[t]he whole point behind a combatant command is to do our war fighting missions[,] whereas the point behind Air Force Space Command is to provide the resources necessary to organize, train and equip, and provide forces to that combatant command." [175] Further, Secretary Wilson described the establishment of the USSPACECOM as a "tremendous step forward," [176] for space militarization as all UCCs are required to have a four-star commander.[177] The USSPACECOM directive marked President Trump's first major move toward the consolidation of military-based space programs.

On February 19, 2019, President Trump issued Space Policy Directive-4 ("SPD-4"), calling for the establishment of the United States Space Force.[178] SPD-4 formally directed the DoD to submit a legislative proposal to Congress that would establish the Space Force as the sixth branch of the military, initially functioning under the umbrella of the Department of the Air Force.[179] According to SPD-4, the purpose of Space Force is "to organize, train, and equip forces to provide for freedom of operation in, from, and to the space domain . . . [and] should include both combat and support functions to enable prompt and sustained offensive and defensive space operations."[180] Abiding by Trump's directive, the DoD submitted a legislative proposal for the creation of the Space Force on March 1, 2019.[181]

Per the newly enacted legislation, Space Force will be stood up over an eighteen-month period under control of the Secretary of the Air Force.[182] The DoD's proposal mirrors Trump's policy directive, including identical verbiage about the purpose of the new consolidated Space Force, including the assertion that "The Space Force includes both combat and combat-support functions to enable prompt and sustained offensive and defensive space operations and joint operations in all domains."[183]

---

[174] Lt. Gen. Thompson is the commander of the Space and Missile Systems Center. *Id.*

[175] *Id.*

[176] *Id.*

[177] The four-star rank is designated by the NATO OF-9 Code, generally a senior commander like a General or Admiral. *See* LAWRENCE KAPP, CONG. RESEARCH SERV., R44389, GENERAL AND FLAG OFFICERS IN THE U.S. ARMED FORCES: BACKGROUND AND CONSIDERATIONS FOR CONGRESS (2019), https://fas.org/sgp/crs/natsec/R44389.pdf.

[178] Space Policy Directive-4 of February 19, 2019, 84 Fed. Reg. 6049 (Feb. 21, 2019).

[179] *Id.*

[180] *Id.*

[181] SPACE FORCE PROPOSAL, *supra* note 5.

[182] *U.S. Space Force Fact Sheet*, U.S. SPACE FORCE, https://www.spaceforce.mil/About-Us/Fact-Sheet (last visited, Apr. 24, 2020).

[183] *Id.* at § 9091(b)(2).

Space Force will be phased into a fully separate branch of the military over the course of five years, beginning in fiscal year 2020.[184] Per the enactment, Space Force will be the smallest branch of the military, with an estimated 15,000 combined military and civilian personnel.[185] Additionally, Space Force "will provide the preponderance of its forces to USSPACECOM[,]" which President Trump directed the DoD to establish in December 2018.[186] The NDAA for the Fiscal Year 2020 approved an initial budget of $14.5 billion, with a requested budget increase to $15.4 billion in 2021.[187]

Though the Space Force proposal was initially met with skepticism from both sides of the aisle, its passage was ultimately successful. While many concerns center around budgetary constraints and distaste for the added bureaucracy another branch of government inevitably requires,[188] perhaps the more important question is whether the newly established military branch is legal under international law.

D. Space Farce: The Illegality of Trump's Space Force

The Space Force legislation did not develop in a vacuum. Rather, it evolved over years of debate in and out of Congress. A similar version of Space Force appeared in the NDAA for the Fiscal Year 2018 under the moniker "Space Corps."[189] This version faced significant Senate opposition, leading to an amended version of the House bill entirely forbidding the establishment of a Space Corps.[190] The Senate amendment broadly prohibited the establishment of any separate military corps "including a Space Corps in the Department of the Air Force."[191] Within two years, NDAA Fiscal Year 2020—including the establishment of Space Force—experienced bipartisan support with a 377 to 48 vote.[192] The shift in support

---

[184] *U.S. Space Force Fact Sheet*, *supra* note 182.

[185] U.S. DEPT. OF DEFENSE, *United States Space Force Strategic Overview*, 1, 9 (2019).

[186] *Id.* at 7.

[187] Stew Magnuson, *Budget 2021: Pentagon Rolls Out Its First Space Force Budget*, NATIONAL DEFENSE (Feb. 10, 2020), https://www.nationaldefensemagazine.org/articles/2020/2/10/pentagon-rolls-out-first-space-force-budget.

[188] *See* Patrick Kelley, *Trump's Space Force Order Would Need Congressional Action*, ROLL CALL (June 19, 2018), https://www.rollcall.com/news/politics/trumps-space-force-order-need-congressional-action.

[189] H.R. 2810, 115th Cong. § 1601 (1st Sess. 2017).

[190] H.R. REP. NO. 115-404, at 1008 (2017) (Conf. Rep.).

[191] H.R. 2810, 115th Cong. § 6605 (as passed by Senate, Sept. 18, 2017). This amendment applies only to the 2018 fiscal year. *Id.*

[192] *Final Vote Results for Roll Call 672*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/evs/2019/roll672.xml (last visited Apr. 24, 2020).

for space policy reflects broader policy concerns of the current administration. Whereas the 2010 National Space Policy under the Obama Administration emphasized the "peaceful purposes" and non-appropriation clauses of the Outer Space Treaty,[193] the Space Force legislation more overtly takes a U.S.-centric interest in space policy.

The iteration of Space Force signed into law by President Trump in December 2019 details the follow functions of the new military branch:

> (c) FUNCTIONS.—The Space Force shall be organized, trained, and equipped to provide—
>
> (1) freedom of operation for the United States in, from, and to space; and
>
> (2) prompt and sustained space operations.
>
> (d) DUTIES.—It shall be the duty of the Space Force to—
>
> (1) protect the interests of the United States in space;
>
> (2) deter aggression in, from, and to space; and
>
> (3) conduct space operations.[194]

While the law purports to express a 'defensive' military purpose, the current Space Force legislation differs from the initial version submitted to Congress in March 2019.[195]

Notably, the functions outlined in the Space Force proposal include "both combat and combat-support functions to enable prompt and sustained offensive and defensive space operations and joint operations in all domains."[196] The central point of contention in this description is the declaration that Space Force will be an 'offensive' as well as defensive presence in space. The Outer Space Treaty limits States to peaceful use of space, an inherently non-aggressive definition. Further, States are precluded from "threat or use of force" [197] except in self-defense.[198] The Space Force proposal's inclusion of 'offensive' operations plunges space policy into a realm of legal questionability. With this proposal, the United States could no longer claim defense-based space policy. Not only did this send "a message to other countries around the world that the U[nited] S[tates] is looking aggressively at our future in space with respect to national

---

[193] 2010 SPACE POLICY, *supra* note 153, at 3.

[194] 10 U.S.C.A § 9081(c)(d) (2020).

[195] *Compare id. with* SPACE FORCE PROPOSAL, *supra* note 5 (where the proposal includes language for both offensive and defensive measures).

[196] SPACE FORCE PROPOSAL, *supra* note 5, at § 9091(b)(2).

[197] U.N. Charter art. 2, ¶ 4.

[198] U.N. Charter art. 51.

defense," but it also presented a threat that other States may feel justified in responding to.[199]

While the final iteration of Space Force removed the 'offensive' language from the legislation, the intention remains. The legislative history of Space Force tells a different story than the final product, which cannot be ignored in light of current global tensions. Legislative history "refers to utterances (and some events) that engage the attention of the legislature during the process, from conception to birth, of enacting the statute being interpreted."[200] American courts have long supported the use of legislative history as a means to determine the intention underlying laws.[201] In fact, "[m]any judicial pronouncements seem to imply that the fidelity owed to legislative intent stands higher than any fidelity the court may owe to the statute itself."[202] For example, in *Schwegmann Bros. v. Calvert Distillers Corp.*, the Supreme Court turned to the legislative history of the Miller-Tydings Act to determine whether the act validated state non-signer provisions on retailers.[203] Justifying the use of legislative history in statutory interpretation, the Court explained, "[w]e look for more definite clues" to determine meaning.[204]

In large part, an analysis of legislative history is essential to the interpretation of any law because it allows for the determination of "the 'true' meaning of a statute, because the constitutional separation of powers assigns to the legislative branch the central responsibility for the statutory management of social policy . . . "[205] Turning to the Space Force legislation, an analysis of committee reports elucidates the disparity between the legislation's written word and its intent. The value of committee reports is "in showing (if they do) the ulterior purposes that the respective bills are intend [sic] to advance."[206]

On April 11, 2019, the Senate Committee on Armed Services held a hearing on the Space Force proposal.[207] At the outset of the meeting,

---

[199] Michael Greshko, *Would a US Space Force be Legal?*, NATIONAL GEOGRAPHIC (Aug. 9, 2018), https://news.nationalgeographic.com/2018/06/space-force-trump-legal-military-role-satellites-science/ (quoting Michael Dodge, a space law expert at the University of North Dakota's Department of Space Studies).

[200] Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1125 (1983).

[201] *See e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 390–95 (1951).

[202] Dickerson, *supra* note 200, at 1126.

[203] *Schwegmann Bros.*, 341 U.S. at 395.

[204] *Id.* at 394.

[205] Dickerson, *supra* note 200, at 1125.

[206] *Id.* at 1131.

[207] *Hearing to Receive Testimony on the Proposal to Establish a United States Space Force Before the S. Comm. on Armed Services*, 116th Cong. (2019) (internal quotations

Chairman Jim Inhofe opened with a speech stating the intention of Space Force is to "restore our margin of dominance in space . . . ."[208] This concern with dominance in space further illuminates tension between Space Force and the Outer Space Treaty. Article II of the treaty specifies that space is "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[209] Thus, no State may exert "territorial sovereignty" in outer space.[210] However, American lawmakers have continuously expressed a desire to place the nation at the apex of space dominance. Apparently unaware of these legal constraints, Senator Tim Kaine framed the Space Force legislation as an international norm setting, stating:

> [T]here's no rules right now, there may one day be rules, and often when we write rules about this, we benefit those who already have the technology and say, Okay, you already have it, we'll establish rules for you, but then we usually establish nonproliferation for rules for everybody who doesn't. So, if they're concerned about the weaponization of space, they want to be able to get in there first so that, if the rules are created, they—they're sort of grandfathered in.[211]

The notion that the United States alone may set the norms in space illustrates not only an ignorance toward established international law, but also an effort to appropriate through influence. In a place meant to be free for all, American lawmakers express merely the concern that "the U[nited] S[tates] is at risk of losing its competitive advantage in space."[212]

From the early days of the Outer Space Treaty, the term 'peaceful' was commonly understood as 'non-aggressive.'[213] The legislative discussions surrounding the establishment of a Space Force make manifest the reality that defense in the eyes if the U.S. government does not mean non-aggression. In actuality, "national security strategy is a misnomer. It is a global security strategy to defend liberty and justice . . . based on the false belief that the best and only way to achieve U.S. security is by forcibly

---

omitted).

[208] *See id.* at 3 (statement of Sen. Inhofe).

[209] Outer Space Treaty, *supra* note 13, at art. II.

[210] David Tan, *Towards a New Regime for the Protection of Outer Space as the "Province of All Mankind"*, 25 YALE J. INT'L L. 145, 158 (2000); *see* discussion *infra* Section IV.

[211] *Hearing to Receive Testimony on the Proposal to Establish a United States Space Force Before the S. Comm. on Armed Services*, 116th Cong. 1, 66–68 (2019) (statement of Sen. Kaine).

[212] *Id.* at 122 (statement of Sen. Warren).

[213] Bridge, *supra* note 93, at 658.

creating a better and safer world in America's image."[214] However, an interest in space dominance cannot be construed as an act "for the benefit and in the interests of all countries" as the Outer Space Treaty mandates.[215] Further, American foreign policy remains trapped in a Cold War mentality, "guided by the belief that a global U.S. military presence is fundamental to making the United States more secure."[216]

IV. THE PHANTOM MENACE: IMPERIALISM IN THE FINAL FRONTIER

"You must begin by gaining power over yourself; then another; then a group, an order, a world, a species, a group of species . . . finally, the galaxy itself."

– Darth Plagueis[217]

The United States extolls its roots as a nation born of revolution. Liberated from Britain's colonial control, the nation loudly calls for the right to self-determination and freedom from imperialist forces.[218] Yet throughout American history, the United States has continually reinforced the notion that it is, and has always been, an empire.[219] Since the 1890's, the United States "has been a consciously and steadily expanding nation," projecting its power outward beyond the physical boundaries of the State itself.[220] The methodology underpinning this expansionism was conceptualized by American historian Frederick Jackson Turner.[221] Commonly regarded as the 'Frontier Thesis,' Turner claimed that "true democracy was the product of an expanding frontier[,]" and thus expansion was an essentially 'American' activity.[222] As an integral part of American success both at home and abroad, the need for new frontiers has become more and more complex as the Earth becomes more crowded. This section explains Turner's 'Frontier Thesis' framework, applies it to U.S. space policy, and argues that space is one of the last remaining frontiers over which the United States can exert its power. Furthermore, within this structure, both the rhetoric and actions the United States has taken

---

[214] Charles V. Peña, *Bush's National Security Strategy is a Misnomer*, 496 POL'Y ANALYSIS 1, 3 (2003) (emphasis omitted).

[215] Outer Space Treaty, *supra* note 13, at art. I.

[216] Peña, *supra* note 214, at 6.

[217] JAMES LUCENO, DARK LORD: THE RISE OF DARTH VADER 319 (2005).

[218] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[219] Williams, *supra* note 19, at 379.

[220] *Id.*

[221] *See* TURNER, *supra* note 23.

[222] Williams, *supra* note 19, at 379–80.

regarding current space policy illuminates the desire to exert sovereign control over space, thus violating the Outer Space Treaty.[223]

A. The Final Frontier Thesis

In 1893, historian Frederick Jackson Turner gave a speech at the Chicago World's Fair titled *The Significance of the Frontier in American History*.[224] In this speech, Turner "theorized that the availability of unsettled land throughout much of American history was the most important factor determining national development."[225] While not an entirely new idea, the Frontier Thesis enlarged upon the existing dogma of Manifest Destiny, a term initially coined in 1845 by writer John O'Sullivan.[226] First applied as a justification for continental expansion into Texas, Manifest Destiny called upon three central bases for the unique qualification of Americans to expand:

1. The special virtues of the American people and their institutions
2. The mission of the United States to redeem and remake the west in the image of agrarian America
3. An irresistible destiny to accomplish this essential duty[227]

O'Sullivan's explanation of the inevitability of American exceptionalism largely drove policy decisions for the following century.[228] When Turner anchored the Manifest Destiny philosophy specifically to the 'frontier' as the vast, unexplored birthright of the people, he asserted that not only were Americans uniquely suited to colonize the frontier, but that it was inherently 'American' to do so.

Turner's ideas experienced near immediate acceptance and implementation, as the United States evolved into an expansionist power

---

[223] *See*, Outer Space Treaty, *supra* note 13, at art. II.

[224] TURNER, *supra* note 23, at 1.

[225] D.R. OWRAM, *Frontier Thesis*, THE CANADIAN ENCYCLOPEDIA (last updated Dec. 16, 2013), https://www.thecanadianencyclopedia.ca/en/article/frontier-thesis.

[226] John O'Sullivan, *Annexation*, 17 US MAGAZINE AND DEMOCRATIC REV. 5, 6 (1845).

[227] ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 2–3 (2006).

[228] The Frontier Thesis drove much of American foreign policy throughout the late 19th and 20th centuries. For example, President Roosevelt used the thesis as a justification for the Spanish-American War, and later the Philippine-American War (1890-1902), which led to the incorporation of the Philippines as a territory of the United States. President Woodrow Wilson also incorporated Turnerian ideas of 'democracy' through his use of US military intervention in the Mexican Revolution (1910-1919). *See id* at 120, 214.

throughout the late 19th and 20th centuries.[229] The Frontier Thesis became the driving force behind American imperialism,[230] as "the free lands of the West that constituted a safety valve for discontented Eastern masses and furnished the nationalizing impulses" that underscored Manifest Destiny ideology.[231] For the adherents to the Frontier Thesis, "frontier democracy was 'born of free land,' which resulted in the distribution of both political power and economic opportunity more equally," making expansion into the 'frontiers' a moral obligation.[232] Throughout its iterations and abridgments, the Frontier Thesis necessarily rests on the notion of American exceptionalism—that the United States is singularly qualified to control the allocation of democracy worldwide.[233] This framing has allowed the U.S. government to justify the use of force against other nations[234] in the name of implementing the 'proper' America-approved democracy. At is core, the nationalist roots of the Frontier Thesis served not only as a justification for expansion, but also reinforced the notion that doing so was a necessity.[235]

For Turner, the frontier described not only open, available land, but the belief that American democracy required an ongoing competition for land.[236] Thus, the frontier became symbol of the capitalist need for competition and free markets, without which democracy would fail.[237] In

---

[229] Everett S. Lee, *The Turner Thesis Reexamined*, 13 AM. Q. 77, 77 (1961).

[230] 'American Imperialism' refers to the cultural, political, military, and economic influence the United States exerts outside of its borders. The term, popularized following the Spanish-American War, is premised on the notion the United States is uniquely qualified in enforcing peace and prosperity worldwide, and thus is justified in expanding its sphere of influence—often forcefully—beyond its borders. *See* "*American Empire*," NEW WORLD ENCYCLOPEDIA (Mar. 17, 2019), https://www.newworldencyclopedia.org/entry/American_Empire.

[231] Lee, *supra* note 229, at 77.

[232] Martin Ridge, *The Life of an Idea: The Significance of Frederick Jackson Turner's Frontier Thesis*, 41 MONT.: THE MAG. OF W. HIST. 2, 8 (1991).

[233] Williams, *supra* note 19, at 383.

[234] The United States has consistently injected itself into the domestic relations of other nations. In Latin America, the US was heavily involved in government transformations in Cuba, the Philippines, Mexico, and Nicaragua, often on the basis of protecting smaller underdeveloped nations from the threat of communism. Furthermore, in eastern Europe, the US has taken an active role in the 21st century, funding political parties to the US-backed candidate wins. In 1996, US money and support aided in the re-election of Russian leader Boris Yeltsin, and 2000, it backed the overthrow of Serbian leader Slobodan Milosevic. *See* Scott Shane, *Russia Isn't the Only One Meddling in Elections. We Do It, Too*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/sunday-review/russia-isnt-the-only-one-meddling-in-elections-we-do-it-too.html.

[235] *See* Williams, *supra* note 19, at 383.

[236] *Id.* at 381–82.

[237] *Id.*

1891, the U.S. Census Director reported that, in light of the rapid expansion of American industry into the rural Western United States, "there can hardly be said to be a frontier."[238] For adherents to the Frontier Thesis, such as historian Brooks Adams, the lack of frontier lands within the United States called for a reimagining of Turner's initial conception.[239] Adams breathed life into a modern incarnation of the Frontier Thesis, arguing that "America's unique and true democracy could only be preserved by a foreign policy of expansion."[240] Where Turner had identified a past trend in American expansion, Adams reimagined that frontier as the opportunity for global expansion of influence. Though policymakers today eschew 'imperialist' as an ideal antithetical to American values, the Frontier Thesis re-entrenches it in the very core of the nation's ideology. In fact, Adams wore the moniker with pride, claiming "I am an expansionist, and 'imperialist,' if you please."[241]

As the world rapidly decolonized following the end of World War II ("WWII"), the Frontier Thesis manifested in foreign policy decisions to give aid to support and perpetuate foreign governments the United States viewed as democratic.[242] In 1947, President Harry S. Truman pledged aid to nations threatened by communism, arguing that the United States bore the "unique mission to defend and extend the frontier of democracy throughout the world."[243] Following in the footsteps of the Truman Doctrine,[244] the 1948 Marshall Plan displayed Truman's commitment to this ideal.[245] Providing economic assistance to help European nations rebuild post WWII, aid given under the Marshall Plan was contingent upon a States' rejection of communism.[246] As evidenced by the Truman Doctrine and corresponding Marshall Plan, the Frontier Thesis premised "the security and well-being of the United States . . . [on] America's unique mission to defend and extend the frontier of democracy throughout the world."[247] The Cold War iterations of the Frontier Thesis rooted the frontier as the fulcrum

---

[238] *Id.* at 381.

[239] *See* TURNER, *supra* note 23.

[240] *Id.* at 380.

[241] *Id.* at 384 (quoting Brooks Adams).

[242] *Id.* at 392.

[243] *Id.*

[244] Special Message to the Congress on Greece and Turkey: The Truman Doctrine, 1 PUB. PAPERS 176 (Mar. 12, 1947).

[245] Economic Cooperation Act of 1948, Pub. L. No. 472, § 102, 62 Stat. 137 (1948) [hereinafter The Marshall Plan].

[246] *Id.*

[247] Williams, *supra* note 19, at 392.

of U.S. power, by imagining the 'frontier' as the regions of the world susceptible to the specter of communism.

Wielding democracy like a sword, American policymakers weaponized their ideals as a tool to project power and influence throughout the world. The Frontier Thesis "became America's explanation of its success and the prescription for its own and others' troubles."[248] Over a century after Turner's speech, Earth's frontiers have been all but erased by global powerhouses settling, industrializing, and controlling the planet's every corner. With fewer and fewer avenues for expansion on Earth, the United States has turned to extraterrestrial frontiers.

B. "A Practical Shadow of Empire"[249]

On its face, the discourse around outer space is rife with imperial tropes. Captain Kirk's famous moniker "the final frontier"[250] draws an unmistakable parallel between frontierism on Earth and the potential for space to be a new domain of exploration and domination. In a speech before the National Space Council in June 2018, President Trump called upon these tropes directly, claiming "[t]he essence of the American character is to explore new horizons and to tame new frontiers."[251] Yet, by definition, outer space should operate outside the realm of the Turnerian 'frontier.' Under Article II of the Outer Space Treaty, space "is not subject to national appropriation by claim of sovereignty . . . or by any other means."[252] Thus, any attempt to 'own' space would necessarily violate international law. Yet, American space policy displays continued attempts to settle this final frontier, not through physical colonization but through ongoing projection of power that effectively renders space a new territory. Moreover, the discourse surrounding space policy reflects a shift away from the obvious tropes of imperialism,[253] taking a subtler approach to the control of outer space as "a practical shadow of empire."[254]

---

[248] *Id.* at 385.

[249] Peter Redfield, *The Half-Life of Empire in Outer Space*, 32 SOC. STUD. SCI. 791, 795 (2002).

[250] *See, e.g.*, STAR TREK: THE MAN TRAP (NBC 1966).

[251] Remarks on Signing a Memorandum on National Space Traffic Management Policy, 2018 DAILY COMP. PRES. DOC. 430, 3 (June 18, 2018).

[252] Outer Space Treaty, *supra* note 13, at art. II.

[253] Imperialist powers tend to be framed as colonialist powers, in that they desire physical domination through settlement and extraction of resources. Further, imperialism has generally been categorized as aggressive, militaristic exertion of control over other nations of expand the reach to a nation. By contrast, imperialist efforts in space are shrouded in a discussion of national defense and use this as a justification for power projection.

[254] Redfield, *supra* note 249, at 795.

Generally, imperialism is a "state policy, practice, or advocacy of extending power and dominion."[255] In his analysis of imperialism, Vladimir Lenin claims that "imperialism is the highest stage of capitalism," thus indicting imperialism as an obvious end point in any capitalist structure.[256] At its roots, this interpretation rests on the conception of capitalism as an economic structure which results in monopolies, and thus a stratification of power.[257] Moreover, this power stratification allows more economically savvy States to exert power over others without ever setting foot within their territory.[258] According to Lenin's articulation, war—both the threat and manifestation of—operates as a function of imperialism not only through the dominion of territory, but also through the perpetuation of fear.[259] This rings particularly true in space, where the persistent threat of war has been used as a justification for heightened militarization and weaponization.

Imperialism operates within outer space as "the persistent tendency of a mature capitalist state system to generate violent conflicts."[260] Thus, the creation and perpetuation of fear—of foreign attack, domination, and the fall of democratic ideals—drives the United States' approach to space policy. In this context, imperialism operates through terror:

> Territorialization proceeds through terror, inscribing a certain space as a space of violence. Scholars of territory have drawn an etymology for the term not to terra, meaning land or terrain, but to terrēre, to frighten, so that territory and terrorism are profoundly linked in conceptions of imperial sovereignty.[261]

Fostering fear has always been an aspect of space policy. In January 2019, the Defense Intelligence Agency ("DIA") published a report, titled *Challenges to Security in Space*, identifying four threats to U.S. interests in space.[262] Pointing to China and Russia as the two most pressing threats, the DIA also cited Iran and North Korea as secondary challengers.[263] While

---

[255] *Imperialism*, ENCYCLOPEDIA BRITANNICA (2019), https://www.britannica.com/topic/imperialism.

[256] VLADIMIR ILLYCH LENIN, IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM 37 (1939).

[257] Brian Jones, *Imperialism the Highest State of Capitalism*, INT'L SOCIALIST REV. (Dec. 2005), http://www.isreview.org/issues/44/imperialism.shtml.

[258] *Id.*

[259] *Id.*

[260] Amiya Kumar Bagchi, *Towards a Correct Reading of Lenin's Theory of Imperialism*, 18 ECON. & POL. WKLY. PE-2, PE-2 (1983).

[261] MANU KARUKA, EMPIRE'S TRACKS 32 (2019).

[262] DEF. INTELLIGENCE AGENCY, CHALLENGES TO SECURITY IN SPACE (Jan. 2019), http://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Space_Threat_V14_020119_sm.pdf.

[263] *Id.*

delineating the existing capabilities of these States, the report focused on the possibility for future advancements that could negatively affect the United States. At no point does the DIA cite a single example of China, Russia, Iran, or North Korea using space technology against the United States, yet the report asserts that someday these states "could pose a threat to militaries using space-based services."[264] Harkening back to the fear-mongering techniques used to justify the arms and space race of the Cold War, the U.S. government's focus on the potentiality of threats and the need for pre-emptive safety re-entrenches space in imperialist discourse.

Unlike the earlier positioning of U.S. space policy as a defensive mechanism to protect American interests, Space Force makes space an inherently violent place.[265] The policy's introduction of offensive space operations sets into motion a policy of violence that demands other nations—such as Russia and China—to respond with violence.[266] Speaking at a military conference on March 2, 2019, Chief of the General Staff of the Russian Armed Forces, General Valery Gerasimov, told attendees that United States' actions regarding the new Space Force "may lead to an escalation of the military-political situation and emergence of new threats, to which Russia will have to respond with reciprocal and asymmetrical measures."[267] Thus, through the implementation of the Space Force, the United States effectively ensures the promulgation of the threats it claims to protect against, and opens space to become a forum of international violence.

In space, this imperialism works through territorialization, the process of "circumscribing places with territorial lines, within which imperial states enact monopolies on violence."[268] Militarization and weaponization of space operates as a force of territorialization, as it requires literal occupation of space by the technologies States launch into orbit.[269] As more and more objects are launched into space, space itself becomes more and more crowded and increases the likelihood for devastating collisions.[270] By this definition, the Space Force proposal functions as an imperialist tool. In

---

[264] *Id.*

[265] *See id.*

[266] *Id.* at 14.

[267] *U.S. Creating Pretexts for Militarization of Space — Russian General Staff*, TASS (Mar. 2, 2019), http://tass.com/defense/1047214 (quoting Valery Gerasimov) [hereinafter *Gerasimov Statement*].

[268] KARUKA, *supra* note 261, at 32.

[269] *Id.*

[270] Danielle Miller, *Calling Space Traffic Control: An Argument for Careful Consideration Before Granting Space Traffic Management Authorities*, 23 ILSA J. INT'L & COMP. L. 279, 279 (2017).

effect, the act of 'taking up space' with a State's space objects monopolizes a finite resource, now with the purpose of offensive weaponization.[271]

C. Out of this World Appropriation

American imperialism has largely been justified as a motive for 'national security,' an amorphous and widely utilized term.[272] Framed as a necessary step to ensure the safety and superiority of the United States, modern space policy expands the "shadow of empire" already present on Earth.[273] However, in addition to the limitations the Outer Space Treaty places on militarization and weaponization of space, the treaty also limits the rights of States to claim space as their own.[274]

Implemented in 1967, the Outer Space Treaty was established at a time of immense fear. The Cold War mentality framed space as a place where States could obtain the literal and metaphorical 'high ground' in global conflict.[275] The treaty marked a time where "the world's superpowers banded together" to ensure that no one could use space aggressively, not because they necessarily wanted space to be peaceful, but rather because they did not want their enemies achieving the upper hand.[276]

The Outer Space Treaty posits space as "a province of all mankind" a phrase which advances free access of space for all.[277] Article II declares that space is "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[278] Therefore, "States are thus barred from extending to outer space, and exercising within it, those rights that constitute attributes of territorial sovereignty."[279] This non-appropriation clause was intended as a "security interest by disincentivizing states from reenacting terrestrial 'land rushes' and taking boundary disputes—a traditional reason for armed conflict—into space."[280]

Colonialism, as a physical manifestation of imperialism through the domination of foreign land, has been largely renounced by the international

---

[271] SPACE FORCE PROPOSAL, *supra* note 5.

[272] Stephen Lendman, *Imperialism 101*, GLOBAL POLICY FORUM (Sept. 17, 2006), https://www.globalpolicy.org/component/content/article/155/26001.html.

[273] Redfield, *supra* note 249, at 795.

[274] Outer Space Treaty, *supra* note 13, at art. II.

[275] Garrett M. Graff, *The New Arms Race Threatening to Explode in Space*, WIRED (June 26, 2018), https://www.wired.com/story/new-arms-race-threatening-to-explode-in-space/.

[276] *Id.*

[277] Outer Space Treaty, *supra* note 13, at art. I.

[278] Outer Space Treaty, *supra* note 13, at art. II.

[279] David Tan, *Towards a New Regime for the Protection of Outer Space as the Province of All Mankind*, 25 YALE J. INT'L L. 145, 158 (2000).

[280] Blount, *supra* note 134, at 522.

community.[281] In 1945, 750 million people lived in territories subject to colonial rule.[282] As a proponent of decolonization, the U.N. authored landmark declarations, including the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which called for the end of colonial control.[283] By 2019, the number of colonized peoples had dropped to approximately two million.[284] This drastic decrease in the latter half of the 20th century demonstrates the efforts of States to limit the distinct features of imperialism, yet it fails to account for the new patterns that have since developed. Moreover, while post-colonialism may point to a single—albeit significant—reduction of imperialism, it does not serve as proof of the *absence* of imperialism.[285] This assertion is made true in the case of space policy, where, the pervasive effects of imperialism remain omnipresent despite the promulgation of international treaties expressly prohibiting such exercises of power.

Specifically, the non-appropriation clause of the Outer Space Treaty not only proscribes physical colonization of space, but broadly forbids "national appropriation . . . by any other means."[286] Through this clause, the treaty seeks to establish equitable access to space, yet this goal is rarely if ever accomplished. As the governing body of law in space, the Outer Space Treaty controls the geostationary orbit,[287] where the majority of the Earth's surveillance satellites are located.[288] Space in the geostationary orbit is a highly valued, and "allotted on a first-come-first-served basis making them virtually unattainable by less scientifically and economically advanced states."[289] The satellites in the geostationary orbit are typically operational

---

[281] Evan Schneider, *Decolonization*, UNITED NATIONS (2019), https://www.un.org/en/sections/issues-depth/decolonization/.

[282] *Decolonization*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/decolonization/index.html#:~:text=When%20the%20United%20Nations%20was,non%2Dself%2Dgoverning%20territories (last visited June 2, 2020).

[283] G.A. Res. 1514 (XV) at 66–67 (Dec. 14, 1960).

[284] Schneider, *supra* note 281.

[285] *Colonialism v. Imperialism*, INTERNATIONAL RELATIONS.ORG, Nov. 21, 2016, http://internationalrelations.org/colonialism-vs-imperialism/.

[286] Outer Space Treaty, *supra* note 13, at art. II.

[287] The geostationary or geosynchronous orbit is located 22,236 miles above Earth's surface. It is a high Earth orbit, allowing satellites to match the orbit of the Earth so that they are able to observe roughly the same area on Earth at all times. *See,* Elizabeth Howell, *What is a Geosynchronous Orbit*, SPACE.COM (Apr. 24, 2015), https://www.space.com/29222-geosynchronous-orbit.html.

[288] Matthew Thornburg, *Are the Non-Appropriation Principle and the Current Regulatory Regime Governing Geostationary Orbit Equitable for All of Earth's States?*, 40 MJIL (Nov. 2018), http://www.mjilonline.org/are-the-non-appropriation-principle-and-the-current-regulatory-regime-governing-geostationary-orbit-equitable-for-all-of-earths-states/.

[289] *Id.*

for approximately two decades, meaning that while they are in use, they effectively erase the ability of developing States to obtain a slot.[290]

Posited as a national security concern, America's interest in space extends far beyond the 'peaceful purposes' demarcated in the Outer Space Treaty. The campaign for superiority in space operates as a form of imperial nationalism, a term to describe "political discourse that is at one and the same time nationalist and imperialist."[291] Within the context of space, the aggressive space policy propounded by the United States reflects the desire to dominate space on the basis that the United States has an inherent right to control. Speaking at a meeting with the National Space Council, Trump analogized the creation of the Space Force not only with national security, but with national identity stating, "our destiny, beyond the Earth, is not only a matter of national identity, but a matter of national security. So important for our military. So important."[292] The focus on national superiority necessarily introduces a hierarchy in space—there can be only one 'leader.'

The Space Force proposal operates as an imperialist tool, and thus extends individual State sovereignty. Both through the physical taking up of space that occurs when States launch objects into outer space, and through the offensive weaponization of space presented in the Space Force legislation,[293] the U.S. space policy directly violates the Outer Space Treaty.

CONCLUSION

"But what is the thread of western civilization that distinguished its course in history? . . . It has to do with the preoccupation of western man with his outward command and effect on physical matter; it has to do with his sense of superiority in the natural order of things . . . resulting in his most persistent myth: that the universe was created for his own exclusive use"
– Arthur Erickson, 1972 [294]

---

[290] *Id.*

[291] Kevin Colclough, *Imperial Nationalism: Nationalism and the Empire in Late Nineteenth Century Scotland and British Canada*, 267 (2006) (unpublished Ph.D. dissertation, U. of Edinburgh) (on file with the U. of Edinburgh).

[292] Remarks on Signing a Memorandum on National Space Traffic Management Policy, 2018 DAILY COMP. PRES. DOC. 430, 3 (June 18, 2018).

[293] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 951-61.

[294] Arthur Erickson, Address to the Institute of Canadian Bankers (Oct. 16, 1972) https://www.arthurerickson.com/about-arthur-erickson/speeches/2/caption.

Addressing the nature of presidential power, former President Richard Nixon famously claimed, "when the president does it that means that it is not illegal."[295] Regardless of what President Nixon believed, presidential power is limited by the U.S. Constitution.[296] Similarly, the nation's worldwide power is limited by international law. As a party to the Outer Space Treaty, the United States is legally bound by all provisions within it.[297] Despite President Trump's lofty desires about the expansion of U.S. space policy via the establishment of the Space Force, his proposals must fall within the boundaries of the treaty.

In the age of Space Force, U.S. space policy goes rogue, violating modern conventions of international law. International relations scholars commonly define a 'rogue state' as "a country [] [that] is keen to deliberately and purposefully commit transgressions and break international laws and policies that are meant to ensure peace globally."[298] Under the guise of national security, and with the promise of national superiority, the United States routinely circumvents established international protocols meant to ensure fair and equitable international relations.

From its inception during the Cold War to the implementation of the Trump Administration's Space Force, the rhetoric surrounding outer space posits United States dominance as a crucial element of national security. The Trump Administration has taken a markedly heavy-handed approach to Space Policy, loudly extolling the need for American dominance in space. While non-aggressive militarization has been a long-accepted practice, the new Space Force proposal threatens to propel U.S. space policy into international illegality. Further, the passage of Space Force codifies a new American imperialism. Analyzed through the lens of the Frontier Thesis, American space policy reflects national efforts to exert power and influence over space, which in turn establishes a power dynamic. Per the non-appropriation clause of the Outer Space Treaty, actions of national appropriation are expressly unlawful.[299]

American statesman and politician Henry Kissinger famously said, "it is not often that nations learn from the past, even rarer that they draw the correct conclusions from it."[300] The prospect of space travel grew out of the

---

[295] James M. Naughton, *Nixon Says a President Can Order Illegal Actions Against Dissidents*, N.Y. TIMES, May 19, 1977, at A1.

[296] U.S. CONST. art. II, § 1.

[297] Steer, *supra* note 14, at 6.

[298] Brian Kasyoka Musili, *What is a Rogue State?*, WORLD ATLAS (Aug. 1, 2017), https://www.worldatlas.com/articles/what-is-a-rogue-state.html.

[299] Outer Space Treaty, *supra* note 13, at art. II.

[300] JEREMI SURI, HENRY KISSINGER & THE AMERICAN CENTURY (2007) (quoting Henry Kissinger).

Cold War. Early policy reflected not only the fear of Soviet eminence, but also the conviction that the United States was—and deserved to be—the global superpower. In part out of technological necessity, access to space is an undeniably important aspect of 21st century life. Even before the Trump Administration's Space Force passed, the international discourse surrounding this new branch of the military garnered heated responses, which only threaten to intensify as the plans to implement the new branch become a reality. Like the Cold War only three decades ago, the Space Force legislation may very well re-entrench a bipolar worldview, especially with states such as Russia who have not only a tumultuous history with the United States but have already spoken out against the new legislation.[301]

Denying the role historical precedent plays in modern policy decisions often leads to devastating consequences. While dynamic and ever-evolving, space law is rooted in a complicated past, and despite a new onslaught of modern concerns, the rhetoric surrounding U.S. space policy has remained entrenched in aggressive imperialist dicta. Taking into account the historical roots of modern domestic and international space law and reading the legislation through the framework of the Outer Space Treaty,[302] the enactment of the Space Force legislation violates international law, under both the peaceful purposes clause[303] and the non-appropriation clause.[304]

While the United States is no stranger to violations of international law,[305] the establishment of a multi-billion-dollar branch of the government to serve illegal goals threatens to push the international community to the brink. When representatives of American government—such as Senator Kaine—assert that there are "no rules right now,"[306] U.S. foreign policy re-entrenches itself in the erroneous notion that international law either does not exist or does not apply to the United States. Whether by adjudication in the ICJ or the U.N. Security Council, international embargo, or other

---

[301] *See Gerasimov Statement*, *supra* note 267.

[302] Outer Space Treaty, *supra* note 13, at art. I.

[303] *Id.* art. IV.

[304] *Id.* art. II.

[305] *See* Margot Patterson, *How the US Violates International Law in Plain Sight*, AMERICA MAGAZINE (Oct. 12, 2016), https://www.americamagazine.org/politics-society/2016/10/12/how-us-violates-international-law-plain-sight ("The terrorist attacks on Sept. 11, 2001, led the United States to embrace military force in a way it had not done before. Along with that came indefinite detention, torture and the kidnapping of terrorism suspects and their rendition to secret black-box sites. But some of those abuses go back before President George W. Bush, to the Clinton administration in the 1990s.").

[306] *Hearing to Receive Testimony on the Proposal to Establish a United States Space Force Before the S. Comm. on Armed Services*, 116th Cong. 1, 66–68 (2019).

means, the United States can and likely will be held accountable for this blatant display of global dominance if it continues on the present path.[307]

Alternatively, and perhaps more probable, the implementation of the Space Force will lead to worldwide proliferation of space weapons and military space programs. As American policymakers continue to display a historical blindness toward the Cold War politics, tensions between states will continue to escalate. Just weeks before Space Force was established, Russian President Vladimir Putin informed Russian national security officials that "[t]he situation requires us to pay increased attention to strengthening the orbital group, as well as the rocket and space industry as a whole."[308] The creation of the U.S. Space Force is reopening a door previously closed at the end of the Cold War, and has the ability to plunge the world back into that frigid face off.

---

[307] *See* David A. Koplow, *Indisputable Violations: What Happens When the United States*
Unambiguously Breaches a Treaty, 37 FLETCHER F. WORLD AFF. 53, 54–55 (2013).

[308] Holly Elligatt, *Putin Fears the U.S. and NATO are Militarizing Space and Russia is Right to Worry, Experts Say*, CNBC (Dec. 5, 2019), https://www.cnbc.com/2019/12/05/nato-in-space-putin-is-worried-about-the-militarization-of-space.html.