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Dear Reader,

It is with great joy that I present to you the 2018 issue of the University of Chicago Journal of Human Rights (UCJHR). The UCJHR was founded in 2016 by several board members of the University of Chicago Amnesty International Chapter* seeking to provide a forum for students to read, research, and publish work in the ever-evolving realm of human rights. This collection of pieces demonstrates the capacity of human rights – a field better defined by its versatile and interdisciplinary nature than by any standard set of definitions – to serve as a lens through which to examine diverse issues of human dignity and justice. No single human rights issue exists in a vacuum, but rather configures into a dynamic fabric of legal frameworks, moral philosophies, and global conversations.

In the questions they explore and the narratives they tell, the pieces included in our third-annual journal bring to life such frameworks, philosophies, and conversations. Alex Ding begins our issue by weighing in on Indigenous protests against the Dakota Access Pipeline, situating the struggle within a broader context of United States settler dispossession. Next, Ayling Dominguez investigates reconstructed borders encountered by immigrants within the United States healthcare system, embodying her arguments within the case of one undocumented Mexican native living in New York City. Sophie Desch moves our focus to felony disenfranchisement, an issue she links to human rights standards endorsed by the United States government as well as research about the impact of voter non-participation on resource allocation to marginalized communities. Then, Sanjana Sarathy takes us to Nepal, the site of her issue of focus: a deeply entrenched ritual called Chaupadi in which menstruating women are isolated to small huts or sheds, often characterized by unhealthy living conditions, outside of the family home. Jessica Law directs our attention back to immigrant rights in the United States, honing in on the immigration detention center as a locus of examination and site at which to interrogate the distinction between civil law and criminal law. Samuel Miller closes the issue with reflections on the internalization of human rights norms in Islamic states, founding his discussion upon the core human rights concerns of women’s status, torture prohibitions, and rights involving religious liberty.

Our authors each illuminate important issues within the dynamic realm of human rights. Our editors have spent the past year in thoughtful dialogue and debate to bring these articles to fruition in their finest possible form. I hope that the finished product of those efforts engages both hearts and minds, and sparks further discussion and action on concerns raised within its pages and beyond them.

Please feel free to continue the conversation by contacting us at uchijournalofhumanrights@gmail.com. Until then, happy reading!

Sincerely,
Tamar Honig

*The opinions of the authors expressed in this journal do not represent the beliefs of Amnesty International.
Last April, Indigenous water protectors at Standing Rock Sioux Indian Reservation were engaged in a “profoundly anti-capitalist” struggle with corporate power, writes Nick Estes in Red Nation, because, “Native bodies stand between corporations and their money”\(^1\). Yet Indigenous scholars and activists, including Estes, have argued that while the Dakota Access Pipeline (DAPL) is certainly about capital and its logics, #NoDAPL\(^2\) should be understood first and foremost as a right to land and to life: a struggle for Indigenous sovereignty and Native liberation within the ongoing political project of the American liberal settler state. “Too few people,” writes Indigenous activist Kelly Hayes in Truthout, “start from a place of naming that we, as Indigenous people, have a right to defend our water and our lives.” Instead, according to Hayes, climate change “in a very broad sense” has become the “center of conversation” around the Dakota Access Pipeline\(^3\). In short, for both Hayes and Estes, established and generalizable liberal discourses on environmental rights do not adequately capture the heart of the #NoDAPL struggle: a claim to Indigenous peoples’ fundamental right to survive and thrive.

In light of Hayes’ and Estes’ interventions, I ask: what gets lost when we discuss #NoDAPL as merely an environmental or anti-corporate issue buried within the broad sweep of progressive narratives around anti-capitalism, climate change, or human rights? How might we theorize #NoDAPL as not just an anti-capitalist struggle steeped in legible rights-based appeals, but also an anti-colonial struggle within specific contemporary settler political regimes? What might that shift reveal about settler modes of governance? In other terms, how does Hayes’ rights-based appeal—the “right to defend our water and our lives”—firmly situate itself within and against logics of settler colonialism\(^4\), and how might such a move open up modes of resistance, political subjectivity, and “refusal” for Indigenous water protectors at Standing Rock and beyond\(^5\)?

In this essay, I situate #NoDAPL within a wider context of U.S. settler dispossession and contemporary liberal democratic state governance. I argue that by shifting our analytic focus from the capital-relation to the settler colonial-relation, we might develop a more critical discourse around the Dakota Access Pipeline protests vis-à-vis human rights that foregrounds Indigenous struggle and subjectivities of Indigenous peoples. Through an evaluation of Marx’s theory of primitive accumulation, I further argue that understanding capital in light of settler colonialism enables us to trace the specific set of eliminatory strategies and eliminatory logics at play with #NoDAPL. Drawing from key texts in Native Studies and Settler Colonial Studies, I argue universal liberal discourses on human rights obscure a more fundamental and a priori claim: Indigenous peoples’ fundamental right to land and to life. In doing so, I demonstrate how the #NoDAPL grassroots movement informs a politics of resistance that speaks to the radical possibilities of Indigenous organizing in contemporary liberal democracies.

### I. Two Accounts? Comparing ‘Primitive Accumulation’ and Settler Colonial Accumulation

In this section, I place Marx’s theorization of capitalist dispossession in conversation with scholars

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\(^2\) The Dakota Access Pipeline protests, also known by the hashtag #NoDAPL, are grassroots movements that began in early 2016 in reaction to the approved construction of Energy Transfer Partners’ Dakota Access Pipeline in the northern United States.


\(^4\) The concept of settler colonialism has re-emerged lately in Anthropology, Native Studies, American Studies and related disciplines. Scholars call it a structure that “endures” (Wolfe 2006) in which the “past is present” (Salamanca 2012) and use it as an alternative way of referring to some contemporary liberal democratic states (Simpson 2014).

of Native Studies. I argue Marxist theories of capitalist accumulation do not fully take into account the particularities of settler practices of dispossession.

In Marx’s *Capital*, capitalist dispossession is most clearly articulated through the theory of “primitive accumulation”. Primitive accumulation, for Marx, refers to a historical process in which non-capitalist societies are transformed into capitalist formations through coercive and often colonial violence. It is through this “originary” and initial dispossession that non-capitalist societies become societies in which wage labor and surplus value come to organize political economies. Primitive accumulation, then, describes the process by which Indigenous peoples became dispossessed of their land in order to make way for capitalist accumulation.

Settler Colonial Studies and Native Studies are two disciplines broadly concerned with theorizing logics of dispossession, capital, and resource exploitation. Some scholars forcefully take up Marxist accounts to productively describe U.S. modes of colonial violence. Other scholars insist there are significant distinctions between primitive accumulation and settler colonial practices of dispossession. Using Indigenous scholar Glen Coulthard in *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* as my guide, I ask: How might Native Studies scholars revise, extend, or destabilize Marxist analytic frameworks to evaluate the specific modes of primitive accumulation within settler-colonial states in ways that might be of more critical use to understanding the Dakota Access Pipeline standoff?

Nick Estes’ insight in *Red Nation* is a helpful entry point. For Estes, capitalist accumulation in Indigenous communities goes beyond the expropriation of Native labor into a new proletariat class. Instead, settler colonial dispossession represents an ongoing “exploitation of our river and lands”. For Estes and other scholars, a heightened focus on land—not merely labor—represents a central paradigmatic shift that signals a specific kind of dispossession within settler colonial projects.

Marx, in contrast, writes in *Capital* that once the expropriation of agricultural populations from the land was complete, the question of land was more or less closed. For Marx, this new class of Indigenous proletariat engaged in wage labor marked a distinct and historical transformation from *primitive accumulation to capitalist accumulation proper*.

Patrick Wolfe’s brilliant monograph “Settler Colonialism and the Elimination of the Native” refutes Marx’s historical account. Wolfe first demonstrates that settler colonialism is a land-centered project: “Land is life—or, at least, land is necessary for life. Thus contests for land can be—indeed, often are—contests for life”. He continues: “territoriality is… settler colonialism’s specific, irreducible element”.

In focusing on land, Wolfe argues that the originary violence that Marx saw as marking an epochal transformation from primitive to capitalist accumulation was not merely the preconditions of capitalist accumulation, but rather the *ongoing conditions of capitalism’s very existence and reproduction*. Such conditions Wolfe terms “the logic of elimination,” which he argues has become “an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence”. Invasion, for Wolfe, is not an event; invasion is a structure that “endures” in which the “past is [made] present”.

Following Wolfe, we might reframe the contemporary struggles of Indigenous peoples like those at #NoDAPL beyond Marxist accounts of a proletariat struggle against modern bourgeois society towards a historicized understanding of #NoDAPL as an enduring and ongoing contestation over land and against elimination.

Further, Wolfe reveals an insightful structural contradiction that is constitutive to settler colonialism: that settler colonialism is, in part, a failed project. As Audra Simpson argues in *Settlement’s Secret*: “the condition of Indigeneity in North America is to have survived this acquisitive and genocidal process and thus have called up the failure of the project itself”. In other terms, the “logic of elimination” has failed to eliminate Indigeneity in North America, and therefore, the simple fact

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2 Ibid., 508.
3 Ibid., 507.
4 Idem.
5 Marx, 510.
of Indigenous existence points to the failure of settler colonialism at the same time as it reveals the continuous nature of Indigenous dispossession.

If, as Wolfe and Simpson argue, primitive accumulation in settler colonial contexts is not just an initial violence or historical starting point, but rather a constitutive and continuous character of colonial and capitalist society in the present, how does the “structure of invasion” maintain and reinvent itself in liberal democracies, where originary state violence against Indigenous populations is thought to be an era of the past, settled or complete?

II. Logics of Elimination in Multicultural Liberal Democracies

Starting from the claim that settler colonialism is, in part, a failed or unsettled project, in this section, I argue that the “eliminatory strategies” of contemporary liberal democracies like the United States and Canada represent a historically continuous, but divergent form of state violence as compared to non-colonial forms of state violence and earlier forms of settler colonial violence. I then trace how such ‘eliminatory strategies’ are deployed at Standing Rock. In short, I ask: how has the rise of ostensibly multicultural and liberal democracies, equipped with rhetorics of inclusion and human rights, changed the ‘eliminatory strategies,’ forms of state violence, and biopolitical management enacted by contemporary settler states upon Indigenous peoples today?

Historically, state violence has been part-and-parcel to processes of dispossession. Violence, as theorized by Marx, was a key component to the expropriation of Indigenous lands in pre-capitalist formations. Primitive accumulation, for Marx, was a very violent process in which capitalist modes of production are introduced “dripping with blood and dirt”. Yet primitive accumulation and the notion of originary violence does not adequately capture the manifold ways capitalism and colonialism operate today in contemporary multicultural liberal democracies, especially with regards to state violence and coercion.

This is not to say that overt and deadly state violence is precluded from liberal democracy’s treatment of Indigenous peoples. As portrayed by television broadcasts, intense state violence has emerged from Standing Rock, where media images of militarized police brutality, pepper spray, rubber bullets, and attack dogs have documented the continued abuse received by Indigenous peoples and allies. “Political violence,” writes Estes, “[is] a tactic of state repression” for both “water protectors who engage in nonviolent direct action to disrupt the construction of the pipeline as well as those not engaged in direct actions”.

For both U.S. and Canadian settler societies, overt and visceral state violence is not the only means by which states enact harm on their Indigenous subjects. But what does state violence look like within multicultural liberal democracies, who are committed at least rhetorically to state benevolence—enacting state care and recognition upon Indigenous peoples? Estes points us to one such mode of enactment: constant surveillance. The state no longer relies merely on visceral force, but is engaged in a whole host of practices and eliminatory strategies that respond to the purported commitments of multicultural liberal democracies, including the deployment of what Audra Simpson calls in the Canadian settler context a “politics of recognition”.

In Mohawk Interruptus: Political Life Across the Borders of Settler States, Audra Simpson argues that the “territorial project” of settler colonialism that includes the accumulation of land has moved “through time to become, in liberal parlance, the ‘problem of difference’”. Liberal democracies like Canada have over the last thirty years, increasingly framed the self-determination efforts of Indigenous peoples in Canada within the register of “recognition.” By politics of recognition, Simpson is referring to the now vast modes of recognition-based strategies within liberal multiculturalism that seek to manage Indigenous claims to self-determination with settler sovereignty by accepting and accounting for Indigenous identities and “difference” within the pluralist settler state. The politics of recognition, while less viscerally violent from previous strategies of settler elimination, is no less violent; indeed, such elision and assimilation of difference enacts real violence upon First Nations peoples in Canada, but is merely made more palatable under an ostensibly tolerant liberal democracy where “recognition is a multicultural solution” and elision of difference is the “trick of toleration”.

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1 Marx, 538.
2 Idem.
3 Idem.
4 Idem.
5 Idem.
At Standing Rock, the U.S. government in April “allowed” the presence of the encampment per the Army Corps of Engineers. Estes documents this exchange, writing that “the #NoDAPL encampment, in an exercise in Native sovereignty, sits atop lands claimed by the Corps, who only recently ‘permitted’ the camp’s presence.” “Permitted” here is used by Estes in quotes, and rightly so. Indigenous people have always had a right to existence, but within the power configurations of the U.S. settler state that seeks to assert itself as having the authority to “permit” and therefore stake a particular propriety of ownership over the land, this right is reframed within liberal principles and confers on the state the power to become the ultimate arbitrator on matters of recognition and sovereignty. This is why “political recognition is a technique of settler governance,” writes Simpson.1 The authority to grant “permission” by the U.S. settler state to recognize the Standing Rock Sioux Indians’ right to exist on the camp is false because, as Simpson argues, Indigenous sovereignty precedes—and therefore could not come from—a politics of recognition. The structural contexts within which recognition claims are articulated and judged are decidedly not neutral: they are deeply inflected with settler colonial power.

III. Conclusion

In conclusion, writers should foreground Native struggles and the settler colonial context when discussing #NoDAPL. Framing #NoDAPL broadly in the registers of anti-capitalism or liberal discourses on human rights obscures the Indigenous peoples’ fundamental demands for Native self-determination, and further, risks upholding a politics of recognition deployed by settler states to manage the “problem” of Indigenous difference. Such a politics, as I have argued, represent a continuation of Wolfe’s “logics of elimination” that are constitutive to the ongoing conditions of settler violence.

Nick Estes writes: “The colonial state does not possess, and never has possessed, the moral high ground.” This is true, and has always been true. Indigenous people have always had a right to exist and a right to collective self-determination over their land. Blanketing #NoDAPL into the apparatus of narratives around anti-capitalism or liberal notions of human rights not only short-changes the efforts of water protectors at Standing Rock, but also risks replicating the very power dynamics that Indigenous peoples have struggled against for centuries. Instead #NoDAPL advocates and water protectors, especially non-Indigenous advocates, should be clear to center Indigenous perspectives. This includes the ability for Indigenous people to make rights-based appeals that extend outside of normative and legible liberal discourse of human rights and Indigenous peoples’ rights to self-determination beyond settler terms of recognition. #NoDAPL water protectors are making such claims: “Water is Life,” a collective claim to existence, a right to land and to life that opens up futures for Indigenous people to both survive and even thrive.

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1 Idem.
Border spectacle, a concept presented by Nicholas de Genova, allows us to view borders as more than just lines on a map or as a means of separating nations; they can and should be viewed as spaces of interaction, collaboration, and contestation which bring about the classification and filtering of peoples.\(^1\) Thus, it becomes easier to understand how physical borders are recreated in everyday life. The notion of illegality, in particular, and citizenship statuses affect migrants' experiences, encounters, and claims to rights and resources. These labels, incidences, and feelings become internalized by migrants. In having this effect, borders impact personal health and wellbeing. This paper presents the story of an undocumented immigrant living in New York City, navigating the reconstructed borders found within the U.S. healthcare system. Upon analyzing this particular narrative, I argue that immigration practices have a direct impact on physical and mental health, as well as an indirect impact by way of altered and limited decision-making. The results of hampered decision-making are not only confined to choices made surrounding one's health, but go so far as to impact the possibility and likelihood of an immigrant's repatriation. With muddled discourse surrounding the “right to health,” and the pre-conceived, racially-biased notions of deservingness permeating the healthcare sector, personal narratives often get drowned out — particularly those of undocumented immigrants. This paper aims to bring to light the distinct predicaments that an undocumented immigrant may face in trying to manage his/her health, in the hopes of overcoming misconstrued perceptions and prompting meaningful resolutions.

The subject of this paper is Enrique Martínez, a Mexican native who immigrated to the United States without authorization in 1985. Since then, he worked in various sectors, ranging from construction to retail, until landing a job as a backroom associate and stocker in Gourmet Garage, a privately held mini-chain of specialty food markets in New York, where he has worked now for over 15 years. Upon first glance, one might not pick up on the ways in which immigration practices influenced Enrique’s career trajectory or health, but such is often the case when dealing with the results of systemic inequality and racial prejudice in the U.S. labor system. Seth M. Holmes, a cultural and medical anthropologist and physician, provides a detailed account of the ethnicity-citizenship-labor hierarchy that migrant workers on the Tanaka farm often faced. He asserts:

“the more Mexican and the more ‘indigenous’ one is perceived to be, the more psychologically stressful, physically strenuous, and dangerous one’s job... the farther down the ladder from Anglo-American U.S. citizen to undocumented indigenous Mexican one is positioned, the more physically taxing the work, the more exposure to weather and pesticides, the more fear of the government, and the less control over one’s own time.”\(^2\)

Holmes points out that dangerous working conditions, fear, overwork, and lack of control or agency extend beyond the experiences of migrant workers in U.S. agriculture, and can be applied to describe migrant work in nearly all fields — from construction\(^3\) to garment factories, and service to domestic work.\(^4\)

In his first construction job as a migrant worker,

\(^1\) De Genova, Nicholas, et al. 2014. New Keywords: Migration and Borders. Cultural Studies 29(1): p. 55


Enrique suffered a significant injury when he fell down several stories of scaffolding and onto the pavement below. Due to a lack of proper safety equipment, training, and tethers, in combination with other dangerous working conditions, Enrique sustained a concussion and years later, now attributes a current eye impairment to that incident. For lack of worker’s compensation, which certainly should have been doled out in this instance, Enrique was not able to afford proper medical attention and continued care. While getting injured on the job is no unique tragedy, Enrique’s status as an undocumented immigrant magnified the negative ramifications ten-fold. Undocumented workers are regularly exploited due to managerial knowledge of how dependent their precarious financial and citizenship status makes them combined with the workers’ fear of being reported to U.S. Immigration and Customs Enforcement (ICE). In other words, managers see no need to provide undocumented immigrant workers with adequate healthcare or employee benefits. Like so many other undocumented workers who face hardship and adversity in the workplace, Enrique stayed silent and never pursued legal action or recourse.

Here, one can see the physical health effects and ramifications of citizenship statuses meant to parcel out state services, protections, and resources in a usually discriminatory manner. Economic necessity and fear of removal from the workplace and country keep undocumented migrant adult and youth workers alike quiet in cases of exploitation, as well as docile and efficient on the job. Thus, Enrique continues to experience the physical effects of having to take on physically strenuous and taxing jobs. In his interview, he speaks at length about the tendon pains he endures from having to perform heavy lifting at Gourmet Garage.

Physical health effects aside, undocumented immigrant status and exploitative working conditions might also increase mental health stresses. Holmes writes of Crescencio, an indigenous Triqui migrant farmworker who experienced severe headaches that would worsen with each racist comment and instance of verbal and emotional violence from his supervisor. Enrique, too, would detail and exhibit signs of emotional stress upon the mention of demeaning remarks from President Trump, or the injustice he suffered at work in terms of the lack of sick days or overtime pay he was owed but never granted. Moreover, I would argue that the prejudicial mental health effects and acts of structural violence immigrants face in the U.S. are more difficult to address as a result of normalized racist sentiment and the inequitable labor system practices that result from it.

For instance, Holmes writes about how “the public gaze – especially that of the wealthy public who shop at elite grocery stores” – Gourmet Garage being one of them — “and live in exclusive neighborhoods – is trained away and spatially distanced from the migrant farmworkers.” I was struck by the similarities between Holmes’ observations and Enrique’s working conditions. Though he did not harp on this in his interview, I view Enrique’s job placement to be deliberate; he was placed in the backroom, loading and docking area, transporting boxes of produce and stocking shelves, always intended to be as out of sight as possible from affluent customers. It was not for lack of English skill that he was placed in these positions either, because he does have some knowledge and could have reasonably been placed as a cashier or greeter, especially after his many years with the company and store.

There is a distinct act of oppression at play here, exhibited both in Enrique’s placement, as well as in his lack of upward mobility in the job. Companies might actively keep undocumented workers from storefront jobs and in more secluded positions because they are the more strenuous jobs and undocumented migrant workers will often take whatever job they can get, no matter how physically taxing, and because displaying worker exploitation in the storefront is not a particularly strategic business tactic. Storefront job positions come with greater customer and social interaction, workplace skill development, and job satisfaction. Thus, being in the backroom might increase mental health stresses not only as a consequence of frustration with job exploitation but also for lack of socialization on the job and satisfaction levels, not to mention lack of recourse to improve

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working conditions.

Still, mental health effects are often harder to trace, particularly in Latinx/Mexican/migrant culture where mental health issues are often dismissed and invalidated, due in large part to machismo — a Latin American cultural concept of exaggerated masculinity, strength, dominance, and aggression. Not only does machismo lead to higher reported levels of stress and depression, but researchers have proposed that more investigation be done surrounding variance on the effects of masculine ideology across cultural groups. Future research should analyze not only how machismo influences higher levels of stress and depression, but also should explore how Mexican male migrants are urged to hide their mental health issues for lack of access to healthcare alongside lack of societal inclusion and acceptance — conditions that force them to connect more with their cultural heritage, including this masculine ideology.

It is imperative to explore the indirect effects of the complex relationship between immigration, health, and decision-making on migrants’ lives, as well. My line of argumentation in this case is that immigration directly impacts health; the health effects sustained then influence and usually limit decision-making for health matters as well as greater life choices. Therefore, immigration and borders indirectly yet thoroughly and regularly regulate and impede decision-making, stripping away a certain level of agency and independence from migrants. It should be noted that the decision-making that is impacted is not limited to choices surrounding the migrant’s health, but also affects determinations surrounding different aspects of their life including their decision to return or continue their immigration journey.

In order to understand the indirect manner in which immigration and borders impact health, one must keep in mind the social structures and attitudes surrounding these matters. Borders allow states to separate and classify more than just land, but people, as well. Feelings of belonging, otherness, and notions of illegality begin to develop, and nations take advantage of these labels to apportion resources and rights to individuals, generally granting more to their constituents and citizens than to migrants and refugees. Sarah S. Willen comprehensively writes, “Put bluntly, neither the state nor society finds unauthorized im/migrants’ health, or their lives, particularly deserving of attention or concern.”

It is this type of social and institutional disregard and inequity when it comes to migrants’ health, particularly undocumented migrants, that pushes them to seek out informal parallel health services. Many of the alternative healthcare services that immigrants seek out are lacking in effectiveness and safety.

As an undocumented immigrant, Enrique does not own health insurance and thereby cannot access affordable healthcare. In his interview, he discusses his health by describing one of the ways he dealt with his foot pain: using homemade remedies that he found online, such as cutting onions in half and putting them on the bottoms of his feet overnight. Those remedies worked, but only for a day or two before the pain returned, raising the question of effectiveness.

Things changed when Enrique met with a curandero: a traditional native healer who uses home remedies to cure illnesses and injuries. The manner in which he found the curandero also demonstrates a lack of agency or control when it comes to healthcare for undocumented immigrants, as the opportunity simply fell into his lap when he was complaining about his tendon pain to a fellow immigrant co-worker. For migrants without familial or social connections in the country of arrival, it can be difficult to succeed or even just subsist. Though Enrique has been here for several decades, he has never quite established himself in the migrant network. But due to the fact that his co-worker just so happened to know a curandero who heals tendon pain, Enrique was able to make use of parallel healthcare services.

Perhaps as a result of the internalization of labels and illegality, undocumented migrants do not necessarily see the state or government as being responsible for their care, which is why they seek out parallel services. This speaks to the vastly misconstrued idea of deservingness. While the so-called deservingness of migrants, particularly undocumented, is often called into question, not enough effort is extended to allow undocumented migrants to access and willingly pay for their healthcare. Willen regards the concept in a similar fashion, stating on her findings of unauthorized im/migrants in Tel Aviv, Israel, that the majority of her survey’s respondents did not expect government handouts, but difficult life circumstances prevented them from

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going against the im/migrant “freeloader” stereotype.\(^1\) Many would purchase health insurance if available, but undocumented immigrants are currently ineligible to do so in the United States, as well as in many other countries around the world.\(^2\)

Enrique paid $60 for his one-time appointment with the *curandero*, who he mentions wanting to see again the following week. The average monthly health insurance cost for an individual in 2017 is $393.\(^3\) Although Enrique’s *curandero* would only cost around $240 if he were to see him each week, family members and friends would very likely help cover the costs of insurance in order to ensure that he has access to medical care. Still, under current immigration practices and legislation, it is not possible for undocumented immigrants to purchase their own healthcare, nor can it be covered under the insurance of a family member or friend with citizenship. “Undocumented immigrants are excluded entirely from the Affordable Care Act’s various individual insurance provisions, as are some individuals with temporary status (e.g., TPS or DACA).”\(^4\) Thus undocumented immigrants have no other option but to seek out alternative healthcare services.

Some might argue that we only criticize parallel healthcare systems because we are looking at them from a Western-medicine perspective, and that we should not interfere with migrants’ health because it is so closely tied to their culture, oftentimes citing these indigenous *curanderos* as an example. I would push back against that overextended cultural relativism argument because culture does not necessarily have to be sacrificed by the simple option and easy access to Western healthcare systems. Immigrants, particularly undocumented immigrants who are excluded from the Affordable Care Act and other relevant healthcare legislation,\(^5\) should have the right (and viable options to exercise that right) to a more formal, state run healthcare system if they so please. Luz Vasquez, Enrique’s late wife, who was also undocumented, had cancer and waited too long to go to the hospital for her symptoms due to fear of deportation, not out of a desire to preserve her culture through the use of a *curandero*. Jonathan M. Metzl and Helena Hansen put it best when describing a sort of cultural competency in the healthcare system that would help health workers hone in on the social injustices and obstacles to equitable healthcare their patients may face, without over-emphasizing culture in a biased or negative manner, allowing for positive structural change.\(^6\)

For many immigrants navigating reconstructed borders in healthcare systems across the United States and the world at large, this change and greater medical awareness and recognition of their circumstances cannot come soon enough.

Decisions regarding parallel healthcare services are just one of the ways in which immigration and borders indirectly affect health. If and when a migrant’s health suffers due to their experiences with immigration practices and recreated borders, not only are their decisions about where to seek medical help impacted, but so are their general and greater life decisions. In his interview, Enrique revealed his wish to return to Mexico soon, and though he did not make the direct connection — i.e. he did not state, “I want to go home because of my tendon pains and the many obstacles I have encountered here in the U.S. as an immigrant,” — several of his individual statements came together in a way that highlighted the subliminal yet serious impact personal health can have on decision-making. For instance:

> “Yea, that takes away the pain a little bit. But my tendons are already messed up beyond repair, those are never going to get better,”
> “I think I’m just going to see how long I can last here,”
> “I had to wait until he [the curandero] got back from Mexico. You know, it’s not necessary for them to be doctors over there in Mexico... When I was talking over the phone with my sister she told me that I should go back home so that they

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5 Castañeda, Heide, Seth Holmes, et al. 2015. Immigration as a social determinant of health. *Annual Review of Public Health* 36:


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can cure me.”

All of the aforementioned (translated) interview statements divulge his fatigue resulting from having worked so many years in hard labor jobs, a disillusion of his current living conditions and the question of how long he can continue to put up with the challenges he faces, a desire for a healthcare system that is easier for him to maneuver, as well as a simple and overall want for long-term, sustainable health and happiness. Although it may appear as though Enrique has the agency and independence to ultimately decide and contemplate these matters of his own accord, one cannot help but wonder whether he would have contemplated the decision to return if it weren’t for having to confront recreated borders and systemic inequality in his everyday experiences in the U.S.

While many nativists and nationalists often call for the assimilation of immigrants and refugees, which would entail immigrants “exchanging their ethnic and cultural behaviours for the practices and norms of the receiving society,” the social systems and immigration practices that states themselves impose restrict immigrants’ and refugees’ ability to assimilate via their health and decision-making. If, for instance, they are not allowed to purchase health insurance, they will not have access to traditional Western medicine and hospitals, and are forced to revert to more cultural and traditional healing practices and service providers.

Much of the current literature on migrants’ and refugees’ wishes to return to their countries of origin focuses on social ties, employment or wages, gender, education level and language proficiency, and amount of contact with native population. Throughout this paper, I have shown that a key factor is being left out of the research on this topic of return and resettlement: that of the migrant or refugee’s health. I have also problematized the right to health as the right to decision-making and agency. Recounting personal narratives such as that of Enrique Martínez and other undocumented immigrants, a severely disadvantaged subset of migrants when it comes to healthcare access and coverage, helps break through the puzzling, divided, partisan, and abstract discussions surrounding the “right to health,” and allows us to see the real-life effects of prejudiced immigrant and healthcare legislation. Undocumented migrants need greater healthcare coverage and to be able to access it without fear of deportation or of encountering recreated borders in the hospital or pharmacy. Furthermore, for migrants who are documented and have some claim to rights, credibility needs to be granted so that their health concerns are heard and their ‘deservingness’ remains unquestioned.

Many claim that the U.S. healthcare system is overburdened as is with problems that non-immigrant Americans face. This reason is often cited as rationale for excluding immigrants from gaining access to the system. I propose that priority be placed on finding solutions to the problems of accessibility and navigation that immigrants of all statuses face. Solutions that benefit the weaker members of our society will also benefit the more privileged. In order to even approach such an idea, however, greater awareness of im/migrant encounters and experiences with healthcare systems must be cultivated. Undocumented immigrants, especially, often have their experiences and obstacles sidelined, intentionally so in increasingly hostile political climates. Thus, the stories and difficulties of undocumented immigrants navigating healthcare systems must be brought to light, with an emphasis on their physical and emotional resilience, as well as their willingness to demonstrate agency in decisions if granted the chance. Such actions and efforts would work towards granting migrants more of a voice and leveled playing field within the border spectacle, and fewer recreated borders to face in their day-to-day lives.

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As Americans, we pride ourselves on our nation’s commitment to democracy and equality. They are the basis of many of our country’s foundational texts and the tenets upon which we attempt to structure our civil society. However, within our electoral system, there remains a glaring injustice that prevents 6.1 million otherwise eligible voters from participating in state and national elections — that is, felony disenfranchisement. Felony disenfranchisement not only prevents citizens from partaking in a process which is critical to maintaining democracy, but places a disproportionate burden on the African-American community, as 1 in 13 African Americans of voting age are barred from voting, a rate which is more than 4 times that of the rest of the American public.

It is important to note that this discrepancy is not some statistical anomaly, but a consequence of inherently racist policies enacted during the Reconstruction period following the Civil War with the express purpose of disenfranchising the newly liberated African-American population — a policy which produced legislation and consequent racial injustices that persist to the present day.

Although previous research has explored this issue primarily as a civil rights concern, this article seeks to frame felony disenfranchisement as a human rights issue as well by linking it to both the standard for human rights endorsed by the U.S. government and a body of research concerned with the effect of voter non-participation on the allocation of vital resources to vulnerable communities. In this paper, I will first proceed by tracing the historical origins and development of felony disenfranchisement from Reconstruction to the present. Secondly, I will examine implications of this policy in terms of the effect of the resulting voting impact on the ability of low-income communities to advocate for policies ensuring basic human needs. In the third section, I wish to examine the relationship between ex-felon voting restrictions and human rights through several constituent parts of the International Bill of Human Rights (a 1948 U.N. Resolution which the United States voted in favor of) in order to elucidate the connection between felon disenfranchisement and the basic principles of human rights. Lastly, I will explore potential reforms and their limitations.

1. Felony Disenfranchisement: A Brief History

The concept of disenfranchisement on account of criminal conviction is not a new one. It can be traced back to the idea of “Civil Death” present in both Ancient Athens and Ancient Rome, which influenced the Germanic and Anglo-Saxon legal traditions for centuries to come. This principle, then enshrined in British Common Law, was adopted by the American colonies where it persisted even after the Revolutionary War. Kentucky became the first state in 1792 to revoke suffrage for those who had been “convicted of bribery, perjury, forgery, or other high crimes and misdemeanors,” a sentiment adopted by 22 other states between 1793 and 1857. This sentiment was eventually incorporated into the 14th Amendment, which states “the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, [cannot be] denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime”.  

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In the fifteen years following the Civil War, the 13th, 14th, and 15th amendments granted freedom, citizenship, and universal male suffrage to the recently freed black population. However, many of these state laws were reworked, with at least 13 states extending the disenfranchisement laws from a small handful of crimes to all felonies. This broadened the scope of disenfranchisement enormously.\(^1\) Despite the fact that these new laws appeared racially neutral on the surface, there was a distinct racial slant to the new legislation. According to Manza and Uggen “[w]hen African Americans [made] up a larger proportion of the state’s prison population, that state [was] significantly more likely to adopt or extend felon disenfranchisement,” whereas states with smaller proportions of black convicts were far more likely to abolish felon disenfranchisement laws in the following decades.\(^2\) For example, during Mississippi’s 1890 Constitutional Convention, a set of felony disenfranchisement laws were enacted which served as a model for the constitutions of other states in the coming years. These laws narrowed disenfranchisement to a specific list of crimes that the delegates believed black men were most likely to commit, including bigamy, forgery, burglary, arson, and perjury,\(^3\) while excluding more serious charges such as robbery, murders, and other crimes for which violence was the principal characteristic.\(^4\) This, coupled with the passage of “an array of interlocking laws essentially intended to criminalize black life” — a set of standards which would rarely, if ever, be enforced on whites, according to Reconstruction historian Douglas Blackmon — led to an increase in the number of African-American men convicted and subsequently stripped of voting rights.\(^5\) Some states, such as Florida, further undermined the voting power of the recently freed population by instating a “legislative apportionment scheme that weakened political representation from densely populated black counties.”\(^6\)

These efforts, according to the American Journal of Sociology, “offered a tangible response to the threat of new African-American voters that would help preserve the existing racial hierarchies.”\(^7\) It was a goal made explicit by many of the legislators drafting the new provisions in myriad states. For example, one moderate leader from Florida claimed that he had prevented the state from becoming “niggerized” with the passage of the state constitution which expanded the offenses to which felony disenfranchisement could be applied.\(^8\) Yet another legislator from the state went on to claim thirteen years later that the criminal disenfranchisement laws were implemented to reduce the size of the black voting base.\(^9\) And perhaps most troublingly, the President of Alabama’s 1901 Constitutional Convention stated that they had expanded felon disenfranchisement “within the limits imposed by the Federal Constitution to establish white supremacy.”\(^10\)

This was not merely a problem confined to Southern states as Northern legislators echoed startlingly similar attitudes. For example, during New York’s Constitutional Convention of 1867, when asked about measures that would extend the franchise to a larger number of African Americans, Delegate H.C. Murphy responded that such proposals would “confound the races, and destroy the fair fabric of democratic institutions, which has been erected by the capacity of the white race.” Yet another delegate proclaimed that “the white race, politically, should have some superior and distinctive position; and the black race… is no race that can command or justly deserve suffrage from me.” In the end, the opinions of these two delegates prevailed and both the property requirement and the felon disenfranchisement laws — two major barriers to the black

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1 Erin Kelley, Racism & Felony Disenfranchisement: An Intertwined History, report, School of Law, New York University, 2.
3 Erin Kelley, Racism & Felony Disenfranchisement: An Intertwined History, report, School of Law, New York University, 3.
vote — persisted.\(^1\)

**Status of Disenfranchisement Laws in the Modern Day and Their Impact**

Despite the efforts of Reconstruction legislators to impede the African-American vote, the passage of groundbreaking legislation such as the Civil Rights Act of 1957 and President Johnson’s Voting Rights Act of 1965 resulted in the dismantling of many barriers standing in the way of the black vote. This, in turn, led to significant progress toward a more equitable electoral system. That being said, many of the racially-targeted felon disenfranchisement laws remain despite numerous legal challenges questioning their constitutionality. For example, in the *Richardson v. Ramirez* (1974) case, the Supreme Court decided 6-3 that “California, in disenfranchising convicted felons who have completed their sentences and paroles, does not violate the Equal Protection Clause.”\(^2\) Moreover, in the *City of Mobile Alabama v. Bolden* (1980) case, the Court ruled that only legislation that was found to have “purposeful discrimination” along racial lines was unconstitutional, stating: “racial discrimination alone is irrelevant unless it can be shown that the intent was to racially discriminate.”\(^3\) This decision was explicitly extended to voter disenfranchisement laws in *Hunter v. Underwood* (1985), setting a precedent for preserving such voting laws that persists to the present day.

These decisions have allowed felon disenfranchisement laws, such as those passed by New York’s 1867 and Florida’s 1868 Conventions, to remain virtually unchanged.\(^4\) However, this means that the racial impact of these laws persist as well; ultimately “the mandatory criminal disenfranchisement provision put in place in 1874 is nearly identical to the process that remains the law in New York today and continues to have its intended effects.”\(^5\) For instance, “black voters in New York comprise nearly 65 percent of the disenfranchised population, even though they comprise less than 13 percent of the state’s voting age population,” and nationwide 7.7% of the adult African-American population is disenfranchised, compared to 1.8% of the non-African-American adult population.\(^6\)

The continued existence of these laws may also be explained in part by an active resistance to reforms of these policies, at least partially motivated by partisan interests. In 2004, the chairman for the Alabama Republican Party was quoted as saying, “As frank as I can be, we’re opposed to [restoring voting rights] because felons don’t tend to vote Republican.” This statement, as disturbing as it is, is one founded in truth: of the ex-felons registered in New York, “about 62 percent were registered as Democrats, compared to just 9 percent who were registered as Republicans.” Similarly, “In New Mexico the breakdown was 52 percent vs. 19 percent, Democrat vs. Republican, respectively.”\(^7\)

But perhaps most problematically, according to the Brennan Center for Justice, the impacts of voter disenfranchisement stretch beyond merely those who are directly barred from voting, since there is often a “ripple effect” in communities with high rates of disenfranchisement. A study conducted by Bowers and Preuhs claimed that registered and eligible African American voters were 12% less likely to vote if they were residents of states with lifetime disenfranchisement policies, as compared with 1% of white voters in identical situations.\(^8\) The study suggested that the practice “exacerbates the bias against low socioeconomic status racial and ethnic minorities in electoral outcomes and policy responsiveness.”\(^9\) Moreover, the laws governing loss

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10 Melanie Bowers and Robert R. Preuhs, “Collateral Consequences of a Collateral Penalty: The Negative Effect of
of voting rights can be complex, leading to confusion and widespread misinformation about who can vote, and also resulting in lower voter turnout at the polls, especially among minority communities.¹

2. Reduced Voter Turnout and Policy Influence

Voter turnout also has drastic effects on the ability of communities to influence legislation related to the distribution of basic resources to vulnerable and underprivileged populations, especially in terms of allocation of funds for education, healthcare, and housing. Since “rates of crime and incarceration disproportionately impact low-income and minority communities,” these already vulnerable communities experience a reduction in voting power, a trend which is evident in the gap between turnout rates of different socioeconomic classes throughout the past few election cycles.² In a recent study, Page, Bartels and Gilens found that members of the top 1% had a turnout rate of 99% in the 2008 presidential election, whereas only 49% of those earning under $10,000 showed up to vote. A similar trend is also apparent in the midterm elections of 2010, in which 61.6% of voters earning over $150,000 voted, in contrast to 26.7% of those making less than $10,000.³

A 2007 study conducted by Nagler and Leighly suggests that there is a large preference gap between non-voters and voters in each constituency, with non-voters more likely to favor unions, federal assistance for schools, and government-sponsored health insurance, and voters on average tending to prefer the reverse.⁴ Moreover, a 2006 study conducted by the Public Policy Institute of California concluded that non-voters were more likely to support more services and higher taxes as well as measures to ensure affordable housing, whereas voters on average were more likely to favor fewer services and lower taxes.⁵

In terms of realizing these policy preferences, in the words of Walter Dean Burnham, “if you don’t vote, you don’t count.”⁶ There is little incentive for politicians to respond to the desires of those who cannot get them re-elected, leading to neglect toward the preferences of non-voters, a disproportionate number of whom are low-income.

3. Felony Disenfranchisement and Human Rights

But what does felony disenfranchisement mean in terms of human rights? Both the racially-based origins and impact of the felony disenfranchisement laws play roles in fostering the unequal realization of preferences of voters and of primarily low-income non-voters. This directly contradicts the tenets of human rights that the United States purports to uphold. For this exploration, it is best to use the UN’s International Bill of Human Rights, specifically its Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). I will use these documents for two reasons. First, the clear language of the documents makes it easy to establish precisely what falls under the umbrella of human rights. Second, the United States has signed both the Declaration in 1948 and both Covenants in 1966, making it clear that the United States is party to this conception of human rights. Moreover, the U.S. Department of State explicitly states, “The values captured in the Universal Declaration of Human Rights and in other global and regional commitments are consistent with the values upon which the United States was founded centuries ago.”⁷

Felony Disenfranchisement and Free and Fair Elections

One way in which felony disenfranchisement conflicts with the International Bill of Human Rights

¹ Erin Kelley, Racism & Felony Disenfranchisement: An Intertwined History, report, School of Law, New York University, (Brennan Center for Justice), 3.
concerns its interference in “free and fair elections.” The Universal Declaration of Human Rights proclaims that “Everyone has the right to take part in the government of his/her country, directly or through freely chosen representatives,” and that these representatives will be chosen by “universal and equal suffrage.”1 The language of the ICCPR in article 25 mirrors this, stating, “Every citizen shall have the right and opportunity… to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” Article 2, paragraph 1 of that same covenant goes on to stipulate:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”2

The way that felony disenfranchisement currently operates systematically excludes African Americans, and in some cases, as illustrated by the Chairman of the Alabama Republican Party, is explicitly intended to exclude Democratic voters. Both violate the terms of the ICCPR, as “universal and equal suffrage” is being denied to members of a certain race (even inadvertently) and to those who hold a certain “political opinion.”

**Felony Disenfranchisement and Access to Basic Needs**

As addressed earlier, the ability to vote impacts a community’s capacity to influence the creation of social welfare programs and the allocation of funds for the most vulnerable to obtain an adequate standard of living. This ability is diminished by the disproportionate effect of felony disenfranchisement on low-income households and minorities. The International Covenant on Economic, Social and Cultural Rights specifies that each person is to enjoy the right “to an adequate standard of living for himself and his family, including adequate food, clothing and housing” and that the government “will take appropriate steps to ensure the realization of this right.”3 However, this goal is not fully realized in the United States as 42 million Americans live in food insecure households.4 Additionally, the National Law Center on Homelessness & Poverty claims: “The U.S. law provides no entitlement to housing assistance for low income people; recognition of a right to even basic shelter is extremely limited.”5

While felony disenfranchisement is by no means the only roadblock standing between low-income individuals and fundamental human rights, it does for these reasons abridge their rights and is therefore unacceptable. As previously noted, reduction in voting power translates to a reduced incentive for elected officials to act in the interests of a certain community, and since the interests of low-income voters are demonstrably different from those of more affluent voters, the needs of this vulnerable community are susceptible to slipping through the cracks.

**4. Conclusion**

The disenfranchisement of convicted felons in our country has been overlooked as an abridgment of human rights for too long. These policies find their roots in vitriolic racism born of the Reconstruction era and still continue to have disproportionate effects upon the target population and upon Democratic voters. This in turn means that there is a “distinction” being made in terms of race, political opinion, and status as an ex-convict, all exceptions that run counter to the rights stipulated in Article 2, paragraph 1 of the International Covenant on Civil and Political Rights.

Felony disenfranchisement reduces the voting

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power of the low-income voting base, affecting not only those directly barred from the ballot boxes but also those who inhabit the same communities as the ex-felons. This impedes the ability of these communities to advocate for themselves, as they have fewer avenues by which to incentivize elected officials to act in their interest. This in turn contributes to a dearth of policies that could bolster low-income communities’ access to adequate nutrition and affordable housing, to name but two of many examples of rights outlined in the International Bill of Human Rights’ International Covenant on Economic, Social and Cultural Rights. This is not to say that reforming felon voting laws would be the silver bullet that would revolutionize the way politicians interact with affected communities, there are many other obstacles that stand between members of these communities and the voting booth. However, felony voting law reform paired with voter mobilization measures like get-out-the-vote drives, increased politician outreach, and improved political literacy education in schools would go far in augmenting the ability of these communities to advocate for policies ensuring their basic rights.

Fortunately, throughout the past several decades there has been a push for the reintegration of ex-felons into the voting sector. Since 1997, twenty-three states have instituted reforms that allow for the reinstatement of voting rights and have made laws concerning felony disenfranchisement less restrictive. However, these victories have been far from absolute, as some states have made such policies stricter in recent years, while others have seen reversals of more permissive felon voting reforms. Despite the growing concern regarding the legitimacy of felony disenfranchisement laws and the increasing awareness of its racial disparity, there is still much work to be done.

Americans pride themselves on living in a nation that ensures liberty and justice for all. However, by allowing the tradition of felony disenfranchisement to persist in its legal system, the U.S. sanctions a tradition of racism within a system that purports to uphold values of equality. Moreover, by allowing these statutes to exist, the U.S. violates the conventions outlined in the International Bill of Human Rights. To truly commit to the cause of justice, it is imperative to overturn laws that stand in the way of equality.

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Every day, millions of women and girls around the world menstruate, a biological function as normal as men growing facial hair. Yet the stigma associated with this process has fostered detrimental and dangerous practices across the world. Chaupadi is a Nepalese ritual of isolating women who are menstruating to a small hut or shed outside of the family’s home. It is “an entrenched, superstitious practice linked to Hinduism, [which] considers menstruating women impure and bad luck, rendering them untouchables.” If these women remained in their homes during the time of their menstruation, community and religious leaders claim that they would cause their family harm and bring bad fortune to their homes. However, during the three or four days that women are forced to sleep outside of their homes, they become easy targets and are likely to be injured or even killed. Being forced to sleep in small, uninsulated huts causes them to be exposed to animal attacks, extreme temperatures, and smoke inhalation through the fires they light to keep warm. Furthermore, these women also have higher chances of being sexually assaulted by men from their villages, as they are alone and not protected inside their homes or with their families.

The practice of Chaupadi is a violation of key human rights as specified by the Universal Declaration of Human Rights (UDHR), which includes the right to a standard of living that ensures health and wellbeing, as well as protection from being discriminated against on the basis of gender. The small and uninsulated huts that the menstruating women sleep in are not adequate shelters and impact their health drastically. Furthermore, an emphasis on non-discrimination is one of the first proclamations in the UDHR. Its articles emphasize the right to health and wellbeing, but also specify that it is a right equally guaranteed to all human beings, regardless of gender. Chaupadi effectively violates these stipulations. Women are discriminated against for a biological process over which they have no control, resulting in an unequal guarantee of health.

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3 UN General Assembly.
Background on Chaupadi

Chaupadi is primarily practiced in rural western Nepal, with 95% of families in the region taking part, although the general stigma associated with menstruation is prevalent even throughout Nepal’s larger cities. In the extreme rituals seen in the more remote areas of the country, the women are also not allowed to consume milk, yogurt, meat or other nutritious foods while on their period, due to a fear that they would contaminate these items, given their “unclean” state. Instead they must subsist on a diet of dry foods, salt, and rice. Based on their beliefs, communities throughout western Nepal are convinced that breaking the tradition “would bring devastating bad luck: crops would fail, animals would die, snakes would fall from the ceiling. The imagined consequences are so dire that few dare to test stopping, even when the practice brings deadly consequences.”

Between 2007 and 2016, at least eight women have died and many more have been injured through sexual assaults or smoke inhalation due to the unsafe and inhospitable conditions of the huts to which they are confined monthly.

The damaging consequences of the period stigma perpetuated by Chaupadi are widespread. Research has shown that “77% of girls and women felt humiliated during their periods, and two-thirds reported feeling lonely and scared when staying in cowsheds.” By being visibly forced out of their homes every month, these women experience negative impacts to their physical and mental health. Furthermore, girls who are menstruating are often not allowed or are unable to attend school because of poor facilities in combination with the community’s customs. Missing a few days of school can be detrimental as “girls fall further behind, sometimes failing exams, and dropping out or being pulled out of school by their parents as a result. In Nepal, where 37 percent of girls marry before the age of 18, leaving school often leads to marriage.”

Human Rights Violation

As previously mentioned, the practice of Chaupadi violates multiple human rights as specified by the UDHR. First off, Article 1 states that, “all human beings are born free and equal in dignity and rights.” Article 2 elaborates that, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex.” These are important concepts to begin with, since these two articles specifically emphasize that every human being is guaranteed rights no matter their gender. Therefore, the fact that women, and never men, are forced to sleep outside and are put in such extreme harm through Chaupadi is a direct violation of Article 2. Furthermore, Article 25 describes the right to health, stating: “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” Being forced to sleep in an unsafe and unclean hut every month is not a standard of living adequate for ensuring the health of the women and girls made to partake in the ritual of Chaupadi. While many of the remote villages do not have easy access to medical care, these villages do have safe and sufficient shelter. To deny this to anyone is a violation of a basic level of adequate living. Sleeping in these huts puts women in danger from both nature and the men in the village. Forcing women to conform to a practice that puts them in danger and takes away their control is discriminatory and violates the basic declaration that all human beings are equal.

Current Status

Despite the rights violations and dangers caused by Chaupadi, the practice does not receive regular press or attention in the international community. This was the case in Nepal for a long time, as well. However, after public outcry over the deaths of many women in western Nepal as a consequence of this ritual, the government issued a ban on Chaupadi in 2005. While this was a legal success, implementing the ban has had many major roadblocks. The ban is rarely enforced in remote districts, which is problematic since Chaupadi is more common in rural villages than in urban centers. Because legal policies are often ineffective in rural areas, they

4 Klasing.
5 Hodal.
6 Klasing.
7 UN General Assembly.
8 UN General Assembly.
9 Klasing.
are only one component to dismantling human rights violating practices.

However, it is also difficult to change behaviors and practices that are ingrained into the culture of these communities. Western or more urban organizations cannot simply enter the community and demand villages to give up a practice they hold as sacred and holy, even if it is a violation of human rights. While the ultimate goal is to stop Chaupadi, the course of action taken to do so should be more gradual and community oriented. Long lasting change is possible, but realistically will not be immediate given the history and reverence behind the practice, especially in rural communities. There needs to be a comprehensive and multifaceted approach to solving this problem, including legal change, increased education and awareness, and wide sweeping enforcement of a ban.

**Solutions for the Future**

Education can play a key role in forming the basis of change. This approach can start with parents and village leaders who have internalized and further the stigma associated with menstruation, which has perpetuated the practice of Chaupadi. Through this education, there should be an emphasis on the harm that parents and village officials are imposing on their daughters, and how it can be easily avoided. This should be done by gaining the trust of these individuals rather than coming in and forcefully stopping a practice that has been an important custom for centuries. If the Nepalese believe that their Gods will curse them or bring bad luck, why should they listen to outsiders trying to force change? One possible way to create gradual change is by creating more insulated and safer huts, or by allowing menstruating women to sleep in their safe and comfortable homes but in a different room or area of the home.

Another major issue that stems from Chaupadi concerning education is girls’ inability to consistently attend school. Therefore, the government should ensure that schools have the necessary and adequately clean facilities to allow girls to come to school whether or not they have their period. Furthermore, schools should track attendance and make sure no girls are neglected, by accommodating them through extra classes or alternative methods to ensure that they receive a solid education. Regular attendance is key in order for girls to secure their future and break the cycle of poverty, early marriage, and general stigma.

In addition to education, nonprofits and social services can play a major role in curbing Chaupadi in rural communities. However, countries like Nepal do not have many of their own services and rely on aid and donations from the international community. In Nepal specifically, the international donor community provides for nearly 60% of Nepal’s development budget, particularly the states most active in Nepal - India, US, UK and the European Union. These international donors have a responsibility to hold Nepal accountable for human rights violations and adherence to humanitarian law. They play a major role in implementing change and should use their influence to encourage respect for the laws and to hold villages accountable. Furthermore, many NGO projects primarily benefit the urban majority while the rural communities suffer and uphold practices that perpetuate

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poverty and discriminatory beliefs. This discrepancy between urban and rural aid is connected to the “lack of roads, communications, infrastructure and appropriate skills among the rural poor [which] has led to centralization of effective power.”¹ A solution like creating roads and increasing transportation will help with the spread of education and also facilitate legislative enforcement. Simply banning Chaupadi has not stopped the practice, so implementation will be more effective if government officials and NGOs can access the villages where the practice is more common. Change on the community level can help to build trust and eventually lead to progress as each generation ages.

Conclusion

Chaupadi is a discriminatory and dangerous practice that puts thousands of Nepalese women in direct harm on a regular basis. It also impacts the education and ability of women to become independent by perpetuating the stigma associated with menstruation. Because this practice is entrenched in the religion and culture of these communities, it can be difficult to convince community members to change. However, gradual change can occur by expanding upon the existing legal ban in combination with pressure from international NGOs and an emphasis on better sex education. Throughout Nepal, girls and women are working to change their society’s views of menstruation and to bring awareness of the dangers of Chaupadi. Each generation can progress by re-evaluating their own views while still maintaining their culture and identity in order to prevent any more deaths or assaults of women as a consequence of this human rights violating practice.

Introduction

On February 8, 2017, Guadalupe García de Rayos, an undocumented Mexican immigrant, attended her required annual immigration check-in at the Phoenix offices of U.S. Immigration and Customs Enforcement (ICE). Although the federal government had allowed her to stay in the United States over the past eight years of check-ins, ICE arrested and detained her. Despite attempts by members of her family and other protesters to block the van holding her, she was deported the next morning. The deportation of García de Rayos was one of the first that garnered mainstream attention during Trump’s presidency.

What led up to her deportation? In the mid-1900s, at the age of 14, García de Rayos illegally entered the United States from Mexico with her parents. She would later become a mother of two U.S.-born children and a working resident in the United States. In 2008, after her employer’s records were seized in a workplace raid, she was arrested. Her arrest was one of hundreds that resulted from raids orchestrated by former Maricopa County Sheriff Joe Arpaio as part of a crackdown on illegal immigration in Arizona. After being detained for months, she was convicted of felony criminal impersonation for using a fake social security number, an offense classified in the least serious level of felonies. After her conviction, she tried to appeal her deportation, but lost. In 2013, she became the subject of a removal order and was placed on court-ordered supervision, requiring her to report to scheduled check-ins with ICE.

Previous

The tidiness of this account is deceptive. While law may take on a transcendental and rational appearance, contradictions and ambiguities that saturate law underpin García de Rayos’ story. For example, her encounter with the law begins with former County Sheriff Joe Arpaio, whose operation first marked her as a criminal. For 18 months, Arpaio and his deputies actively defied a federal judge’s injunction to stop conducting immigration patrols that relied on racial profiling. The discrepancy between García de Rayos’ deportation and Arpaio’s presidential pardon exemplifies the uneven application of the law—a contradiction with tremendous consequences for the lives of the powerless. The inconsistency of law enforcement is further exacerbated by the cascading layers of the law that render it inscrutable and impossible to navigate. At different points of her story, García de Rayos entered separate realms of law—civil (her immigration) and criminal (her felony conviction)—and was shuttled between the two. The delineations between federal, state, or local law and between civil and criminal law become moot when enforcement is arbitrary at its best or racist at its worst. The blurring of lines is not merely a semantic problem and it can confer deadly consequences when, for example, protections that are granted by the Constitution are forgone. Often, legal institutions and arbiters of law do not bear these consequences. For García de Rayos, the overdeter-

4 Rivas, “Phoenix activists.”
mination of these manifold layers led to expulsion from her home and separation from her children.

This paper will examine the delineation between civil law and criminal law in the domain of immigration at the site of the detention center. This delineation is important to understanding the rights of immigrants and their unjust treatment in broader society. Although their presence in the United States itself is not a crime, undocumented immigrants are dominantly portrayed and treated like criminals. When “Latino” is conflated with “illegal,” entire communities of people, regardless of citizenship status or birthplace, are persecuted.1 Moreover, this paper will also interrogate the nature of detention itself and the obfuscation of the civil-criminal distinction in immigration detention. We need not look far from García de Rayos’ story to understand why the detention center is an important locus of examination: Arpaio justified his Tent City, the outdoor Arizona jail characterized by cruel living conditions, as a crime deterrent.2 Criminality pervades all carceral institutions regardless of any pretense that undocumented immigrants are detained for civil offenses, not criminal ones. Furthermore, as of December 2016, the for-profit prison industry encompasses 65% of the beds intended for immigrant detainees.3 Given the trend of privatization across multiple industries and the largely criticized privatization of prisons, this paper will review the differences between the privatized immigration detention center and its government-operated and/or criminal counterparts, and will consider the implications for immigration law and incarceration. When the mantra “Immigrant Rights are Human Rights” can be heard across protests, social media feeds, and the mouths of politicians, we must ask whether these rights are indeed upheld in the United States.

In the Public and Under the Law

Before looking at the immigration detention center, it is essential to understand how an individual gets there. The distinction between criminal law and civil law is not widely known. While undocumented immigrants are depicted as criminals, they are often classified differently under civil law in the United States. These two broad categories of law are often conflated with no clear delineation by the general public and in the actions of law enforcement. According to federal law, entering the United States without proper inspection and admittance is criminally punishable as a misdemeanor or felony and can result in a fine or imprisonment:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.4

This means that while the illegal entry is considered a crime, one’s presence in the United States itself is not a crime, although it may be in violation of immigration law. Undocumented presence is only criminally punishable if the individual was previously deported and reenters the United States illegally.5 The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 included a provision that would have criminalized undocumented status and classified one’s presence as a felony; ultimately, after being passed by the House of Representatives, the bill sparked massive protests and failed to pass in the Senate in 2006.6

Undocumented status does not necessarily imply illegal immigration. According to a 2006 report

UCJHR 24

5 Ibid.
published by the Pew Hispanic Center, approximately 45% of the total undocumented immigrant population entered the country legally with visas. While this figure may be outdated given changing immigration trends, there is a general consensus that the proportion of the undocumented immigrant population that entered legally is significant—at least a third. Every year from 2008 to 2012, the number of people who entered with a temporary visa and overstayed has been greater than the number of those who entered across the southern border without inspection. Contrary to dominant, racialized narratives about immigration and immigrants, an undocumented immigrant is not automatically or necessarily a criminal, nor is their presence criminally punishable. To brand all undocumented immigrants as criminals would be dangerous and inflammatory, possibly inciting anti-immigrant violence or discrimination. Because anti-immigrant legislation is driven by public demand and general sentiment, such stigmatization is profoundly consequential, risking their access to social services and resources or job stability and wages. The criminalization of undocumented immigrants legitimates their exclusion and discrimination.

The civil-criminal law distinction has substantive consequences for immigrants who undergo proceedings for deportation, as classified in the civil system. Under federal immigration laws, defendants undergo civil proceedings, as administered by the Department of Homeland Security (DHS), and thus lack the protections and due process that are normally afforded to criminal defendants. In fact, according to a report published in 2011, over 160,000 people without U.S. citizenship had been deported without any hearings before an immigration judge. Similar to criminal proceedings, wherein “nearly all criminal cases are resolved through plea bargaining” because defendants do not want to risk receiving a harsher sentence if they go to trial, immigrant detainees are offered stipulated removal to avoid further incarceration. Records show that government agents purposefully provide inaccurate and confusing information about the law in order to encourage detainees to opt for stipulated removal, which waives their right to trial and to appeal. The majority of those who accept stipulated removal are those who have been detained and do not have a lawyer, indicating an exploitative pattern of misleading or coercing immigrants in desperate situations at the expense of their due process rights and futures. If detainees instead chose to fight their cases, they could be released from detention on bond and may even win “the right to remain legally in the country.”

The delineation between civil law and criminal law easily becomes obscured or entirely elided, both in public discourse and media, and in legal proceedings. Being present in the United States without U.S. citizenship is not a crime, but undocumented immigrants and non-citizen residents are stigmatized as criminals and are constantly held under public discrimination with dangerous consequences for their lives. Immigrants with criminal backgrounds do not deserve mistreatment and violations of their rights are equally abhorrent, but the flattening of undocumented immigrants into a monolithic group precludes incisive examination of the lived realities and injustices that immigrants face. Legally, undocumented peoples undergo civil proceedings without the protections given to criminal defendants. As civil defendants, they are procedurally stripped of due process rights. Thus, the undocumented individual exists in a violent aporia between civil defendant and criminal, subject at all times to legal cruelty.

**Immigration Detention: Punishment without Conviction**

U.S. immigration policy has been characterized as *de facto* “catch and release” policy: when those entering

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5 American Civil Liberties Union, *Criminalizing Undocumented Immigrants*.
7 Ibid.
the United States illegally or those present in the United States in violation of immigration law were apprehended by U.S. Customs and Border Protection (CBP) or ICE officials, they would purportedly be released to await their immigration hearings.\(^1\) According to a 2005 report published by the National Center for Policy Analysis, a majority of defendants fail to appear at their hearings.\(^2\) Given public concerns of safety, premised on dominant characterizations of immigrants—those of color—being criminals, and reported findings that apprehended immigrants are released and unmonitored, immigrant populations present in the United States are thought to pose a threat to the integrity and security of the country. As such, there have been legislative pushes to establish a “catch and detain” policy. Detention then is an integral component of immigration law and border enforcement, which necessitates a critical examination of the nature of immigration detention today.

Immigration detention is the practice of detaining immigrants—broadly those who cross the border into the United States, including asylum seekers—as a response to regulating immigration and processing those who enter.\(^3\) Unlike criminal detention and imprisonment, immigration detention is not intended to be punitive; its stated purpose is to hold and process individuals as they undergo proceedings for authorization or deportation. The majority of detainees in immigration detention are low custody priorities without previous criminal convictions who are not considered flight risks.\(^4\) However, in a 2015 report, the U.S. Commission on Civil Rights (USCCR) concluded that the treatment of detainees in immigration detention facilities violated detainees’ Fifth Amendment rights. These detention facilities were found to be punitive in their conditions and treatment of detainees, which, the USCCR states, “contradicts the civil and non-punitive nature of the immigration detention system.”\(^5\) Immigration detention then is an institutional manifestation of the collapse of civil law into criminal law because it in practice exceeds its intended purpose into the realm of criminal punishment, all while remaining under the pretense of bureaucratic necessity.

Like criminal prisons, immigration detention facilities disturbingly fail to comply with established national and federal detention standards regarding special protections, medical care, accommodations, services, food, and labor:

- **LGBT rights.** There is a lack of accommodations for LGBT detainees, violations of LGBT rights, and lack of adequate legal services and resources in ICE-owned facilities.\(^6\)
- **Child protection.** Respective DHS offices and agencies do not fully comply with established federal standards by failing to provide quality care and services to unaccompanied children who have been detained.\(^7\)
- **Sexual assault prevention.** The USCCR assessed immigration detention facilities’ compliance with the Prison Rape Elimination Act of 2003, which provides protections for detainees. The commission concluded that “ICE’s lack of transparency regarding their contracts with private detention companies inhibits the assurance that [Prison Rape Elimination Act of 2003] standards are being properly implemented” and that DHS does not provide detainees sufficient information of their rights, nor does the department adequately address sexual assault, abuse, or staff misconduct.\(^8\) There is even evidence of immigration authorities sexually assaulting their detainees.\(^9\)
- **Medical care.** In one incident, a detainee attempted suicide after repeated sexual assault by a guard. Both ICE and the operator of the detention center failed to provide her immediate medical care after the suicide attempt and punished her

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6. Ibid., 44.
7. Ibid., 67.
8. Ibid., 89-90.
with solitary confinement upon her return from the hospital to the center.¹

Food. Privately owned facilities consistently fail to comply with food standards.²

Involuntary labor. Detainees allege that they were forced to work in ICE facilities “or else risk punishment with solitary confinement,”³ which can amount to a form of torture.⁴

It is evident, across government-operated and privately owned immigration detention facilities, that facility conditions are, at best, inadequate and, at worst, inhumane and cruel.

It is important to emphasize that the function of immigration detention is to hold immigrants for processing purposes, often pending a hearing before an immigration judge. Especially in cases where there is a shortage of judges, immigrants are unjustly subjected to poor living conditions and maltreatment for long periods of time without due process.⁵ Recalling ICE’s use of stipulated removal, the detention facility is a site of extreme rights violation and abuse. Altogether, immigration detention throws out its civil impetus and demonstrates excessively penal practices. The systemic quality of these violations indicate that they are not isolated events nor mere signs of negligence but rather, an institution predicated on violence against its detainees. There is even evidence that ICE could be using detention as a tool of political repression—an immense abuse of power and further indicative of the flawed nature of immigration detention.⁶

From Government to Corporation

The DHS is the operator of the U.S. government’s largest federal detention system with approximately 400,000 detainees per year, in comparison to the Department of Justice’s Bureau of Prisons (BOP) with approximately 200,000 detainees in 2015.⁷ The DHS-operated immigration detention system has greatly expanded over the past few decades. In 1995, immigration detention was operating with fewer than 7,500 beds. In 2012, Congress established a mandatory quota of 34,000 beds daily under the Consolidated Appropriations Act of 2012, a more than 450% increase in beds since 1995.⁸ Contrary to what one might expect, the increase in beds does not reflect a parallel increase in the number of immigrants in the U.S., which increased by less than 200% in the same time period.⁹ The reason for the expansion of immigration detention is perhaps more sinister.

Although the DHS operates the immigration detention system, the department contracts most of its beds out to facilities owned by state and local governments, and private corporations, with a total of more than 250 facilities nationwide. Of these beds, ICE only owns 11%. Privately owned, for-profit prisons operate 18% of the beds, state and local government-owned facilities that exclusively house immigrant detainees operate 24%, state and local facilities that also house criminal detainees operate 28%, and the U.S. Marshals Service-owned facilities operate 19%. Some of these state and local facilities then also subcontract out to private prison companies.¹⁰ Thus, the federal government owns and operates only a small fraction of its immigration detention system—a system that is premised upon federal, civil law—that is intended to hold detainees as they undergo immigration proceedings.

Billions of dollars flow through the immigration detention system, to and from government agencies and corporations. Just considering cities and counties, immigration detention has become a significant source of income. As part of a growing trend, California was paid by the federal government almost $55.2 million for housing immigrant detainees in local jails in 2008, up

⁶ Gruberg, For-Profit Companies.
⁷ Ibid.
⁹ Gruberg, For-Profit Companies.
from $52.6 million in 2007 and with an expected $57 million in 2009 (actual figure unknown). In 2009, the largest federal contract in California was with the Los Angeles County Sheriff’s Department for housing immigrant detainees. Other smaller cities in California have also been receiving income of hundreds of thousands of dollars for immigration detention amidst budget cuts to other departments. In reference to their detention facility, the police chief of the Santa Ana Police Department told the Los Angeles Times, “We treat [the jail] as a business.”

In addition to cities and counties viewing detention facilities as businesses, and profiting off of them like businesses, the majority of immigrant detainees are housed in facilities that were designed from their inception to be businesses. These are the detention facilities that are owned by private, for-profit prison companies, whose intended business is to run and manage such facilities. The two largest private prison companies that the U.S. government contracts for immigrant detention are the Corrections Corporation of America—rebranded as CoreCivic in late 2016—and GEO Group, Inc. In 1980, there were 4,062 detention beds nationally and in 1983, the U.S. government first contracted out to CoreCivic to house immigrants; at the time, CoreCivic was near bankruptcy. As described earlier, since the 1980s, the immigration detention system has massively expanded to the current 34,000 beds. Through the 1990s, Congress enacted multiple pieces of legislation that resulted in the expansion of detention capacity. While the initial growth of the immigration detention system was perhaps a response to a perceived need of increased immigration enforcement, the entry of private prison companies into immigration detention marked the emergence of another driving force for its expansion: profit. Between 2004 and 2014, CoreCivic spent $18 million and GEO Group, Inc. spent $4 million on lobbying. Between 2006 and 2015, CoreCivic spent more than $8.7 million to lobby Congress just on Homeland Security appropriations. Concurrently, the role of privately owned, for-profit prisons in immigration detention swelled: in 2005, approximately 25% of immigrants in DHS custody were held in detention facilities operated by private prison companies. This figure increased to 62% of detained immigrants in 2014 and it increased again to 73% in 2016. Meanwhile, the number of BOJ federal prisoners held in private prisons was 13% in 2014 and 11% in 2016. Private corporations are a key player in the prison industrial complex, holding an immense amount of influence in the detention system and pertinent legislation, and generating record-breaking profits.

In contracts between ICE and prison companies, there is a guaranteed minimum number of beds that must be paid for every day, in addition to the congressionally-mandated bed quota. Moreover, these contracts include a tiered pricing structure that incentivizes detaining more people for lower costs. Bed quotas dangerously encourage increased immigration enforcement and detention. The profit motive further troubles the guise of immigration detention as a civil procedure, intended only for the processing of immigrants. Detaining immigrants has then become a question of saving or making money. With this logic, the concerns of living conditions and rights violations are unimportant to the operators of these facilities. Prison companies are incentivized to cut costs, which may take the form of forgoing medical care, legal resources, or even edible food. On top of the money they receive from the federal government, these corporations have taken advantage of the detained population for even greater profit. CoreCivic and GEO Group have forced their immigrant detainees to work for little to no pay, often doing work to maintain and operate the facility. Although slave-like labor in criminal prisons may be legal under the Thirteenth Amendment, the same provision does not apply to immigrant detainees who are held on civil charges, making such involuntary labor illegal. In other words, the federal government pays millions of dollars to these corporations to operate detention facilities that end up being maintained by the detainees themselves, perhaps illegally. Moreover, as private entities, there is not even a pretense of an obligation to the public. Compounding with ICE’s lack of transparency, there is little capacity to hold these companies accountable for their practices. Ultimately, immigration detention is not driven by any need to enforce immigration law but the call for profit.

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2 Gruberg, For-Profit Companies.
3 Ibid.
Moving away from quotas does not necessarily provide a solution to these corporations’ profit-grabbing. In 2014, ICE started a four-year, $1 billion contract with CoreCivic to build a massive detention facility. Again, in other contracts, the private operating company is paid according to the amount of beds that are occupied; with this $1 billion contract, CoreCivic is paid a fixed amount for full capacity, “even if the facility is... half full, as it [had] been in [the] recent months” at the time of reporting by The Washington Post.\(^1\) Thus, corporations like CoreCivic stand to profit off of the apprehension and incarceration of immigrants by ICE and CBP, both in periods of heightened detainment and of stagnant or decreasing detainment. Corporations have therefore successfully leveraged their capital to secure a stable source of profit regardless of any service rendered, which testifies to the immense political power that they wield. The political influence that they hold further obstructs any form of action or accountability that can be taken against them.

These private corporations hold a particular, vested interest in immigration detention specifically. As detailed earlier, as the proportion of privately detained immigrants has increased in recent years, the proportion of privately held federal prisoners has decreased.\(^2\) In August of 2016, the Department of Justice (DOJ) announced a phase-out of the use of privately run federal prisons by the BOP. In the hours after the announcement was made, the stocks of CoreCivic and the GEO Group, Inc. dropped in price by roughly 40%.\(^3\) On February 23, 2017, U.S. Attorney General Jeff Sessions rescinded the DOJ’s decision; stock prices for the aforementioned corporations have increased significantly since the November 8 election.\(^4\) While the DOJ’s move away from private prisons perhaps would have hurt these corporations, the corporations have demonstrably shifted and expanded to immigration detention as a profitable and enduring industry.\(^5\) This has frightening implications for the future: the ongoing right violations and abuse of immigrants may grow; reaching even greater extremes.

**Conclusion**

On the topic of immigration, deportation is often the dominant concern; however, before deportation—threatened or realized—the immigrant faces detention. Far from its purported civil and non-punitive purpose, immigration detention and its facilities are cruel in nature and, with the powerful grip of corporate interests, driven by profits. While the undocumented immigrant or the non-citizen are not criminals under the law, they are ultimately regarded and treated as such: hyper-policed and targeted for arrest and detainment. When immigration detention center—privately owned and operated—is at the behest of corporations that stand to profit off of the massive incarceration of immigrants or a political climate that demands such, it fails its supposed, intended purpose. Scaling through law, detention, and the immigration detention center, the contradictions that undergird and constitute the system of immigration detention become apparent.

The purpose of this paper is not to demarcate non-criminal immigrants as “good immigrants” that do not deserve the cruelty they receive from the general public, ICE, and private prisons, which necessarily posits a “bad immigrant” as indeed deserving of it. Rather, I attempt to trace immigration detention as a deeply vexed and contradictory site of violence, from its legal precepts to its privatization. We might ask after reading these horrific statistics and accounts, “What can we do? What is the alternative?” We must keep in mind: this paper is less about immigrants or immigration than it is about law and incarceration. While there is a difference between civil and criminal law, which confer certain

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2. Gruberg and Jawetz, Reliance on Private Prisons.


protections and procedures, immigration detention and criminal imprisonment are inextricably linked. There is a dominant assumption that incarceration is necessary and immanent, but as the case of CoreCivic demonstrates, the growth of immigration detention or incarceration broadly is born out of moneyminded interests, ignoring any absurdities like $1 billion for a half full facility. Money has no obligation to the rights of people; instead, there is profit to be made by forgoing protections and accommodations. If we are committed to immigrant rights or human rights, we must interrogate the multitude of forms that incarceration fashions for itself and the injustices that lie therein.
How should human rights treaties be enforced? The absence of a centralized enforcement apparatus has caused many to question the effectiveness of the human rights regime. In contrast to the classical mode of treaty ratification, which required signatories to ratify treaty provisions unanimously, proponents of the universal human rights regime have allowed states to put forth reservations to human rights treaties to achieve a desired universality of ratification, so long as reservations do not violate core objects and purposes of the treaties in question. This position is predicated on a commitment to the idea that universal ratification of human rights treaties, even with reservations, will lead to the eventual internalization of those norms in member states.

I contend against allowing for reservations (and, by extension, the aspiration for universality in human rights law) by arguing that its core assumption of internalization is not supported by empirical data on public sentiment regarding three core human rights concerns: (i) women’s status and gender equality, (ii) torture prohibitions, and (iii) civil and political rights involving religious liberty. I survey recent Pew Research Center data on public sentiment in various Islamic states and legal dissension between governments of Islamic state parties to the Organization of Islamic Cooperation and international human rights conventions to show how the internalization of core human rights norms has not occurred despite decades-long ratification of these treaties. Given that this evidence suggests human rights conventions and Islamic-based reservations reflect regional as opposed to universal moral commitments, I argue that enforcing human rights at the regional level will facilitate a greater degree of integrity to the provisions of these treaties.

I. Introduction

The absence of a centralized enforcement apparatus brings into question the practical effectiveness of the human rights regime and forces many to view it as merely aspirational. Additionally, reservations put forth toward human rights treaties prior to the state ratification of these accords cause some concern, particularly as to whether reservations undermine core objects and purposes of the treaties in question, and to what degree, if any, reservations should be acceptable.

Considering that signing onto human rights treaties is an entirely voluntary venture made by individual sovereign states, and that there is no centralized enforcement apparatus to ensure compliance with the provisions of human rights treaties, there are few available responses to reservations that participants in a human rights treaty can pursue.

One option is to object to reservations. In a recent draft essay on objections to reservations, legal scholar Tom Ginsburg observes that reserving states emphasize either sovereign particularism or the supremacy of Islam as the basis of their contention with the human rights regime. Objections to reservations are a retort to these contentions that aim to uphold the desired universal applicability of human rights. Yet, in choosing to object to reservations, as Ginsburg maintains, objections have emerged as a “decentralized mechanism of interpretation for a scheme designed to maximize breadth but not depth of treaty obligations.” In other words, the pursuit of universality often entails sacrificing a degree of integrity with the core principles of a human rights treaty. Accordingly, the ratification of human rights treaties (which allow for reservations) differs from the classical mode of treaty ratification, which entailed unanimous affirmation of the provisions of a treaty in its entirety.

Why have standards been lowered for the adoption of human rights treaties? Supporters of human rights treaties have opted to pursue broad, formal acceptance of human rights accords over a practical commitment to the integrity of their provisions to express the importance of their core values. In other words, it is believed that allowing states to put forth reservations to treaties that they have ratified would advance the formal universality of human rights norms and, consequently,
their internalization.

The internalization thesis argues that if human rights norms are presented to a society, those norms will be adopted over time and compliance will ultimately result. As legal scholars Kal Raustiala and Anne-Marie Slaughter indicate, most theories of compliance with international law "are at bottom theories of behavior influence of legal rules." To achieve the desired universality, and presuming that the internalization thesis is sound, international legal scholars like Ryan Goodman have maintained that reserving states should be able to remain parties to human rights conventions so long as their reservations do not conflict with the core object and purposes of the treaties in question.

In this paper, I will challenge the assumption that the consequence of formal adoption of human rights treaties is the internalization and compliance with international human rights norms. My argument will proceed as follows. Given recent Pew data on public sentiment toward concerns at play in central human rights instruments – such as women's status and marriage norms, gender equality, prohibition of torture, and individual civil and political rights – I will argue that there is little empirical support for the notion that Islamic states will likely internalize human rights norms under pressure of international human rights law.

I maintain that human rights morality and law is better described and pursued in terms of regional (as opposed to universal or global) moral commitments. This leads to my main conclusion that human rights treaties should opt for regional integrity over superficial universality.

II. Assessing internalization

- Pew data on global public sentiment on areas of concern to the international human rights agenda suggest that principles enshrined in human rights accords are not being internalized by Islamic state parties to these agreements.
- These findings are consistent across various human rights concerns, including
  (i) gender equality/women's status and
  (ii) torture prohibitions, and
  (iii) civil and political rights pertaining to religious liberty.

It appears as though a basic assumption held by proponents of a “universal” scheme for human rights is that the internalization thesis is sound. Why would states sacrifice depth of ratification for breadth of participation in a human rights program if it were assumed that the pursued universality of ratification would not facilitate the internalization of and compliance with those norms in reserving states?

Although there are a few examples we may point to in Muslim-majority countries that highlight the possibility of internalization of liberal and human rights norms and political commitments (most notably Turkey after the Tanzimat Reforms and the rise of Kemalism in the 1920s), data on both the capacity for international human rights laws to influence public sentiment and governmental behavior in Muslim-majority states decades after the ratification of human rights treaties show that this prospect is not widespread despite decades of ratification of central human rights accords. I will proceed by analyzing poll data collected by the Pew Research Center on public sentiment regarding central human rights concerns to test whether they are actually being internalized in Islamic states.

Despite certain scholars commenting on an apparent “proliferation of rights claims” since the conception of the Universal Declaration of Human Rights (UDHR) in 1948, I define the most central human rights concerns as those with the most ratifications and which mobilize the most amount of fiscal resources. I will then assess whether these human rights concerns are, in fact, being internalized by state parties to human rights conventions.

As Michael A. Elliott has observed in recent studies of human rights instruments recognized by the Office of the United Nations High Commissioner for Human Rights, the prevalence of certain categories in human rights documents that establish either protections of entities or violations of human rights principles can be understood to reflect the central moral concerns or “sacred” categories of the human rights program. As Elliott has observed, the frequency of appearance of certain categories in human rights legal documents far

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outstrips that of others, which supports the notion that some categories are more central to human rights morality than others.

While many categories, such as the protection of gypsies, the elderly, the media/journalists and so forth, do appear in human rights instruments that articulate protected entities and institutions, they appear with far less frequency than others. After the all-inclusive category “Everyone/All Persons”, which appears with the greatest frequency among human rights documents (18.6% of total frequency), the categories of “The Elderly”, “Gypsies”, “The Media/Journalists” only appear with a total frequency of roughly 1.0%. Of documents that discuss human rights violations, the categories that appear most frequently are “Children” (14.4% of total frequency). Alternatively, categories such as “Abuses against the Administration of Justice” and “Authoritarianism” only appear with a frequency of around 1.0%. Along with “Children”, the categories that appear most frequently with respect to violations are “Torture”, Persecution”, and “Ill or Degrading Treatment” (11.9%). If the frequency of these categories in human rights instruments that articulate protected categories and discuss violations thereof are reflective of the central moral concerns of the human rights program, those that appear with greater frequency can be understood to lie closer to the heart of the program’s commitments than those that appear less frequently in human rights documents.

Furthermore, the number of state parties to conventions that articulate concerns central to human rights imperatives mirror the prevalence of these concerns in human rights instruments. For instance, in accordance with the fact that the category of “Children” appears most frequently of any category in human rights instruments, the 1989 Convention on the Rights of the Child stands as the most ratified treaty in the history of international relations with 196 parties. The Convention on the Elimination of All Forms of Discrimination Against Women, with 189 parties, follows closely behind. Moreover, of the 193 UN member states, 169 are parties to the International Covenant on Civil and Political Rights, and 162 are parties to the 1985 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The number of parties indicates the importance of these values to human rights morality.

Other evidence for the centrality of certain human rights moral concerns pertains to the amount of funding received by human rights organizations. For example, the United Nations Children’s Funds (UNICEF) boasts an annual revenue of nearly 5 billion USD and receives the greatest number of annual donations from the private sector at 1.26 billion USD. By comparison, the World Food Program and the UN Refugee Agency, organizations of comparable size and prestige in the eyes of global humanitarianism, received 88 million USD and 191 million USD, respectively. If the relative amount of funding received by humanitarian organizations like UNICEF is indicative of its importance to the human rights program, then categories like “Children” are, again, central to human rights morality.

I would now like to question whether de jure commitments to central human rights instruments and the principles articulated therein actually prompt changes in de facto state behavior and public sentiment. Are the moral categories most central to the human rights program really being internalized by parties to international human rights conventions like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture (CAT), the International Covenant on Civil and Political

2 Ibid.
3 This percentage includes various problems related to children, including Child Abduction, Child Begging, Harmful Child Labor, Child marriages, Child/Infant/Maternal Mortality, Child Pornography, Child Prostitution or Sexual Slavery, Child Sex Tourism, Forced Religious Conversion of Children, Children and Domestic Violence or Abuse, Sale or Trafficking of Children and Organs, Use/Procuring/Offering of Children for the Production and Trafficking of Drugs, Forced/Compulsory Use of/Displacement of Children in Armed Conflict, and Discrimination against Children with HIV/AIDS.
Rights (ICCPR) and the Convention on the Rights of the Child (CRC)? To assess the degree to which these moral commitments are being internalized and reflected in governmental and societal behavior, I will refer to empirical studies conducted by the Pew Research Center.

(a) Women’s status and marriage

Personal status and marriage laws in many states party to the OIC remain the only components of legislation that explicitly rely on Islamic law, in contrast to matters of procedure, commercial law, finance, and so forth, which have been borrowed from European and North American legislative systems. Because these areas of societal norms and laws are understood to warrant special protection from the intrusion of international imperatives and the forces of globalization, they have been particularly resistant to changes that would reflect internalization of human rights norms with respect to sex and gender equality.

Despite explicit references to women’s right to equality in marriage and family life along with right to equality before the law in Articles 15 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and in Article 3 of the International Covenant for Civil and Political Rights (ICCPR), public sentiment in many state parties to the OIC limit women’s marital rights relative to their husbands. Although many OIC member states are parties to CEDAW, the respondents in Pew research surveys on public sentiment regarding women’s status and marriage norms in OIC member states “say that a wife should always obey her husband.” In 20 of the 23 countries where the question was asked, at least half of respondents indicate that they believe a wife must obey her spouse, and upwards of 95% of respondents in Southeast Asia, South Asia, and the Middle East and North Africa consistently agree that a wife must obey her husband, including respondents in Malaysia (96%), Indonesia (93%), Thailand (89%), Afghanistan (94%), Pakistan (89%), Bangladesh (88%), Tunisia (93%), Morocco (92%), Iraq (92%), Palestinian Territories (87%), Egypt (85%), Jordan (80%), and Lebanon (74%).

Jordan and Egypt ratified CEDAW in 1992 and 1981, respectively. Despite being parties to the Convention for decades now, there is not much data to support an internalization of human rights norms involving non-discrimination of sex and gender, and women’s status and marriage norms. Furthermore, since ratifying CEDAW, marriage laws in both countries have resisted amendment in light of international human rights standards.

First, Jordan has had a particularly tenuous relationship with the imperatives involving women’s equality in international human rights law. Prior to the codification of CEDAW in 1979, Jordan’s 1976 code provided that “the husband shall treat his wife well and deal with her fairly; the wife shall obey her husband in permitted things.” Of course, the rhetoric of obedience to the husband on the part of the wife would stand in stark contrast to the articles laid out in CEDAW and would lead to decades of contention between the two.

More than a decade after Jordan ratified CEDAW in 1992, it submitted an Islamic-based reservation to CEDAW in 2006, maintaining that Article 16 of the Convention (which stipulates equal rights in marriage, including rights and responsibilities in marriage) “is incompatible with [Islamic law].” Under Jordanian law, it explains further, “marriage [in Islam] is not based on equality of rights and duties for husband and wife, but on reciprocity… It follows that the concept of equality between spouses cannot be made to fit into the existing legal system.” Naturally, it followed in 2007 that the CEDAW committee noted its concern regarding Jordan’s “assertion that it cannot… for religious reasons, amend provisions of its Personal Status Act to give women equal rights with men in matters of marriage, divorce and custody of children” and called Jordan to begin further revisions.

Second, Egypt has negotiated international legal pressure in a different way, albeit while still appealing to the Shari’a as a basis for delegitimizing the injunctions of international conventions, revealing both a lack of internalization and compliance with human rights norms. Although Egypt’s engagement with European law dates

3 Ibid.
6 Ibid. The rationale in this reservation echoes Iran’s statement in 1979 opting out of ratifying the Universal Declaration of Human Rights.
7 Ibid.
8 Ibid. Emphasis added.
back at least to 1883 when it adopted the Napoleonic Code as its civil law (in 1949 its civil code was borrowed from the French Civil Code, and in 1955 Shari’a courts were disbanded altogether), the weight of the Shari’a still proves important in matters of women’s status and marriage law.

For example, in 2000, Egypt amended its divorce law with the *khul’* provision, which the Egyptian National Council for Women described to CEDAW as giving “women the equal right of divorce through *Khul’*, or repudiation, which is the indigenous Islamic formulation of women’s right to divorce for incompatibility without need to prove damage.” While this sounds promising and in line with human rights norms pertaining to sex and gender equality and women’s status, the Committee representing CEDAW expressed concern for the fact that “women who seek divorce by unilateral termination of their marriage contract (khula) under Law No. 1 of 2000 can only obtain such a divorce if they forgo alimony and return their dowry.” In light of these concerns, the Committee called on Egypt to revise the law to eliminate financial discrimination against women.

Despite being parties to CEDAW for decades, it appears as though internalization of its central commitments has yet to occur in states like Egypt and Jordan.

(a) Torture

In addition to the commitment to substantive gender equality as a central human rights concern, the prohibition of torture is also a primary concern to the human rights program. The prohibition of torture commitment is enshrined in both the 1985 *Convention Against Torture* (CAT) and in Article 7 of the 1976 *International Covenant on Civil and Political Rights* (ICCPR), both of which are widely ratified human rights instruments. Yet, similar to the resistance to internalization of sex and gender equality norms in spite of state ratification of human rights conventions, the prohibition of torture commitments in international human rights law also appears to face resistance to internalization. While reliable data on instances of torture is difficult to ascertain because of its covert nature, there are a few sources I will look at in order to get a better picture of how well torture prohibitions are being internalized by the public in state parties to these conventions.

In 2015, the Pew Research Center conducted a survey of public opinion in 38 countries around the globe on the legitimacy of torture against suspected terrorists. The study found that the global median for considering torture to be justified in certain cases (involving suspected terrorists), is upwards of 40%. The regions of Africa and the Middle East both yielded results above the median, at 55% approval and 45% approval, respectively. Furthermore, countries that are parties to both the CAT and the ICCPR are among those who fall above the 40% median. These include, but are not limited to, Lebanon (around 70% approval), Pakistan (around 50%), Nigeria, Israel, and Kenya (all over 60%), Uganda (80%), Jordan (45%), and India and the United States (at around 58%).

Of course, a longitudinal study would be necessary to determine whether the percentage of populations that consider torture to be justified in certain cases has, in fact, been unaffected by the instantiation and ratification of international human rights norms against the use of torture and was not actually higher prior to codification of CAT and ICCPR Article 7. In other words, it could be the case that the 40% global median for considering torture to be justified in certain cases could be lower than it had been before the creation and ratification of human rights instruments that prohibit torture (the CAT and the ICCPR, the second of which has enshrined a prohibition of torture or cruel, inhuman and degrading treatment or punishment in Article 7).

Yet, if we consider the stature of the prohibition of torture norm in the human rights program as one of the few rights which are considered to be (as they proclaim themselves to be in theory) *jus cogens* norms, which do not permit derogation even in times of war (and, presumably, including in the face of terror threats), then the 40% median reveals that, in practice, the prohibition on torture norm as something which is supposed to be non-derogable is far from internalized.

Legal scholars Adam S. Chilton and Mila Versteeg conducted surveys on whether information on the ratification of the ICCPR is available to the public.

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2 CEDAW/C/Egy/CO/7 5 February 2010 Committee’s Concluding Observations on Egypt’s combined sixth and seventh reports, paras 49 and 50.
3 Ibid.
4 Ibid.
5 Richard Wike, “Global opinion varies widely on use of torture against suspected terrorists.” Pew Research Center (9 February 2016).
6 Ibid.
status of international law or constitutional law impacted public support for the use of torture.1 Complementing the Pew data adduced above, the findings in Chilton and Vesteeg’s study suggest that legal prohibitions on torture have been largely ineffective in altering public sentiment toward torture, especially when it comes to being used in the face of terror threats. As Chilton and Versteeg indicate, “information on the status of international law nor constitutional law has a substantial effect on public support for the use of torture.”2 They write elsewhere that torture prohibitions as enshrined in constitutions in countries with strong constitutional traditions may nevertheless fail because the use of torture often enjoys substantial popular support, especially in the face of terror threats.”3

Despite the non-derogable nature of the prohibition of torture imperative in international human rights law, public sentiment on the usage of torture reveals that this prohibition is, in fact, considered derogable in certain circumstances pertaining to national defense and the maintenance of public security (inhibiting terror threats). Given that both a large portion of the populations of state parties to both the CAT and the ICCPR consider torture to be a legitimate response to circumstances such as the interrogation of suspected terrorists and that, according to research conducted by Chilton and Versteeg, public support for torture is unaffected by information about the status of international legal or constitutional torture prohibitions, it seems to be fairly clear that the kind of all-encompassing, non-derogable torture prohibitions in human rights law are not being internalized by state parties to the CAT and the ICCPR.

(a) Civil and political rights

Referring back to Elliott’s study of categories central to human rights morality and law, I would like to discuss the implications of the primary protected category “All Persons”. Of course, the civil and political rights at the center of the human rights program are afforded to “All Persons” by virtue of their humanity as such. This is a central and basic feature of human rights morality.

These civil and political rights afforded to human beings by virtue of their humanity as such (values like free expression, religious liberty, and public safety), can be seen as core values of constitutional democracies and define the parameters of the civil sphere.

While finding their origins in liberal constitutions, the particular civil and political rights afforded to “All Persons” by virtue of their humanity as such became enshrined in international accords like the ICCPR and include non-discrimination, minority rights, and equality before the law (Articles 26 and 27), procedural fairness in law, the presumption of innocence and due process (Articles 14, 15, and 16), and individual liberty, including freedom of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy (Articles 12, 13, and 17 - 24). The ICCPR also requires civil and political right to be recognized “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2).4

Interestingly enough, many, if not all, of these rights mirror those found in both constitutions of liberal democracies (including France, India, Germany, South Africa, Australia, the United States, and Canada) and the European regional bloc of the United Nations, the European Convention for Human Rights (ECHR), which is enforced by its judicial apparatus the European Court of Human Rights.

However, internalization of these norms has been met with resistance in state parties to the Islamic bloc of the UN, where Islam defines the limits on what the legitimate scope of civil and political rights entail (conversely to the position of traditional religion in liberal constitutions and human rights instruments). For instance, religious freedom has certainly not been internalized by a majority of Islamic state parties to the OIC. Support for the death penalty for apostates is significant among the populace of Arab states: the death penalty for those who leave Islam is widely supported in Egypt (86%) and Jordan (82%). Furthermore, 66% of people who support the instantiation of Shari’a law in the Palestinian territories also support the death penalty for apostasy.5

Similar to the resistance against the ability to freely leave a particular religious tradition, Muslims in Central Asia, the Middle East, and North Africa are not

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2 Ibid.
4 International Covenant on Civil and Political Rights (Article 2.1).
likely to believe non-Muslims can practice their religion freely in these regions. Fewer than half of respondents in Kyrgyzstan (48%), Tajikistan (47%) and Uzbekistan (26%), for example, say non-Muslims are able to practice their faith freely and openly. Similarly, in the Middle East and North Africa region, 37% of Iraqis and 31% of Egyptians believe non-Muslims are free to practice their religion. In 15 of the countries surveyed, Muslim respondents are more likely to report that they are free to practice their religion than to say the same about people of other religious communities. The gaps are particularly wide in Jordan (22 percentage points), Kyrgyzstan (20), Turkey (20) and Egypt (15).

In addition to public sentiment which stands in tension with the imperatives of the ICCPR, governmental behaviors in Islamic state parties to the OIC which have also ratified the ICCPR stand in contrast with central concerns of the Covenant. Pakistani criminal law considers desecrations of the Qur'an to be illegal and insults directed toward Muhammad to warrant the death penalty. In accordance with this legal provision, a Christian Pakistani was sentenced to death in response to the charge of blasphemy as recently as November 2010. Afghan authorities have likewise sentenced a journalist to death for blasphemy in 2009 in light of criticisms he had made of Qur’anic verses as part of an Internet piece he had written on women’s rights.

In Iran, this moral conviction has found articulation in its Constitution and has also served to justify criminal penalties. In 2007, a group of students at Tehran’s Amir Kabir University were incarcerated for publishing articles suggesting that no human being (including Muhammad and Ayatollah Khamenei) is infallible. Among the many activists who have been arrested and detained in recent years for alleged blasphemy and criticism of the Islamic regime, Iranian blogger Omid Mirsayafi died in prison in March 2009 while serving a 30-month sentence for reasons including criticism of religious leaders.

In sum, considering the Pew data surveyed here on public sentiment regarding limitations on religious liberties in Islamic states (who are also parties to the ICCPR) and their governmental behaviors in prosecuting religious dissidents, it can hardly be said that human rights norms enshrined in the ICCPR have been internalized by state parties to the Islamic bloc of the UN.

(a) Children’s rights

The last protected category in the human rights canon I will look at is “Children”. As noted above, the Convention which protects children’s rights is the most ratified treaty in the history of international human rights law and mobilizes the greatest amount of fiscal resources of all humanitarian causes. While it seems as though the moral concern for children has been internalized to a greater degree across state parties to the CRC, there are reasons to suspect even this category’s internalization.

First, data presented by UNICEF indicates that 24% of children in least developed countries aged 5 to 14 years and 10% of children in the Middle East and North Africa engaged in child labor at the time of the survey in 2016. While these figures are shocking and greater than what we might expect given the stature of children’s rights commitments on the global stage, it cannot be inferred from this data that public support for child labor (or the practice thereof) has remained constant around the globe or in these regions, as we have seen in other areas of humanitarian concern such as support for torture in certain situations involving threats to natural security or public safety and women’s status and marriage norms. While a longitudinal study would be needed to determine whether child labor figures have decreased in these regions or not, it’s easy to consider the possibility that instances of child support in these regions have diminished since widespread ratification of

2 Ibid.

Second, child executions also challenge the internalization of children’s rights on the global stage. Iran presents an example of a state party to the CRC while having a notorious history for being the world's largest executioner of juvenile offenders. Yet, it likewise cannot be inferred on the basis of Iran’s child execution policy that the protections enshrined in the CRC are not being internalized in other state parties to the Convention. Unlike what we have seen in public sentiment on torture prohibitions, sex and gender equality, personal status and marriage law, or civil and political rights, it may very well be the case that the protected category of “Children” may have the capacity to act as a robust “universal” moral commitment.

On a final note, we could question whether the data on imperatives involving children’s rights can be explained in terms of (i) the CRC being instrumental in changing societal norms pertaining to children, or (ii) reflective of a very widespread (and perhaps universal) moral imperative of protecting children as a commitment already embedded in a vast majority of human cultures and societies (in other words, a robust global “sacred”). Nevertheless, a longitudinal study would be necessary to determine whether widespread ratification of the CRC marks a turning point in practices such as child labor.

(a) Concluding remarks on internalization

In this section, I have set out to assess the soundness of the internalization thesis in light of empirical research on support for central human rights norms in Islamic states. The preceding observations will be used in the following sections to assess the appropriateness of various human rights ratification schemes.

As we have seen, Pew research on public support for norms enshrined in human rights instruments involving gender equality and marriage rights, civil and political rights, and the prohibition of torture norms challenge the soundness of the internalization assumption at the heart of human rights treaties. However, there are few examples of internalization that I would like to briefly address.

First, while I adduced data on high rates of disapproval for civil and political rights such as freedom of religion for non-Muslims in Islamic states and high rates of approval for capital punishment for the “crime” of leaving Islam in many of these states, Turkey (a Muslim-majority country with a 98% Sunni population), does not mirror similar public sentiment found in other Muslim-majority nations. Whereas countries like Egypt and Jordan, for instance, support the death penalty for leaving Islam at rates of 86% and 82%, respectively, only 17% of Turks support this view. This is perhaps because of Turkey’s longstanding history of embracing liberal principles central to law and politics of European constitutional democracies - from the Tanzimat reforms of the 1800s through the early-twentieth century Kemalist movement’s emphasis on secularization of the public sphere. In fact, Turkey is the only state party to the OIC that is also a member state of the European Convention for Human Rights (ECHR) and has adopted many principles reflective of European liberalism in its secular constitution.

The Turkish case is certainly an example whereby internalization of human rights norms (pertaining to civil and political rights) has occurred. But, as Pew data indicates about public opinion on prohibition of torture norms, women’s status and marriage law, and civil and political rights, this is by no means the norm in most of the Muslim-majority state parties to the OIC. In fact, if the example of Turkey tells us anything about the relationship between civil and political rights and a society marked by a majority Islamic culture, it is that the internalization of human rights norms is predicated on the adoption of the classical liberal divergence between traditional religion and the law. As this differentiation does not exist in the vast majority of Islamic states party to the OIC, Turkey cannot serve as an example for the prospect of internalization of human rights norms in contemporary Islamic states.

I will now briefly discuss globalism and regionalism in light of the preceding examination of the internalization thesis.

III. Globalism vs. regionalism

- Sweeping Islamic-based reservations to various international human rights conventions and European objections to these reservations reflect regional moral and legal commitments.

As Tom Ginsburg indicates in his paper “Ob-
objections to Reservations as Decentralized Definition of Obligations,” reservations to international human rights treaties are generally one of two types: (i) Islamic-based reservations and (ii) state sovereignty-based reservations. states that emphasize sovereignty-based reservations, such as the United States, do trigger objections. Yet, the more common type of reservation met with objections in international human rights law are Islamic-based reservations.

Islamic-based reservations and the objections to these reservations (objections which, as Ginsburg posits, entail a kind of decentralized mode of regulating international human rights cooperation) reflect an “intense contestation going on between two universalisms: international human rights law and Islam.” Supporting this claim, Ginsburg observes that countries which have generated the most objections to their reservations, both for the ICCPR and other human rights treaties, have been majority Muslim countries, and “many of the most controversial reservations implicate Islam.”

In light of the Pew data adduced above, this is not surprising. As we have already seen, public sentiment and domestic law in states party to the OIC are often at odds with moral commitments central to human rights conventions and legitimize these stances on the held moral, political, and legal centrality of the religion of Islam. In fact, international declarations made by states party to the OIC reflect this kind of public sentiment on the primacy of this alternative universalism.

Concerned that the Universal Declaration of Human Rights was not reflective of non-Western values, member states of the OIC submitted the Cairo Declaration of Human Rights in Islam (CDHRI) to the World Conference on Human Rights in 1993. The Preamble of the CDHRI explicitly bases its moral framework on the foundation of “the Islamic Shari`ah,” asserting that “the fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them inasmuch as they are binding divine commandments.”

Articles pertaining to freedom of religion and expression that follow from the Preamble also focus on the centrality of Islam. Article 10 states that “Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.” Islamic values as enshrined in the source-texts of the Shari`ah are considered foundational in the CDHRI. Further, Article 16 illustrates this lexical priority when maintaining that “Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari`ah.”

Similarly, Article 19(D) articulates the centrality of Islamic moral grounds in criminal law when stipulating that “There shall be no crime or punishment except as provided for in the Shari`ah.” Additionally, the CDHRI affirms the centrality of Sharia as authoritative in defining limits to rights and freedoms in its Article 24 when it states that “All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari`ah.”

We can also observe trends in Pew data on Muslim views on the centrality of the religion of Islam in law and political rights in Muslim-majority states:

Pew data shows that in many state parties to the OIC, the authority of the human rights regime as such is questionable. In a Pew Research Center survey of Muslims in 39 countries, participants were asked whether they would want Sharia law (defined here as a legal code based on the Qur’an and other Islamic sacred texts), to be the official law in their country. Responses among the populations of the 57 state parties to the OIC were overwhelmingly high, with nearly all Muslims in Afghanistan (99%), and most in Iraq (91%), Pakistan (84%), Palestinian territories (89%), Morocco (83%), Egypt (74%), Jordan (71%), and Tunisia (56%) supporting Sharia law as the official law. Furthermore, support for Sharia being applied to non-Muslims is most widespread in the Middle East and North Africa, where at least 40% of Muslims in all countries (except Iraq and Morocco) hold this view (with the exception of Iraq and Morocco).
It is clear that widespread public approval for the centrality of Shari’a law mirrors the sweeping Islamic-based reservations made by many Muslim-majority states to international human rights conventions, and serves to highlight the rift between Islamic moral and legal norms as a kind of universalism in itself and universal human rights morality and law. I would like to posit that the rift between the Islamic universalism and the human rights universalism has much to do with the position religion is understood to occupy in the public sphere and in law.\(^1\)

Nevertheless, it appears as though universality is a basic and inbuilt assumption of both international human rights law and Islamic law, commitments to which motivate sweeping Islamic-based reservations to human rights law which position human rights laws in a position of subjection to the legitimizing principle of Sharia, Islamic-based multinational declarations like the CDHRI, and public sentiment on the centrality of Islamic law in Muslim-majority states. As Ginsburg succinctly observes, the contention between these two universalisms “reflects a [profound] comparative divergence in the understanding of the purposes of international law.”\(^2\)

### IV. Conclusion

Descriptively, this landscape of competing universalisms reflects a regional character of public morality on the international stage that challenges the aspirations of a “universal” conception of human rights. Given this landscape, proponents of human rights can take one of two prescriptive stances: they can either (I) insist on the universality of human rights as something that trumps the moral and legal consensuses of other peoples, or (ii) focus on strengthening human rights jurisprudence and enforcement in regions whose moral and legal systems already bear semblance to human rights commitments.

1. Without getting into a discussion on a genealogy of human rights or the political philosophy of liberalism, I would like to note that liberal legal systems (including international human rights law) relegate religious manifestations to a place of deference to a generally-applicable set of laws which govern the civil sphere. In other words, a generally-applicable law (as opposed to a law guided by a particular traditional religion), which has the capacity to both limit and protect religious manifestation, defines the public sphere. Islamic legal systems, alternatively, are predicated on the centrality of the religion of Islam in particular, and often define limits to civil and political rights on that basis.

2. Ibid.

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