Volume VIII Spring 2014 Issue 2

Columbia Undergraduate Law Review

Articles

THE COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME VIII • ISSUE 2 • Spring 2014

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The Excessive Political Dominance over Doctors: How Texas's Newest Abortion Regulations Violate Women's Constitutional Rights

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Abstract
Texas has enacted several new anti-abortion legislations under the interest of regulating the medical profession while directly placing a burden on women's abilities to obtain abortions. The most recent illustration of this overreach are the newest Texas Health & Safety Codes §§ 171.0031, 171.041-171.048, 171.061-171.064, which require that physicians have authorization from a hospital within 30 miles of the clinic in order to have hospital admitting privileges. These statutes do not provide exemptions for medical emergencies and ensure that 24 counties in Rio Grande Valley in Texas will be left without abortion providers. Most legal scholars and courts interpret the undue burden test in Planned Parenthood v. Casey to prohibit state regulations that impose significant difficulties onto women's abilities to choose abortions, including the substantial burden on the accessibilities to abortion clinics. Nevertheless, the United States Court of Appeals for the Fifth District departed from Casey's well-established legal precedent by staying the Western District Court of Texas' injunction relating to these statutes. I demonstrate that the only reasonable way to understand the precedent established by Casey is that women's right to privacy supersedes legitimate state interest in protecting the integrity of the medical profession. The Court of Appeals departed from this precedent and, instead, relied on the inaccurate use of the undue burden test in Gonzales v. Carhart as a mechanism to allow the enforcement of Texas's unconstitutional statutes.

The Supreme Court's ruling in *Roe v. Wade* in 1973 established the precedent asserting that women's right to abortions prior to fetus viability[1] are fundamental rights. This liberty is currently an unenumerated right under the First, Fourth, Fifth and Ninth Amendments of the United States Constitution; protected within the scope of personal liberty and right to privacy under the Fourteenth Amendment; and found in the penumbras of the Bill of Rights.[2] Personal liberty has an extension to the activities relating to marriage, procreation, contraception, family relationships, child rearing, and education. Thus, it is broad enough to encompass women's rights to reproductive choice and bodily integrity by asserting the freedom to decide whether to terminate their pregnancies.[3] However, one may argue that Texas's legislature has recently confused the idea that abortion rights are protected against governmental intrusion. Through various statutes that make women's abilities to attain an abortion nearly impossible, it appears that these political actors have begun a campaign to eliminate women's rights to abortions.

Upon the establishment of the undue burden test in *Planned Parenthood v. Casey*,[4] states began to rely on the concept of legitimate state interest in order to pass anti-abortion legislation. Under the pretense that such laws are in the state's interest of protecting women's health and/or the medical profession, legislators have reduced women's accessibility to abortions. Because the *Casey* Court diverted from the review of anti-abortion laws under the strict scrutiny test established by *Roe v. Wade*[5] and, instead, established the undue burden test, states have gained large latitude in interpreting what acts constitute a substantial burden on women's rights to abortions. The undue burden test asserts that states may pass acts regulating abortion procedures pre-viability as long as these laws do not hinder women's rights to reproductive choice.[6] Nevertheless, due to the plurality opinion in *Planned Parenthood v. Casey*, there is confusion as to which regulations accurately balance states' legitimate interests and women's rights to abortion procedures.

Utilizing the confusion relating to the undue burden test, states have passed informed consent laws,[7] resource awareness regulations,[8] and partial-birth abortion bans[9] with an apparent disregard for the effects on women's rights to reproductive choice. Using the precedent established in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey* in conjunction with the creation of the undue burden test,[10] these laws have been enacted based on the justification that states have the authority to assert their important interest in safeguarding women's health and in maintaining medical standards.[11] However, the lack of balance between these interests and women's ability to obtain abortions pre-viability has become the central argument for those claiming that these statutes are unconstitutional. As states solely review their interest as being distinct from women's rights to bodily integrity, the undue burden test has become equivalent to the rationale-basis review.[12] This is illustrated in Texas's latest infringement upon women's right to abortions in its Texas Health & Safety Codes §§ 171.0031, 171.041-171.048, 171.061-171.064.[13] These statutes require that physicians who perform abortions must have hospital admitting privileges and can prevent women from obtaining a medically-induced abortion after 49 days from their last menstrual periods. The State of Texas has enacted these acts under the fabricated interest of regulating the medical profession. Meanwhile, these laws have directly placed an obstacle on women's ability to obtain an abortion.

This article proposes that these statutes are unconstitutional by reviewing the evidence presented to the United States District Court for the Western District of Texas in *Planned Parenthood v. Abbott*[14] and the improper application of the undue burden test by the United States Court of Appeal for the Fifth District in its ruling on the case.[15] In order to properly review the infringements these laws present, Section I examines the meaning of the undue burden test in accordance with *Planned Parenthood v. Casey* and determines that a state's legitimate interest cannot be reviewed in isolation from its effects on a woman's right to reproductive

choice. For the purposes of indicating the origin of the Appellate Court's inaccurate understanding of the undue burden test, Section II demonstrates the Supreme Court's departure from its own established precedent through the misrepresentation of the undue burden test in *Gonzales v. Carhart*. Section III suggests that the United States Court of Appeal for the Fifth District erred in granting a stay of the United States District Court for the Western District of Texas's decision in relation to the Texas's hospital admitting requirements because the State of Texas does not have a strong likelihood of succeeding on appeal. Section III suggests, therefore, that by incorrectly implementing the undue burden test, the Appellate Court's opinion established that a state's interest surpasses a woman's rights and liberties to reproductive choice.

I. THE UNDUE BURDEN TEST ACCORDING TO *PLANNED PARENTHOOD V. CASEY*

Roe v. Wade established that women have a fundamental right to abortions prior to viability. This right is protected under the First, Fourth, Fifth, Ninth and Fourteenth Amendments, and rooted in the penumbras of the Bill of Rights. [16] Therefore, the Court recognized that any law regulating or restricting this fundamental right must be reviewed under the strict scrutiny test.[17] This test requires that states present a compelling governmental interest and that any laws be narrowly tailored to meet such interest. The Court declared a state's interest as one that extends to regulation at the end of the first trimester and that is:

> reasonably relate[d] to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.[18]

Consequently, the *Roe* Court asserted that women's rights to abortions after viability are limited to states' legitimate interests in relation to regulating medical standards. However, because *Roe*'s central holding established that a woman's right to an abortion extends to the consulting physician's medical judgment, the Court stated that the permissible state regulations of abortion procedures could not be legislated until the end of the first trimester and states may only enact regulation relating to abortions after this stated period in order to preserve and protect the woman's health.[19] The Court recognized that the state has a compelling interest in protecting potential life upon fetal viability and may proscribe abortion procedures except when necessary to preserve the health and life of the mother.[20]

Nevertheless *Planned Parenthood v. Casey*[21] modified the constitutional test for abortion without overturning *Roe v. Wade*. By establishing the undue burden test, the Supreme Court's plurality opinion in *Planned Parenthood v. Casey* specified that states have a legitimate interest in protecting the life of the fetus from the point of conception.[22] It must be noted that this interest is not unqualified as states are restricted from enacting statutes that create a substantial obstacle to the woman's right to choose and, thus, measured by an undue burden to the woman seeking an abortion.[23] This test allows for the state to express its substantial interest in potential life or some other valid state interest prior to viability, yet a law designed to further this interest which imposes an undue burden on the woman's decision is not constitutional.[24] Consequently, the *Casey* Court established that, although the state may protect the life of a fetus, the right of a woman to have an abortion prior to viability remains a fundamental right. The state must exercise its legitimate interest without negatively affecting and/or superseding a woman's right to bodily integrity.

The recent ruling by the United States District Court for the Western District of Texas in *Planned Parenthood v. Abbott* clarified the undue burden test by stating that two qualifications must be fulfilled in order for an abortion restrictive act to survive

constitutional scrutiny.[25] The first prong requires that the regulation pass the rational-basis review. This review, or constitutional test, requires that states show that a law's purpose or effect is rationally related to legitimate state interests. Nonetheless, legitimate state interests are directly intertwined with how statutes serve to further states' legitimate purposes of their laws. As asserted by the Supreme Court in *Planned Parenthood v. Casey*:

> a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[26]

Therefore, the "purpose" inquiry is an assessment of the legislature's real motive. The appropriate analysis, distinct from a rational-basis analysis, is whether the state's purpose is to hinder autonomous reproductive choice and, thus, require that "regulations be motivated by a permissible purpose."[27] Put simply, a state's interest cannot be validated if, as a result of its implementation, a woman's ability to attain an abortion is hindered. The undue burden test requires that the state's interest be reviewed in conjunction with a woman's right to an abortion.

Consequently, a state's legitimate interest cannot only rest upon common state interests, such as the promotion of family values, preservation of fetal life, or regulation of the medical profession. Instead, the interest proposed by various statutes must be reviewed equally to the effects on women's right to choose in order to satisfy the "purpose inquiry" established by the undue burden test. This concept is described in the test's second prong, which measures the effects on women's right to choose by the fact that regulations cannot place a "substantial burden" on women seeking any abortion and reasonable alternatives must exist.[28] Because the *Casey* Court reaffirmed the central holding in *Roe v. Wade*, this analysis of the undue burden test resonates in logic. Although rejecting the trimester work in *Roe v. Wade*, the opinion

in *Planned Parenthood v. Casey* stated that the "consideration of the fundamental constitutional questions resolved by *Roe v. Wade*, of principles of institutional integrity, and of the rule of stare decisis required that the essential holding of *Roe v. Wade* be retained and reaffirmed."[29] Since *Roe v. Wade* determined that the right to an abortion relates to the right to privacy and personal liberty, the right to an abortion remains a fundamental freedom. Therefore, the undue burden test cannot simply be a synonym for rational-basis review.

The test must be more extensive in requiring that states carry the burden of proving actual states' interests *and* the lack of significant, actual impositions to women's right to choose. The Supreme Court affirmed this argument in *Planned Parenthood v. Casey* by stating that, before fetus viability, "the woman has the right to choose to terminate her pregnancy" and a law designed to further a state's interest or as a way to remove the private choice granted by *Roe v. Wade*, which imposes an undue burden, is "shorthand for the conclusion that the state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[30] As a result, the undue burden test cannot be completed by simply determining that a state has a legitimate interest and, instead, requires that such interest be measured in accordance with a law's effect on women's right to choose. Although acknowledging states' interests in potential life and in the regulation of the medical profession, the Court has maintained that women's personal rights supersede a state's substantial, legitimate interest. Therefore, any legislation that fulfills a state's interest yet infringes on women's rights and freedoms to choose abortion as a right to privacy, liberty, and bodily integrity is unconstitutional.

II. THE DISTORTION OF THE UNDUE BURDEN TEST IN *GONZALES V. CARHART*

The Supreme Court neglected to follow the requirements of the undue burden test in *Gonzales v. Carhart.*[31] Prior to this case,

the Supreme Court correctly implemented the undue burden test and determined that a Nebraska statute, which criminalized the performance of any "partial birth" abortion, was unconstitutional in *Stenberg v. Carhart.*[32] The typical abortion procedure affiliated with partial-birth is known as dilation and extraction (D&X),[33] yet dilation and evacuation (D&E) sometimes involves the delivery of at least some bodily part.[34] Therefore, the Nebraska act would prohibit D&E, which is the most common abortion procedure for women, as well as D&X within the first and second trimester.[35] As confirmed by the Supreme Court, this makes the act unconstitutional due to its negative limitation on women's abilities to attain this abortion procedure. The act further stated that the procedure that is used to only save the life of the mother whose life is endangered by a physical disorder, illness, or injury is exempt.[36] Consequently, the act did not carry an exemption for the preservation of the mother's health as established in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey.*[37] The health exception is required by established precedent in *Roe v. Wade*, which specified that "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[38] Therefore, abortion regulations must consist of exemptions for the preservation of the patient's health even after viability, and not solely for the patient's life.

As a result, the Court stated that, in addition to the act's undue burden on a woman's right to choose a D&E abortion, Nebraska legislatures endangered the woman's health when regulating abortion methods.[39] The Attorney General for Nebraska argued that D&X procedures are irregular and that safe alternatives remain available.[40] However, in reviewing the District Court's record, it was factually concluded that D&X may be the best procedure in certain cases to preserve the health of a woman.[41] After reviewing the amici brief from the American College of Obstetricians and Gynecologists, the *Stenberg* Court asserted that:

> Depending on the physician's skill and experience, the D&X procedure can be the most appropriate abortion procedure for some women in some circumstances. D&X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period. Compared to D&Es involving dismemberment, D&X involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix.[42]

Although the Justices also accepted the fact that there is some division of opinion among some medical experts over the greater safety of D&X procedures, this lack of medical unison only confirmed that the law required a health exception.[43] By correctly implementing the undue burden test and respecting the established precedent of *Planned Parenthood v. Casey*, the Court stated that the word "necessary" in *Casey*'s phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" cannot require unanimity of medical opinion and that the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method may be right.[44] Therefore, the Supreme Court's majority decision rejected the state's argument by stating that "the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."[45]

In clear contradiction with this rationale, the Supreme Court decided that a federal statute called the Partial-Birth Abortion Ban Act of 2003 was constitutional in *Gonzales v. Carhart.*[46] Because of the selective wording within the statute, D&X procedures are the only "partial-birth" abortion procedures prohibited. Congress defined a "partial-birth" abortion as procedure in which a physician:

> Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.[47]

The act contains an exception allowing the performance of "a partial-birth abortion that is necessary to save the life of the mother whose life is endangered by a physical disorder, illness, or injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[48] Exactly as seen in the Nebraska's "partial-birth" abortion ban, the federal law lacks the required health exception established by *Roe v. Wade*, confirmed in *Planned Parenthood v. Casey*, and utilized to claim Nebraska's regulation unconstitutional in *Stenberg v. Carhart*. Although its wording includes life-endangering conditions, the act only exempts partial-birth abortions that are necessary in order to save the life of the mother and neglects any conditions that may be detrimental to the mother's health. This precludes a woman who may have permanent health complications due to the pregnancy from obtaining a partial-birth abortion. A hypothetical illustration of the negative consequences of this act is its requirement of the usage of induced labor or an abortion using the D&E method for a woman whose uterus lining may be defective. However, contrary to their established precedent, the Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003.[49]

By ignoring the Court's own established principles of law, the majority opinion only used the standards established by rational-review basis test as opposed to all of the requirements set by the undue burden test. When determining the constitutionality of the law, the Court claimed "the government has a legitimate and

substantial interest in preserving and promoting fetal life."[50] Therefore, the Court concluded that "where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to ban certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn."[51] Although the Court claimed to have utilized the undue burden test, the Justices only reviewed the legitimate state interest in maintaining medical standards without balancing the act's implications on women's rights to abortions. However, the undue burden test cannot simply measure the state's interest in relation to its abortion statutes without overturning *Planned Parenthood v. Casey*. Instead, the test requires that courts review the effects an act may have on women's reproductive rights. In other words, courts must determine that legislation passed by states does not place women's health in jeopardy and, thus, does not create an actual undue burden on women's right to choose an abortion.

Nonetheless, under the rationale that there remained medical and scientific uncertainty as to the health benefits of D&X procedures, the Court stated that the federal statute was exempted from the required health exception.[52] This conclusion directly refuted the findings in *Stenberg v. Carhart*. The *Stenberg* Court reaffirmed that abortion laws require a health exception in order to validate post-viability and pre-viability abortion regulations.[53] Within the case, Justice O'Connor's concurring opinion stated that a "ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional."[54] Consequently, the usage of caution must be the logical approach in determining the requirement for health exceptions within abortion laws that have a direct effect upon women's health. Regardless of medical uncertainty, legislatures have a duty to insure the health of their women constituents and, thus, any abortion statutes should

favor the protection of women's health over a state's interest in fetal life, especially regarding pre-viability abortions.

In *Gonzales v. Carhart*, one may argue that the Supreme Court hid behind legal verbiage in order to uphold the federal statute due to the extreme method utilized in D&X abortion procedures. This is evident when reviewing Justice Kennedy's emphasis that the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[55] Further, the Court stated that Congress was concerned with "the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. […] Under [their] precedent it is clear that the State has a significant role to play in regulating the medical profession."[56] Therefore, the improper ruling delivered by the Court was not due to the misguided use of the undue burden test. Instead, it derived from the urge to uphold legislation that proscribed D&X methods of abortion. Because of the plurality opinion in *Casey*, confusion has occurred as to which regulations accurately balance states' legitimate interests and women's rights to an abortion. Benefiting from this misperception, the Supreme Court implicitly overruled *Stenberg v. Carhart* by solely focusing on a state's legitimate interest in regulating the medical profession in order to protect fetal life while disregarding the effects on a woman's health and right to choose.

III. TEXAS REGULATION OF ABORTION PROCEDURE ACT'S FAILURE TO MEET THE UNDUE BURDEN TEST

Since *Gonzales v. Carhart* did not overturn *Planned Parenthood v. Casey*, the Court's ruling established a misguided understanding of the standards of the undue burden test. Utilizing this incorrect precedent, legislatures and courts are infringing upon women's right to an abortion. Under the argument of regulating the medical profession, many states have begun to enact legislation that imposes an actual, substantial obstacle in women's ability to choose abortion pre-viability. The Texas Health & Safety Codes §§ 171.0031, 171.041-171.048, 171.061-171.064[57] are clear

examples of this infringement on women's rights. Because of the United States Court of Appeal for the Fifth District's incorrect interpretation of the undue burden test established by the Supreme Court's ruling in *Planned Parenthood v. Casey*, Texas has enacted and begun its implementation of laws that seem injurious to abortion rights. These statutes require that physicians have permission from a hospital within thirty miles of the clinic in order to have hospital admitting privileges. It further states that a physician performing or inducing an abortion may not knowingly provide an abortion-inducing drug that does not meet the standard provided by the FDA to a pregnant woman for the purpose of inducing an abortion or enabling another person to induce an abortion in the pregnant woman.[58] These statutes do not provide an exemption for medical emergencies in order to preserve the patient's health or life.[59]

Planned Parenthood of Greater Texas Surgical Health Services, its affiliates, and several other women health clinics and physicians sought and attained a permanent injunction against the State of Texas from the United States District Court for the Western District of Texas on the act's effective date. This injunction was rendered against the enforcement of the act's Admitting-Privileges Provision and the enforcement of the act's FDA Protocol Requirement onto women whom a surgical abortion would be unsafe, in accordance to their physician's medical judgment for the preservation of the women's health and lives.[60] However, the State of Texas appealed the District Court's decision to the United States Court of Appeal for the Fifth District the same day the final judgment was entered. The State also sought and attained a stay of the permanent injunction relating to the hospital admitting privileges requirements delivered by the United States District Court for the Western District of Texas from the same Appellate Court. The United States Court of Appeal for the Fifth District did accept the District Court's distinction that the act's abortion-inducing drug restrictions creates a substantial obstacle in the path of women seeking an abortion for whom a surgical

abortion is not safe. Therefore, the Appellate Court denied a stay of the injunction declaring that the act's FDA Protocol Requirement that placed a ban on medical-induced abortion for such patients was unenforceable.

The United States Court of Appeal for the Fifth District relied upon (1) whether the stay applicant has made strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties' interest in the proceeding; (4) whether this is of public interest when deciding to stay the District Court's decision.[61] The Appellate Court found that the State of Texas has substantial interest in regulating the medical profession and that the Supreme Court has established that states have broad latitude to decide that a particular function may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.[62] Therefore, by incorrectly interpreting the undue burden test and only utilizing the rational-basis review, the Appellate Court asserted that the State of Texas held a legitimate interest in protecting the medical profession when staying the District Court's ruling.

It may be suggested that the Appellate Court's analysis departs from the requirements of the undue burden test. In first analyzing the act's hospital admitting privileges requirement, the District Court stated that the State of Texas lacked any evidence that there were any problems with communication between abortion providers and emergency-room physicians.[63] It was further determined that, because no hospital can legally refuse to provide emergency care, an abortion provider's lack of hospital admitting privileges has no effect on the accessibility to an emergency room for any patient.[64] Therefore, the District Court held that there was no rational relationship between improved patient outcomes and hospital admitting privileges.[65] The Appellate Court overlooked this conclusion entirely by substituting the State's lack of evidence with its interest in protecting the

integrity and ethics of the medical profession.[66] In reviewing the hospital admitting privileges requirement from this perspective, the Court stated that the State of Texas presented "evidence that such a requirement fosters a woman's ability to seek consultation and treatment for complications directly from her physician."[67] However, the District Court's record did not present any evidence that women's health were endangered due to the lack of treatment from their physicians in emergency rooms. Instead, the record demonstrated that there was no difference in the quality of care received by an abortion patient in an emergency room.[68]

Since there are no findings showing negative effects within the medical profession due to the lack of physicians' hospital admitting privileges in the present, one must contemplate how the medical profession's integrity is threatened. The Appellate Court does not even attempt to account for this question. Instead, the Court declares the District Court's decision that a state has no rational basis for requiring physicians that perform abortions to have hospital admitting privileges to be similar to repudiating a state's constitutional right to require that only physicians perform abortions.[69] The Appellate Court insinuates that a patient is safer if a doctor has hospital admitting privileges. However, the State of Texas defines a "physician" as "a person licensed to practice medicine in this state."[70] The statute does not mention that only medical practitioners with hospital admitting privileges are to be recognized as physicians. Further, there is no evidence supporting the claim that physicians with such privileges are more competent when performing abortions. Therefore, the District Court did not deviate from the established precedent that a state may require that physicians perform abortions because it did not redefine the term physician in accordance to Texas's statute or dispute evidence of increased safety to patients as none was presented. In order establish the necessary rational relationship between Texas's hospital admitting privileges requirement and its legitimate interest in protecting the integrity and ethics of the medical profession, the

Appellate Court's analysis crosses into reviewing fabricated evidence that was never entered into the District Court's record.

Even if the Appellate Court's indicated government interest was factual, Texas's statute still fails the undue burden test as it creates an actual, substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. The District Court found that a large number of abortion providers are unable to meet the annual threshold for hospital admissions because most physicians' low risk abortion practices do not result in any hospital admissions.[71] Consequently, the District Court's evidence reflects that twenty-four counties in Rio Grande Valley in Texas would be left without abortion providers.[72] The Appellate Court responded to this conclusion by ignoring it completely. Instead, the Court stated that the record illustrated that more than 90% of women seeking an abortion in Texas would be able to obtain one from physicians within 100 miles of their residences.[73] The Appellate Court also claimed that it is undisputed that physicians with hospital privileges would be available in Corpus Christi to perform abortions if the act went into effect and the distance from Rio Grande Valley to Corpus Christi is less than 150 miles.[74] Therefore, the Court concluded that an increase in travel distance of less than 150 miles is not an undue burden on abortion rights for some women.[75] However, the undue burden test was not established to ensure that the rights of only *some* women are protected and, instead, asserts that states cannot infringe on the right to choose for *all* women. The notion that some women will not have the necessary accessibility to an abortion, especially pre-viability, is sufficient evidence that a state is causing a substantial obstacle upon women's rights.

Nonetheless, if one were to accept the Appellate Court's analysis that the State of Texas made strong showings that it is likely to succeed on the merits, the Court still fails to fulfill the required prongs to grant a stay of the District Court's decision. The questions as to whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will

substantially injure the other parties' interest in the proceeding are never answered. The plausible reason for the lack of response by the Appellate Court lies in the fact that Texas would not have been irreparably injured by the denial of a stay of the injunction. As already stated, there is no evidence that hospital admitting privileges contribute to better quality within the medical profession. Therefore, since there is no defect within the medical field due to the lack of physicians' hospital admitting privileges, Texas cannot be correcting one with its statute. Meanwhile, because evidence shows that abortion clinics will close and some women will be without abortion providers within their area, the stay of the District Court's decision significantly injures the opposing parties.

IV. CONCLUSION

Due to the irreparable injury to the other parties, Planned Parenthood petitioned the Supreme Court of the United States to vacate the Appellate Court's stay in *Planned Parenthood v. Abbott.*[76] However, the majority of the Court denied the applicant's request to vacate. The analysis offered by the Supreme Court, as written by Justice Scalia and joined by Justice Thomas and Justice Alito in a concurring opinion, is that the State of Texas has a strong likelihood of succeeding on its merits and that the "State faced irreparable harm because any time a State enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[77] The rationale presented by these Justices is that, because of the established precedent in *Gonzales v. Carhart*, the state has the authority to regulate the medical profession in relation to abortion providers. Therefore, vacating the stay granted by the Appellate Court would weaken the state's legislative abilities.

This analysis leaves the real injured members, the women within the State of Texas, deprived of their constitutional protections. The Court's function is partly to regulate the legislative body within this nation in order to insure that

policymakers do not infringe upon one's constitutional rights. As a result of the Supreme Court's palpable neglect towards the evidence presented to the United States District Court for the Western District of Texas, the Court abused its discretion and became the vehicle utilized by the states in order to infringe on women's rights to an abortion. This statement resonates in logic as neither the Appellate Court nor the Supreme Court dispute the substantial evidence that Planned Parenthood "made a strong showing that their interests would be harmed by a stay."[78] Instead, these courts relied upon the mistaken notion that "given the State's likely success on the merits, [the irreversible harm to Planned Parenthood] is not enough, standing alone, to outweigh the other factors."[79]

Nonetheless, the rulings rendered by the United States Court of Appeal for the Fifth District and the Supreme Court directly and blatantly contradict the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*. A fundamental right cannot be outweighed by the interest in protecting legislative powers. Instead it must be sheltered from legislative powers. The right to an abortion prior to viability is a fundamental right and any legislation relating to this right must be reviewed with the consideration of protecting such right. The design of the undue burden test was meant to be a mechanism in order to recognize a state's interest while protecting women's constitutional rights. However, the test was never intended to be a means for states to infringe upon women's rights to choose an abortion as the *Casey* Court has never recognized that legitimate state interests surpasses women's constitutional rights to bodily integrity and reproductive choice.

By properly reviewing the record created within the United States District Court for the Western District of Texas, the Supreme Court's dissenting opinion in *Planned Parenthood v. Abbott*[80] delivered by Justice Breyer and joined by Justice Ginsburg, Sotomayor, and Kagan asserts the true meaning of the undue burden test. Acknowledging the absence of evidence that an

abortion provider's lack of hospital admitting privileges has a negative effect on the accessibility to an emergency room for any patient and the strong findings that twenty thousand women in Texas will be without abortion services if these laws are upheld,[81] the dissent recognized the statutes' inability to survive the undue burden test. Therefore, Justice Breyer stated that the harm "tilts in favor of the applicants."[82] He further rationalized that if the law is valid, "then the District Court's injunction harms the State by delaying for a few months a change to the longstanding status quo [and i]f the law is invalid, the injunction properly prevented the potential for serious physical or other harm to many women whose exercise of their constitutional right to obtain an abortion would be unduly burdened by the law."[83]

Although one is able to comprehend states' interests in protecting the integrity of the medical profession and the health of their women constituents, legislators are still required to respect one's constitutional rights. With the assistance of the courts, our governmental officials have departed from this idea and created a legislative body that is predatory towards women's rights and liberties. The undue burden test in *Planned Parenthood v. Casey* was never meant to be used as a means to deprive women of their constitutional rights and, instead, was designed to balance a state's legitimate interest with women's right to privacy. However, states have begun to use the compromise developed by the *Casey* Court as a means to attain more legislative power over what was meant to be a decision between a woman and her physician. Texas's newly enacted statutes demonstrate how fragile a woman's right to an abortion is within today's society. Many believe that *Roe v. Wade* settled the debate over abortion rights, yet women are currently struggling to maintain and protect their fundamental rights from governmental intrusion. Because of the rulings by the United States Court of Appeal for the Fifth District and the Supreme Court, the only hope provided to the women in Texas faced with the actual obstacle of attaining an abortion is the fact that the statutes are still being reviewed by United States Court of Appeal

for the Fifth District. Moreover, if the Appellate Court determines that these statutes do not present an actual, substantial burden on women's rights to abortions, these statutes may likely be reviewed by the Supreme Court. Instead of manipulating the test's standards into becoming a synonym for the rational-basis review, one may only anticipate that either the Appellate Court or the Supreme Court will correctly implement the undue burden test in order to preserve women's rights and liberties.

[1] The Supreme Court found that Physicians have regarded a fetus as viable when it is potentially able to live outside the mother's womb without artificial aid and this point is about twenty-four to twenty-eight weeks in *Roe v. Wade*, 410 US 113 (1973).
[2] *See* Griswold v. Connecticut, 381 US 379 (1965), Stanley v. Georgia, 394 US 557 (1969), Terry v. Ohio, 392 US 1 (1968), Katz v. United States, 332 US 846 (1948), Olmstead v. United States, 277 US 438 (1928).
[3] *See* Roe v. Wade, 410 US 113 (1973).
[4] *See* Planned Parenthood v. Casey, 505 US 883 (1992)
[5] In Roe v. Wade, 410 US 113 (1973), the Supreme Court established that the Strict Scrutiny Test must be used when reviewing abortion legislations because the right to an abortion is a fundamental right. As such, the State/Government may pass legislation that interferes with such right only if capable of proving a compelling government interest and that the written law is narrowly tailored.
[6] *See* Casey, 505 US 833 (1992), at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe* v. *Wade.* It is a rule of law and a component of liberty we cannot renounce.")
[7] 505 US 833 (1992)
[8] Health & Safety Codes § Sec. 171.101-Resource Awareness Session: The Health and Human Services Commission, in consultation with the department and the Department of Family and Protective Services, shall: (1) develop a resource awareness session of not more than three hours that provides information regarding: (A) a pregnant woman's option to place her child for adoption; (B) women's health before and during pregnancy; and(C) available resources for pregnant women and their children, including: (i) the federal special supplemental nutrition program for women, infants, and children; (ii) the supplemental nutrition assistance; and(iii) information on selection of a physician;

Sec. 171.102-Applicability: This subchapter does not apply to: (1) an abortion performed or induced if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates the immediate abortion of her pregnancy; (2) an abortion performed on a minor whose pregnancy is a result of a sexual assault, incest, or other violation of the Penal Code that has been reported to law enforcement authorities or that has not been reported because she has a reason that she declines to reveal because she reasonably believes that to do so would put her at risk of retaliation resulting in serious bodily injury; or (3) an act done with the intent to: (A) save the life or preserve the health of an unborn child. This law was enacted on August 2013 and is to be implemented no later than January 2014.

[9] *See* Gonzalez v. Carhart, 550 US 124 (2007).

[10] *See* 410 US 113 (1973), 505 US 833 (1992).

[11] *See* Roe, 410 US 113 at 177.

[12] The Rationale Basis Review requires that States/Government Interests be *legitimate* and conceivable (does not need to be actual) and that the Laws be *rationally related* or non-arbitrary to such Interest.

[13] These statutes require that physicians have an agreement with a hospital within 30 miles of the clinic in order to have hospital admitting privileges. It further states that a physician performing or inducing an abortion may not knowingly give, sell, dispense, administer, provide, or prescribe an abortion-inducing drug that does not meet the standard provided by the FDA to a pregnant woman for the purpose of inducing an abortion or enabling another person to induce an abortion in the pregnant woman.

[14] *See* Abbott, US Dist. LEXIS 154069 WD Tex. (2013).

[15] *See* Planned Parenthood v. Abbott, US App. LEXIS 22231 (2013).

[16] The Supreme Court explicates the privacy right regarding reproductive decisions in *Roe v. Wade*, 410 US 113 (1973).
[17] *See* Roe, 410 US 113 (1973). The Supreme Court determined that the definition of "person" under the Fourteenth Amendment does not apply to the unborn and that the right to personal privacy does exist in the Constitution. Such privacy rights extend to marriage, procreation, contraception, family relationship, and child rearing/education, reaffirming the decisions in *Loving v. Virginia, Skinner v. Oklahoma; Eisenstadt v. Baird, Prince v. Massachusetts,* and *Pierce v. Society*. The Court held that the state may regulate the abortion procedure only if such regulation relates to the protection and preservation of maternal health upon the end of the first trimester and until the fetus is viable; the state may prohibit abortions, with the exclusion as to the mother's health and safety, once the fetus is viable; the state may provide legislation that insures that abortions are performed under circumstances that insure maximum security for the patients, legislation that requires the maintaining of proper medical records, and legislation that protects human life. The Supreme Court rationalized (based on history and medical knowledge) that upon animation of the fetus, legislation that protects human life was reasonable. The Court held that the right to an abortion is a fundamental right in which the State/Government may pass legislation that interferes with such right only if capable of proving a compelling government interest and that the written law is narrowly tailored. As stated by the Court, a "state criminal abortion statute […] that excepts from criminality only a lifesaving procedure […] without regard to pregnancy stage and without recognition of the other interests involved is violative of the Due Process Clause of the Fourteenth Amendment." The Court, therefore, held that Texas failed to meet their burden of demonstrating that the Texas Criminal Abortion Statutes served to fulfill the State's compelling interest when infringing upon Roe's right to privacy.
[18] *See* Roe, 410 US 113 at 183.

[19] *See* Roe, 410 US 113 at 164, 183.
[20] *See* id at 162-65.
[21] *See* Casey, 505 US 883.
[22] Toscano & Reiter, *Upholding a 40-Year-Old Promise: Why the Texas Sonogram Act is Unlawful According to Planned Parenthood v. Casey*, at 10. The article will appear in one of the issues in Volume 34 of Pace Law Review. (forthcoming 2014).
[23] Toscano & Reiter, 34 Pace L. Rev. *supra*.
[24] *See* Casey, 505 US 883, at 877.
[25] *See* Abbott, US Dist. LEXIS 154069 WD Tex. (2013).
[26] *See* Casey, 505 US 883, at 877.
[27] *See* Abbott, US Dist. LEXIS 154069 WD Tex. at 16-17.
[28] Id at 14.
[29] *See* Casey, 505 US 883, at 874
[30] Id at 877.
[31] 550 US 124 (2007).
[32] *See* 530 US 914 (2000). The Nebraska law defined such abortion as a procedure that "partially delivers vaginally a living unborn child as intentionally delivering in the vagina a living unborn child, or a substantial portion thereof." The law was designed to prohibit a fetus' partial delivery with the aim at aborting such fetus.
[33] *See* Stenberg, 530 US 124 (2000). D&X involves removing the fetus from the uterus feet first through the cervix in one pass rather than several passes and is ordinarily associated with the term Partial-Birth Abortion.
[34] Id at 922-925.
[35] Id
[36] Id
[37] Id.
[38] *See* Roe, 410 US 113 at 164.
[39] *See* Stenberg, 530 US 914 at 931-932.
[40] Id.
[41] Id at 934.
[42] Id at 935-937.

[43] Id at 937.
[44] Id.
[45] Id at 938.
[46] *See* 550 US 124 (2007).
[47] 18 USC. § 1531(b)(1)(A).
[48] 18 USC. § 1531(d)(1).
[49] *See* Gonzales v. Carhart, 550 US 124 (2007).
[50] *See* Gonzales, 550 US at 145.
[51] Id at 158.
[52] Id.
[53] *See* 530 US 914 at 930.
[54] Id at 949-951.
[55] *See* Gonzales v. Carhart, 550 US 550 US at 157.
[56] Id at 157.
[57] These statutes were passed during the Second Called Session of the 83rd Texas Legislature as an Act "relating to the regulation of abortion procedures, providers, and facilities and providing penalties" on July 12, 2013.
[58] *See* id.
[59] Id.
[60] Id.
[61] *See* Planned Parenthood v. Abbott, US App. LEXIS 22231 (2013).
[62] *See* Abbott, US App. LEXIS 22231 at 7-8.
[63] *See* Abbott, US Dist. LEXIS 154069 WD Tex. At 18-20.
[64] *See* id.
[65] Id.
[66] *See* Abbott, US App. LEXIS 22231 at 7-8.
[67] Id US App. LEXIS 22231 at 8-9.
[68] *See* Abbott, US Dist. LEXIS 154069 WD Tex. at 18-19.
[69] Id US App. LEXIS 22231 at 10-11.
[70] Tex. § 151.001(a)(12).
[71] *See* Abbott, US Dist. LEXIS 154069 WD Tex. at 20-21.
[72] Id.

[73] *See* Abbott, US App. LEXIS 22231 at 18-23.
[74] Id.
[75] Id.
[76] *See* Planned Parenthood v. Abbott, 187 L. Ed. 2d 465 (2013).
[77] *See* id at 466-467.
[78] Id at 466.
[79] Id at 466.
[80] *See* 187 L. Ed. 2d 465 (2013).
[81] Id at 468.
[82] Id at 468.
[83] Id at 468-469.

An Assessment of the Legality of Intervention in Syria

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Abstract:
Intervention in Syria has been a looming possibility given the ongoing conflict and violence that wracks the country. This essay seeks to examine the legality of such an option, and how legal concerns might shape the nature and scope of any intervention. Beyond that, it seeks to challenge existing discourse that has focused on intervention against the Assad regime, and makes the point that from the perspective of strict International Law, pro-regime intervention may seem, oddly, more permissible than anti-regime intervention. In light of this premise, this essay will subsequently consider potential avenues of reform and evaluate their internal coherence, amenability to existing state-practice, and overall utility in the ever-evolving matrix of International Law.

The ongoing Syrian conflict should not be seen as a single monolithic conflict with clearly demarcated sides and objectives, but rather a continuing morass of conflicts between various poorly-defined and loosely-affiliated groups. From the Free Syrian Army's conflict with Shabiha and Hezbollah, to the Kurdish Desteya Bilind a Kurd's (DBK) struggles against pro-government forces in the Northeast, and even to alleged terrorist groups like the Al-Nusra Front, the varied parties and diverse conflicts give rise to the invocation of a range of legal doctrines to apply to the Syrian situation.[1]

This essay will establish as its starting point the prohibition on the use of force in Article 2(4) of the UN Charter, a prohibition also recognised in customary international law per the *Nicaragua* judgment.[2] This essay will then examine the two Charter-recognised exceptions to this general prohibition, namely the provisions in Arts 24-25 of the Charter which grant Chapter VII powers to the Security Council to maintain international peace and security, and Art 51 which affirms the 'inherent right of individual or collective self-defence if an armed attack occurs'.[1]

Apart from these two charter-recognised exceptions, this essay will examine other alleged exceptions, evaluating if a) there is sufficient state practice and opinio iuris that they actually are legal exceptions to Art 2(4) and b) if, on the facts in Syria, these exceptions apply to allow for a legal intervention. These asserted exceptions include humanitarian intervention (including R2P), the broader pursuit of a 'War on Terror', the invitation of the actual legitimate government, the use of chemical weapons, and, perhaps specific to the Kurds and other minorities, the pursuit of self-determination.

It is at this point apt to note that while much of the discourse on the topic has focused on intervention in aid of anti-regime forces, many of these legal justifications could well be used by the regime's allies in favour of pro-regime intervention.[3] This essay will therefore consider potential legal justifications for

[1] Article 51, Charter of the United Nations

intervention in favour of the Assad Baathist regime: invited intervention might be deemed as legal, though complications may arise if the situation is framed as a Civil War rather than merely the quelling of unrest. Similarly, the presence of groups like the Al-Nusra Front or the Abu Mohammed al-Golani among anti-regime forces suggests that the very same independent 'War on Terror' justification might be used by Assad's allies to justify intervention on his behalf.[4] The doctrine of collective self-defence may also apply in favour of intervention for Assad, insofar as one accepts that an armed attack has occurred against his regime. Similarly, Russia, China and Iran may claim that they are intervening to protect their nationals in various parts of Syria. Even one of the most oft-trumpeted justifications for intervening against Assad may be turned on its head and an argument may be made that an independent doctrine of Humanitarian intervention in fact justifies intervention for the regime. Granted, it is unlikely that Assad's allies would rely on such a legal justification, but this merely underscores how these justifications for intervention often cut both ways. Corollary to all of these questions is the issue of how far the proposed intervention can go: answers to this issue have ranged from no-fly zones to full-scale regime change.

Broadly, this essay will suggest that outside the Charter-endorsed exceptions to the Art 2(4) prohibition, the other purported legal justifications either a) lack sufficient state practice or opinio iuris to be melded into Customary International Law, b) are not made out on the facts or a combination of (a) and (b). Moreover, insofar as one accepts that the anti-regime forces are unable to rely on self-defence as made out in Art 51, and there is no UNSC resolution permitting the use of force in Syria, there does not appear to be a sound legal basis for intervention on behalf of anti-regime forces. Rather ironically, it might be that pro-regime intervention has a sounder legal basis than anti-regime intervention, and this will be discussed subsequently.

The second part of this essay will engage with the normative and theoretical justification for the conclusion reached above. It will examine if any theoretical legal basis may be found

for the aforementioned justifications, drawing in particular on former ICJ Judge Hersch Lauterpacht's natural law foundations for international law.[5] This essay will then pose broader questions of whether the structure of international law could be modified to better deal with such crises. One proposal, raised by Professor Stefan Talmon of the University of Bonn, is the possibility of a distinction between the public international law governing inter-state conflicts and the law governing intra-state conflict.[6] Associate-Professor Sivakumaran of the Nottingham Law School expounds on this possibility, highlighting that this approach allows for the creation of a separate framework for deciding which party or armed group in a failed state should be regarded as the legitimate government.[7] He further suggests that there should be a distinction in dealing with 'internal armed conflicts' compared to 'international armed conflicts'. However, Simonsen, of Oxford University, argues forcefully that this approach is untenable because a) the difficulties in assigning recognition of sovereignty still exist in determining which party in the internal armed conflict represents the sovereign state and b) internal armed conflicts often have international elements of intervention, the Rwandan intervention in the Ituri conflict in Congo or Indian support for the LTTE in Sri Lanka being prime examples.[8] Perhaps the broader question is whether international law on the use of force should strictly include only that which is set out in the UN Charter and Customary International Law, or whether it ought to extend to the principles which undergird those entities.

This essay will conclude affirming that there do not seem to be legal avenues, apart from the two Charter-endorsed exceptions to Art 2(4), for intervention against the Assad regime. It will suggest that the theoretical underpinnings for such asserted justifications are often unclear and unelucidated, with states preferring to rely on political statements rather than legal arguments in justifying their proposed interventions. This essay will ultimately conclude questioning whether the issue of legality is likely to matter significantly beyond providing ex-post justification for a decision already made on other grounds (like

politics or economics) on the question of Syria, particularly given the past instances of states flagrantly disregarding legal concerns when such interests are at stake.

I. BASIC PRINCIPLES: THE PROHIBITION ON THE USE OF FORCE

Turning first to the basic principle undergirding the use of force, the general prohibition on the threat or use of force is set out in Art 2(4) of the UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…'. In *Armed Activities on the Territory of the Congo* the ICJ declared it a 'cornerstone of the UN Charter', with Christenson and Ronzitti in the Italian Yearbook of International Law going so far as to describe it as being ius cogens.[9] However, there is considerable controversy over the interpretation of this article, three of which are addressed: what 'the threat of use of force' entails, what 'the use of force' entails and lastly and perhaps most significantly, the appropriate interpretation of 'in any other manner inconsistent with the Purposes of the United Nations'.

On the first controversy, numerous developing countries have suggested that the 'threat' of use of force ought to involve economic coercion as well, though states like the US have, in statements by Secretary of State J. F. Dulles, rejected this interpretation.[10] On the second, there is uncertainty as to whether 'use of force' can be legally distinguished from intervention or law enforcement. In *Nicaragua*, it was held that the mere supply of funds to armed opposition could not amount to an unlawful use of force, though the arming and training of such groups could. However, this distinction was complicated by *Guyana v Suriname*, which held that there was a legal distinction between use of force and mere law enforcement, without going into further detail.[11] This complication was exacerbated in the Claims Commission's ruling in *Ethiopia v Eritrea* where it was held that Eritrea could violate Art 2(4) even in defending its own territory.[12] The third and most significant controversy lies in the relevance of the aforementioned

latter part of the Art 2(4). Writers like Former Chichele Professor of International Law O'Connell have argued (in the context of Israel's Entebbe raid) that the latter part of Art 2(4) concerning 'the Purposes of the United Nations' allows the limited use of force (that is to say, not to topple the regime) where UN security mechanisms are ineffective.[13] Commentators like Franck, the former President of the American Society on International Law (ASIL), have suggested that this means Article 2(4) has been 'killed', but fellow ASIL members Henkin and Reisman have suggested, quite pithily, that 'reports of the death of Article 2(4) are greatly exaggerated'.[14] This debate over the appropriate interpretation of Art 2(4) is particularly relevant to the Syria issue given the invocation of humanitarian intervention 'in line with the purposes of the UN' (Kerry, 2013), over and above the broad significance of that provision in any discussion on the use of force.[15] It is with this backdrop of uncertainty even over basic and fundamental provisions that one approaches the various justifications put forward for intervention.

II. JUSTIFICATION FOR ANTI-REGIME INTERVENTION

There are two Charter-sanctioned exceptions to the broad Art 2(4) prohibition on the use of force. The first is Security Council Authorisation and the second is in the event of self-defence. To date, there has been no resolution from the UNSC permitting the use of force in relation to the ongoing Syrian conflict. There has also been no resolution with language along the lines of Resolution 1973 which permitted 'all possible means' to protect Libyan citizens. There does not appear to be any means to invoke 'revived security council authorisation' as a justification either, given that there has not been a UNSC resolution in the past allowing the use of force on Syria. The very notion of 'revived security council authorisation' is itself on highly tenuous legal grounds, with only the UK's Christopher Greenwood having relied on it to justify the use of force against Iraq in 2003.[16] Anti-Assad forces might try to rely on the doctrine of implied UNSC authorisation as Slovenia and France did regarding Kosovo in

1999, but this doctrine receives very limited support elsewhere and existing UNSC resolutions on Syria (2043, 2059, 2118) do not provide any sound basis for implying broad authorisation for the use of force. In sum, in the absence of further UNSC resolutions, there does not appear to be any UNSC sanctioned basis for using the Arts 24-25 exceptions to the prohibition on the use of force.

The second Charter-sanctioned exception is self-defence under Article 51. There are three possibilities under the broad umbrella of self defence: First, Turkey may rely on the 22 June 2012 downing of its F4-Phantom Air Force jet, the ongoing cross-border shelling and the incursion of a Syrian military helicopter 1 mile into its airspace on 16 September 2013 to argue that there has been an armed attack on it.[17] Second, Israel may claim a right to self-defence following the 9 September 2013 bomb explosion targeted at a military patrol on the Golan Heights, as well as the small arms and mortar fire its positions on the Golan have received from the Syrian villages of Bir Ajam and Breika.[18] Third, various nations may claim the protection of their nationals as a subset of 'self-defence'. Of these three possibilities, the third is the most legally contentious given that only a few states (Russia after its South Ossetia/Abkhazia intervention in 2008 and Israel in Entebbe being key examples) have voiced support for such a doctrine. The other two possibilities centre on whether the facts meet the legal threshold for permitting intervention for self-defence rather than questions of the law itself.

A. JUSTIFICATIONS FOR ANTI-REGIME INTERVENTION: SELF-DEFENCE

Turning to the first possibility – Turkey's retaliation against Syrian armed attack – this situation avoids the thorny academic debate among writers like Bowett and Schwebel regarding whether anticipatory self-defence or a broad conception of self-defence in a Cold War framework is necessary.[19] Rather, there has been an actual attack, and the question is therefore one largely of fact – whether a) this armed attack meets the legal thresholds set and b) whether this armed attack can in fact be attributed to Syria. It

should be noted that the right in Article 51 only extends up to the point where there is a UN response: self-defence is a temporary right. It is contentious as to whether UNSC Resolution 2118 suffices as a 'UN response', but it is unlikely to suffice given that it is not targeted in response at any nation's claim of self-defence, but rather at the broader humanitarian and chemical weapons issue in Syria.

As argued in *Definition of Aggression* and *Nicaragua*, an armed attack need not be by a regular army and can be by an armed band, groups, irregulars or mercenaries.[20] In the June 2012 Syrian downing of the F4 Jet, it is unclear exactly which individual downed the aircraft but the broad legal scope granted as to who carried out the armed attack renders this uncertainty less significant in this area. A second issue is whether the attack was of sufficient gravity to be considered an armed attack. The *Oil Platforms* judgment picked up on the controversial passage in *Nicaragua* which stated that 'it is necessary to distinguish the most grave forms of the use of force from other less grave forms' and affirmed it.[21] This lack of empirical certainty arose again in Ethiopia's *Ius ad Bellum* claims 1-8, where the court held that 'geographically limited clashes between small Eritrean and Ethiopian patrols among a remote and disputed border' were not of a magnitude to constitute an armed attack.[22] On the facts between Turkey and Syria, it seems that the firefights between small patrols along Syria's Northern border with Turkey might not be grave enough to constitute 'armed attack', but the shooting down (with SAM anti-aircraft missiles) of Turkey's F4 may be grave enough in this situation. Regardless, Turkey may attempt to argue that there ought to be an accumulation of the attacks against it, as the US did with Vietnam in the 1970s. The International Court of Justice (ICJ) in *Nicaragua* left open the possibility that there could be accumulation of events but writers like the Israeli commentator Barry Levenfield (writing about Israeli counter-fedayeen tactics in Lebanon) have criticised the possibility of accumulation, suggesting that aggregating different acts is an unrealistic exercise.[23] In subsequent cases like *Cameroon v Nigeria, Iranian*

Oil Platforms and *DRC v Uganda*, the court declined to discuss this controversial issue, thus leaving the position unclear. If Turkey is able to rely on the accumulation doctrine, it appears likely that the succession of attacks on its armed forces – be they foot patrols on its border with Syria or the downed F4 plane – are sufficiently grave to constitute armed attack. Even if this is not the case, it seems likely that the unprovoked attack on the Turkish military plane not in Syrian airspace is sufficiently grave by itself, though this is contentious.

The second issue for consideration is whether the attack was attributable to Syria. Initially, this was contentious given the lack of reliable information but following the examination of the crashed plane by US research vessel *EV Nautilus*, it was found that the plane had been downed by a Russian-made laser-guided missile used by pro-regime forces and not within the rebel arsenal. The Turkish Deputy Prime Minister has recognised this finding and it thus seems apparent that the attack was in fact carried out by regime forces. [24]

If Syria's actions against Turkey do in fact constitute an armed attack, then per Art 51, Turkey has an 'inherent right' to act in self-defence. However, Turkey has not acted to report the measures it is taking in self-defence to the UNSC. In *Nicaragua* it was held that 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence' and subsequent state practice, as recently as US reporting of Libyan actions in the Gulf of Sirte and American reporting post 9/11, supports the importance of reporting such acts.[25]

Perhaps the broader significance of Turkey being able to claim a right of self-defence under Art 51 against the Syrian regime is that Turkey, as a member of NATO, may invoke Article 5 of the NATO Charter which requires all members of NATO to take 'such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area'. In this case, this might have seen an escalation of the conflict

if all 28 member states could invoke the Art 51 right to Collective self-defence.

However, two issues arise with such a projection: First, Turkey ultimately did not choose to invoke Article 5 of the NATO Charter, relying instead on Article 4 which provided for 'consultations' with other members on how to resolve the threat to its security. Second, any act of self-defence would be bound by the *Caroline* 'necessary and proportionate' test. This requirement has, after *Nicaragua, Wall Advisory Opinion, DRC v Uganda* and *Oil Platforms* been absorbed into Customary International Law and the ICJ has traditionally regarded it as a question of fact, drawing a distinction between necessity and proportionality. Any response taken by Turkey (and possibly its NATO allies) in self-defence thus would have to satisfy both these requirements. As Professor Gardam of Adelaide University summarises, self-defence is not punitive and reprisals are illegal.[26] However, there is no legal obligation that the counter-attack must be limited to one's own territory, nor must the same weapons or munitions be used. Writers like former ICJ judge Robert Jennings have criticised this as not providing a sufficiently flexible ex-ante guideline as to what acts of self-defence are legal.[27] He suggests that the Caroline test is only useful as an ex-post tool to criticise or legitimise acts of intervention, and that it often allows the avoidance of the larger question of whether Art 51 self-defence can, in principle, be raised. Whether or not Jennings is correct, existing state practice suggests that the necessity and proportionality requirements are a part of international law and will need to be considered when establishing the legality of Turkish self-defence.

The second possibility under the umbrella of self-defence is that Israel argues that it has a right to self-defence following the 9 September bomb explosion targeted at a military patrol on the Golan, as well as small arms and mortar fire on its outposts on the Golan.[28] Israel's claim to self-defence will be held to the same legal standards as outlined above, but its claim appears considerably shakier than that of Turkey. First, it will have difficulty establishing that the attacks are of sufficient gravity.

Even if it is able to rely on the accumulation doctrine (which is itself uncertain), it does not seem likely that the bomb explosion on the Golan and the small arms fire it receives are of sufficient gravity, per *Oil Platforms*. Complicating this difficulty is that the bomb detonated outside the fence it had erected and caused only minor damage to an Israeli vehicle. Israel suffered no casualties in all the attacks launched from Syria and disruption along the Golan was minimal.[29] The second difficulty in establishing an Israeli claim to self-defence against Syria is that it is uncertain whether the attack(s) can be attributed to the Syrian regime. Sunni militias, including forces affiliated to Al Qaeda such as the Al-Nusra Front and the Abu Bakr Al-Baghdadi are known to be operating in the region and pro-regime forces had in fact been pushed out of the town of Breika three days before the bombing.[30] These militias fighting against the Alwaite government are known to be hostile to Israel and thus their striking the occupied territories would be unsurprising. Exacerbating this difficulty is the fact that the bombing, in the words of former Israel Mossad Chief Meir Dagan, closely resembles the IED-type attacks faced by ISAF troops in Afghanistan rather than the act of a state.[31] The third difficulty is that the attacks took place on occupied territory and thus it would be controversial to describe them as actions on the territory of the state of Israel. In sum, it appears less likely that an Israeli claim to self-defence justifying the use of force against Syria would succeed. Even if it did, the necessity and proportionality requirements would restrict it to a very narrow operation. Israel's past operations in retaliation to such actions like Operation Summer Rains and the July 2006 War in Lebanon appear clearly disproportionate and any legal self-defence in this context cannot take on such a scope.[32]

The third possibility subsumed under the broader heading of 'self-defence' is intervention for the protection of nationals. This doctrine was first employed by the UK in the 1956 Suez Crisis where it set out three requirements for such intervention: i) there is an imminent threat of injury to nationals ii) there is a failure or inability on the part of the territorial sovereign to protect

the nationals in question and iii) the measures of protection are strictly confined to the object of protecting nationals against injury. Writers like Northwestern University's D'Amato and NYU's Franck have argued in support of this doctrine, relying on the lack of UNSC condemnation of US intervention in Panama and Grenada and more specifically, lack of UNSC criticism of the doctrine itself.[33] On the other hand, leading commentators like Brownlie and Akehurst have argued convincingly that intervention to protect nationals is of doubtful value in furthering the purposes of the UN as it provides a façade for justifying intervention and in so doing causes more harm than it protects, particularly given the humanitarian costs and infrastructure damage inevitable in any armed intervention.[34] It is perhaps significant to note that of the numerous instances where states have raised the doctrine of protection of nationals to justify intervention, they have very often done so with a range of other reasons like 'regime invitation', 'protection of nationals' and 'protection of economic interests' as well: Congo in 1960, the Dominican Republic in 1965 and the US intervention topping Manuel Noriega in 1989 being prime examples.[35] Further complicating this situation is that of the many instances where intervention was explained, at least in part, on grounds of protection of nationals, only in two did the intervention stop at the rescue of those nationals: Entebbe in 1976 and the *Mayaguez* rescue operation in 1975 – in the Suez, Panama, Grenada, Cote d' Ivoire, Sierra Leone and now Georgia (and Abkhazia and South Ossetia) the intervention can hardly be said to have been proportionate.[36] In sum, this potential legal justification does not seem to have much basis in international law. If it did, the potential for any nation to claim that it had a small number of nationals in the country might offer near-unfettered potential for abuse and disproportionate intervention.

A final possibility which might be subsumed under self-defence is the notion of anticipatory self-defence in response to Syria's purported nuclear proliferation, or its chemical weapons use near the town of Ghouta.[37] The majority of states flatly refuse to recognise any legal doctrine of anticipatory self-defence, but the

lack of detailed provisions on the topic in UNGA resolutions such as the *Declaration on Friendly Relations, Definition of Aggression* and the *Declaration on the Non-use of Force* lend themselves to differences in interpretation.[38] It is significant that in invocations of self-defence that involve two states, rather than a state and an armed group, past precedence has shown a preference for avoiding the use of 'anticipatory self-defence'. For example, Israel's launching of Operation Focus in 1967 to wipe out the air forces of the Arab League nations was not described as 'anticipatory' self-defence, but rather in response to Egyptian closing of the Straits of Tiran, which Israel characterised as an act of war allowing it to use self-defence.[39] Similarly, the American interception of USSR-made nuclear weapons sailing for Cuba in 1962 was framed in terms of 'regional peacekeeping' under Chapter VIII rather than anticipatory self-defence.[40] While this general reluctance to rely on a separate legal doctrine of anticipatory self-defence, even by the US and Israel, is not in itself conclusive grounds to conclude that they did not believe it was legal, it is strong evidence that even those states recognise that this justification is highly contentious. This recognition is shared by the ICJ in the *Nicaragua* and *DRC v Uganda* cases where they chose to avoid discussion of the issue of the legality of anticipatory self-defence. Even if there is a doctrine of anticipatory self-defence, it is highly unlikely it extends to the mere possession of nuclear weapons, per the *Nuclear Weapons Advisory* which clearly specifies that mere possession may be for deterrence and therefore is not in itself illegal. Noted International Law barrister Samuel Wordsworth suggests that this extends to chemical weapons as well – particularly relevant in this case since Syria was not party to the Chemical Weapons Convention until late 2013.[41] While it is widely accepted (with only Russia and Syria dissenting openly) that the Syrian government did use chemical weapons against rebel forces near the village of Ghouta, this does not in itself offer a legally viable means to justify foreign intervention in the matter. In sum, this possibility of combining anticipatory self-defence with Syria's use or possession of WMD does not appear to be legally permissible. This is so even if the use

of chemical weapons is argued to be a violation of ius cogens: there is no evidence that there is a ius cogens rule against the use of chemical weapons and even if there is, nothing in the law suggests that military intervention is a permissible, necessary or proportionate means of resolving it. In the same way South Africa's apartheid policy might have been a breach of ius cogens and that did not justify military force against it, it appears unlikely that the present breach, insofar as there is one, would justify the use of military force.

Having examined the Charter-sanctioned exceptions to the Art 2(4) prohibition, attention shifts to those exceptions asserted often unilaterally or by a small group of states. These asserted exceptions include humanitarian intervention (including R2P), the broader pursuit of a 'War on Terror', the invitation of the actual legitimate government, the use of chemical weapons, and, perhaps specific to the Kurds and other minorities, the pursuit of self-determination. With each of these asserted exceptions, this essay will consider a) whether there is any sound legal basis for them and b) whether they are made out on the facts.

B. JUSTIFICATIONS FOR ANTI-REGIME INTERVENTION: HUMANITARIAN INTERVENTION

The first of these exceptions, humanitarian intervention, is one that has come to prominence fairly recently. Past instances of intervention which might have claimed to be of a humanitarian nature such as India's aiding Bangladesh in 1971 or Tanzania's overthrow of Idi Amin in 1979 did not explicitly seek to justify the intervention on humanitarian grounds.[42] In fact, the UK and France argued in 1979 that violations of human rights could not justify the use of force, and that the best case that can be made in support of humanitarian intervention 'is that it cannot be said to be unambiguously illegal'.[43] Writers like D'Amato and Lillich (of UVA fame) have argued that there are numerous instances of state practice supporting a legal right to humanitarian intervention because the states using force should, or could have used the humanitarian intervention justification, but this gives rise to three

problems.[44] First, it is hardly the role of the individual state to decide when humanitarian intervention is necessary – that appears more a UNSC decision given the UN context in which states operate. Second, the *Definition of Aggression* and the *Friendly Relations Declaration* exclude the right to intervene, with 'no consideration of whatever nature, whether political, economic, military or otherwise' being able to serve as justification for aggression. Third, the *Nicaragua* judgment holds that the 'use of force cannot be the appropriate method to monitor or ensure respect (for human rights)'.

That being said, there appears to be a noteworthy trend of state practice in favour of humanitarian intervention. The US, UK and France intervened for the repressed Kurds and Shiites in Iraq in the mid-1990s, while NATO states acted first in Bosnia & Herzegovina (Op Deliberate Force) and then Yugoslavia (Op Allied Force) largely in the name of humanitarian intervention.[45] Belgium, in response to the *Legality of the Use of Force* case, put forward an independent legal doctrine of humanitarian intervention which drew support from the UN Secretary-General who had said that 'slowly but surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of state sovereignty being formed'.[46] It is significant that the UK Attorney-General's statement on the justification for war with Syria is framed overwhelmingly in terms of humanitarian intervention.[47] However, support for humanitarian intervention as a separate legal doctrine seems limited to Belgium, the UK, US and France. Other NATO states like Germany and Austria have described the Kosovo intervention as a one-off instance and numerous states have expressed preference for the UNSC, rather than a separate organisation like NATO, to be determining when intervention is legal.[48] This suggests that there is a lack of sufficient state practice to bring the doctrine of independent humanitarian intervention into the scope of Customary International Law. The doctrine of Responsibility to Protect (R2P) does not appear to be particularly useful in establishing whether or not such an independent doctrine exists, though arguments during

debate on the Resolution at the 2005 World Summit appear to weigh in favour of there being no independent doctrine.

On the facts of the Syrian situation, it is difficult to establish whether the facts on the ground fulfil the threshold requirements for humanitarian intervention, assuming it to be a separate and sound legal doctrine. It is difficult, given the lack of information, to say conclusively what the casualty figures are and even if they are known – which side is responsible for the majority of those casualties? A further problem is with how many casualties are required before it is legally appropriate to label an incident worthy of 'humanitarian intervention'. It is unlikely that the ICJ (or for that matter the UN) will set a conclusive empirical number, but the lack of this number creates considerable uncertainty and gives rise to considerable delays in wrangling over whether humanitarian intervention is justified. For instance, the besieged Syrian town of Muadamiyat-al-sham in the Rif Damashq Governorate faces the starvation of 12, 500 of its residents this coming winter, but it is uncertain as to whether this, along with the existing casualty figures, will suffice.[49] Failure to clearly elucidate this doctrine, assuming once again that it is a legally-recognised doctrine, may give rise to the macabre comparisons of various crises, with crude arguments along the lines of 'since intervening in Kosovo was justified for the saving of 7, 000 lives, why not here where tens of thousands are at stake'.[50] This quagmire is best resolved either by rejecting altogether the doctrine of legal humanitarian intervention, or running with the doctrine and setting clear and absolute indicators which are granted legal recognition, with clearly laid-out enforcement procedures. In sum, it is uncertain if the situation in Syria, despite the human cost of the drawn-out conflict, fulfils the pre-requisites for any supposed doctrine of humanitarian intervention on the facts.

This question on the facts is perhaps further complicated by the evolution of the conflict. In the early period immediately following the uprising, it might have been far easier to characterise the situation as one of grave humanitarian need given that Assad's regime forces had clear superiority against protesters who were

often unarmed or poorly armed. Currently, given the inclusion in anti-regime affiliates of heavily armed and well-trained former Jihadis from around the region, particularly with Saudi and Qatari weapons, there appears to be a less clear-cut case for humanitarian intervention, especially since these Jihadis are not beyond humanitarian abuses themselves.

A. JUSTIFICATIONS FOR ANTI-REGIME INTERVENTION: THE 'WAR ON TERROR'

Having cast doubt on the viability of humanitarian intervention as a suitable legal justification for intervention against the regime, this essay will focus on whether the 'War on Terror' can justify intervention against regime forces. The invocation of 'the War on Terror' as a legal doctrine justifying intervention is contentious in the Syrian context for three reasons. First, there has not been a clearly defined terrorist attack similar to the USS Cole Bombings or 9/11.[51] US-defined terrorist groups like Hezbollah have been participating in the conflict, but does the mere fact that they are terrorist groups justify intervention without terrorist acts within the context of that conflict? The term 'terrorist' has been bandied about by the regime, but this appears more a linguistic rather than legal turn of phrase. Second, it is uncertain whether engaging in the 'War on Terror' is an independent legal justification for intervention, or if it is merely an extension of self-defence. Third, it is unclear how far the 'necessary and proportionate' requirements can be adjusted in a terror context. Can it extend to engaging regimes which back such terrorist groups? Does this apply even if that terrorist group has not conducted a significant terrorist act giving rise to self-defence?

First examining the legal basis for the 'War on Terror' as a separate legal justification, it appears that there is little support for this argument. Ratner, of the University of Michigan, argues that it is separate and independent, but even US behaviour after 9/11 contradicts this.[52] The US invoked, for the first time in history, Article 5 of the NATO Charter, calling on all NATO members to come to its aid after it had been attacked. It also submitted a report

to the UNSC in preparation for Operation Enduring Freedom, detailing its retaliatory measures in self-defence under Article 51 of the UN Charter. It thus does not appear that there is sufficient state practice for the doctrine of the 'war on terror' to exist independently in a legal sense. If one accepts, therefore, that the 'War on Terror' label is merely an extension of Article 51, then the question in Syria becomes one of whether external states can exercise pre-emptive self-defence to engage terrorist groups in Syria under the label of the 'War on Terror'.

The legality of pre-emptive strikes in any situation – not just involving terrorists, has been championed by a very small group of states. Israel has used pre-emptive strikes against terrorist groups extensively, exemplified by the targeting of the PLO in Tunis and subsequent strikes in Lebanon and the surrounding areas. Similarly, the US has used pre-emptive strikes in the name of anti-terror efforts, its invasion of Iraq in 2003 explained at least in part by President Bush's National Security Strategy.[53] There has been near overwhelming criticism of these acts, whether in principle or on grounds of their proportionality. This may be seen as a reflection of the lack of state practice or opinio iuris favouring the legality of such acts, and this casts significant doubt on the legality of any intervention in Syria purely on the grounds of furthering the War on Terror.

Even if one were to accept that there could be legal pre-emptive strikes against terrorists, questions arise of the proportionality requirement, per the *Nicaragua* and *Oil Platforms* decisions. Can it be proportionate to tackle not just members of terror cells who have perpetrated terrorist attacks, but also those who give support and shelter to them? Can wholesale regime change be effected on such grounds? The case of *DRC v Uganda* suggests otherwise, though some writers have argued that Operation Enduring Freedom provides a watershed for this historical trend.[54] There does not appear to be much support for this view, given the widespread criticism of Operation Iraqi Freedom thereafter, though it should be pointed out that most of those strikes involved a range of other legal justifications as well.

Both the High-level Panel Report and the Secretary-General's Report *In Larger* Freedom expressly rejected the doctrine of pre-emptive self-defence which they understood as action against non-imminent threats.[55] Perhaps even more significant problems can be found in the framing of the 'pre-emptive counter-terror strike right', which even in the 2006 US National Security Strategy does not make clear what will trigger the rights of pre-emptive action and what the scope of such action entails.[56] The UK, the US's strongest supporter in such matters, has not openly accepted a wide-view of the doctrine of pre-emption – the Foreign Secretary clearly disavowed such a doctrine in 2004 and recognised that a wide view deprives the requirement of 'imminence' of any substance.[57] In sum, it does not appear that a foreign intervention in response to the mere involvement of Hezbollah or Shabiha is legal. Granted, it might be argued that responding in such a manner might be proportionate given the needs of asymmetric counter-insurgency warfare, but there is insufficient state practice to adjudicate on the matter.

D. JUSTIFICATIONS FOR ANTI-REGIME INTERVENTION: REGIME RECOGNITION

Having cast aspersions on the practicability of the 'War on Terror' as a legal justification for anti-regime intervention, another possible solution might be to change the nature of the 'regime' in question. What this entails is the recognition of a rebel group as the 'legitimate' government of a state and then reliance on that group's invitation to intervene. There is a clear precedent for this in Libya, with France being the first state to recognise the Libyan National Transitional Council as the legitimate government and subsequently making reference to their pleas for help in intervening.[58] That said, it should be noted that this invitation was not the primary French legal justification for intervention. Rather, they adopted the UNSC Resolution 1973 as part of the broader NATO mission to restore international peace and security. There does appear to be some state practice supporting the notion that a legitimate government can invite aid and assistance, with Bahrain

in 2011 and Syria's stationing of troops in Lebanon for 30 years being key examples.[59] However, this begs the question what the 'legitimate' government of a state is and how one can identify that government. A second issue raised is how far this assistance is allowed to go and how the 'necessity' and 'proportionality' requirements are refracted into this situation.

Considering first the issue of whether anti-Assad states can recognise the rebel affiliated groups as the true sovereign government of Syria in order to respond to invitations to intervene, there has been state practice for this in the past: Czechoslovakia and Hungary by the USSR and Tibet by China are instances where a (puppet) government was recognised by the superpowers in order to have a legitimate and supposedly legal invitation with which to justify their intervention.[60] Giuseppe Sperduti has suggested that 'territorial effectiveness might not be essential, but a legitimate government must be seen as an emanation of the community for which it purports to act'.[61] Stefan Talmon suggests that another characteristic of a legitimate government which is capable of issuing legal invitations to intervene is that it is independent and not subject to the whims and wishes of external states.[62] However, Brownlie has instead contended that in order to show that a government is not independent, a very high standard of proof is established – it must be, for all intents and purposes, a 'puppet' in order to not be independent.[63] There does not appear to be clear and settled principles by which the 'true' government of a state is divined, but Talmon has put forward a view that 'a government that commits massive human rights violations or even genocide of its own people is to forfeit its right to represent the people and forfeits its status of government irrespective of whether or not it is deposed by outside intervention'.[64] However, there is a lack of consensus of opinio iuris on this matter and thus the legality of simply identifying the Syrian National Council as the legitimate government and intervening on its intervention is in considerable doubt. Another possibility is that foreign intervention might point to earlier foreign involvement in the region as justification for intervention, but there does not appear to have been significant

foreign intervention in Syria (beyond the arms deals and trade one might expect of a state) to justify this possibility.

Even if one were to accept that the SNC could legally invite foreign intervention, questions arise of limitations on this principle. The first limitation is that if there is a civil war rather than mere internal unrest, it has come to be accepted that there is a duty not to intervene, even if the government requests it, unless there is prior UNSC authorisation. Insofar as the Syrian conflict has taken on the characteristics of a civil war, this appears to be a limitation on the principle. Given that the SNC and FSA rebels are in open war with Syrian government forces, and rebels control about 60% of Syrian land and 40% of the population, this does not appear to be mere 'internal unrest'. This issue of classification has been heavily disputed, from South Vietnam's assertion that it was an independent state asserting its Art 51 right to self-defence against North Vietnam and North Vietnam claiming it was engaged in a war of self-determination against the US, to Bosnia's conflict with Yugoslavia and its assertion that it was a separate state.[65] There does not appear to be significant guidance on this matter of classification provided either by general state practice, or ICJ judgments.

The second limitation if the SNC could legally invite foreign intervention is what that foreign intervention could possibly actually do. There is considerable past precedence of states intervening at the request of rebel groups and subsequently toppling the incumbent government by force, with the Americans in Guatemala, Chile and Iran, the Russians in Cuba, Angola and Vietnam, and even the French in Zaire, CAR and Togo being key examples.[66] However, this practice is primarily rooted in Cold War politics and there are few modern examples of this. Moreover, there does not appear to be sufficient state practice or congruence in terms of opinio iuris to be able to conclude that invited foreign intervention can go so far as to topple incumbent regimes. This appears to be a sizeable limitation on the legality of foreign intervention in the Syrian context.

E. JUSTIFICATIONS FOR ANTI-REGIME INTERVENTION: KURDISH SELF-DETERMINATION

A final possibility justifying intervention in Syria, albeit not to topple the regime, is in support of the struggle for Kurdish self-determination. Kurdish unrest in the region has persisted since Ottoman times, and amidst the unrest of the Syrian uprising has found deep roots in Kurdish-controlled areas along the Northeast and Northwest of the country. It had formerly been limited by an effective military presence to small-scale attacks and bombings, but the stretching of the regime's forces, coupled with the fear of regime reprisals, has given rise to a far more organised Kurdish entity. Intervening on behalf of the Kurdish right to self-determination differs from the aforementioned legal justifications in that it does not apply broadly to aid for the wide SNC/FSA affiliation of organisations, but specifically to Kurdish resistance seeking to forward Kurdish independence. Legally, the debate on the right to self-determination had faded considerably in importance in the post-decolonisation era, but it has its primary legal origin in the 1961 Indian annexation of Goa. The colonial powers argued that this annexation had been an illegal breach of Art 2(4), whereas India and various Second World countries argued that it had been a legitimate act to resolve the spectre of colonialism.[67] The divisions within the UNSC prevented the adoption of any decisive resolution. Successive UNGA resolutions failed to address the topic of the use of force in self-determination, with Resolution 1514 *Declaration on the Granting of Independence to Colonial Peoples* and the *Friendly Relations Declaration* avoiding clear statements in the interest of gaining unanimity. Former ILC member Professor Dugard identifies the use of words like 'struggle' rather than 'armed force' and 'legitimate' instead of 'legal' as indicative of an intentional obfuscation of the legal position.[68] It is noteworthy that the main resolutions which actually do mention and support the use of armed force in self-determination, *The Importance of the Universal Realisation of the Right of Peoples to Self-Determination'* and *Declaration on the Inadmissibility of Intervention*, both did not

manage to secure consensus. Even judicially in the *Nicaragua* judgment, little guidance was offered as to the legality of the practice of armed assistance for self-determination. Judge Schwebel in his dissenting opinion suggested that the court had impliedly endorsed a special exception to Art 2(4) for wars of national liberation, but the rest of the court did not directly tackle the issue. What is perhaps significant is that most of these discussions have taken place largely in the context of anti-colonialism. Even the breakup of the USSR, Yugoslavia and Czechoslovakia havs not brought a sustained increase in state support for the use of force for self-determination. As Byers and Nolte, writing in the context of US hegemony, note, there is precious little support by states for the right of ethnic groups to use force to secede from existing states – examples in Nagorno Karabakh, Ingushetia and Dagestan all failing to gather much international attention.[69]

Even if there was a legal doctrine permitting armed intervention in support of ethnic independence movements like the Kurds, it is difficult to see how the facts of the Syrian situation fulfil its requirements. First, the Kurdish armed resistance does not have clearly stated or articulated objectives. The Kurdish Popular Protection Groups (YPG) function primarily as armed area-defence militia.[70] They do not go out of their way to engage regime forces, nor is there a clear political aim to their actions beyond organised self-defence. Even the Supreme Kurdish Committee (DBK) does not have clear political aims, their function being primarily as a means of co-ordinating an effective defence of Kurdish areas in Syria.[71] In fact, the DBK is made up of two separate Kurdish parties – one which agitates for autonomy within Syria itself and another which advocates complete independence from Syria. These groups had set aside their political objectives in order to find a modus vivendi for armed defence against Syria, but this leaves their political aims unclear. Given the lack of clarity and the non-mention of self-determination in their political message, it is difficult to ascertain whether the DBK can raise the issue of self-determination as a justification for its armed struggle, and by

extension even harder to tell if foreign intervention in aid of the DBK is legal or not. A further problem if one accepted a legal doctrine permitting armed intervention in support of ethnic independence in practice is the potential floodgates situation it might potentially give rise to. Disaffected minorities throughout the world, from the Basques in Spain to the Mandinka in Guinea-Bissau might then request foreign aid in armed uprising. Given these problems, it appears that a) there is little support for a doctrine permitting armed intervention in support of ethnic self-determination movements and b) even if there was such a legal doctrine, it is not made out on the facts given the lack of a clear political self-determination objective within the DBK.

II. JUSTIFICATIONS FOR PRO-REGIME INTERVENTION

Having examined the potential legal justifications for armed intervention against the Regime, this essay will subsequently demonstrate that many of those very same justifications might be employed by the selfsame regime to legally justify intervention on its behalf. This is an observation scantly made in the mainstream press but it should not be construed as representing the author's personally held views in any way. The possible legal justifications for intervention in favour of the Assad regime are: invited invitation (both per se and in retaliation to foreign intervention), fighting the 'War on Terror', the doctrine of 'collective self-defence', the protection of nationals and even humanitarian intervention. Given that this essay has already considered the questionability of the legal bases on which many of these justifications stand on, this segment of the essay will focus on whether, even assuming the legality of the justifications, they are made out on the facts.

A. JUSTIFICATIONS FOR PRO-REGIME INTERVENTION: INVITED INTERVENTION

The viability of 'invited intervention' by Assad's allies on the regime's behalf appears somewhat controversial. The basic principle, as Nolte identifies, is that intervention on the invitation

of the legitimate government is permissible, as the *Nicaragua* judgment alludes to and as has been borne out by the example of Syria's 30 year intervention in Lebanon, nominally at the invitation of the Lebanese government.[72] However, this principle is qualified by statements in the *Additional Protocol II to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts*, which specifies that in the event of a civil war, outside intervention is not permissible. Prima facie, this precludes the legality of intervention given that per the very same *Additional Protocol II*, a state of Civil War is present where both sides control territory. Insofar as the situation in Syria can be accurately and legally described as a civil war, it appears that pro-regime intervention is legally impermissible. However, as former ICC-campaigner Professor Doswald-Beck points out, there is an exception that outside interference in favour of one party to the struggle permitted counter-intervention on behalf of the other, with the UK having cited Angola as an example of this.[73] There is considerable past precedent for such responses, with the UK's intervention in Oman in support of the Sultan (purportedly in response to external UAR aid to rebels) and the French intervention in Chad (purportedly in response to Libyan aid to rebels) being significant examples. On the facts, al-Assad's regime may claim that the foreign aid (whether lethal or non-lethal) provided to the rebels constitutes foreign intervention in the civil war, which then justifies foreign intervention on its behalf as well.

Whether or not the legality of this argument succeeds on the facts is largely a function of whether the foreign aid anti-regime forces received pre-date foreign intervention in the civil war. This then begs the question of when the civil war began, given its ill-defined parameters and amorphous progression from civil unrest to all out civil war. If it can be demonstrated on the facts that foreign intervention for the rebels within the civil war context pre-dates foreign intervention for the regime, there appears to be sound legal ground for intervention on al-Assad's behalf by his foreign allies.

However, questions arise of the interface of the necessity and proportionality requirements were al-Assad's allies to intervene on

his behalf in response to prior foreign intervention. Given that the pro-rebel states have not openly committed armed forces, it is likely that the bulk of intervention will be in the provision of funds and materiel, or in the form of covert operations. Given the subterfuge and uncertainty as to the extent of intervention on both sides, it is difficult to come to a clear judgment as to the proportionality of either intervention. There are suspicions of US CIA provision of training to FSA fighters in training camps in Turkey but simultaneously there are accusations that the Russian SPETSNAZ is training regime forces in counter-insurgency warfare out of the Russian naval base in Tartus.[74] While this appears a possible avenue for legal intervention on the regime's behalf, this will ultimately depend on the facts and whether or not there is a chronologically precedent foreign intervention in the civil war.

B. JUSTIFICATIONS FOR PRO-REGIME INTERVENTION: THE WAR ON TERROR

The second possibility is that the regime's allies invoke the 'War on Terror' as an independent legal doctrine justifying intervention. Assuming for the purposes of argument that the 'War on Terror' is in fact an independent legal doctrine justifying intervention, it is worth noting that among the rebel coalition, there are numerous Jihadi groups, including groups recognised by anti-regime states like the US as terrorists. These include the al-Nusra Front, the Jaysh al Mujahirin wa al-Ansar and even the Asala al wa Tanmiya Front, a splinter cell off the Syrian Islamic Liberation Front which has known al-Qaeda links.[75] States like Russia may argue that these groups include fighters from Chechnya and Dagestan, and are linked to terrorist groups which threaten Russian security. If the 'War on Terror' is in fact an independent legal doctrine separate from self-defence, the presence of these groups destabilising the country might suffice to justify legal intervention to, in the words of President Bush in his 2002 National Security Strategy, 'combat terrorism wherever it rears its ugly head'. [76]

However, if one accepts the more mainstream view that the 'War on Terror' is not an independent legal doctrine and at best a subset of self-defence, then there does not appear to have been any attack on Syria's allies which justifies intervention. Arguably, Syria's allies like Russia and China might argue for collective self-defence as American invoked after 9/11, but this goes back to the question on whether terrorist groups engaged in conventional warfare in the context of a civil war rather than acts of terror can give rise to this collective self-defence as well. This uncertainty and lack of a clear casus belli for the regime's allies might explain rebel reluctance to attack facilities like the Russian naval base at Tartus, which if attacked, would give Russia clear access to a claim of self-defence. As things stand at present, it appears legally very contentious whether al-Assad's allies can invoke the 'War on Terror' as a justification for intervention.

C. JUSTIFICATIONS FOR PRO-REGIME INTERVENTION: PROTECTION OF NATIONALS

A third avenue by which al-Assad's allies might seek to justify intervention is the protection of their nationals. Given considerable Russian investment in Syria prior to the outbreak of hostilities, there are large numbers of Russian expatriates in Syria. Russia has also used the 'protection of their nationals' as legal justification for intervention in the recent Georgian conflict, demonstrating their willingness to adopt this legal justification which has not received particularly widespread support from the international community. The requirements for raising this justification on the facts would be the same as for the anti-regime states: there does not appear to be an imminent threat of injury to nationals given that rebel forces have for the most part avoided the Tartus area, which has the highest proportion of expatriates in Syria.[77] Similarly, there has not yet been a failure or inability on the part of the territorial sovereign to protect the nationals in question: Mukhabarat operatives have been specifically assigned to protect Russian expatriate areas both in Damascus and along the coast, suggesting that protection of these foreign nationals is a high

priority for the Syrian government.[78] Even if intervention were legally permissible, the measures of protection would be strictly confined to the object of protecting nationals against injury and it is unlikely that this would entail a wholesale defeat of rebel forces. In sum, even if one were to accept the 'protection of nationals' as an acceptable legal justification, it does not appear to be made out on the facts to justify intervention by al-Assad's allies.

D. JUSTIFICATIONS FOR PRO-REGIME INTERVENTION: HUMANITARIAN INTERVENTION

The final possibility that may be raised by the regime's allies is, fairly ironically, humanitarian intervention. Even assuming the unlikely situation that humanitarian intervention is in fact an acceptable legal justification for intervention, it remains unlikely that it will be made out on the facts, or used by al-Assad's allies at all as a justification. Arguably, the anti-regime coalition is guilty of humanitarian abuses as well, though questions arise as to whether these abuses are of sufficient gravity or scope as to justify intervention. Examples abound of the execution of Alawite prisoners of war, and even of innocent Alawite citizens caught up in the fighting.[79] There is considerable uncertainty in the absence of any objective fact-finding missions as to the scale of these acts, but it is beyond reasonable doubt that at least some of the rebel groups have adopted a 'no-prisoners' policy, particularly in the Northern parts of Syria as winter sets in and food shortages grow more acute. Insofar as these acts meet the nebulous threshold permitting humanitarian intervention, and assuming that humanitarian intervention is a legal basis for intervention, this appears to provide legal grounds for which intervention can take place. However, three problems arise to undermine the plausibility of this solution. First, questions of attribution arise in ascertaining which side is responsible for atrocities – the lack of reliable information makes these questions very difficult to resolve. Second, questions of threshold arise in relation to whether humanitarian intervention is legally permissible or not. Numerous states in the world, from Singapore to Bahrain, are engaged in

some form of human rights abuses and it thus begs the question what threshold must be crossed before humanitarian intervention is permissible.[80] Finally, it seems overwhelmingly unlikely that Syria's allies, given their own human rights records, will run this argument. Moreover, if they do use this argument, it might be construed as state practice for NATO states running a humanitarian intervention argument in the future and is thus likely to be avoided. In sum, it appears that on the facts, it is highly unlikely that humanitarian intervention can be used as a legal basis for intervention and even if it can, it is overwhelmingly unlikely that it will be.

In summary, it appears that of the justifications raised for armed intervention, only the 2 Charter-sanctioned ones have sound legal bases. Of the others, there simply appears to be insufficient state practice to justify them being part of international law. That being said, if one puts aside for the moment the strict requirement of state practice and opinio iuris for a doctrine being part of Customary International Law, there may be grounds for suggesting that there are logically, even if not strictly legally, sound bases for intervention.

III. PHILOSOPHICAL BASES AND POTENTIAL LEGAL SOLUTIONS TO CONFLICT-RESOLUTION

Having examined the state of International Law as it currently stands, it appears permissible to conclude that little assistance is afforded to those bearing the brunt of the ongoing violence in Syria. In considering what legal solutions might ease the conflict-resolution process, recourse may be had to the philosophical basis of the various doctrines feted above. One possible argument centres on questions of where international law originates. Early European natural lawyers like Grotius and Vattel have argued for a natural moral basis of first principles from which law emerges, whereas more recent philosophers like Gentili and Hegel have advocated a positivist approach: that law stems from the agreement and consensus of states.[81] If one were to assume a naturalist origin of international law, as Hersch Lauterpacht did,

one could potentially argue that morality and moral concerns underpinning the law are threatened by gross human rights violations and thus the breach of these fundamental human rights principles could plausibly give rise to a right to end their breach.[82] Insofar as one sees international law as an extension of certain principles of natural justice or morality, one might argue that the central tenet of those moral principles is the advancement of human well-being. To the extent that this is being directly infringed upon, there may be just cause for challenging the infringement. Of course, this analysis makes the assumption that international law is in fact natural in its origin, that it is up to individual sovereign states to ascertain when these principles are breached, and that the consequences of the breach extend to the use of force to correct it. These assumptions appear somewhat untenable given that it is not even clear what these 'moral principles' so alluded to are. There are few, if any, clear principled maxims in international law which undergird the entire international legal system. Unless one accepts a moral basis for international law, even amidst the uncertainty in understanding what those morals are and how far they reach, it is difficult to legally justify a doctrine of humanitarian intervention giving rise to the use of force.

IV. CHALLENGES AND POTENTIAL SOLUTIONS

A significant issue in finding a legal basis for humanitarian intervention is in transposing the moral outrage at humanitarian crises and human rights abuses to legal judgment. Insofar as international law is a construct of the wills of states (as manifested by their political leadership), there does not seem to be a way, without the wills of states, to construct a legal framework by which humanitarian intervention can be legally justified, much less practically enforced. That being said, there is increasing argument, particularly by writers such as Georgetown's Rosa Brooks, that the wills of states can no longer be seen as sovereign in an unfettered sense.[83] Insofar as the sovereign nature of a state derives from the mandate of the people which it rules, it is arguable that this

mandate it lost when gross human rights abuses take place against those people. This dovetails well with Lauterpacht's naturalist monist view of international law which sees individuals as constituent elements making up state entities in the international legal framework.[84] If one accepts that the consent on which international law is constructed need not solely be the consent of state governments, but also can include the consent of the individuals in states, this might provide an avenue by which human rights might be better upheld and the abuses of states curtailed. Granted, this is theoretical hypothesising without any basis in state practice or opinio iuris at present, but it offers a means by which one could bridge the gap between moral condemnation of human rights abuses by states and actual legal action. A further potential problem is of course at what stage human rights abuses become sufficiently grave that a state's government loses its sovereignty, and another issue is that as things stand, the primary actor in international law is still the state – not the individual. This theoretical model thus also appears unsatisfactory in offering a means by which legal condemnation can be offered for gross human rights violations like those going on in Syria at present.

A. POTENTIAL SOLUTIONS: DISTINGUISHING LAWS GOVERNING INTER-STATE CONFLICT AND LAWS GOVERNING CONFLICT WITHIN STATES

One potential solution to the Syria situation which involves a broader shifting of international law has been put forth by Stefan Talmon, who suggests the possibility of a distinction between the law governing inter-state conflict and that governing conflict within states.[85] Sivakumaran has elaborated considerably on this possibility, emphasising that a separate set of laws that applied within 'failed states' or states without legitimate governments would offer a legally sound base for humanitarian intervention.[86] Sivakumaran advocates an adaptation of the R2P model specifically for intervention within failed states that would allow for intervention for humanitarian reasons if certain objective criteria are met.[87] This would entail the setting of a specified

casualty figure which had to be exceeded before intervention was legally permissible. Corollary to this would be the requirement to publish figures or evidence as to how the casualty figures were reached. Sivakumaran also envisages that states may only intervene strictly to halt the humanitarian abuses, with the necessity and proportionality requirement maintained. A noteworthy aspect of this model is that it does not strictly require armed intervention to be the last resort – the focus is on casualty figures rather than allowing for the full range of diplomatic options to be exhausted.[88] This is explained by Sivakumaran in light of the fact that many states often use these long and drawn out diplomatic processes in order to buy time for further genocide or abuses. As he puts it, 'insofar as saving lives is the chief concern, it seems apropos that the perpetrator is not permitted to benefit from his own diplomatic delays'. This model of a separate legal model for internal conflicts would still require either a treaty or sufficient state practice in order to gain the weight of international law (Per Art 38(1) of the ICJ Charter) but according to Sivakumaran might offer a possible theoretical model governing the legality of conflicts within states.

However, there are numerous issues with Sivakumaran's model which contribute to it being largely dissatisfactory. As Simonsen points out, Sivakumaran's clean cut black and white distinction between 'internal' conflicts and 'international' conflicts is hardly appropriate in today's day and age.[89] The multi-faceted nature of modern conflicts is borne out in the Ituri conflict in Congo, which involves numerous disparate tribal groups, each with their own backers and allied states. Countries like Uganda are fighting Lendu tribesmen rather than separate armed forces, while the DRC is fighting armed groups fronted by the Nationalist and Integrationist Front. The fact that some African historians like Oude Elferink see Ituri as an extension of the Second Congo War whereas others see it as a whole separate conflict by itself accentuates the uncertainty that appears inherent with the classification of modern conflicts.[90] Given this difficulty in categorising conflicts, it appears difficult to be able to say with any

degree of precision or certainty which set of laws to apply in particular modern conflicts. Taking the present Syrian example, it appears that while the majority of fighting is being done internally, Iranian Republican Guard units and Hezbollah militias have been engaging rebel forces, while foreign mujahedeen fighters from Afghanistan and the Caucasus have launched sustained attacks on government troops.[91] In this situation with considerable foreign involvement, it is uncertain whether the conflict would still be described as an 'internal' one.

A further problem with Sivakumaran's model was highlighted by Goodwin-Gill as early as 1986 when he was still UN High Commissioner for Refugees.[92] He argues that the making of judgments of international law concerning the use of force is rendered considerably harder by the nature of the intervention taking place. He argues that the preponderance of interventions are of a covert nature, at least officially, with states typically denying all links with the task forces they deploy to intervene. Highlighting the Special Forces deployed to aid UNITA in Angola, and pre-Gulf of Tonkin Resolution US covert involvement in Vietnam, Goodwin-Gill argues that regime change (or the propping up of regimes, for that matter) is often not as overt and direct as an all-out conflict.[93] If one is unable to even determine the presence of foreign intervention, the questioning of classifying a conflict becomes considerably harder. Even if there is suspected foreign intervention, questions arise of what the burden of proof must be in order to demonstrate that there is foreign participation. Granted, this question arises even outside Sivakumaran's model, but the difficulty in detecting and proving foreign intervention is accentuated by his model where the very set of laws to apply is dependent on classification. It thus increasingly appears that Sivakumaran's model is untenable given the real world stresses of the status quo.

B. POTENTIAL SOLUTIONS: STATE CRIMES IN STATE RESPONSIBILITY

A possible alternative solution which allows the apportionment of responsibility onto states which commit sustained and gross human rights abuses against their own citizens is that proposed by NYU's J. H. H. Weiler to reintroduce Article 19 of the 1976 *Draft Articles on State Responsibility*.[94] The text reads as follows:

Article 19

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
>
> (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation

> of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

This text was heavily debated and highly contentious with states like the US, UK and France strongly condemning it while former ICJ judges like Robert Ago and Giorgio Gaja expressed support for it.[95] James Crawford ultimately, for pragmatic reasons as special rapporteur, advocated the exclusion of Article 19 in the final draft to allow for its passage.[96] However, if one considers the value in this article for allowing the allocation of legal responsibility for situations like that in Syria (before it escalated to a full-out civil war), it suggests that this article merits further examination. Applied to the Syrian case, Article 19 3(c) offers a means by which Syria might be legally responsible for an 'international crime'.

The question this begs, and that Article 19 fails to address, is whether this would justify intervention or 'enforcement action'. This lends itself to the threefold problem with this solution. First, the lack of detail as to the consequences that would arise from state responsibility concerning a 'Crime of State' essentially strips the label of much meaning. If all the label becomes is an empty shell that cannot give rise to enforcement, state responsibility loses practical effect. A secondary tier to this problem is how to distinguish in severity between different state crimes, and what body would provide for this and by what standard. There is once again a deafening silence on this matter. The second problem relates to the lack of clarity concerning the term 'international community as a whole'. When Article 19 was rejected, the objection herein was political: fears arose that the 2nd and 3rd world dominated UNGAs would use 'state crimes' to limit 1st world nations. The third problem is with the notion of describing states as 'criminal'. Nigel Rodley describes this as the 'broad reluctance and aversion to collective punishment': the notion of describing a state as criminal almost atavistically feels odd given our familiarity with describing individuals as criminal.[97] In the modern, largely democratic world, a state may be seen as exercising the collective will of the people, so describing it as 'criminal' smears that label onto the animating collective will as well. While the third

objection is a largely philosophical one, the first problem in particular is one that Article 19 needs to resolve in order to be a viable option in the Syrian conflict. It ought to be noted that even if Article 19 had been passed, and even if it provided for intervention, questions would still arise of how that intervention or enforcement action was to be carried out – questions of necessity and proportionality would nonetheless still arise. These difficulties, buttressed by the problems of getting sufficient state support for such a measure in the status quo, militate towards a conclusion which does not see Article 19, at least as it stands and without significant amendment, as a viable solution for the ongoing situation in Syria.

V. CONCLUSION

This essay will conclude making three tiers of observations concerning the Syrian conflict and its relationship with international law. It will first underscore the multiplicity of actors in the conflict and raise questions of international law's ability to deal with so many different actors. It will then suggest that the Syrian conflict, more than any other conflict in the present day (save possibly some of the African Great Lakes conflicts) emphasises that the notion of the 'state' ought not to be overemphasised in international law, particularly in the law concerning the use of force. Finally, this essay will raise questions of whether the issue of legality is likely to matter significantly beyond providing ex-post justification for a decision already made on other grounds (like politics or economics) on the question of Syria.

One of the most striking things about the Syrian conflict is how significantly the complexity and confusion intrinsic in its operation is stripped away in mainstream media reporting. The lack of detailed information hampers the ability to make observations which apply across the board, while the presence of multiple actors with different objectives and modes of operation simultaneously presents legal questions of applicability. Questions arise of whether treatment of the al-Nusra Front should differ from

that of the FSA, and what the status of former FSA splinter groups now espousing Jihadi ideology is vis-a-vis a possible intervention. Does the nature of intervention differ because of the multiplicity of groups present? It might affect the principle coherence of some of the purported justifications for intervention – it seems odd for humanitarian intervention in protection of human rights to help an Islamist and possibly extreme Wahhabist group (the al-Nusra Front, for instance) which has scant respect for human rights itself. Similarly, can 'collective self-defence' apply to what is essentially a terrorist group which has happened to take over some functions of government and public service provision in a particular region? This notion of whether there can be a different legal response to different actors in a conflict has ramifications beyond solely the Syrian situation, raising difficult questions of the recognition in international law of non-governmental groups which, while devoid of the legal recognition of a government, nonetheless wield actual power on the ground. This first tier of the conclusion about the multiplicity of actors thus lends itself well to the second tier: avoiding the deification of the state.

The second tier of this conclusion engages International Law's fixation with the notion of the state. Granted, there have been shifts away from this in the recognition of treaty organisations and even individual responsibility – the trial of individuals like Ratko Mladic and the indictment of Omar al-Bashir for war crimes and crimes against humanity being prime examples. However, there is a difference between mere 'recognition' of groups and individuals as being entities governed by and subject to international law and actual engagement of the law with these groups. International law recognises groups like the al-Nusra Front and the SNC because to not do so would simply be wilful blindness towards the facts on the ground, but it has no provisions as to how to deal with and differentiate such groups. This is an area international law will need to involve in, because the notion of the 'state' as wielding a monopoly on force within the geographical boundaries of its territory is one that is increasingly untenable. Weiler recognises that while states will continue to play

a leading role in international law, it is important to not merely pay lip service to the existence of other non-state actors, but rather to actively envisage and develop structures to interact with them in the international order.[98] Without this kind of interface, such groups may exist in a legal lacuna – a nebulous region of uncertainty into which the law does not tread. The very notion of the 'state' in the present day is increasingly contested, with failed states and popular front movements both vying for the legitimacy which being dubbed a 'state' gives. It might be time for international law to recognise that there is nothing inherently magical about the label 'state' – and adapt accordingly. While states will, as a matter of simple fact, continue to play a leading role in international law, provision must be made for the erosion of the monopoly of force and the existence of disparate non-state governing bodies like Hamas or the Kachin Free Army in Burma, both of which provide state-like services without having the legal recognition of a state.[99] The Syrian conflict has brought this notion of 'statehood' into sharp focus, and a myriad accompanying questions arise.

The final tier of this conclusion questions whether the issue of legality is likely to matter in the decision-making matrix of various states or groups, especially in comparison to other more tangible grounds such as economic gain or political capital. As Alain Pellet recognises, 'law is one factor which is taken into account when states make decisions' but this statement is in itself telling in two regards.[100] First, it demonstrates the state-focused nature of international law which granted, might have been reasonable when Pellet was writing, but does not hold as much sway at present. Whether groups and armed militias operating on the periphery or outside the reach of law take law as a factor when making decisions is largely a function of their objectives and political situation, with the SNC's decision not to strike at the Russian naval facilities at Tartus being an obvious example. Second, questions arise of how significant law as a factor is in the decision-making matrix, whether for states or groups. These are not questions about the self-serving use of the law, but rather

questions of how much it influences decision-making. Some might see it purely as a function of gaining political capital and legitimacy, but even fewer would suggest that adherence to international law would be an overriding concern even over a state's geo-political strategic interests. This ambivalence as to the accuracy of the law is evident in the vaguely worded 'justifications' and statements released both by states and the UNGA, typically in the interest of cohesion and unanimity rather than strict adherence to the law. In sum, it appears that the role of the law in decision-making is likely to differ from group to group, but that even so, it is likely to be of secondary importance to broader strategic interests. Law may be used as a justification for pursuit of those interests, and may be used to gain political capital or popular support, but does not appear to be a concern significant enough in itself to drastically alter decisions by political leadership.

In conclusion, this essay has argued that the asserted legal 'justifications' for intervening in Syria do not actually appear be part of international law, and the Charter-sanctioned justifications for use of force do not seem to apply to anti-regime forces. Paradoxically, pro-regime intervention appears to have more legal justification insofar as it is proven that there has been prior foreign intervention in the civil war. This essay has examined a number of proposed frameworks by which humanitarian intervention might be made legal, and found them wanting. Ultimately, this essay suggests that the appropriate way to see the Syrian conflict is as an example of the complex, multifaceted and rapidly-changing conflicts of the future – conflicts which will accelerate evolution in the way international law operates in the years to come.

The author wishes to express his heartfelt gratitude to his supervisor Professor Christine Gray, his Director of Studies Dr. Philip Murray, his family, the second-year lawyers at St. John's College, Cambridge, and his noble and learned friend Mr Benjamin Mak.

[1] BBC News, *Syria Crisis: Guide to Armed and Political Opposition*. December 2013
[2] *Republic of Nicaragua v United States of America* case. ICJ Reports (1986)
[3] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50)
[4] Ibid
[5] Lauterpacht, *The Development of International Law by the International Court*, London, 1958. Chapter 1
[6] Talmon, S, The Reality of International Law. Essays in Honour of Ian Brownlie. Foreword by Sir Robert Jennings (Oxford: Clarendon Press, 1999)
[7] Sivakumaran, S, *The Law of Non-International Armed Conflict*. ICQL 2012.
[8] Simonsen, N, *Internal Conflicts and Grey Areas in Classification*. ICQL 2012.
[9] Christenson and Ronzitti, *Regional Organisations and the Development of Collective Security* (2004)
[10] Cot and Pellet, *La Charte des Nations Unies* (1991) – Chapter 1: *Buts et Principes*. Translated.
[11] (2008) 47 ILM. 166
[12] 45 ILM 430 (Dec. 19 2005)
[13] O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (2008) ICLQ
[14] Henkin and Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights* (1996)
[15] Kerry, J, "White House Press Conference" November 2013. Available at http://www.state.gov/secretary/remarks/2013/09/214441.htm
[16] Greenwood, C, *Select Committee on Foreign Affairs Archive* (2005)

[17] Hurrieyet Daily News, *Turkish Jet attacked by Syrian Military: President Erdogan Vows Action*, June 2012.
[18] Haaretz. Kessling, Amir. '*Israeli Convoy Attacked on Golan Heights'* (28 November 2012)
[19] Schwebel, S, *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel* (1994)
[20] UN General Assembly, 29th Session. Resolution adopted by the General Assembly. 3314. Definition of Aggression.
[21] I.C.J. Reports 1996, p. 803.
[22] United Nations, *International Legal Protection of Human Rights in Armed Conflict*, November 2011, HR/PUB/11/01
[23] Levenfield, *Israel's Counter-Fedayeen Tactics* (1983)
[24] Hurrieyet Daily News, *Turkish Jet attacked by Syrian Military: President Erdogan Vows Action*, June 2012.
[25] Gray, International Law and the Use of Force, OUP 3rd Ed., 2013.
[26] Gardam, S. *Proportionality, Necessity and Force in International Law,* Cambridge Studies in International and Comparative Law, Vol XXIII (2004).
[27] Jennings, *Oppenheim's International Law* Vol 3 (2005)
[28] Haaretz. Essling, Amir. '*Israeli Convoy Attacked on Golan Heights'* (28 November 2012)
[29] Ibid
[30] BBC News, 'Rebel Counterattack in Southern Syria Dislodges Regime Forces' November, 2012.
[31] Haaretz. Zitun, Yoav. *IED Attack on Golan Heights* November 2012.
[32] Cordesman, A, *Lessons of the 2006 Israel-Hezbollah War* (2007)
[33] D'Amato and Franck, *The Emerging Right to Democratic Governance* (1992)
[34] Brownlie in honour of Akehurst, *Essays on the UN and Principles of International Law* (1994)
[35] Simma, *The Charter of the United Nations: a Commentary* (2nd Ed, 2002)

[36] Alexandrov, *Self-Defense and the Use of Force in International Law* (1996)
[37] BBC News, *Syrian Chemical Weapons Attack in Ghouta* (August 2013)
[38] Bowett, *Self-Defence in International Law* (1958)
[39] Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136-II RCADI (1972)
[40] Ibid, pp117.
[41] Wordsworth, R. *Chemical Weapons and Ius Cogens* (2013)
[42] McDougal and Feliciano, *Law and Minimum World Public Order* (1961)
[43] Rifaat, *International Aggression: A Study of the Legal Concept* (1979)
[44] D'Amato and Lillich, *Humanitarian Intervention and the United Nations* (1973)
[45] Barsotti, 'Armed Reprisals' in Cassese (ed.), *The Current Legal Refulation on the Use of Force* (2001)
[46] UN General Assembly, 53rd Session. Speaker's List 105, June 1999
[47] UK AG Justification for Syria Intervention: "https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf" Accessed 14 Jan 2014.
[48] Keesings, *The Guardian* 47477-9 (2007)
[49] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50).
[50] Keesings, *The Guardian* 47706 (2007)
[51] Taft, '*Self-Defence and the Oil Platforms Decision'*, Yale Journal of International Law (2004): 29
[52] Ratner, *International Law and the Use of Force*. Oxford (2006)
[53] Gardam, *Necessity, Proportionality and the Use of Force by States* OUP (2004)
[54] Ibid, pp37

[55] Dinstein, *War, Aggression and Self-Defence* OUP (4th Ed., 2005)
[56] Ibid pp149
[57] Ibid pp181
[58] Ulfstein and Christiansen, *The Legality of the NATO Bombing in Libya*, ICQL 2013
[59] Gray, *International Law and the Use of Force*. OUP 3rd Ed., 2013 Chapter 4
[60] Reisman, *Allocating Competences to use Coercion in the post-Cold-War World*, in Damrosch and Scheffer (eds)
[61] Sperduti, G. 7 Com.Int. 404-13 (1952)
[62] Goodwin-Gill/Talmon (eds.), The Reality of International Law. *Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), pp. 499-537
[63] Brownlie, *Principles of Public International Law* OUP *(*7th Ed,. 2008)
[64] Goodwin-Gill/Talmon (eds.), The Reality of International Law. *Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), pp. 499-537
[65] Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond,* 35 Cornell ILJ 2002
[66] Farer, *Drawing the Right Line*, 81 AJIL (1987)
[67] Ibid, pp83
[68] Dugard, J, *International Law: A South African Perspective*. OUP Clarendon Press: (2006)
[69] Byers and Nolte, *US Hegemony and the Foundation of International Law*. OUP Clarendon Press: (2003)
[70] BBC News, *Iraqi Kurdistan: A State in the Making?* (October 2013)
[71] Ibid
[72] Nolte, G. *Coalitions of the Willing: Avantgarde or Threat?* Routledge (2007)
[73] Doswald-Beck. *Human Rights in Times of Conflict and Terrorism* (2011)

[74] Haaretz. Mosgovaya, Natasha. 'U.S. Urges Syria to Respect Civil Rights, after Security Forces Open Fire on Protesters' (28 March 2011).
[75] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50).
[76] Byers, M. *'Terrorism, the Use of Force and International Law after 11 September'*, 51 ICLQ (2002) 401
[77] Al-Jazeera, *'Rebels Intensify Efforts in Damascus Outskirts'* (2013)
[78] Reuters, '*Russian Nationals told Tarsus remains safe*' (19 Sept 2013).
[79] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50).
[80] Becker, T. *Terrorism and the State* OUP (2006)
[81] C Pippan, 'The 2011 Libyan Uprising, Foreign Military Intervention and International Law' (2011) Juridikum: Zeitschrift für Kritik-Recht-Gesellschaft 2, 159-69.
[82] Lauterpacht, *The Function of Law in the International Community* OUP (1933)
[83] Brooks, R, *Building the Rule of Law* 33 GJICL (2004)
[84] Lauterpacht, *The Development of International Law by the International Court*. Oxford (1958)
[85] Guy Goodwin-Gill/Stefan Talmon (eds.), The Reality of International Law. Essays in Honour of Ian Brownlie (Oxford University Press, 1999), pp. 499-537
[86] Sivakumaran, S, *The Law of non-international Armed Conflict* ICQL (2012)
[87] Ibid, pp 147
[88] Ibid pp149
[89] Simonsen, N, *Internal Conflicts and Grey Areas in Classification*. ICQL (2012)
[90] Elefenrik, *An Overview of the Ituri War*. AJMH 2006

[91] JM Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum* ' 17 JC&SL (2012): 117-46, 124.
[92] Goodwin-Gill, G, *UNHCR Annual Report* (1986)
[93] Ibid pp36
[94] Weiler, J. *Fundamental Rights and Fundamental Boundaries*. NYU (2009)
[95] Ago and Gaja, *The Concept of an Injured State*. Durham (2008)
[96] JM Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum* ' 17 JC&SL (2012): 117-46, 124.
[97] Rodley, *The UN Human Rights Machinery and International Criminal Law*. Hart Publishing (2003)
[98] Weiler, J. *Fundamental Rights and Fundamental Boundaries*. NYU (2009)
[99] O Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010): 290, 294 and 309
[100] Pellet, A. *Droit International Penal.* Louvain (2000)

Works Cited

1. Ago and Gaja, *The Concept of an Injured State*. Durham (2008)Alexandrov, *Self-Defense and the Use of Force in International Law* (1996)Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50)
2. Al-Jazeera, *'Rebels Intensify Efforts in Damascus Outskirts'* (2013)
3. BBC News, 'Rebel Counterattack in Southern Syria Dislodges Regime Forces' November, 2012.
4. BBC News, *Syrian Chemical Weapons Attack in Ghouta* (August 2013)
5. Becker, T. *Terrorism and the State* OUP (2006)
6. Barsotti, 'Armed Reprisals' in Cassese (ed.), *The Current Legal Refulation on the Use of Force* (2001)
7. Bowett, *Self-Defence in International Law* (1958)Lauterpacht, *The Development of International Law by the International Court*, London, 1958.
8. Brooks, R, *Building the Rule of Law* 33 GJICL (2004)
9. Brownlie, *Principles of Public International Law* OUP *(*7th Ed,. 2008)
10. Brownlie, In Honour of Akehurst, *Essays on the UN and Principles of International Law* (1994)
11. Byers and Nolte, *US Hegemony and the Foundation of International Law*. OUP Clarendon Press: (2003)
12. Byers, M. *'Terrorism, the Use of Force and International Law after 11 September'*, 51 ICLQ (2002) 401
13. Christenson and Ronzitti, *Regional Organisations and the Development of Collective Security* (2004)
14. Cordesman, A, *Lessons of the 2006 Israel-Hezbollah War* (2007)

15. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010)
16. Cot and Pellet, *La Charte des Nations Unies* (1991)
17. D'Amato and Franck, *The Emerging Right to Democratic Governance* (1992)
18. D'Amato and Lillich, *Humanitarian Intervention and the United Nations* (1973)
19. Dinstein, *War, Aggression and Self-Defence* OUP (4th Ed., 2005)
20. Doswald-Beck. *Human Rights in Times of Conflict and Terrorism* (2011)
21. Dugard, J, *International Law: A South African Perspective*. OUP Clarendon Press: (2006)
22. Elefenrik, *An Overview of the Ituri War*. AJMH 2006
23. Farer, *Drawing the Right Line*, 81 AJIL (1987)
24. Gardam, S. *Proportionality, Necessity and Force in International Law,* Cambridge Studies in International and Comparative Law, Vol XXIII (2004).
25. Gardam, *Necessity, Proportionality and the Use of Force by States* OUP (2004)
26. Goodwin-Gill/Talmon (eds.), The Reality of International Law. *Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), pp. 499-537
27. Goodwin-Gill, G, *UNHCR Annual Report* (1986)
28. Gray, C, International Law and the Use of Force, OUP 3rd Ed., 2013.
29. Greenwood, C, *Select Committee on Foreign Affairs Archive* (2005)
30. Haaretz, Zitun, Yoav. '*Israeli Convoy Attacked on Golan Heights'*. 28 November 2012
31. Haaretz. Ashkenazi, Eli. *Three Mortar Shells Fired From Syria Hit Israel*. November 2012.

32. Haaretz. Mosgovaya, Natasha. 'U.S. Urges Syria to Respect Civil Rights, after Security Forces Open Fire on Protesters'. March 2011
33. Henkin and Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights* (1996)
34. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* 16 August 2012 (A/HRC/21/50).
35. Hurrieyet Daily News, *Turkish Jet attacked by Syrian Military: President Erdogan Vows Action*, June 2012.
36. Jennings, *Oppenheim's International Law* Vol 3 OUP (2005)
37. Keesings, *The Guardian* 47706 (2007)
38. Keesings, *The Guardian* 47477-9 (2007)
39. Lauterpacht, *The Function of Law in the International Community* OUP (1933)
40. Lauterpacht, *The Development of International Law by the International Court*. Oxford (1958)
41. Lehmann, J. 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum* ' 17 JC&SL (2012)
42. Levenfield, *Israel's Counter-Fedayeen Tactics* OUP (1983)Talmon, S, The Reality of International Law. Essays in Honour of Ian Brownlie. Foreword by Sir Robert Jennings (Oxford: Clarendon Press, 1999)
43. McDougal and Feliciano, *Law and Minimum World Public Order* (1961)
44. Nolte, G. *Coalitions of the Willing: Avantgarde or Threat?* Routledge (2007)
45. O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (2008)

46. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond,* 35 Cornell ILJ 2002
47. Pellet, A. *Droit International Penal*. Louvain (2000)
48. Pippan, C. 'The 2011 Libyan Uprising, Foreign Military Intervention and International Law' (2011) Juridikum: Zeitschrift für Kritik-Recht-Gesellschaft 2, 159-69.
49. Ratner, *International Law and the Use of Force*. Oxford (2006)
50. Reisman, *Allocating Competences to use Coercion in the post-Cold-War World*, in Damrosch and Scheffer (eds) NYU (2001)
51. Reuters, '*Russian Nationals told Tarsus remains safe*' (19 Sept 2013).
52. Rifaat, *International Aggression: A Study of the Legal Concept* OUP (1979)
53. Rodley, *The UN Human Rights Machinery and International Criminal Law*. Hart Publishing (2003)
54. Schwebel, S. *Aggression, Intervention and Self-Defence in Modern International Law*, 136-II RCADI (1972)
55. Schwebel, S, *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel* (1994)
56. Simma, *The Charter of the United Nations: a Commentary* Taft Publishing (2nd Ed, 2002)
57. Simonsen, N, *Internal Conflicts and Grey Areas in Classification*. ICQL 2012.
58. Sivakumaran, S, *The Law of Non-International Armed Conflict*. 2012.
59. Sperduti, G. 7 Com.Int. 404-13 (1952)
60. Taft, '*Self-Defence and the Oil Platforms Decision'*, Yale Journal of International Law (2004): 29
61. Ulfstein and Christiansen, *The Legality of the NATO Bombing in Libya*, ICQL 2013
62. UK Attorney General's Justification for Intervention in Syria (2013):

"https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf" Accessed 14 Jan 2014.

63. United Nations, *International Legal Protection of Human Rights in Armed Conflict*, November 2011, HR/PUB/11/01
64. Weiler, J. *Fundamental Rights and Fundamental Boundaries*. NYU (2009)
65. Wordsworth, R. *Chemical Weapons and Ius Cogens* OUP (2013)

Addicted, Pregnant and Punished: The Cruel and Unusual Treatment of Pregnant Addicts

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Abstract:
The discourse on America's war on drugs increasingly acknowledges the disparate impact on minorities of current drug policies and enforcement of those policies. But few consider the unique burden faced by female drug addicts. In particular, I will explore the treatment of pregnant drug addicts because, arguably, an individual is most clearly female, or defined by femaleness, when pregnant, as it is a distinctly female experience.

In the following paper, I will consider the Alabama's chemical-endangerment law. Originally designed to protect children from exposure to controlled substances, the law now allows for the prosecution of pregnant drug users and, in doing so, contradicts the Robinson vs. California Supreme Court Case decision. In the Robinson decision, the court states that punishing someone for an illness such as drug addiction constitutes cruel and unusual punishment. However, pregnant addicts are not afforded the same protection. The chemical-endangerment deprives this population of the support they need even though, by virtue of being pregnant, they require specialized care. Punishing rather than treating drug addiction among pregnant addicts therefore constitutes an egregious violation of the Eighth Amendment prohibition against cruel and unusual punishment.

The relative worth of a mother's versus fetus' rights has long been a subject of debate. This enduring and impassioned disagreement about personhood takes many forms, extending beyond the well-publicized and frequently-discussed abortion debate. For example, an Alabama statute – the Chemical Endangerments of Exposing a Child to an Environment in which Controlled Substances are Produced or Distributed (§ 26-15-3.2) – creates a compelling and specific controversy about pregnant women's[i] rights. Enacted in 2006 to protect children from exposure to meth labs, the chemical endangerment law has become the basis of approximately sixty cases in which women face jail time for consuming drugs while pregnant; the law carries a mandatory sentence of ten years if the fetus dies.[ii] This specific calculation of maternal versus fetal rights violates the Eighth Amendment in light of the Supreme Court case *Robinson v. California*, which states that punishing individuals solely for using drugs constitutes cruel and unusual punishment.

This paper focuses first on *Robinson v. California*, explaining that imprisonment on the basis of drug addiction violates the Eighth Amendment because it is unproductive, disproportionate, and stigmatizing. Next, the paper explains why the chemical endangerment law, like the California Health and Safety Code critiqued in *Robinson v. California*, solely penalizes addiction. Comparing the statutes reveals that, when applied to pregnant addicts, the endangerment law exacerbates the three problematic aspects—unproductive, disproportionate, and stigmatizing— of the California law, making for a particularly cruel and unusual form of punishment. Last, the paper reflects on the underlying similarities between the two laws and the implications of imprisoning female addicts.

The constitutional argument against applying the chemical endangerment statute to pregnant women emerges from the Supreme Court case *Robinson v. California*. In 1962, a pair of Los

Angeles police officers arrested Lawrence Robinson after noticing discoloration and scabs on his arms that were indicative of narcotics use.[iii] Robinson admitted to using narcotics, a statement he later denied. A jury convicted Robinson of violating statute §11721 of the California Health and Safety Code which states:

> "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics….Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail….In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

The judge sentenced him to 90 days of imprisonment. The state appellate court affirmed the jury's verdict but after further appeal, the Supreme Court reversed the decision. The justices ruled that although many behaviors associated with drug addiction, such as distributing or possessing narcotics, warrant legal repercussions, penalizing addiction alone amounts to cruel and unusual punishment in multiple ways. Fully understanding why imprisonment on the basis of addiction violates the Eight Amendment requires reviewing; each of the three ways in which the California statute is problematic. First, imprisonment does not effectively address the behavior the law seeks to curtail. Second, the punishment given to narcotics addicts is incongruent with the severity of their supposed crime. Furthermore, the statute unnecessarily stigmatizes individuals already struggling with the ignominy of addiction. In short, imprisoning narcotics addicts is

cruel and unusual because it is unproductive, disproportionate, and stigmatizing.

The Court ruled that the California statute violated the Eighth Amendment in part because it obscured the difference between crime and illness, making Robinson's imprisonment cruelly unproductive. This claim about inefficacy rests upon the logic that the state interests of reducing crime and illness must be separate initiatives. In the majority opinion, Justice Stewart readily acknowledged the state's compelling interest in curtailing narcotics use and the criminal behavior it inspires. Additionally, the state likely hopes to reduce drug addiction and specifies that state may impose "compulsory treatment, involving quarantine, confinement, or sequestration" or, in the case of Robinson's specific illness, "establish a program of compulsory treatment for those addicted to narcotics" in order to achieve this goal.[iv] However, the Court warned that the state must distinguish the imperative to prosecute drug-related crimes with the desire to reduce drug addiction because the latter qualifies as an illness; the American Psychological Association, which designates diagnostic criteria for mental *illnesses*, defines substance abuse or addiction as "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance-related problems."[v] Conflating the state's interest in curtailing the criminal behavior associated with drug use combined with the compelling state interest in curtailing narcotics use proves unproductive. Indeed, the California statute does not facilitate medical treatment or produce the ultimate goal of ending narcotics use: "It is not a law which even purports to provide or require medical , treatment."[vi] Because the law does not guarantee drug treatment, the Justice Stewart does not need to review the efficacy of drug treatment programs or their general availability to know that the state does not appropriately take into account the difference between the criminal behavior associated with drugs and

the illness of drug addiction. In other words, whether an individual imprisoned under the statute accesses treatment in prison is a function of luck; the law does not guarantee or proactively make drug treatment available. In addition, it is extremely difficult to receive treatment as prison drug education/intervention programs typically have a waiting list of *thousands* of prisoners.[vii] Sadly, while budget cuts and overcrowding routinely complicate prisoners' efforts to enroll in a program, drugs remain widely available behind bars.[viii] Subsequently, sending addicts to prison with no promise of treatment but undeniable access to narcotics, is essentially sentencing them to addiction. This failure to secure treatment effectively amounts, in the eyes of the Court, to denying treatment and responding to the illness with an antidote to crime (imprisonment) instead of treating the actual illness; imprisonment does nothing to cure or curb the drug addiction. Imprisoning addicts actively frustrates the state's goals because prisons do not offer to all addicts the medical treatment required to overcome the disease of narcotics addiction. The unconstitutionality of imprisoning Robinson partially lies in the state's failure to recognize that "addicts are patients, not criminals."[ix] Another way of understanding the hopelessness of "penalizing an illness, rather than at providing medical care for it" requires considering the Court's revelation that *being* ill differs from a singular act.[x] The state cruelly overlooks that being addicted constitutes a persistent state of being, which unlike a single criminal act, should not end in imprisonment. Rather, addiction is a very serious disease that demands treatment, so severe that Justice Douglas likens addiction to a state of continual death when he notes that "to be a confirmed drug addict, is to be one of the walking dead"[xi] However, if the state of suffering from addiction warrants punishment, narcotic addicts indefinitely risk arrest until they change their very condition of being. If arrested, and subsequently are unable to seek treatment, addicts will continue to actively violate the law that

precipitated their arrest. Justice Stewart understood the punishment to be cruel because it punishes individuals in a manner that ensures the persistence of their criminal state of being. This unusually unproductive situation, in which punishment ensures future incidence of the crime, is very cruel.

Ninety days of imprisonment constitutes a disproportionate punishment for being ill, a second hallmark of unusual cruelty. The Court writes that a "punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'"[xii] "Disproportionate" hardly begins to encapsulate the inappropriate pairing of offense and punishment enacted in the Robinson case. The American legal system typically takes pains to consider a person's intent when deciding the extent to which they should be punished; *mens rea* (Latin for "guilty mind") amounts to one of law's most foundational safeguards against disproportionate punishment. Stated simply, the law usually accounts for an individual's intentionality and allows one's lack of malice or knowledge to mitigate their sentence. Yet, within the context of the California statute, there was little consideration for *mens rea,* and addicts received a disproportionately harsh sentence for their incidental crime. Ultimately, the statute sought to punish individuals afflicted with "an illness which may be contracted innocently or involuntarily," or, a disease that does not necessitate a guilty mind.[xiii] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"[xiv] because individuals do not choose to contract a cold. Going outside without a coat in the winter increases the likelihood of catching a cold; accepting unnecessary risk factors does not connote *choosing* to catch a cold. Similarly, no one chooses to be addicted to narcotics; rather individuals can make choices that expose them to the possibility of becoming addicted. Even *if* becoming addicted was a choice for which the law could appropriately find fault in, once addicted, addicts lose "their power of self-control."[xv] In other

words, those who remain unconvinced by the Court's common cold analogy must concede that once someone becomes addicted, he/she does not operate the basis of conscious choices but rather at the whims of a disease. Because neither the moment of becoming addicted nor the state of remaining addicted result from active choices, imprisoning addicts exemplifies the scenario of a punishment not fitting the crime.

Lastly, unnecessarily stigmatizing an individual with an arrest and conviction further exacerbates the cruelty of the statute's mandated punishment. "Unnecessarily" refers to the previously reached conclusion that punishing addicts does not end addiction. Essentially, an unproductive law exists unnecessarily.[xvi] Furthermore, this unnecessary law creates life-changing consequences for ill individuals and tags them with the damning label of "criminal." Protecting society against the violence and disorder associated with drug use does not require blemishing an individual's reputation because labeling an addict as a criminal does nothing to alleviate their addiction. Levying a demeaning and enduring classification is no more effective as means for protecting society than civil commitment."[xvii] Civil commitment addresses addiction without humiliating and isolating addicts from others as criminals Civil commitment embarks from the cruelty of condemning illness towards a more humane response: comprehensive care for those who need it most. Stigma resulting from a criminal conviction so profoundly affects individuals that merely equating drug addiction to criminal activity seems inappropriate. Accordingly, "cruel and unusual punishment results not from confinement, but from convicting the addict of a crime."[xviii] By being unproductive, disproportionate, and unnecessarily harsh, laws criminalizing narcotic addiction meet the criteria of cruel and unusual punishment.

Having explained the unconstitutionality of punishing drug addiction, the question remains whether prosecuting pregnant

women under Alabama's chemical endangerment law similarly violates the Eighth Amendment. Determining the personhood of fetuses is a necessary first step toward understanding the law. If the fetus endangered by the ingested chemicals is a "person," the law rightfully punishes inflicting pain on another human being. However, if the fetus endangered by the ingested chemicals is not a "person," the law responds only to drug addiction and, in doing so, violates the Constitution. In order for the logic of *Robinson v. California* to apply, prosecution must be motivated by drug addiction alone, not harm against another human.

Fortunately, the chemical endangerment laws can be discussed in terms of punishing addiction without delving too deeply into the fraught and complex personhood debate. Simply examining and valuing legislative intent reveals that the chemical endangerment law does not attend to fetuses as people and therefore singularly responds to the "crime" of having a drug addiction. Prosecutors erroneously apply the chemical endangerment law to pregnant drug addicts. Though a New York Times profile on the law observes that the district attorney in Alabama "makes little distinction between fetus and child," legal scholars argue that the "Legislature did not intend the child abuse statute to apply to facts involving prenatal drug use.[xix] Accordingly, the statute reads:

> (a) A responsible person commits the crime of chemical endangerment of exposing a *child* to an environment in which he or she does any of the following:
>
> (1) Knowingly, recklessly, or intentionally causes or permits a *child* to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.

> (2) Violates subdivision (1) and a *child* suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.
> (3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the *child*. A violation under this subdivision is a Class A felony….." (Emphasis added).

Beyond rejecting the law as a measure against drug use while pregnant at the time of its writing, the legislature proactively continues to reject prosecutors' interpretation of the statute. Even as prosecutors assign criminal charges to women, the "legislature has repeatedly rejected amendments to expand the law's definition of 'child' to explicitly mean 'fetus.'"[xx] Regardless of whether one believes fetuses deserve the same rights as infants, children, or adults, the legislature clearly did not write the law with fetuses in mind, thus settling, for the purposes of this essay, the question of fetal personhood. The importance of legislative intent renders the question of personhood in this particular instance moot because legislatures monopolize the right to define laws. In fact, legal advocates for pregnant women writing an amicus curiae brief in support of Hope Ankrom, a mother prosecuted under the statute, urge the Alabama Supreme Court to exercise restraint and respect the legislature's monopoly on defining crime.[xxi] Legal procedure and the notion of checks and balances dictate that the legislature's intention of excluding fetuses from the endangerment law trumps prosecutors' aspirations to expand the meaning of "child" to include fetuses. The authors of the brief state that multiple state judges have ruled that a "court may not expand the meaning of 'human being' to include an unborn viable fetus because the power to define crimes and to establish criminal penalties is exclusively a legislative function."[xxii] Notably, the Court's acknowledgment of

the viability of an unborn fetus highlights how the matter at hand boils down to respecting legislative powers, not defining personhood. Recognizing viability usually translates into advocating for fetal rights, but the Court couches this suggestion of a pro-life stance in legal fact; judicial opinion cannot constitutionally transform legislation against legislatures' will.

Because the chemical endangerment law, according to the legislature (the rightful creators and interpreters of law), addresses children only, the law does not punish pregnant drug users for harming fetuses. The law does not consider fetal rights. When prosecutors imprison women using the chemical endangerment law, they purportedly do so in the name of punishing harm to another human being. Because the statute does not substantiate these accusations with acknowledgement of fetal rights, women are being punished simply for having a drug addiction. Alabama's chemical endangerment law criminalizes the narcotic addiction of pregnant women, thus violating the Eighth Amendment. The four descriptors that helped delineate the unconstitutionality of imprisoning addicts operate in particularly cruel and unusual ways when the addicts will or have just given birth.

First, punishing pregnant women in lieu of providing treatment amounts to a particularly unproductive intervention in failing to help them as addicts[xxiii] or as mothers. Tiffany Hitson, a teenage mother from Alabama, can attest to the inefficiency of the law that imprisoned her for a year after giving birth to a girl with cocaine and marijuana in her system. She observes, "They're just sending people straight to prison. It doesn't help their drug problems."[xxiv] The signatories of the amici curiae brief corroborate Hitson's personal experience of Alabama's unproductive response. "Because of the compulsive nature of drug dependency," they write, "warnings or threats are unlikely to deter drug use among pregnant women."[xxv] Beyond failing to alleviate drug addiction, the endangerment law undermines an unstated but universal goal:

reducing rates of abortion.[xxvi] By criminalizing pregnancy that occurs under imperfect circumstances, the law likely discourages pregnant addicts from seeking treatment for fear of prosecution and leads them to abort fetuses endangered by their addictions."[xxvii] In the absence of rehabilitation and in the shadow of retribution, the chemical endangerment law ensnares mothers in an endless cycle of "criminal behavior" and legal consequence. Amanda Kimbrough, the mother of three included in the amici curiae brief, faced serious criminal charges for testing positive for methamphetamine after giving birth. She provides a poignant illustration of the perseverance of untreated addiction. In addition to the initial "crime" of using narcotics, Kimbrough encountered further drug-based legal trouble when "she was charged with selling Oxycodone to a confidential informant."[xxviii] Her past punishment for using drugs did not deter future use. By definition, negative consequences have little meaning to an addict; the American Psychological Association's definition of addiction includes a statement about an addict's tendency to continue using substances despite negative consequences such as imprisonment. Consequently, the possibility of jail time did not and could not motivate Kimbrough to overcome her severe addiction. Threatening prison time solved none of her problems; the law essentially left her to resolve a formidable "chronic, relapsing biological and behavioral disorder with genetic components"[xxix] on her own. Without comprehensive treatment, she and other addicts remain in the throes of a disease that robs them of their judgment and self-control. Ultimately, the sadness of this reality is that prison effectively punishes these women for poor judgment and self-discipline while simultaneously robbing them of a chance to regain control.

Just as Robinson's sentence of ninety days was ruled a disproportionate response to his addiction, the punishment meted out to addicted mothers greatly exceeds the punished behavior in

severity. Certainly, separation from one's newborn child seems unusually cruel. Hope Ankrom, who spent time in prison after her baby tested positive for marijuana and cocaine, describes the unique torture of needing to breastfeed while separated from one's baby: "There is nothing more painful than needing to express [breastfeed] and not being able to."[xxx] Prior to or directly after giving birth, the female body requires special care that prisons cannot and do not provide. Advocates for mothers note that "pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist."[xxxi] These problems range from the relatively simple task of making bottom bunks available to pregnant women (as to reduce the risk of falling) to the enormous responsibility of treating the postpartum depression of a mother who has been separated from her baby against her will. Though the advocates do not define "exceptional circumstances," non-violent behavior resulting from a chronic disease does not warrant sending a physically and emotionally vulnerable to a notoriously dangerous prison.[xxxii] Furthermore, imprisonment precludes them from accessing available and effective drug treatment programs, the same deprivation of treatment for addicts that led the Court to rule that *Robinson v. California* violated the Eighth Amendment.

The excessiveness of the endangerment law's penalties become even clearer in light of the fact that using drugs while pregnant does not impact fetuses as profoundly as prosecutors suggest. While media and prosecutors demonize women for birthing drug-addicted babies, medical professionals insist that the "crime" of consuming drugs while pregnant rarely harms the fetus. In an open letter to the media written in 2005, ninety-three medical professionals stated, "in utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosable and treatable, but no such symptoms have been found to occur following prenatal cocaine or

methamphetamine exposure."[xxxiii] Notably, they do not assert that drugs have no impact on the fetus - opiates undoubtedly affect the fetus and ideally drugs should not infiltrate the womb. But medical treatment easily mitigates the consequences. The medical reality of *in utero* exposure pales in comparison to the utter devastation to the fetus portrayed by the media and prosecutors. In particular, cocaine and methamphetamine use, the drugs that landed Hitson, Kimbrough and Ankrom in jail, may not affect the fetus at all. The authors of Ankrom's amicus curiae brief quote The American College of Obstetricians and Gynecology's assessment that there "is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine."[xxxiv] While the ideal pregnancy is entirely drug-free, drug use during pregnancy does not have a clear, medically recognized impact on children. Pregnant addicts are punished on the basis of having had an imperfect pregnancy, not in proportion to the actual harm their behavior visits upon their child. Their imprisonment is a disproportionate punishment because the women's offending actions are far less catastrophic to their children than some believe. Additionally, the conditions of imprisonment are disproportionately difficult as they have special physical and mental needs that are not adequately met.

Finally, the stigmatizing label of "criminal" given to drug addicts seems especially cruel and unusual when a pregnant woman is seen as both a criminal *and* a bad mother in the eyes of the law. Although a "pregnant drug user's behaviors parallels that of a drug user-possessor rather than a drug dealer who would ordinarily be the target of drug delivery statutes" the statute nonetheless considers them dealers to minors.[xxxv] In addition to being seen as an addict – a devastating title in its own right – pregnant users find themselves depicted as malicious criminals intent on distributing drugs (to their own child no less!) and involving others in their criminal behavior. In swift succession,

women morph, in the eyes of the law and subsequently their community, from addicts, to criminals, to dealers, to a danger to children. Imagining the course drugs take through their bodies as an exchange of drugs to a fetus characterizes women as drug dealers and, because of the supposed recipient of her drugs, a bad mother as well. Because of "powerful, unspoken community sanction[s] against the combination of drugs and pregnant women" in Alabama, recovering from the stigma of a chemical endangerment charge seems nearly impossible[xxxvi]. Ankrom reluctantly put dreams of being a physical therapist to bed after her conviction. She quickly realized that "when you want to work with children or the elderly, they see that abuse charge and they're like:…'You're not going to work here.'"[xxxvii] Where a criminal history elicits concern, a criminal history involving purported harm against a child evokes utter contempt.

The California Health and Safety Code statute and the prosecution of pregnant addicts under Alabama's chemical endangerment law violate the Eighth Amendment prohibition against cruel and unusual punishment. Both fail to produce meaningful change, provide effective treatment, respond proportionally, or help addicts without demonizing them. The statutes also share a fundamental flaw in that they underestimate the utterly controlling and life-altering devastation of a mental illness such as narcotics addiction. The laws overlook the way in which an addicted mind wreaks havoc on a person.

Punishing addiction constitutes a Foucauldian moment of the state regulating an individual's body, regardless of whether or not the supposed criminal is pregnant or not, female or male. However, in a society that systematically privileges women's bodies over their minds, the law's focus on imprisoning the addicted body, rather than treating the ill mind, implicitly condones society's penchant for seeing women as bodies. Disregarding the necessity of therapeutic, rehabilitative care to a

pregnant addict seems to bolster a troubling trend in contemporary legal imaginings of women as incubators. In other words, when a law so blatantly ignores the state of a woman's mind and essentially punishes her for poorly managing her reproductive capacity, it becomes clear that the law can reduce women to their physical bodies. In the name of preserving the body, securing a perfect womb, addiction unjustly elicits imprisonment not aid. In addition to qualifying as cruel and unusual punishment in the same way Robinson's imprisonment violated the Eighth Amendment, prosecuting pregnant women under the chemical endangerment law contains the added cruelty of contributing to the notion that women are wombs first and people second.

[i] For the purpose of this paper, "pregnant women" refers to both women currently with child and women who recently gave birth. In addition to promoting concise writing, using "pregnant women" as an all-encompassing term echoes the law's tendency to see women solely in terms of their reproductive capacity. Furthermore, the verbal conflation of the two states appropriately reflects the remarkable speed with which prosecutors arrest women for chemical endangerment. Immediately after giving birth, while still experiencing the physical effects of pregnancy and giving birth, women find themselves in jail.

[ii] Katherine Cooney, "Drug Addiction, 'Personhood' and the War on Women," *Time Magazine*, April 26, 2012, accessed November 19, 2012, http://newsfeed.time.com/2012/04/26/drug-addiction-personhood-and-the-war-on-women/.

[iii] *Robinson v. California*, 370 U.S. 660 (1962), 661.

[iv] Id, 665.

[v] American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., text rev.), Washington, DC: Author, 192.

[vi] 370 U.S. 660 (1962),666.

[vii] United States Government Accountability Office: A Report to Congressional Requesters. *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff and Inrastructure*. September 2012.

[viii] "Drugs Inside Prison Walls," *Washington Times*, January 27, 2010, accessed March 10, 2014, http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls/?page=all.

[ix] 370 U.S. 660 (1962),673.

[x] Id., 678.

[xi] Id., 672.

[xii] Id., 676.

[xiii] Id., 667.
[xiv] Id., 667.
[xv] Id., 673.
[xvi] The law's lack of necessity stems from its inefficiency. A necessary law responds to an individuals' drug addiction effectively and thoughtfully. But, in the absence of a productive law, statutes that stigmatizes without treating addicts continuously prove that sometimes, something is *not* better than nothing.
[xvii] "Prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well" (Ibid., 676).
[xviii] Ibid., 676.
[xix] Adam Nossiter, "In Alabama, a Crackdown on Pregnant Drug Users," *The New York Times*, March 15, 2008, accessed on November 9, 2012, http://www.nytimes.com/2008/03/15/us/15mothers.html?pagewanted=all&_r=0.
[xx] Ada Calhoun, "The Criminalization of Bad Mothers," *The New York Times Magazine*, April 29, 2012, accessed November 10, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all.
[xxi] Brief for the National Advocates for Pregnant Women, Southern Poverty Law Center and Drug Policy Alliance as Amicus Curiae, Ankrom v. State of Alabama, NO. 11-10176 (2010), 25, accessed November 10, 2012.
[xxii] Ibid., 26.
[xxiii] Recall that many prisoners are placed on waiting lists for treatment programs yet face no substantial delays in accessing drugs.
[xxiv] Nossiter, "In Alabama, a Crackdown on Pregnant Drug Users."
[xxv] Brief as Amicus Curiae, Ankrom v. State of Alabama, 36.

[xxvi] Even the staunchest pro-choice advocates do not consider themselves "pro-abortion." Ideally women seek abortions after all else (effective birth control, abstinence etc.) fails.
[xxvii] Cooney, "Drug Addiction, 'Personhood' and the War on Women."
[xxviii] Calhoun, "The Criminalization of Bad Mothers."
[xxix] Brief as Amicus Curiae, Ankrom v. State of Alabama, 7.
[xxx] Calhoun, "The Criminalization of Bad Mothers."
[xxxi] Brief as Amicus Curiae, Ankrom v. State of Alabama, 39.
[xxxii] Kim Severson, "Troubles at Women's Prison Test Alabama," *The New York Times*, March 1, 2014, accessed March 19, 2014, http://www.nytimes.com/2014/03/02/us/troubles-at-womens-prison-test-alabama.html?_r=0.
[xxxiii] David C. Lewis, M.D., open letter to the media, 27 July. 2005, accessed November 19, 2012.
[xxxiv] 57 Am. Coll. of Obstetricians & Gynecologists, Information about Methamphetamine Use in Pregnancy, Mar. 3, 2006, available at http://www.rhrealitycheck.org/emailphotos/ACOGmethtalkingpoints.pdf.
[xxxv] Horn, "Mothers Versus Babies," 639.
[xxxvi] Nossiter, "In Alabama, a Crackdown on Pregnant Drug Users."
[xxxvii] Calhoun, "The Criminalization of Bad Mothers."

Works Cited

Alabama Code § 26-15-3.2 Chemical Endangerment of Exposing a Child to an Environment in which Controlled Substances are Produced or Distributed (Accessed November 10, 2012).

Brief for the National Advocates for Pregnant Women, Southern Poverty Law Center and Drug Policy Alliance as Amicus Curiae, Ankrom v. State of Alabama, NO. 11-10176 (2010). (Accessed November 10, 2012).

California Health and Safety Code § 11721 (Accessed November 18, 2012).

Calhoun, Ada. "Mommy Had To Go Away for A While."*The New York Times Magazine*, April 29, 2012, MM30. (Accessed November 10, 2012).

Cooney, Katherine. "Drug Addiction, 'Personhood' and the War on Women." *Time Magazine*, April 26, 2012. (Accessed November 19, 2012).

David C. Lewis, M.D., open letter to the media, 27 July. 2005 (Accessed November 19, 2012).

Haines, Errin. "Virginia Weighs Ban on Some Restraints for Pregnant Inmates." *The Washington Post*, sec. Metro, November 25, 2012. (Accessed November 30, 2012).

Horn, Meghan. "Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse." *William & Mary Journal of Women and the Law*. 14. no. 3 (2008): 635-657. http://scholarship.law.wm.edu/wmjowl/vol14/iss3/6 (accessed December 5, 2012). (Accessed November 10, 2012).

Nossiter, Adam. "In Alabama, a Crackdown on Pregnant Drug Users." *The New York Times*, sec. U.S., March 15, 2008.

Lester, Barry M., Lynne Andreozzi, and Lindsey Appiah. "Substance use during pregnancy: time for policy to catch up with research." *Harm Reduction Journal* . 1. no. 5 (2004): 1-44. http://www.harmreductionjournal.com/content/1/1/5 (accessed November 19, 2012).

Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). (accessed November 10, 2012).

United States Government Accountability Office report to Congressional Requesters. *Bureau of Prisons:Growing Inmate Crowding Negatively Affects Inmates, Staff and Inrastructure*. September 2012

Plata o Plomo *A Bribe or a Bullet*: Corruption, Violence, Drug Trafficking and Counternarcotics Strategy in Mexico

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Abstract:
Mexico's lucrative drug industry sabotages development efforts in the country, particularly as legal standards decline. The climate of illicit drug production and trafficking in Mexico has resulted in 'lawless zones' fueled by corrupt officials and gruesome violence, threatening the legitimacy, efficiency, and development of the state. Mexico must develop its capacity to govern especially as drug-related violence becomes a pressing humanitarian issue. In the 20th century, Mexico developed a comparative advantage in drug trafficking due to its geographical location, its economic instability, and the centralized system of corruption encouraged by the authoritarian Institutional Revolutionary Party (PRI). As the PRI administration cultivated a blueprint of systematic corruption, economic incentives seduced local authorities and disintegrated legal concerns.

The drug economy in Mexico thrives because counternarcotic policies declare drugs as illegal; yet it is unlikely that domestic decriminalization will yield long-term solution to the cartel wars plaguing Mexico. Instead, counternarcotic policy in Mexico should focus on reforming Mexico's law enforcement and judicial systems, enacting preventative measures, realizing viable economic alternatives, and empowering Mexican civil society. Counternarcotics strategy in Mexico must demilitarize to be successful, shifting its focus away from hard power and instead toward criminal justice, economic alternatives, and the development of civil society.

On March 23, 1994, in a crime-ridden neighborhood of Tijuana, a man in the middle of a crowd of thousands lifted a nickel-plated handgun and fatally shot PRI presidential candidate Luis Donaldo Colosio in the head.[1] In the aftermath, conspiracy theories surfaced and rumors abounded. So deeply ingrained is citizen mistrust of the Mexican government that academics and journalists to this day disagree on the exact motive and perpetrator of the assassination—yet most interpret the event as an act of drug cartel violence in response to Colosio's anti-crime platform and refusal to accept drug money.[2]

Regardless of why Colosio was killed, says author Jerry Langton, "it changed things in Mexico."[3] Drug cartels emerged as the principal form of organized criminal enterprise that continues to challenge the Mexican state today, leaving behind a trail of death, corruption, and human rights violations.[4] Statistics suggest that cartels have infiltrated over 1,500 Mexican cities,[5] with 450,000 individuals working in jobs directly related to drug trafficking and cultivation in Mexico.[6]

As primarily a transit country, Mexico's trafficking of cocaine bound for main consumer markets in North America and Europe threatens the legitimacy, efficiency, and development of the state.[7] Today, criminal groups battling over drug transshipment *plazas*[8] enlist the support of other gangs[9] and criminal enterprises, resulting in 'lawless zones'—criminal enclaves fueled by corrupt officials and gruesome violence where law does not reign. Mexico's traffickers push drugs north, leaving addicts, destitution, and despair in their wake.[10]

In the 20th century, Mexico developed a comparative advantage in trafficking narcotics due to its geographical location, its economic instability, and the centralized system of corruption encouraged by the authoritarian Institutional Revolutionary Party, or *Partido Revolucionario Institucional* (PRI). Violence, poor governance, and increasing corruption ensued with the demise of the single-party system, the allure of glamorous drug culture or

narco-cultura, and the militarization of security policy in recent years. Counternarcotics strategy in Mexico *must* demilitarize to be successful, shifting its focus away from hard power and instead toward criminal justice, economic alternatives, and the development of civil society.

The crisis of today's security failure cannot be tackled without understanding its historical causes, enmeshed as they are with the evolution of a young modern state.[11] Three main periods emerge during which Mexico developed its comparative advantage in drug trafficking: the appearance of a local illicit drug economy; then the rise of a centrally regulated illicit market under the PRI (1929-1997); and finally the transition to a privatized and increasingly violent drug economy (1997-present).[12] Author Robert J. Bunker outlines three simultaneous phases charting the evolution of cartels over time as they became increasingly violent, geographically dispersed, and threatening to state institutions—paving the way for the drug industry to flourish in Mexico.

And flourish it did: with the ascendance of cocaine, corruption burst all barriers until it became so entwined with Mexican political structure that the Mexican government seemed to depend on illicit dealings.[13] Following the historic examples of Colonel Esteban Cantú[14] and General Abelardo L. Rodríguez,[15] the PRI administration cultivated a blueprint of systematic corruption. According to author Paul Kenny, the "fabulous increase" in the value of cocaine over the decade from 1985-1995 expanded the need for the political protection of Mexican drug traffickers as they began to participate more closely in the process from production to supply.[16] Corruption's place in the scheme of relations between state and criminals had now reversed: in the past, criminals had been *forced* to pay to avoid the sanction of violence by state agents. Now, criminals *chose* to pay—and they could punish non-compliance.[17]

By the 1990s, corruption became systemic in the absence of any security force to regulate the criminal market, further heralding

the prosperity of an illegal drug presence in Mexico.[18] The authoritarian PRI party designed corruption into the political process: the money taken from taxing criminals and accepting bribes went to pay for the uniforms, equipment, and offices of the police. According to Kenny, this situation didn't happen by chance: "Crime was made to pay for the state."[19] Concerns about legality decayed as economic incentives seduced local authorities. Kenny describes: "The imperatives of economic benefit took priority over legal niceties from a world away," further preparing Mexico to host a prosperous illicit economy.[20]

Concerned especially about Mexico's illicit financial flows, Eduardo Valle[21] in his 1994 letter of resignation revealed this culture of politics, economy, and violence that so supported the rise of drug traffickers in Mexico. He asked:

> When are we going to have the courage and political maturity to tell the Mexican people that we are suffering *a species of narcodemocracy*? Will we have the intellectual capacity and ethical fortitude to affirm that Amado Carrillo, the Arellano Félix brothers and Juan García Ábrego, are, in a manner inconceivable and degrading, propellers and even *pillars of our economic growth and social development*? That nobody can outline a political project in which the leaders of drug-trafficking and their financiers are not included because, *if you do, you die*?[22]

In mentioning Mexico's '*species of narcodemocracy*,' as Kenny points out, Valle referred to the political structure that laid the condition for drug money to go directly to politicians: After President Salinas declared the demise of the single party regime, increased democratic competition forced politicians to run costly electoral campaigns, draining candidates' access to the resources needed for clientelism and motivating them to rely increasingly on drug proceeds.[23]

Cartel leaders had virtually become '*pillars of economic growth'* at the highest national level, especially after the 1986 oil

price collapse, whose only recourse seemed to be national profits from cocaine. '*If you do, you die*,' Valle warned, alluding to the violent 1994 assassination of Luis Donaldo Colosio, a man who died because he was not corrupt enough to appease cartel leaders.[24]

It seems illicit economies have a built-in propensity for violence—as is especially the case with drug economies, where the threat of violence is a protection against the risk of fraud.[25] By 1993, violence had become the trademark of all newly ascendant criminal bosses, but stood out most with Ramón Arellano Félix, whose violence broadcasted the unmistakable message that the perpetrator enjoyed absolute impunity.[26]

Yet violence plunged the old regime into a legitimation crisis, exemplifying how the drug industry hampered any possibility for good governance in Mexico: The regime was authoritarian, yet what was its justification if it couldn't repress violence—if indeed it was symbiotic with the expression of violence?[27] Governability refers to the ability of a government to allocate values over its society, and to exercise ultimate authority in the context of generally accepted rules and procedures.[28] In the absence of strong state presence in Mexico, however, violent criminal groups can provide public goods, becoming not just a target but also a competitor of the state—illustrating another way in which Mexico's drug industry threatens the legitimacy of the Mexican government.[29]

Even counternarcotics policies themselves can lead to more violence: documented successes against criminal groups, for example, have created "vacancy chains," or gaps in criminal group leadership and organization that have produced even more instability than would have emerged had the policy strategy never been implemented.[30] This raises the question: What kind of state can achieve regulatory control over a set of actors otherwise predisposed to violence? The evident answer, as history would have it, is an authoritarian state.[31] Local and federal authorities in PRI-era Mexico, for example, asserted their supremacy over the

illegal drug economy by monopolizing the means of coercive protection.[32] It should come as no surprise, then, that transactional violence was much less pervasive under the PRI, which regulated criminal activity with the intimidation afforded only to authoritarian regimes.

Yet an authoritarian regime is neither feasible nor sensible today. In the past, isolation from modern international human rights standards and the permissive international conditions of the Cold War lent the PRI perfect conditions to develop an authoritarian administration. Today, however, most countries would uphold international prohibition policies and oppose Mexico's deployment of pro-narcotic policies. Furthermore, the heavy-handed military strategy typical to authoritarian regimes seems only to exacerbate drug-related violence.

Rather, counternarcotic policy in Mexico aimed at reducing the scale and violence of the drug industry should focus instead on reforming Mexico's law enforcement and judicial systems, enacting preventative measures, realizing viable economic alternatives, and empowering Mexican civil society. A. L. Magaloni argues that the current Mexican criminal justice system was designed to function in an authoritarian political context and in a country with a low crime rate. "Despite the disappearance of those two conditions that made it work," she continues, system operators did not change their work methods after the fall of the PRI. "The role of the police, the prosecutor, and the judge remain very similar to that during the old regime."[33]

Reform for Mexico's weak judicial branch should materialize as change in the working methods of public prosecutors' offices—namely, a shift away from confession and toward investigation and the imposition of far higher burdens of proof on prosecutors.[34] Additionally, certain ambiguities surround jurisdictional responsibility that cartels and gangs have managed to exploit; organized crime, in practice, fits in both local and national categories since drug trafficking is a federal crime while

kidnapping is only a local matter.[35] These ambiguities must be resolved to improve transparency and accountability.

A 2002 report by the United Nations estimated that between 50 and 70 percent of Mexican judges were corrupt; most Mexican citizens view the judiciary as a patronage system sustained by family ties and wealth; and one in three Mexicans admitted to paying a bribe to judges in exchange for a positive verdict.[36] Similarly, 80 percent of Mexican citizens view the police as corrupt.[37] Referring to the rampant corruption of Mexican law enforcement authorities, Paul Kenny points out:

> Above all, [the police] worked for the cartels. Police officers would wait for criminals—to escort, not arrest, them. When they did arrest a drug lord, it was to protect him from the DEA and extradition. They would arrive at crime scenes—to dispose of evidence. They accompanied every step in the process of drug transportation.[38]

To combat this corruption of judicial and law enforcement authorities, the Mexican government must develop viable economic alternatives that can sustain growth and wean both corrupt officials and transnational criminals off of economic subsistence. Authors Raymond Fisman and Miguel Edward agree: "By boosting the economic returns for staying on the right side of the law, 'carrots' might then dramatically alter the cost-benefit calculation facing potential criminals."[39]

The Mexican government should also concentrate on criminal money finances. The longevity of a group of violent entrepreneurs is more vulnerable to disruptions in their finances than insurgents or terrorists.[40] O'Neill points out that "targeting illicit funds is one of the most effective ways of dealing with drug trafficking."[41] Specifically, Mexico should focus on developing legitimate investigative organizations to analyze trails of illicit financial flows.[42]

Only five percent of crimes committed in Mexico are ever solved.[43] Without punishment for criminality, the allure of cartel

soft power that celebrates a criminal lifestyle becomes even more powerful.[44] Authors Evan Brown and Dallas D. Owens refer to the allure of "socially attractive crime" when criminal groups openly challenge the legitimacy of the government with few judicatory repercussions.[45] To prevent further thwarting of Mexican state authority, Mexico should focus on revamping criminal punishment tactics and reinforcing state institutions tasked with the delivery of justice.

Yet due-process criminal punishment differs drastically from oppressive military strategy, which is especially ill-suited to take on cartel wars in such violent and hypercompetitive market conditions as those sustained today.[46] No military strategy can defeat the law of supply and demand, thus running the risk of stoking more cartel violence. Author Paul Rexton Kan links counterinsurgency and counterterrorism with the "exacerbation of violence" directly related to drug trafficking.[47]

Currently, the multi-year, billion-dollar Mérida Initiative aims to provide $1.4 billion in assistance to "contain and consolidate" Mexico's violence and government reforms, respectively.[48] As a package of the U.S. counterdrug and anticrime cooperation to Mexico and Central America, the Mérida Initiative was initiated in 2008 by the Bush administration and was reauthorized and expanded in 2010 by the Obama administration. It states four primary goals: (1) break the power and impunity of criminal organizations; (2) assist the Mexican and Central American Governments in strengthening border, air, and maritime controls; (3) improve the capacity of justice systems in the region; and (4) curtail gang activity in Mexico and Central America and diminish drug demand in the region.[49] Following a similar guideline for drug policy strategy, Mexico should focus more on specific functional and geographic areas where it can be implemented.

To empower Mexican civil society, for example, Mexico could establish grants to create programs that share personal stories

about how a *narco-cultura* has negatively affected ordinary people, thereby demonstrating how both drug consumption and cartel culture can ruin lives.[50] The United Nations Office of Drugs and Crime (UNODC) too notes the important role of family in preventing drug abuse, implying that such socially-directed programs as noted above would yield a high success rate in Mexico.[51]

Since drug trafficking is so embedded both socially and economically throughout Mexico, violence has increased without a sense of outrage on behalf of Mexican citizens. A population outraged and mobilized against organized crime would render criminals more vulnerable, but wide media coverage of brutal murders might desensitize Mexican citizens—alternatively, such graphic media coverage could incite in them the sense of outrage and disgust that demands justice.

Mexican government officials should therefore also seek to empower and protect those who publish news about drug violence on blogs and social networking sites like Twitter. These 'citizen journalists' compensate for the deficit in traditional journalism resulting from numerous cartel attacks against more typical public informants like the press and the state.

The influential 'Blog del Narco,'[52] for example, presents unflinchingly the gruesome beheadings and other cartel-related acts of violence characteristic to some areas of Mexico. Validating yet condemning such grisly violence, this and other social media outlets represent an important opportunity for citizens of Mexico to come together to confront their shared atrocity—an opportunity for which the Mérida Initiative could expand to include funding to protect such outlets. As Rexton Kan points out, "Journalists should be afforded protection from cartel attacks."[53]

While counterintuitive, neither military strategy *nor* domestic drug legalization will yield long-term solution to the cartel wars plaguing Mexico.[54] As Rexton Kan points out, adopting counterinsurgency and counterterrorism tactics risks exacerbating

violence and the potential rupturing of positive relations between the U.S. and Mexico—relations that are of utmost importance for "a host of other important issues" unrelated to high-intensity crime such as immigration, trade, and responses to pandemics.[55] The nature of this high-intensity crime with a hypercompetitive market at its core means that military strategy is especially ill-suited to take on a "mosaic cartel war," since no military strategy can usurp market forces. According to author Paul Rexton Kan, the continued reliance on the military for nonmilitary purposes has led to a "strategic stalemate" for the government since it has exhausted its highest-intensity options of retaliation.[56]

Nor will legalization yield positive results in combating high-intensity crime in Mexico. Illegality exacerbates violence since its concomitant reduction in supply raises prices and therefore the stakes of narcotics trade in Mexico and disallows less-confrontational methods of dispute resolution in the absence of a legitimate legal court; yet legalization in itself may *not* be the answer. As extremely fluid entities, cartels will surely adapt their proficiency in violence to accommodate any new dynamics that drug legalization will bring—and it remains entirely unclear that legalization would lessen the pressures of a hypercompetitive market to begin with.[57]

As drug trafficking is a transnational business, it remains unclear whether the North American Free Trade Agreement (NAFTA) would be elastic enough to permit narcotics commerce. Even if the United States or Mexico were to take concerted steps toward legalization, international prohibition of the trade itself would likely remain intact, cancelling out any possibility for significant advances toward international solution.[58] In Mexico, a more multifaceted and geographically focused version of the Mérida Initiative that emphasizes justice, prevention, economic alternatives, and civil society on the regional level is in order. Although cartels provide the crux of the violence and corruption

taking place in Mexico, drugs represent neither the beginning nor the end of Mexico's complex security crisis today.

Yet international cooperation must prevail in the fight against organized crime in Mexico. Brown and Owens explain: "Long term solution cannot be successful if confined to single countries or bilateral agreements."[59] Author Abraham Lowenthal declares the narcotics problem a "transnational issue" that neither the United States nor any Latin American nation can successfully handle by itself without close and sustained cooperation with regional partners.[60] Although most international parties seem to understand how best in theory to join forces against drug trafficking in Mexico, policy implementation has largely failed.

The UNODC identifies three major international drug control treatises upon which current international cooperation efforts are based. The first two—the Single Convention on Narcotic Drugs of 1961, as amended in 1972, and the Convention on Psychotropic Substances of 1971—codified international control measures to reserve the availability of narcotic and psychotropic substances for scientific and medicinal purposes and to prevent their diversion into illicit channels, while also including general provisions on illicit drug trafficking and drug abuse.[61]

The third—the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988—extended this control regime to precursor chemicals essential for the manufacture of narcotic drugs and purported to strengthen the framework of international cooperation in criminal matters including extradition and mutual legal assistance, indicating that international powers understood the appropriate control mechanisms even before the explosion of the drug trade in the late 1980s and early 1990s.[62]

As an intended complement to the call for international cooperation under the United Nations Convention of 1988, the 1990 Mexico-United States Agreement on Cooperation in Combating Narcotics Trafficking and Drug Dependency similarly

resolved to extend to Mexico and the United States "the necessary cooperation to effectively combat narcotics trafficking and drug dependency."[63] Yet, as Lowenthal points out, "instead of building better bridges with our current neighbors," the United States began construction on a defensive fence at the Mexican border, fomenting resentment of the U.S. and its global policies among Latin American parties.[64]

This attempt to keep the drug problem *out* of the United States has only exacerbated the issue. Laying the blame on failures of Latin American governments belies the complexity of the narcotics problem, which "has as much to do with deep-seated failures in advance industrial countries" as with weak governance, crime, corruption, and poverty in Latin American nations.[65] International cooperation will only begin to be successful once all parties recognize that the roots—and therefore the solutions—of this destructive business begin necessarily at the international level.

In an effort to improve current international cooperation efforts, Lowenthal emphasizes cultural perceptions of the United States' "world role" abroad: inter-American relations would most quickly be improved, he suggests, if the U.S. returns to a world role that is respectful of international law and opinion, cooperative rather than domineering, committed to multilateralism and international institutions, sensitive to Latin American aspirations for broader international recognition, and true to the fundamental values that are shared by citizens throughout the Americas.[66]
The U.S. should reconsider its typically dismissive and intrusive style of interaction with Latin Americans and instead seek to build mutual respect in the Americas; redouble its efforts to constructively engage Latin American and Caribbean cooperation; and "explain to the American public" why the U.S. would profit from more stable neighbors, expanded markets, more attractive investment opportunities, and more hospitable tourist destinations

if it could cooperate with Latin American and Caribbean nations to reduce poverty, inequity, and ethnic exclusion.[67]

Crucially, the U.S. must rethink its "war on drugs" metaphor, which encourages heavy-handed and bellicose coercion mechanisms and emphasizes the tendency to seek "victory" against a defeated enemy instead of coming together to find a mutually beneficial solution.[68] Adopted in 1984 by the Organization of American States (OAS) General Assembly, Resolution 699 established an appropriate precedent. The international community must continue the initiative of its "Program of Rio" to synchronize legislation, encourage collaboration among anti-drug agencies, and cooperate among judiciary and enforcement agencies so as to realize these international cooperation goals in practicable terms.[69]

Unfortunately, the international community will likely *not* soon recognize illicit financial flows as a legitimate source of development funding. Until then, Mexico must apply a concerted effort to improve its capacity to govern. Endemic structural violence and decades of mistrust between communities and policy administrators will continue to prevent development initiatives from solving the many institutional issues that continue to plague Mexico today.[70] Ultimately, Mexican state officials face no chance of fighting cartel violence and improving development initiatives unless they change the ways they wage this war.[71]

[1] Jerry Langton, *Gangland: The Rise of the Mexican Drug Cartels From El Paso to Vancouver* (Ontario: Wiley, 2012), 73.
[2] Ibid., 74; and Paul Kenny and Mónica Serrano, Ed., *Mexico's Security Failure: Collapse into Criminal Violence* (New York: Routledge, 2012), 43.
[3] Langton, *Gangland*, 74.
[4] Mauricio Merino Huerta, "La policía comunitaria: Self-Defense Groups in Mexico: The Aftermath of a Poorly Designed Policy," *Georgetown Journal of International Affairs*, Ed. 14.2, Spring/Fall 2012, http://journal.georgetown.edu/2013/07/26/la-policia-communitaria-self-defense-groups-in-mexico-the-aftermath-of-a-poorly-designed-policy-by-mauricio-mering-jaime-hernandez-colorado/, 147.
[5] Samuel Logan, "Mexico," *Southern Pulse*, June 9, 2009 quoted in Robert J. Bunker and John P. Sullivan, "Cartel Evolution Revisited: Third Phase Cartel Potentials and Alternative Futures in Mexico" in *Small Wars & Insurgencies*, (Routledge: March 12, 2010), 41.
[6] Marc Lacey, "In Drug War, Mexico Fights Cartel and Itself," *New York Times* (March 29, 2009) quoted in Bunker, "Cartel Evolution," 41.
[7] The United Nations Office of Drugs and Crime estimates that close to 90% of the cocaine entering the United States crosses the U.S./Mexico land border, mostly through the state of Texas. *See* "Mexico, Central America and the Caribbean" in UNODC, http://www.unodc.org/unodc/en/drug-trafficking/mexico-central-america-and-the-caribbean.html.
[8] 'Plazas' or corridors—for the lucrative transshipment of drugs in to the U.S.—such as Tijuana, Ciudad Juárez, and Nuevo Laredo have been the focal points of numerous killings and gun battles. *See* Bunker, "Cartel Evolution," 30.

[9] These numerous local and transnational gangs and criminal enterprises include Mara Salvatrucha (MS-13), 18th Street, Los Negros, and La Linea. *See* Bunker, "Cartel Evolution," 31.
[10] Laura Valligran, "As Mexico's traffickers ship drugs north, they leave addicts in their wake," *Christian Science Monitor,* (January 25, 2013), http://www.csmonitor.com/World/Americas/2013/0125/As-Mexico-s-traffickers-ship-drugs-north-they-leave-addicts-in-their-wake.
[11] Kenny, "Security Failure," 46.
[12] Ibid., 46.
[13] Kenny, "Security Failure," 41.
[14] The first major Mexican racketeer, Colonel Esteban Cantú declared himself governor in 1914, inspired by the sudden profitability of drugs; he then seized the opportunity of prohibition to enrich himself.
[15] As a governor and monopolist of the opium trade, General Abelardo L. Rodríguez was a beneficiary of the "vice" boom on the Mexican side of the U.S.-Mexico border that resulted from the alcohol and gambling prohibitions; in 1932 he became Mexico's first millionaire president.
[16] Kenny, "Security Failure," 41.
[17] Ibid.
[18] Ibid., 44.
[19] Ibid., 47.
[20] Ibid., 31.
[21] Eduardo Valle ("The Owl") was a leader of the Mexican left who represented the National Democratic Front (FDN) and served as an agent of the Attorney General's Office during the Carlos Salinas administration.
[22] *Reforma* 17 December, 19 December, 24 December 2009 quoted in Kenny, "Security Failure," 42.
[23] Kenny, "Security Failure," 42.

[24] Ibid.
[25] Ibid., 47.
[26] Félix represented an utterly new composite figure: the Mafioso who killed for business, and the psychopath who could kill a policeman or a wealthy teenager or another *narco* for not showing him respect. *See Reforma* 13 August 2009, 12 May 2010 quoted in Kenny, "Security Failure," 45.
[27] Kenny, "Security Failure," 46.
[28] A good government achieves this end through the monopoly of legal coercion, the administration of justice, administrative capacity, the provision of minimum public goods, and conflict management. *See* John Bailey and Jorge Chabat, Eds., *Transnational Crime and Public Security: Challenges to Mexico and the United States* (San Diego: UCSD, 2002), 217.
[29] Evan Brown and Dallas D. Owens, "Drug Trafficking, Violence, and Instability in Mexico, Colombia, and the Caribbean: Implications for U.S. National Security," *Strategic Studies Institute Colloquium Brief,* 2.
[30] Ibid.
[31] Kenny, "Security Failure," 47.
[32] The PRI operated under a few unspoken rules for three decades to regulate relations between the political class and the criminal markets: (1) levels of criminal violence were to remain tightly confined; (2) traffickers were not allowed to emerge as an independent power; and (3) nationalist tenets both reminded traffickers of the benefits of keeping their profits at home and deterred them from developing domestic consumption markets. *See* Kenny, "Security Failure," 49.
[33] A. L. Magaloni quoted in Kenny, "Security Failure," 100.
[34] Kenny, "Security Failure," 100.
[35] Ibid., 93.
[36] United Nations Special Rapporteur, *Independence of Judges and Lawyers: Report on the Mission to Mexico,* January 24, 2002, 18

quoted in Paul Rexton Kan, *Cartels At War: Mexico's Drug-Fueled Violence and the Threat to U.S. National Security* (Washington, D.C.: Potomac Books, 2012), 93; and Jose Fernandez Menendez, *Mexico: The Traffickers' Judges, Global Corruption Report 2007,* Transparency International quoted in Rexton Kan, *Cartels*, 93.

[37] Diego Cevallos, "Police Caught between Low Wages, Threats, and Bribes," *International Press Service News,* June 7 2009, http://ipsnews.net/news.asp?idnews=38075 quoted in Rexton Kan, *Cartels*, 93. Between 1994 and 1996, 1250 members or 22 percent of the Mexican police force were arrested for connections to drug cartels. *See* Kenny, "Security Failure," 41.

[38] Kenny, "Security Failure," 33.

[39] Raymond Fisman and Miguel Edward, *Economic Gangsters* (Princeton: Princeton University Press, 2008), 190 quoted in Rexton Kan, *Cartels*, 141.

[40] Rexton Kan, *Cartels*, 141.

[41] Fisman and Edward, *Economic Gangsters*, 190 quoted in ibid., 141.

[42] Until 2011, the only money laundering investigative organization was the Financial Intelligence Unit (FIU) within the Office of the Secretary of Finance and Public Credit. *See* Rexton Kan, *Cartels*, 141.

[43] Ibid., 138.

[44] Ibid., 138.

[45] Brown and Owens, "Drug Trafficking," 3.

[46] Rexton Kan, *Cartels*, 129.

[47] Ibid., 131.

[48] *See* "Common Enemy, Common Struggle: Progress in U.S.-Mexican Efforts to Defeat Organized Crime and Drug Trafficking," A Report to the Members of the Committee on Foreign Relations, United States Senate, One Hundred Eleventh Congress, Second Session, May 18, 2010, 3.

[49] Ibid.
[50] Rexton Kan, *Cartels*, 143.
[51] "Reinforcing the role of the family to prevent drug abuse in Mexico," UNODC, June 6, 2013, http://www.unodc.org/unodc/en/frontpage/2013/June/reinforcing-the-role-of-the-family-to-prevent-drug-abuse-in-mexico.html.
[52] The anonymous blog, reported to host at least three million unique viewers per month, plays a central role in the information ecosystem in the context of the War on Drugs in Mexico. *See* http://www.elblogdelnarco.net.
[53] Rexton Kan, *Cartels*, 143.
[54] Drug legalization in Mexico faces significant hurdles, including the unlikelihood that the U.S. would divest itself of its domestic policies; the likelihood that international prohibition of the trade itself would remain; the difficulty of reforming transnational trade arrangements such as NAFTA to accommodate narcotics commerce; and the likelihood that cartels would adapt their proficiency in violence to service the new market dynamics that legalization would inevitably bring. *See* Rexton Kan, *Cartels*, 135.
[55] Rexton Kan, Cartels, 131.
[56] Rexton Kan, *Cartels*, 132.
[57] Ibid., 134-135.
[58] Ibid., 134.
[59] Brown and Owens, "Drug Trafficking," 4.
[60] Abraham F. Lowenthal, "Toward Improving Cooperation in the Americas," *Estudios Internationales,* Año 41, No. 160 (Instituto de Estudios Internacioinales, Universidad de Chile: Mayo-Augusto 2008), 122.
[61] "Legal Framework for Drug Trafficking," UNODC, http://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html.
[62] Ibid.

[63] American Society of International Law, "Mexico-United States: Agreement on Cooperation in Combating Narcotics Trafficking and Drug Dependency," *International Legal Materials*, Vol. 29, No. 1 (January, 1990), 59.
[64] Lowenthal, "Cooperation in the Americas," 122.
[65] Ibid., 126.
[66] Ibid., 132.
[67] Ibid., 131-132.
[68] Ibid., 127.
[69] Bruce Zagaris, "Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere," *The University of Miami Inter-American Law Review*, Vol. 37, No. 3 (Spring-Summer, 2006), p 455; and Irving Tragen, "World-Wide and Regional Anti-Drug Programs," *Drugs and Foreign Policy: A Critical Review* (Raphael F. Perl ed., 1994), 175 quoted in Zagaris, "Enforcement Cooperation," 456.
[70] Francisco I. Bastos, Waleska Caiaffa, Diana Rossi, Marcelo Vila, and Monica Malta, "The children of mama coca: Coca, cocaine and the fate of harm reduction in South America," in *International Journal of Drug Policy* 18 (2007), 102.
[71] Moisés Naím, "The Five Wars of Globalization," *Foreign Policy Magazine* (2003), 6.

Works Cited

American Society of International Law. "Mexico-United States: Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency." *International Legal Materials*. Vol. 29, No. 1. January, 1990. Pp 58-61.

Bastos, Francisco I., Waleska Caiaffa, Diana Rossi, Marcelo Vila, and Monica Malta. "The children of mama coca: Coca, cocaine and the fate of harm reduction in South America." *International Journal of Drug Policy* 18. 2007.

Bailey, John and Jorge Chabat, Eds. *Transnational Crime and Public Security: Challenges to Mexico and the United States*. San Diego: UCSD, 2002.

Brown, Evan and Dallas D. Owens. "Drug Trafficking, Violence, and Instability in Mexico, Colombia, and the Caribbean: Implications for U.S. National Security." *Strategic Studies Institute Colloquium Brief.*

Bunker, Robert J. and John P. Sullivan. "Cartel Evolution Revisited: Third Phase Cartel Potentials and Alternative Futures in Mexico." *Small Wars & Insurgencies*. Routledge: March 12, 2010.

Cevallos, Diego. "Police Caught between Low Wages, Threats, and Bribes." *International Press Service News.* June 7 2009. http://ipsnews.net/news.asp?idnews=38075.

"Common Enemy, Common Struggle: Progress in U.S.-Mexican Efforts to Defeat Organized Crime and Drug Trafficking." A Report to the Members of the Committee on Foreign Relations. United States Senate. One Hundred Eleventh Congress. Second Session. May 18, 2010.

El Blog Del Narco. http://www.elblogdelnarco.net.

Fernandez Menendez, Jose. *Mexico: The Traffickers' Judges, Global Corruption Report 2007.* Transparency International.

Fisman, Raymond and Miguel Edward. *Economic Gangsters.* Princeton: Princeton University Press, 2008.

Kenny, Paul and Mónica Serrano, Ed. *Mexico's Security Failure: Collapse into Criminal Violence.* New York: Routledge, 2012.

Lacey, Marc. "In Drug War, Mexico Fights Cartel and Itself." *New York Times.* March 29, 2009.

Langton, Jerry. *Gangland: The Rise of the Mexican Drug Cartels From El Paso to Vancouver.* Ontario: Wiley, 2012.

"Legal Framework for Drug Trafficking." UNODC. http://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html.

Logan, Samuel. "Mexico." *Southern Pulse*. June 9, 2009.

Lowenthal, Abraham F. "Toward Improving Cooperation in the Americas." *Estudios Internationales.* Año 41, No. 160 Instituto de Estudios Internacioinales, Universidad de Chile. Mayo-Augusto 2008. PP 121 - 132.

Merino Huerta, Mauricio. "La policía comunitaria: Self-Defense Groups in Mexico: The Aftermath of a Poorly Designed Policy." *Georgetown Journal of International Affairs*. Ed. 14.2, Spring/Fall 2012. http://journal.georgetown.edu/2013/07/26/la-policia-communitaria-self-defense-groups-in-mexico-the-aftermath-of-a-poorly-designed-policy-by-mauricio-mering-jaime-hernandez-colorado/.

"Mexico, Central America and the Caribbean." UNODC. http://www.unodc.org/unodc/en/drug-trafficking/mexico-central-america-and-the-caribbean.html.

"Mexico's Presidential Election and the Cartel War." Stratfor Global Intelligence. February 9, 2012.

http://www.stratfor.com/weekly/mexicos-presidential-election-and-cartel-war.

Naím, Moisés. "The Five Wars of Globalization." *Foreign Policy Magazine*. 2003.

"Reinforcing the role of the family to prevent drug abuse in Mexico." UNODC. June 6, 2013. http://www.unodc.org/unodc/en/frontpage/2013/June/reinforcing-the-role-of-the-family-to-prevent-drug-abuse-in-mexico.html.

Rexton Kan, Paul. *Cartels At War: Mexico's Drug-Fueled Violence and the Threat to U.S. National Security*. Washington, D.C. Potomac Books. 2012.

United Nations Special Rapporteur. *Independence of Judges and Lawyers: Report on the Mission to Mexico.* January 24, 2002.

Tragen, Irving. "World-Wide and Regional Anti-Drug Programs." *Drugs and Foreign Policy: A Critical Review.* Raphael F. Perl ed., 1994.

Valligran, Laura. "As Mexico's traffickers ship drugs north, they leave addicts in their wake." *Christian Science Monitor.* January 25, 2013. http://www.csmonitor.com/World/Americas/2013/0125/As-Mexico-s-traffickers-ship-drugs-north-they-leave-addicts-in-their-wake.

Zagaris, Bruce. "Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere." *The University of Miami Inter-American Law Review*. Vol. 37, No. 3. Spring-Summer, 2006. Pp 421-516.