WISCONSIN UNDERGRADUATE LAW REVIEW

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Contents

Founders' Mission

We founded the Wisconsin Undergraduate Law Review to be the University of Wisconsin-Madison's most hands-on legal publication for undergraduate students. We noted a lack of opportunities for students to learn about legal writing, explore their passion through topics of their choice, and apply their skills through two unique peer reviewed publications.

The organization is designed to be a forum for ideas and learning. Free from preconceived judgments on ideals or perspective, students should feel the freedom to discover themselves and their possible love for law. However, The Wisconsin Undergraduate Law Review is not just for students interested in practicing law, it is for students who understand that the U.S. legal system and the laws that it produces will impact us every day for the rest of our lives. Through research, discussion, editing, and publishing we will provide a space for discovery.

We are fueled by the pursuit of the Wisconsin Idea, which can be simplified to one key driving thought:

Education should influence people's lives beyond the classroom.

We hope the Wisconsin Undergraduate Law Review will grow and evolve as it has been designed to do. As the organization is carried forward, we hope it will continue to be a hands-on forum for legal writing exploration, but most importantly continue to positively impact the student experience. Members of the Wisconsin Undergraduate Law Review should find the organization as a space for finding their passions and discovering a greater understanding of how law impacts the world around them.

Sincerely,

Zoey Kue, Class of 2026

Arun Griffen, Class of 2025

Letter From the Editor

Dear Reader,

On behalf of the Wisconsin Undergraduate Law Review (WULR) I am pleased to share the Spring issue of the first volume of The Journal.

I would like to thank the staff writers, associate editors, executive editors, and the leadership team for all of the hard work that was poured into this first volume. To the staff writers, I cannot wait to celebrate your writing. The passion and thought each of you exemplified through your pieces is recognized. To the Executive and Associate Editors, this organization would not have been able to publish this first edition without you. Thank you for the endless dedication and time each of you contributed to these pieces.

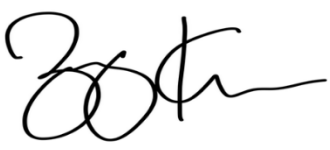
While it was WULR's first full calendar year run at the University of Wisconsin-Madison, each of these members played such a pivotal role in making this edition come to fruition this year. It has been an honor for WULR to be a part of your undergraduate journey. To everyone who was able to make this happen, thank you for taking the chance on a new campus organization, believing in it as much as I have, and investing so much of yourselves within it.

This volume ranges on a plethora of topics that includes challenging university divestment efforts, evolving the Winters Doctrine, extending the statues of limitations for sexual assault in Wisconsin, contesting the 1849 Wisconsin abortion statute within the Wisconsin Supreme Court case *Kaul v. Urmanski*, and how family separation at the US-Mexico border is unconstitutional.

WULR strives to deepen the understanding and conversation of law-related ideas at the University while fulfilling the utmost goal to uphold and serve the Wisconsin Idea. Our organization aims to create a community that embraces diverse outlooks and fosters conversations that enrich the academic community at the University of Wisconsin-Madison.

It has been a privilege to be the Wisconsin Undergraduate Law Review's first Editor-in-Chief. Together, we have started something invigorating in expanding undergraduate legal publishing at the University of Wisconsin-Madison. As this is the embarkment of something new, we look forward to how this organization will continue to flourish in generations to come.

Sincerely,



Zoey Kue, Editor-in-Chief

Editorial Team

University Foundations and the Controversy Over Divestment:

How Pro-Palestinian Protests Have Reinvigorated Discussion Surrounding University Foundations and Their Role in Financial Management and Investment

Logan Anderson
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I. Introduction: University Foundations and Surrounding Controversy

American universities represent some of the world's most rigorous academic institutions tasked not only with training future leaders but also pioneering life-altering innovation and research for the benefit of the entire globe. To properly facilitate and manage these often massive bureaucratic institutions, several governing entities take command of specific sectors of a university. The term 'university foundation' refers to the entities affiliated with both public and private universities that coordinate and strategically manage financial assets with the goal of sustaining and advancing university operations. These entities also aid in cultivating strong alumni networks and relationships, recognizing their vitality through financial contributions and other forms of engagement that advance a university. The funding and financial management of universities have recently come under heavy scrutiny in the wake of a highly publicized armed conflict between Israel and Hamas within the Gaza Strip.[1] Debates over university financial support for military complexes and other organizations that aid armed conflicts have since been inflamed by claims that the investment practices of the United States' most prominent educational institutions implicate them in the consequences of such conflicts.[2] This has surfaced questions surrounding the administrative operations of universities in students' fight to alter investments and, most importantly, how moral and social values are interwoven into invested capital and what causes they support.

A. Overview of University Foundations

The establishment of foundations that assist with financial obligations and management, specifically large ones, allows universities to bifurcate the internal fiscal responsibilities with those of the foundation. This promotes smooth financial operations because, while internal financial management centralizes budgeting and short-term goals, a foundation's financial scope involves long-term planning and investment. University foundations are typically established as non-profit entities that can operate independently from a university while remaining in charge of managing private donations, endowments, and other forms of assets. The University of Wisconsin Foundation, for example, describes itself as a "private, nonprofit corporation that encourages individuals and organizations to make gifts and grants to the university."[3] Both the importance of and dependence upon University Foundations grew as the percentage of private funds supporting universities grew amid losses from state and other government sources of funding.[4] With fewer public funds from the state or federal government, the need for adequate financial planning and strategic investments grew to ensure long-term sustainability for public universities.

B. Student Social Movements and Protests on University Property

The role of university foundations in financial management, and therefore their influence, has been growing drastically for several years due to increased reliance on private funding, endowment growth, and economic independence from state funding. However, there has been a rapid increase in public awareness

[1] Zachary Folk, "College Protesters Want Divestment from Israel: Here's Why That's so Difficult," Forbes, May 15, 2024, https://www.forbes.com/sites/zacharyfolk/2024/05/15/college-protesters-want-divestment-from-israel-heres-why-thats-so-difficult.

[2] Ibid.

[3] University of Wisconsin Foundation, "About Us," University of Wisconsin Foundation, July 17, 2010, https://www.supportuw.org/about-us/.

[4] David Bass, "The Foundation-Institution Partnership: The Role of Institutionally Related Foundations in Public Higher Education," New Directions for Higher Education 2010, no. 149 (December 2010): 17–25, https://doi.org/10.1002/he.377.

of their existence over the past year, particularly in their discretion in investing, that has drawn outrage from some members of the public. University students became invested in the continued rising tension within the Gaza Strip that promulgated an armed conflict beginning on October 7th, 2023. Student protests, in response to the armed conflict between Israel and Hamas, objected to foundations' current investment practices and called for divestment from organizations associated with Israeli interests. Student-led Pro-Palestinian protests first gained enormous national attention when students at the University of Columbia established their encampment on university lands and subsequently occupied Hamilton Hall in resistance to the university's attempts to dismantle the encampment.[5] This then spurred a marked escalation in protests that echoed across the country, with over forty universities seeing variations in pro-Palestine protest camps established to convey popular dissent against Israel's actions and the role United States entities play in implicitly affirming the armed conflict.[6] Throughout American history, university students have played a keen role in national and global political terrains, demonstrating active and consequential roles. Dating back to student movements in the 1930s, student activists established their ability to devote "as much attention to foreign policy as to domestic issues." Students, as demonstrated through recent protests, remain a pivotal and influential demographic that is actively engaging in social movements and invested in international politics. This form of political activism often manifests in demonstrations that rest on a nation-founding principle of freedom of speech, historically known to force social change and demand that laws and policies grow, remain interpretable, and adapt with time.

C. Attempts at Balancing Foundation & Student Interests

Universities are placed in an uncomfortable position as they face high dissension between two significant coalitions tied to their mission. On the one hand, universities' obligations are to the very students they exist to educate, but on the other, foundations are tasked with providing and securing the finances necessary to fund and successfully educate students and promote research. The separation of foundations and the University also introduces ambiguity for students seeking changes in investment practices and confusion over who actually holds the discretion and power of divestment. Additionally, the functions and obligations of foundations in investment practices are governed by legislation and legal standards, which must work in tandem with calls from protesters to effectuate tangible changes. As universities navigated through the growing protests throughout the Spring 2024 semester, they had to rely on current policies and practices for handling protesters, along with established communication channels between the university administration and the university foundation. Despite any attempts at balancing both interests by universities, relations between protesters and the administration seemed to deteriorate with significant police interventions across many campuses, most notably at Columbia.[7]

D. Roadmap

Students have demonstrated a clear interest in broader transparency in the investment practices of universities and an expansion of influence afforded to student advocacy groups concerning the practices of educational institutions. This paper aids in situating student activism and protest demands within the complicated and bureaucratic institutions of higher education. Analyzing the role of both a university and a foundation contextualizes how they uniquely play a role in the goal of student protests. A rigorous understanding of the law and legal obligations outlining endowment management helps to place the feasibility of divestment and weigh it against the other interests of both foundations and universities. Considerations of the relevance of student activism and who the university serves to represent also factor

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[5] Amira McKee et al., "Dozens Occupy Hamilton Hall as Pro-Palestinian Protests Spread across Campus," Columbia Daily Spectator, April 29, 2024, https://www.columbiaspectator.com/news/2024/04/30/dozens-occupy-hamilton-hall-as-pro-palestinian-protests-spread-across-campus/.

[6] Coral Murphy Marcos, "Columbia University Calls for Inquiry into Leadership as Student Protests Sweep 40 Campuses," The Guardian, April 27, 2024, sec. World news, https://www.theguardian.com/world/2024/apr/26/pro-palestinian-protests-college-campuses.

[7] Associated Press, "How Columbia University Became the Driving Force behind Protests over the War in Gaza," AP News, April 30, 2024, https://apnews.com/article/israel-palestinian-campus-protests-timeline-f7cd3abe635f8afa4532b7bed9212b56.

into the complicated network of higher education. Heeding all these considerations best allows for a more meticulous understanding of student interests and a well-informed understanding of how a university can or should respond to calls for divestment. Ultimately, the law remains quite definitive in its fiduciary guidance; however, it substantially presents the opportunity for more rigorous student involvement and even potential action pursuant to protesters' demands or other forms of investment alterations.

II. Structure and Purpose of Universities and University Foundations

A. Legal Non-Profit Status & Entity Functions/Goals

University foundations are almost always created and organized as explicitly removed, distinct, and independent from the university they strive to support. Most commonly, foundations have a non-profit organization legal status under Section 501(c)(3) of the Internal Revenue Code that regulates taxes.[8] The benefit of this status is that it remains tax-exempt, though these foundations must demonstrate that their primary purpose is one of public benefit rather than private gain and abstain from any form of lobbying for legislation in order to qualify.[9] A primary component of obtaining 501(c)(3) status is the inclusion of a statement of purpose within the organization's charting document, such as articles of incorporation or bylaws, that aligns with the abovementioned qualifications to obtain and maintain this tax-exempt status. Each non-profit may draft or create these documents differently, as long as they can successfully make a showing that their purpose aligns with that of a 501(c)(3) in their application. The Wisconsin Foundation and Alumni Association (WFAA), for example, outlines a mission surrounding promoting and advancing "the objectives of the University of Wisconsin–Madison by encouraging the interest, engagement, and financial support of alumni, donors, and friends in the life of the University and with each other."[10] This process of obtaining a non-profit status is essential to university endowment management and provides an important precedent for investing practices, as the purpose is charitable and typically guided by statements of purpose. Although foundations remain separate entities from universities, they are inextricably linked and, therefore, dependent upon each other to guide decisions relating to values, ethics, and common practices.

B. Social, Moral, & Ethical Responsibilities of a University and Foundations

Arguments that universities are responsible for heeding social and moral values are commonly disputed because such claims are themselves amorphous and founded upon subjectivities that are variant between individuals. It is essential, however, to extend universities the necessary latitude to freely craft and recognize the social, moral, and intellectual principles that constitute the character of their particular institution. These values are pivotal in creating mission and vision statements, which can carry substantial weight through their effectuation when universities make major decisions in accordance with them. This introduces an opportunity for educational institutions to craft policies and decisions that can reflect social and moral values, as they are explicitly documented, to avoid charges of bias. The subsequent sections of this analysis will argue that universities can and do have the ability to imbue policy and decision-making with considerations of moral and evaluative natures, allowing for actions by foundations to be pursuant to them.

III. Foundation Endowment Management

A. Purpose and Use of an Endowment

A university endowment comprises all the money and other various forms of financial assets held by an academic institution, including those from donations. This endowment is charged with keeping the finances of a university organized and assisting in the management of both the institution's immediate

[8] 26 U.S.C. § 501(c)(3).

[9] Internal Revenue Service, "Exemption Requirements - 501(C)(3) Organizations | Internal Revenue Service," Irs.gov (IRS, 2019), https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations.

[10] Wisconsin Foundation and Alumni Association, "Mission and Values," Wisconsin Foundation and Alumni Association, n.d., https://www.advanceuw.org/mission/.

financial success and its longevity. The endowment is the primary source of funding that supports teaching, research, and other missions of the educational institution, such as public service, that require fiscal support.[11] This pool of financial assets relies upon continuous donations and strategic investments to endure, all of which are managed by university foundations. The foundation is tasked with the management of the endowment, a function that necessarily involves balancing targeted money for specific initiatives along with generating a cohesive investment plan. This management is heavily dependent and reliant on the outlined, prescribed educational and institutional goals. It is also heavily informed by the institution's day-to-day and yearly spending to ensure that the endowment provides for all operational costs. This requires stupendous planning to ensure the long-term stability of financial assets. Ultimately, an endowment aims to ensure that sufficient financial security is provided and that a university is well-established to endure over time. Endowment management is typically guided by comprehensive analyses of existing institutional budgets, expenditure estimations, and includes planning for erroneous costs. Important regulatory law concerning the management of endowments includes the Uniform Prudent Management of Institutional Funds Act (UPMIFA), a model act that every U.S. state and territory, excluding Pennsylvania and Puerto Rico, has adopted. This act guides foundations on management by instituting a prudent investor standard, which essentially sets legal standards and procedural guidance for fiduciary responsibilities to ensure profitable investing.[12] Additionally, this act includes a "charitable purpose doctrine," requiring any investment plan of endowments to consider the relationships of investments with the broader social mission of the university or foundation.[13] This leaves a relative amount of ambiguity about how aligned an investment plan must be with a university's social missions. These doctrines are already embedded within the statutory laws of most states, primarily through the UPMIFA, although application, interpretation, and enforcement occur on a state-by-state basis, which introduces the possibility of inconsistency on a national scale.[14] The relationship to the charitable mission establishes ties between social values and their realization through universities' investment and monetary management.

B. Protests Social Influences

Student engagement and influence in the financial planning and endowment management of a university is little to none. It is typically entirely the purview of a non-profit entity, like a foundation, to control the endowment, with a foundation's creation and administration being charted separately but in coordination with university policies or similar documents. This lack of full integration between a foundation and a university potentially contributes to ineffective communication and institutional misunderstandings between students and universities about their protest demands, heightening tensions among pro-Palestinian students and university administration. The only influence and participation existent for student protesters are the roles and access that their university or college will allow them. As a result, institutional misunderstanding about who controls the endowment combined with students battling with university administrators for a seat at the table that is rarely given, and, when it is, only reluctantly. This combination explains high tensions and heated interactions between protesters and state or university officials.

IV. University Endowment Investment

A. Fiduciary Duties of Foundations

The fiduciary responsibilities and obligations that accompany managing an endowment, if appropriate to their investment portfolio, will be shouldered by a university foundation. A large portion of these duties are enshrined in the foundation or university's founding documents, such as articles of

[11] Albert Phung, "How Do University Endowments Work?," Investopedia, June 21, 2022, https://www.investopedia.com/ask/answers/how-do-university-endowments-work/.
[12] National Conference of Commissioners on Uniform State Laws, Uniform Prudent Management of Institutional Funds Act (UPMIFA), 2006, https://www.uniformlaws.org.
[13] "Uniform Prudent Management of Institutional Funds Act," Wikipedia, August 27, 2022, https://en.wikipedia.org/wiki/Uniform_Prudent_Management_of_Institutional_Funds_Act.
[14] NCCUSL, *supra* note 12, at 11.

incorporation or bylaws that establish the structure and responsibilities of those who manage the endowment. Financial obligations also exist in both state and federal laws that outline what constitutes appropriate and ethical financial management of a non-profit 501(c)(3) entity. The Uniform Prudent Investors Act (UPIA) is another state law that has been adopted by every U.S. state and Washington D.C., with the exceptions of Delaware and Louisiana, and provides a broad, uniform framework for fiduciary investment practices and management of private trusts.[15] This law stipulates conditions and emphasizes the importance of risk management, diversification, and balancing long-term growth with income generation.[16] The logistics of managing endowments involves vast amounts of accounts, funds, and pockets of money that oftentimes have different sources, obligations, and goals attached to them. The UPMIFA is the primary source of legal guidance that helps endowment managers organize and coordinate these various monetary sources while remaining accountable to the university and funding providers. Endowment management involves the use of both restricted and unrestricted funds, the former being those typically sourced directly from a donor with a certain intent for the money, while the latter comes unconditionally. With the money an individual donor provides, they often have specific conditions for the money's use, which are legally binding. Pursuant to UPMIFA, the charitable trust doctrine ensures that funds are used according to donor restrictions and intent.[17] A common example of restricted funds is monies designated for a specific purpose, like a scholarship or funding to support a specific type of research. Therefore, with these restrictions, foundations must factor additional, varying constraints into their investment decisions, typically requiring more liquidity and financial flexibility in allocating restricted funds. This can present barriers and obstacles when creating plans for investment or divestment, introducing another contributing factor to such decisions.

Common law practices based on previous judicial decisions and precedents are another origin of guiding law for fiduciary responsibilities. The primary three elements of common law for fiduciaries include the duty of loyalty, care, and obedience.[18] The duty of loyalty requires the foundation's complete loyalty to the university it serves by ensuring that all decisions are made in the institution's best interests, not some other third-party or individual interests.[19] The duty of care demands that a reasonable amount of diligence is employed in making financial decisions, including active participation and knowledge of an organization's operation.[20] The duty of obedience relates to a fiduciary assurance that all laws, policies, and regulations, including the organization's own, are adhered to. This involves carrying out an organization's mission and vision as expressed or stipulated in foundational documents, especially if philosophical or moral aspects are involved.[21] In tandem with uniform state laws, common law obligations provide a robust yet open-ended structure to financial commitments to suit the goals and needs of each university. An adequate amount of interpretation is allowable in the adherence to a fiduciary duty that can involve differing strategies and applications of investments, such as excluding specific industries, companies, etc. Therefore, an action of alteration in investments by a foundation would have a sound basis if the action is made in the interests of advancing the organization's mission and vision as it relates to protest demands and an endowment's financial involvement. Ultimately, foundations have discretion, legal latitude, and an obligation to conform to expressly written values held within a university, allowing them to take action on at least some demands made by protesters.

B. Investment Strategies

[15] National Conference of Commissioners on Uniform State Laws, Uniform Prudent Investor Act (UPIA), 1994, https://www.uniformlaws.org.
[16] *Id.*
[17] NCCUSL, *supra* note 12.
[18] Theodore Schneider, "Understanding Fiduciary Duties: Legal Obligations," Schneiders & Associates LLP, March 29, 2024, https://rstlegal.com/understanding-fiduciary-duties-legal-obligations/.
[19] Ibid.
[20] Ibid.
[21] Ibid.

The investment strategies of endowments have mirrored the methods of many other financial entities managing substantial sums of money: diversification. Endowments possess considerably larger reservoirs of money than the vast majority of individual investors, enabling them to have access to a greater variety of investment options, especially ones that require significant upfront capital, in the pursuit of the largest financial gains.[22] Therefore, endowments often make use of illiquid investments such as "hedge funds, private equity, venture capital, and real assets like oil and natural resources."[23] These types of investments typically require high gestation periods, making them extremely useful and fruitful in the interest of outperforming traditional investments like stocks and bonds. This strategy is crucial for universities because it allows them to secure premier investment results and ensures financial security and longevity for their institution. Conversely, investing in alternatives to traditional stocks and bonds places universities in a position for criticism because these investments may directly benefit vast and politically motivated entities, such as the case with Israel and Hamas. Investment portfolios rely on these forms of high minimum investments for the greatest returns, yet these tend to be in politically charged sectors like oil and natural resources.

To avoid tensions between investment and politics, many universities, such as the University of Michigan, have instituted blanket policies refraining from considering politics within investment decisions. The University of Michigan explicitly "shield[s] the endowment from political pressures and base[s] investment decisions on financial factors such as risk and return."[24] In an official press release, the university stated that the ultimate goal of the investment is to "generate the greatest possible income, subject to the appropriate amount of investment risk,"[25] placing their fiduciary duty far above any social responsibilities. This approach is seemingly consistent with the practices of other American universities, most of which express little to no interest in entertaining calls for divestment over preserving existing prioritizations of neutrality in the name of financial success. Ultimately, the trend of investment strategies is to err on the side of fiduciary duty, which is conservatively interpreted to explicitly prioritize returns on investment over entertaining calls to reconsider the ethical or moral implications of their current investment practices.[26] This illuminates the power of university foundations to construe a myth of helplessness by utilizing law-dominated fiduciary obligations to rationalize politically neutral investment strategies. However, these laws never mandate that foundations exclude political, social, and moral considerations from their decision-making. Policies and practices such as these show an overt preference for monetary considerations and tend to show conservative interpretations of financial obligations. These policies discourage students' political and civic engagement and exhibit disinterest and closed-mindedness in establishing a much-needed dialogue with protest demands. These dialogues are essential for universities showing interest in supporting the ideas of the very students they serve to educate, while also improving communication that may quell tensions that lead to police intervention.

C. Divestment Movement

The contemporary divestment movement advocates for divestment from controversial industries and companies with a vested interest in or benefits from the armed conflict between Israel and Hamas. This conflict within the Gaza Strip has had a potent effect on many students of higher education with personal connections to the region or strong political and ethical interests in the conflict. This movement is highly charged with influxes of emotion stemming from the profound impact of the ongoing violence within the Gaza Strip for families who have lost loved ones, been displaced, or suffered serious harm. Divestment movements are not new and have been targeted at universities previously, as seen by the divestment

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[22] Manoj Singh, "How to Invest like an Endowment," Investopedia, December 11, 2023, https://www.investopedia.com/articles/financial-theory/09/ivy-league-endowments-money-management.asp.
[23] Ibid.
[24] Colleen Mastony, "Regents Decline to Divest from Companies Linked to Israel," The University Record, 2023, https://record.umich.edu/articles/regents-decline-to-divest-from-companies-linked-to-israel/.
[25] Ibid.
[26] Glenn Altschuler, "Why Very Few Colleges Will Divest from Israel," The Hill, October 20, 2024, https://thehill.com/opinion/education/4941710-why-very-few-colleges-will-divest-from-israel/.

movement in the 1990s surrounding South Africa and apartheid.[27] However, this contemporary movement presents unique circumstances due to how interwoven large-scale investments in global financial structures are with the conflict, along with the United States' foreign interests. Most significantly, "the breadth of protesters' demands and Israel's integration into the global economy" present a nearly insurmountable challenge for foundations to facilitate divestment.[28] Campus protests throughout the Spring 2023 semester have largely advocated for the terminations of "all investments in Israel-related funds and businesses" in the hopes that such calls would contribute to financial pressures with the power to sway further armed conflict within the Gaza Strip.[29] This divestment call is relatively broad and includes various high-profile companies such as Amazon, Alphabet, and Google, which have substantial market value and help contribute to endowments' investment earnings.[30] The advocacy and protests amongst college students represent a politically important demographic and anti-war movement that demands specific action and purports certain moral and ethical values to be espoused by American educational institutions. The demanded divestment to economically isolate Israel would undoubtedly have a profound impact, though the realization of this demand may not be entirely legal.

D. Legal Risk of Divestment/Investment

University foundations and endowment managers attempting to facilitate divestment position themselves in a world of legal uncertainty regarding their financial and investment management, depending on the actions they take to attempt divestment. In at least 38 states, legislation exists that aims to discourage techniques such as divestments from Israel as a tactic for actions opposing the country.[31] Many of these and similar laws stipulate that public entities cannot invest or contract with companies that employ the boycotting tactics of Israel. Specifically for public universities, these types of statutes have largely discouraged divestment efforts due to widespread opposition and the risk of laws restricting investment in entities that support the Boycott, Divestment, and Sanctions (BDS) movement. In *Koontz v. Watson*, a federal district judge ruled that an anti-BDS law in the state of Kansas violated the Constitution, as the defendant "was denied her First Amendment right to participate in a boycott."[32] Therefore, while legal challenges to universities that choose to divest from Israel remain a possibility, there is some legally grounded precedent to guide rationales for universities that choose to pursue such tactics. Ultimately, there is no clear evidence to indicate that divestment would necessarily result in significant legal repercussions.

Another significant legal consideration in divestment is whether it conflicts with the common law duties like loyalty, obedience, and care, along with UPMIFA. Fiduciary duty has traditionally been emphasized and interpreted to prioritize financial returns for the endowment, although it doesn't mandate profit maximization at all costs. Still, divestment practices that contradict traditional profit-maximizing investment practices that have the potential to decrease an endowment's total earnings could throw into question whether foundations are adhering to their fiduciary duty. The UPMIFA "imposes a duty to diversify"[33] the investments of endowments, effectively nullifying the possibility for a university to unilaterally divest from every industry and company associated with Israel and the ongoing armed conflict

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[27] Brown University Library, "1987 Divestment | Protest & Perspectives: Students at Brown 1960s–90s," library.brown.edu, n.d., https://library.brown.edu/create/protest6090/1987-divestment/.

[28] Altschuler, *supra* note 26.

[29] Susan Jones, "Protesters Want Divestment, but What Does That Really Mean?," University Times, 2024, https://www.utimes.pitt.edu/news/protesters-want.

[30] Ibid.

[31] Whizy Kim, "The Boycott Movement against Israel, Explained," Vox, October 28, 2023, https://www.vox.com/world-politics/23935054/boycott-movement-palestine-against-israel-bds.

[32] Koontz v. Watson, 283 F. Supp. 3d 1007, 1013 (D. Kan.2018).

[33] Deeks, Laura E. "DISCOURSE AND DUTY: UNIVERSITY ENDOWMENTS, FIDUCIARY LAW, AND THE CULTURAL POLITICS OF FOSSIL FUEL DIVESTMENT." Environmental Law 47, no. 2 (2017): 335–427. http://www.jstor.org/stable/26491778.

in the Gaza Strip.[34] Israel's deep "integration into the global economy"[35] is the primary cause for this inability, along with endowments' reliance on third-party managers like venture capital and private equity investments, where these managers are contractually constrained in identity and investment disclosures.[36] This essentially makes sourcing specific investments and determining which entities they benefit extraordinarily arduous due to a lack of disclosure. Therefore, an attempt at divestment by removing all investments potentially tied to Israel is not only doomed to violate fiduciary duties via lack of diversification and harming investment returns, but also, logistically, seemingly nears practically impossible.

Although unilateral divestment from Israel likely violates diversification, it also almost certainly violates the duty of care by not acting in the best interests of the beneficiary of the endowment. Complete divestment from the interests of an entire country could pose immense legal risk, charging the decision as politically motivated rather than financially justified, especially if it impacts the endowment's investment negatively. This negative impact is essentially irrefutable due to the multitude of industries and sectors that would have to be boycotted to avoid benefiting Israel in any successful way.

However, unilateral divestment is certainly not the only option; a targeted divestment approach has the potential to bridge the gap between protesters' calls, fiduciary responsibilities, and financial success. Targeted divestment would involve individual universities analyzing their investments and discerning the most consequential effects on Israel and the financial implications of the endowment. Therefore, decisions can be made to divest from investments that may be specifically aiding the armed conflict, showing deference to outlined university values, and being responsive to student advocates. This is on solid legal grounds in accordance with fiduciary duties, so long as dedication is put into the decision and refrains from excluding large sectors that would conflict with diversification principles. The common law fiduciary duties incorporate a high level of flexibility concerning individualized investment when determining loyalty. The duty of loyalty, focused primarily on the interests of the educational institution first, is also pursuant to the university's values and missions. This aids in rationalizing decisions, rescinding investments that contradict an academic institution's mission, and utilizing an interpretation with sufficient legal grounds.

Further considerations a foundation must make in assessing divestment also concern how the decision may impact university relations with critical donors and other university stakeholders that play significant roles in an educational institution's finances or long-term stability. These considerations are imperative in the calculus for determining risk management of endowments, even though they are not explicitly financial or investment decisions within themselves. This demonstrates that although universities strive to be politically neutral, there are unavoidable political decisions and considerations that must be made, especially in relationships with financially influential alumni.

V. Accountability & Transparency: The Legal Implications

A. Disclosure Transparency

The laws and regulations that guide the permissibility of disclosing how an endowment is invested are relatively loose. The Freedom of Information Act (FOIA)[37] is well known as a primary avenue for public information pursuant to the federal government, except colleges and universities are not under the jurisdiction of this act but rather individual state laws. Therefore, the primary guiding law on disclosure rests upon state-specific public record laws, which apply only to public universities as they are state entities. An example of such a law is the Wisconsin Public Records Law (WPRL), which allows access to records created or kept by an agency.[38] However, foundations may skirt the jurisdiction of these laws by being private entities, such as the University of Wisconsin Foundation. Public universities often have private foundations, which heavily limit the ability of the public to access any information relating to endowments

[34] UPMIFA, *supra* note 12.
[35] Altschuler, *supra* note 26.
[36] Brown University, "Q&a with Jane Dietze: The Brown Endowment, Divestment and Ethical Investing," Brown University, September 17, 2024, https://www.brown.edu/news/2024-04-19/dietze.
[37] 5 U.S.C. § 552.
[38] Wisconsin Statutes §§ 19.31–19.39.

and investments. For foundations that happen to be public, access to detailed information via open-record laws remains extremely limited due to exceptions that exist to protect competitive investment data or confidential donor information.

University foundations and universities, whether private or public, if established as non-profit entities as they most commonly are, must provide IRS Form 990. Concerning investment disclosures, this form must provide information on total revenue and expenses, the various sources of revenue, and a further breakdown of expenses.[39] Information relating to investment strategies and general investments is provided on this form, but detailed information such as specific holdings and identities of donors is not outlined on this publicly available form.[40] Ultimately, the laws relating to investment disclosure to the government remain limited and even further redacted from the public. This lack of public transparency is necessary to protect the financial interests of the endowments. Yet, it has also led to a lack of trust between universities and their student protests. Therefore, without specific access and unique cooperation between the university and students advocating for divestment, whether a university has investments linked to Israel will remain unknown. The law is flexible for universities to disclose further financial information. However, this voluntary act must comply with existing fiduciary duties and other binding confidentiality agreements with donors or other stakeholders.

There is adequate legal ability for university foundations to make good-faith efforts to investigate and provide additional transparency concerning their investment's relationship with Israel and potential actions available pursuant to demands from protesters. This has the potential to radically improve ties between universities and students, although the ultimate decision remains with the university and whatever foundation or entity manages its endowment. Currently, most universities provide elementary statistics and information within endowment reports, as seen in a 2024 Endowment Report from the University of Wisconsin Foundation.[41] This information is wholly inadequate to address student concerns. Individual universities and colleges have the legal permissibility to be forthcoming with their students and heed calls to remain more transparent about the endowment's investments. Reforms to systematically alter this process must come from each university and its governing authorities to establish policies and procedures that affirmatively guide student collaboration and input to cater to a more inviting environment for student advocacy. This would be a formidable step in mediating a tense situation, promoting transparency, and actively engaging its students.

VI. Conclusion

Assessing and analyzing all the considerations, laws, stakeholders, and moving parts present within the campus protests allows for a complete picture to be painted. This analysis sheds light on potential solutions, differing perspectives, and pathways available toward mutual understanding and the facilitation of divestment initiatives. University foundations are the go-to entity within a university surrounding the discussion of investments and financial assets. From a legal perspective, they have wide latitude in addressing the issues posed by protesters' demands. This involves more active sharing of investment disclosures, how specific investment decisions are made, and the practicality and processes for changing investment tactics or strategies. It's vital that universities utilize these options to tend to their students adequately in the educational interests of continually striving for intellectual curiosity and stimulation. This is the bare minimum that should be attempted by university administrators and foundations, who have wide legal latitude to facilitate numerous options to engage students critically. Going further, the law provides deference to universities and their foundations in crafting final decisions about investments and processes to manage endowments. The decision to divest from certain funds, whether driven by moral and ethical considerations or a shift in investment strategy, is generally supported under current law, provided it is

[39] "Return of Organization Exempt from Income Tax," IRS, 2016, https://www.irs.gov/pub/irs-pdf/f990.pdf. (IRS Form).
[40] Ibid.
[41] Endowment Report, "Endowment Report | University of Wisconsin Foundation," University of Wisconsin Foundation, September 29, 2010, https://www.supportuw.org/publications/endowment-report/.

conducted with due diligence to fiduciary duties and done in a measured and meticulous manner. At its core, student activism should reign as the supreme motivator and guide universities to utilize their legal latitude and demonstrate their commitment to their students and their educational institution's moral or social values over sheer financial gain. This legal analysis exposes the wide range of options available to universities while contextualizing the situation and providing a perspective on possibilities and processes to facilitate real change. The final decision must come from the pressure that students can apply to universities and educational institutions' willingness to heed social calls and further engage with their students.

Balancing Redress and Due Process:

Reforming Statutes of Limitations for Sexual Assault

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I. Introduction

Legislatures and lawmakers do not demonstrate a strong understanding of the processes that rape victims go through, illustrated by the implementation of statutes of limitations for sexual assault crimes. Statutes of limitations (SOLs) are put in place to prevent individuals from being prosecuted years after a crime has occurred, when physical evidence has expired, deteriorated, or become unreliable. However, it may take victims of sexual assault years to process their trauma and gain the confidence to come forward. Statutes of limitations for sexual assault crimes are brief, restrictive periods of time, that limit the chance for victims to receive justice. When statutes of limitations have expired, victims are often discouraged from reporting their assaults or pursuing legal action. This limitation undermines accountability and overlooks the evolving nature of evidence collection. It is crucial to work towards making the judicial system more accessible, such as through implementing tolling statutes on a state-by-state basis that pause SOLs when DNA evidence is available, to allow survivors to hold their attackers accountable. DNA evidence can be used as a powerful tool to identify perpetrators many years after the crime has occurred or the SOLs have expired. Reforming Tolling statutes would ensure that cases with strong forensic evidence are not dismissed on technical grounds. Despite their original intent to foster fairness and efficiency within the legal system, statutes of limitations impede justice for survivors in practice. With the emergence of DNA technology transforming the legal field, it is crucial to reform and extend the statutes of limitations to ensure that survivors of sexual assault have adequate opportunity to seek redress and that perpetrators are held responsible for their actions regardless of how much time has elapsed.

II. Background

Generally, statutes of limitations set a time limit for when a criminal charge can be brought or a lawsuit can be filed.[42] These time limits are intended to preserve the integrity of the judicial process by barring litigation outside of an established timeframe to protect individuals from having to defend themselves against prosecution for events that occurred so long ago that a fair defense is no longer possible. For example, physical evidence may deteriorate or be lost over time, key witnesses may become unavailable or have diminished recollection, and the overall reliability of the fact-finding process may be compromised.[43] SOLs offer protection that extends to defendants, ensuring that they are not subject to unfair trials.[44] Further, statutes of limitations serve as a mechanism to encourage victims to report crimes quickly and law enforcement agencies to initiate investigations promptly. [45] In this sense, they promote the timely handling of legal cases and reduce the volume of litigation by streamlining legal proceedings. SOLs minimize prolonged uncertainty and provide psychological closure because cases cannot be tried when they expire. For all involved, including defendants, victims, and witnesses, statutes of limitations can provide a sense of repose by allowing individuals to move forward with their lives without the looming threat of litigation for past events. Being involved in legal proceedings, prosecution, and trials can force individuals to relive their past trauma. Therefore, statutes of limitations contribute to a sense of finality and stability

[42] Jillian Miller Purdue and Fredrick E. Vars, "Time to Heal: Trauma's Impact on Rape & Sexual Assault Statutes of Limitations," *Texas A&M Law Review*, vol. 11, no. 1 (2023), 126 - 127.
[43] *Id.*
[44] Hunter Grolman, "Pressing Pause: Tolling Statutes of Limitations for Sex Offenses While Rape Kits Remain Untested," *The American University Journal of Gender, Social Policy & the Law*, vol. 26, no. 3 (2018), 976.
[45] Purdue and Vars, *supra* note 1, at 129.

for those involved beyond the defendant.[46] However, while these laws serve to protect due process rights for the accused, they can also unintentionally obstruct justice, particularly in cases of sexual assault, where victims often delay reporting due to trauma or fear of retaliation.

III. Sexual Assault: Underreporting and Legal Barriers

Rape is a prevalent societal issue but an underreported crime largely because of the feelings of fear or shame that victims of sexual violence experience. One out of every five women and one out of every seventeen men has been raped in their lifetime.[47] Historically, violence against women has been overlooked and ignored due to the patriarchal norms ingrained in society. Until 1994, sexual assault lacked legal recognition. This changed with the enactment of the federal Violence Against Women Act, which finally recognized domestic violence, sexual assault, and stalking as serious crimes deserving of legal protection, federal attention, and increased resources.[48] Today, despite increased awareness and legal recognition, victims, both female and male, still hesitate to come forward and report incidents of sexual violence. This ongoing reluctance to report highlights the continued challenges in combating sexual violence and dismantling entrenched societal attitudes that perpetuate underreporting.

Sexual assault is defined as sexual contact that occurs without the victim's consent. Behavior that falls under this category includes attempted rape, rape (non-consensual sexual intercourse), forcible rape (rape procured using force or forcible compulsion), forcing the performance of sex acts, and unwanted sexual touching.[49] If survivors of sexual assault bravely come forward to report that they have been victimized, they deserve the chance to achieve justice through the prosecution of their case. However, statutes of limitations are a barrier for victims of sexual assault, restricting the window during which they can seek legal recourse. In the state of Wisconsin, certain cases can be prosecuted at any time, and are not bound by the confines of the statutes of limitations. Specifically, first-degree sexual assault, Wis. Stat. § 940.225 (1), first-degree sexual assault of a child, Wis. Stat. § 948.02 (1), and repeated acts of sexual assault of the same child, Wis. Stat. § 948.025 (1). Violations of these statutes do not have time limitations on prosecution. However, a prosecution for the violation of statute Wis. Stat. § 940.225 (2), second-degree sexual assault, or Wis. Stat. §940.225 (3), third-degree sexual assault, may only be commenced within 10 years after the commission of the violation. Further, prosecutions of second-degree sexual assault of a child must be commenced before the victim reaches the age of 45.

A. Statutory Classifications of Sexual Assault

The key distinction between first and second-degree sexual assault is the presence of a weapon. "Use or threat of use of a dangerous weapon" elevates first-degree sexual assault to a class B felony (Wis. Stat. § 940.225 (1)(a)). Second-degree sexual assault encompasses a range of scenarios involving force, injury, impairment, or lack of consent. However, it is a lesser offense, a Class C felony, requiring the "use or threat of force or violence" for conviction (Wis. Stat. § 940.225 (2)(a)). First-degree sexual assault, with its heightened severity due to the involvement of a weapon, carries no statutes of limitations. However, second-degree sexual assault is subject to a statute of limitations of only 10 years, despite sharing many similarities with first-degree sexual assault in terms of the trauma inflicted on victims and the violation of their consent.

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[46] Grolman, *supra* note 3, at 974.

[47] Black, Michele, Basile, Kathleen, Breiding, Matthew, Smith, Sharon, Walters, Mikel, Merrick, Melissa, Chen, Jieru, & Stevens, Mark (2011). The National Intimate Partner and Sexual Violence Survey: 2010 summary report. Centers for Disease Control and Prevention.

[48] Office of Justice Programs, "Violence Against Women Act of 1994: The Federal Commitment to Ending Domestic Violence, Sexual Assault, and Stalking," *National Criminal Justice Reference Service*, n.d., https://www.ojp.gov/ncjrs/virtual-library/abstracts/violence-against-women-act-1994-federal-commitment-ending-domestic.

[49] Purdue and Vars, *supra* note 1, at 128.

This disparity highlights how survivors of second-degree sexual assault face unequal treatment within the legal system, lacking the same opportunity to pursue their cases. By drawing rigid legal lines between types of force or threat, the law creates a hierarchy of harm that fails to account for the complexities of sexual violence, particularly in cases involving power dynamics, psychological coercion, or intimate partner assault. As a result, survivors whose cases are classified as second-degree are subject to a 10-year statute of limitations, while those classified as first-degree face no such constraint. This is particularly problematic given that the trauma of sexual assault often leads survivors to delay reporting for well over a decade, especially in cases involving someone they know, which accounts for a significant portion of incidents. Approximately 40 percent of rapes are committed by acquaintances, and nearly half involve intimate partners.[50] There is an urgent need for reform to ensure that all survivors of sexual assault, regardless of the specific circumstances of their case, have equal opportunities for justice and closure.

B. DNA Exceptions

Wis. Stat. § 939.74(2d) outlines an important exception to the usual time limits for prosecuting felony cases, including certain sexual assaults. According to this statute, if the state collects biological evidence such as semen, blood, or other material containing DNA before the statute of limitations expires, that evidence can be analyzed to generate a deoxyribonucleic acid (DNA) profile. This profile is then compared against known profiles in CODIS, the Combined DNA Index System. If a match is found, identifying a likely suspect, the state has up to 12 months from either the date of identification or the original expiration of the statute of limitations (whichever comes later) to file charges (Wis. Stat. § 939.74(2d)). For example, in a second-degree sexual assault case, the state has 10 years to file charges. If DNA evidence is collected within that 10-year period, it can be analyzed to create a DNA profile. If that profile later matches someone in CODIS, helping to identify a likely suspect, the state then has up to 12 additional months from either the date of the match or the end of the original 10-year period (whichever is later) to begin prosecution. This reveals several significant issues in the current legal framework. First, if a sexual assault kit is not tested before the 10-year timeframe expires, the opportunity to generate and use DNA evidence for prosecution is lost. This is particularly concerning because due to lack of funding and prioritization, there is a well-documented backlog of untested sexual assault kits at medical facilities and law enforcement agencies.[51] Delays in testing mean that crucial evidence may remain untouched for years, ultimately preventing justice from being served even when the perpetrator's DNA is available.[52] Second, expecting victims to report within a strict 10-year window does not reflect the realities of trauma or the complex social and psychological barriers that often cause victims to delay reporting.[53] Lastly, even after a DNA match is found, the law only allows a 12-month period for the state to initiate prosecution, which may not be long enough. The policies, workload, and resources of law enforcement and prosecution agencies may inhibit their ability to move quickly on a case within this timeframe.[54] Senate Bill 1007 was introduced in 2023, proposing a reform of Wis. Stat. § 939.74 2d, demonstrating that agencies recognize that a 12-month period is not enough time to thoroughly investigate, prepare, and commence prosecution. This bill proposes that when a person is implicated in a felony by DNA evidence, the expired SOLs would be reset. Specifically, the state would be allowed to commence prosecution within three years from the day the DNA evidence implicates the perpetrator of the crime, regardless of whether the original statute of limitations had expired. The extension from one year to three years would enable more effective prosecution and law enforcement

[50] Black, Basile, Breiding, Smith, Walters, Merrick, Chen, & Stevens, *supra* note 6.
[51] Chris Gilligan, "Rape Kit Backlogs Remain in States Despite Funding," *U.S. News & World Report*, June 20, 2023, https://www.usnews.com/news/best-states/articles/2023-06-20/rape-kit-backlogs-remain-in-states-despite-funding.
[52] Ibid.
[53] Purdue and Vars, *supra* note 1.
[54] Rebecca Campbell, Steven J. Pierce, Dhruv B. Sherman, Hannah Feeney, and Giannina Fehler-Cabral, "Developing Empirically Informed Policies for Sexual Assault Kit DNA Testing: Is It Too Late to Test Kits beyond the Statute of Limitations?," *Criminal Justice Policy Review*, vol. 30, no. 1 (2019), 73 - 105.

investigation, therefore ensuring that survivors are not denied justice due to procedural time constraints and that the legal system can fully respond to the availability of new forensic evidence.

IV. Delayed Reporting

Victims of sexual assault often delay reporting their assaults due to the deep psychological trauma they experience and the complex societal pressures they must navigate. Trauma-induced reporting delays are common, with survivors coming forward about their sexual assaults years after the event.[55] Almost one-third of rape victims suffer from PTSD and experience symptoms that can include severe emotional distress, avoidance of discussion or reminders surrounding the event, memory issues, and depression.[56] These symptoms can inhibit a survivor's ability to process their trauma and pursue justice against their perpetrator. Victims may require years to comprehend and process what has happened to them.[57] Further, over 80% of victims know their attackers and have been abused by a family member, friend, or authority figure in their lives. This may result in delayed reporting from victims because they fear retaliation from their attacker or are afraid that their community will not believe their story and provide support.[58] The emotional toll of navigating these interpersonal dynamics, combined with the effects of trauma, helps explain why delayed reporting is not a sign of unreliability but a reflection of the profound and lasting impact of sexual violence. Legal frameworks must recognize this reality and adapt to meet survivors where they are, instead of punishing them for the time it takes to heal by requiring them to submit to SOLs.

The consequences of delayed reporting are not just theoretical; they play out publicly in high-profile cases where survivors face intense scrutiny for coming forward years after their assault. One of the most visible examples is the case of Associate Justice Brett Kavanaugh, where the national response to delayed reporting revealed deep societal biases against survivors. Dr. Christine Blasey Ford's decision to accuse Kavanaugh of sexually assaulting her decades earlier sparked widespread backlash, particularly from Republican lawmakers and U.S. Senators, who questioned her credibility based solely on the time that had passed.[59] In 2019, Judge Kavanaugh was nominated by Donald Trump to be a United States Supreme Court Justice. At this time, Dr. Ford alleged that Justice Kavanaugh and a friend attempted to forcibly rape her at a high school party to the extent that she feared for her life.[60] During the trial, Dr. Ford, a licensed clinical psychologist, testified that she continued to struggle with "anxiety, phobia, and PTSD-like symptoms" from the event that occurred in her adolescence, even as an adult.[61] President Donald Trump suggested that the rape must not have been "as bad as she says," because it was not reported 30 years prior when it occurred.[62] Despite the psychological and emotional challenges behind delayed reporting, this case shows that victims often face societal skepticism when they come forward after an extended period of time. Many discredited Dr. Ford's story, focusing on the decades-long delay rather than acknowledging the enduring psychological effects of trauma. Her experience exemplifies how the timing of a report is too often weaponized to cast doubt on a survivor's credibility, rather than being understood as a natural consequence of trauma. Expanding statutes of limitations is not only a legal reform; it is a statement that validates survivors' experiences and shifts societal norms by challenging the misconception that delayed reporting signals dishonesty.

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[55] Purdue and Vars, *supra* note 1.

[56] Purdue and Vars, *supra* note 1, at 137.

[57] Purdue and Vars, *supra* note 1, at 139.

[58] Jill Filipovic, "No More Statutes of Limitations for Rape," *The New York Times*, December 31, 2015, https://www.nytimes.com/2016/01/01/opinion/no-more-statutes-of-limitations-for-rape.html [https://perma.cc/DJ42-395M].

[59] Jacey Fortin, "#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet," *The New York Times*, September 23, 2018, https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html [https://perma.cc/B4PD-CZGX].

[60] Ibid.

[61] Purdue and Vars, *supra* note 1, at 167.

[62] Fortin, *supra* note 18.

The public backlash against Dr. Ford did not occur in a vacuum; it reflected broader societal attitudes that silence survivors and punish them for speaking out too late. In response to the backlash Dr. Ford received, thousands of individuals took to social media to push back against this narrative, sparking the #WhyIDidn'tReport movement. The online movement was launched by women who wanted to share their reasons for delayed reporting and support Dr. Ford's case. Using this hashtag, along with #MeToo, women vocalized their struggles to process their trauma, the fear that they would not be believed, and the shame and stigma associated with being a victim.[63] The #MeToo social media campaign raised awareness of the prevalence of sexual abuse, harassment, and the culture of rape in America.[64] A large number of women utilized this hashtag to support women who were reporting years after their abuse, reaffirming that they were not alone in their experiences. However, this movement received backlash as well, as critics attempted to discredit the experiences of victims and blame them for their situations.[65] In some cases, this movement negatively impacted the careers of women by subjecting them to scrutiny and skepticism. #MeToo exposed the deep-rooted societal attitudes that perpetuate victim-blaming and backlash against those who come forward with their experiences of sexual assault.[66] This public backlash further illustrates why rape victims may take years to gain the confidence to report. Given how many survivors came forward during these movements, it is clear that delayed reporting is not rare; it is a widespread reality. Legal reforms expanding statutes of limitations must reflect this truth, ensuring that survivors are not denied justice simply because they were not ready to report on society's timeline.

V. Proposals for Reforming Statutes of Limitations

While some survivors, like Dr. Ford, face widespread public scrutiny for delayed reporting, others are barred entirely from seeking justice because the law simply does not give them enough time. In many states, statutes of limitations for sexual assault remain shockingly short; especially for lower-level or misdemeanor charges that still involve non-consensual sexual contact. For example, some jurisdictions allow as little as one to three years for prosecuting cases of non-consensual sexual intercourse, regardless of the trauma endured by the victim. After these statutes of limitations end, the case can no longer be prosecuted and victims lose the ability to hold their rapists accountable. These states include: Alabama (one year), Georgia (two years), Idaho (one year), Kentucky (one year), Maryland (one year), Minnesota (three years), Mississippi (two years), Missouri (three years), New Mexico (two years), and Ohio (two years).[67] Even in more severe cases, such as sexual intercourse procured through force, many states still impose rigid limitations that prevent meaningful accountability. Specifically, Arkansas (six years), Indiana (five years), Montana (five years), New Hampshire (six years), New Mexico (five years), North Dakota (seven years), and Tennessee (eight years).[68] The prevalence of these very short statutes of limitations highlights the need for reform across the country. Some scholars suggest extending the statutes of limitations to 10 years in all cases of rape and sexual assault. Others recommend completely abolishing the limitation periods for rape by means of force.[69] These narrow timelines disproportionately harm survivors and protect perpetrators, particularly when the crime does not meet the highest legal threshold required to bypass these deadlines

A. Addressing Child Sexual Abuse Cases

Some scholars argue that the statute of limitations should be changed for sex abuse committed against children because they can take especially long to come forward about their abuse. Children lack the emotional maturity and agency to recognize the abuse they are experiencing and report it within the time

[63] Ibid.
[64] Constance Grady, "The Mounting, Undeniable Me Too Backlash," *Vox*, February 3, 2023, https://www.vox.com/culture/23581859/me-too-backlash-susan-faludi-weinstein-roe-dobbs-depp-heard.
[65] Ibid.
[66] Ibid.
[67] Purdue and Vars, *supra* note 1, at 171 - 173.
[68] *Id.*
[69] Purdue and Vars, *supra* note 1, at 163.

constraints of statutes of limitations.[70] They are wholly dependent on adults, particularly caregivers, to advocate for them and initiate legal action. Yet in many cases, children feel too frightened, ashamed, or unsafe to disclose abuse to those very adults, especially when the abuser is a family member or someone within the household. A study examined the medical records of 534 sexual assault victims at Newcastle Provincial Hospital in South Africa between 2005 and 2009. The findings indicated that victims under the age of nine were afraid of how their relatives would respond to their abuse, which delayed their reporting.[71] Of the victims who delayed reporting, 22.4% were under the age of nine years old, which would mean that they were unable to seek medical assistance without an adult intervening on their behalf.[72] It is necessary for the legal system to accommodate for the specific needs of this vulnerable population. Altering the statute of limitations to allow for more time would recognize the long-lasting effects of childhood trauma and provide survivors with a realistic opportunity to pursue justice once they are emotionally, legally, and logistically able to do so.

The New York Child Victims Act exemplifies the importance of expanding the statutes of limitations for child sexual assault cases. The New York Child Victims Act was passed in 2019 and extended until 2021, allowing victims to file suits that would have otherwise been barred by the statutes of limitations.[73] Before this act was passed, most claims were only valid until a victim reached the age of 23. After its passing, victims had one additional year to file their claims, which were valid until they reached the age of 55. The public response to the act was immediate and overwhelming with over 400 lawsuits filed on the first day that it was implemented. Many suits targeted institutions like the Catholic Church, entities that had long shielded perpetrators through intimidation and institutional protection.[74] The influx of legal activity reveals that many survivors had long wanted to come forward but were previously blocked by restrictive statutes of limitations. It is a powerful message that if the justice system is willing to evolve to meet the realities of trauma, survivors will seize that opportunity to seek justice. Other states should look to New York's example and implement similar reforms that center on the needs of survivors rather than the convenience of the legal system or the protection of institutions.

B. Challenging the Evidence-based Defense of SOLs

A common argument made in favor of statutes of limitations is that they serve the purpose of preventing the expiration or staleness of biological evidence in legal proceedings. If SOLs are expanded and cases are investigated decades after the crime, prosecutors will often need to rely on evidence that was originally collected many years earlier. As time passes, biological evidence degrades and the possibility arises that both the prosecution and defense will be unable to refute or verify claims due to the loss of this critical evidence. For example, the defense could want to challenge the accuracy of DNA evidence linking their client to the victim. However, if two decades have passed since the sample was collected, it could have been discarded or deteriorated. Therefore, the defense would be unable to retest the biological sample (blood, semen) to potentially produce a DNA profile that excludes their client. Stale evidence can compromise the integrity of a trial, as degraded or incomplete evidence can lead to inaccurate and unjust conclusions. However, SOLs are not the only protection a defendant has against this issue in legal proceedings. The Due Process clause of the Fifth and Fourteenth Amendments ensures that states must follow specific legal procedures before depriving a citizen of their protected rights. It allows a defendant to challenge delays in a pre-trial indictment by arguing that such delays were deliberate tactical maneuvers by

[70] David R. Katner, "Delayed Responses to Child Sexual Abuse, the Kavanaugh Confirmation Hearing, and Eliminating Statutes of Limitation for Child Sexual Abuse Cases," *American Journal of Criminal Law*, vol. 47, no. 1 (2020), 29.
[71] Adegoke Adefolalu, "Fear of the Perpetrator: A Major Reason Why Sexual Assault Victims Delayed Presenting at Hospital," *Tropical Medicine & International Health* 19 (2014), 343.
[72] Ibid.
[73] Katner, *supra* note 29, at 31.
[74] *Id.*

the prosecution, unfairly disadvantaging or prejudicing the defense.[75] This provision protects defendants against the staleness of evidence by ensuring that undue delays do not compromise the ability to mount a fair and effective defense.

Moreover, in the specific context of child sexual abuse, the concern about deteriorating biological evidence is often overstated. As Katner (2020) explains, physical evidence is absent in the vast majority of these cases, as less than 5% involve biological evidence like semen, blood, or DNA. Instead, the child's testimony, their history, and psychological evaluations are more critical pieces of evidence in determining whether abuse occurred.[76] Heavy reliance on physical evidence results in the small amount of child sexual assault case prosecutions.[77] genital injuries are most often observed within 24 hours of the assault and may disappear completely after a week. Additionally, semen or ejaculate is unlikely to be found, especially if the child has bathed, used the bathroom, or if more than 72 hours have passed. Even when injuries occur, they can heal rapidly, particularly with the hormonal changes of puberty, which may mask signs of trauma.[78] Moreover, many abusive acts, such as fondling, oral sex, or digital penetration, do not leave physical traces. Penetration can also occur without causing visible injury or leaving DNA, especially if there is no ejaculation or if the tissue is elastic and unbroken. Some abusers may also experience erectile or ejaculatory dysfunction, further reducing the chance of leaving biological evidence.[79] Katner outlines the many circumstances where biological and physical evidence is not present. Therefore, using the potential degradation of biological evidence as a justification for short statutes of limitations fails to reflect the evidentiary reality of how these cases are handled. The fear of degrading biological evidence should not be the basis for limiting survivors' ability to seek justice. Expanding or eliminating statutes of limitations, particularly in child sexual abuse cases, is not only appropriate, but necessary, to ensure the legal system can accommodate the needs of survivors as they take time to process their trauma and come forward to report the crime that has occurred.

VI. The Backlog of Untested Rape Kits: Challenges and Implications

While biological evidence may be unavailable in certain cases, the real issue is that valuable forensic evidence that does exist is going unused. Not because of age or degradation, but because of systemic failures in evidence processing. The current backlog of rape kits highlights the abundance of DNA evidence available, yet the potential of this evidence is untapped because of the constraints of current statutes of limitations for sexual assault cases. After a victim is assaulted, a rape test kit is administered by medical professionals to gather and preserve physical evidence, such as the semen or saliva of a perpatrator. Then the biological samples are tested and a DNA profile can potentially be built that identifies a perpetrator. There are estimates that over 200,000 sexual assault kits await testing.[80] US News and World Reports conducted a comprehensive study, investigating 30 U.S. states that house over 25,000 kits that had not been submitted to a forensic lab for analysis.[81] This study revealed that the backlog of sexual assault kits exists because of deficient policies and protocols within law enforcement agencies, limited resources, and economic obstacles. For example, the cost of testing one sexual assault kit is $1,000 - $1,500, which places a large financial burden on organizations that lack sufficient funding.[82] Despite the narrative that evidence becomes stale with time, tens of thousands of sexual assault kits containing viable DNA remain untested, rendering justice inaccessible even in cases where prosecution might still be possible under current SOLs.

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[75] Jonathan W. Diehl, "Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases," *Jurimetrics*, vol. 39, no. 4 (1999), 433.
[76] Katner, *supra* note 26, at 4.
[77] Katner, *supra* note 26, at 6.
[78] Katner, *supra* note 29, at 7.
[79] *Id.*
[80] Campbell, Pierce, Sherman, Feeney, and Fehler-Cabral, *supra* note 13, at 74.
[81] Gilligan, *supra* note 10.
[82] Ibid.

A. The Value of Testing Backlogged Rape Kits

When tested, rape kits can result in strong investigative leads and most importantly the identification of perpetrators. However, given the economic challenges that contribute to the backlog, questions arise about the efficiency of allocating resources to testing sexual assault kits. Is it efficient to allocate resources to testing sexual assault kits that are several years old? The findings of Campbell's 2019 study provide a compelling answer. When tested, all sexual assault kits could be useful and produce a DNA profile and identify a suspect. Some kits may be so dated that the statute of limitations for the crime has expired.[83] However, the 2019 study that Campbell conducted found that when testing a group of SOL-expired kits and a group of SOL-unexpired kits, the number of DNA profiles created and resulting CODIS hits were equal. This shows that the SOL-expired rape kits that have been trapped in the backlog remain as valuable as more recent kits.[84] In Campbell's study, of the 351 SOL-expired kits that were tested, 49% yielded CODIS-eligible profiles, resulting in 90 CODIS hits and 29 connections to other sexual assault cases.[85] The results of Campbell's study and other scholarly findings demonstrate that despite the passage of time, these kits have the potential to yield vital evidence that can be instrumental in identifying perpetrators, corroborating victim testimonies, and linking cases to other assaults.[86]

By generating DNA profiles and contributing to matches in the CODIS database, SOL-expired rape kits not only provide closure for individual cases but also can potentially identify patterns of behavior and serial offenders.[87] This underscores the importance of prioritizing the testing of all rape kits, alongside the need to reform the statutes of limitations for sexual assaults. Under the constraints imposed by existing statutes of limitations, DNA evidence from untested sexual assault kits with expired SOLs cannot be utilized. It is necessary to expand or abolish the SOLs to ensure that the valuable forensic evidence obtained from these sexual assault kits can be utilized effectively to advance investigations and facilitate legal proceedings.

B. Tolling Exceptions

Proposals are being made to create an exception to statutes of limitations in sexual assault cases when DNA evidence is present, reflecting a growing recognition that the law must evolve alongside technological advancements. As forensic science improves and society deepens its understanding of trauma and delayed disclosure, rigid statutes of limitations risk becoming outdated barriers to justice. Tolling exceptions emerged as a balanced solution. These exceptions are narrowly tailored to address specific challenges such as the widespread backlog of untested rape kits, without unfairly exposing defendants to indefinite delays or violating constitutional rights.[88] Several states have already moved to modernize their statutes by integrating DNA-based tolling provisions into their limitation laws. For example, in New York, statutes of limitations can be paused or "tolled" under certain conditions, such as when a defendant has fled the jurisdiction or when their identity is unknown.[89] A tolling provision would allow a defendant to be prosecuted even if they fled the jurisdiction for an extended period of time and returned after the SOLs have expired. Under this provision, the New York courts can suspend statutes of limitations while a defendant's whereabouts are unknown.[90] This tolling framework has been extended to cases involving DNA evidence as well. Under these exceptions, if a rape kit has been collected but not yet tested, the statute of limitations is suspended until a DNA profile can identify a suspect. New York courts have upheld the constitutionality of these tolling exceptions, affirming that they do not violate a defendant's due process rights or impede their ability to receive a fair and speedy trial.[91] This legal development reflects a broader shift in public

[83] Campbell, Pierce, Sherman, Feeney, and Fehler-Cabral, *supra* note 13, at 3 - 27.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Grolman, *supra* note 3.
[89] *Id.*
[90] *Id.*
[91] *Id.*

policy and judicial reasoning: one that places greater emphasis on survivor access to justice and systemic accountability. DNA tolling provisions represent a critical step forward in aligning the law with both modern investigative capabilities and the lived realities of survivors.

C. Implementation of SOL Reform

This SOL reform is gaining popularity and being implemented in other states as well. For example, an Illinois bill allows an exception to be made for defendants whose identity was unknown at the time of the incident.[92] This allows prosecutors to bypass SOL requirements and file charges even after the usual time limit has passed due to DNA evidence revealing the identity of a perpetrator after the SOL has expired. However, other states like New Hampshire have not interpreted their tolling statutes to allow for a DNA exception. Although the New Hampshire statute tolls during the time that a defendant has left the state, the statute of limitations does not toll when there is an untested rape kit delaying the identification of a perpetrator.[93] This can be detrimental in cases of sexual assault because a rape kit is a powerful investigative tool that law enforcement agents need to effectively do their jobs.[94] In situations involving stranger rapes, DNA from rape kits can be the only evidence that links a perpetrator to the crime. If the state is unable to identify a victim's attacker before the SOL expires, a victim has very limited options to hold their rapist accountable.[95] If states are unable to decrease the backlog of untested sexual assault kits, it is necessary to interpret tolling provisions and make an exception to the statute of limitations when DNA evidence can possibly identify an attacker.

VII. Conclusion

Statutes of limitations for sexual assault cases present profound and persistent barriers to justice for survivors. Although originally enacted to promote fairness, efficiency, and the preservation of reliable evidence, these laws often fail to reflect the complex realities of sexual violence and trauma. Survivors frequently delay reporting due to fear, shame, psychological trauma, or distrust in legal institutions, barriers that are compounded by social stigma and power imbalances, particularly when the perpetrator is a figure of authority or someone known to the victim. As a result, many statutes of limitations expire before survivors are ready or able to come forward, cutting them off from legal recourse before their healing has even begun. Even when survivors do report, the justice system can fail them in other ways, such as through the long-standing backlog of untested rape kits. These kits, which often contain viable DNA evidence, sit untouched in storage facilities for years, while the statutes of limitations quietly run out. This mismatch between legal timelines and institutional delays creates a system where survivors are denied justice not because the evidence is lacking, but because the clock has run out. This is where tolling provisions offer a necessary and practical path forward. By pausing the statute of limitations in cases where DNA evidence has been collected but not yet tested, tolling reforms help ensure that prosecutorial opportunities are not lost due to bureaucratic inefficiencies. These provisions recognize that the justice system itself can cause delays and that survivors should not be penalized for systemic failures beyond their control. The successful implementation and constitutional validation of tolling laws in states like New York demonstrate that reform is not only feasible; it is effective and fair. To build a legal system that truly serves survivors, statutes of limitations must be modernized to reflect both the advances in forensic science and the realities of trauma and disclosure. The original intent behind statutes of limitations may have been to uphold due process and ensure fairness in legal proceedings, but when those safeguards end up silencing survivors, we must ask: who are these laws really protecting?

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[92] Diehl, *supra* note 34.
[93] *Id.*
[94] Grolman, *supra* note 3.
[95] *Id.*

Family Separation in US Policy

Examining the Legal implications of Family Separation in US Immigration Policy

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I. Introduction

Family separation at the United States-Mexico border has become a national crisis. As the United States (US) continues to debate its approach to immigration, one issue has emerged as contentious: the practice of separating children from their parents at the US-Mexico border. This not only inflicts emotional and psychological harm on families, but also raises significant constitutional concerns regarding the protection of fundamental rights.

Why does this matter? Immigration is a topic that transcends political rhetoric and affects lives. The families caught in the cycle of separation are not abstract concepts or numbers; they are human beings seeking safety, security, and the chance at a better future for themselves and their families. The trauma caused by family separation endures long after the physical separation ends, and the consequences extend beyond the immediate individuals involved, reverberating through society as a whole.[96] The treatment of these families reflects broader questions about the values upon which this nation was built: freedom, justice, and the protection of human dignity.

This paper argues family separation at the US-Mexico border is unconstitutional under the Fifth and Fourteenth Amendments. The separation of families by law enforcement not only violates the due process protections guaranteed in the Constitution, but also undermines the nation's core principle of liberty. By examining the legal implications of this practice, I will demonstrate that policies leading to family separation are not just harmful, but fundamentally unjust.

II. Background

The United States was established upon the foundational contributions of immigrants. Immigration refers to the process of traveling to a country with the intent of permanent residence there.[97] In the late 1800s, many people decided to immigrate to the United States to flee crop failure, land and job shortages, and rising taxes. The US was perceived as the land of economic opportunity. Nearly 12 million immigrants arrived in the United States between 1870-1900, many who were from Germany, Ireland, and England.[98] As of today, 14% of the US's population is foreign-born, and over half of them are now naturalized citizens.[99] A naturalized citizen is a person who was not born in the United States but has become a US citizen through a formal process after meeting specific requirements and passing an application process.[100] Mexico accounts for the largest share of US immigrants at 23%, with India and China following. Immigrants play a vital role in the US economy. By expanding the labor force and increasing consumer spending, they help drive overall economic growth. They are essential workers in key societal industries which include healthcare, agriculture, food production, and construction. [101] In sum, immigrants have and continue to play a substantial role in strengthening the US economy.

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[96] Kathryn Hampton, Elsa Raker, Hajar Habbach, Linda Camaj Deda, Michele Heisler, Ranit Mishori, "The Psychological effects of forced family separation or asylum-seeking children and parents at the US-Mexico border: A qualitative analysis of mediocre-legal documents", Volume 16 Issue 11, November 24, 2021.

[97] Merriam-Webster.com Dictionary, s.v. "immigration," last modified 2025.

[98] Library of Congress, "Immigration to the United States, 1851-1900", *Library of Congress,* Assessed April 16, 2025.

[99] American Immigration Council, "Immigrants in the United States", July 27, 2021

[100] U.S Citizenship and Immigration Services, Citizens and Naturalization, last modified April 8, 2021,

[101] FWD.us, *Immigration Benefits All Americans and Strengthens the Economy,* last modified March 14, 2024.

Undocumented immigrants are those who reside in the United States without legal status.[102] When the US government comes to the disclosure of undocumented immigrants, many undocumented families undergo family separation. Today, this has emerged as an extremely contentious aspect of US immigration policy. Rooted in the broader context of immigration enforcement, family separation often occurs as part of the government's attempt to control unauthorized immigration. One prime example includes The Chinese Exclusion Act of 1882, which imposed punishments of imprisonment and hard labor to Chinese persons convicted of unlawful entry to or presence in the US, which ultimately led to the separation of parents from their children.[103] Furthermore, in the case *Wong Wing v United States*, Wong Wing, Lee Poy, Lee Yon Tong and Chan Wah Dong were brought before John Graves who was a commissioner of the United States Circuit Court. John Graves ultimately found that the aforementioned persons were unlawfully within the United States. This case subsequently established that detainment or temporary confinement as part of the means necessary to give effect to the exclusion of expulsion of Chinese aliens as valid. If Congress saw it fit to promote the policy of subjecting the persons of alien status to infamous punishments of hard labor or confiscating their property, legislation must provide for a judicial trial. Such legislation is only valid if it establishes the guilt of the accused through due process. Furthermore, the term alien refers to any person who is not a citizen or a national of the United States.[104] In this case, Wong Wing, Lee Poy, Lee Yon Tong, and Chan Wah Dong were considered aliens under the law.[105] The United States Supreme Court found that the Fifth and Sixth Amendments to the US Constitution forbade the imprisonment at hard labor without a jury trial for non-citizens convicted of illegal entry to or presence in the United States.[106] In the ruling *Wong Wing v. United States*, it was found that deportation is a civil action, not a criminal one. In law, a civil case refers to two or more individuals or private entities disputing their rights relative to each other, whereas a criminal case involves the government attempting on behalf of its citizens to punish a person for violating its criminal law.[107]

During World War II, US President Franklin D Roosevelt signed Executive Order 9066 in February of 1942 which led to the internment of Japanese American families in camps, forcibly separating many families from their homes.[108] This order declared that, "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national defense premises, and national-defense utilities…" which was used to justify Japanese internment.[109] A Japanese-American man named Fred Korematsu chose to stay at his residence rather than obey the order to relocate. He was arrested and convicted of violating the order. The Court ruled that the government's forced internment of Japanese Americans during World War II, as authorized by Executive Order 9066, was constitutional.[110] In *Korematsu v. United States*, the Supreme Court upheld the internment of Japanese Americans as a constitutional exercise of wartiming power, citing national security concerns. The Court deferred to military judgement, claiming the exclusion was not based on race but on urgent necessity during a time of war.

In the aftermath of constitutional challenges such as *Wong Wing V. United States* and preceding landmark decisions like *Korematsu v. The United States*, immigration policies in the early twentieth century underwent significant transformation. The Immigration Act of 1924, also known as the Johnson-Reed Act, established quotas that limited immigration from other countries outside of Western Europe, effectively

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[102] Immigrants Rising, Defining Undocumented, last modified August 2023.
[103] *Wong Wing v. United States,* 163 U.S. 228 (1896).
[104] Legal Information Institute, Alien, Wex, assed April 16, 2025.
[105] Wong Wing v. United States, *supra* note 8.
[106] *Id.*
[107] Legal Information Institute, Civil, Wex, assed April 16, 2025.
[108] National Archives, *Executive Order 9066: Resulting in Japanese-American Incarceration,* last modified January 24, 2022.
[109] *Ibid.*
[110] Congressional Asian Pacific American Caucus, *CAPAC Marks 80 Years Since the Korematsu v. United States Decision*, December 18, 2024.

halting immigration from Asia[111] However, the Immigration and Nationality Act of 1965 abolished these quotas, reshaping US demographics.[112] Following 9/11, the fears of future attacks created stricter immigration policies that led to an increase in detention and deportation of foreign nationals.[113] In response to increasing immigration from neighboring countries, the US Customs and Border Protection (CBP) was created, tasked with preventing people from entering the country illegally or bringing anything harmful or illegal into the United States.[114] The Department of Homeland Security (DHS) was established in 2003, with the missions of preventing terrorist attacks and protecting against threats and hazards to the nation.[115] The US Immigration and Customs Enforcement (ICE), created in 2003, was similarly tasked with deterring illegal immigration as well as enforcing immigration laws at the US Mexico border.[116] Despite these policy shifts, the question of how to manage immigration continues to generate debate, especially as undocumented immigrants rise from neighboring countries.

Family separation was officially introduced as a policy in 2018. On April 6, 2018, US Attorney General Jeff Sessions announced the zero-tolerance policy, intended to ramp-up criminal prosecution of people caught entering the US illegally. Nearly 3,000 children were separated from their parents. [117] Donald Trump, the 45th and 47th President of the United States, signed Executive order 13841. In Section one, it states, "It is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available." [118]

The practice of family separation at the US-Mexico border violates guaranteed rights and protections under US law. One such example includes the Due Process Clause of the Fifth Amendment. This states that no person shall be deprived of life, liberty or property without due process of law. [119] The Supreme Court has established that the 14th amendment mirrors the Fifth Amendment protections, extending the legal obligation to all of the states.[120] Furthermore, the Court has affirmed that the 14th Amendment's due process protections apply to all persons, regardless of race, color, or citizenship status.[121] Additionally, the Supreme Court has established two distinct components of due process: procedural due process and substantive due process. Procedural due process states that the government must follow certain procedures before they may deprive a person of a protected life, liberty, or property interest.[122] Substantive due process protects fundamental rights that the government may not infringe upon even if it provides procedural protections. [123]

These constitutional guarantees have been at the root of several landmark cases challenging immigration policies that involve the separation of families at the US-Mexico border. Courts have had to consider whether due process was violated when children were taken from their parents without clear procedures or timely reunification. *Flores v. Reno*, a key case regarding constitutional protections, discussed the treatment of unaccompanied minors in immigration detention centers. In the ruling of *Flores v. Reno*, it was found that the Immigration and Naturalization Service (INS) must release minors from

[111] U.S. Department of State, The Immigration Act of 1924 (The Johnson-Reed Act), assessed April 16, 2025.
[112] Lyndon Baines Johnson Presidential Library, *Signing of the Immigration and Nationality Act,* October 3, 1965.
[113] Muzaffar Chishti and Jessica Bolter, "Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System," Migration Information Source, September 22, 2021.
[114] U.S. Customs and Border Protection, "U.S. Customers and Border Protection," last modified April 16, 2025.
[115] US Department of Homeland Security, "About the Department of Homeland Security", *Federal Register*, last modified April 16 2025.
[116]U.S. Immigration and Customs Enforcement, *About ICE,* last modified March, 2025.
[117] Human Rights Water, "Q&A: Trump Administration's 'Zero-Tolerance Immigration Policy," August 16, 2018..
[118] Donald J. Trump, Affording Congress an Opportunity to Address Family Separation, Executive Order 13841, 83 FR 29435, June 25, 2018.
[119]Legal Information Institute, Due Process, Wex, assessed April 16, 2025.
[120] *Id.*
[121] Congressional Research Service, *Amdt 14.S1.3 Due Process Generally,* Constitution Annotated, 1791, 2025.
[122] *Id.*
[123] *Id.*

unnecessary delay, unless detention of a juvenile is required to secure her timely appearance or to ensure the safety of that of others.[124] The ruling emphasized family unity, a principle still central to understanding family separation practices today.

III. Constitutional Framework

The United States constitution is the world's longest surviving written charter of government, which was written in 1787, ratified in 1788, and has been in effect since 1798.[125] The Bill of Rights, the first 10 amendments in the Constitution, spells out Americans' rights in relation to the federal government. It guarantees civil liberties, like the freedom of speech or the right to bear arms, along setting forth rules for legal due process under the law. [126] One such example of the due process guarantee is the Fifth Amendment, which states "no person shall be deprived of life, liberty, or property without due process of law."[127] Due process refers to a course of legal proceedings according to rules and principles that have been established in a system of jurisprudence for the enforcement and protection of private rights.[128] The Fourteenth amendment passed by the Senate in 1866 and ratified in 1868 provides all citizens with "equal protection under the law" extending the provisions of the Bill of Rights to the States.[129] The Supreme Court Case *Gitlow v. New York* established that the First Amendment's protections of freedom of speech and press apply to state governments through the Due Process Clause of the Fourteenth Amendment. This decision marked the beginning of incorporating the Bill of Rights to the states. [130] In section 1 of the Fourteenth Amendment, it states" Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." [131] The Supreme Court has interpreted that section 1 of the Fourteenth Amendment shall apply to all individuals within the US, regardless of citizenship in *Plyler v. Doe*.

The Equal Protection Clause of the Fourteenth Amendment applies to undocumented immigrants, prohibiting discriminatory state actions, as demonstrated in the United States Supreme Court Case *Plyler v. Doe* . In this case the state of Texas enacted a law that denied public education to children who were not legally admitted into the United States. The Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment, stating that undocumented immigrant children could not be denied access to public education because the law unfairly discriminated against them based on their immigration status. The Court found the state's interest in denying these children an education was not sufficient to justify the harm caused by denying this right.[132] By relying on this analysis, it becomes clear that the government cannot justify policies that negatively affect undocumented immigrants without reason, and the Equal Protection Clause ensures that all persons, regardless of immigration status, are entitled equal protection under the law.

The Supreme Court Case *Zadvydas v. Davis* determined that the Fifth Amendment is applicable to undocumented immigrants. The case involved a challenge to detention of an immigrant whose deportation has been delayed indefinitely. The Supreme Court held that the Fifth Amendment's Due Process Clause applies to all persons within US jurisdiction, including noncitizens, and that immigrants cannot be deprived of liberty without due process. Even though they are noncitizens, the US government is required to provide procedural safeguards before removing individuals from the county or separating families.[133]

The Supreme Court Cases *Plyler v. Doe* and *Zadvydas v. Davis* both highlight the application of constitutional protections to undocumented immigrants, demonstrating the Supreme Court's commitment

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[124] *Flores v. Reno*, 507 U.S. 292 (1993).
[125] U.S. Senate, *About the Senate and the Constitution*, last modified 2025.
[126] National Archives, *The Bill of Rights: What Does it Say?,* last modified December 15, 2021.
[127] Donald J. Trump, *supra* note at 21.
[128] "Due process," *Encyclopaedia Briticanna*, last modified March 2025.
[129] U.S. Senate, *Landmark Legislation: The Fourteenth Amendment*, last modified January 2025.
[130] Gitlow v. New York, 268 U.S. 652 (1925).
[131] National Archives, 14th Amendment to the U.S. Constitution: Civil Rights, 1868.
[132] *Plyler v. Doe*, 457 U.S. 202 (1982).
[133] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

to ensuring that all individuals within the United States, regardless of immigration status, are guaranteed specific constitutional rights. The *Plyler v. Doe* decision established that state laws cannot arbitrarily discriminate against undocumented immigrants. Similarly, *Zadvydas v. Davis* reinforced the principle that the government cannot detain individuals indefinitely without due process, which emphasizes the importance of procedural fairness including those without legal status in the United States. Together, these rulings underscore the broader constitutional protections that all persons, regardless of citizenship, are entitled to protections in the Bill of Rights and the Fourteenth Amendment, ensuring that the rights of due process and equal protection are not denied to any individual in the US.

A. The Fifth Amendment

The Fifth Amendment's Due Process Clause protects individuals from being deprived of "life, liberty, or property, without due process of law."[134] Liberty encompasses the fundamental right to maintain family relationships, a right the Supreme Court has recognized in cases addressing parental authority and government inference. The protection applies to all persons within the United States, regardless of immigration status. As federal immigration authorities have engaged in practices that involved family separation at the US-Mexico border without prior legal justification or individual review, these actions raise significant constitutional concerns. The following cases illustrate how such practices may violate the Fifth Amendment's due process protections.

In *Reno v. Flores* (1993), Justice Atonin Scalia wrote, "it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[135] This interpretation establishes that undocumented immigrants are entitled to its protections under the Fifth Amendment. Furthermore, in the Flores Settlement, the Immigration and Naturalization Service (INS) promulgated a rule governing the detention and release of alien minors. The rule authorized adult relatives to obtain custody of the children who were separated by families at the US-Mexico border.[136] By relying on this analysis, it is clear that undocumented immigrants facing family separation at the US-Mexico border should be entitled to procedural protections and children are entitled to a guardian. Government decisions to separate parents from their children must be subject to clear legal grounds and the individuals affected should have the right to challenge such decisions in a fair hearing. The Fifth Amendment's due process protections state that family separations cannot be carried out arbitrarily. Thus, any policy that removes children from their parents must be grounded in individualized assessments, ensuring that parents have the chance to contest their fitness before such drastic measures are taken.

The Due Process Clause of the Fifth Amendment protects fundamental rights from arbitrary government interference, a principle known as due process. Among these rights is the recognition that parents have a fundamental liberty interest in the care, custody, and control of their children. In *Troxel v. Granville,* the Supreme Court emphasized that parental rights cannot be infringed upon without compelling government interest. The Court held that, although third parties may petition for visitation rights, such petitions cannot override a fit parent's decision without sufficient justification, such as the harm of the child. This framework highlights the importance of the parent-child relationship.[137] The Supreme court case *Troxel v. Granville* established that the Fifth Amendment's Due Process Clause, through its protection of individual liberties, includes the right to family integrity, recognizing parents have a fundamental right to raise their children without undue interference from the government. [138] These rights include the right to raise one's children as a parent.[139] By relying on this analysis, family separation at the US-Mexico border, which interferes with the parent-child relationship, specifically without individualized assessments, violates the constitutional protections guaranteed by the Fifth Amendment.

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[134]*Legal Information Institute*, *supra* note at 24.

[135] Gretchen Frazee, "What Constitutional Rights Do Undocumented Immigrants Have?", *PBS NewsHour*, June 25.

[136]Congressional Research Service, "The Flores Settlement and Its Impact on Family Detention," *CRS Report R45297*, September 17, 2018.

[137] *Troxel v. Granville*, 530 U.S. 57 (2000).

[138] *Id.*

[139] Legal Institute, Substantive Due Process, Wex, accessed April 16, 2025.

In *Zadvydas v. Davis*, the Supreme Court held that the indefinite detention of undocumented citizens without a clear end point raised serious constitutional concerns under the Fifth Amendment's Due Process Clause. The Court emphasized that detention raises constitutional concerns under the Fifth Amendment, which guarantees that no person shall be deprived of liberty without due process of law. This decision establishes a foundational principle: noncitizens are entitled to constitutional protections once they are within US territory.[140] Applying this principle to the context of family separation, the federal government's policy of separating families at the US-Mexico border specifically without notice, hearings, or individualized assessments, constitutes a violation of the liberty interest in familial association. Such actions, carried out without due process violate the same constitutional guarantees recognized in *Zadvydas v Davis*. While the context differs, both situations involve the government's infringement on the liberty of noncitizens without providing legal protections.

In the precedents set by the Supreme Court, it is clear that family separation at the US-Mexico border constitutes a violation of the Fifth Amendment's Due Process Clause. As established in *Troxel v. Granville*, the Court affirmed that parental rights are fundamental and protected in the Constitution, including the right to family integrity, which can only be infringed upon in cases where there is compelling evidence of the harm of the child. This principle is emphasized in *Reno v. Flores*, which held that undocumented immigrants are entitled to due process in deportation proceedings. Furthermore, in *Zadvydas v. Davis*, it was established that undocumented citizens are entitled to due process protections, affirming that the federal government cannot deprive individuals of their liberty without procedures. By relying on this analysis, it is evident that the policy of family separation, which removes children from their parents without individualized assessments of hearings, violates the Fifth Amendment's guarantee of due process. These cases underscore the need for clear legal grounds, fairness in procedures, and the opportunity to contest actions, ensuring the fundamental right to family integrity is not arbitrarily infringed.

B. The Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment has been interpreted to include certain fundamental rights, including the right of parents to direct the care, custody, and upbringing of their children. This section will examine how this principle has been applied in key court decisions that shape the legal foundations of parental rights under the Constitution.

In the ruling *Stanley v. Illinois*, the Supreme Court held that the state cannot presume parental unfitness simply because a father is unmarried. The Court found that such assumptions, without individualized hearings, violate the Due Process Clause of the Fourteenth Amendment. The ruling emphasized that all parents regardless of status and are entitled to a hearing on their fitness before being deprived of custody from their children.[141] By relying on this analysis, it becomes evidence that the parent-child relationship cannot be lawfully dissolved based on broad judgements. This precedent further weakens the support for federal policies that systematically separated families at the US-Mexico border without individualized assessments. Blanket separations presume parental unfitness without due process, violating constitutional protections.

In *Santosky v. Kramer*, the Supreme Court held that the termination of parental rights requires a heightened standard of proof and procedural protections under the Due Process Clause of the Fourteenth Amendment. This case involved a mother whose parental rights were threatened, but the state did not provide sufficient legal procedures. The Supreme Court emphasized the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.[142] The Court based this ruling on the Fourteenth Amendment, which protects individuals from state actions that deprive them of life, liberty, or property without due process. This principle can be directly implicated in the US government's policy of separating families at the US-Mexico border, without individualized assessments of parental fitness. The federal government recognizes that the parent-child relationship is constitutionally

[140] *Plyler v. Doe*, *supra* note at 38.
[141] *Stanley v. Illinois*, 405 U.S. 645 (1972).
[142] *Id.*

protected and cannot be severed without due process. Applying this precedent, family separation at the US-Mexico border fails to meet requirements of fairness. By relying on this analysis, it becomes clear that any federal policy which removes children from their parents without individualized hearings or an opportunity to contest their separation, violates the constitutional rights of both parents and children under the Fourteenth Amendment.

Additionally, in *Ms. L v. US Immigration and Customs Enforcement*, The US District Court for the Southern District of California held that the plaintiffs plausibly alleged a violation of their substantive due process. This case involved parents and children who had been separated while in federal immigration custody. The Court determined that the government's practice of separating families without the finding of clear parental unfitness implicated the fundamental liberty interest mentioned in the Fourteenth Amendment. Although this decision was grounded in the Fifth Amendment, the court's reasoning reflected the principles of family integrity recognized under the Fourteenth Amendment.[143] By relying on this analysis, it reinforced the constitutional principle for family integrity under the Constitution that must be upheld.

These three landmark cases illustrate the constitutional boundaries that govern the relationship between the state and the family, particularly under the Fourteenth Amendment's Due Process Clause and the Equal Protection Clause. In *Santosky v. Kramer*, the Supreme Court held that the termination of parental rights requires a heightened standard of proof. The Court recognized the fundamental liberty interest parents have in the care and custody of their children, which cannot be overridden without due process. Furthermore, in *Stanley v. Illinois*, the Court found that the state may not presume parental unfitness based solely on a parent's marital status. The decision reaffirmed the necessity of individualized hearings before removing the custody of a child or children from parents. Both of these cases emphasize that the state must proceed on a case-by-case basis when interfering with parental rights. Additionally, in *Ms. L v. US Immigration and Customs Enforcement*, the court's reasoning reinforced the constitutional principle of family integrity and due process under the Fourteenth Amendment. These precedents collectively suggest that family separation practices at the US-Mexico border, when applied without individualized review and adequate projections, fail to uphold the specific constitutional guarantees.

IV) The Immigration and Nationality Act (INA)

The Immigration and Nationality Act (INA) was enacted in 1952. The INA is a comprehensive federal law that established provisions and reorganized the structure of immigration law in the US. It has been amended several times and is enshrined in the US code, a collection of federal laws for the United States. [144] Within the INA, it outlines procedures for the admission of noncitizens, deportation and removal processes, and naturalization requirements within the country. The INA is important because the INA sets the legal foundation for how the US government handles immigration today.

Section 212 (8 U.S.C. 1182) titled *Inadmissible aliens* grants the President authority to suspend the entry of aliens deemed detrimental to US interests.[145] This section has been invoked to justify various immigration policies but it does not authorize or mention family separation as a viable policy. Section 235 (8 U.S.C 1225) titled *Inspection by immigration officers: expedited removal of inadmissible arriving aliens*; *referral for hearing,* addresses the inspection and removal process for individuals arriving at the border. It specifically discusses that an alien who is brought to the United States after being interdicted in international or US waters shall be deemed for purposes of this chapter an applicant for admission.[146] While it allows for expedited removal, it does not require the separation of families. Lastly, Section 101(a)(15) defines categories of noncitizens which include refugees and asylum seekers who are entitled certain protections under the law.

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[143] *Ms. L. v. U.S. Immigration and Customs Enforcement*. 302 F. Supp. 3d 1149. S.D. Cal. 2018.
[144] U.S. Citizenship and Immigration Services, *Immigration and Nationality Act,* last modified May 8, 2019.
[145] 8 U.S.C. § 1182 (2024).
[146] 8 U.S.C. § 1225 (2024).

The Immigration and Nationality Act (INA) of 1952, serves at the cornerstone of US immigration law, outlining procedures for the admission of noncitizens, deportation and removal processes, and naturalization requirements. Notably, the INA does not mandate the separation of families during immigration enforcement. For instance, Section 212 (8 U.S.C 1182), titled Inadmissible Aliens, grants the president authority to suspend the entry of aliens deemed detrimental to US interests but does not prescribe family separation. Similarly, Section 235 (8 USC 1125), titled *Inspection by Immigration officers: Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing*, addresses the inspection and removal process for individuals arriving at the border and allows for expedited removal. Lastly, Section 101 (a) (15) defines categories of noncitizens, including refugees and asylum seekers, who are entitled certain protections under the law, further emphasizing that the family unit is not disrupted by immigration procedures.

Given that the INA does not require family separation, the implementation of such a policy becomes a matter of executive discretion. However, when this discretion results in the separation of families without individualized due process, it implicates constitutional protections. The Supreme Court has long recognized the fundamental right to family integrity under the Due Process Clauses of the Fifth and Fourteenth Amendments. In the Supreme Court case *Moore v. City of East Cleveland*, the Court held that a zoning ordinance prohibiting a grandmother from living with her grandchild violated substantive due process of the Fourteenth Amendment, emphasizing that "freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause."[147] This precedent affirms that policies leading to the separation of families without clear legal justification and due process are unconstitutional. Therefore, the INA's non mention of family separation strengthens the argument that such policies exceed lawful enforcement and violate constitutional rights.

V. Conclusion

The constitutional principles in the Fifth and Fourteenth Amendments establish that the federal government cannot separate families at the US-Mexico border because it violates fundamental rights. As demonstrated in *Troxel V. Granville*, the Due Process Clause of the Fifth Amendment protects the right to family integrity, affirming parental rights cannot be infringed upon without compelling justification. Similarly, in *Zadvydas v. Davis*, the Court affirmed that due process protections extend to all individuals within the US, regardless of immigration status. The government's actions in separating families without individualized hearings or assessment, lack due process required under these constitutional mandates. Under the Fourteenth Amendment, the government must ensure that its actions do not arbitrarily infringe on the rights of individuals in the US. *Santowsky v Kramer* emphasized the need for procedural protections when the state seeks to terminate parental rights. The case *Stanley V. Illinois* affirmed that all parents are entitled to individualized hearings before being deprived of custody from their child or children. The rulings make clear that family separation based on broad policies or assumptions of parental unfitness violate due process.

Furthermore, in *Ms. L v US Immigration and Customs Enforcement*, the court emphasized the constitutional protections for family integrity and due process, highlighting the need for individualized assessment before separating families. The case underscored the constitutional risks of blanket family separation policies. It is clear that the federal immigration practices must be reformed to align with the Constitution, ensuring that policies respect the fundamental rights of people, and do not disproportionately harm specific groups.

First, blanket family separation policies must end. Family separation at the US-Mexico border must first have individualized evidence of parental unfitness or danger to the child. To ensure fairness, the government must mandate individualized hearings before any family separation takes place. These hearings should include adequate notice, access to legal counsel, and the opportunity to contest. Second, to ensure transparency the establishment of independent oversight bodies can be used to monitor enforcement practices and ensure compliance with due process and equal protection under the law. These bodies would

[147] *Moore v. City of East Cleveland,* 431 U.S. 494 (1977).

provide transparency in cases involving vulnerable populations. To prevent further harm, the government should invest in trauma-informed alternatives to detention such as community-based supervision programs and family shelters, which keeps parents and children together during immigration proceedings without compromising US immigration enforcement goals. Third, Congress should take action by codifying protections for family integrity into federal law, explicitly affirming that these rights apply to all individuals, including immigrants. This legislation would prevent future executive outreach and enforce constitutional protections. Finally, immigration enforcement must be evaluated under equal protection standards to ensure that policies do not result in disproportionate harm to immigrant families. Policies that failed to meet strict scrutiny should be deemed unconstitutional and eliminated.

The right to family integrity is a constitutional right protected by the liberty interest. The federal government's failure to respect this right demands both accountability and legislative reform. Upholding the Constitution, the Supreme Law of the Land, requires that all individuals regardless of their immigration status, are afforded the fundamental rights of due process and equal protection under US law.

Flowing Tensions:

The Changing Application of the Winters Doctrine Under Climate Change

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I. Introduction

The deserts of the American Southwest were not the only deserts that called the United States home. Large swaths of the Great Plains, the flatlands of the Pacific Northwest, and the entirety of the Southwest were all once referred to as the "Great American Desert".[148] As the West became increasingly settled, the arid landscape posed a significant problem: the water in its natural form could not sustain the population that wanted to settle there. Thus began the long history of American water projects, aided by the prior appropriation doctrine and a perhaps supercilious air of American exceptionalism. As white settlers flooded the West, the federal government was beginning to establish reservations for Native American tribes in its latest iteration of Federal Indian Policy. The intention of these reservations would come to play a critical role in the establishment of the Winters Doctrine, a cornerstone of tribal and water law in the American West.

The threat of climate change and the increase of droughts in the West has opened a new chapter for the Winters Doctrine, the tribal water law axiom enshrined by *Winters v. United States*. The Winters Doctrine mandates the existence of water rights for tribal nations, though it does not mandate *access* to these rights. The looming scarcity of this precious resource has led to a litany of legal challenges over *Winters* (1908), state rights, beneficial use, and many more keystone precedents of non-riparian water law. This legal critique aims to explore these various challenges, as well as unpack the obligation held by the federal government to tribal nations which ensures access to water. Water law in the West has long been regarded as static, but as the water changes so must the law. The application of the Winters Doctrine must continue to evolve if the federal government is to maintain its trust responsibilities to tribal nations. It is critical that the Winters Doctrine not become a casualty in the coming war between policy and posterity.

II. Background

The first battle over Indigenous water rights arose, perhaps unsurprisingly, from one of the first water projects of the American West. Unlike the plentiful rivers of the East, water law in the western states has long been based in a scarcity and appropriative mindset. The Gold Rush-era doctrine of prior appropriation, originating in the 1850s, allows for chronological claims of beneficial use of available water, granting access to the first party with a tangible claim.[149] The earliest legal challenge to prior appropriation began as a petty dispute between neighboring farmers along Arizona's Granite Creek but was rejected by the state of Arizona on the grounds that historical Indigenous water management in the desert and Latin America indicated the necessity of such a system, as the irrigation infrastructures developed by the Hohokam and Incan peoples implied a longstanding human intervention in water scarcity.[150] Yet, as the West was settled, it was not seen to clearly follow that the same Indigenous peoples who first implemented prior appropriation should be allowed to exercise it.

The 1908 dispute between the Gros Ventre and Assiniboine tribes against nearby settlers over the diversion of Montana's Milk River away from the Fort Belknap Indian Reservation was a routine battle with unprecedented significance. The Milk River, such named for its peculiar tea-like color,[151] came to

[148] Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* (New York: Penguin Books, 1986).

[149] Norman K. Johnson, "The Doctrine of Prior Appropriation and the Changing West" (Staff Report, Western States Water Council, 1987).

[150] *Clough v. Wing*, 2 Ariz. 371, (1888).

[151] Meriweather Lewis, "May the 8th", *Journals of the Lewis and Clark Expedition*, 1805.

redefine the concept of reservation and water allocation in the years to follow. At the time of the dispute, the intended purpose of reservations by the federal government was to encourage Native communities to adopt a Westernized view of industriousness through organized agriculture,[152] which necessitated adequate irrigation. Thus, the diversion of the Milk River in a manner that prevented irrigation of the Fort Belknap Reservation was found to be prejudiced against the concept of reservation itself.[153] The ruling established the legal precedent known as the Winters Doctrine, which has held that by the establishment of a reservation, water flowing through the territory is, likewise to the land, exempt from the laws and appropriation of surrounding states.[154] As long as there is water in the Western United States, there will be prior appropriation– and the Winters Doctrine has long served as an essential addendum to this principle.

The Fort Laramie treaties that culminated in the formation of the Fort Belknap Indian Reservation did not mention water. Yet, the Court noted that "[t]he lands were arid, and without irrigation, were practically valueless", and accommodated the need regardless of the plain language of the treaty.[155] In a 2023 legal battle between the State of Arizona and the Navajo Nation over federal claims to the Colorado River, it was found that while the Treaty of Bosque Redondo, which established the Navajo reservation, similarly neglected to mention water, it also neglected to mention federal obligation.[156] There was no mechanism outlined by which the federal government was to go about securing water for the Navajo Nation, and thus the existence of a right did not mean the Nation was entitled to it being exercised.[157] This ruling would forever raise the stakes of tribal water law in the American West. The 27,000 square miles of the Navajo Nation comprises a land claim larger than 10 U.S. states,[158] yet one in three households lack access to running water.[159] The desert will only grow more arid, and water in the American West will become increasingly scarce as the climate changes and consumption grows.[160] The threat of climate change, exacerbated by the lack of federal climate policy, has made access to water an existential threat to tribal nations across the American West, a threat to which the legal recourse is as of yet unwritten.

III. A Horizon of Adaptation

Indigenous tribes across the Western United States have relied on water for both spirit and sustenance for as long as they have lived upon the land. The rights to use, fish, and gather from reserved waters is a crucial aspect of Federal Indian Law that has been consistently reaffirmed. While the Winters Doctrine established the right to water itself, later rulings cemented the right to engage in cultural practices involving water and marine life.[161] Yet it is now these practices, pure access to water, and even economic prosperity that have become subject to the threat of climate change.[162] With the newfound loophole within

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[152] The U.S. National Archives and Records Administration, "Milestone Documents: Dawes Act (1887)", February 8, https://www.archives.gov/milestone-documents/dawes-act.

[153] *Winters v. United States*, 207 U.S. 564,(1908).

[154] *Id.*

[155] *Id.*

[156] *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

[157] Renee Shapiro, "Water Rights and Tribal Law: Arizona et al v. Navajo Nation et al", (Emerging Topics Blog, Lewis and Clark Law School, 2023).

[158] Robert Glennon, "The Navajo Nation has lacked access to water for decades. The Supreme Court just made it worse", Fast Company, June 24, 2023, https://www.fastcompany.com/90914251/navajo-nation-water-access-water-rights-supreme-court.

[159] Shapiro, *supra* note 10.

[160] "As the climate dries, American west faces problematic future, experts warn," United Nations Environment Programme, May 27, 2024, https://www.unep.org/news-and-stories/story/climate-dries-american-west-faces-problematic-future-experts-warn.

[161] *United States v. Adair*, 723 F.2d 1394, (1984).

[162] "Chapter 15: Tribes and Indigenous Peoples," Fourth National Climate Assessment, accessed January 10, 2025, https://nca2018.globalchange.gov/chapter/15/.

the Winters Doctrine implying that the exercise of water rights will become pursuant to the language of obligation that may or may not exist within the verbiage of centuries-old treaties, it is evident that an era of adaptation must arise to combat these threats.

A. Obligation to Tradition

While climate change is a global concern, its impacts are felt most profoundly by Indigenous communities.[163] The various traditional practices of the tribal nations of the American West have been shaped by the lands they have called home for millennia. Traditional Ecological Knowledge, or TEK, is a generationally-accumulated teaching about the interactions of humans with the rest of the natural world that have informed Indigenous ways of living in both the past and present.[164] TEK has informed the economic prosperity of tribes in the Western U.S., such as through the integration of traditional harvesting methods into the fishery industry.[165] The rights to water and fish may initially seem separate, if not marginally aligned topics, but the legal basis of reservation underpins them both. While the Winters Doctrine underscores water as an aspect of survivability for reservations, the landmark *U.S v. Washington State* decision– often referred to as the Boldt decision– does the same for fish, which in the Pacific Northwest were nearly as disputed as water was in the American Southwest.[166] Under this ruling, tribes were granted access to traditional fishing grounds, including off-reservation lands, and the co-management of fisheries with the federal Government was established, increasing federal responsibility to the health of off-reservation resources.[167] It is this legal precedent that will most enable the survival of traditional practices in the face of climate change, as it illuminates the obligation that Winters lacked.

The United States Department of the Interior has a trust responsibility to protect and conserve identified resources for all federally-recognized tribal nations.[168] Fish is considered one of those identified resources.[169] The Pacific Northwest is a region that, while abundant in rivers, is still subject to prior appropriation doctrines set over 170 years ago, making it an appropriate lens from which to analyze both water and resource rights.[170] As a consequence of the Winters Doctrine and established trust responsibilities, it becomes the obligation of the federal government to coordinate the protection of the waters in which identified fish reside through consultation with local tribes. This jointly managed protection of a critical right provides a framework for the continued implementation of the Winters Doctrine in light of the Arizona v. Navajo Nation decision. Water is a recognized right, regardless of treaty language, yet it is treaty language that was left to determine access to this right. The precedent of the Boldt decision requires the federal government to work with tribes to ensure access to recognized resource rights, even if the point of access is off-reservation. As the threat of climate change and water scarcity becomes more pressing due to erratic precipitation and increased drought,[171] it is this cooperation that will provide for the complete fulfillment of water rights pursuant to the Winters Doctrine.

B. The Frontier of Groundwater

In the effort to adapt to growing water scarcity, it is not only the trust obligations of the federal government that will be challenged. The search for new water sources in the West will present legal

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[163] Ibid.

[164] Ibid

[165] Ibid.

[166] "Introduction to United States v. Washington," Gallagher Law Library, *University of Washington Law School*, November 5, 2024, https://lib.law.uw.edu/indian-tribal/boldt.

[167] *United States v. Washington*, 520 F.2d 676, (1975).

[168] "The Service's Native American Policy," U.S. Fish and Wildlife Service, *Native American Liason*, 510 FW 1, January 20, 2016, https://www.fws.gov/policy-library/510fw1.

[169] Hannibal Bolton, testimony before the Senate Committee on Indian Affairs, *Impacts on Tribal Fish and Wildlife Management Programs in the Pacific Northwest*, U.S. Fish and Wildlife Service, June 4, 2003.

[170] Johnson, *supra* note 1.

[171] United Nations, "Water – at the center of the climate crisis", *Climate Action*, Accessed April 16, 2025, https://www.un.org/en/climatechange/science/climate-issues/water#:~:text=Climate%20change%20is%20exacerbating%20both,and%20the%20entire%20water%20cycle.

challenges to the prior appropriation doctrine that must be addressed to prevent prejudice against tribal nations, as the promise of a permanent homeland is not forsaken in the face of uncertainty. The ruling in *Winters v. U.S.* only provides the right to "waters of a river flowing through a territory", neglecting the potential right to groundwater sources (i.e. aquifers) that may become crucial sources of water in the near future.[172] This discrepancy was resolved by the ruling in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, which extended *Winters* protections to groundwater.[173] However, there remains significant potential for a tightening of these rights if water scarcity challenges state interests.[174]

In the Colorado River Basin, one of the most highly disputed water regions in the United States, groundwater potential has risen to prominence– and tension.[175] A warming climate has depleted spring rains, resulting in over-absorption of snowmelt by the land, and subsequently less for human use.[176] This loss has been acutely felt by the seven states– Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada, and California– which rely on the waters of the river, but even the longstanding agreement to share the bounty of the Colorado River has been undermined by the presence of groundwater. Unlike the river, there is no collaborative compact to govern the use of groundwater, which heightens the risk of state-to-state conflict over water use that may conflict with the supply reserved for tribal nations.[177] Given that it was a presumed threat to Arizona's state water supply that led to the limited application of *Winters*, it is imperative that tribal nations take action to cement their claims to this crucial resource.[178]

The use of groundwater, while currently protected, could be further enshrined by tribes through the use of the prior appropriation doctrine. The principle of "first use" deriving from the prior appropriation doctrine effectively guarantees a legal claim to water in the West, and thus even minor extraction of groundwater for tribal use would ensure its future availability, at least in a legal sense.[179] Beyond this action, numerous tribes have begun the process of federal water settlements, which would, once litigated, have the potential to secure claims to water regardless of *Winters* provisions.[180] However, these measures require either infrastructure or time, neither of which were intended barriers under the Winters Doctrine. The right of use to groundwater will become essential to the notion of reservation established under the Winters Doctrine. It is the trust responsibility of the federal government to actively work with tribal nations to ensure the respect of this right, lest the right to water become a battle of assets, forsaking the purpose and responsibility of reservation altogether.

IV. Inevitable Disputes

Due to drought, water scarcity will increase with every degree of climate warming. This is certain. Less certain is the answer to a deeply troubling question: when will the West run out of water, and what

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[172] Winters v. United States, *supra* note 6.

[173] Catherine Schluter, "Indian Reserved Rights to Groundwater: Victory for Tribes, for Now," *The Georgetown Environmental Law Review,* no. 32, (2020).

[174] *Id*.

[175] Alvin Powell, "Lessons emerge as 7 thirsty states war over Colorado River water", *The Harvard Gazette*, February 14, 2023, https://news.harvard.edu/gazette/story/2023/02/colorado-river-crisis-explained/.

[176] "Colorado River's Snowpack Decline Due to Lack of Spring Precipitation," *Environmental System Science Program*, U.S. Department of Energy, August 16, 2024, https://ess.science.energy.gov/highlight/colorado-rivers-snowpack-decline-due-to-lack-of-spring-precipitation/#:~:text=The%20Science,cause%20is%20less%20spring%20rain.

[177] Doug Kenney, interview with the Public Policy Institute of California, *Groundwater and the Colorado River*, Public Policy Institute of California, October 1, 2018, https://www.ppic.org/blog/groundwater-and-the-colorado-river/#:~:text=DK:%20While%20it's%20hard%20to,left% 20out%20of%20the%20discussion.

[178] Morgan Sjogren, "Supreme Court Rules Against Navajo Nation in Colorado River Case," Sierra: The Magazine of the Sierra Club, The Sierra Club, June 23, 3023, https://www.sierraclub.org/sierra/supreme-court-rules-against-navajo-nation-colorado-river-case.

[179] Susan D. Brienza, "Wet Water v. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects," *Stanford Environmental Law Journal*, (1992); Johnson *supra* note 1.

[180] Shapiro, *supra* note 10; Schluter, *supra* note 26.

happens if states descend into the chaos of water wars? Legal battles between (or within) states concerning water access are on the rise.[181] The lengthiest and most prominent of such is the ongoing *Texas v. New Mexico* lawsuit. This case, which hinges on the allocation of surface and groundwater under the 1938 Rio Grande Compact, raises two critical concerns: antiquated documents may no longer suffice as the law of the land, and the federal government will have increased oversight into the management of such disputes.[182] In order to maintain tribal water rights under a limited Winters Doctrine, it must be acknowledged that even foundational cases like *Winters* itself may fall under question. The federal government has an increased power to mediate water disputes between states, as well as a continued obligation to Indigenous water rights. An increase in federal jurisdictional power, such as that displayed in the settled portions of *Texas v. New Mexico*, allows the federal government to act as a direct arbitrator of water allocation.[183] Tribal water claims will be subsequently strengthened by this lateral positioning, as federal oversight of both tribal and state claims eliminates the resources and infrastructure gap that currently privileges state interests.[184] The inevitability of water disputes provides the prime basis for the federal government to act without prejudice to preserve the water rights of tribal and non-tribal entities alike.

A. Non-Tribal Demand

The prior appropriation doctrine, to avoid becoming a puerile, first-come system, contains an economic provision known as 'beneficial use'. While prior appropriation does grant water rights to the first user of the water source, they are only entitled to as much water as is economically necessary to achieve their means.[185] This ensures that all parties with a claim to the water are able to use it to their fullest needs, and typically prevents any party from unduly prejudicing the claim of another. Critically, the beneficial use provision preferences the act of appropriating the water for a reasonable use over land and property rights.[186] Having a claim to land does not imply a claim to its water as long as another party can prove appropriation for a beneficial use. The Winters Doctrine, while no longer beholden to solely surface water, relies on the existence of a reservation to guarantee water rights.[187] Federally recognized tribal nations without an established reservation lack a claim to water rights under *Winters*, and nations with reservations now face a federal government that has ruled it will take no affirmative steps to ensure water access for any tribe lacking enumeration of such obligation in its treaty. This precarious position becomes more complicated when state and corporate interests are amongst those vying for access to the ever-depleting water of the West, as those entities often have more resources and more lenient legal standards for water claims.[188]

Increasing water scarcity is not a scenario for which there lacks legal framework. The West has long been prepared for extended periods of drought, and the beneficial use provision enables parties to continue full use of their claimed water without the threat of additional claims or the consideration of others' needs.[189] Among the states in the Colorado River Compact, this means that they may continue to collect their full amount of water, even if it is to the detriment of others or the environment, a provision which led

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[181] Abrahm Lustgarten, "As Colorado River Dries, the U.S. Teeters on the Brink of Larger Water Crisis," ProPublica, August 25, 2022, https://www.propublica.org/article/colorado-river-water-shortage-jay-famiglietti.

[182] Martha Pskowski, "Texas sued New Mexico over Rio Grande water. Now the states are fighting the federal government," *Inside Climate News*, The Texas Tribune, November 4, 2024, https://www.texastribune.org/2024/11/04/texas-new-mexico-water-dispute-rio-grande-supreme-court/#:~:text=At%20issue%20is%20the%20water,that%20pump%20water%20from%20aquifers.

[183] *Texas v. New Mexico and Colorado*, 602 U.S. ___, (2024).

[184] Leslie Sanchez, Bryan Leonard, & Eric Edwards, "Paper Water, Wet Water, and the Recognition of Indigenous Property Rights," *Journal of the Association of Environmental and Resource Economists,* April 2023, 10.1086/725400.

[185] Johnson, *supra* note 1; "Beneficial Use," Cornell Law School, Legal Information Institute, June 2021, https://www.law.cornell.edu/wex/beneficial_use.

[186] *Sacramento Grazing Association Inc. v. United States*, No. 04-786 Fed. Cl., (2021).

[187] Schluter, *supra* note 26 at pp. 730; Winters v. United States, *supra* note 6.

[188] Sanchez, Leonard, & Edwards, *supra* note 37.

[189] *Westlands Water District v. United States*, 37 F.3d 1092, (2003).

to the raising of *Arizona v. Navajo Nation*.[190] Indeed, improvements in infrastructure to maximize one party's water intake, even to the detriment of another, is fully allowable as long as the water is verifiably dedicated to beneficial use.[191] The prevailing scarcity mindset of the American West has created the prime conditions for highly contested water claims, and the immense economic and municipal responsibilities of states gives them significant sway under the beneficial use provision.

While tribes with established reservations are still guaranteed rights to water, these rights are classified more clearly as 'paper' rights, rather than 'wet' rights, complicating the actual appropriation of limited water.[192] Paper rights, or rights that are guaranteed by law or policy, are generally regarded all less enforceable than wet rights under the prior appropriation doctrine, as wet rights concern current use and therefore constitute a "first use" claim.[193] Having a clear mechanism to appropriate and distribute the water, as well as a stake in water allocation compacts, would provide individual tribal nations with an increased ability to access their rightful water without relying on any action from the federal government. However, the fact that such a reserved right exists should not be neglected, and tribal nations do not have equivalent legal footing with states in these negotiations due to their sovereign status and presence on federal trust lands. Thus, there must exist a method of acquiring water for tribal nations, considering the provisions of the federal government but without any direct action therefrom.

B. The Question of Quantification

The Winters Doctrine, under prior appropriation, typically establishes the most senior water claim in a particular region for the reservations present there, as the treaties signed with the federal government often predate cities and states, and treaty-related federal acts as outlined in the Supremacy Clause take priority over conflicting state laws.[194] The potency of this claim sparked significant anxiety amongst states fearing that their water use would be limited by the expanding needs of tribal nations, and the Supreme Court subsequently intervened to establish a fixed limit of water to be allocated to tribal nations, not to be relitigated.[195] This fixed limit proved immediately controversial, as the Court ruled that this fixed allocation be a settled matter even in cases of federal neglect or error.[196] As previously established, both states and tribes have claim to water, but the only obligation of the federal government is to aid in conserving marine ecosystems for traditional use. This obligation underscores the critical aspect unforeseen by the decision in *Arizona v. California* : the potential for climate change to radically change marine habitats, forcing the federal government to conserve more for ecological purposes and limiting the resources to consuming parties.[197] Fixed limits of water intake for tribal nations are inherently unsustainable due to changes in consumption type and general availability of water. As climate change increases water scarcity through drought, the issue of water quantification must be radically rethought. Though the *Arizona* decision effectively ended modification of water allotments, the precedent under which modifications originally existed would provide increased security for both tribal nations and states. Currently, in attempting to make states more stable beneficiaries of water, climate change has enacted a higher burden of uncertainty onto tribal nations.[198] Given the doctrine of prior appropriation, this should not be the case; no junior claimant should hold more control over the water than that of the senior. Formerly, modification of water claims was based on excess and conducted by non-reservation entities, allowing for the continued revision of water

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[190] *Arizona v. Navajo Nation*, *supra* note 9.

[191] *Montana v. Wyoming and North Dakota*, 563 U.S. 368, (2011).

[192] Brienza, *supra* note 32.

[193] *Id.*; Sanchez, Leonard, & Edwards, *supra* note 37.

[194] U.S. Const. art. 6, § 2, cl. 1.

[195] *Arizona v. California*, 373 U.S. 546,(1963).

[196] *Id.,* ; *Nevada v. United States*, 463 U.S. 110, (1983).

[197] Dylan R. Hedden-Nicely & Lucius C. Caldwell, "Indigenous Rights and Climate Change: The Influence of Climate Change on the Quantification of Reserved Instream Water Rights for American Indian Tribes," Utah Law Review, vol. 2020 no. 3, 2020.

[198] *Id.*

allocation to both tribal and non-tribal consumers.[199] This appeal of the *Winters* ruling provided that whatever water was diverted in excess of reasonable beneficial use would be reallocated, and there would be no fixed quantity of water beyond the bare necessity of use.[200] Though this ruling initially provided more security to tribes, states were provided the surety that water claims would not be abused to their disadvantage. While a system of excess would not be sustainable under drought-like conditions likely to be exacerbated by climate change, the model of continuous reevaluation provides a legal basis for a more equitable distribution of water.

Introducing modification of water allocation would introduce a level of uncertainty for non-tribal entities, but that uncertainty is justified as it would then be equally shared. In order to uphold the Winters Doctrine and respect prior appropriation, a continuous modification of water claims, based not on past data but future projections, must be adopted.[201] This notion is not without precedent: the Flathead Reservation Water Management Board is a joint water compact with representatives from both the state of Montana and the Confederated Salish and Kootenai Tribes Tribal Council, as well as an independent representative, organized for the purpose of continuously evaluating water claims from tribal and non-tribal claimants alike.[202] If claims to water are to be quantified, it is imperative that this quantification reflect changing circumstances so as to avoid unlawful prejudice against either states or tribal nations. A further adoption of joint compacts for all established reservations lacking specific water-related treaty obligations with the federal government would be the most equitable near-term solution for addressing the quantification of water rights under the Winters Doctrine and prior appropriation.

V. Conclusion

The arid West will not see itself with bountiful water anytime soon. The preservation of water rights for tribal nations under the Winters Doctrine is an essential trust obligation of the federal government, and a senior claim to water secures the Winters Doctrine under prior appropriation. The threat of climate change will continue to have an impact on the West's water supply, and without legal reform, this burden will be borne chiefly by tribal nations. Reservations in the West use less water and expel less carbon than the states that border their territories, yet the brunt of these crises threatens tribal nations with unbalanced uncertainty. It is time to use existing legal frameworks to ensure the continued vitality of water rights in the face of this threat.

While the *Navajo Nation* decision relieved the federal government of any expectation of action to secure water rights for tribal reservations, the obligation to preserve marine ecosystems for traditional purposes established under the Boldt decision and *Adair* provide justification for federal oversight of waterway health. Adjusting water allocation rights between states and tribal nations so as to preserve a base level of ecological health would fall under federal trust responsibilities, illuminating the need for adaptation under climate change. Access to traditional practices involving marine ecosystems is a critical aspect of Federal Indian Law that can become concurrent to *Winters*-type disputes in times of scarcity, emboldening the federal government to take action in the face of climate change.

The use of groundwater will become more prevalent as the American West faces increased droughts, and the accommodation of this resource into the Winters Doctrine has provided an avenue for tribal nations to maintain a claim to this water. However, the complexities of prior appropriation regarding the elevation of 'wet' rights makes it evident that in order for tribal claims to prevail over doubt, use of groundwater must begin. Under the Winters Doctrine, tribal nations do not relinquish their right to weather

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[199] *Conrad Inv. Co. v. United States*, 161 F. 829, (1908).

[200] *Id.*

[201] *Id.*

[202] "About the Compact," Flathead Reservation Water Management Board, accessed January 16, 2025, https://www.frwmb.gov/about/; "Water Rights Compact Entered Into By The Confederated Salish And Kootenai Tribes Of The Flathead Reservation, Montana, The State Of Montana, And The United States Ratified," Flathead Reservation Water Management Board, 85-20-1901, 2021.

through non-use, but the potential for conflict with states if any interstate compact were to be established provides compelling encouragement for tribal nations to begin developing infrastructure to access this resource. The increased regulatory power of the federal government offered by the *Texas* decision provides a crucial safeguard against prejudice of tribal rights, but the likely conflict offered by this new frontier of water should not be understated.

The American West is home to a myriad of overlapping water claims, and the threat of climate-induced droughts make collaborative efforts to govern water usage an appealing solution. Descending into the chaos of water wars would be a lengthy legal process unlikely to offer ideal benefits to any party, and thus the establishment of water compacts arises as the most politically beneficial system. The necessity of cooperation amongst all water claimants is essential to restoring the balance of risk between states and tribal nations. Re-opening water allotments established under the pre-climate crisis *Arizona* decision would create a more equitable disbursement of water stress across the Western United States. There may not be more water in the near future, but what water exists can certainly be managed more fairly and efficiently in accordance with federal statutes.

By re-examining the nature of federal obligation, expanding water claims under prior appropriation, and increasing collaborative oversight of water resources by removing antiquated ideas of quantification, the survival of *Winters* can be guaranteed. The United States cannot in good conscience allow this legal precedent to become a casualty of changing times. The concept of reservation was a promise made by the federal government to tribal nations– their sovereign partners. In the name of legality, diplomacy, and decency, the time has come to look beyond the narrowing of the *Navajo Nation* decision and commit to the obligations the federal government still has. The water troubles of the West are not disappearing any time soon, but neither should the legal precedent that has been the bedrock of this region for over a century.

Kaul v. Urmanski:

The Future of Women's Health in Wisconsin

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I. Introduction: The National Context of Maternal Health

A. Historical Legal Protection of Reproductive Rights

For nearly fifty years, a constitutional right to abortion was protected under the landmark decision *Roe v. Wade.* In this case, the United States Supreme Court recognized that the penumbral right to privacy implied under the Constitution's Fourteenth Amendment extended to a woman's decision to terminate a pregnancy.[203] This decision descended from *Griswold v. Connecticut*, which first established the existence of a constitutional right to privacy and held that it provided married couples the freedom to use contraception.[204] The Court later extended privacy rights to unmarried individuals in *Eisenstadt v. Baird* and, ultimately, it was the Court's recognition of a robust right to privacy which emboldened it to federally protect abortion rights through *Roe*.[205] *Planned Parenthood v. Casey* would later modify *Roe*'s framework by replacing the trimester approach with the undue burden standard; it affirmed the central holding that pre-viability abortion was constitutionally protected.[206] However, this half-century-old precedent was abruptly disregarded in June 2022 when the Court, in *Dobbs v. Jackson Women's Health Organization*, declared that the Constitution provides no right to abortion, returning regulation entirely to the states.[207] This creates a critical juncture for Wisconsin, where the interpretation of an 1849 statute in *Kaul v. Urmanski* will determine whether the state honors international human rights obligations and prevents a public health crisis by recognizing the law as a feticide statute rather than a comprehensive abortion ban.

B. Maternal Health Outcomes and Abortion Access

The stark reality of restricted abortion access is written in maternal mortality statistics across the United States. States that have enacted strict abortion bans following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* have since seen women dying at dramatically higher rates than comparable states with in-tact protections of reproductive healthcare access. The Mississippi Delta region—encompassing Arkansas, Louisiana, Mississippi, and Tennessee—stands as a grim testament to this disparity, with these states showing the nation's highest maternal death rates following their implementation of near-total abortion bans. In contrast, states like Vermont, California, and Connecticut, which have strong protections for reproductive healthcare, report the lowest maternal mortality rates in the country.[208] Research projects that a nationwide abortion ban would increase maternal deaths by 24% overall, with an even more devastating 39% increase among Black women, highlighting the intersectional nature of this healthcare crisis.[209]

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[203] Center for Reproductive Rights, "Roe v. Wade," *Center for Reproductive Rights*, https://reproductiverights.org/roe-v-wade/.
[204] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[205] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[206] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[207] Dobbs v. Jackson Women's Health Organization, 597 U.S.__(2022).
[208] Giuliana Grossi, "New Report Shows Worsening Health Outcomes for Women in States With Abortion Bans," *AJMC*, July 18 2024, https://www.ajmc.com/view/new-report-shows-worsening-health-outcomes-for-women-in-states-with-abortion-bans.
[209] Elyssa Spitzer, Tracy Weitz, Maggie Jo Buchanan, "Abortion Bans Will Result in More Women Dying," *CAP*, November 2 2022, https://www.americanprogress.org/article/abortion-bans-will-result-in-more-women-dying/.

In *Kaul v. Urmanski*, Wisconsin's 1849 abortion statute must be interpreted as a feticide law, prohibiting non-consensual pregnancy termination, rather than a blanket abortion ban. This interpretation would protect women's health by preserving access to necessary reproductive healthcare, prevent a public health crisis similar to those in states with strict abortion bans, and align with both contemporary medical standards and international human rights obligations.

C. The Persistence of Abortion Despite Legal Status

These outrageous statistics represent the impossible choices women have to make during desperate circumstances. When abortion access is restricted, women do not stop seeking abortions; they are merely forced to entertain— and often, ultimately pursue— dangerous alternatives. Medical research published in the Public Medical Center demonstrates that restrictive abortion policies drive increases in unsafe abortions as women resort to covert methods to terminate pregnancies. The Public Medical Center found that abortion is widely considered a low-risk procedure, with abortion-related deaths occurring most frequently in the context of unsafe abortion practices. Such unsafe procedures– including those performed by unskilled providers or in unsanitary environments– account for approximately 8% of maternal deaths globally, making them a top direct contributor to maternal mortality alongside hemorrhage, hypertension, and sepsis.[210] The consequences of restrictions are measurable: a comprehensive study of 162 countries found that maternal mortality rates are lower in countries with more flexible abortion access laws, suggesting that changes in abortion policies may have grievous implications for maternal deaths. Perhaps most telling is a finding that most abortions occurring in countries with restrictive abortion policies are not considered safe, and directly contribute significantly to maternal morbidity and mortality. Even seemingly minor restrictions can have severe consequences, as demonstrated in 2011, when the state of Ohio implemented additional requirements for medical abortions, which made it more difficult for women to undergo the procedure. This included increased costs and restricted timing and location of services, resulting in an increase in women requiring additional medical interventions.[211] These statistics underscore the reality that restrictions on abortion do not reduce the need for abortion; they merely increase the risks women must take. It's clear that, when faced with limited options, women will find ways to make difficult decisions—often with dangerous consequences that could otherwise be avoided with access to safe, regulated healthcare.

II. Background: Wisconsin's Legal Crossroads

A. The 1849 Abortion Law

As the Wisconsin Supreme Court considers *Kaul v. Urmanski,* these nationwide trends demand attention. The case, which challenges the state's 1849 abortion law, represents a critical junction for healthcare access that will impact the health and lives of Wisconsin residents for generations to come. At issue is Wisconsin Statute 940.04, which states that any person "who intentionally destroys the life of an unborn child" could face felony charges.[212] Since the *Dobbs* decision, Wisconsin prosecutors have disagreed sharply over whether this 175-year-old statute prohibits all abortions or only those performed without the pregnant person's consent.[213]

B. Attorney General Kaul's Interpretation of the 1849 Abortion Law

Wisconsin Attorney General Josh Kaul argues the 1849 law should be interpreted as a feticide statute—prohibiting only non-consensual termination of pregnancy—rather than a broad abortion ban,

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[210] PLOS Medicine Editors, "Why restricting access to abortion damages women's health," *PLOS Medicine*, 19(7), (July 26, 2022), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1004075.

[211] *Id.*

[212] *Id.*

[213] Todd Richmond, "Wisconsin Supreme Court grapples with whether state's 175-year-old abortion ban is valid," *AP*, November 11 2024, https://apnews.com/article/wisconsin-supreme-court-abortion-lawsuit-arguments-09ef69db3e0ef6117b3cf059f4a01a26.

offering Wisconsin an opportunity to avoid the public health crisis unfolding in more restrictive states.[214] Kaul bases this interpretation on several key factors: the statute's placement within the criminal code alongside other assault provisions and its historical application exclusively to non-consensual abortion cases. Furthermore, Kaul asserted that his legal position derives from Wisconsin's constitutional provisions safeguarding liberty and equal protection, as well as established precedents that recognize and defend an individual's right to bodily autonomy.[215]

C. District Attorney Urmanski's Interpretation of the 1849 Abortion Law

Sheboygan County District Attorney Joel Urmanski and his attorneys argue that the "plain meaning [of the law] prohibits consensual abortion." They point to the specific language of the statute, which provides: "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." Urmanski's legal team presents three specific textual arguments for why the law should apply to consensual abortions. First, they note that "a doctor who performs an abortion is a person other than the mother of an unborn child," placing physicians squarely within the statute's scope. Second, they emphasize that "'unborn child' is defined in [the statute] as 'a human being from the time of conception until it is born alive,'" establishing protection from the earliest stages of pregnancy. Finally, they argue that "a consensual abortion involves the intentional destruction of the life of the unborn child," meeting the statute's intent requirement.[216] This textualist approach stands in direct opposition to Kaul's more contextual and historical interpretation.

III. Human Rights Implication

The stakes of this interpretation become clearer when examining the human rights implications of forcing pregnancy continuation against medical advice. While U.S. constitutional jurisprudence has shifted away from federal protection of abortion rights, international human rights frameworks provide a robust legal foundation for reproductive autonomy. The Universal Declaration of Human Rights (UDHR), widely recognized as customary international law and thus binding on all states regardless of formal ratification, establishes in Article 3 that "everyone has the right to life, liberty and security of person."[217] The right to security of a person has been interpreted by human rights bodies to encompass bodily autonomy and reproductive self-determination. Similarly, Article 25 recognizes the right to medical care and necessary social services, which numerous UN treaty bodies have interpreted to include access to reproductive healthcare.[218]

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[214] Mary Ziegler, "Wisconsin Justices Appear Hostile to 175-Year-Old Abortion Law," *State Court Report*, November 18 2024, https://statecourtreport.org/our-work/analysis-opinion/wisconsin-justices-appear-hostile-175-year-old-abortion-law#:~:text=The%20state's%20Democratic%20attorney%20general,cannot%20pursue%20charges%20against%20abortion.

[215] Margaret Faust, "Wisconsin AG hints at broader abortion lawsuit if state Supreme Court agrees to hear case," *Wisconsin Public Radio*, March 14 2024, https://www.wpr.org/news/wisconsin-ag-hints-at-broader-abortion-lawsuit-if-state-supreme-court-agrees-to-hear-case.

[216] Jack Kelly, "Wisconsin Supreme Court takes up challenge to 1849 abortion law," *Wisconsin Watch*, November 11 2024, https://wisconsinwatch.org/2024/11/wisconsin-supreme-court-abortion-law-ban-republican-democrat/.

[217] "Universal Declaration of Human Rights," *United Nations*, December 10 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[218] Women and Foreign Policy Program Staff, "Abortion Law: Global Comparisons," *Council on Foreign Relations*, March 7 2024, https://www.cfr.org/article/abortion-law-global-comparisons

A. Legal Obligations Under International Law

The International Covenant on Civil and Political Rights (ICCPR), which the United States has both signed and ratified, prohibits cruel, inhuman, or degrading treatment in Article 7.[219] The UN Human Rights Committee, which monitors implementation of the ICCPR, has explicitly stated in its General Comment No. 36 that restrictions on abortion access can violate this prohibition when they force women to resort to unsafe abortions or to continue pregnancies that pose risks to their physical or mental health.[220] The Committee further notes that states "must provide safe, legal and effective access to abortion" in cases where carrying a pregnancy to term would cause "substantial pain or suffering," including but not limited to pregnancies resulting from rape or incest or involving fatal fetal impairment.[221]

Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognizes women's right to access healthcare on a basis of equality with men.[222] While the United States has signed but not ratified CEDAW, its provisions are increasingly recognized as reflective of customary international law.[223] The CEDAW Committee has consistently held that denying women reproductive health services constitutes discrimination and violates their right to health care. In its General Recommendation No. 24, the Committee writes that "access to health care, including reproductive health, is a basic right under the Convention on the Elimination of All Forms of Discrimination against Women." The Recommendation continues, specifically noting that "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."[224]

B. Application to Wisconsin's Abortion Restrictions

These international human rights standards gain particular relevance in Wisconsin, where the 1849 law, if interpreted as Urmanski advocates, would provide no exceptions for rape or incest—a point emphasized by Wisconsin Supreme Court Justice Jill Karofsky during oral arguments for *Kaul*.[225] Such a restrictive regime would place Wisconsin in violation of established human rights norms; Hence, restrictions on abortion access violate Article 7 of ICCPR when they force women to resort to unsafe abortions or to continue pregnancies that pose risks to their physical or mental health.[226]

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[219] General Assembly resolution 2200A (XXI), "International Covenant on Civil and Political Rights," *United Nations*, December 16 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[220] Livio Zilli, "The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion," *OpinioJuris*, June 3 2019, https://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion/.

[221] https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf

[222] United Nations General Assembly resolution 34/180, **"**Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979," *United Nations*, December 18 1979, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=extended%20as%20necessary.-,Article%2012,those%20related%20to%20family%20planning.

[223] Lisa Baldez, *Defying Convention*, (Online, Cambridge University Press, 2014), Chapter 6, https://www.cambridge.org/core/books/defying-convention/why-the-united-states-has-not-ratified-cedaw/E9B03497B53ECC36EC4C8AA3A1FD0B08.

[224] "CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) ," *UNHCR*, 1999, https://www.refworld.org/legal/general/cedaw/1999/en/11953.

[225] MJ Keane, "State Court Hears 1849 Abortion Ban," *The Norse Star*, December 4 2024, https://thenorsestar.com/5524/news/state-court-hears-1849-abortion-ban/.

[226] General Assembly resolution 2200A (XXI), "International Covenant on Civil and Political Rights," *United Nations*, December 16 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

IV. Legal Analysis

The legal foundation for Kaul's interpretation rests on solid precedent. The Dane County Circuit Court's initial ruling in favor of Kaul drew support from the Wisconsin Supreme Court's 1994 decision in *State v. Black*, which applied the 1849 statute to prosecute assault-induced miscarriage—supporting the interpretation that the law's original intent focused on non-consensual pregnancy termination.[227]

A. Precedential Support for Kaul's Interpretation

Furthermore, Kaul argues that subsequent regulations, including the state's 20-week abortion ban, have implicitly repealed any broader interpretation of the 1849 law, reflecting the trend of legal analysis in contemporary Wisconsin that aligns with modern principles of statutory interpretation, including the doctrine of implied repeal. The Wisconsin Supreme Court has consistently recognized the doctrine of implied repeal when later statutes create an "irreconcilable conflict" with earlier ones, leading to a ratification that agrees with modern principles.[228] Wisconsin's post-Roe abortion regulations, which explicitly permitted and regulated abortion up to certain gestational limits, would be rendered moot if the 1849 law were interpreted to ban all abortions, creating precisely the type of irreconcilable conflict that triggers implied repeal

V. National Landscape and State Comparisons

The Wisconsin Supreme Court now faces a choice between two futures: one where Wisconsin joins states experiencing rising maternal mortality rates and deteriorating healthcare access, or one where it aligns with states taking explicit measures to protect reproductive healthcare access in the effort to save lives. While the doctrine of 'evolving standards of decency' is typically applied to issues of cruel and unusual punishment, its underlying premise— that courts must interpret statutes in light of contemporary understanding and societal progress— provides a compelling argument for applying the same approach here, particularly in the context of medical advances and the evolving understanding of reproductive healthcare.[229] This evidence demonstrates that interpreting the 1849 law as a broad abortion ban would trigger a public health crisis similar to that seen in the Mississippi Delta region, raising serious equal protection concerns given the demonstrated disparate impact on vulnerable populations.[230] Conversely, accepting Kaul's interpretation would preserve access to essential healthcare, which is legally relevant under both Wisconsin's constitutional guarantees of bodily autonomy and equal protection, while maintaining appropriate restrictions on non-consensual pregnancy termination. Furthermore, Urmanski is inconsistent with existing legal precedent and would create significant legal and public health challenges, making it a problematic and untenable approach.

VI. Impact on Wisconsin Healthcare

A. Public Health Implications of Interpretive Choices

Attorney General Kaul's interpretation of the 1849 law offers a legally sound and historically grounded approach that would prevent Wisconsin from sliding into the healthcare crisis seen in more restrictive states. By recognizing the statute as a feticide law rather than a broad abortion ban, the court can maintain appropriate protections against non-consensual pregnancy termination while ensuring access to essential healthcare, upholding principles of statutory interpretation, evolving standards of decency, and the state's duty to protect public health as discussed in international human rights frameworks. This

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[227] Ziegler, *supra* note 11.

[228] "Wisconsin Department of Justice," Home, n.d. https://www.wisdoj.gov/Pages/home.aspx#:~:text=First%2C%20a%20later%2Denacted%20law%20impliedly%20repeals%20an,statutes%20can%20stand%20in%20force.%E2%80%9D%20State%20v.

[229] Legislative Reference Bureau. "ANNOTATED WISCONSIN CONSTITUTION," December 9, 2022. https://docs.legis.wisconsin.gov/2021/related/wiscon/wi.pdf.

[230] 1241483873729422. "Restricted Access to Abortion Violates Human Rights," January 4, 2016. https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/04/11/24/restricted-access-to-abortion-violates-human-rights.

interpretation aligns with both the Court's historical trend—as evidenced by the *State v. Black* (1994) precedent—and the evolution of medical practice over the past 175 years. During oral arguments before the Wisconsin Supreme Court, Kaul's team emphasized the concept of implied repeal, arguing that "conflicting laws" now exist between the 1849 statute and subsequent healthcare regulations.[231] Modern abortion care now involves medications, techniques, and safety protocols that were unimaginable to the legislature that drafted the 1849 law, creating a fundamental disconnect between the statute's original context and its application today.

B. Preventing Healthcare Crisis Through Proper Interpretation

Accepting Kaul's argument would acknowledge the reality that abortion restrictions do not prevent abortions; they only make them more dangerous. The data from states with strict bans shows that such restrictions drive women to seek unsafe alternatives, leading to increased medical complications and deaths.[232] This underscores the responsibility of the state to mitigate these avoidable deaths and protect the health of its citizens. Restricting access to abortion is not compatible with international norms, such as those articulated in the UDHR and CEDAW, which emphasize the duty of governments to protect individuals' health and liberties, including their discretion over healthcare decisions. While these international frameworks may not directly bind Wisconsin, they provide a clear moral and legal foundation for arguing that the state has an obligation to safeguard the rights and well-being of women within its jurisdiction. Restrictions on access to abortion differ fundamentally from other legally prohibited activities because it is considered an essential healthy procedure. First, abortion involves a time-sensitive medical decision concerning a person's own body, implicating constitutional privacy and bodily autonomy interests that courts have long recognized as deserving heightened protection.[233] Second, unlike recreational substances, abortion is recognized by major medical organizations as a necessary healthcare procedure with no viable substitute when medically indicated.[234] Wisconsin has the opportunity to learn from these outcomes and choose a different path– one that prioritizes public health in line with the state's duty to protect its citizens, respects medical expertise as fundamental to healthcare decisions, and protects fundamental human rights, as recognized in both constitutional law and international human rights frameworks.

As Justice Karofsky noted during oral arguments, interpreting the 1849 law as a total ban would mean forcing pregnancy continuation even in cases of rape and incest—an outcome that is legally impermissible under binding international human rights obligations.[235] Such an interpretation would violate Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, prohibiting cruel, inhuman, or degrading treatment. The UN Human Rights Committee has explicitly stated that restrictions forcing women to continue pregnancies in cases of rape or incest violate this prohibition. Furthermore, this interpretation would contravene Wisconsin's constitutional guarantees of equal protection, as the disparate impact on women's health constitutes a form of discrimination under international human rights frameworks, including principles established in the Convention on the

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[231] Morrissey, Chloe. "Kaul V. Urmanski: SCOWIS Hears Oral Arguments Over State's 1849 Abortion Law," November 11, 2024. https://www.wkow.com/news/kaul-v-urmanski-scowis-hears-oral-arguments-over-states-1849-abortion-law/article_cf551f90-a080-11ef-9071-3fbb27f57ca0.html.

[232] PLOS Medicine Editors, *supra* note 9.

[233] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

[234] "AMA announces new adopted policies related to reproductive health care," *AMA*, November 16 2022, https://www.ama-assn.org/press-center/press-releases/ama-announces-new-adopted-policies-related-reproductive-health-care#:~:text=Expanding%20support%20for%20access%20to,health%20care%20that%20they%20need.%E2%80%9D

[235] General Assembly resolution 2200A (XXI), "International Covenant on Civil and Political Rights," *United Nations*, December 16 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

Elimination of All Forms of Discrimination Against Women (CEDAW).[236] The Wisconsin Supreme Court has previously recognized that state constitutional provisions must be interpreted in light of evolving standards and international norms. Such a restrictive interpretation would place Wisconsin among the most extreme states in the nation, establishing a legal regime that has been explicitly condemned by authoritative human rights bodies and that demonstrably leads to increased maternal mortality, which directly conflicts with the state's constitutional obligation to protect citizens' right to life

VII. Conclusion

A. Summary of Legal Arguments for Kaul's Interpretation

As the Wisconsin Supreme Court deliberates on Kaul v. Urmanski, the state stands at a pivotal crossroads in its approach to reproductive healthcare. The interpretation of the 1849 law will determine whether Wisconsin joins states experiencing deteriorating maternal health outcomes or forges a path that prioritizes medical expertise, human rights principles, and the well-being of its citizens. Attorney General Kaul's interpretation—that the statute should be understood as a feticide law prohibiting only non-consensual pregnancy termination—offers a legally sound resolution that honors both the statute's historical application and the dramatic evolution of medical practice over 175 years.[237]

This interpretation finds support in established precedent, including S*tate v. Black* (1994), which applied the 1849 statute to prosecute assault-induced miscarriage rather than consensual medical procedures.[238] It recognizes the doctrine of implied repeal, acknowledging that Wisconsin's post-Roe abortion regulations have created an irreconcilable conflict with any broader reading of the antiquated statute. Most importantly, it offers Wisconsin an opportunity to avoid the public health crisis unfolding in states with strict abortion bans, where maternal mortality rates have risen dramatically since *Dobbs*.

B. Potential Impacts of Court Decision

The Wisconsin Supreme Court should recognize that interpreting the 1849 law as advocated by District Attorney Urmanski would force healthcare providers to withhold potentially life-saving care, create impossible ethical dilemmas, and compromise the doctor-patient relationship. It would place Wisconsin among the most restrictive states in the nation, with no exceptions for rape or incest, despite clear evidence that such policies lead to worse health outcomes and increased maternal mortality.

By adopting Kaul's interpretation, the court can ensure that Wisconsin's approach to reproductive healthcare remains grounded in contemporary medical understanding, respects fundamental human rights principles, and protects the health and autonomy of Wisconsin residents. This balanced approach would maintain appropriate protections against non-consensual pregnancy termination while ensuring that Wisconsin women retain access to essential healthcare services. The evidence from other states demonstrates that this path not only aligns with modern legal principles but directly saves lives—a consideration that must weigh heavily as the court determines the future of reproductive rights in Wisconsin.

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[236] United Nations General Assembly resolution 34/180, **"**Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979," *United Nations*, December 18 1979, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=extended%20as%20necessary.-,Article%2012,those%20related%20to%20family%20planning.

[237] Ziegler, *supra* note 11.

[238] Ibid.