

SOUTH CAROLINA JOURNAL
OF INTERNATIONAL LAW AND
BUSINESS

VOLUME 15

SPRING 2019

ARTICLES

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BEDOUIN IN ISRAEL

Morad Elsana

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STUDENT NOTE

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SOUTH CAROLINA JOURNAL
OF INTERNATIONAL LAW &
BUSINESS

Volume 15, Issue 2

Spring 2019

The *South Carolina Journal of International Law & Business* (US ISSN 1936-4334) is a student-edited legal journal published in affiliation with the University of South Carolina. The Journal is an online publication.

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SYSTEMATIC INDIGENOUS PEOPLES' LAND DISPOSSESSION: THE BEDOUIN IN ISRAEL

*Morad Elsana**

I. INTRODUCTION

In 2007, the Israeli government unilaterally decided to settle the Bedouin land dispute and dispose of their land claims.¹ The state ordered Bedouin land claims to be promptly adjudicated in court.² The court, however, followed a forty-year-old precedent and rejected all Bedouin claims.³

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¹ See Israeli Government Res. 2491 (Oct. 28, 2007).

² See *id.*

³ See CA (BS) 7161/06 Suleiman Aluqbi v. St. of Israel, (unpublished manuscript) (2012) (Isr.).

In reaction, as part of the Bedouin's attempts to defend their rights, they, with several scholars,⁴ decided to challenge the legal status of Bedouin land through judicial intervention.⁵ This could change the longtime *Alhawashelah* precedent from 1984 and convince the court to recognize Bedouin land rights.⁶ Despite their intensive research and intellectual efforts, however, the test case they chose to take to court was also rejected.⁷

While recent research focuses on the judicial means that deprive the Bedouin of their lands⁸, this article presents the other part of the picture: a major part of the Bedouin lands was not expropriated by recent judicial means. Instead, they were legislated through laws by the Israeli Knesset and enforced by the administrative infrastructure overseen by the executive branch of the government through political and administrative means.⁹

⁴ See Morad Elsana, *The Role of the Judiciary in Dispossessing Indigenous Peoples' Land: The Bedouin Case in Israel*, 33 J. JURIS. 333 (2017); Oren Yiftachel, Alexander (Sandy) Kedar & Ahmad Amara, *Re-Examining the 'Dead Negev Doctrine': Property Rights in the Bedouin-Arab Space*, 14 MISHPAT UMIMSHAL (2012).

⁵ See *id.*

⁶ See *id.*

⁷ See CA (BS) 7161/06 Suleiman Aluqbi et. al. v. State of Israel, *supra* note 3; Suleiman Aluqbi v. St. of Israel, (2012).

⁸ See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford U. Press ed., 1996); see also Elsana, *supra* note 4; see also Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

⁹ See generally Singer, *supra* note 8.

For many indigenous peoples throughout the world, the judicial battles to preserve or regain land rights generally started after violence from the initial dispossession that occurred.¹⁰ In the Bedouin's case, the timeline of this experience is somewhat more recent when compared to the narratives of the indigenous peoples of the Americas or Australia.¹¹ Therefore, judicial actions overlap with ongoing administrative executive and political legislative acts of land dispossession.¹² Thus, untangling the specific sources and methods of land dispossession becomes essential in the ongoing effort to understand the Bedouin peoples' encounter with a version of a settler colonial state.¹³

This article argues the indigenous land issue is not a classical legal case. Rather, it is an issue with a sharp political, ideological and cultural character. Therefore, the handling of the issue in court is "unusual" in many ways. It poses many non-conventional issues and clearly contradicts basic principles of justice. The article starts by showing that most Bedouin land rights were dispossessed through a colonial methodology that combines settlement, occupation, and acquisition of indigenous land on multiple levels rather than typical

¹⁰ See BILL YENNE, *INDIAN WARS: THE CAMPAIGN FOR THE AMERICAN WEST* (2006).

¹¹ See generally LOUIS A. KNAFLA, *ABORIGINAL TITLE AND INDIGENOUS PEOPLES: CANADA, AUSTRALIA, AND NEW ZEALAND* (W. Wesley Pue, et al. eds., 2010).

¹² See Singer, *supra* note 8.

¹³ See generally Elsana, *supra* note 4.

judicial decisions.¹⁴ The first part of land dispossession occurred through settlement and international decisions that supported the dispossession.¹⁵ The second part occurred after the establishment of the “settler state” through colonial oriented, administrative and legislative actions that ignore indigenous Bedouin land rights.¹⁶ Many of these acts are for the sole benefit and interest of the settler population.¹⁷ Moreover, these acts laid the groundwork for later colonial legal rulings that only confirmed previous administrative and legislative actions, and continued to ignore indigenous Bedouin land rights.¹⁸

Section two of this article introduces the indigenous land dispossession, generally exploring how indigenous land was dispossessed in several phases by different methods that include administrative, executive, and judicial ones.¹⁹ Section three introduces essential background about the Bedouin, including their demographics and land dispute. Then, section four describes the process of Bedouin land dispossession on the general level as part of the Palestinian land

¹⁴See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford U. Press ed., 1996).

¹⁵See *id.*

¹⁶ See Elsana, *supra* note 4, at 6.

¹⁷ See *id.*

¹⁸See generally *First Nations Summit, Implementation of Jurisprudence Concerning Indigenous Peoples' Rights: Experiences from the Americas - A Canadian Perspective 19-20* (2005), http://www.fns.bc.ca/pdf/ImplementationofJurisprudence_IP1005.pdf.

¹⁹ See Singer, *supra* note 8.

dispossession.²⁰ Section five focuses on the specific level of land dispossession, describing the explicit methods designated solely and especially for Bedouin in the Negev.²¹ This section details the administrative and legislative methods for land dispossession, mainly the concentration plan and the Goldberg plan.²² On the legislative level, this section looks at three acts and focuses on the Land Settlement Ordinance of 1969 as a major instrument for Bedouin land dispossession.²³ Finally, section six concludes with a discussion that aims to shed light on elements and tactics the state has been using to bend the rules (on the judiciary level) in order to make sure courts follow the state's plan.²⁴

II. THE DISPOSSESSION OF INDIGENOUS PEOPLES LAND RIGHTS

The dispossession of indigenous peoples' land rights remains one of the most common human rights violations around the world.²⁵ After the discovery of the New World, the Europeans started a long process of

²⁰ See Elsana, *supra* note 4, at 9.

²¹ See generally Israeli Government Res. 2491 (Oct. 28, 2007).

²² See generally Ministry Of Construction & Housing, GOLDBERG REPORT 31–2 (2009), http://www.moch.gov.il/SiteCollectionDocuments/odot/doch_goldberg/Doch_Vaada_Shofet_Goldberg.pdf.

²³ See Elsana, *supra* note 4, at 19.

²⁴ See generally Elsana, *supra* note 4.

²⁵ See Erica-Irene A., *Economic and Social Council Final Working Paper No. E/CN.4/Sub.2/2001/21*, 38 (June 11, 2001), http://www1.umn.edu/humanrts/demo/RelationshipptoLand_Daes.pdf.

conquest, occupation, and colonization of indigenous peoples' lands.²⁶ The newcomers took over the territory of indigenous peoples while denying their sovereignty, their land rights, their cultural expression, and, on several occasions, their very existence.²⁷

While specifics vary, indigenous peoples around the globe fiercely opposed the European invasions and resisted the occupation of their lands.²⁸ In many instances, they even engaged in wars or armed conflicts with the invaders to resist the acquisition and occupation of their lands.²⁹ However, the Europeans ultimately took over indigenous peoples' lands and territories through military dominance.³⁰ After conquering and occupying the lands, colonial powers and the new settlers established their new sovereign state's power over the

²⁶ See ANAYA, *supra* note 14, at 3.

²⁷ See *First Nations Summit, Implementation of Jurisprudence Concerning Indigenous Peoples' Rights: Experiences from the Americas - A Canadian Perspective* 19-20 (2005), http://www.fns.bc.ca/pdf/ImplementationofJurisprudence_IP1005.pdf; see also PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* (2006 U. of Toronto Press ed., 2005) (discussing how Aboriginal peoples' leaders and state representatives, such as Edward Woodward, head of the Woodward Commission, traveled from Australia to the United States and Canada to learn about the recognition of indigenous peoples land rights); EPHRAIM YUCHTMAN-YAAR & ZE'EV SHABAT, *MAGAMUT BAHEVRAH HAYESRAILIT [TRENDS IN ISRAELI SOCIETY]* 1218 (2003) (discussing former Israeli Prime Minister Golda Meir's denial of the existence of a Palestinian nation).

²⁸ See KNAFLA, *supra* note 11, at 173.

²⁹ See YENNE, *supra* note 10, at 7.

³⁰ See ELSANA, *supra* note 4, at 7.

indigenous territories.³¹ With their new governmental systems—administrative, political, and, eventually, judicial—they continued dispossessing the remaining of indigenous peoples' lands.³² Hence, while conquest and occupation enabled taking physical possession, the new state's administrative, political, and judicial methods were utilized to legitimize their acts of dispossession.³³ At the same time, this ensured that no political or legal options were available for indigenous people to defend or regain their land rights.³⁴

The process of dispossession rarely, if ever, proceeded in a clear, simple sequence, and depending on the size of the territory, the physical conquest often overlapped with the establishment of the governmental systems that established the Western legal apparatus for nullifying the rights of indigenous peoples to their own lands in perpetuity.³⁵ While the judicial method of dispossession was often the last method utilized by a government, it often overlapped in its establishment and actions with ongoing administrative policies and political or legislative actions that expropriated land from indigenous peoples.³⁶ One need to think only of

³¹ See generally, JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* (2006) (discussing methods of land dispossession).

³² See Singer, *supra* note 8.

³³ See *id.*

³⁴ See *id.*

³⁵ See generally ANAYA, *supra* note 14, at 3.

³⁶ See *id.*

the history of the United States and the infamous Trail of Tears to recognize the pattern of executive and legislative actions, overlapping with, in that case, somewhat more sympathetic judicial action that nevertheless ultimately dispossessed tens of thousands of indigenous peoples from their lands.³⁷

The international community supported the invasion and occupation of indigenous peoples of the New World.³⁸ Unlike modern international law that protects the rights of indigenous peoples, during that time, international law supported colonial acts of invasion and land dispossession even when they violated indigenous peoples' rights.³⁹ "Europeans" at that time denied indigenous peoples in the New World the right of sovereignty and facilitated the dispossession of their land.⁴⁰ Old principles of international law and legal doctrines, such as the Doctrine of Discovery and *terra nullius*, justified the occupation and the dispossession of indigenous peoples' land.⁴¹ Relying on such international law principles, colonial powers made fictional assumptions regarding indigenous peoples' land that severely affected their land rights.⁴² They did this

³⁷ *See id.*

³⁸ *See id.* at 9, 26.

³⁹ *See id.* at 6, 15-26.

⁴⁰ *See id.* at 22.

⁴¹ *See* Blake Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE UNIV. LAW REV. 507, 512 (2011).

⁴² *See id.*

first, by claiming that indigenous peoples did not legally exist (thus their land could be acquired); then, by arguing that they were inferior to the colonial powers (thus their right to lands could be extinguished).⁴³ In the United States, for example, Chief Justice of the Supreme Court John Marshall similarly justified the way in which colonial powers laid claim to indigenous peoples' lands during the Age of Discovery.⁴⁴ Australia considered Aboriginal land as a vacant land and denied their land ownership claims.⁴⁵ Similarly, Israel considers all Bedouin's land as *mawat* land, which literally means "dead land."⁴⁶

Despite this, during the last few decades indigenous people have succeeded in bringing their issues to the attention of the international community.⁴⁷ Moreover, several international organizations, such as the International Labor Organization (ILO), have raised the issue and called for recognition of indigenous

⁴³ See GILBERT, *supra* note 31; Gilda C. Rodriguez, *Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights*, 23 N. C. J. INT. LAW COMM. REGUL. 711, 722 (1997).

⁴⁴ See Watson, *supra* note 41 at 511.

⁴⁵ See Rodriguez, *supra* note 43 at 722.

⁴⁶ See Chanina Porat, *Israel's Policy on the Bedouin Issue and Left-Wing Alternatives, 1953-1960*, 10 Iyyunim BiTekumat Israel 420-476, 457 (2000) (explaining Bedouin submitted land claims as early as the 1950s. They based their land claims on documents proving that they had paid taxes. However, the State claimed that no land titles settlement occurred in the Negev; therefore, Bedouin did not possess any proof of land ownership. In addition, the State claimed that tax documents were lost from the State archives).

⁴⁷ See generally ANAYA, *supra* note 14.

peoples' land rights.⁴⁸ Others have articulated several instruments that recognize and protect indigenous peoples' rights. For example, in 2007, international recognition of indigenous peoples' land rights through the United Nations Universal Declaration for the Rights of Indigenous Peoples.⁴⁹ Unfortunately, despite these substantial developments, international law continues to offer very limited protection for their land rights.⁵⁰

On the national level, after the establishment of the settlers-state, indigenous peoples began to struggle for their land rights through the settler-state system, but mainly through local courts.⁵¹ But as this article shows, their legal struggle was also cut off and doomed to failure. The legislations the settler-state enacted and the administrative processes it carried out not only led to the dispossession of indigenous lands, but also created the platform for legal supremacy and even eliminated any chance of indigenous claims in court.⁵² Furthermore, changes settler-states made on the ground, and many other factors—not directly related to land conflict—such as language competence (difficulties) and a difficult

⁴⁸ See generally GILBERT, *supra* note 31.

⁴⁹ See generally Universal Declaration for the Rights of Indigenous Peoples, G.A. Res. 61/295 (Oct. 2, 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁵⁰ See GILBERT, *supra* note 31 at 114.

⁵¹ See Elsana, *supra* note 4 at 336 (explaining although other struggle and advocacy options were available more attention was given to the legal advocacy).

⁵² See *id.* at 367.

economic situation have made their struggle impotent; without a real chance of success.⁵³

However, in the recent decades, many indigenous groups around the globe, with no other choice, focus on judicial advocacy; sometimes they overestimate the power of judges and courts to recognize their rights.⁵⁴ They tend to forget the inherent conflict between colonialism and injustice, especially in land conflicts.⁵⁵ They also ignore the historical fact that the majority of indigenous peoples' land was mainly dispossessed by non-judicial methods.⁵⁶ But, most importantly, they forget that when they approached national courts to protect their rights, and recognize their right, national courts—with some exceptions—could not provide any protection, in the contrary many times courts supported the colonial action and even legitimized them.⁵⁷

The Bedouin case shows how their land was dispossessed and how the Bedouin's have been trying, with no avail, to get their land rights recognized in the courts that have been denying their cases time after time. This article goes further to show how the state, using legislation, and administrative orders was able to

⁵³ *See id.* at 357.

⁵⁴ *See generally* Gilbert, *supra* note 31.

⁵⁵ *See id.* at 157.

⁵⁶ *See id.*

⁵⁷ *See generally* Elsana, *supra* note 4 (according to the decisions of J. Marshall in the US context and the decision of the Israeli Supreme court in Alhawashela case).

dispossess about 90% of Bedouin land.⁵⁸ Moreover, these legislative and administrative orders insured the Bedouin's land rights were denied in court.

III. THE BEDOUIN AND THEIR LAND ISSUE

A. *THE BEDOUIN*

The Bedouin in Israel live in the Negev, the southern part of Israel.⁵⁹ They are part of the Arab-Palestinian minority in Israel⁶⁰ that consists of between 200,000 and 230,000 people. They constitute about 3.5% of Israel's population.⁶¹ The Bedouin live in two types of settlements: (1) village the state has recognized ("townships") and (2) villages that the state considers illegal settlements ("villages" or "unrecognized villages").⁶² Approximately two-thirds of the Bedouin population in the Negev live in seventeen townships and nearly one-third live in thirty-five unrecognized

⁵⁸ See generally Elsana, *supra* note 4.

⁵⁹ See Salman Elbedour et al., *Bedouins of the Negev: Ethnicity and Ethnic Identity among Bedouin Adolescents in Israel*, 2 INT. J. CHILD HEALTH HUM. DEV. 177 (2009) (exploring Bedouin identity).

⁶⁰ See *id.*

⁶¹ See *Lexicon of Terms: Minorities in Israel, Bedouin*, THE KNESSET (July 2007), <http://www.knesset.gov.il/lexicon/heb/bedouim.htm>; Ghazi Falah, *Israeli State Policy toward Bedouin Sedentarization in the Negev*, 18 J. OF PALESTINE STUDIES 71, 78 (1989).

⁶² See Shiri Bass Spector, *Environmental and Health Issues Among Bedouin in the Negev Unrecognized Villages*, KNESSET RESEARCH AND INFORMATION CENTER (2011), <http://www.knesset.gov.il/mmm/data/pdf/m02809.pdf>.

villages.⁶³ Bedouins who live in unrecognized villages are deprived of very basic rights and services, including running water, electricity, secure infrastructure, education, health services, and social services.⁶⁴ But most importantly, they are not allowed to build any houses in these villages.⁶⁵ Thus, they are subject to harsh state acts such as, house demolitions, crop destruction, livestock confiscation, and land expropriation,⁶⁶ all due to a longtime dispute over the land.

Historically, the Bedouin have lived as a semi-nomadic people in the Negev for centuries, well before the establishment of the State of Israel and some would say since the fifth century C.E.⁶⁷ The Bedouin have lived in the Negev from the time immemorial and consider themselves natives.⁶⁸

Mischaracterizations of their nomadic and semi-nomadic lifestyle have been used as part of the narrative to undermine claims to their historic presence in the Negev and to assert a lack of ties—to these specific lands.⁶⁹ However, the Bedouin have long-held tribal

⁶³ *See id.*

⁶⁴ *See* HUMAN RIGHTS WATCH, OFF THE MAP, <http://hrw.org/reports/2008/03/30/map> (last visited Mar. 5, 2019).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* PENNY MADDRELL & YUNIS GRINAWI, THE BEDOUIN OF THE NEGEV 4, LONDON MINORITY RIGHTS GROUP (1990).

⁶⁸ *See* Yiftachel, *supra* note 4 at 134-36.

⁶⁹ *See* Havatzelet Yahel, Ruth Kark & Seth J. Frantzman, *Are the Negev Bedouin an Indigenous People?*, MIDDLE EAST Q. (2012), <http://www.meforum.org/3254/negev-bedouin-indigenous> (last visited Jan

territorial boundaries, defined by intra- and inter-tribal agreements of customary tribal law, forged over generations and preserved in indigenous documents called *Sanadat*.⁷⁰ *Sanadat* describe the Bedouin land, rights, boundaries of different tribes' lands, size, and the owners and many other details related to their land, just like any modern title deed.

B. *THE BEDOUIN'S LAND ISSUE*

Since its establishment, the State of Israel has been denying Bedouin land rights and continues to dispossess their lands in order to drive them out.⁷¹ The dispossession of Bedouin land⁷² can be divided into two general phases: (1) the occupation of the land, and (2) the legalization of the occupation of the land.⁷³ The State first occupied the Bedouin's land, evicted many of them and concentrated the remaining groups into a small area in the northern Negev called *Siyag*.⁷⁴ Then, in the second phase, it enacted several laws that further enabled the dispossession of Bedouin land through legislative and judicial means.⁷⁵ Courts have supported the

9, 2017) (This article shows how some Israeli scholars, who are affiliated with the government, present the Bedouins in Israel).

⁷⁰ See *Elsana supra* note 4.

⁷¹ See *Havatzetlet, supra* 69 at 8-9.

⁷² See HUMAN RIGHTS WATCH, OFF THE MAP, *supra* note 64.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

dispossession and made sure the interpretation of the law maintained the same principles.⁷⁶

Like Palestinian lands, Bedouin lands were occupied as part of the colonial activity of the Zionist settlement movement in Palestine during the British Mandate. These lands were then occupied during the war fought in 1947 to 1948, immediately after the U.N. vote to establish a Jewish state in Palestine.⁷⁷ The early colonial history of the Bedouin barely even scratches the surface of the broader history of European colonialism that reshaped the map of the Middle East in the wake of World War I and the dissolution of the Ottoman Empire.⁷⁸

The Negev had been part of the Ottoman Empire for centuries, and it fell under British rule (later British Mandate) in Palestine from 1917 to 1948.⁷⁹ The land reforms to settle and register land rights (title deeds), instituted by the Ottomans and continued by the British in Palestine, were not applied to the Bedouin lands in the Negev.⁸⁰ However, in practice, both the Ottomans and the British largely accepted the Negev Bedouins' tribal system for establishing land claims, handling land disputes between tribes, paying taxes on lands, and

⁷⁶ *See id.*

⁷⁷ *See* YEHUSHOA PORAT & YAKOVSHAVIT, *THE HISTORY OF ERETZ YESRAEL: THE BRITISH MANDATE AND THE JEWISH NATIONAL HOME* (1998).

⁷⁸ *See* Ahmad Amara, *The Negev Land Question Between Denial and Recognition*, 42 *THE J. OF PALESTINE STUDIES* 4, 27, 30-34 (2013).

⁷⁹ *See id.* at 29.

⁸⁰ *See id.* at 30.

managing land-related issues.⁸¹ Hence, neither the Ottoman nor British land registry laws were applied to the Negev Bedouin.⁸² Thus, when the British Mandate ended and the State of Israel was established, the Bedouin found themselves facing a different settler-colonial ruler who applied the old rules in new ways that did not recognize their indigenous land rights.⁸³

IV. BEDOUIN LAND DISPOSSESSION ON THE GENERAL LEVEL

The roots of the Bedouin land issue can be traced to the history and developments in Palestine and the Middle East since the late 18th century.⁸⁴ Like many Palestinian lands, Bedouin lands were occupied as part of the Zionist movement in Palestine.⁸⁵ The first phase of their dispossession was done as a part of the entire Palestinian land dispossession without specific attention to Bedouin land in the Negev.⁸⁶ While the second phase was completed later as part of an explicit project designated to specifically dispossess the indigenous Bedouins of the Negev.⁸⁷

⁸¹ *See id.* at 31-34.

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See* Elsana *supra* note 4.

⁸⁵ *See* Falah, *supra* note 61, at 73.

⁸⁶ *See* Elsana, *supra* note 4, at 339.

⁸⁷ *See id.*

Settlement in Palestine started to be the primary goal for the Zionist movement after the decision to establish a State for the Jewish people.⁸⁸ During the late 19th century, the Zionist movement held its first conference where it decided to establish a Jewish state in Palestine. As part of its plan, the Zionist movement started a process of settlements in different places in Palestine. To facilitate Jewish settlement, the Zionist movement focused on land purchase in Palestine.⁸⁹

In addition to the above-mentioned reasons, the Zionist movement of settlement in Palestine was also supported by both practical (the need for land) and ideological levels.⁹⁰ On a *practical level*, Zionist leaders believed that possession of land in Palestine was an essential element for the Zionist project's success, vital for the future Jewish state, and important to accommodate incoming Jewish immigrants.⁹¹ On the *ideological level*, the movement embraced a biblically based ideology that claimed that the land in Palestine (i.e. the land of Israel) was divinely given to the Jewish

⁸⁸ Practical Zionism - under the leadership of Moshe Lilienblum and Yehuda Leib Pinsker - argued that immigration to Israel and settlement should begin soon, even before the attainment of a charter for the Land of Israel. The proponents of this approach emphasized the need for large-scale settlement in Palestine/Eretz Israel that would help establish a national home. See WALTER LAQUEUR, *A HISTORY OF ZIONISM* 103-07 (2003); Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine*, (2006).

⁸⁹ *See id.*

⁹⁰ *See* Elsana, *supra* note 4 at 340.

⁹¹ *See id.*

people, and thus, Jews must “redeem the land” from non-Jewish inhabitants.⁹² Many of the movement’s leaders also brought with them a European culture of bias that viewed the Arabs, particularly the Bedouin, as uncivilized people, and viewed their land as empty land, *terra nullius* in the classical sense.⁹³

A. INTERNATIONAL INTERVENTION

As a result of the influx of Jewish migrants from Europe to Palestine and the spread of the news about the Zionist plan to establish a Jewish state, Palestinians demonstrated against the British mandate and demanded the restriction of Jewish migration. demanding to restrict the Jewish migration.⁹⁴ These “demonstrations” reached their peak in the 1936 Arab Revolt.⁹⁵ The British, who ruled during that time, asked for the intervention of the international community and forwarded the issue to the League of Nations, who in turn, decided to establish a committee, the Peel Commission, to search for and suggest a solution for the issue.⁹⁶ After deliberations, the committee came up

⁹² See *id.* at 341-2.

⁹³ See GERSHON SHAFIR, *LAND, LABOR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT, 1882-1914*. Cambridge: Cambridge (University Press, 1989); Yiftachel, *supra* note 88 at 54.

⁹⁴ See Elsana, *supra* note 4 at 350-54 (discusses British mandate’s refusal to recognize Bedouin customary law).

⁹⁵ See MATTHEW KELLY, *THE CRIME OF NATIONALISM: BRITAIN, PALESTINE, AND NATION-BUILDING ON THE FRINGE OF EMPIRE* 11, 58 (2017).

⁹⁶ See Elsana, *supra* note 4 at 348-49; MARTIN GILBERT, *THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT* 12-3 (2012).

with the partition plan to divide Palestine into two states: an Arab state and a Jewish state.⁹⁷ During that time (1937), Zionist leaders discovered that the proposed Jewish state borders excluded the Negev region.⁹⁸ Zionist leaders acknowledged the need to expand Jewish settlements into the Negev in order to convince the international community to include the Bedouin territory in the Negev to the future Jewish state.⁹⁹

They also came to understand that the rules of partition of the land were based mainly on the “existence of majority.”¹⁰⁰ In places where the majority of people were Jews, the committee offered the area to the Jewish state, and in areas of Arab majority, the area was offered to the Arab state.¹⁰¹ Jewish leaders realized that to get the Negev included into the future Jewish state, they had to settle it with Jewish settlers.¹⁰² Therefore, over the next two years,¹⁰³ the Zionist movement established eleven small colonies in the Negev, each with only a little more than a wall and a

⁹⁷ See Elsana, *supra* note 4 at 348-49.

⁹⁸ See Chanina Porat, *Policy of Land Purchase and Settlement in the Negev before the War of Independence*, 62 CATHEDRA 123-54, 393 (1991).

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ Before the 1939 White Paper closed off Jewish purchases of land, and again after 1946 when the Morrison-Grady Plan recommended again allowing Jewish land purchases in Palestine.

watchtower.¹⁰⁴ The Zionist movement's plan worked and the 1947 League of Nations Partition Plan for Palestine designated the Negev as part of the Jewish state.¹⁰⁵

B. THE 1948 WAR AND THE ESTABLISHMENT OF A NEW STATE

The Partition Plan, however, was just the beginning of the conquest phase of the land dispossession for the Palestinian land, including the Bedouin. The 1948 war that broke out when the British ended the mandate on Palestine and decamped, resulted in the conquest of the rest of Negev. The brutality of the Jewish paramilitary organizations during the 1948 war, and later by the Israeli Army, with their determination to expel as many Palestinian Arabs from their homes as possible,¹⁰⁶ resulted in the eviction of an estimated 700,000 Palestinians, only an estimated 160,000 remained.¹⁰⁷ When the border of the State of Israel was finally established in 1949, the Palestinians who

¹⁰⁴ See Porat, *supra* 98 at 123 (describing the Zionist movement and establishment of 11 Jewish settlements in the Negev, illustrating the Jewish existence in the Negev).

¹⁰⁵ See GILBERT, *supra* 96.

¹⁰⁶ See BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881-1998* (2011).

¹⁰⁷ See ILAN PAPPE, *A HISTORY OF MODERN PALESTINE: ONE LAND, TWO PEOPLES* 127 (2006).

survived the war became citizens of the new Jewish State.¹⁰⁸

After the establishment of Israel, despite their Israeli citizenship, tens of thousands of Palestinian-Israelis were forcibly relocated from their original villages to other villages; a practice that affected all Arabs, but mainly the Bedouins of the Negev.¹⁰⁹ Indeed, the majority of the remaining 11,000 Bedouins were evicted from their land and relocated to a small area in the northern Negev called the *siyag*, “fence” in Hebrew.¹¹⁰

After Israel’s independence, the State placed all Palestinians under a military rule from 1949 until 1966 and forced many Palestinians to live in designated areas.¹¹¹ During this eighteen year period, the State worked on several levels to change the historical reality and geography of the region. The State destroyed many villages that were abandoned by the Palestinians and

¹⁰⁸ See Nihad Bokae’e, *Palestinian Internally Displaced Persons Inside Israel: Challenging the Solid Structures*, PALESTINE-ISRAEL J. POLITICS, ECON. & CULTURE 2, 3-4 (2003).

¹⁰⁹ See *id.*; WALID KHALIDI, *ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948* (1992).

¹¹⁰ See Elsana, *supra* note 4 at 349; PENNY MADDRELL, *BEDOUIN OF THE NEGEV* 6 (1989) (The Negev Bedouin population before 1948 had been an estimated 65-95,000, and their historic lands covered all of the Negev. Israel concentrated their remnant on 10% of their historic lands, in a triangular area between Be’er Sheva, Arad, and Dimona.)

¹¹¹ See generally *The Arab-Israeli War of 1948*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/arab-israeli-war> (last visited Mar. 11, 2019).

prevented inhabitants from returning to their homes.¹¹² The State built Jewish settlements in place of the destroyed Palestinian villages, and changed the geographical zoning of the land by planting forests or building roads to make reestablishment of the Palestinian villages impossible.¹¹³ Israel took these actions despite obligations under international law¹¹⁴ and demands from the international community that Israel allow refugees to return to their homes.¹¹⁵

C. THE ESTABLISHMENT OF THE STATE

On the political level, land control became an important component of the State's settlement, development, and defense policies.¹¹⁶ The first leaders of the State, such as David Ben-Gurion, Avraham Granott, and Moshe Dayan, believed that State control of land

¹¹² See Jonathan Cook, *Palestinian Villages Hidden Under Israeli Forests*, VIMEO (Sept. 27, 2016) <https://vimeo.com/184497845>.

¹¹³ See *id.*

¹¹⁴ See Palestine - Progress Report of the United Nations Mediator, G.A. Res. 194 (III), (Dec. 11, 1948) (recognizing the right of Palestinian return for the first time. However, since it is only a General Assembly resolution it is not binding under international law, as opposed to Security Council resolutions).

¹¹⁵ See A Universal Declaration of Human Rights, G.A. Res. 217 (III) (Dec. 10, 1948) (stating generally in Article 13 that: "[e]veryone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country"); see also An International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) (Dec. 16, 1966).

¹¹⁶ See *Elsana, supra* note 4.

was an essential for the existence of Israel.¹¹⁷ Acting on this belief, that a Jewish presence on as much land as possible within the State was essential for Israel's future security, Israel drafted plans for land control, which focused on demographic engineering and population distribution in the State. The overall goal of these plans was to establish a Jewish presence in most areas of the country, a goal that relied heavily on the State's control of land.¹¹⁸ As a result, these policies were implemented, without exception, from the northern border of Israel all the way to the southern tip of the Negev.¹¹⁹

On the legislative level, Israeli leaders strove to ensure the laws of the State were in line with the goals of the land control policies.¹²⁰ When the State adopted parts of Ottoman law and terms from the British Mandate for Palestine,¹²¹ it applied a legal policy that deprived Palestinian-Arabs, including the Bedouin, of their land.¹²² Over time, Israel amended or terminated many Ottoman and British laws and have enacted new property laws that deny Palestinian-Arab's land rights.¹²³ By adopting British Article 46 of the Palestine Order in Council-1922, which preserved part of Ottoman land

¹¹⁷ *See id.* at 340.

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.* at 340-41.

¹²¹ *See id.*

¹²² *See id.* at 341.

¹²³ *See id.*

law, the State adopted the Ottoman law of the *Majallah* that included the Ottoman land code.¹²⁴

On the administrative level, tools, such as eviction orders, administrative relocations, service deprivation, recognition and urban planning, and zoning, provided additional methods for transferring Palestinian-Arab lands to the State.¹²⁵ Through planning laws and zoning regulations, the State allocated the majority of Arab land for Jewish settlement and development needs, while preventing or reducing land available for Arab-Israeli citizens.¹²⁶ This planning policy affected all Arab land dispossessions, but the Bedouin land in the Negev was disproportionately affected.¹²⁷

In conclusion, the Zionist-Israeli colonial project in Palestine was accomplished through a Jewish settlement project initiated during Ottoman and then continued during British rule; then exacerbated by the international community's partition of Palestine into a Jewish State and an Arab State in 1947; and later solidified through an Israeli military conquest of much of the land designated as an Arab State in 1948. After the establishment of the State, like many colonial powers, Israel came to rely on its legislative and administrative methods of land dispossession.

¹²⁴ *See id.*

¹²⁵ *See id.* at 346.

¹²⁶ *See id.* at 346-47.

¹²⁷ *See id.* at 347.

V. THE DISPOSSESSION OF BEDOUIN LAND ON THE SPECIFIC LEVEL

On the local level, Bedouin land in the Negev was subject to additional policies of land dispossession.¹²⁸ As mentioned above, the first phase of the Bedouin land dispossession began in the 1930s after the Peel Commission proposed a partition plan for Palestine that excluded the Negev from the Jewish State.¹²⁹ As a result, Zionist leaders established eleven small colonies in the Negev in order to show the land was settled by Jews.¹³⁰ Then in 1946, the Morrison-Grady international committee, appointed by the League of Nations, recommended a final partition plan that partitioned most of the Negev land to the Jewish state.¹³¹

The above-mentioned policies and acts of Palestinian land dispossession directly affected the Bedouin.¹³² Mainly, these policies were able to transfer most of the Bedouin's land to the State.¹³³ However, the Bedouin continue to possess and own about one and half million dunams, about 370,000 acres, in the Negev, an area the State considers essential for future settlement and development.¹³⁴ Thus, Israel has been subjecting the

¹²⁸ *See id.* at 348-349.

¹²⁹ *See id.*

¹³⁰ *See* Elsana, *supra* note 4 at 349.

¹³¹ *See* GILBERT, *supra* note 96.

¹³² *See* Elsana, *supra* note 4 at 349.

¹³³ *See id.*

¹³⁴ *See id.*

Bedouin to additional policies and acts of land dispossession that have been specifically designed for the Bedouin in the Negev. These policies were executed through various methods with the primary methods being administrative and legislative policies.¹³⁵

A. *THE ADMINISTRATIVE LAND DISPOSSESSION*

On the administrative level, the state first concentrated the Bedouin in a small area; second, it forced them to live in small number of towns within a designated area; and third, it declared all other Bedouin villages as illegal settlements.¹³⁶

1. *Concentrating the Bedouin in One Place*

After the establishment of Israel, in order to secure more land for Jewish settlement, the state gathered the remaining Bedouins into a small area called the *Siyag*.¹³⁷ Later, in 1956, the state and the military institute started discussing the “Bedouin Problem,” proposing a variety of possible ways to handle the Bedouin in the Negev.¹³⁸ Interestingly, as Swirski and Hasson mention “all of the proposals [the government]

¹³⁵ *See id.*

¹³⁶ *See* SHLOMO SWIRSKI & YAEL HASSON, *INVISIBLE CITIZENS: ISRAEL GOVERNMENT POLICY TOWARD THE NEGEV BEDOUIN* (2006).

¹³⁷ *See* Chanina Porat, *Israel's Policy on the Bedouin Issue and Left-Wing Alternatives, 1953-1960*, 10 *IYUNIM BI TEKUMAT ISR.* 420-76, 454.

¹³⁸ *See* SWIRSKI & HASSON, *supra* note 136, at 15.

considered shared a common denominator – *reducing to a minimum the area on which the Bedouin would be settled in the Siyag region.*”¹³⁹ Minister of Agriculture, Moshe Dayan, who aimed to transform the Bedouin into an urban proletariat, suggested settling Bedouin in mixed Jewish-Arab localities at the center of Israel, along the lines of the cities of Jaffa and Ramleh, where they would become urban laborers.¹⁴⁰ The second proposal, which eventually the state adopted,¹⁴¹ suggested concentrating the Bedouin in two or three townships within the *Siyag* area in the Negev.¹⁴²

The plan to concentrate the Bedouin in smaller areas, all within the already contained area of the *Siyag*, was implemented gradually in several stages. In the first stage, the state recognized two Bedouin townships and required all Bedouin in the surrounding villages to relocate to the new townships.¹⁴³ During that time, Israel claimed that the purpose of the act was to *modernize* Bedouin society by putting an end to the Bedouin’s

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 16.

¹⁴¹ Oren Yiftachel & H. Yacobi, *Control, Resistance and Informality: Urban Ethnocracy in Be'er Sheva, Israel*, URBAN INFORMALITY 228 (Ananya Roy & Nezar AlSayyad eds., 2003).

¹⁴² Yair Bauml, *Yahasos shel hamimsad hayesrail il aaravim bayesrael: Mdeniot, Ekronot peolah, haasor hashini 1958-1968* [The Attitude of the Israeli Establishment to the Arabs in Israel: Policy, Principles and Action. The Second Decade, 1958-1968] 310-15 (Ph.D. dissertation, University of Haifa, 2002).

¹⁴³ *Id.* at 54.

nomadic way of life and provide them with modern services.¹⁴⁴

The majority of Bedouins, however, opposed leaving their villages, and the state's efforts to relocate the Bedouin failed.¹⁴⁵ The Bedouin who refused to leave their villages also refused to abandon their way of life and disrupt their traditional livelihoods.¹⁴⁶ Although some state officials claimed that the Bedouin were opposed to modernizing their society, in reality, according to many commentators, the Bedouin were mainly concerned that concentrating themselves in to small towns would destroy their culture and their traditional economy.¹⁴⁷ Since Bedouin economy relies heavily on a combination of cultivating land and raising livestock, land is essential to maintain their financial independence.¹⁴⁸ In addition, the Bedouin were also concerned that the policy would not only continue to discriminate against them in planning and land allocation, but also deprive them of their ability to live traditionally with their extended families and tribes.¹⁴⁹

¹⁴⁴ Ismael Abu Saad & Cosette Creamer, *Socio-Political Upheaval and Current Conditions of the Neqab Bedouin Arabs*, in CURRENT CONDITIONS OF THE NAQAB BEDOUIN ARABS 28 (Yiftachel et al. eds., 2012).

¹⁴⁵ See generally HUMAN RIGHTS WATCH, OFF THE MAP, *supra* note 64.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Emanuel Marx & Avinoam Meir, *Land, Towns and Planning: The Negev Bedouin and the State of Israel*, GEOGRAPHY RESEARCH FORUM 45-46 (2005).

¹⁴⁹ *Id.*

With limited success of the first stage of forced sedentarization, the state continued to use every possible opportunity to evict Bedouins from their traditional lands and settle them into new townships.¹⁵⁰ One such opportunity appeared with the application of the Israel-Egypt Peace Treaty.¹⁵¹ In 1979, as part of the Israel-Egypt Peace Treaty, the state decided to relocate military facilities from the Sinai Peninsula (which Israel returned to Egypt as part of the treaty) onto the site of a large Bedouin community in the Tal-Almalah area.¹⁵² As part of this move, the state not only confiscated large segments of Bedouin land, but it also evicted every Bedouin living in the Tal-Almalah area.¹⁵³ The Bedouins were then relocated to two new towns,¹⁵⁴ created especially for the purpose of resettling the Tal-Almalah evacuees.¹⁵⁵ This relocation was legalized within Israeli law by the Negev Land Acquisition Act (peace treaty with Egypt) of 1980.¹⁵⁶

The four existing towns were insufficient incentive to drive out the Bedouins from their villages.¹⁵⁷

¹⁵⁰ See SWIRSKI & HASSON, *supra* note 136.

¹⁵¹ See Jamil Dakwar, *The Supreme Court and the Confiscation of Palestinian Lands: On the Politics of Legal Formalism*, 2 ADALAHS REV. 14, 14 (2000).

¹⁵² See SWIRSKI & HASSON, *supra* note 136 at 24-5

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 25 (Kuseife and Ar'ara townships).

¹⁵⁵ See DAKWAR, *supra* note 151 at 14.

¹⁵⁶ See The Negev Land Acquisition Law, Isr.-Egypt. 5740-1980 34 LSI 190 (170-182) (represents a peace treaty with Egypt).

¹⁵⁷ See SWIRSKI & HASSON, *supra* note 136 at 35.

Thus, in the third stage, Israel recognized additional three Bedouin villages.¹⁵⁸ These villages were established on Bedouin lands, and although some Bedouins were living there already, the state expanded the villages into towns and planned for increased settlement of Bedouins from surrounding villages and rural areas.¹⁵⁹ Another time, Israel attempted to concentrate the Bedouins in now seven planned towns, which was met with very limited success.¹⁶⁰

Over the next decade, Israel refused to recognize or establish additional villages and continued its attempts to settle Bedouin from unrecognized villages in the seven existing, recognized towns.¹⁶¹ This fourth stage consisted of a two-part plan. The first part aimed to evict the remaining Bedouin population living in forty-five unrecognized villages (about 50% of the whole Bedouin population in the Negev) and relocate them to the seven recognized townships.¹⁶² As part of the state plan to force the Bedouin to relocate to the recognized towns, it deprived the Bedouin in these villages of basic services, such as housing, running water, electricity, education, and health services.¹⁶³ It also applied a tough housing demolition policy in order to force the Bedouin to leave

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* HUMAN RIGHTS WATCH, *supra* note 64.

¹⁶¹ *See generally* SWIRSKI & HASSON, *supra* note 136.

¹⁶² *See id.* at 68.

¹⁶³ *See id.*

their lands and relocate into the designated townships.¹⁶⁴ The second part of the plan was to re-engage with greater intensity with the judicial process of settling Bedouin land title claims, which meant creating a legal fiction that officially dispossessed most Bedouin of their traditional land.¹⁶⁵

In 1996, the Bedouin established the Regional Council for the Unrecognized Villages (RCUV), the first organization devoted to the rights of those who live in the unrecognized villages.¹⁶⁶ The RCUV worked with human rights non-governmental organizations (“NGOs”) to advocate for Bedouin rights, opposing the State’s discrimination, oppression, and deprivation policies.¹⁶⁷ In addition, during the 1990s and early 2000s several human rights organizations started raising international awareness about the plight of the Bedouin of the Negev.¹⁶⁸ Eventually, the State realized that it was impossible to settle the remaining Bedouin population from forty-five villages into the existing seven townships.¹⁶⁹ As a result, Israel recognized an additional

¹⁶⁴ See generally HUMAN RIGHTS WATCH, *supra* note 64.

¹⁶⁵ See *id.*

¹⁶⁶ See Joseph Schechla, *The Invisible People Come to Light: Israel’s “Internally Displaced” and the “Unrecognized Villages”*, 31 J. PALEST. STUD. 20–31, 28 (2001).

¹⁶⁷ See *id.* at 28.

¹⁶⁸ See Seth J. Frantzman, Havatzelet Yahel & Ruth Kark, *Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of the Negev, Israel*, 17 ISR. STUD. 78–104, 79 (2012).

¹⁶⁹ Many reasons could explain the decision, including the court’s desire to criticize State policy. In addition, the High Court of Justice issued

ten villages between 2000 and 2012, creating a total of seventeen Bedouin townships.¹⁷⁰

The State also made many changes to disconnect the Bedouin physically, economically, and emotionally from their land, like evicting Bedouins from their land, and preventing agriculture use.¹⁷¹ Such changes destroyed the Bedouins' traditional economy, undermined their traditional leadership, and literally changed the Bedouins' landscape by building many Jewish towns and other projects on their land.¹⁷² The State designed these changes to convey to the Bedouin a clear message: that restoring the land to the Bedouin is not an option. Instead, the only available solution is compensation.

2. *Planning and Zoning Policy*

As a part of the concentration plan, the State applied a planning and urbanization policy in order to prevent Bedouin re-settlement outside the designated

several decisions ordering the State to build schools, clinics, and streets for Bedouin in unrecognized villages. On the other hand, the seven recognized villages remained poor and many people could not secure building lots to live in the recognized parts of the villages.

¹⁷⁰ This number is not fixed. It is expected to increase each time the State recognizes additional Bedouin villages.

¹⁷¹ See generally, Ghazi Falah, *Israeli State Policy Toward Bedouin Sedentarization in the Negev*, 18 J. PALEST. STUD. 71–91 (1989) (Describes the State's policy of eviction and disconnecting Bedouin from their land).

¹⁷² See Terra Tolley, *Rising Voices: Bedouin Youth Navigating Education and the Future amidst Protracted Conflict*, 2015 (Citing Stewart 2011, *Bedouin vs. Israel's Bulldozers*, THE INDEPENDENT).

Siyag.¹⁷³ Planning and urbanization policy went hand-in-hand with the goal of land dispossession.¹⁷⁴ This policy aimed for placing “the maximum number of [Bedouin] on a minimum amount of land and [dispensing] a minimum number of Jews on a maximum amount of land.”¹⁷⁵ One particular part of the State policy would transform the Bedouin into an urbanized society of a few small towns.¹⁷⁶ Moshe Dayan, an Israeli leader and the former Israeli Minister of Agriculture, expressed his view and even wished to eradicate Bedouin culture altogether by settling them in permanent villages and transforming them into an urban people.¹⁷⁷ In an interview with *Haaretz* newspaper, Dayan stated:

We should transform the Bedouin into an urban proletariat in industry, services, construction, and agriculture...Eighty-eight percent of the Israeli populations are not farmers; let the Bedouins be like them. Indeed, this would be a radical move which means that the Bedouin would not live in this land with his herds, but

¹⁷³ See SWIRSKI AND HASSON, *supra* note 136 at 18.

¹⁷⁴ See HCJ 528/88 Eliezer Avitan v. Israel Land Admin. 43(4) PD 297 (1988) (Isr.) (indicating that the main purpose for settling the Bedouin is to protect the State land).

¹⁷⁵ SWIRSKI & HASSON, *supra* note 136, at 18; see Sawsan Zaher, *The Right of Arab Bedouin Women to Adequate Housing and Accommodation*, 23 ADALAH'S NEWSL. 1 (2006); AMER EL HUZEIL ET AL., A PLAN FOR THE TREATMENT OF THE BEDOUIN PROBLEM, CENTER FOR LEGAL AND ECONOMIC RESEARCH IN THE MIDDLE EAST 9 (1999).

¹⁷⁶ See Falah, *supra* note 61 at 72.

¹⁷⁷ See Moshe Dayan, *On Land Policy and the Bedouin Problem*, HA'ARETZ, July 31, 1963, (cited in ISSACHAR ROSEN-ZVI, TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL 60 (2004)).

would become an urban person who comes home in the afternoon and put his slippers on . . . the children would go to school with their hair properly combed. This would be a revolution, but it may be fixed within two generations. Without coercion but with government direction. . . this phenomenon of the Bedouin will disappear.¹⁷⁸

Planning and zoning laws were influential tools to prevent the Bedouin from returning and using their land. Especially, the Planning and Building Law of 1965¹⁷⁹ is used to evict many of Bedouin from their land, relocate them to townships, and strip them of their land.¹⁸⁰ The Law authorizes the State to use a speedy process of administrative orders to demolish any house or building in areas not designated for residential housing.¹⁸¹ At the same time, the State designated all Bedouin villages as nonresidential areas preventing any planning or development in Bedouin villages except the recognized townships.

These acts of dislocation continue to affect Bedouin land rights to this day, because they enable the State to practice different policies to evict or displace the Bedouin from their land. For example, the 2008 Goldberg Committee, a government committee that was formed to address ongoing Bedouin land claims, stated in its report that Bedouin who were not in possession of

¹⁷⁸ *Id.*

¹⁷⁹ See Planning and Building Law, 5725-1965, 467 SH 307 (Isr.).

¹⁸⁰ See HUMAN RIGHTS WATCH, *supra* note 64 at 71.

¹⁸¹ See Planning and Building Law, 5725-1965, 467 SH 307, art. 241 (Isr.).

their land (i.e., living on their land or cultivating it) were not eligible for any land substitute as part of their compensation.¹⁸² Instead, the Committee offered those Bedouin monetary compensation only, a type of compensation the Bedouin have rejected for a long time.¹⁸³

The Bedouin who lost possession of their land also lost their ability to bargain for land recognition or land compensation.¹⁸⁴ Significantly, the State law does not recognize Bedouin land rights; therefore, Bedouin cannot seek any judicial relief through the State judicial system; the only way to force the state to compensate them is through keeping their ground (i.e., possessing the land).¹⁸⁵

Additionally, the plan to concentrate the Bedouin in the *Siyag* zone drastically deteriorated Bedouin living conditions. To protect their possession of land, many

¹⁸² See Ministry of Construction & Housing, *supra* note 22 at 31–2.

¹⁸³ See Farah Mihar, *Israel's Denial of the Bedouin* 8, http://scholar.googleusercontent.com/scholar?q=cache:PNa9ear0VNkJ:scholar.google.com/&hl=en&as_sdt=0,47 (last visited Aug 23, 2018); Bedouin reject compensation offer, accusing Israel of land grab - Haaretz - Israel News | Haaretz.com, <https://www.haaretz.com/1.5134697> (last visited Apr 19, 2019).

¹⁸⁴ See *e.g.* Ministry of Construction & Housing, *supra* note 22 (The report suggests offering compensation only for Bedouin who possess land [possessed land]).

¹⁸⁵ See Morad Elsana, DISPUTES THAT TAKE THE LIVES OF YOUTH IN THE NEGEV (خلافتات تحصد أرواح الشباب في النقب) الجزيرة مباشر NEGEV, <http://mubasher.aljazeera.net/blog-post/-أرواح-الشباب-خلافتات-تحصد-أرواح-الشباب-في-النقب> (last visited Jan 16, 2018).

Bedouins have been compelled to live in their unrecognized villages, sacrificing their standard of living and their basic rights due to limitations on housing rights, employment, and livestock grazing.¹⁸⁶ In these villages, Israel refuses to provide plans to recognize Bedouin villages or provide home building permits, running water, electricity, education, or health services.¹⁸⁷ When the Bedouin challenge this policy by building homes, the State reacts with home demolition orders: it destroys every new Bedouin home, files criminal charges, and punishes Bedouin with prison time, and heavy fines.¹⁸⁸

3. *The Goldberg Committee and its Report: Concentration is the Ultimate Plan*

Despite all of the State's efforts, Israel still found many Bedouin unwilling to yield their land.¹⁸⁹ In 2007, another committee was convened to deal with the situation in Bedouin.¹⁹⁰ The Goldberg Committee was

¹⁸⁶ See Ahmad Amara, *The Negev Land Question: Between Denial and Recognition*, 42 J. PALEST. STUD. 27–47, 29 (2013).

¹⁸⁷ The State of Israel has been refusing to recognize the majority of Bedouin villages.

¹⁸⁸ Referencing the history of Alaraqib Bedouin village that was demolished more than 150 times.

¹⁸⁹ See Harriet Sherwood, *The Israelis Keep Bulldozing Their Village, But Still The Bedouin Will Not Give Up Their Land* | Harriet Sherwood, THE GUARDIAN (Mar. 1, 2011), <https://www.theguardian.com/commentisfree/2011/mar/01/israelis-demolish-bedouin-village>.

¹⁹⁰ See Ahmad Amara, *The Goldberg Committee: Legal and Extra-legal Means to Solving the Naqab Bedouins Case*, HAGAR STUDIES IN CULTURE POLITY AND IDENTITIES (2008).

established for many reasons.¹⁹¹ Some reasons related to the Bedouin struggle and their living conditions, while other reasons related to Israel's settlement project and policy of land control, including Israel's plan to transfer military facilities from the center of the State, near Tel-Aviv, to the Negev.¹⁹² Additionally, the strengthening Bedouin struggle and the growing appearance of Bedouin issues in national and international media shamed and embarrassed Israel.¹⁹³ In some cases, the visible struggle even changed and impeded Israel's settlement plans.¹⁹⁴

In the past two decades, the Bedouin struggle for their rights was notably strengthened.¹⁹⁵ Several national and international organizations started to work for the Bedouin cause and advocate for their rights.¹⁹⁶ The

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See U.N. Econ. & Soc. Council, Comm. on Economic, Social, and Cultural Rights, 30th Sess., May 5-23, 2003, U.N. Doc. E/C.12/1/Add.90 (2003), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.90&Lang=en.

¹⁹⁴ See Yehezkel Lein, *Land Grab: Israel's Settlement Policy in the West Bank*, B'TSELEM (2002), https://www.btselem.org/download/200205_land_grab_eng.pdf.

¹⁹⁵ See Ahmad Amara, Ismael Abu-Saad & Oren Yiftachel, *Indigenous (In)Justice*, HARVARD UNIVERSITY PRESS (2012) <http://www.geog.bgu.ac.il/members/yiftachel/books/Indigenous%20%28In%29Justice.pdf>.

¹⁹⁶ See Moran Elsana, *The Dispossession and Recognition of Indigenous Peoples' Land Rights—The Case of Bedouin in Israel*, AMERICAN UNIVERSITY (2013),

organizations began to submit petitions to local courts, the Supreme Court, and other tribunals, file reports to international bodies, and approach local and international media to raise awareness of Bedouin issues, including their living conditions, unrecognized villages, and land dispossession.¹⁹⁷ Human rights organizations started to urge Israel to provide basic services to Bedouin in the unrecognized villages, such as health services, education, infrastructure such as roads, and electricity for schools.¹⁹⁸ When Israel refused these services, the organizations submitted petitions to courts and litigated for Bedouin rights.¹⁹⁹ In many cases, they succeeded in forcing Israel to establish health clinics, build schools, pave roads, and provide many other rights and services.²⁰⁰

On the planning and building level, many NGOs, along with community leaders, challenged Israel's planning policy.²⁰¹ Through several Supreme Court

<https://auislandora.wrlc.org/islandora/object/thesesdissertations%3A95/datastream/PDF/view>.

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See, e.g.*, HC 786/04, Ahlam el-Sana v. Ministry of Health (unpublished manuscript) (2004) (Isr.) (petition for family health clinics in Laqiya and Hura in the Naqab).

²⁰¹ *See* HCJ 6672/00, Jazi Abu Kaf v. Minister of the Interior PD (2000) (Isr.); Pador 02-2-790, 2 TAKDIM ELION 2002(3), 2935 (dismissing a petition to prevent the expansion of the jurisdiction of the Omer Municipality that would encompass the land of Bedouin villages of Tarabin and Mkemen).

petitions, NGOs managed to get decisions that canceled the expansion of the master plans of some Jewish towns that aimed to annex lands that belonged to Bedouin villages.²⁰² In other petitions, NGOs succeeded in freezing parts of the National Master Plan that ignored the Bedouin villages.²⁰³ which ignore the Bedouin villages. Further, the organizations were able to get a decision that required the National Planning and Building Council to amend the Master Plan in a way that must take into account the existence of Bedouin villages in future planning.²⁰⁴ These achievements forced the State to take the Bedouin villages into consideration when planning the Beer-Sheva Metropolitan Plan.²⁰⁵

In January 2008, the Minister of Construction and Housing (MOCH) appointed a committee of eight members, headed by emeritus Supreme Court Justice Eliezer Goldberg.²⁰⁶ However, instead of focusing on the Bedouin development problems, the Committee focused on additional ways to evict and displace the Bedouin from the unrecognized villages to the Bedouin townships

²⁰² *See id.*

²⁰³ Known in Hebrew as *tama* 4/14.

²⁰⁴ *See* H CJ 1991/00 Abu-Hamad vs. the National Planning Council PD (2007) (Isr.); TAKDIM ELION 2007(3), 2542.

²⁰⁵ *See id.*

²⁰⁶ *See* Shahar Ilan & Yanir Yagna, *Committee: Government Should Formally Recognize Bedouin Villages in Negev*, HAARETZ (2008), <http://www.haaretz.com/news/committee-gov-t-should-formally-recognize-bedouin-villages-in-negev-1.259322>.

and settle their land claims.²⁰⁷ The Bedouins disputed the composition of the Goldberg Committee because six of the eight members were Jews who represented the Israel's interests.²⁰⁸ Two Bedouin representatives were appointed by the minister, but these members were affiliated with the government cause rather than Bedouin rights.²⁰⁹ Neither of the members came from Bedouin NGOs or Bedouin rights groups.²¹⁰

The Goldberg Committee issued a report after a year-long process of deliberations, during which the Committee heard from State officials, representatives from local and international organizations, and some Bedouins who did not boycott the Committee.²¹¹ In November 2008, a report was submitted to the Israeli Prime Minister that drew up general guidelines and recommendations for the government on how to deal with Bedouin settlement.²¹² Although the report is the first official document to recognize the historical

²⁰⁷ See Ahmad Amara, *The Battle for the Land and Housing Rights of the Negev Bedouin*, http://www.academia.edu/235048/The_Battle_for_the_Land_and_Housing_Rights_of_the_Negev_Bedouin (last visited Feb. 6, 2013).

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See Ahmad Amara, *The Goldberg Committee: Legal and Extra-legal Means to Solving the Naqab Bedouins Case*, HAGAR STUDIES IN CULTURE POLITY AND IDENTITIES (2008), https://www.researchgate.net/publication/269141091_The_Goldberg_Committee_Legal_and_extra-legal_means_of_solving_the_Naqab_Bedouin_case.

²¹² See Ministry of Construction & Housing, *supra* note 22 at 31–2.

injustices imposed upon the Bedouin, the recommendations did not meet the minimum expectations of the Bedouin community.²¹³

According to leading human rights organizations, the Goldberg Committee failed to recognize Bedouin land rights and did not suggest any solution.²¹⁴ Instead, it suggested similar mechanisms and methods that had failed in the past.²¹⁵ The Committee even added new methods and mechanisms that further discriminate against Bedouin and deprive them of some of their compensation rights, namely ownership of 20% of their land.²¹⁶ As for the recognition of Bedouin villages, the Committee failed to specify clear recommendations.²¹⁷ Instead, it suggested that only villages with a sufficient population in locations that do not conflict with other plans could be recognized.²¹⁸ Ultimately, the Committee's report did not suggest any major change for the Bedouin problem and did not propose any substantial solution for any of the three issues in conflict: recognition of Bedouin land, recognition of their villages, or demolition of their

²¹³ See Elsana, *supra* note 196.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See Etta Prince-Gibson, *The Bedouin Dilemma*, MOMENT MAGAZINE (2019) <https://www.momentmag.com/bedouin-dilemma/>.

houses.²¹⁹ The report was a disappointment in regard to Bedouin land rights, recognition of their villages, and demolition of their homes.²²⁰

Furthermore, many Bedouins consider the Report to be the major source of their current troubles.²²¹ It accelerated the process of the Bedouin land confiscation, supported the policy of house demolition, and encouraged the uprooting their villages.²²² Most importantly, it established the platform for the Praver Plan, which was used to execute the recommendations of the Goldberg Committee.²²³ These recommendations

²¹⁹ See Regional Council for the Unrecognized Villages in the Negev, *Principles Paper Submitted to the Committee for Bedouin Settlement in the Negev*, GOLDBERG COMMITTEE (Feb. 7, 2008) (copy on file with author).

²²⁰ See Regional Council for the Unrecognized Villages in the Negev, *A Response to Goldberg Commission Report* (Dec. 28, 2008) (copy on file with author).

²²¹ See Harriet Sherwood, *Bedouin's Plight: 'We Want to Maintain Our Traditions. But It's A Dream Here'*, THE GUARDIAN (2011) <https://www.theguardian.com/world/2011/nov/03/bedouin-plight-traditions-threat-israel>.

²²² See Ben Fargeon & Michal Rotem, *Enforcing Distress: House Demolition Policy in the Bedouin Community in the Negev*, NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY (2016), https://www.dukium.org/wp-content/uploads/2016/06/HDR_2016_ENG-1.pdf.

²²³ See *The Arab Bedouin in the Unrecognized Villages in the Naqab (Negev): Between the Hammer of Praver and the Anvil of Goldberg*, ADALAH'S NEWSLETTER, (Apr. 2011), https://www.adalah.org/uploads/oldfiles/upfiles/2011/Thabet_English_2.pdf.

causes the eviction of the Bedouin from their villages and confiscation of their land.²²⁴

4. *The Praver Plan*

Later, in the same year, Israel established another team to examine the execution of the committee's recommendations and suggested guidelines for a policy on the Bedouin settlement in the new townships, including their land claim settlements.²²⁵ The government also asked the Committee to provide recommendations on policies to regulate the Bedouin settlement and provide proposals for new legislation for this matter.²²⁶

In 2009, a short time after the Goldberg Committee's Report, the government established the Praver Committee, headed by Ehud Praver, the former deputy chairman of the National Security Council.²²⁷

²²⁴ See *id.*

²²⁵ See *Recommendations of the Implementation Team for the Goldberg Report for the Regulation of Bedouin Settlement in the Negev* ISRAEL PMO, (המלצות צוות היישום לדו"ח גולדברג להסדרת התיישבות הבדואים), בנגב,

<http://www.pmo.gov.il/policyplanning/hevra/Documents/goldberg1012.pdf> (last visited Aug. 19, 2017).

²²⁶ PRIME MINISTER'S OFFICE, *The Establishment of a Commission to Draft Policy for Regulating Bedouin Settlement in the Negev*, <http://www.pmo.gov.il/Secretary/GovDecisions/2007/Pages/des2491.aspx> (last visited July 10, 2017).

²²⁷ See *The Praver Plan and Analysis* (2011), <https://www.adalah.org/uploads/oldfiles/upfiles/2011/Overview%20and%>

The government asked the Committee to prepare a plan for the implementation of the Goldberg Committee's recommendations, which include:²²⁸ (1) the settlement of Bedouin land claims; (2) the planning of new towns for Bedouin; and (3) the enforcement of the law in regard to the Bedouin illegal house construction (i.e. house demolition).²²⁹

In May 2011, the Praver Committee submitted its recommendations in a report known as the Praver Report.²³⁰ The Report suggested new compensation offers for Bedouin claimants.²³¹ It distinguished the compensation of the Bedouin for claims of possessed land, land designated as agricultural land, and unpossessed land (Bedouin have to give up possession of the land, which means they have to evacuate their

20Analysis%20of%20the%20Praver%20Committee%20Report%20Reco
mmendations%20Final.pdf.

²²⁸ See *The Arab Bedouin in the Unrecognized Villages in the Naqab (Negev): Between the Hammer of Praver and the Anvil of Goldberg*, ADALAH'S NEWSLETTER, (2011), http://www.adalah.org/uploads/oldfiles/ufiles/2011/Thabet_English_2.pdf (last visited Mar. 15, 2019).

²²⁹ See Anat Raskin, *Shel Me Hadamah Hazu? Baekvot Doah Praver Lehasdarat Hahityashvout Habedouit Banegev [Whose Land? Following The Praver Report On The Regulation Of Bedouin Settlement In The Negev]*, MEZRAH, <http://www.goarad.co.il/?pid=15&t=mFinal&L1=41&L2=144&item=1847> (last visited July 10, 2017).

²³⁰ See Ze'ev Binyamin "Benny" Begin, *Regulating Bedouin Settlement in the Negev Report*, <http://www.pmo.gov.il/BranchesAndUnits/beduin/Documents/DOCHbegin.PDF> (last visited Sept. 24, 2016).

²³¹ See *id.*

land).²³² Regarding only possessed land, the Report suggested offering Bedouin claimants parcels of land up to 50% of their claimed land as compensation.²³³ As discussed *supra*, during the last sixty years, Israel displaced most of the Bedouin from their land and deprived their possession; therefore, the number of current landholders is very small.²³⁴ For claims regarding land not possessed by claimants, which is the majority of Bedouin claimants, the Report suggested only offering Bedouin monetary compensation.²³⁵ This means depriving this group of any part of their land as compensation.²³⁶

With respect to the issue of planning arrangements for Bedouin settlements and recognition of Bedouin villages, the Report stated: “solutions for the existing population will be in the existing seven government-planned townships, in the Abu Basma villages (or by expanding the jurisdiction of such

²³² See *Israeli Land Authority Destroys Bedouin Fields In Negev*, MA'AN NEWS AGENCY (2014), <http://www.maannews.com/Content.aspx?id=671036>.

²³³ See INTER-MINISTERIAL TEAM TO IMPLEMENT REPORT RECOMMENDATIONS FOR REGULATING BEDOUIN SETTLEMENT- FURTHER DISCUSSION AND TRANSFER OF ACTIVITIES FROM ONE OFFICE SPACE, PRIME MINISTER'S OFFICE, <http://www.pmo.gov.il/Secretary/GovDecisions/2011/Pages/des3707.aspx> (last visited Mar. 15, 2017).

²³⁴ See *Israeli Land Authority Destroys Bedouin Fields In Negev*, MA'AN NEWS AGENCY, (Feb. 5, 2014), <http://www.maannews.com/Content.aspx?id=671036>.

²³⁵ See *id.*

²³⁶ See *id.*

villages), and in new settlements.”²³⁷ In this regard, the Report suggests beginning a process of planning that would cover the total Bedouin population in the unrecognized villages.²³⁸ The process of the settlement regulation would include planning expansions for the existing towns to absorb the additional Bedouin concentrations, and establishing new townships as deemed necessary.²³⁹

With regard to recognition of new Bedouin villages, the Report set a high bar of requirements for recognition.²⁴⁰ It stated: “[T]he establishment of new settlements is contingent upon the ‘criteria of population density and continuity’, as well as ‘an examination of size and economic capacity.’”²⁴¹ For years, similar criteria have prevented the recognition of Bedouin villages.²⁴² The Report also included several other

²³⁷ See A Report of the Inter-Ministerial Team for the Implementation of the Recommendations to Regulate Bedouin Settlement in the Negev (hereinafter *Praver Report*), Art. 2.5.2, (2011), http://moch.gov.il/Gov_Decisions/Pages/GovDecision.aspx?ListID=f33e0a4b-aa35-4b12-912e-d271a6476a11&WebId=fe384cf7-21cd-49eb-8bbb-71ed64f47de0&ItemID=289 (last visited July 10, 2017).

²³⁸ See *id.*

²³⁹ Concentrations are the unrecognized Bedouin villages, as the State prefers to call them.

²⁴⁰ See *The Arab Bedouin in the Unrecognized Villages in the Naqab (Negev): Between the Hammer of Praver and the Anvil of Goldberg*, ADALAH’S NEWSLETTER, http://www.adalah.org/uploads/oldfiles/upfiles/2011/Thabet_English_2.pdf (last visited Mar. 15, 2019).

²⁴¹ *Praver Report*, *supra* note 237.

²⁴² See *id.*

elements like a strict timetable and strict implementation of rules to ensure completion.²⁴³ Additionally, the proposal includes “a plan for the economic development and growth of [the] Bedouin population in the Negev.”²⁴⁴

Many human right organizations believe that the results of the Praver Plan would be disastrous for the Bedouin if implemented, since the plan suggests the eviction of the majority of the Bedouin from their villages in the Negev.²⁴⁵ The Report reveals that only one-third of the Bedouin of the unrecognized villages will remain in their current places, while two-thirds will be uprooted from their villages and resettled in other Bedouin towns.²⁴⁶ The Report proposed to displace nearly 20,000 to 30,000 Bedouins from their villages and transfer them to other Bedouin towns such as Rahat, Kseifa, and Hura.²⁴⁷ Many villages such as Assir,

²⁴³ *See id.*

²⁴⁴ *Id.* at 32-34.

²⁴⁵ *See The Praver Plan and Analysis*, <https://www.adalah.org/uploads/oldfiles/upfiles/2011/Overview%20and%20Analysis%20of%20the%20Praver%20Committee%20Report%20Recommendations%20Final.pdf>.

²⁴⁶ *See id.*

²⁴⁷ *See* Zafrir Rinat, *Israel Approves Plan to Relocate 30,000 Bedouin from Unrecognized Villages*, HAARETZ, (Sept. 11, 2011), <http://www.haaretz.com/news/national/israel-approves-plan-to-relocate-30-000-bedouin-from-unrecognized-villages-1.383772>.

Alssera, and Um Alhiraan—with respective populations of 1500, 1000, and 500—would be demolished.²⁴⁸

Additionally, the plan suggested implementing a new segregation protocol in the Negev.²⁴⁹ It arranges for Bedouin settlements within a clearly demarcated and separate region in the Negev; it separates the Bedouin population from the rest of the State's population.²⁵⁰

After the Report's publication, many right wing political parties protested against the plan.²⁵¹ They claimed that the government was giving out the Negev to the Bedouin.²⁵² As a result of the amounting pressure from these right wing political groups, Prime Minister Benjamin Netanyahu ordered the National Security Advisor, Jacob Amidror, to review the Report.²⁵³ Accordingly, Amidror reviewed the plans and made

²⁴⁸ See Adalah, *Nomads Against Their Will*, THE ATTEMPTED EXPULSION OF THE ARAB BEDOUIN IN THE NAQAB:THE EXAMPLE OF ATIR-UMMAL-HIERAN (Soshana London Sappir trans.), <https://www.adalah.org/uploads/oldfiles/eng/publications/Nomads%20Against%20their%20Will%20English%20pdf%20final.pdf> (last visited Sept. 24, 2016).

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ See Ronen Medzini, *On The Way To Approval: Large Cut in Lands for Bedouin*, YNET, (Dec. 31, 2012), <http://www.ynet.co.il/articles/0,7340,L-4116414,00.html>.

²⁵² See *id.*

²⁵³ See *Netanyahu Tries to Turn Arab Peace Initiative on its Head*, THE TIMES OF ISREAL, (June 1, 2016), <https://www.timesofisrael.com/netanyahu-tries-to-turn-arab-peace-initiative-on-its-head/>.

several amendments that affect the location of the resettlement, land ownership claims, and the amount of compensation.²⁵⁴ Amidror's amendments further decreased the area designated for the Bedouin settlement.²⁵⁵ He state "no land [compensation] will be given to Bedouin and no Bedouin settlement will be planned west of Highway 40."²⁵⁶

In addition, Amidror's amendments decreased the amount of land the Bedouin were supposed to receive as part of their compensation as claimants.²⁵⁷ The amendment specifies that the proposed arrangement would only apply to Bedouin who filed a lawsuit prior to October 1979, and whose claims were not rejected by the Land Settlement Officer or the court.²⁵⁸ Another amendment provides that the proposed arrangement will apply only to land, which the Bedouins held and cultivated, rather than claims for grazing lands, which constitute most of the claimed land.²⁵⁹ Further, the amendments held that the determination of land area for purposes of providing compensation shall be made

²⁵⁴ *See id.*

²⁵⁵ *See id.*

²⁵⁶ Medzini, *supra* note 251.

²⁵⁷ *See The Association for Civil Rights in Israel*, TEL AVIV HEADQUARTERS (Oct. 2011), https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ISR/INT_CESCR_NGO_ISR_47_9137_E.doc.

²⁵⁸ *See id.*

²⁵⁹ *See Ahmad Amara, The Negev Land Question: Between Denial and Recognition*, 42 INST. FOR PALESTINE STUDIES, 4 (2013), <https://www.palestine-studies.org/jps/fulltext/162935>.

according to evidence of cultivation of the land, or living on the land close to the time of filing the original claim, provided that the land was not held at that time or in the future by the State.²⁶⁰

Bedouin, who earlier objected to the Praver Plan, claimed that Amidror's amendments made the proposal totally unacceptable, mainly because the amendments dramatically reduced the land Bedouin could get in compensation as part of the land settlement.²⁶¹ The original Praver Plan proposed an area of 45,220 acres (183,000 dunams) for Bedouin living in the unrecognized villages in exchange for settlement of their land claims, but after the amendments, the area was reduced by almost half.²⁶²

In summary, the Praver Plan outlines implementation of the Goldberg Commission Report to deal with the Bedouin settlement issue in the unrecognized villages, rather than recognizing their villages. The Plan was prepared without any consultation with Bedouins of the unrecognized villages, and it could

²⁶⁰ See Rinat Zafrir, *Ben-Gurion Government Recognized Bedouin Rights*, HAARETZ, <http://www.haaretz.co.il/news/education/1.1473104> (last visited Jul 10, 2017).

²⁶¹ See Elsana, *supra* note 196.

²⁶² See Rinat Zafrir, *Israel Approves Plan to Relocate 30,000 Bedouin From Unrecognized Villages*, HAARETZ.COM, (2011), <http://www.haaretz.com/news/national/israel-approves-plan-to-relocate-30-000-bedouin-from-unrecognized-villages-1.383772> (last visited July 10, 2017) (noting that Bedouin representatives define the program "a declaration of war on the Bedouin.").

lead to the uprooting of tens of thousands of Bedouin from their homes.²⁶³

5. *The Legislative Method of Land Dispossession and the Ordinance Regime*

On the legislative level, after the establishment of Israel, it was less acceptable than it had been during the War, but also illegal, to evict the Bedouin, who became citizens of the State from their villages.²⁶⁴ Therefore, the State began using another, less aggressive, and more politically acceptable means to evict the Bedouin from their lands: the law. Thus, the State started relying more on legislation in order to continue to the “wholesale takeover” of Bedouin lands.²⁶⁵ Legislation not only enabled the dispossession of Bedouin land but also legitimized the dispossession in legal terms and in eyes of many Israeli citizens and international community.²⁶⁶ These legislations can be divided into two groups. The first group were national/general laws, which applied to all the Arabs in Israel, facilitated the dispossession of Bedouin land as part of the general policy of Arab lands

²⁶³ See *ACRI: Discriminatory Praver Plan Approved*, NEW ISRAEL FUND AUSTRALIA (Sept. 13, 2011), http://www.nif.org.au/acri_discriminatory_praver_plan_approved (last visited July 10, 2017).

²⁶⁴ See *Elsana*, *supra* note 196.

²⁶⁵ See *id.*

²⁶⁶ See Amer El Huzeil et al., *A Plan for the Treatment of the Bedouin Problem*, CENTER FOR LEGAL AND ECONOMIC RESEARCH IN THE MIDDLE EAST 9 (1999).

dispossession.²⁶⁷ These laws include the Absentee Property Law (1950) and the Land Acquisition Law (1953).²⁶⁸ The second group of laws, which this Article focuses on, specifically focused on Bedouin land dispossession, including: The Land Rights Settlement Ordinance (1969), the Negev Land Acquisition Act (Peace Treaty with Egypt) of 1980 (The Peace Law), and the Public Land Law (Trespasser Eviction) of 1981 (Amendment 2005).²⁶⁹

This second group of laws, especially Land Rights Settlement Ordinance (1969), “created the ‘alleged’ mechanism and framework for the investigation for Bedouin land rights,”²⁷⁰ which resulted in the dispossession of most of their land, and continue to serve for such purpose.²⁷¹

²⁶⁷ See Joshua Weisman, *The Land Law, 1969: A Critical Analysis*, 5 ISR. L. REV., 379 (1970), available at <https://www.cambridge.org/core/journals/israel-law-review/article/land-law-1969-a-critical-analysis/CB85A330BFD6D551D3210C8A197C6970>.

²⁶⁸ See Land Acquisition Law, 5740-1980, 34 LSI 190, 170-182 (Isr.).

²⁶⁹ See Weisman, *supra* note 267.

²⁷⁰ ISSACHAR ROSEN-ZVI, TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL 46 (2004) (they created a “complex web of legal mechanisms that imposed insurmountable procedural and evidentiary obstacles that preventing the indigenous Bedouin from effectively protecting their land.”).

²⁷¹ See Ahmad Amara, *The Battle for the Land and Housing Rights of the Negev Bedouin*, HOUSING & ESC RTS. L. Q. 1 (Mar. 2008) http://www.academia.edu/235048/The_Battle_for_the_Land_and_Housing_Rights_of_the_Negev_Bedouin.

B. *LAND RIGHTS SETTLEMENT ORDINANCE OF 1969*

The Land Rights Settlement Ordinance (1969) is the first major legislation that disproportionately impacted Bedouin land rights.²⁷² During the late 1970s, as part of Israel's policy of land registration, the State legislated the Ordinance to register and determine the ownership of land in Israel.²⁷³ As part of this procedure, Israel initiated a process for settling all Bedouin land claims.²⁷⁴

The Bedouins filed 3,220 land-title settlement lawsuits asking the State to recognize their land ownership for about 245,000 acres of land.²⁷⁵ Many Bedouin, however, were excluded from this process. The Alazazimah tribes, for example, who owned about 55,500 acres, located in Sahl-Albagar (*Har-Hanegev* region), were prevented from filing land settlement claims due to the fact that the State had previously expropriated their land for military needs.²⁷⁶ In this lone step, the State dispossessed about 20% of Bedouin

²⁷² See AMARA, *supra* note 195.

²⁷³ See Havatzelet Yahel, *Land Disputes Between the Negev Bedouin and Israel*, 11 ISR. STUD. 1–22, 11 (2006).

²⁷⁴ See Porat, *supra* note 46 at 457; PORAT, *supra* note 77 at 19.

²⁷⁵ See SWIRSKI AND HASSON, *supra* note 136 at 19.

²⁷⁶ See Yiftachel, *supra* note 4.

land.²⁷⁷ Thus, as several scholars indicate the Bedouin land claims reached as many as 300,000 acres.²⁷⁸

Surprisingly, all of the 3,220 Bedouin land settlement claims were rejected by the Land Settlement Officer.²⁷⁹ Therefore, per the Ordinance requirement, the Settlement Officer forwarded all Bedouin lawsuits to the District Court for final judgment.²⁸⁰ The Settlement Officer claimed that the Bedouin do not possess the required documents, namely British or Ottoman title deeds to prove their land ownership.²⁸¹ The Land Settlement Officer refused to accept the Bedouin's traditional documentation, such as contracts for land

²⁷⁷ See Dan Rabinowitz & Sliman Khawalde, *Demilitarized, then Dispossessed: The Kirad Bedouins of the Hula Valley in the Context of Syrian-Israeli Relations*, 32 INT'L J. OF MIDDLE EAST STUD., 511, (2000) <http://www.jstor.org/stable/259423>.

²⁷⁸ See Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 LAW SOC. REV. 231–257, 244, 250 (1996).

²⁷⁹ See Suhad Bishara, *Adalah's Position Paper on "Prayer II"*, THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (Jan. 2017), https://www.adalah.org/uploads/uploads/Adalah_Position_Paper_Prawler_II_23.1.2017.pdf.

²⁸⁰ See LAND RIGHTS SETTLEMENT ORDINANCE [REVISED] 5729, (1969), https://www.nevo.co.il/law_html/Law01/286_031.htm (last visited Aug 25, 2018) (according to article 43 of the Ordinance when the Land Settlement Officer decides to dismiss a land settlement claim he has to forward it for the District Court, for a final decision).

²⁸¹ See *Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages, OFF THE MAP*, <https://www.hrw.org/report/2008/03/30/map/land-and-housing-rights-violations-israels-unrecognized-bedouin-villages> (last visited Mar. 23, 2019).

purchase (*Sanadat*) and other evidence as sufficient proof of their land rights.²⁸²

When Bedouin reached the District Court, as part of their appeal, it as well, rejected their lawsuits and refused to recognize any of their land rights, thus they appealed to the High Court.²⁸³ The High Court also rejected their land claims and ordered the land to be registered under the name of the State.²⁸⁴ In the precedential case of the *Alhawashelah v. State of Israel*, the High Court rejected the appeal and decided that Bedouin land was *Mawat* land,²⁸⁵ and thus ruled that Bedouin lands were to be registered as State land, indicating that the Bedouin had no legal right to the land.²⁸⁶ Since *Alhawashelah* is case precedent, all courts have rejected all subsequent Bedouin land claims.²⁸⁷ To this day, no court has ruled in favor of Bedouin claimants for a single land-claim lawsuit.²⁸⁸

²⁸² See Elsana, *supra* note 196.

²⁸³ *Id.* at 56.

²⁸⁴ See *id.*

²⁸⁵ See CA 218/74 Salim El-Huashlla v. State of Israel (*Alhawashelah*) 38(3) PD 141 (1974) (Isr.).

²⁸⁶ See HCJ 84/83 El-Wakili v. State of Israel 37(4) PD 173 (1983) (Isr.).

²⁸⁷ See Ron Kelley, *Israel's Bedouin: The End of Poetry*, AM. FOR MIDDLE EAST UNDERSTANDING (AMEU) 3 (1998) ("To date, no Bedouin has ever won a land claim. This includes some 3,000 lawsuits by the Bedouin over the past two decades.").

²⁸⁸ See *Palestinian Bedouin IDPs, Ongoing Displacement and Land Rights: Israel Poisons Bedouin Land in Abda Unrecognized Villages*, AL MAJDAL 37 (2003) (reporting that no Bedouin has ever won a land claim to

I. The Ordinance Regime: The Effect of Legislation

Indeed, the laws that Israel passed created a new regime for Bedouin land dispossession, but among the many laws, the Land Rights Settlement Ordinance is particularly notable.²⁸⁹ The Ordinance eliminates the previous land regime, introduces a new regime that regulates Bedouin land, and effectively ensures Bedouin land dispossession.²⁹⁰ Instead of settlement and land title registration, the Ordinance initiated a new process that established the basic legal elements that ensured the long-term dispossession of Bedouin lands.²⁹¹ Through sophisticated and extraordinary steps, the Ordinance established new rules for land settlement claims, determined the jurisdiction of courts, and articulated the applicable law for the land settlement process.²⁹²

The administrative and legal steps that the Ordinance requires for Bedouin land claims is challenging for most Bedouin.²⁹³ It requires them to submit a “land title settlement claim” to the Land Rights

any of the more than 3000 lawsuits filed over 50 years, and this places the burden of proof regarding Bedouin land claims on Bedouin).

²⁸⁹ See DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* (1990).

²⁹⁰ See *Elsana*, *supra* note 196.

²⁹¹ See *id.*

²⁹² See *id.* (It started by describing the process, defining the settlement areas, and drafting the orders and notices for the towns).

²⁹³ See Land Rights Settlement Ordinance (Revised), 5729- 1969, 13 OSI 293, 293, Art. 17 (Isr.).

Settlement Officer (part of the Ministry of Justice).²⁹⁴ Then, the Land Settlement Officer investigates and assesses the claims.²⁹⁵ If the Officer approves the claim, he registers the land in the name of the Bedouin claimant.²⁹⁶ However, when the Officer rejects the lawsuit, he declares it a disputed claim and transfers the case to the District Court for a final judgment.²⁹⁷ According to the Ordinance, only the Court is authorized to settle disputes concerning land rights and to make final decisions that dismiss their land claim.²⁹⁸ Article 17(a) of the Ordinance states: “[u]pon publishing a settlement notification in a town, every person who claims land rights shall appear [in court]. . . and submit his memorandum of claim in the prescribed form.”²⁹⁹ Articles 43 and 44 of the Ordinance determine both the appropriate court jurisdiction and the applicable law to be applied where there is a dispute between claimants.³⁰⁰

Relying on the *claim* that the Bedouin do not hold any land rights, the Ordinance requires Bedouins to go

²⁹⁴ *Id.*

²⁹⁵ *See id.* at Art. 22.

²⁹⁶ *See id.*

²⁹⁷ *See id.* at Art. 53.

²⁹⁸ *See id.* at Art. 43 (“The court only is authorized to hear and adjudicate any dispute about land in a settlement area, and if there were conflicting claims between two or more plaintiffs, the settlement officer shall transfer the dispute to court.”)

²⁹⁹ *Id.* at Art. 17(a).

³⁰⁰ *See id.* at Art. 43, 44 (Article 43 of the Ordinance provides that only courts shall have jurisdiction over disputes regarding land settlement, and if there are any conflicting claims between two or more claimants, the Land Settlement Officer shall transfer the dispute to court).

through a legal process to prove their rights.³⁰¹ The Ordinance disregards Bedouin traditional land rights and sets the platform for the policy of land dispossession in the Negev.³⁰² The Ordinance ignores customary law or land rights based on international customary law.³⁰³

The Ordinance establishes a set of rules that ensure the supremacy of the State and the inferiority of Bedouin legal rights.³⁰⁴ It supports Israel's legal position and undermines the Bedouin's position.³⁰⁵ Specifically, Article 135 of the Ordinance "classifies all [*M*]awat lands as State property, unless formal legal title could be produced."³⁰⁶ Since the State classifies Bedouin land as *Mawat* land, it essentially classifies, or considers Bedouin land as State property.³⁰⁷ Such articles give a clear privilege to the State over Bedouin claimants and facilitate the expropriation of their land by legal means.³⁰⁸

Further, the Ordinance preserves the State's right to object to any Bedouin claim without requiring that the

³⁰¹ See Elsana, *supra* note 196, at 58.

³⁰² See *id.*

³⁰³ See Land Rights Settlement Ordinance, *supra* note 293.

³⁰⁴ See Elsana, *supra* note 196, at 58.

³⁰⁵ See *id.*

³⁰⁶ Tawfiq S. Rangwala, *Inadequate Housing, Israel, and the Bedouin of the Negev*, 42 OSGOODE HALL LAW J. 415, 440–41 (2004).

³⁰⁷ See PLIA ALBECK, *DOAH MESAKEM SHEL TZEVEV HAMOMHIM LEANYAN HESDER MEKARKIEN EZOR HASYAG HANGEV HTSFONI* [REPORT OF THE TEAM OF EXPERTS ON THE ISSUE OF LAND SETTLEMENT IN THE SIYAG AREA AND THE NORTHERN NEGEV], ISR. MINISTRY OF JUST. (Oct. 20, 1975).

³⁰⁸ See Elsana, *supra* note 196, at 58.

State prove any rights or connection to the Bedouin land.³⁰⁹ Article 22 of the Ordinance adds “[t]he State’s rights in land shall be investigated and will be settled whether officially sued or not, all rights in land that have not been proven by other claims shall be registered in the name of the State.”³¹⁰ In addition, Article 53 grants the State the ultimate right to object to the settlement of title claims.³¹¹ The Article states:

[i]f an objection was filed in one of the matters mentioned in Articles 51 and 52, the Settlement Officer shall transfer the matter to the court, and the court may order the registration of the possessor as the owner of the land, if it finds that the mentioned conditions were met.³¹²

In traditional legal procedure, the party who claims rights against the possessor generally submits the claim, serves as the plaintiff, and proves his claim.³¹³ The new order, however, reverses the traditional rule.³¹⁴ Instead of asking the state (to submit a claim and prove it) it requires the Bedouin—who possess the land—to submit the claim, serve as the plaintiff, and carry the burden of proof.³¹⁵

³⁰⁹ *See id.* at 59.

³¹⁰ *See* Land Rights Settlement Ordinance, *supra* note 293.

³¹¹ *See id.* at Art. 53.

³¹² *Id.*

³¹³ *See* Elsana, *supra* note 4, 354-57 (Oct. 2017).

³¹⁴ *See id.*

³¹⁵ *See id.* at 351.

According to Article 43 of the Ordinance, for either side to be able to own the land, both the Bedouin and the State must prove their rights.³¹⁶ Under Article 45 of the Ordinance, when neither the Bedouin nor the State agrees to serve as plaintiff, the court decides which side should be the plaintiff and subsequently bear the burden of proof.³¹⁷ In Bedouin land cases, however, the Ordinance changes the traditional order and demands the Bedouin plaintiffs to submit lawsuits for land settlement.³¹⁸ Then, the State then summons the Bedouin to court and, once again, forces them to serve as plaintiff and carry the burden of proof.³¹⁹

The Ordinance also transforms the status of the Bedouin people from “owners of land,” or “possessors of land,” to “claimants of land,” or “claimants for land rights.”³²⁰ This transformation has a tremendous effect on Bedouin land adjudication in courts, which results in a long, complicated legal process that denies Bedouin

³¹⁶ See Land Rights Settlement Ordinance, *supra* note 293 at Art. 43.

³¹⁷ See *id.* at Art. 45.

³¹⁸ See *id.* at Art 43 (The Bedouin must defend their land in court. If they do not appear in court, they automatically lose their claims and their land).

³¹⁹ Many Bedouins were surprised to find that when they came to defend their land they were summoned to court as plaintiffs rather than defendants. Some Bedouins did not know about the claims their parents had submitted filed in the land registry long time before legal action had been taken by the State.

³²⁰ See Land Rights Settlement Ordinance, *supra* note 293 at Art. 17(a).

land rights.³²¹ The process requires Bedouins who appeal for land ownership to prove their rights, while those who agree to accept compensation are not required to do so.³²² In other words, the process denies the recognition of land rights for those who insist on asking courts to recognize their land ownership, while at the same time, recognizes land ownership for those who agree to sell their land to the State. In latter cases, the State recognizes Bedouin rights *mainly* based on their traditional law.³²³ The State's "acceptable paradox" does not find any representation in the legal process.³²⁴ Such changes contradict basic rules of due process and law of evidence (rules of evidence), delay adjudication, and prevent Bedouins from effectively bringing forth evidence to prove their claims.

A careful analysis of the situation on a macro level reveals that the State, rather than the Bedouin, deserves to serve as the plaintiff. The State is the party that acts and behaves as the plaintiff in the general adjudicatory process. The State is the one interested in obtaining or acquiring rights through the legal process; It claims rights against the Bedouin who is in possession

³²¹ Compare Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006) (explaining the land settlement dispute between the Onieda Indian Nation and New York's non-Indian citizens).

³²² See Land Rights Settlement Ordinance, *supra* note 293 at Art. 43.

³²³ See Morad Elsana, *The Recognition of Indigenous Peoples' Land: Application of the Customary Land Rights Model on the Arab-Bedouin Case in Israel*, 7 GEO. J. L. & MOD. CRIT. RACE. PERSP. 45, 61 (2015).

³²⁴ See Elsana, *supra* note 196.

of the land.³²⁵ The State claims rights, summons Bedouins to court, and controls the legal process, while the Bedouin (defined as the plaintiff) behave as defendants and attempt to defend their rights in court. Also, in the land settlements process, the State is the party who initiates the legal process and forces the Bedouin to file their claims. In the 1970s the State forced the Bedouin to file land title settlement claims; in 2003, the State filed counterclaims and forced the Bedouin to adjudicate their land settlement claims in court.³²⁶ Therefore, the State, rather than the Bedouin, should serve as the plaintiff and carry the burden of proof.

Israel's control of the legal process is another factor that should be taken into consideration. The State decides when to start the process, when to freeze it, and against which tribe or tribes to submit claims. The State controls many important elements of the process such as the time passed, and the statutes of limitation. Only through colonial "legal magic" does the impossible become possible against indigenous peoples.³²⁷ The timing of such acts proves to have a tremendous effect on the Bedouin claims, since it defines and controls the ability of the Bedouin to provide evidence and call witnesses to court. These limitations eventually lead to the Bedouin's inability to prove their cases.

³²⁵ See generally Kent McNeil, *The Onus of Proof of Aboriginal Title*, 37 OSGOODE HALL L.J. 775, 776 (1999).

³²⁶ See Morad Elsana, *The Role of the Judiciary in Dispossessing Indigenous Peoples*, AM J. JURIS. 333, 350-51 (2018).

³²⁷ See Elsana, *supra* note 323 at 61.

One blatant example of how the State undermines the Bedouin position can be found in Israel's ability to delay adjudication of Bedouin land claims for a long time. The State has kept Bedouin claims pending for about forty years after the Land Settlement Process began in the early 1970s. That delay is one of the elements that severely undermined the Bedouin's ability to bring evidence, especially witnesses, to the court, particularly because of the Bedouin oral culture³²⁸ During the delay, many Bedouin claimants lost the ability to prove their land rights due to the death of many claimants and witnesses to traditional, pre-State life.³²⁹ Much of the major evidence was lost with them.³³⁰ This is significant because the Court requires evidence from 1921, the year of the British *Mawat* Ordinance, or before to be available.³³¹ Further, the Ordinance places the ultimate power to adjudicate Bedouin land in the hands of the State.³³² The State then abuses that power by managing and manipulating the process in order to weaken the Bedouins' legal position and undermine their ability to prove their land rights.

Finally, one must notice that Article 44 of the Ordinance outlines the substantive law courts should apply when evaluating a land settlement claim, provides that: (a) A court shall judge by land laws that are in effect

³²⁸ *See id.*

³²⁹ *See id.*

³³⁰ *See id.* at 62.

³³¹ *See id.*

³³² *See id.*

during the trial, *and take into an account the rights of real estate by law and by equity.*³³³ However, despite this, the state and courts have ignored such options and insists the Bedouin have no land rights.³³⁴

2. *The Bedouins' Limited Understanding of the Land Title Settlement Process*

Bedouins' limited understanding of Israel's legal system and of the Hebrew language are other factors that limit their ability to advocate their land rights, and indirectly facilitate confiscation of their land.³³⁵ Land title settlement was an unfamiliar process for the Bedouin; many of them did not really understand the process, its goals, or the documents they received from the Land Registrar Officer, such as application forms for land claims.³³⁶ Many mistakenly thought that the State wanted to register their land in the Land Registry to recognize their ownership.³³⁷ During the process of submitting the land title settlement applications, the Bedouin were required to provide evidence of their land rights, which they did in the form of *Sanadat* or witnesses' statements.³³⁸ They also had to define the

³³³ *See id.* at 54.

³³⁴ *See id.* at 43.

³³⁵ *See id.* at 20.

³³⁶ *See id.* at 57.

³³⁷ *See id.*

³³⁸ *See id.* at 19.

borders and the size of their land.³³⁹ At the end of each application for land title settlement, they received official documents signed by the State Officer of the Land Registration Office, under the Ministry of Justice, acknowledging receipt of those documents, but not confirming land ownership.³⁴⁰ However, many Bedouins were illiterate and could not read the content of the documents they received.³⁴¹ To this day, some Bedouins mistakenly think that the application forms or the confirmation of their traditional documents, that they receive from the Land Settlement Officer, are Israeli title deeds for their land.³⁴² Therefore, many Bedouin mistakenly refer to the documents as title deeds or official documents that prove their land ownership.³⁴³

In addition, during the late 1970s, when Israel started the land settlement process, the Bedouin did not trust the new State, especially in issues related to their land.³⁴⁴ In the beginning, many of them refused to submit land settlements claims through this process.³⁴⁵ The State, only after making extraordinary efforts, was able to convince the Bedouins to submit settlement

³³⁹ *See id.*

³⁴⁰ *See id.* at 57.

³⁴¹ *See id.*

³⁴² *See id.* at 58.

³⁴³ *See id.*

³⁴⁴ *See id.* at 56.

³⁴⁵ *See* SWIRSKI AND HASSON, *supra* note 136 at 5 (discussing Bedouin suspicions and attitudes toward state authorities).

claims.³⁴⁶ The State also sent officers to tribal leaders to convince them to submit claims on behalf of their tribes³⁴⁷. Furthermore, when such efforts did not suffice, the State warned the Bedouins about the consequences of not submitting claims.³⁴⁸

3. *The Government Committee and the Mawat Land Doctrine*

In 1975, Israel appointed a special committee to inquire into the legal status of Bedouin land rights (which became known as the Albeck Committee).³⁴⁹ In October the same year, the Committee issued its report about Bedouin land rights.³⁵⁰ The report stated three main points: first, all lands of the Negev (*Siyag* area) are *Mawat* lands because when the Ottoman Lands Code of 1858 was published, there was no permanent settlement in the Negev; second, no Bedouin can acquire any land

³⁴⁶See Farah Mihlar, *Israel's Denial of the Bedouin*. BRIEFING LONDON: MINORITY RIGHTS GROUP INT'L. 1, 8 (2011).

³⁴⁷See Aron Medzini, *Bedouin Settlement Policy in Israel: Success or Failure?* HORIZONS GEOGRAPHY 79/80, 37, 39 (2012).

³⁴⁸See LAWS OF THE STATE OF ISRAEL ORDINANCE ART. 5(B)(2) (a warning of the expected results to a person who does not file his claim at the required time, and will not delimit the plot he is claiming and the penalties that are due to him for this failure) (translation).

³⁴⁹See Ahmad Amara, *The Goldberg Committee: Legal and Extra-legal Means to Solving the Naqab Bedouins Case*, HAGAR STUDIES IN CULTURE POLITY AND IDENTITIES 8 (2): 227, 229 (2008), https://www.researchgate.net/publication/269141091_The_Goldberg_Committee_Legal_and_extra-legal_means_of_solving_the_Naqab_Bedouin_case.

³⁵⁰See *id.*

rights, even under possession and continuous cultivation; third, all Bedouin land is State land.³⁵¹

The report further established the principles of the policy applicable to Bedouin land to this day, particularly the non-recognition of Bedouin land ownership.³⁵² As a result of the Committee's recommendations, the State did not bring any further Bedouin land claim lawsuits to be adjudicated in courts until 2003.³⁵³ Instead, "[t]he State started to push the Bedouin to relinquish their lands by offering them compensation and convincing them to settle their land claims through different methods of pressure and negotiations."³⁵⁴

4. *Halt on Bedouin Land Settlement 1984-2003 and The Negev Plan of 2003*

Between 1984 and 2003, Israel continued to refuse to recognize the Bedouin land rights and continued to expropriate their land when the Bedouin refused to accept the State's offers for land settlement.³⁵⁵ Meanwhile, the majority of Bedouin refused to either relinquish their lands or settle their land lawsuits.³⁵⁶ Some Bedouin refused as a matter of principle and others

³⁵¹ See SWIRSKI AND HASSON, *supra* note 136 at 20–21.

³⁵² See *id.* at 21.

³⁵³ See Elzana, *supra* note 4.

³⁵⁴ *Id.* at 31.

³⁵⁵ See *id.* at 31–32.

³⁵⁶ See *id.* at 33.

refused due to inadequate offers of compensation.³⁵⁷ As a result, this situation became a deadlock, with no solution that both the Bedouin and State could accept. Israel started to claim that the halt in the land rights settlement process was impeding the development of the Negev.³⁵⁸ This created another excuse for the State to continue to promote more aggressive plans and policies to end the Bedouin land issue; specifically, the State pursued adjudicating the Bedouin long-time pending land settlement lawsuits (completion of the land title settlement process), obtained favorable decisions in courts, and disposed the Bedouin land.³⁵⁹

For many years, Israel claimed the Bedouin land issue was the main obstacle for the development of the Negev.³⁶⁰ In fact, State officials and political leaders continue to promote the idea that Bedouin land claims are the main reason behind their refusal to leave their land and move to settle in the new townships.³⁶¹ The State started to claim in the media that solving or eliminating the land settlement issues is the only way to develop the Negev.³⁶²

³⁵⁷ See Havatzelet Yahel, *Land Disputes Between the Negev Bedouin and Israel*, 11 ISR. STUD. 1–22, 12 (2006) (stating “from 1978 until 2003 agreed settlements of claims were achieved with regard to over 140,000 dumans, most of them in the area of airfields”).

³⁵⁸ See *id.* at 8.

³⁵⁹ See *id.* at 10–12.

³⁶⁰ See ADALAH, *supra* note 248.

³⁶¹ See *id.* at 22–24.

³⁶² See Ghazi Falah, *Israeli State Policy Toward Bedouin Sedentarization in the Negev*, 18 J. OF PALESTINE STUDIES, 71–91 (1964).

In 2003, the government decided to confront the Bedouin issue through the Negev Plan of 2003.³⁶³ According to the government, the plan aimed to improve services and infrastructure in the recognized townships and to guard the State's land in the Negev against Bedouin trespassing or theft.³⁶⁴ In practice, the plan sought to relocate Bedouin from their villages into designated townships and settle Bedouin land claims.³⁶⁵

Bedouin were also concerned that their land would be taken from them to serve Jewish development needs and settlement programs in the Negev, rather than to serve their own urgent development needs, that have been ignored for more than sixty years, as it did in Umm al-Hiran Village, and Azzarnouge.³⁶⁶ Bedouin claimed that the main goal of the plan is to evict them from their land, concentrate them in large towns, and dispossess them of their land.³⁶⁷ Therefore, the Bedouin opposed

³⁶³ See SWIRSKI AND HASSON, *supra* note 136 at 12.

³⁶⁴ See Israeli Government Resolution No. 216 (ARB/I) (14 April 2003).

³⁶⁵ See Noam Sharvit, *When the State sues Bedouin compromise Globes*, <http://www.globes.co.il/news/article.aspx?fbid=1000174638> (last visited July 10, 2017); SWIRSKI AND HASSON, *supra* note 136 at 29.

³⁶⁶ See IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY 50 (1980) (describing the State policy of control of the Arab minority through land control).

³⁶⁷ See Interview with Oren Yiftachel, Prof. at Ben Gorion University, at Ben Gorion University (2011), *available at* http://www.dirasat-aclp.org/arabic/files/Oren_Yiftachel_Kitab_Dirasat_2011.pdf (discussing the Bedouin boycott of the Goldberg Committee).

the plan, refused to cooperate, and advocated against the plan.³⁶⁸

C. COUNTERCLAIMS: THE ENDLESS EFFECT OF THE
ORDINANCE

In 2004, as part of the Negev Plan—in a step designed to put additional pressure on Bedouin to coerce them to settle their land claims—the State renewed the adjudication of Bedouin land claims in courts and started to submit mass counterclaim lawsuits against Bedouin.³⁶⁹ Israel vowed to adjudicate all Bedouin land claims and settle the Bedouin land issue.³⁷⁰ To make the plan more effective and assertive Israel allocated special budgets, and hired a special team of lawyers and experts to complete the task as soon as possible.³⁷¹

These counterclaims compel the Bedouin to either settle their land claims or appear in court for adjudication.³⁷² If claimants do not appear in court to adjudicate their claims, the court would dismiss their

³⁶⁸ See *Qiadat Alawasat Alar Abi Tarfud Attaanul Ma' Lajnat Goldberg Letasweat Alaradi [Arab Sector Leadership Refuses To Deal With The Goldberg Committee To Resolve The Issue Of Land]*, ARABS 48 (Jan. 20, 2008), available at <http://www.pls48.net/?mod=print&ID=25973> (reporting on the final statement of the Peace Tent Conference for land and housing protection).

³⁶⁹ See *Elsana*, *supra* note 4 at 34.

³⁷⁰ See *id.*

³⁷¹ See *ADALAH*, *supra* note 248 at 10.

³⁷² See *Yahel*, *supra* note 69.

claim and confiscate the land.³⁷³ The government also raised the compensation offer, for a limited time of three years, in order to speed up the process, and increased the land component compensation from 20% to 30%.³⁷⁴ At the same time, it warned that those who refuse to settle their land claims would be deprived of both their land and compensation.³⁷⁵

The results have been devastating for Bedouin land rights. Shortly after 2004, the State brought more than 130 counter-claims to Bedouin land claims; the State won forty cases, relating to about 6177 acres (25,000 dunams) that were registered in the name of the State.³⁷⁶ As of April 2016, Bedouins have lost every land case that has come to trial.³⁷⁷ In an effort to extinguish

³⁷³ See *The Negev Coexistence Forum for Civil Equality, THE ARAB-BEDOUINS OF THE NAQAB- NEGEV DESERT IN ISRAEL (SHADOW REPORT) 1*, 11–12 (2006).

³⁷⁴ See *Decisions of the Council at its Meeting on 04/03/04*, ISRAEL LANDS ADMINISTRATION, http://www.mmi.gov.il/hodaotmmiint/show_h.asp?key=525&CodeMaarec et=1 (last visited July 10, 2017) (outlining compensation land prices and construction fields regarding the Negev Bedouin).

³⁷⁵ See *id.*

³⁷⁶ See Yahel, *supra* note 69 at 13.

³⁷⁷ See *Supreme Court Rejects Appeal by Bedouin Land Rights Activist Convicted of Trespassing*, HAARETZ, November 22, 2018, <https://www.haaretz.com/israel-news/supreme-court-rejects-appeal-by-bedouin-land-rights-activist-1.6677523> (last visited Apr 20, 2019); Jillian Kestler-D'Amours, ISRAEL'S BEDOUIN BATTLE DISPLACEMENT, <https://www.aljazeera.com/indepth/features/2013/08/2013828125945288209.html> (last visited Apr 20, 2019) (Israeli courts have ruled in favor of the Israeli government in 100 percent of bedouin land ownership cases to date); C.A 4220/12 Al-Uqbi vs. State of Israel, , Nivo 2015.

the Bedouin land issue, the State summons Bedouin claimants to the Land Settlement Office one by one, or tribe by tribe, to settle Bedouin land claims.³⁷⁸

D. NEGEV LAND ACQUISITION (PEACE TREATY) 1980

Israel also utilized Negev Land Acquisition legislation to dispossess Bedouin land. In 1979, the State signed the Camp David Peace Agreement with Egypt.³⁷⁹ According to the agreement, Israel agreed to withdraw from the Sinai Peninsula and remove its military bases from Egypt.³⁸⁰ Rather than selecting alternative available places in the Negev, Israel decided to relocate the military airport and the military bases on Bedouin land in the Tal-Almalah region, where a major concentration of Bedouin tribes and lands are located.³⁸¹

In order to avoid legal intervention by Bedouin or human rights groups, Israel passed the Negev Land Acquisition Law of 1980, known as the Peace Treaty with Egypt (“Peace Treaty Law”).³⁸² The Peace Treaty Law imposed Bedouin eviction and land dispossession, and established the compensation process by law.³⁸³ This

³⁷⁸ See Ronit Levine-Schnur, *Regulating Bedouin Settlement: A Disengagement Plan for the Negev*, ISR. DEMOCR. INST. 22–23, https://www.academia.edu/5348554/Regulating_Bedouin_Settlement_A_Disengagement_Plan_for_the_Negev (last visited July 4, 2017).

³⁷⁹ See HUMAN RIGHTS WATCH, *supra* note 64, at 15.

³⁸⁰ See David K. Shipler, *Israelis Approve Sinai Withdrawal*, N.Y. TIMES, (April 22, 1982).

³⁸¹ See ROSEN-ZVI, *supra* note 270, at 64–65.

³⁸² See The Negev Land Acquisition, *supra* note 156.

³⁸³ See HUMAN RIGHTS WATCH, *supra* note 64, at 15-16.

law allowed the State to evict all Bedouin people in the Tal-Almalah area and exile them to the designated townships of Arara and Ksyefeh.³⁸⁴ It also allowed the State to confiscate their land in exchange for small amounts of compensation, with a price fixed by law.³⁸⁵

Although it was designed specifically for the Tal-Almalah region, the State applied the Peace Treaty Law to all Bedouin land settlement matters, especially to matters regarding land compensation.³⁸⁶ Today, the law defines both the monetary and land components of compensation.³⁸⁷

The Peace Treaty Law not only physically dispossessed Bedouins of their land, but also subjected them to inadequate and discriminatory compensation rules. Compensation paid to other settlers highlights inequity: the State paid Jewish settlers evacuated from the Negev in the same year more than ten times the amount paid to the dislocated Bedouin.³⁸⁸ Twenty-four years later, when the State evicted Bedouin and Jewish residents from Gaza Strip, compensation reflected a comparable disparity.³⁸⁹ Following the 1980 Peace

³⁸⁴ *See id.*

³⁸⁵ *See id.*

³⁸⁶ *See Amara, supra* note 78, at 77.

³⁸⁷ *See id.*

³⁸⁸ *See* Elezer Goldberg, HAVADA LEHATSAAT MDINIOT LEHASDARAT HITYASHVUT HABEDOUIM BANEDEV [PROTOCOL OF GOLDBERG COMMITTEE], MINISTRY OF CONSTRUCTION & HOUSING 75 (May 6, 2008).

³⁸⁹ *See* Ezra Hezikia, *The Evacuees Act Passed Third Reading*, ARUTZ SHEVA (Aug. 4, 2011) <http://www.inn.co.il/News/News.aspx/223902>.

Agreement, the State worked to confiscate as much Bedouin land as possible with these inequitable compensation terms.³⁹⁰

*E. PUBLIC LAND ACT (REMOVAL OF SQUATTERS) OF
2005*

In 2005, the government enacted additional legislation aimed to further dispossess Bedouin land. The law, part of an amendment to the Public Land Act, gives local authorities the power to issue orders for the removal of squatters from public land without judicial review, a previously mandatory step.³⁹¹ The obvious purpose of the Act is to prevent Bedouins from using their traditional land—which the State defines as public land—and to evict them quickly if they do use it.³⁹²

VI. CONCLUSION

Through administrative activities and various legislation, Israel established a system that dispossesses Bedouin land³⁹³ and targets Bedouin land rights on multiple levels.³⁹⁴ Such laws not only facilitate Bedouin

³⁹⁰ See ROSEN-ZVI, *supra* note 270 at 3.

³⁹¹ See Amara, *supra* note 78, at 38-39.

³⁹² See Adalah, *Discriminatory and Anti-Democratic Laws*, ADALAH'S NEWS L. 1, (Feb. 2008) available at <http://www.adalah.org/newsletter/heb/feb08/2.php>.

³⁹³ See Amara, *supra* note 78, at 29.

³⁹⁴ See *id.*

land dispossession, but also enable and legitimize land dispossession by the executive and judiciary branches.³⁹⁵

The case of Bedouin land dispossession mirrors the systematic dispossession of indigenous peoples by colonial powers, who employed methods of invasion, occupation, removal, concentration, denial of land rights, legislation initiatives, and strategic policies, to dispossess land.³⁹⁶ Additionally, the Israeli State, also made many physical changes to the Bedouin landscape, further disconnecting the Bedouins physically, economically, and emotionally from their land.³⁹⁷ Such changes destroyed the Bedouins' traditional economy,³⁹⁸ undermined their traditional leadership, and literally changed the Bedouins' landscape by building towns and projects on their land.³⁹⁹ These changes were designed to convince the Bedouins that restoring the land to the

³⁹⁵ See Jeremy Forman & Alexandre Kedar, *Colonialism, Colonization and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective*, 4 THEOR. INQ. LAW, 496 (2003), <http://www.degruyter.com/view/j/til.2003.4.issue-2/til.2003.4.2.1074/til.2003.4.2.1074.xml?onlyResultQuery=chinese> (last visited July 10, 2017).

³⁹⁶ See Walid Salem, *Jerusalem: Reconsidering the Settler Colonial Analysis*, 21 PALESTINE-ISR. J. OF POL., ECON. AND CULTURE (2016), <http://www.pij.org/details.php?id=1706>.

³⁹⁷ See *id.*

³⁹⁸ See Moshe Dayan, *On Land Policy and the Bedouin Problem*, HAARETZ, (July 31, 1963), cited in ISSACHAR ROSEN-ZVI, *TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL*, 60 (Ashgate Publ'g Ltd., 2004).

³⁹⁹ See Amara, *supra* note 78, at 279-80.

Bedouins is not an option,⁴⁰⁰ and that the only available solution to Bedouin land claims is through financial compensation.⁴⁰¹ This is created a psychology that keeps pushing many Bedouins toward settling their land rights and giving up their longtime struggle.

The most important consideration is the way Israel's actions and legislations were able to manipulate legal rights and eliminate the Bedouins ability to advocate for their land.⁴⁰² The State changed procedures, changed the burden of proof, delayed the adjudication process until witnesses died, and ignored a substantial law that could recognize Bedouin rights under the principle of equity.⁴⁰³ In addition, Bedouin professional and economic disadvantages, coupled with linguistic

⁴⁰⁰ See *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.); *Wik Peoples v Queensland* (1996) 187 CLR 1 (Austl.) (addressing the difficulties of recognizing Aboriginal rights due to the new realities surrounding their land).

⁴⁰¹ See Admin C (BS) 257/04 Ass'n for Support and Prot. Of Bedouin Rights in Israel v. The Nat'l Planning and Constr., PM 2004(2) 7038 (2004) (Isr.) (finding no connection to land after the State evicted Bedouin from their land in the 1950s and refusing to interfere in the State's project to build a Jewish town on Bedouin land).

⁴⁰² See *id.*; Elisabeth Marteu, *Some Reflections on How Bedouin Women of the Negev Relate to Politics: Between Political Marginalization and Social Mobilization*, 16 BULL. OF THE FRENCH RES. CTR. IN JERUSALEM, 271, 273-74 (2005) (discussing Israeli nationalization of Bedouin land).

⁴⁰³ See Yahel, *supra* note 69 (stating "from 1978 until 2003 agreed settlements of claims were achieved with regard to over 140,000 dumans, most of them in the area of airfields").

obstacles, are eliminating Bedouin chances to win in courts.⁴⁰⁴

⁴⁰⁴ See Ismael Abu-Saad, *Education as a Tool for Control vs. Development Among Indigenous Peoples: The Case of Bedouin Arabs in Israel*, 2 HAGAR INT'L SOC. SCI. REV., 241, 245, 256 (2001) (discussing socio-economic, linguistic, and educational challenges Negev Bedouin community faces).

THE CHALLENGES AND IMPLICATIONS OF FISCAL HEALTH

*Bruce D. McDonald, III**

The condition of a local government's fiscal health presents challenges to those working for the government, but also to those who rely upon the goods and services that it provides. Significant attention has been paid to improving our understanding of fiscal health to improve the decision-making process of administrators. Unfortunately, little consensus has emerged concerning how it is defined and how it is measured. How we view the defining terms and resulting measurement, however, has differing legal implications related to a government's bankruptcy or the imposition of an emergency manager by the state. Our understanding of fiscal health can also

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affect the recognition of a government's liability. This article seeks to bring some understanding to the fiscal health of local governments. This is accomplished by defining fiscal health, providing an overview of how the health is measured, and discussing the legal implications that emerge as a result.

I. INTRODUCTION

In recent years interest in government sustainability has increased.¹ Administrators of local governments face declines in their available revenue while demand for public goods and services increases.² At the same time, states shift more responsibility of providing services onto local governments.³ While the Great Recession brought the financial condition of local governments to the forefront,⁴ events such as the bankruptcies of Jefferson County, Alabama, in 2011, and Detroit,

¹ See Craig S. Maher, Bruce D. McDonald, and Steven C. Deller, *The Fiscal Health of U.S. Cities*, New York, NY: Routledge (forthcoming) (on file with authors).

² See D. Roderick Kiewiet & Matthew D. McCubbins, *State and Local Government Finance: The New Fiscal Ice Age*, 17 ANN. REV. POL. SCI., 105-22 (2014); E. A. SCORSONE, H. LEVINE & J. B. JUSTICE, HANDBOOK OF LOCAL GOVERNMENT FISCAL HEALTH., 1-7 (E.A. Scorsone et al. eds., 2013).

³ See *id.*

⁴ See SCORSONE, *supra* note 2, at 11-41; Bruce D. McDonald, *Does the Charter Form Improve the Fiscal Health of Counties?*, 75(4) PUB. ADMIN. REV. 609-18 (2015) (discussing general theory and history of administrative roles governments play) .

Michigan, in 2013, exposed the implications of poor financial planning.⁵

The problem remains more widespread than Jefferson County and Detroit. Since 2010, more than 50 local governments in the United States have filed for bankruptcy.⁶ Even more employ emergency managers to address their financial problems and others struggle to stay solvent.⁷ Some states established financial monitoring systems to provide an early indication of problems to allow for early intervention and prevention.⁸

Although rarely phrased in the context, the position of a local government's fiscal health is inherently a legal issue, as many of the services provided by local governments are done as a result of state mandate.⁹

⁵ See Bruce D. McDonald, *Measuring the Fiscal Health of Municipalities* (Cambridge, MA: Lincoln Inst. of Land Pol'y, Working Paper No. WP17BM1, 2017).

⁶ See *Bankrupt Cities, Municipalities List and Map*, GOVERNING, <http://www.governing.com/gov-data/municipal-cities-counties-bankruptcies-and-defaults.html>; McDonald, *supra* note 5.

⁷ See Evgenia Gorina, Craig Maher, & Marc Joffe, *Local Fiscal Distress: Measurement and Prediction*, 38(1) PUB. BDGT. & FIN. 72-94 (2018) (discussing financial conditions and a need for a fiscal reporting device).

⁸ See generally SCORSONE, *supra* note 2, at 77-124 (citing Dean Michael Mead, *The Development Of External Financial Reporting And Its Relationship To The Assessment Of Fiscal Health And Stress* (2013)); PEW CHARITABLE TRUSTS, STATE STRATEGIES TO DETECT LOCAL FISCAL DISTRESS: HOW STATES ASSESS AND MONITOR THE FINANCIAL HEALTH OF LOCAL GOVERNMENTS (2016).

⁹ See SCORSONE, *supra* note 2, at 43-74; Junghack Kim, Bruce D. McDonald, & Jooho Lee, *The Nexus of State and Local Capacity in Vertical Policy Diffusion*, 48(2) AM. REV. OF PUB. ADMIN. 188-200 (2018)

States also typically impose restrictions on the capacity of local governments to adjust their current tax policies or impose new ones.¹⁰ The legal requirement of local governments to do more with less creates a financial tension. In some instances, this results in skirting other responsibilities that could have long-term implications for the government and its employees.¹¹ While the ability of a local government to effectively manage is tied to its financial constraints, there is little available to help the administrators of local governments determine when the problems have become too much and the fiscal health of the government is at risk.¹²

(discussing vertical policy diffusion from a state and local perspective); Bruce D. McDonald & Carl J. Gabrini, *Determinants of County Charter Decisions: An Event History Analysis of Florida Counties*, 24(4) J. OF PUB. ADMIN. RES. & THEORY 721-739 (2014) (discussing demographic, economic, and political determinants in localized charter adoption).

¹⁰ See Judith I. Stallmann, Craig S. Maher, Steven C. Deller, & Sungho Park, *Research on The Effects of Limitations on Taxes And Expenditures*, 3(2) J. OF PUB. & NPRFT. AFF. 197-222 (2017) (discussing the history, application, and theory of tax and expenditure limitations).

¹¹ See *id.*

¹² See John M. Trussel & Patricia A. Patrick, *The Symptoms and Consequences of Fiscal Distress in Municipalities: An Investigation of Reductions in Public Services*, 13(1) ACCT. & THE PUB. INT. 151-71 (2013) (discussing financial condition and testing a specific assessment model to provide warnings prior to fiscal distress); John M. Trussel & Patricia A. Patrick, *Assessing and Ranking the Financial Risk of Municipal Governments: The Case of Pennsylvania*, 19(1) J. OF APPL'D ACCT. RES. 81-101 (2018).

II. WHAT IS FISCAL HEALTH

The concept of a government's fiscal health is defined loosely both in the literature and in practice.¹³ However, the definitions can be categorized as either accounting/budgetary or economic in nature.¹⁴ Although both relay similar concepts about the condition of a government, they do so do in the context of their respective fields.¹⁵

Accounting and public budgeting literature presents a definition of fiscal health that is centered on the capacity of a government to provide or expand a program or service.¹⁶ Historically, the budgeting side of the literature has pointed towards an understanding of fiscal health as simply "the extent to which [a government's] financial resources exceed its spending obligations."¹⁷ Although this was a simple view of fiscal health, it had the advantage of clarity and comprehensibility.¹⁸ If revenue was available to cover the cost of a program or service, the government was considered fiscally

¹³ See SCORSONE, *supra* note 2, at 43-74; Bruce D. McDonald, *Local Governance and the Issue of Fiscal Health*, 50(1) ST. & LOC. GOV'T. REV. 46-55 (2018) (discussing fiscal health and how to measure it).

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ Frances Stokes Berry, *Stokes Innovation in Public Management: The Adoption of Strategic Planning*, 54(4) PUB. ADMIN. REV. 323 (1994).

¹⁸ *See* Beth Walter Hondale, James M. Costa, & Beverly A. Cigler, *FISCAL HEALTH FOR LOCAL GOVERNMENTS: AN INTRODUCTION TO CONCEPTS, PRACTICAL ANALYSIS, AND STRATEGIES* (London, UK: Elsevier) (2004).

healthy.¹⁹ However, with the financial crisis of New York City in 1975, an interest in a more complete understanding of a government's condition emerged.²⁰ The improved understanding of a government came in the form of the Governmental Accounting Standards Board (GASB) in 1984.²¹

Currently, while GASB holds little regulatory authority, the statements the board produces guides local governments' financial disclosures.²² As governments adhere to the guidance, there has been an increase in publicly available data, which can be used to get a more nuanced perspective of the government's financial position.²³ This increase in data has allowed scholars to draw on the accounting literature to establish an understanding of fiscal health, specifically focused on an all-inclusive fiscal health, rather than the singular focus of the budgetary approach.²⁴

Consequently, scholars have expanded the definition of fiscal health to reflect a government's ability to balance its financial obligations with its available

¹⁹ *See id.*

²⁰ *See* Junghack Kim, Bruce D. McDonald & Jooho Lee, *The Nexus of State and Local Capacity in Vertical Policy Diffusion*, 48 AM. REV. OF PUB. ADMIN. 188, 189 (2018).

²¹ *See id.*

²² *See id.*

²³ *See id.* at 188.

²⁴ *See id.*

revenue streams.²⁵ From this definition, a government is considered fiscally healthy if its resources meet its obligations. On the contrary, if it does not have the resources, then it may be experiencing fiscal stress.²⁶ The ability to balance the obligations is viewed across four solvencies. These are:

1. *Cash Solvency* - the ability of the government to meet its immediate or short-term financial obligations;
2. *Budget Solvency* - the ability of the government to meet its financial obligations over a budgeted fiscal year;
3. *Long-Term Solvency* - the ability of the government to meet its long-term financial obligations; and
4. *Service-Level Solvency* - the ability of the government to finance the base level programs and services as required by law.²⁷

The benefit of the expanded approach to fiscal health is it allows for the consideration of where the

²⁵ See David J. Helpap, *The Importance and Complexity of Assessing Urban Fiscal Health*, 48 ST. & LOC. GOV'T REV. 208, (2016); Rebecca Hendrick, *Assessing and Measuring the Fiscal Health of Local Governments: Focus on Chicago Suburban Municipalities*, 40 URB. AFF. REV. 78, (2004); Craig S. Maher & Karl Nollenberger, *Revisiting Kenneth Brown's "10-Point Test"*, 25 GOV'T FIN. REV. 61, (2009); Sarah Arnett, *State Fiscal Condition: Ranking the 50 States* (George Mason Univ. Mercatus Ctr., Working Paper No. 14-02, 2014).

²⁶ See Hendrick, *supra* note 25, at 80

²⁷ See *id.* at 84

government is in meeting the needs of the citizenry while considering the demands that are placed on the organization in the future.²⁸ Innate to this is the ability of the government to withstand unforeseen disruptions, such as a recession or change in the demographics of the residents.²⁹

The second lens of fiscal health is economic in nature. While the accounting/budgetary lens focuses on the financial capacity of a government, the economic lens focuses on the capacity of the community.³⁰ Local governments are established as a reflection of the community they serve, but they comprise only a small portion of the community's resources.³¹ The expectation behind this approach is that governments have the capacity to commandeer the resources of the community should the need arise.³² This could be accomplished through policy tools, such as an increase in tax rates or by imposing new taxes, as well as through legal tools, such as eminent domain.

One way to think about how the accounting/budgetary and economic lenses compare is to put them into the context of a typical household. On the accounting/budgetary side, the fiscal health of the house is a reflection of their ability to pay their mortgage and

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *See* Howard Chernick & Andrew Reschovsky, *The Fiscal Condition of U.S. Cities: Revenues, Expenditures and The "Great Recession."* 39(4) J. OF URBAN AFF. 488-505 (2017) (Discussing the comparison of expenditures and revenues of local governments across several U.S. cities).

³² *See id.*

other bills. The healthiness of the household is then reported as a credit score in order to allow banks and credit companies to understand the position of the household. The economic side is focused on the resources that the household may have available but has not yet effectively utilized. This includes the opportunity of members in the household to seek out employment with higher income, taking on a second job, short-selling or renting the house, the selling of family heirlooms, or even liquidating books and movies that are in a home collection.

As our understanding of fiscal health has grown in recent years, the use of the economic lens in the academic literature as a primary definition has diminished. The imposition of tax and expenditure limitations by states has limited the capacity of local governments to seize the resources of those in the community.³³ Although not proponents of the economic approach themselves, Wang, Dennis, and Tu³⁴ relied on the economic conditions of a state as a secondary lens to

³³ See Ji-Hyung Park, Sungho Park, & Craig S. Maher, *The Effects of Tax and Expenditure Limitations (TELS) on Municipal Fiscal Outcomes During a Period of Fiscal Distress*, 18(1) PUB. FIN. & MGMT. 84-110 (2018) (Discussing the practical effects of TELS on fiscal decision-making); Judith I. Stallmann, Craig S. Maher, Steven C. Deller, & Sungho Park, *Research on the Effects of Limitations on Taxes and Expenditures*, 3(2) J. OF PUB. & NPRFT. AFF. 197-222 (2017) (Discussing the reasons for lower revenue generation in local and state governments).

³⁴ See Xiaohu Wang, Lynda Dennis, & Yuan Sen Tu, *Measuring Financial Condition: A Study of U.S. States*, 27(2) PUB. BDGT. & FIN., 1-21 (2007) (introducing a new method for calculating measurements that provide insight into a government's financial condition).

justify the financial indicators that they used in the model of fiscal health.³⁵ Unsurprisingly, the lens does continue to be prevalent within the practice of economic development; conversations on lost opportunities for Benton Harbor, Michigan, due to the poor economic planning surrounding its golf course are evidence of the lens's use.³⁶

III. THE MEASUREMENT CHALLENGE

While the two lenses of fiscal health may present a picture and definition that is relatively straightforward, the variation in how fiscal health is understood becomes much more complicated when considering how it should be measured. Although considerable attention has been given in literature to the measurement of fiscal health, no consistent system has emerged.³⁷ In the absence of a definitive approach to the measurement, researchers often take an ad hoc approach.³⁸ In an ad hoc approach, researchers are free to choose their variables based on the

³⁵ See Chernick, *supra* note 31.

³⁶ See *id.*

³⁷ See ROY BAHL, FINANCING STATE AND LOCAL GOVERNMENT IN THE 1980'S (1984); E.D. Benson, B.R. Marks & K.K. Raman, *Tax Effort as an Indicator of Fiscal Stress*, 16(2) PUB. FIN. Q., 203-18 (1988); Evgenia Gorina, Craig Maher & Marc Joffe, *Local Fiscal Distress: Measurement and Prediction*, 38(1) PUB. BDGT. & FIN., 72-94 (2017); BETH WALTER HONADLE, JAMES M. COSTA & BEVERLY A. CIGLER, FISCAL HEALTH FOR LOCAL GOVERNMENTS: AN INTRODUCTION TO CONCEPTS, PRACTICAL ANALYSIS, AND STRATEGIES (2004); Robert Kleine, Philip Kloha & Carol S. Weissert, *Monitoring Local Government Fiscal Health: Michigan's New 10-Point Scale of Fiscal Distress*, 19(3) GOV'T. FIN. REV., 18-23 (2003).

³⁸ See McDonald, *supra* note 13.

availability of data or ease of estimation.³⁹ The ad hoc approach gives administrators the ability to relay a perspective of financial condition based on the audience and the story they want to tell.⁴⁰

Despite the ad hoc nature of most approaches, at the center of the accounting and budgetary lens is the use of financial ratios. Ratio analysis is “the examination of a financial relationship between items as a means of identifying trends in financial behavior or position.”⁴¹ Ratios express the relationship between two pieces of financial data as a proportion, rate, or percentage.⁴² An example of a ratio’s expression using a 1.15 current ratio (the ratio of current assets to current liabilities) is provided in Table 1.

Table 1. Example of Expressing Financial Ratios

Expression	Example
Proportion	The relationship between current assets and current liabilities is 1.15:1.
Rate	Current assets are 1.15 times as great as current liabilities
Percentage	Current assets are 115% of current liabilities

³⁹ *See id.*

⁴⁰ *See id.* at 2-3.

⁴¹ *Id.* at 3.

⁴² *See id.* at 3.

Financial ratios emerged in the 1890s as a result of the introduction of single-name paper loans.⁴³ In the 1870s, commercial banks began requesting the financial statements of companies for use in lending decisions, but the volume of information presented in the statements became a hindrance in any analysis being conducted.⁴⁴ As commercial banks looked for ways to improve their work, they experimented with different approaches.⁴⁵ One of these approaches was the development of the current ratio, which compares a company's current assets to its current liabilities.⁴⁶

In the years after the development of the current ratio, dozens of ratios were created to provide a more in-depth understanding of the financial condition of a business and to reflect activities the business is involved with.⁴⁷ Their numbers grew so rapidly that by 1919 researchers were looking for ways to mitigate the proliferation of ratios by clarifying which ratios should be utilized in measuring the fiscal health of a corporation.⁴⁸ Financial ratios may provide a picture of

⁴³ See James O. Horrigan, *A Short History of Financial Ratio Analysis*, 43(2) THE ACCT. REV., 284-94 (1968) (discussing the origin and history of financial ratios).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See ROY A. FOULKE, PRACTICAL FINANCIAL STATEMENT ANALYSIS 178 (6th ed. 1961).

⁴⁷ See Horrigan, *supra* note 43.

⁴⁸ See *id.*; Alexander Wall, *Study of Credit Barometrics*, 5 FED. RES. BULL., 229-43 (1919).

an organization's fiscal health, but utilizing too many ratios or incorrect ratios can produce misleading results.⁴⁹ Ultimately, it was Altman's (1968) work on corporate bankruptcy that clarified which ratios should be used in the consideration of a firm's financial position.⁵⁰ Altman's work may have resolved the debate on how to measure fiscal health for businesses, but the understanding of which ratios are important to governments has never been clarified.⁵¹

Without any clarification on which ratios matter, some measurement systems emerged that produce an image of fiscal health based on the type of financial obligation the analyst is interested in.⁵² An analyst concerned about the immediacy of a government's capacity to provide services may focus on the measurement of its efficiency ratio (the ratio of total expenditures to total revenue).⁵³ Alternatively, someone that is concerned about the government's ability to pay for its pension programs may reference coverage ratios (ratios that reflect the capacity of an organization to meet its short-term and long-term liabilities).⁵⁴ Such approaches provide an interesting insight into the

⁴⁹ See Edward I. Altman, *Financial Ratios, Discriminant Analysis and the Prediction of Corporate Bankruptcy*, 23(4) THE J. OF FIN., 589-609 (1968) (discussing misleading results due to faulty interpretations of methodologies).

⁵⁰ See *id.*

⁵¹ See McDonald, *supra* note 5, at 3-4.

⁵² See *id.* at 4.

⁵³ See *id.*

⁵⁴ See *id.*

financial health of the organization, but that insight focuses narrowly on a single aspect of the broader fiscal condition.⁵⁵

Similar to the work of Altman (1968), public administration researchers have looked for ways to constrain the prevalence of ratios for governments. In 1981, the International City/County Management Association developed its Financial Trend Monitoring System (FTMS) that incorporates thirty-six different financial indicators across twelve areas.⁵⁶ The authors readily admit the infeasibility of calculating all of the ratios, thus giving administrators discretion to choose among the ratios based on their need.⁵⁷ The system was updated in 2003 to incorporate a government's environmental and organizational factors.⁵⁸ In total, FTMS now combines forty-two different indicators to produce its version of fiscal health.⁵⁹ Finkler, Smith, Calabrese, and Purtell's (2017) pivotal textbook on financial management for public administrators recommends the use of nineteen different ratios, though

⁵⁵ *See id.*

⁵⁶ *See generally* Sanford M. Groves, W. Maureen Godsey, & Martha A. Shulman, *Financial Indicators for Local Governments*, 1 PUB. BDGT. AND FIN. 5-19 (1981) (describing common issues with evaluating financial condition and a suggested method for combatting those issues).

⁵⁷ *See id.* at 9-11.

⁵⁸ *See* McDonald, *supra* note 5, at 3.

⁵⁹ *See* KARL NOLLENBERGER, SANFORD M. GROVES & MAUREEN G. VALENTE, *EVALUATING FINANCIAL CONDITION: A HANDBOOK FOR LOCAL GOVERNMENT* (Int'l City/County Mgmt. Ass'n., 4th ed. 2003).

they also note other ratios which might tailor the image of healthiness.⁶⁰

Several notable attempts have been made to follow in the footsteps of Wall (1919) not just to establish a set system of ratios that should be used, but transition that system into a single number that reflects whether a government is healthy or stressed.⁶¹ Brown (1993), for instance, developed a points-based text around ten ratios that summed the points on a “10-to-20” point scale as a way of measuring fiscal health in comparison to other governments.⁶² Wang, Dennis, and Tu (2007) tried to address the issue of condensing the number of ratios into something useable by focusing on the measurement of a government’s fiscal health rather than factors that may drive or determine it.⁶³ Their system incorporates a series of eleven indicators that reflect the solvency of a government.⁶⁴ Some more recent work, similar to Altman (1968), has sought to clarify the appropriate

⁶⁰ See STEVEN A. FINKLER, DANIEL L. SMITH, THAD D. CALABRESE, & ROBERT M. PURTELL, *FINANCIAL MANAGEMENT FOR PUBLIC, HEALTH, AND NOT-FOR-PROFIT ORGANIZATIONS* (CQ Press, 5th ed. 2017).

⁶¹ See generally McDonald, *supra* note 5 (providing an overview of various methods that have been developed in an effort to accurately measure financial condition).

⁶² See generally Ken W. Brown, *The 10-Point Test of Financial Condition: Toward an Easy-to-Use Assessment Tool for Smaller Cities*. 9 GOV’T. FIN. REV. 21-26 (1993) (detailing how to calculate ten ratios and how each can be used to assess a city’s financial condition).

⁶³ See generally Wang, *supra* note 34, at 1-21. (introducing a new method for calculating measurements that provide insight into a government’s financial condition).

⁶⁴ See *id.* at 8; McDonald, *supra* note 13, at 49.

measure of fiscal health by estimating the impact of the ratios on instances of municipal bankruptcy, though this work is still in progress.⁶⁵

The economic lens is also plagued by measurement issues, albeit the plague is much more contained than that of the accounting and budgetary lens. Measurement approaches within the economic lens typically turn to the economic growth and development literature for guidance. Because fiscal health reflects the capacity of a community's economy, fiscal health indicators often mirror those that drive economic growth: the gross domestic product of the community, physical capital, private investments, and the size and skill of the labor force.⁶⁶ On occasion, the research might take it further and focus less on the overall size of the economy, choosing instead to focus on the government to draw on those resources.⁶⁷ An example of this in practice is Ladd and Yinger's 1989 study that focused on the capacity of the government to raise additional revenue from the economy.⁶⁸ While the economic lens is diminishing in

⁶⁵ See generally Altman, *supra* note 49. (analyzing and applying results from a discriminant analysis of financial ratio used to predict corporate bankruptcies); McDonald, *supra* note 13 (providing an overview of various methods that have been developed in an effort to accurately measure financial condition).

⁶⁶ See Wang, *supra* note 37.

⁶⁷ See *id.* at 10.

⁶⁸ See Michael A. Pagano, *Book Review*, 23 POL'Y SCIENCES 331 (1990) (reviewing HELEN F. LADD & JOHN YINGER, *AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY* (1989)); Howard Chernick & Andrew Reschovsky, *The Fiscal Condition of U.S. Cities: Revenues, Expenditures and the "Great Recession"*, 39 J. URBAN AFF. 488,

importance, the statistical relationships between financial ratios and economic data have encouraged those utilizing the accounting/budgetary lens to incorporate economic variables as controls within their models.

IV. LEGAL IMPLICATIONS

A central legal concern behind fiscal health is the capacity of a local government to meet its financial and service obligations.⁶⁹ The full extent of the legal implications behind how fiscal health is defined and measured, however, is not well understood. We do know that there are implications. The flexibility for administrators to choose the definition and measurement system of fiscal health that they use may allow them to tailor their discussion to the situation or audience, but it also opens the possibility that an approach can be selected as a way to hide or mask the true status of the government.⁷⁰ Brown's 10-point test, for example, allows the analyst to select the comparative governments that are used in the analysis.⁷¹ By including governments with financial difficulties, a government can be

488-505 (2017) (discussing different means and examples of assessing fiscal health).

⁶⁹ See Charlie K. Coe, *Preventing Local Government Fiscal Crises: Emerging Best Practices*, 68 PUB. ADMIN. REV. 759, 759-67 (2008) (Discussing the roles of both the state and local government in handling fiscal crises).

⁷⁰ See Richard M. Bird, *Reflections on Measuring Urban Fiscal Health*, 35 MUN. FIN. J. 45, 50 (2014).

⁷¹ See Brown, *supra* note 62.

presented as fiscally healthy regardless of their true condition.⁷² The same masking can be done when a more ad hoc approach is utilized by removing financial ratios that paint a government in a negative light.⁷³

Although no statistics on the frequency of this kind of masking are available, we know that it happens in practice. McDonald noted that the constructive use of Brown's test established Detroit, Michigan as being among the healthiest cities in the United States in 2013, the same year that the city filed for bankruptcy.⁷⁴ Marlowe's analysis on the capacity of the local governments that were vying for Amazon.com's "HQ2" to afford the incentives that were offered concluded that most of the cities were unhealthy.⁷⁵ Additionally, in applying Brown's test, Marlowe measured the relative health of the cities in comparison and not their actual status.⁷⁶

Local governments frequently offer businesses incentives for the expansion or relocation of the business into a community and businesses frequently incorporate the financial condition of a government into their

⁷² See *id.* at 24.

⁷³ See McDonald, *supra* note 13, at 47.

⁷⁴ See *id.* at 51; Brown, *supra* note 66, 21-26.

⁷⁵ See Justin Marlowe, *A Public Finance Take on HQ2*, LINKEDIN (Jan. 26, 2018), <http://www.linkedin.com/pulse/public-finance-take-hq2-justin-marlowe/>.

⁷⁶ See *id.*

decision-making process.⁷⁷ After all, financially sound governments are better able to provide incentives. If the condition of a government is worse than what was relayed, the government may be susceptible to litigation from the business in order to ensure the incentives are provided.

Additionally, the methods of collecting data for the underlying ratios of fiscal health also pose concerns.⁷⁸ A staple of financial ratios is the inclusion of an organization's liabilities.⁷⁹ In an accounting context, the calculation of a government's liabilities can often be uncertain.⁸⁰ Administrators have been known to use this uncertainty to their advantage by adjusting parameters of a liability to make it appear lower than it really is.⁸¹ For example, administrators can adjust and mask liabilities through defined benefit public pension plans.⁸² As cost and amortization payments increase, there is evidence suggests administrators have taken less than prudent methods to defer the government's required

⁷⁷See David Heald, *Accounting for Government Guarantees: Perspectives on Fiscal Transparency from Four Modes of Accounting*, 48 ACCT. & BUS. RES. 782 (2018).

⁷⁸See Timothy C. Irwin, *Defining the Government's Debt and Deficit*, 29 J. ECON. SURV., 711, 718-20 (2015).

⁷⁹See *id.*

⁸⁰See *id.* at 726.

⁸¹See generally William Easterly, et al., *When is Fiscal Adjustment an Illusion*, 14 ECON. POL'Y 55, 57 (1999).

⁸²See Jeffrey Diebold, et al., *Sweat the Small Stuff: Strategic Selection of Pension Policies Used to Deter Required Contributions*, 36 CONTEMP. ECON. POL'Y 505-525 (2018) (Discussing the influence of amortization payments on administrator's decisions regarding state finances).

contributions.⁸³ Ultimately, these methods can mask the true size of the liability and portray the government as healthier than it is.⁸⁴ More importantly, masking the liability can impact a government's capacity to pay on the liability when it comes due.⁸⁵ At its worst, this could leave the thousands of local government employees without a pension.⁸⁶

On the side of service provision, fiscal stress can hinder a local government's ability to meet its required service and goods obligations.⁸⁷ Both states and the courts often require that certain goods and services be offered; occasionally, the mandate may even include the extent to which the goods and services are funded.⁸⁸ This is more common with education funding.⁸⁹ Improper financial planning or a poor understanding of a government's position can result in more control by the mandator, or the local government's forced disillusionment.⁹⁰

It is also worth noting the legal implications surrounding fiscal health extend beyond the local level. Traditionally, counties were established as administrative branches of the state to manage public

⁸³ *See id.* at 506.

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See* McDonald, *supra* note 4, at 609.

⁸⁸ *See id.*

⁸⁹ *See* McDonald, *supra* note 13, at 48.

⁹⁰ *See id.*

safety, dispense social services, and administer public works programs.⁹¹ Although some states have created distance from their counties by granting home rule, states are ultimately responsible for county actions and must address problems when they emerge.⁹² The same responsibility does not exist between the state and municipalities; however, states have typically stepped in when municipalities experience severe financial hardship to avoid negatively affecting the state as a whole.⁹³

V. CONCLUSION

Understanding a local government's fiscal health is a key aspect of effective administration.⁹⁴ Unfortunately, the literature on fiscal health has provided little certainty in terms of how fiscal health is defined and how it should be measured. Researchers in fields such as public administration, accounting, and economics have stepped forward to solve the fiscal health dilemma.⁹⁵ The fiscal health of local governments is an amazingly complex,

⁹¹ See David R. Morgan & Kenneth Kickham, *Changing the Form of County Government: Effects on Revenue and Expenditure Policy*, 59 PUB. ADMIN. REV. 315, 317 (1999).

⁹² See Bruce D. McDonald & Carl J. Gabrini, *Determinants of County Charter Decisions: An Event History Analysis of Florida Counties*, 24 J. PUB. ADMIN. RES. & THEORY 721, 722-23 (2014).

⁹³ See PEW CHARITABLE TR., *supra* note 8, at 4.

⁹⁴ See *id.* at 2.

⁹⁵ See generally Gorina, *supra* note 7.

multi-dimensional issue. Despite a large and growing literature, no resolution has emerged.

The absence of a resolution presents a challenge for administrators which has been confounded by the Great Recession.⁹⁶ The recession has been over for nearly a decade, but the increased service commitments imposed upon local government have largely continued and the tax limitations have only grown as residents demand lower taxes in a good economy. As researchers and academics have struggled with the challenge, their view of fiscal health has taken on a mono-dimensional quality that has ignored the legal implications of fiscal health.⁹⁷ This does not mean the implications are not there, but rather that we have to seek them out.

This article has certainly not sought to provide a comprehensive understanding of those legal implications. It has not even sought to provide a complete understanding of fiscal health. Rather, it has merely attempted to connect the two and start a conversation on the legal dimensions. We know how we define and measure fiscal health can have legal implications for both the government at hand and the constituents it represents. These implications need to be clarified and better understood. The financial condition of local governments is destined to continue playing a central role in their decision-making process and those who practice the law must be prepared to confront it.⁹⁸

⁹⁶ See McDonald, *supra* note 13, at 46.

⁹⁷ See *id.*

⁹⁸ See generally McDonald, *supra* note 1.

SOCIAL MEDIA, MANIPULATION, AND VIOLENCE

*Allyson Haynes Stuart**

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example . . . and the telephone another . . . So, it will be with the Internet and social media.¹

Many of us lament the ubiquity of social media² and the attention it takes from face-to-face activities,

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¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (citations omitted).

² Social media refers to “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).” *Social Media*, MERRIAM-WEBSTER.COM DICTIONARY <https://www.merriam-webster.com/dictionary/social%20media>. The social media websites (“sites”) I refer to primarily are Facebook, Twitter, Instagram, and YouTube, which are also referred to as third-party platforms. See Jonathan Peters & Brett Johnson, *Conceptualizing Private Governance in A Networked Society*, 18 N.C. J. L. & TECH. 15, 49 (2016) (“Google,

particularly on the part of young people. Social media generally stresses the importance of appearance, and makes most of us believe our lives pale in comparison to everyone else on the planet.³ It has been linked to depression and low self-esteem in teenagers, and no one is completely sure of the long-term effects of small screen use on the body and brain.⁴ But this essay addresses an even darker side to social media: its use for manipulation on scales both small and large and its direct and indirect ties to violence. Increasingly, social media is used as a tool to foment violence, particularly in regions of the world where access to the Internet is otherwise limited. Even when a social media site is not itself an instrument to foment violence, it may have the effect of encouraging and validating the extreme views that result in violence. What is the role of social media sites in containing their use for such nefarious purposes, and how should the law govern them? Should such sites be liable for failing to take down misleading or

Facebook, YouTube, and Twitter are examples of third-party platforms that offer a variety of services that enable their users to share content.”).

³ Note Facebook’s recent “10 Year Challenge,” which encouraged users to post pictures of how little they had changed in 10 years. See Rebecca Jennings, *Why You’re Seeing the 10-Year Challenge Everywhere*, VOX (Jan. 16, 2019, 5:10 PM), <https://www.vox.com/the-goods/2019/1/16/18185256/10-year-challenge-facebook-meme>.

⁴ A survey conducted by the Royal Society for Public Health of 14-24 year olds in the United Kingdom found that Snapchat, Facebook, Twitter, and Instagram all led to increased feelings of depression, anxiety, poor body image, and loneliness. See Rachel Ehmke, *How Using Social Media Affects Teenagers*, CHILD MIND INSTITUTE, <https://childmind.org/article/how-using-social-media-affects-teenagers/> (last visited Feb. 26, 2019).

inaccurate content or for allowing hate speech? If not, what are other options for controlling its misuse?

I. UBIQUITY OF SOCIAL MEDIA IN THE U.S. AND AROUND
THE GLOBE

In a relatively short period of time, our world has been taken over by social media. Facebook is only fifteen years old, but sixty-eight percent of U.S. adults and fifty percent of U.S. teens use the social media platform.⁵ Additionally, around forty percent of U.S. adults get their news from Facebook.⁶ Thus, social media sites have now surpassed print newspapers as a news source for Americans; twenty percent of U.S. adults surveyed say that they often get their news via social media, as opposed to the sixteen percent who obtain their news from print newspapers.⁷

Globally, social media use has grown astoundingly. According to the Pew Research Center, seventy-five percent of adults in Jordan and an average of sixty-eight percent of adults in the Middle East and North Africa

⁵ See John Gramlich, *10 Facts About Americans and Facebook*, PEW RESEARCH CENTER (Feb. 1, 2019), <http://www.pewresearch.org/fact-tank/2019/02/01/facts-about-americans-and-facebook/>.

⁶ See *id.*

⁷ In 2017, the portion of U.S. adults who got news via social media was about equal to the portion who got news from print newspapers. See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CENTER (Dec. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

now use social media.⁸ Worldwide, an average of sixty percent of adults use social media.⁹ In some countries, social media adoption has risen dramatically in the last few years. For example, “only forty-nine percent of Lebanese adults used social media in 2015, but in 2017, that number increased to seventy-two percent.”¹⁰ Similarly, “just two years ago only fifty-one percent of South Korean adults were on social media, compared to almost sixty-nine percent in 2017.”¹¹

In certain countries, social media sites have a monopoly status. In an extreme example, fewer than five percent of Myanmar’s population had mobile phones until 2014, when the government loosened restrictions and first allowed SIM cards to be sold at affordable levels.¹² After that, a much greater number of people bought smartphones—and those phones were all

⁸ See Jacob Poushter, Caldwell Bishop & Hanyu Chwe, *Social Network Adoption Varies Widely by Country*, PEW RESEARCH CENTER (June 19, 2018), <http://www.pewglobal.org/2018/06/19/3-social-network-adoption-varies-widely-by-country/>.

⁹ See *id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Euan McKirdy, When Facebook Becomes ‘The Beast’: Myanmar Activists Say Social Media Aids Genocide, CNN (Apr. 6, 2018, 8:05 PM), <https://www.cnn.com/2018/04/06/asia/myanmar-facebook-social-media-genocide-intl/index.html>; See Megan Specia & Paul Mozur, *A War of Words Puts Facebook at the Center of Myanmar’s Rohingya Crisis*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/asia/myanmar-government-facebook-rohingya.html>.

preinstalled with Facebook.¹³ The use of Facebook in Myanmar went from about two million in 2014 to over thirty million today.¹⁴ There, Facebook “is the Internet” and is the way most people get their news.¹⁵ That can have dire results when the news people receive is not necessarily true and is being used for improper purposes.¹⁶

II. THE DARK SIDE OF SOCIAL MEDIA USE

There are myriad benefits from social media, like its use during the revolutions of the Arab Spring to put pressure on governments and spread truth in the face of propaganda.¹⁷ But there are three primary problems:

¹³ See Specia & Mozur, *supra* note 12.

¹⁴ See *id.*

¹⁵ See Barbara Ortutay, *Facebook Admits Not Doing Enough to Prevent Myanmar Violence*, WASH. TIMES (Nov. 6, 2018), <https://www.washingtontimes.com/news/2018/nov/6/facebook-admits-not-doing-enough-to-prevent-myanmar/>.

¹⁶ See *infra* Incitement to Violence.

¹⁷ See Kevin Gregg, “Text ‘Revolution’ to Vote”: *Social Media’s Effect on Popular Consent and Legitimacy of New Regimes*, 31 B.U. INT’L L.J. 315, 334 (2013) (describing the significant role of camera-phone videos posted on Facebook in Tunisia’s popular revolution); Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet Under International Law*, 39 N.C. J. INT’L L. & COM. REG. 701, 755 (2014) (“[T]he history books will also note that 2011 marked the beginning of a new age when mass protest, revolution and armed conflict was not only facilitated by, but made possible through, digital communication networks and social networking sites. Facebook, Twitter, and YouTube had transformed civil society’s engagement with, and in, warfare.”); Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, PROJECT ON INFORMATION TECHNOLOGY AND POLITICAL ISLAM (2011) (unpublished manuscript),

misleading or inaccurate stories used to influence elections, misleading or inaccurate stories used to foment violence, and the more tangential effect on violence that results when people with extreme views find amplification and validation of those views on social media.

A. ELECTIONS

News had certain built-in safeguards when traditional media outlets controlled its distribution. Journalists and newspapers have reputations to protect, in addition to incentives to avoid liability, and so they follow safeguards that require source-vetting, fact-checking, and backup evidence.¹⁸ There is a level of

(https://deepblue.lib.umich.edu/bitstream/handle/2027.42/117568/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_PITPI.pdf?sequence=1&isAllowed=y%20) (“Our evidence shows that social media was used heavily to conduct political conversations by a key demographic group in the revolution – young, urban, relatively well-educated individuals, many of whom were women. Both before and during the revolutions, these individuals used Facebook, Twitter, and YouTube to put pressure on their governments.”).

¹⁸ See Washington Post Staff, *About Us: Policies and Standards*, WASHINGTON POST (Jan. 1, 2016) https://www.washingtonpost.com/news/ask-the-post/wp/2016/01/01/policies-and-standards/?noredirect=on&utm_term=.9f3bf843b3c4 (“The Post has a multi-level structure for the review and editing of stories that may include fact-checking. These include assignment editors (department heads, their deputy editors and assistant editors) who collaborate with reporters on the origination of stories and typically provide initial review when a story is submitted by a reporter; multiplatform editors (also called copy editors) who often provide initial review on breaking news stories and routinely provide second-level review on print and other less time-sensitive stories;

reliability in traditional news outlets that is not inherent in stories on social media. Additionally, the news sources themselves on social media may not always be what they appear. Russia, via its government Internet Research Agency, uses misleading website names to suggest its stories are coming from the U.S. rather than Russia.¹⁹ As they say, “On the Internet, nobody knows you’re a dog.”²⁰

The public has known for some time about Russia’s interference in the 2016 U.S. Presidential election on social media, but in December 2018 two expert reports revealed a trove of details.²¹ The Senate commissioned

and senior editors who have overall oversight of the daily and weekend report for digital publication throughout the day as well as The Post’s print editions. Editors who oversee digital platforms also may be involved in the presentation of stories as well as headlines, news alerts and newsletters. The number of editors who review a story prior to publication and the extent of their involvement varies depending on a range of factors, including complexity, sensitivity, and the pressure of time.”).

¹⁹ The website usareally.com is funded by the sponsors of the Russian “troll factory” accused of interference in the 2016 US Presidential election. *See Russia Protests After Journalist Detained, Interrogated at DC Airport*, ASSOCIATED PRESS (Nov. 11, 2018), <https://www.washingtontimes.com/news/2018/nov/11/alexander-malkevich-usa-really-editor-detained-dc/>.

²⁰ See Michael Cavanaugh, ‘Nobody Knows You’re A Dog’: As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows The Joke Rings As Relevant As Ever, WASHINGTON POST (Jul. 31, 2013), https://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html?noredirect=on&utm_term=.6e128dc23f88.

²¹ One report was prepared by social media analysts New Knowledge and the other by an Oxford University team working with analytical firm

the expert reports as part of its bipartisan investigation of Russian interference, and the reports are based largely on data about the Russian operations provided to the Senate by Facebook, Twitter, and the other companies whose platforms were used.²² The reports describe the ongoing efforts of the Russian government's Internet Research Agency, based in St. Petersburg, Russia, to erode trust in U.S. democratic institutions and to divide Americans by race and extreme ideology.²³ Part of that effort included targeting African-Americans.²⁴ On Facebook and Instagram, Russians specifically targeted black American communities using Gmail accounts with American-sounding names to recruit and sometimes pay unwitting American activists to stage rallies and spread content.²⁵ One tactic was using Facebook ads targeted at users who had shown interest in particular topics, including black history, the Black Panther Party, and

Graphika. See Mark Hosenball, *Russia Used Social Media for Widespread Meddling in U.S. Politics: Reports*, REUTERS (Dec. 17, 2018, 2:18 PM), <https://www.reuters.com/article/us-usa-trump-russia-socialmedia/russia-used-social-media-for-widespread-meddling-in-u-s-politics-reports-idUSKBN1OG257?il=0>.

²² See Renee DiResta et al., *The Tactics & Tropes of the Internet Research Agency*, NEW KNOWLEDGE, <https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper.pdf>.

²³ See Hosenball, *supra* note 21.

²⁴ See Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html>.

²⁵ See DiResta et al., *supra* note 22, at 34.

Malcolm X.²⁶ The most popular of the Russian Instagram accounts was @blackstagram, with 303,663 followers, while on YouTube, the largest share of Russian material covered the Black Lives Matter movement and police brutality, with channels called “Don’t Shoot” and “BlackToLive.”²⁷ The expert reports revealed that, while much attention has been focused on Facebook, the Internet Research Agency in fact created social media accounts under fake names on virtually every available platform,²⁸ with the goal of supporting Donald J. Trump as a candidate in the Republican primary, then in the general election, and as president since his election.²⁹

In April of 2019, Special Counsel Robert Mueller released his long-awaited investigative report of Russian interference in the 2016 election. The report further detailed the actions of the Russian troll farm Internet Research Agency and its social media interference dating back to 2014, including the use of fake Facebook accounts.³⁰

²⁶ See *id.*

²⁷ See *id.* at 30.

²⁸ See Shane & Frenkel, *supra* note 24.

²⁹ See Craig Timberg & Tony Romm, *New Report on Russian Disinformation Prepared for the Senate, Shows the Operation’s Scale and Sweep*, WASH. POST (Dec. 17, 2018), https://www.washingtonpost.com/technology/2018/12/16/new-report-russian-disinformation-prepared-senate-shows-operations-scale-sweep/?noredirect=on&utm_term=.aca9ee116e41.

³⁰ See Dustin Volz & Allan Cullison, ‘*Putin Has Won*’: Mueller Report Details the Ways Russia Interfered in the 2016 Election, Wall St. J. (Apr.

Facebook plays a prominent role in an additional social media election scandal involving Cambridge Analytica and one of the largest data leaks in social media history.³¹ Cambridge Analytica was a voter profiling company started in 2014 by Steve Bannon and Robert Mercer, using a psychographics platform developed by Christopher Wylie and Aleksandr Kogan, that mapped personality traits based on what people liked on Facebook.³² The company's goal was to develop detailed psychological profiles of every American voter so that campaigns could tailor their pitches from person to person.³³ To that end, the company created an application for Facebook with a personality quiz that asked 120 questions about personality and behavior.³⁴ Then, it scored people on traits like openness, extroversion, and agreeableness, and mixed those results with polls, voter records, and online activity in order to create personality models for voters.³⁵ Users of the app

19, 2019), <https://www.wsj.com/articles/putin-has-won-mueller-report-details-the-ways-russia-interfered-in-the-2016-election-11555666201>.

³¹ See Carole Cadwalladr, Nicholas Confessore & Matthew Rosenberg, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html>.

³² See *id.*

³³ See Scott Detrow, *What Did Cambridge Analytica Do During the 2016 Election?*, NAT'L PUB. RADIO (Mar. 20, 2018), <https://www.npr.org/2018/03/20/595338116/what-did-cambridge-analytica-do-during-the-2016-election>.

³⁴ See *id.*

³⁵ See *id.*

— about 270,000 people — technically consented to having their data harvested when they took the quiz (including education, location, the groups and pages they liked, their relationship status, and where they worked).³⁶ But the app also gathered information from the friends of those users, amounting to about “50 million raw profiles” that were provided to Cambridge Analytica.³⁷ The company then used that data for targeted advertisements and other election-related efforts on behalf of conservative candidates.³⁸ Most notably, the data was used to support Donald Trump in the 2016 election, when Cambridge Analytica designed target audiences for digital advertisements and fundraising appeals, modeled voter turnout, bought television advertisements, and determined where then-candidate Trump should travel to increase his support.³⁹

The U.S. is not alone in experiencing election interference via social media use.⁴⁰ The democracy advocacy group Freedom House found that at least

³⁶ See *id.*; Rosenberg, *supra* note 31.

³⁷ See Rosenberg, *supra* note 31. The app violated Facebook rules both in gathering data for a purpose other than the research purpose that was disclosed, and for violating a loophole in Facebook’s architecture that allowed the app to harvest data of users who had not given permission.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See Jackie Snow, *Last Year, Social Media Was Used to Influence Elections in at Least 18 Countries*, MIT TECH REV. (Nov. 14, 2017), <https://www.technologyreview.com/the-download/609478/last-year-social-media-was-used-to-influence-elections-in-at-least-18-countries/>.

seventeen other countries also had their elections manipulated through social media throughout 2016.⁴¹

B. INCITEMENT TO VIOLENCE

Facebook has also been tied to violence in countries where the social media platform has been used to foment action against disfavored groups.⁴² In Myanmar, Facebook has an outsized importance because of the way the country's Internet use developed.⁴³ Until 2014, fewer than 5% of individuals there used mobile phones because they were prohibitively expensive.⁴⁴ That year, changes in government policies lowered the price of SIM cards, allowing a much greater number of people to afford them.⁴⁵ Importantly, those mobile phones were usually programmed to include Facebook and its messaging application.⁴⁶ Users had little experience with the Internet before having mobile phones, therefore for many in Myanmar, Facebook "is the Internet."⁴⁷ The social media platform has been used to target the disenfranchised Rohingya Muslim minority, which has been the target of a sustained campaign of violence and

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See* McKirdy, *supra* note 12.

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See* Ortutay, *supra* note 15.

abuse by the Myanmar military that the United Nations calls “ethnic cleansing”.⁴⁸

Ultra-nationalist Buddhists have used Facebook to publish hate speech and foment violence against the Rohingya. This includes posting fake pictures of the Muslims burning their own homes and of decaying bodies they said were Buddhist victims of Rohingya attacks, and using the Facebook messenger service to forward messages warning of incoming attacks by Muslims.⁴⁹ In September 2017, the Buddhists warned of a fabricated “jihad,” which incited a “call to arms” against the Muslims.⁵⁰ The purge of Muslims and subsequent refugee crisis have seen 700,000 Rohingya forced from their homes.⁵¹

Sri Lanka is another example where there have been instances of hate speech used against the Muslim minority.⁵² In March 2018, parts of Sri Lanka’s Central Province experienced a wave of anti-Muslim riots, which the government blamed on hate speech against the Muslim community that was spread over Facebook, WhatsApp, Instagram, and Viber.⁵³ There are also

⁴⁸ See Specia & Mozur, *supra* note 12; McKirdy, *supra* note 12.

⁴⁹ See Specia & Mozur, *supra* note 12.

⁵⁰ See McKirdy, *supra* note 12.

⁵¹ See *id.*

⁵² See Amantha Perera, *Social Media – the New Testing Ground for Sri Lanka’s Freedom*, INTER PRESS SERV. NEWS AGENCY (July 18, 2018), <http://www.ipsnews.net/2018/07/social-media-new-testing-ground-sri-lankas-freedom/>.

⁵³ See *id.*

examples of people trolling journalists and using threats to prevent them from telling the truth.⁵⁴ Between five and six million Sri Lankans use Facebook, and research shows that social media is the primary platform of political interaction for Sri Lankans between eighteen and thirty-four.⁵⁵ Misinformation, disinformation, and threats to journalists have risen sharply.⁵⁶

In India, there are infamous examples of social media weaponization.⁵⁷ In July 2018, a mob lynched five people after rumors spread, via WhatsApp messages, that these people were child abductors.⁵⁸ The victims were poor agricultural workers from a nearby district, who were surrounded and attacked by a crowd of about three thousand people.⁵⁹ Earlier that week, three more people were killed in another part of India after social media rumors spread of child abduction and human organ harvesting.⁶⁰ Mobs have killed people in at least three other instances, all related to fake rumors circulated mostly through WhatsApp groups.⁶¹

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See generally* Swati Gupta & Bard Wilkinson, *WhatsApp India: Five lynched after online child kidnap rumors*, CNN (July 3, 2018, 4:37 AM), <https://www.cnn.com/2018/07/02/asia/india-lynching-whatsapp-intl/index.html> (providing examples of recent weaponization of social media).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.* (discussing similar mob attacks in India).

Finally, to a lesser extent, conspiracy theorists have touted their beliefs online in the U.S. and sparked violence. In response to Alex Jones's assertion that the 2012 Sandy Hook Elementary mass shooting was a hoax perpetrated by gun control advocates, Mr. Jones's supporters harassed the grieving parents of child victims.⁶² And after the circulation of the bizarre Pizzagate conspiracy theory, alleging that Hillary Clinton and other Democrats were secretly running a child-sex ring, one supporter brought an assault rifle to a Washington, D.C. pizza restaurant, vowing to save the children locked in the basement.⁶³

C. FOMENTING HATE

Aside from direct incitement of violence, social media links to violence in more insidious ways. There is a tie between recent shootings in the U.S. and a history of social media radicalization. Before Cesar Sayoc allegedly sent fourteen pipe bombs through the mail to prominent Democrats around the country, he had become radicalized online and was "sucked into a vortex

⁶² See Kevin Roose, *Cesar Sayoc's Path on Social Media: From Food Photos to Partisan Fury*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/technology/cesar-sayoc-facebook-twitter.html>.

⁶³ See Spencer S. Hsu, 'Pizzagate' Gunman Sentenced To Four Years In Prison, As Prosecutors Urged Judge To Deter Vigilante Justice, WASH. POST (June 22, 2017), https://www.washingtonpost.com/local/public-safety/pizzagate-gunman-sentenced-to-four-years-in-prison-as-prosecutors-urged-judge-to-deter-vigilante-justice/2017/06/22/a10db598-550b-11e7-ba90-f5875b7d1876_story.html?utm_term=.2d464811e9a1.

of partisan furor.”⁶⁴ Beginning in 2016, Sayoc started posting right-wing news stories, pro-Donald Trump images, and stories about Muslims and the Islamic State on Twitter and Facebook.⁶⁵ Weeks before the 2018 bombings, Sayoc had posted violent fantasies and threats against several people to whom pipe bombs were sent, including Democratic representatives, prominent liberals, and Trump critics.⁶⁶ On social media he found a home for his more strident views, including conspiracy theories involving the Clintons, Barack Obama, George Soros, and illegal immigration.⁶⁷ Many subjects of his tweets were targeted with mailbombs.⁶⁸

Robert Bowers, the suspected gunman who killed 11 people at a Philadelphia synagogue, was an avid user of the social media site Gab.⁶⁹ Unlike mainstream social

⁶⁴ See Nicole Chavez, *Cesar Sayoc Was a DJ, Bodybuilder and Pizza Delivery Man Before He Became a Bomb Suspect*, CNN (Oct. 27, 2018, 9:39 PM), <https://www.cnn.com/2018/10/27/politics/cesar-sayoc-mail-bomb-suspect/index.html>.

⁶⁵ See Julie Turkewitz & Kevin Roose, *Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/robert-bowers-pittsburgh-synagogue-shooter.html>.

⁶⁶ See Roose, *supra* note 62, at A20.

⁶⁷ See *id.*

⁶⁸ See Benjamin Weiser, *Mail Bomb Suspect Accused of Targeting Clinton, Obama and Other Democrats to Plead Guilty*, N.Y. TIMES, Mar. 15, 2019, at A21 <https://www.nytimes.com/2019/03/15/nyregion/mail-bomber-cesar-sayoc.html>.

⁶⁹ See Becky Metrick, *Pittsburgh Synagogue Shooting Suspect used Social Media Platform Created by Pa. Native*, PA. REAL-TIME NEWS, (Mar. 27, 2019, 9:27 AM), <https://www.pennlive.com/news/2019/03/an->

media, Gab is infamous for allowing racist, anti-Semitic, and bigoted comments.⁷⁰ Bowers frequently used the site to criticize and threaten Jews; he referred to Jews as children of Satan, and the enemy of white people.⁷¹ He accused Jews of aiding migrant caravan “invasions.”⁷² Five minutes before police were alerted to the shooting, Bowers posted on the site: “[I] can’t sit by and watch my people get slaughtered. Screw your optics, I’m going in.”⁷³

Scott Paul Beierle killed two people and wounded five others in a Tallahassee yoga studio before turning the gun on himself.⁷⁴ Evidence shows that he, like Sayoc and Bowers, bore a grudge against a certain group and found kinship for that hatred on social media.⁷⁵ Beierle

allentown-school-administrator-shared-photos-of-minors-having-sex-and-police-looked-the-other-way-lawsuit-says.html.

⁷⁰ See Alina Selyukh, *Feeling Sidelined by Mainstream Social Media, Far-Right Users Jump to Gab*, NAT’L PUB. RADIO, (Mar. 27, 2019, 9:25 AM), <https://www.npr.org/sections/alltechconsidered/2017/05/21/529005840/feeling-sidelined-by-mainstream-social-media-far-right-users-jump-to-gab>.

⁷¹ See Saeed Ahmed & Paul P. Murphy, *Here’s What We Know So Far About Robert Bowers, the Pittsburgh Synagogue Shooting Suspect*, CNN, (Oct. 28, 2018, 7:14 AM), <https://www.cnn.com/2018/10/27/us/synagogue-attack-suspect-robert-bowers-profile/index.html>.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See Dakin Adone & Artemis Moshtaghian, *Gunman in Florida Yoga Studio Shooting made Misogynistic Comments on Youtube*, CNN, (Mar. 27, 2019, 9:36 AM), <https://www.cnn.com/2018/11/03/us/tallahassee-shooting-yoga-studio/index.html>.

⁷⁵ See Anna North, *How Mass Shooters Practice Their Hate Online*, VOX MED. (Nov. 3, 2018, 9:19 PM)

made numerous racist and misogynistic comments in Youtube videos and identified with “involuntary celebrities.”⁷⁶ He made violent comments about women who rejected him, and he expressed sympathy toward Elliot Roger, who killed 6 people and injured others in Santa Barbara after posting a manifesto blaming the cruelty of women for his own virginity.⁷⁷

In probably the worst example yet of online extremism leading to offline violence, an Australian man fatally shot 51 Muslim worshippers and injured 39 others at two mosques in Christchurch, New Zealand.⁷⁸ Just before the attack, he published a link on a right-wing forum to a 74-page white supremacist manifesto.⁷⁹ He then used a camera mounted to his head to livestream the attack on Facebook.⁸⁰ The New York Times reported that “[t]he gunman appeared to pair the shooting with the typical trolling tactics of the internet’s most far-right instigators, playing to a community of

<https://www.vox.com/identities/2018/10/31/18039294/scott-beierle-tallahassee-shooting-pittsburgh-gab>.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ Charlotte Graham-McLay, *Death Toll in New Zealand Mosque Shooting Rises to 51*, N.Y. TIMES, (May 2, 2019), <https://www.nytimes.com/2019/05/02/world/asia/new-zealand-attack-death-toll.html>.

⁷⁹ Kevin Roose, *A Mass Murder of, and for, the Internet*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/technology/facebook-youtube-christchurch-shooting.html>.

⁸⁰ *Id.*

like-minded supporters online who cheered him on in real time as they watched bodies pile up.”⁸¹

While social media did not cause these individuals to take the action they did, it provided an echo chamber for their disturbed views, validated those views, and encouraged hate.⁸² Bowers seemed to see himself as having an audience on social media for whom he was performing in slaughtering people.⁸³ The New Zealand shooter quoted Bowers (“screw your optics”) in a posting before he began his own horrific live performance.⁸⁴ The Internet did not create hate, but it has given hate a worldwide platform.

III. WHAT CAN BE DONE?

Social media sites themselves are increasingly addressing the problems of manipulation and violence.⁸⁵ In addition, many countries have opted for government

⁸¹ Daniel Victor, *In Christchurch, Signs Point to a Gunman Steeped in Internet Culture*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/world/asia/new-zealand-gunman-christchurch.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁸² *See id.*

⁸³ *See* Turkewitz & Roose, *supra* note 65.

⁸⁴ Roose, *supra* note 79.

⁸⁵ *See, e.g.*, Alex Hern, *WhatsApp to Restrict Message Forwarding After India Mob Lynchings*, GUARDIAN (July 20, 2018), <https://www.theguardian.com/technology/2018/jul/20/whatsapp-to-limit-message-forwarding-after-india-mob-lynchings>.

action to address online hate.⁸⁶ The action of the sites has been criticized as doing too little, while the action of governments has been criticized as doing too much.⁸⁷ Either way, limits on “bad” speech risk censorship of “good” speech.

A. GOVERNMENT ACTION

One solution to problematic use of social media sites is for governments to control any such use for improper means.⁸⁸ However, government action too often amounts to outright censorship.⁸⁹ After the March 2018 anti-Muslim riots in Sri Lanka, the Sri Lankan government responded with a weeklong shutdown of Facebook, WhatsApp, Instagram, and Viber.⁹⁰ In addition to censorship, government action often targets social media speech critical of its own actions.⁹¹ The Chinese government is infamous for Internet censorship, imposing a system of Internet filters known as the Great

⁸⁶ See e.g., Saritha Rai, *India Seeks Access to Private Messages in WhatsApp Crackdown*, BLOOMBERG (Feb. 13, 2019, 6:50 AM), <https://www.bloomberg.com/news/articles/2019-02-13/india-targets-facebook-evil-in-backlash-against-u-s-giants>.

⁸⁷ See generally DiResta et al., *supra* note 22.

⁸⁸ See, e.g., Howard, *supra* note 17.

⁸⁹ See *id.*

⁹⁰ See Perera, *supra* note 52.

⁹¹ See Mirae Yang, *The Collision of Social Media and Social Unrest: Why Shutting Down Social Media Is the Wrong Response*, 11 NW. J. TECH. & INTELL. PROP. 707, 709 (2013) (discussing Egypt’s shutdown of Internet and cell phone service in response to civil unrest).

Firewall to block content and shut out foreign technology companies.⁹²

Now, India is accused of following that model and proposing strong, new measures that would allow Indian officials to demand that online platforms like Facebook and Twitter remove posts or videos that they deem libelous, invasive of privacy, hateful, or deceptive.⁹³ Those sites would be responsible for the content their users share.⁹⁴ In addition, the Indian government has cracked down on WhatsApp, by pressing the service to provide access to encrypted messages.⁹⁵

In the European Union, data protection laws strongly protect users of social media, and in some instances require companies to remove material from their sites or scrub links to particular stories.⁹⁶ Under the “right to be

⁹² See Vindu Goel, *India Proposes Chinese-Style Internet Censorship*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/technology/india-internet-censorship.html?smid=tw-nytimesbits&smtyp=cur>.

⁹³ See *id.*

⁹⁴ See Rai, *supra* note 86 (draft published on the government’s website suggests the guidelines would hold these services responsible for a broad range of content, including information found to be “blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of another’s privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever”).

⁹⁵ See *id.*; See also Goel, *supra* note 92.

⁹⁶ See Regulation 2016/679, 2016 O.J. (L 119) (General Data Protection Directive Regulation or “GDPR”); Directive 95/46/EC, art. 12, 1995 O.J. (L 281).

forgotten,” citizens have a right to their own personal information, and the right to demand that data be deleted when it is no longer necessary for the legitimate purposes for which it was gathered.⁹⁷ Google, which is the search engine used by a whopping 95% of Europeans, was first ordered to take down links in Spain in May 2014,⁹⁸ and has since been asked to delete links to 2.9 million websites.⁹⁹ The right to be forgotten or “right to erasure” was enshrined in the General Data Protection Regulation (GDPR), which went into effect in 2018.¹⁰⁰

Even if we wanted this kind of control over Internet speech in the U.S., such action would likely be deemed unconstitutional. Protection of free speech in the U.S. is “unparalleled elsewhere in the world.”¹⁰¹ The U.S. Supreme Court has specifically acknowledged the importance of free speech on social media websites such

⁹⁷ *Id.* (Under the GDPR, an EU citizen has the right to demand that an organization erases her personal data if, among other reasons, the data is no longer relevant to the reason it was collected or if she withdraws consent to the data being used. This right is limited, for example, by the organization’s right to freedom of expression and if the data is in the public interest.)

⁹⁸ See Case C-131/12, *Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD)*, 2014 E.C.R. 317.

⁹⁹ See *id.*; *Google Wins Bout in Fight Against ‘Right to Be Forgotten’*, LIVEMINT (Jan. 11, 2019, 6:49 AM), <https://www.livemint.com/Companies/tUyyXERKejWs08dnovzFJM/Google-can-limit-right-to-be-forgotten-to-EU-Top-court-ad.html> (France has unsuccessfully attempted to globalize the EU’s orders that Google delete links.)

¹⁰⁰ See GDPR Art. 17, Part 1, Right to Erasure (2018) <https://www.gdpreu.org/the-regulation/list-of-data-rights/right-to-erasure/>.

¹⁰¹ Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet Under International Law*, 39 N.C. J. INT’L L. & COM. REG. 701, 716 (2014).

as Facebook.¹⁰² The Court interprets the First Amendment to require that any content-based restrictions on speech will be presumed invalid, and the government has the burden of showing those restrictions are narrowly tailored to serve a significant governmental interest.¹⁰³ Although the First Amendment provides less protection to obscenity, defamation, and threats of violence, it would certainly protect speech that is true but “no longer necessary” as the GDPR would condemn.¹⁰⁴

In addition, U.S. law protects social media websites from any liability based on what others post to those sites. Since passage of the Communications Decency Act of 1996 (CDA), social media and other sites have been immunized from liability based on content provided by a third party.¹⁰⁵ Section 230 of the CDA protects Internet providers and Internet-related services

¹⁰² See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (“While in the past there may have been difficulty identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the Internet’ in general, and social media in particular. . . . One of the most popular of these sites is Facebook . . .”).

¹⁰³ See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

¹⁰⁴ See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383–84 (1992) (noting that “these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.”).

¹⁰⁵ See 47 U.S.C. § 230 (2018).

— such as social media platforms¹⁰⁶ — by prohibiting those platforms from being treated as “the publisher or speaker of any information provided by another information content provider.”¹⁰⁷ The Section establishes federal immunity to any cause of action that would make a social media site liable for information originating from a third-party user, even when the platform has actual knowledge of harmful content.¹⁰⁸

Because of this immunity, any legal challenges to the way social media sites control their content would likely

¹⁰⁶ See *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (including a listserv email newsletter sent by a website operator within the definition of interactive computer service); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (holding that a matchmaking and dating website is an interactive computer service); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 n.2 (4th Cir. 1997) (concluding that America Online fell within the definition of interactive service provider); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Facebook qualifies as interactive computer service because it “provides information to ‘multiple users’ by giving them ‘computer access...to a computer server’...namely the servers that host social networking websites.” (quoting 47 U.S.C. § 230(f)(2) (2012))).

¹⁰⁷ 47 U.S.C. § 230 (2018).

¹⁰⁸ See *id.* at § 230(c)(1); *Klayman*, 753 F.3d at 1358 (The immunity is contingent on three conditions: (1) the party seeking immunity is a “provider or user of an interactive computer service”; (2) the claim treats the party seeking immunity “as the publisher or speaker” of the disputed content; and (3) the claim is based on content produced “by another information content provider.”; *Zeran*, 129 F.3d at 330 (Alternatively, providers cannot claim immunity when an action arises out of content the ICSP produced itself. However, a service’s capability to control or remove content posted on their social media website does not void its immunity.) This incentivizes services to willingly regulate and improve their content while keeping their protection intact.

require legislative changes.¹⁰⁹ Recently, Congress has focused on problems posed by unchecked use of social media. Legislators have introduced several bills in Congress and in states like California that would increase privacy protections for users of social media in light of the Cambridge Analytica scandal.¹¹⁰ Specifically, Congress seems increasingly willing to weaken the immunity granted to social media sites under the CDA.¹¹¹ In April 2018, a new law went into effect that limits the immunity provided under CDA Section 230 for online services that knowingly host third-party content to promote or facilitate sex trafficking.¹¹² The law removes CDA immunity for those online platforms with respect to state criminal charges if the conduct underlying the state violation would constitute a

¹⁰⁹ *See id.*

¹¹⁰ *See* Customer Online Notification for Stopping Edge-Provider Network Transgressions (“CONSENT Act”), S. 2639, 115th Cong. (2018) (requiring websites to notify customers about the collection, use, and sharing of sensitive customer proprietary information of the customer, and to obtain opt-in consent to use, share, or sell the sensitive information of customer); Social Media Privacy Protection and Consumer Rights Act of 2019, S. 189, 116th Cong. (2019) (requiring online platform operators to inform a user, prior to a user creating an account or otherwise using the platform, that the user’s personal data produced during online behavior will be collected and used by the operator and third parties, along with the option to specify privacy preferences, and requiring notification within 72 hours violation of a user’s data security); Assembly 288, 2018-2019 Sess. (Cal. 2019) (requiring social media companies to allow users to have their personally identifiable information permanently removed from the company’s database and records upon closing of their accounts).

¹¹¹ *See* 47 U.S.C. § 230, *supra* note 105.

¹¹² *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”), H.R. 1865, 115th Cong. (2017).

violation of anti sex-trafficking statutes; the law removes immunity for FOSTA-related civil suits brought by victims against online services that knowingly promote or facilitate sex trafficking through such activities as hosting third-party posts, listings and advertisements.¹¹³

At a July 2018 hearing in the House Judiciary Committee on social media filtering practices, a Congressman suggested to representatives of Facebook, Twitter, and YouTube that further exceptions to CDA immunity could be in the works.¹¹⁴ At a hearing in December 2018 on Google's business practices, Congress members criticized the broad protections that Section 230 provides to platforms such as Google.¹¹⁵ One bill has been introduced that would remove Section 230 immunity when social media companies use algorithms to alter and filter content.¹¹⁶

¹¹³ See Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement Against Online Providers for Knowingly Facilitating Sex Trafficking*, PROSKAUER: NEW MEDIA AND TECH. L. BLOG (Apr. 11, 2018), <https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking/>.

¹¹⁴ See Issie Lapowski, *Lawmakers Don't Grasp the Sacred Tech Law They Want to Gut*, WIRED (July 17, 2018, 5:47 PM), <https://www.wired.com/story/lawmakers-dont-grasp-section-230/>.

¹¹⁵ See Jeff Kosseff, *Congress Could Still Break the Internet. Here's How (Opinion)*, GOV'T TECH. (Dec. 17, 2018), <http://www.govtech.com/policy/Congress-Could-Still-Break-the-Internet-Heres-How-Opinion.html>.

¹¹⁶ See Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019). Based on the press release accompanying the bill's introduction, its primary purpose is to counter alleged social media bias against conservative views. See Press Release, Louie Gohmert, Member,

There are many problems associated with limiting social media sites' immunity. The CDA has been widely credited with allowing the Internet to flourish and changing website immunity from liability risks self-censorship and suppression of lawful speech.¹¹⁷

B. ACTION BY SOCIAL MEDIA SITES

The most obvious solution to misuse of social media is for those sites themselves to crack down on misuse in the form of manipulation and hate speech, although this too comes with risks to free expression.¹¹⁸ While the sites have community standards and guidelines for use,

U.S. House of Representatives, Gohmert Statement on Bill that Removes Liability Protections for Social Media Companies (Dec. 20, 2018), <https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676>.

¹¹⁷ See Jonathan Zittrain, *CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy?* (Aug. 31, 2018), <https://blogs.harvard.edu/jzwrites/2018/08/31/cda-230-then-and-now/> (The Internet's development over the past twenty years has benefited immeasurably from the immunities conferred by Section 230. We've been lucky to have it. But any honest account must acknowledge the collateral damage it has permitted to be visited upon real people whose reputations, privacy, and dignity have been hurt in ways that defy redress. Especially as that damage becomes more systematized – now part of organized campaigns to shame people into silence online for expressing opinions that don't fit an aggressor's propaganda aims – platforms' failures to moderate become more costly, both to targets of harassment and to everyone else denied exposure to honestly-held ideas.).

¹¹⁸ While social media sites are not bound by constitutional restrictions on government action, they have been likened to public spaces where restrictions on free speech should be prohibited. See Colby M. Everett, *Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media*, 28 KAN. J.L. & PUB. POL'Y 113, 127, (2018) (“Social media is a modern-age public forum.”).

and respond to complaints by, in some instances, taking down posts or banning users from their sites, these measures are often not enough to prevent manipulation and violence.¹¹⁹

Some sites have acknowledged as much and made recent efforts to do better, particularly in response to the violence that has resulted in Myanmar and India. In July 2018, Facebook pledged that it would begin removing information in Myanmar that could lead to people being physically harmed.¹²⁰ In August of that year, Facebook banned Myanmar's military chief and nineteen other individuals and organizations from the network in order to prevent the hate speech and propaganda.¹²¹ And three months later, Facebook admitted it did not do enough to prevent the violence and hate speech in Myanmar, vowing to "do more" to protect human rights.¹²² In India, WhatsApp attempted to crack down on the viral spread of misinformation through its service by limiting the ability to forward messages to only twenty people.¹²³

In the U.S., Facebook removed the account of suspect Cesar Sayoc, but only after the story emerged of

¹¹⁹ See Everett, at 120–21 ("Social media websites utilize community guidelines and moderation to retain users and protect business interests. These websites outsource a vast majority of moderation to armies of overseas contractors who screen flagged information and make judgment calls based on guideline compliance. The rest is left to algorithms.").

¹²⁰ See Frenkel, *supra* note 24.

¹²¹ See Ortutay, *supra* note 15.

¹²² See *id.*

¹²³ See Hern, *supra* note 85.

Sayoc's mailing of pipe bombs.¹²⁴ A Facebook representative said that several of Sayoc's previous posts violated Facebook's community standards and had been removed before his arrest but that none of his posts, reported to or discovered by Facebook, contained violations of its rules severe enough to remove the account entirely.¹²⁵ And while a political commentator had complained to Twitter about Sayoc's threats to her prior to his sending the pipe bombs, Twitter had said he had not violated their rules against abuse.¹²⁶

Criticism prompted by the livestreamed New Zealand shooting led to Facebook's institution of measures to limit livestreaming¹²⁷ and to combat use of its site by white nationalists.¹²⁸ On March 27, 2019, Facebook announced that it was imposing "a ban on

¹²⁴ See Jason Hanna, Evan Perez, Scott Glover, Steve Almasy & Ray Sanchez, *Bomb Suspect Arrest: What We Know About Cesar Sayoc*, CNN Politics (Oct. 26, 2018, 10:56 PM), <https://www.cnn.com/2018/10/26/politics/suspicious-packages-arrest/index.html>.

¹²⁵ See *id.*

¹²⁶ See Donie O'Sullivan, *Bomb Suspect Threatened People on Twitter, and Twitter Didn't Act*, CNN (Oct. 27, 2018, 10:12 AM), <https://www.cnn.com/2018/10/26/tech/cesar-sayoc-twitter-response/index.html>.

¹²⁷ See Heather Kelly, *Facebook Changes Livestream Rules After New Zealand Shooting*, CNN (May 15, 2019), <https://www.cnn.com/2019/05/14/tech/facebook-livestream-changes/index.html>.

¹²⁸ Facebook Newsroom, Mar. 27, 2019, <https://newsroom.fb.com/news/2019/03/standing-against-hate/>.

praise, support and representation of white nationalism and white separatism on Facebook and Instagram.”¹²⁹

After criticism that it was becoming a hub for “nut-case” conspiracy theories, YouTube began appending Wikipedia blurbs to videos espousing such theories and began giving priority to reliable news sources over partisans in search results for breaking news stories.¹³⁰ Next, YouTube announced it was changing its recommendations algorithm to reduce the spread of “borderline content and content that could misinform users in harmful ways.”¹³¹ Most recently, YouTube announced plans to remove videos and channels “that advocate neo-Nazism, white supremacy and other bigoted ideologies in an attempt to clean up extremism and hate speech” on its service.¹³²

In an extreme case, a social media site that does not control hate speech may find itself closed off from the Internet altogether. After the Pittsburg synagogue shooting and revelations that the suspected gunman used the social network site Gab to threaten Jews, numerous

¹²⁹ *Id.*

¹³⁰ See Kevin Roose, *YouTube Unleashed a Conspiracy Theory*, N.Y. TIMES (Mar. 26, 2018, 6:30 PM), <https://www.nytimes.com/2019/02/19/technology/youtube-conspiracy-stars.html>.

¹³¹ *See id.*

¹³² Kevin Roose & Kate Conger, *YouTube to Remove Thousands of Videos Pushing Extreme Views*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/business/youtube-remove-extremist-videos.html>.

Internet infrastructure providers, including payment processing firm Paypal, hosting service Joyent, domain register Godaddy, and numerous app stores, banned the site.¹³³ Paypal explained its decision by stating that it would not affiliate with a site that “explicitly allow[s] the perpetuation of hate, violence or discriminatory intolerance.”¹³⁴ A similar fate befell the neo-Nazi website Daily Stormer after the violence during a white supremacist rally in Charlottesville, Virginia.¹³⁵

C. FURTHER ACTION

There are enormous difficulties in policing speech on social media sites like Facebook, because the site must respond to users who have customs that are unfamiliar to Facebook employees and who speak in varying dialects.¹³⁶ But social media sites should continue to “do more.” Facebook needs to ensure that it has the manpower and knowledge to do the reviewing of content that it promises in its community standards.¹³⁷ Social media sites should continue to tweak algorithms and recommendations to favor verifiable news over false news and conspiracy theories, so as not to add to the

¹³³ See Ivana Kottasova & Sara Ashley O’Brien, Gab, the Social Network Used by the Pittsburgh Suspect, Has Been Taken Offline, Cnn: Business (Oct. 29, 2018, 12:00 PM), <https://www.cnn.com/2018/10/29/tech/gab-offline-pittsburgh/index.html>.

¹³⁴ *Id.*

¹³⁵ See Everett, *supra* note 118 at 114. (2018).

¹³⁶ See McKirdy, *supra* note 12 (noting the difficulty Facebook faces in monitoring the rise of hate speech in Myanmar because of language difficulties).

¹³⁷ See *Facebook Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Apr. 2, 2019).

problem when the false stories trend. Adding disclaimers next to false stories is a good step.

Second, government should continue to step in when social media manipulation equates to foreign interference in elections. The U.S. should make election interference a priority of foreign policy diplomacy, attempt to negotiate cross-border prosecution of offenders, or enter treaties where members promise not to use cyber election interference.

Third, hand in hand with its engagement abroad, government must cooperate with the technology industry and social media websites themselves in finding solutions. Congress can work with Facebook and other sites to make progress on these issues without stifling Internet speech or enacting technological solutions that will be quickly obsolete. New Zealand's Prime Minister has issued a "Christchurch Call," an effort to enlist companies like Facebook, Twitter and YouTube to do more to curb violent and extremist content.¹³⁸ Seventeen countries, the European Commission, and eight large technology companies have signed onto the call.¹³⁹

Finally, one solution will be self-enacting. With time, social media users should become more Internet-

¹³⁸ See Jamie Tarabay, *As New Zealand Fights Online Hate, the Internet's Darkest Corners Resist*, N.Y. TIMES (July 5, 2019), https://www.nytimes.com/2019/07/05/world/asia/new-zealand-internet.html?nl=todaysheadlines&emc=edit_th_190706?campaign_id=2&instance_id=10726&segment_id=14968&user_id=4022f9f0b977acdc8bf6eb8211796809®i_id=555121730706. Prime Minister Jacinda Ardern also responded to the Christchurch shootings by refusing to utter the shooter's name, banning the sharing or viewing of the shooter's manifesto, and tightening gun laws.

¹³⁹ *Id.*

savvy, particularly in areas where Internet use is still developing. Additionally, monopolies on users' social media attention should break down, as we already see users abandoning Facebook in favor of sites like Snapchat. And with time, more content can be developed to drown out untruthful or hateful content.

IV. CONCLUSION

Social media is here to stay, and with it come true dangers as well as benefits. The 2016 presidential election has shown us that our social media sites can be used to taint the very basis of our democracy – our election system. Violence in India and Myanmar has erupted in direct response to false stories that could only be spread with such speed and breadth via social media sites. And other violence, like mass shootings, can be tied directly to social media sites where troubled individuals find like-minded peers and fan the flames of hate and derangement. These problems must be addressed by social media sites and by the government, but with care not to destroy the freedom of speech that social media epitomizes. As the Supreme Court noted in 2017, new technologies will be exploited for criminal means. The solution includes improving the technology, not destroying it.

HOW THE RAISE ACT PROMOTES URBAN AMERICA'S ECONOMIC GROWTH OVER RURAL AMERICA'S

*Robert Koons**

This legislative comment will discuss the proposed immigration bill titled Reforming American Immigration for Strong Employment (“RAISE Act” or “Act”) by Senators Tom Cotton and David Perdue.¹ The RAISE Act earned national attention after President Trump hosted both Senators at the White House to announce his support.² Senator Cotton declared that the RAISE Act “should help promote economic growth;” Senator Perdue added that the immigration system should “protect the interests of working Americans.”³ America’s economy, however, is driven by a fusion of urban and rural

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¹ See RAISE Act, S. 1720, 115th Cong. (2017).

² See President Donald Trump, Trump Administration Immigration Policy Announcement, C-Span (Aug. 2, 2017) <https://www.c-span.org/video/?432076-1/president-backs-gop-senators-skilled-based-immigration-bill>.

³ Senators David Purdue & Tom Cotton, Trump Administration Immigration Policy Announcement, C-span (Aug. 2, 2017) <https://www.c-span.org/video/?432076-1/president-backs-gop-senators-skilled-based-immigration-bill>.

economies, supported by workers with diverse abilities.

This comment will address the Act's proposition to grow urban America's economy over rural America's economy, and propose amendments that aim to stabilize the benefits of immigration for both urban and rural America. Economies, no matter the geographic location, that attract high-skilled workers grow faster by expanding the labor force and increasing the productivity of the economy;⁴ the Act would push this growth to urban America. First, the Act's points system predominately incentivizes immigrants to settle in urban America.⁵ Second, by shifting to a merit-based immigration policy, the Act removes certain motivations for immigrants to settle in rural America.⁶ Third, the Act does not satisfy the labor force demands of industries in rural America. The RAISE Act helps urban America's economy to the extent of harming rural America's.⁷

⁴ See Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?*, 2 AM. ECON. J.: MACROECON. 31, 32 (2010). See generally Gianmarco I. P. Ottaviano & Giovanni Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 153 (2012) (discussing the effects of immigration on native workers and previous immigrants).

⁵ See RAISE Act, S. 1720, 115th Cong. (2017).

⁶ See *id.*

⁷ See *id.*

Part II of this comment will provide background material and explain the proposed legislation. Part III will analyze the consequences of the proposed legislation and provide potential solutions. Part IV will summarize the analysis.

I. BACKGROUND

The RAISE Act will replace the Immigration and Nationality Act's Diversity Visa Program with a skills-based immigration points system,⁸ known as a merit-based immigration system.⁹ The points system will favor immigrants who can "financially support themselves and their families and demonstrate skills that will contribute to our economy," according to President Trump.¹⁰ This is meant to increase productivity in the economy, grow wages, and copy the Canadian and Australian immigration programs.¹¹

This transition to the points system will bring many changes to the current system.¹² Most notably, by ending the Diversity Visa Program, there no longer will be "50,000 immigrant visas available annually, drawn from

⁸ *See id.*

⁹ *See id.*

¹⁰ *See* President Donald Trump, *supra* note 2.

¹¹ *See* Senator David Purdue, Trump Administration Immigration Policy Announcement, C-Span (Aug. 2, 2017) <https://www.c-span.org/video/?432076-1/president-backs-gop-senators-skilled-based-immigration-bill>.

¹² *See* RAISE Act, *supra* note 5.

random selection among all entries to individuals who are from countries with low rates of immigration to the United States.”¹³ The Act will move away from the current employer-based immigration system that allows employers to demand the immigrants that could help their business.¹⁴ Also, the Act would depart from the broad application of the family-ties system that connects family members inside the United States with members outside by “eliminating existing preferences for extended family members of U.S. residents, while keeping in place preferences for spouses and minor children.”¹⁵ Consequently, the Act eliminates the ability for “grandparents, mothers, fathers and siblings [to] reunite with their families who have emigrated to the United States.”¹⁶ According to Senators Cotton and Perdue, the bill “would lead to an overall reduction in

¹³ U.S. Citizenship and Immigration Services, *Green Card Through the Diversity Immigrant Visa Program* (Jan. 11, 2018), <https://www.uscis.gov/greencard/diversity-visa>.

¹⁴ See *The RAISE Act: What Lies Beneath the Proposed Points System?*, AM. IMMIGR. COUNCIL, (Aug. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_raise_act_what_lies_beneath_the_proposed_points_system.pdf.

¹⁵ Elizabeth Redden, *Opposition to Trump-Backed Immigration Bill*, INSIDE HIGHER ED (Aug. 3, 2017), <https://www.insidehighered.com/news/2017/08/03/trump-backed-bill-would-halve-legal-immigration-create-points-based-system>.

¹⁶ *The RAISE Act is Cruel and Un-American*, NAT'L IMMIGR. L. CTR., (July 28, 2017), <https://www.nilc.org/2017/08/02/raise-act-cruel-un-american/>.

legal immigrants of 41 percent in year one, and of 50 percent at the end of 10 years.”¹⁷

Under the proposed Act, the merit-based system would award points to prospective immigrants based on six categories: (1) education, (2) salary (if the immigrant has a job offer), (3) the sum of an immigrant’s investment in a business, (4) age, (5) an extraordinary achievement, and (6) score on an English language assessment.¹⁸ This comment will focus on the first three categories. The Act allots points for immigrants with educations in a professional degree or science, technology, engineering, or mathematics (STEM).¹⁹ The points awarded for salary are based on multiples of the median household income in the state in which the applicant will be employed;²⁰ these points are rewarded to encourage applications from immigrants who can financially support themselves and drive up wages.²¹ The Act substantially rewards immigrants who invest \$1.35 million or \$1.8 million “in a new commercial enterprise in the United States, maintain such investment for at least 3 years, and play an active role in the management of such commercial enterprise as the applicant’s primary occupation.”²²

¹⁷ Redden, *supra* note 15.

¹⁸ See RAISE Act, *supra* note 5.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Redden, *supra* note 15.

²² See *id.*

A “rural” area, according to the United States Census Bureau, is any area outside of an “urban area.”²³ Today, “urban areas” include two types of geographies: urban areas, consisting of populations greater than 50,000 people, and urban clusters, consisting of populations greater than 2,500 and less than 50,000.²⁴ To avoid any confusion, this comment will refer to urban areas and urban clusters as “urban America” and non-urban America will be referred to as “rural America.”

The RAISE Act will award the following points to the prospective immigrant in the following manner:²⁵

²³ See *How Does the U.S. Census Bureau Define "Rural?"*, U. S. CENSUS BUREAU, (2010), <https://gis-portal.data.census.gov/arcgis/apps/MapSeries/index.html?appid=7a41374f6b03456e9d138cb014711e01>.

²⁴ See *id.* (quoting “Today, ‘urban areas’ consist of two types of geographies: ‘Urbanized Areas’ have a population of 50,000 or more. ‘Urban Clusters’ have a population of at least 2,500 and less than 50,000.”).

²⁵ See Kelsey Cork, *Reforming American Immigration for Strong Employment (RAISE) Act: Points Criteria*, BERRY APPLEMAN & LEIDEN LLP (2017), <http://www.balglobal.com/wp-content/uploads/Perdue-Cotton-Summary-8-2-v2.pdf>.

POINTS CRITERIA

Education

Highest Degree Obtained	Points
Foreign high school degree	1
U.S. high school degree	1
Foreign bachelors degree	6
U.S. bachelors degree	6
Foreign professional degree	10
U.S. professional degree	13
Foreign masters in STEM	7
U.S. masters in STEM	8
Foreign PhD in STEM	10
U.S. PhD in STEM	13

Age

Age	Points
18 to 21	6
22 to 25	8
26 to 30	10
31 to 35	8
36 to 40	6
41 to 45	4
46 to 50	2
50+	0

Investment & Active Management

Investment level	Points
\$1.35 million to \$1.8 million	6
\$1.8 million and over	12

Extraordinary Achievement

Achievement	Points
Nobel Prize & specific equivalents	25
Olympic medal & equivalent	15

Job Offer

Salary level	Points
1.5x median to 2x median	5
2x median to 3x median	8
3x median and over	13

English Language

English Assessment Score	Points
6 th to 7 th decile	6
8 th decile	10
9 th decile	11
10 th decile	12

II. ANALYSIS

A. THE POINTS SYSTEM DRIVES IMMIGRANTS TO URBAN AREAS IN THREE NOTABLE WAYS

1. Education, High-Skilled Labor

The RAISE Act pushes productivity growth to urban America through the points system. First, the points system funnels high-skilled immigrants into cities by broadly awarding points to immigrants who hold a STEM degree or a professional degree.²⁶ STEM-educated and professional-degree-holding immigrants are more likely to be employed in urban areas.²⁷ These

²⁶ See RAISE Act, *supra* note 5.

²⁷ See *Spotlight on Statistics: STEM Occupations Made up Over One-Fifth of Employment in Some Areas*, U.S. DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, (2007), <https://www.bls.gov/spotlight/2017/science-technology-engineering-and-mathematics-stem-occupations-past-present-and-future/home.htm> (*quoting*, “Although STEM occupations made up 6.2 percent of national employment, they made up nearly 23 percent of employment in California-Lexington Park, Maryland, and over 22 percent of employment in San Jose-Sunnyvale-Santa Clara, California.”); Justin Fox, *Rural America Is Aging and Shrinking*, BLOOMBERG, (June 20, 2017), <https://www.bloomberg.com/view/articles/2017-06-20/rural-america-is-aging-and-shrinking> (*quoting*, “Only 30 percent of rural Americans rate job opportunities in their communities as excellent or good, compared with 50 percent in urban areas and 45 percent in suburbs.”). See generally, *The Immigration Debate: Studies on the Economic, Demographic, and Fiscal Effects of Immigration*, NAT’L RES. COUNCIL (James P. Smith & Barry Edmonston, eds., National Academy Press 1998), <https://www.nap.edu/read/5985/chapter/11#392> (discussing the trend of immigrants concentrated in metropolitan areas); AM. IMMIGR. CTR., *supra* note 14 (describing the general allocation of points under the RAISE Act).

jobs will continue to be focused in cities since STEM occupations and professional degree jobs will grow faster than other rural occupations.²⁸

All STEM occupations, however, are not found in urban areas.²⁹ STEM employees focused in unconventional sources of energy and agricultural technicians are mostly located in rural areas.³⁰ The Act, to encourage STEM-educated immigrants to work in these areas, should either increase the amount of points awarded for STEM jobs that support rural areas or apply a multiple if the job is located in a rural area.

2. *High-Paying Jobs*

Second, the RAISE Act, by measuring the immigrant's salary against the entire state's median wage,³¹ measures the immigrant against an expansive base that does not reflect the differing urban and rural economies, deterring a possible award for an immigrant

²⁸ See Dennis Vilorio, *STEM 101: Intro to Tomorrow's Jobs*, BUREAU OF LAB. STAT.: OCCUP. OUTLOOK Q., <https://www.bls.gov/careeroutlook/2014/spring/art01.pdf> (quoting "BLS projects overall STEM employment, as defined in this article, to grow about 13 percent between 2012 and 2022. This is faster than the 11-percent rate of growth projected for all occupations over the decade.").

²⁹ See *id.*

³⁰ See *Emerging Energy Industries and Rural Growth*, 2013 U.S. DEP'T OF AGRIC. ERR-159, https://www.ers.usda.gov/webdocs/publications/45155/41053_err159.pdf?v=0 (quoting, "unconventional sources made substantial contributions to employment growth" [in rural areas]).

³¹ See RAISE Act, *supra* note 5.

working in rural America. Since urban jobs are higher paying than rural jobs,³² the Act, again, rewards immigrants who will work in urban America more favorably than their rural counterparts. Instead, the measurement should compare the immigrant's salary to those salaries in the same county, township, or state congressional district, so the immigrant can still raise the average wage in that area and be more accurately compared to peers while not being penalized for moving to a rural area.

3. *Investment*

Third, the Act's "Investment and Active Management" definition is biased towards urban America. Five urban areas—New York, Miami, Los Angeles, Houston, and Dallas—produced as many new businesses as the rest of the nation combined from 2010 to 2014.³³ These urban areas have bigger economies and

³² See Alemayehu Bishaw & Kirby G. Posey, *A Comparison of Rural and Urban America: Household Income and Poverty*, U. S. CENSUS BUREAU (Dec. 8, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/a_comparison_of_rura.html (quoting, "median household income for rural households was \$52,386, about 4.0 percent lower than the median for urban households, \$54,296.").

³³ See *Dynamism in Retreat: Consequences for Regions, Markets, and Workers*, ECON. INNOVATION GROUP, (Feb. 2017), <https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf> (quoting, "From 2010 to 2014, five metro areas—New York, Miami, Los Angeles, Houston, and Dallas—produced as big of an increase in businesses as the rest of the nation combined.").

attract new businesses, while rural America falls behind.³⁴

To accurately reflect the needs of rural economies, the Act must adjust the requirements to qualify for a reward under the “Investment and Active Management” category. Large-scale projects are needed to support infrastructure development—“including water and sewer, electric utilities, internet broadband services, community facilities, and housing”—in rural communities.³⁵ These large-scale projects need substantially more than 1.35-1.8 million dollars to start and actively manage. So, by rewarding an active management in a business and not providing an investment option that reflects the capital requirements and business structure of rural areas, the Act perpetuates the concentration of new business investment in urban America.³⁶ To help rural America, the Act should reward the same amount of points for a 1.35-1.8 million dollar

³⁴ See Jeff Desjardins, *Mapped: The US Cities with the Biggest Economies*, BUS. INSIDER, (Sept. 27, 2017), <https://www.businessinsider.com/us-cities-with-the-biggest-economies-2017-9> (noting that economics capabilities tend to be clustered in urban areas).

³⁵ See *Rural America at a Glance*, U.S. DEP’T. OF AGRIC., (2017), <https://www.ers.usda.gov/webdocs/publications/85740/eib-182.pdf?v=43054>.

³⁶ See Manuel Adelino, Song Ma & David T Robinson, *Firm Age, Investment Opportunities, and Job Creation*, at 2 (NAT’L BUREAU OF ECON. RES., Working Paper No. 19845, 2014) (noting the finding that new firms, sparked by investment, account for the bulk of net employment creation).

investment that will fund these large-scale projects in rural America.”

*B. MOVING TO A MERIT-BASED IMMIGRATION SYSTEM
PUSHES IMMIGRANTS TO URBAN AMERICA*

*1. Departure from the family-links system will create a
cycle of low-skilled migration*

Under the current immigration plan, immigration tends to occur in chains that “link family members and friends to common destinations.”³⁷ The family could be anywhere in America, in an urban or rural geography. A movement away from the family-ties arrangement will change the way an immigrant decides where to live. Immigrants are often “dependent on their families and friends to integrate them into job networks,” whereas, current citizens “tend to be less constrained in their destinations and are more apt to respond to labor market forces, as well as other amenities, that occasionally shift in response to economic cycles and global economic forces.”³⁸ Therefore, departing from family-ties arrangement will cause immigrants to not rely on family ties for the source of their immigration. Rather, immigrants will search for areas where the labor market is more promising, just as American citizens currently

³⁷ See William H. Frey, *Immigration, Domestic Migration, and Demographic Balkanization in America: New Evidence for the 1990s*, 22 POPULATION & DEV. REV. 741, 743 (Dec. 1996), http://www.frey-demographer.org/reports/R-1996-6_ImmigrationDomestic.pdf.

³⁸ See NAT'L RES. COUNCIL, *supra* note 27.

practice. Since higher paying jobs are found in urban areas,³⁹ this pushes immigrants away from rural America.

This predominant high-skilled immigration to urban America will hurt rural America's productivity growth; this funneling of high-skilled workers is one of the factors that has led to the "selective out-migration of native-born less-skilled workers in high-immigration areas" in the past.⁴⁰ While well-educated workers move to urban America for well-paying or fast-growing employment opportunities,⁴¹ "high school graduates, high school dropouts, and lower-income residents move away from most high-immigration metropolitan areas."⁴² The economic growth of urban America brings high wages; however, the growth also leads to a higher cost of living and pushes the less wealthy to search for living conditions in rural America where the cost of living is cheaper.⁴³ This low-skilled migration is harmful because

³⁹ See Alemayehu Bishaw & Kirby G. Posey, *A Comparison of Rural and Urban America: Household Income and Poverty*, U. S. CENSUS BUREAU (Dec. 8, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/a_comparison_of_rura.html (quoting, "median household income for rural households was \$52,386, about 4.0 percent lower than the median for urban households, \$54,296.").

⁴⁰ See NAT'L RES. COUNCIL, *supra* note 27, at 401.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See William Hawk, *Expenditures of Urban and Rural Households in 2011*, U.S. DEPT. OF LAB.: BUREAU OF LAB. STAT. (Feb. 2013), <https://www.bls.gov/opub/btn/volume-2/expenditures-of-urban-and-rural-households-in-2011.htm>.

“low-skilled immigrants compete with less well-educated, long-term, and native-born residents for jobs and, therefore, they serve to bid down their wages and take away employment opportunities.”⁴⁴ This leaves low-skilled citizens to migrate to rural America, and rural America will need to rely on low-skilled workers to drive productivity growth.

With the immigrant no longer considering the geographic location of their family, future immigrants under this plan will focus on the new deciding factors: education, high-paying jobs, and investment, which lean towards domiciling in urban areas. To put it another way, the immigrant, moving to be with family, is no longer searching for work near the family, which may be located in an urban or a rural area, but instead, the immigrant is searching for work that is predominately found in urban America. Thus, the Act must acknowledge this benefit of the family-links system and reward immigrants who have family-ties to America.

2. *Departure from the employer-based system will harm employers*

The departure from an employer based system makes it harder for employers to find qualified immigrants because the immigrant has to seek the employer out.⁴⁵ This new system will move the country away from the current demand-driven model, “which allows employers

⁴⁴ NAT'L. RES. COUNCIL, *supra* note 27, at 405.

⁴⁵ AM. IMMIGR. COUNCIL, *supra*, note 14, at 5.

to select the workers they need, subject to government regulations.”⁴⁶ The immigration system should continue to focus on employer-based systems because the departure from it “may not lead to economic growth and increased competitiveness if these immigrants cannot find jobs to match their skill set.”⁴⁷

Shifting to a merit-based immigration policy reduces the possibility that rural American employers can attract immigrants to their business; thus, the employer-based system must remain in place.

*C. THE RAISE ACT FAILS TO SATISFY AMERICA’S LABOR
NEEDS, WHICH PREDOMINATELY HURTS RURAL
AMERICA’S ECONOMY*

Since the U.S. birthrate just hit a historic low⁴⁸ and baby boomers are progressing into retirement, economists and business owners are calling for more immigration, not less.⁴⁹ Rural America’s lower levels of

⁴⁶ *See id.* at 1.

⁴⁷ AM. IMMIGR. COUNCIL, *supra* note 14, at 2; John Graham, *CFO Survey: With Hiring Their Top Concern, Firms Want More Skilled Immigrants*, DUKE UNIV. CFO GLOBAL BUS. OUTLOOK (Sept. 2018), <https://www.fuqua.duke.edu/duke-fuqua-insights/cfo-survey-sept-2018> (showing that the results “reflect longstanding support for immigration among business leaders”).

⁴⁸ *See* Heather Long, *It’s a ‘Grave Mistake’ for Trump to Cut Legal Immigration in Half*, THE WASHINGTON POST, (Aug. 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/02/its-a-grave-mistake-for-trump-to-cut-legal-immigration-in-half/?utm_term=.d0a459e5efd7.

⁴⁹ *See id.*

labor force participation stem partly from an “older population, higher disability rates, and other factors.”⁵⁰ Particularly, southern rural counties will be hit the hardest with this reduction in net migration, with nearly 85 percent of America’s “persistent-poverty counties” in the South.⁵¹ This reduction in total immigration distinguishes the bill from Canada’s and Australia’s versions that “both let in more than double the number of immigrants per capita than the United States.”⁵² Despite transitioning to more high-skilled immigrants, the American economy will be two percent smaller with 4.6 million fewer jobs in 2040 if immigration is decreased by 50 percent.⁵³

Also, the Act reduces the immigrants who used to primarily fill rural economy jobs. South Carolina Senator Lindsey Graham denounced the immigration policy and stated, “hotels, restaurants, golf courses and farmers will tell you this proposal—to cut legal immigration in half—would put their business in

⁵⁰ See U.S. DEP’T. OF AGRIC., *supra* note 35, at 4.

⁵¹ See *id.* at 5 (showing LERS defines persistent-poverty counties as those with 20 percent or more of their populations living in poverty over approximately 30 years [measured by the 1980, 1990, and 2000 decennial censuses and 2007-11 American Community Survey]).

⁵² See Long, *supra* note 48.

⁵³ See *The RAISE Act: Effect on Economic Growth and Jobs*, PENN WHARTON BUDGET MODEL, (Aug. 10, 2017), <http://budgetmodel.wharton.upenn.edu/issues/2017/8/8/the-raise-act-effect-on-economic-growth-and-jobs>.

peril.”⁵⁴ Senator Graham also declared that the bill will be “devastating” for his state’s economy because it will reduce the number of “immigrants who work legally in our agriculture industries.”⁵⁵ Immigrants are crucial to the “essential economy” which is made up of the food services and hospitality industries, construction, agriculture, elder care, and manufacturing.⁵⁶ Low-skill migration will not be able to sustain the population decline in the rural US.⁵⁷

III. CONCLUSION

The Act’s inclination to benefit urban America will ultimately hurt rural America. Instead of focusing on factors that would predict how likely an immigrant is to fill the needs of all of America, the Act focuses on driving economic growth towards urban America. The RAISE Act, however, can fill the needs of rural America, by adjusting the points system, considering the benefits of the family-links system in the points allotment, preserving the employer-based system, and increasing the total number of immigrants.

⁵⁴ See Caitlin Byrd, *Lindsey Graham says Trump’s Immigration Proposal Would be ‘Devastating’ for South Carolina*, THE POST AND COURIER, (Aug. 2, 2017), https://www.postandcourier.com/news/lindsey-graham-says-trump-s-immigration-proposal-would-be-devastating/article_a28a1a52-77b0-11e7-aba1-bbb38f874191.html.

⁵⁵ See *id.*

⁵⁶ See AM. IMMIGR. COUNCIL, *supra* note 14, at 6.

⁵⁷ See U.S. DEP’T. OF AGRIC., *supra* note 35, at 4.