Big Picture Thinking: Judges' Enforcement of International Treaties

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Introduction

The United Nations Convention against Transnational Organized Crime (the "TOC Treaty") and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (the "Protocol") signifies an agreement between 187 parties, 147 of which have signed the convention,[1] to combat the worldwide human trafficking epidemic, a $150-billion-dollar industry.[2] Pursuant to those goals and duties, the United States has made some progress, which includes state and federal regulation. Independently, states have enacted measures to combat this issue; uniquely, the District of Columbia and a couple of other states have implemented a legal privilege between human trafficking counselors and victims.[3]

The TOC Treaty's aim is to be an "effective tool and [provide] the necessary legal framework for international cooperation in combating, *inter alia*, [. . .] criminal activities [. . .]."[4] The Protocol, supplementing the TOC Treaty, aims: "(a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objectives."[5] The United States' Senate received the

[1] *United Nations Convention against Transnational Organized Crime*, UNITED NATIONS (Sept. 22, 2016, 01:52 PM), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en.
[2] *Human Trafficking by the Numbers*, HUMAN RIGHTS FIRST (Jan. 07, 2016), http://www.humanrightsfirst.org/resource/human-trafficking-numbers.
[3] *State Confidentiality Statutes*, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND, at 15, http://www.lsc.gov/sites/default/files/LSC/pdfs/8.%20%20Appendix%20VI%20%20Handout%2030%20State%20Confidentiality%20Chart%207-20.pdf.
[4] *United Nations Convention against Transnational Organized Crime and its Protocols,* December 13, 2000, S. EXEC. REP. NO. 109-4, 40 ILM 335, at 2 (2001).
[5] *Id.*

Message from the President of the United States, regarding the TOC Treaty, which established that the Protocol is non-self-executing.[6]

A non-self-executing treaty is a treaty that is unenforceable in domestic courts without legislative implementation.[7] Given the nature of the Protocol, the goals of the TOC Treaty are not automatically enforced and do not automatically create a cause of action that a court can directly exercise its power over. However, courts have the power and responsibility to further the legitimate goals of international treaties and can create common law aimed at doing just that. Further, courts can make judgments that promote the international treaties in place and, while promoting the aims of the Protocol, may interpret confidentiality privileges to extend to human trafficking counselors and translators acting in a guidance or emergency capacity. Doing so would further legitimate the United States' interests in combatting the growing human trafficking industry.

The United States has implemented legislation to attempt to combat human trafficking. For example, there is federal legislation aimed at combatting human trafficking by increasing the effectiveness of investigations, anti-trafficking programs, and creating initiatives aimed at deterring human trafficking.[8] Congress has also passed the Victims of Trafficking and Violence Prevention Act which combats human trafficking by, among other things, ensuring assistance and protection for victims.[9] Additionally, the Customs and Facilitations and Trade Enforcement Reauthorization Act of 2009 "prohibit[s] the importation of goods to the United States made

[6] Message from the President of the United States, U.N. Convention Against Transnational Organized Crime, Treaty Doc. 108-16, Senate, 108th Congress, 2d Session, at 26-27 (February 23, 2004).
[7] Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L., 695, 695 (1995).
[8] 22 U.S.C. §§7101-13.
[9] Public Law 110-457 (110th Congress) (2008).

through the benefit of human trafficking or forced labor."[10] Whereas Congress has taken many steps to address the issue of human trafficking, statistics show that this a persistent problem worldwide. To combat this growing issue and increase the likelihood that traffickers will be brought to justice, courts should use their interpretation power and their ability to create binding precedent to further the goals of international treaties, regardless of whether the treaties are self-executing or not.[11] For example, could extend confidentiality privileges to human trafficking counselors and interpreters.

Section I will provide a brief background on the human trafficking problem and why courts should intervene and use their authority to address the problem. The United States' implementation of the TOC Treaty will also be discussed. Section II will discuss the courts' ability to use their judgment and decision-making powers and interpretive techniques to create precedent, which would aim to enforce and promote international treaties. The historical enforcement and promotion of international treaties by domestic courts and courts' abilities today will then be discussed. Section III will offer an example of what courts could do to promote the Protocol.

Section I – Background

a. Human Trafficking

Human trafficking is an international epidemic, that affects and concerns the United States.[12] Pursuant to the Protocol, 'human trafficking' is defined as:

[10] HUMAN TRAFFICKING LAWS & REGULATIONS, Homeland Security, https://www.dhs.gov/human-trafficking-laws-regulations (last published Sep. 22, 2015).
[11] *Foster v. Neilson*, 27 U.S. 253, 314 (1829). *Foster* is the first case that makes a distinction between self-executing treaties and non-self-executing treaties and explains that the former has judicial affect absent legislative action whereas the latter does not. *Foster*, 27 U.S. at 314 (overruled on other grounds by United States v. Percheman, 32 U.S. (Pet.) 51, 52 (1833)).
[12] *What is Human Trafficking?*, CASE Act, http://www.caseact.org/learn/humantrafficking/.

> ". . . the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]"[13]

At least 2.45 million people were trafficked internationally and domestically between 1995-2004 (est.).[14] Given the difficulty of calculating the total number of victims of human trafficking, statistics have had large disparities and many have been criticized.[15] In 2004, the United States State Department, in the Trafficking in Persons Report, reported that approximately 14,500 to 17,500 women and children were trafficked into the United States.[16] However, the criticism of the methodology used to estimate the number of human trafficking victims into the United States continued and United States' governmental agencies have resisted making any new estimations.[17] As human trafficking continues, law enforcement is finding the epidemic difficult to curb; however, improvements are being made.[18]

The number of prosecutions internationally related to human trafficking continues to increase, generally, from 2007 until 2014.[19] In 2014, there were approximately 10,051 prosecutions, resulting in 4,443 convictions related to human trafficking.[20] What is slightly disturbing is the fact that the number of convictions vary from 2007 until 2014; there is not an

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[13] United Nations Convention, *supra* note 4, at 42.
[14] *Human Trafficking: A Brief Overview*, SOCIAL DEVELOPMENT NOTES, No. 22, at 4 (Dec. 2009). http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/Human_Trafficking.pdf.
[15] John Cotton Richmond, *Perspectives on Fighting Human Trafficking: Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS L.J. 1, 14-16 (Fall, 2015).
[16] *Id.* at 16.
[17] *Id.*
[18] *Trafficking in Persons Report*, United States of America Department of State, 48 (July 2015), http://www.state.gov/documents/organization/245365.pdf.
[19] *Id.*
[20] *Id.*

overall increasing patter as there are with prosecutions.[21] Domestically, the United States' Trafficking in Persons Report reported that in 2014, the federal government, through the Department of Human Services, the Federal Bureau of Investigation and the Department of State, opened approximately 2, 919 investigations allegedly involving human trafficking.[22] The United States Department of Justice convicted only 184 human traffickers in 2014, which was a slight increase from 2013.[23] The United States and the international community have taken steps to address the problem.[24] The United States, for example, enacted the Trafficking Victims Protection Act ("TVPA") in 2000.[25] The TVPA aims to combat human trafficking by promoting policies relating to the prosecution of traffickers, the protection of victims, and the prevention of human trafficking.[26] However, trafficking victims face obstacles in order to obtain the protections, services, and benefits afforded to them.[27]

A victim of human trafficking, who is a citizen of the United States, must prove that "they were trafficked due to coercion, force, or fraud," a limitation that excludes children under the age of 18.[28] Foreign nationals who are victims of human trafficking must prove more in order to receive assistance.[29] Before non-citizens can apply for a T visa, which allows them stay in the United States and seek naturalization rather than be deported, they must establish themselves as a victim through a law enforcement agency, or through other credible evidence such as through

[21] *Id.*
[22] *Id.* at 353.
[23] *Human Trafficking by the Numbers*, *supra* note 2.
[24] Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUMAN RIGHTS L. REV. 143, 151 (2011).
[25] *Id.*
[26] *Trafficking Victims Protection Act*, FIGHT SLAVERY NOW, https://fightslaverynow.org/why-fight-there-are-27-million-reasons/the-law-and-trafficking/trafficking-victims-protection-act/trafficking-victims-protection-act/.
[27] Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 16 UTAH L. REV. 535, 540 (2016).
[28] *Id.*
[29] *Id.*

court transcripts or news reports.[30] Further, a victim who is not a United States citizen must "demonstrate they reported the trafficking scheme to a law enforcement agency, assisted with the investigation, and made good-faith efforts to obtain an [law enforcement agency's] endorsement" in order to receive assistance.[31] One of the major problems with those requirements is that "research shows that a victim who takes the stand against an alleged abuser faces increased risk of retaliation[;] forcing a victim to testify against his or her alleged trafficker significantly increases his or her safety risks."[32]

The difficulty and uncertainty of receiving benefits is detrimental to victims of human trafficking. Much research has been done regarding the mental health issues faced by victims, particularly the prevalence of Post-Traumatic Stress Disorder (PTSD).[33] Victims also have been found to suffer from anxiety and depression disorders, which include nervousness, shakiness, terror, and panic spells.[34] Additionally, victims "with traumatic histories of physical and/or sexual abuse have also been found to be at increased risk for the development of dissociative disorders."[35] In order to ensure victims' recovery and the prevention of these mental health disorders, medical services are crucial and victims need to have access to such aid.[36] Further, it is argued that victims need to have access to mental health professions, rather than non-licensed

[30] *Id.* at 540-541.
[31] *Id.* at 541.
[32] Kenneth E. Noyes, Esq., DC Coalition Against Domestic Violence (June 25, 2009), http://www.dccadv.org/img/fck/Human%20Trafficking%20Mendelson%20Ltr%206%2009%20FIN.doc.
[33] Erin Williamson, Nicole M. Dutch, & Heather J. Clawson Caliber, *Evidence-Based Mental Health Treatment for Victims for Human Trafficking* (April 14, 2010), https://aspe.hhs.gov/basic-report/evidence-based-mental-health-treatment-victims-human-trafficking#Mental.
[34] *Id.*
[35] Erin Williamson, Nicole M. Dutch, & Heather J. Clawson Caliber, *Evidence-Based Mental Health Treatment for Victims for Human Trafficking* (April 14, 2010), https://aspe.hhs.gov/basic-report/evidence-based-mental-health-treatment-victims-human-trafficking#Mental. "Dissociative disorders are characterized as a disruption in the usually integrated functions of consciousness, memory, identity, or perception." *Id.*
[36] *Id.*

counselors.[37] The reasoning for this is because "non-licensed counselors may also lack the unique skill required for proper treatment implementation, but they may also lack testimonial privilege in court. Therefore, victims may be re-victimized if these counselors are called upon to testify during court proceedings since these counselors may have to disclose information that the victims believed to be confidential."[38] For victims of human trafficking, mental health aid and social support are vital to reduce mental health conditions, although such aid and support are difficult to acquire.[39]

In addition to the TVPA, since 2000, the federal government and every state, including the District of Columbia, has enacted human trafficking statutes, aimed at combating this international problem, though they are not sufficient and further action is needed.[40] Specifically, since 2012, "Congress and state legislatures introduced 1,601 bills related to sex trafficking, 387 of which became law."[41] However, many of these statutes prove inefficient and tedious.[42] In fact, twenty-three states and the District of Columbia have statutes that are much more narrow than the TVPA, making access to victims' services even more difficult for human trafficking victims.[43] For example, in several states, the minor age is much younger than defined in the TVPA, thus requiring minor children to prove that they were trafficked as a result of force, fraud, or coercion.[44] Other states provide further limitations, which include narrowly defining 'trafficking' or restricting trafficking to include only instances that involve force.[45] The currently

[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Peters, *supra* note 27, at 535.
[41] *Id.* at 536.
[42] *Id.* at 542.
[43] *Id.*
[44] *Id.* at 543.
[45] *Id.* at 544.

enacted state laws aimed at helping human trafficking victims actually "contradict the TVPA and anti-trafficking policies designed to protect victims."[46] These narrow statutes result in fewer victims that are able to be helped and fewer prosecutions.[47]

Regardless of the implemented state and federal regulations, more can be done to discourage traffickers and help victims.[48] In the United States' 2015 Trafficking in Persons Report, recommendations for the nation are suggested.[49] The report "encourage[s] the adoption of victim-centered policies at the state and local levels that ensure victims, including children, are not punished for crimes committed as a direct result of being subjected to trafficking."[50] Also vital to the suggestions presented in this paper, the recommendations included an "increase in training, including in the U.S. insular areas, on indicators of human trafficking and the victim-centered approach for criminal and juvenile justice officials[…]."[51] It is clear that any current legislative, social, etc. measures that are being taken globally and domestically are inadequate, given the statistics regarding human trafficking and the recommendations made within the State Department's report.[52] Additionally, many of the measures taken by the United States only seek to provide assistance and aid to victims, rather than aim to facilitate convictions and locate traffickers.[53]

[46] Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 16 UTAH L. REV. 535, 545 (2016).
[47] *Id.* at 546.
[48] *Trafficking in Persons Report*, *supra* note 18, at 353.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 354-355.

b. The United Nations Convention Against Transnational Organized Crime and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children

The international community has also taken steps to combat the human trafficking epidemic.[54] As part of the United Nations Convention against Transnational Organized Crime, the U.N. added the Protocol, which went into effect on the 25th of December 2003.[55] The primary purpose of the TOC Treaty is to promote international cooperation in preventing and combatting transnational organized crime.[56] To supplement the TOC Treaty, the Protocol was added to specifically protect human trafficking victims, particularly women and children.[57] Specifically, the Protocol includes provisions urging States to adopt measures that assist victims in legal proceedings and ensure their protection.[58]

Despite the valiant effort by member countries of the United Nations, the TOC Treaty and the Protocol,[59] lack efficiency.[60] The definitions adopted by the United Nations remain in conflict with the definitions of terms such as 'crime,' 'organized,' etc., adopted by member nations.[61] The varied definitions lead to ambiguities and questions regarding how the TOC Treaty should be implemented and to what extent.[62] Unfortunately, implementation had lacked

[54] Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUMAN RIGHTS L. REV. 143, 151 (2011).
[55] *United Nations Convention against Transnational Organized Crimes (with protocols)*, Audiovisual Library of Int'l L., http://legal.un.org/avl/ha/unctoc/unctoc.html.
[56] United Nations Convention, *supra* note 4, at 5.
[57] *Id.* at 42.
[58] *Id.* at 45.
[59] K. Baer, *The Trafficking Protocol and the Anti-Trafficking Framework: Insufficient to address exploitation*, 4 ANTI-TRAFFICKING REV. 167, 167 (2015).
[60] Paulo Pereira, *The UN Convention Against Transnational Organized Crime and its Ambiguities*, (Oct. 25, 2013), http://www.e-ir.info/2013/10/25/the-un-convention-against-transnational-organized-crime-and-its-ambiguities/.
[61] *Id.*
[62] *Id.*

effectiveness.[63] Similarly, the Protocol seeks to create a definition of 'human trafficking'[64] A consistent definition would "arguably promote[] international standardisation and accountability, presuming States are party to the Protocol, and adopt and incorporate a definition proffered by national legislation."[65] In actuality, States have discretionarily defined 'human trafficking' and selectively implemented human trafficking legislation.[66]

The Protocol was enacted primarily as a law enforcement instrument but also serves to ensure and improve measures aimed at protecting and helping victims.[67] For example, the Protocol urges States to adopt measures to ensure victims have access to information regarding their legal rights, assistance during any legal proceedings, and translators to assist them.[68]

President George W. Bush signed the TOC Treaty and the Protocol on December 13, 2000 and subsequently submitted it and a message to the Senate[69] on February 23, 2004.[70] Within his message to the Senate, President Bush made it explicitly clear that the TOC Treaty and the Protocol, with few stated exceptions, was meant to be non-self-executing.[71] When a treaty is ratified, it is by its nature either self-executing, which indicates the treaty can be automatically applied as law and enforced by courts, or non-self-executing, which indicates the

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[63] *Id.*
[64] Baer, *supra* note 59, at 167.
[65] *Id.*
[66] *Id.*
[67] Natalia Ollus, *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel*, 16, 21, http://www.unafei.or.jp/english/pdf/RS_No62/No62_06VE_ Ollus1.pdf.
[68] *Id.* at 24.
[69] The Senate considered the Treaty Document 108-16 and advised and consented to the ratification of the Treaty, along with the two additional protocols. *Text – Resolution and Ratification: Senate Consideration of Treaty Document*, 108-16, https://www.congress.gov/treaty-document/108th-congress/16/resolution-text. The Treaty was ratified on November 3, 2005. Chapter XVIII Penal Matters, United Nations Convention against Transnational Organized Crime (Nov. 15, 2000), https://treaties.un.org/pages/ViewDetails.aspx?src= TREATY&mtdsgno=XVIII-12&chapter=18&clang=_en#EndDec.
[70] Message from the President of the United States, *supra* note 6, at III.
[71] *Id.* at xviii, xxvii, xxxvi.

treaty does not become automatically applicable as domestic law and that the courts cannot enforce them as such, absent Congressional legislation.[72] President Bush, thus, explicitly relayed to the Senate that he believed the TOC Treaty and the Protocol should not be readily judicially enforceable as domestic law.[73]

The power of the courts to interpret laws, codes, treaties, etc. has sparked a continuing dialogue among scholars and commentators as to who the proper authority is to determine the execution status of an international treaty.[74] The Supreme Court's 2008 decision in *Medellin v. Texas*[75] provided some clarity to the self-execution doctrine.[76] In a 6-3 decision, Chief Justice Roberts wrote for the majority stating:

> "The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate.[…] If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented in 'mak[ing]' the treaty, by ensuring that it contains language plainly providing for domestic enforceability[,]'[… which] the Senate must consent to[…]"[77]

The implementation of international treaties into domestic law, regardless of their classification, is the responsibility of the Executive and Legislative branch.[78] Further, the opinion states that it is the courts' "obligation to interpret treaty provisions to determine whether they are self-executing" and that a textual approach should be employed, given that the Senate looks at the

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[72] Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 Yale L.J. 1784, 1786 (May 2011).
[73] Message from the President of the United States, *supra* note 6, at xviii, xxvii, xxxvi.
[74] Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 Am. J. of Int'l L. 540, 540 (2008).
[75] In *Medellin*, a convicted murder from Mexico sought a writ of habeas corpus and raised a claim based on the Vienna Convention, which gave him the right to notify the Mexican consulate. *Medellin v. Texas*, 552 U.S. 491, 501 (2008). During his incarceration, the International Court of Justice decided a case in which it held that the United States had violated the Vienna Convention by failing to inform Mexican nationals, including Medellin, of their Vienna Convention rights. *Medellin*, 552 U.S. at 502. The Supreme Court of the United States granted certiorari to determine if the International Court of Justice decision was binding on state and federal courts. *Id.* at 504.
[76] Bradley, *supra* note74, at 540.
[77] *Medellin*, 552 U.S. at 526.
[78] *Medellin v. Texas*, 552 U.S. 491, 526 (2008).

language of a treaty when determining whether or not to ratify it.[79] Thus, the Court would likely agree with President Bush and the Senate that the TOC Treaty and the Protocol are non-self-executing, excluding the provisions President Bush states should be self-executing, because the President expressly states the self-execution status of the provisions.[80]

Section II – Courts' Ability to Promote and Enforce International Treaties

a. Historical enforcement and promotion

There is much scholarship and judicial support for the notion that any treaty, whether it be self-executing or non-self-executing, is the law of the land, via the Supremacy Clause[81].[82] However, Chief John Marshall rejected this distinction in *Foster v. Neilson* where he stated that there are two avenues to make a treaty enforceable in domestic courts. Either treaties operate directly as domestic law, without any Congressional action or they act as contracts, whereby Congress must execute the treaty, i.e. pass legislation, to give the treaty domestic law effect.[83] However, *Foster* classified the 1819 Treaty of Amity as non-self-executing; four years later, in *United States v. Percheman*, the Court classified the same treaty as self-executing.[84]

The TOC Treaty and Protocol, as it has been discussed, are non-self-executing; thus, they are not judicially enforceable, absent Congressional legislation implementing the TOC Treaty and Protocol.[85] However, given the nature of the TOC Treaty, it is arguably not domestic law,

[79] *Id.*
[80] Message from the President of the United States, *supra* note 6, at xviii, xxvi-xxvii, xxxvi.
[81] The Supremacy Clause states that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land [.]" U.S. CONST. art. VI, § 2.
[82] Leonie W. Huang, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 FORDHAM L. REV. 2211, 2226 (2011).
[83] *Foster*, 27 U.S. at 314.
[84] Huang, *supra* note 82*,* at 2227.
[85] Message from the President of the United States, *supra* note 6, at xviii, xxvii, xxxvi.

but courts can use extralegal[86] sources to influence and motivate their decisions, if they choose to classify the treaty as non-self-executing.

Much of the research into the judiciary's power to promote and further the goals of international treaties is focused on self-executing treaties because courts can interpret and implement standards and procedures those treaties put forth, just as they do with federal, state, and local statutes. However, moving away from the self-executing treaties, it has been argued that there is a shift among common law judges "in judicial orientation toward a more flexible interpretive approach to unincorporated human rights treaties."[87] Courts have developed interpretation techniques to utilize non-self-executing international treaties to incorporate them into domestic law.[88] For example, courts have utilized the *Charming Betsy* canon,[89] which argues that if a statute is ambiguous, courts should interpret the statute in a way that is consistent with international treaties, even when the treaty is non-self-executing.[90]

The *Charming Betsy* canon of interpretation supports the notion that judges can use international law to influence decisions and interpret domestic law. The *Charming Betsy* canon originated in the 1801 Supreme Court case *Talbot v. Seeman*.[91] The *Talbot* case involved the

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[86] Throughout this paper, the term 'extralegal,' meaning outside the law, is used synonymously with 'non-legal.'
[87] Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 635 (April 2007).
[88] *Id.* at 636.
[89] The *Charming Betsy* Canon originated from the Supreme Court case *Murray v. Schooner Charming Betsy*, where Chief Justice Marshall wrote, "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Crootof, *supra* note 72, at 1792. Further, the canon has two rebuttable presumptions: "(1) the 'presumptions that Congress does not intent to pass statutes which violate international law' and (2) the 'presumption that Congress does not intent to pass statutes which violate treaty obligations.'" *Id.* (quoting William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 883 (4th ed. 2007) (citing *Sosa v. Alvarez-Machin*, 542 U.S. 692 (2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).
[90] *Id.* at 1792-93.
[91] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 485 (Jan. 1998); *see Talbot v. Seeman*, 5 U.S. 1 (1801).

seizure of a neutral ship by a U.S. navy captain during the conflict between the United States and France.[92] The Court, working with a 1799 federal statute, stated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."[93] The Supreme Court reaffirmed the canon in the 1804 Supreme Court case *Murray v. The Schooner Charming Betsy*.[94] *Murray* was also concerned with the conflict with France and a seized vessel, pursuant to the Nonintercourse Act of 1800, prohibiting trade with the French Republic.[95] Without referring to *Talbot*, the *Murray* court applied the same logic stating that "[i]t has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains[…]" and that "[this] principle[] [is] believed to be correct, and they ought to be kept in view in constructing the act now under consideration."[96]

Courts have chosen to invoke the *Charming Betsy* canon haphazardly and have utilized international law to decide cases inconsistently with the government's interpretation of statutes.[97] The majority in *Hartford Fire Insurance Co. v. California* upheld the government's position in regards to the statute at issue.[98] The dissenters relied on the *Charming Betsy* canon to interpret the statute contrary to the United States' interpretation.[99] Lower courts have also used the canon to interpret statutes counter to the government's interpretations.[100] International law, including

[92] Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, at 485.
[93] *Id.* at 486; *Talbot*, 5 U.S. at 43 (internal quotations omitted).
[94] Bradley, *supra* note 91, at 486.
[95] *Id.*
[96] *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).
[97] David Sloss, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study, Cambridge University Press,* 28 (2009); Bradley, *supra* note 91, at 486.
[98] *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).
[99] *Id.*
[100] Ingrid Bunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy* Canon, 46 B.C. L. Rev. 293, 342 (Mar. 2005); *See, e.g.*, *FTC v. Compagnie De Saint-Gobain-Pont-a-*Mousson, 636 F.2d 1300, 1326 (1980) (interpreting the FTC Act against the FTC "to ensure conformity with general principles of

treaties, can be applied under the guise of interpretation. Based on the judicial history, it appears that judges use these interpretive techniques in a wide range of circumstances.[101]

In addition to the *Charming Betsy* canon "courts apply the [deference] canon primarily in cases where the U.S. government is a party or an *amicus*."[102] It is clear that courts have broad discretion to incorporate and utilize international treaties when determining a judgment, regardless of how sporadic that occurs. Since courts have utilized international treaties without Congressional legislation explicitly allowing them to do so, it follows that the courts can use the treaties as inspiration when deciding cases.

Courts routinely use outside influences, that is, outside of domestic law, to motivate their decisions. Scholars have concluded, using quantitative and qualitative means, that the Supreme Court responds to the public's opinion.[103] The Supreme Court has and continues to weigh in on many cases regarding important social issues.[104] Legal scholars have continued to contemplate decisions handed down by the Supreme Court in cases like *Roe v. Wade* and, more recent decisions such as, the Court's decisions on the Affordable Care Act, gay marriage, the Voting Rights Act, affirmative action, abortion,[105] etc.[106] Many scholars argue that "in American democracy, public mood (an aggregation of individual policy sentiments) has a statistically

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international law"); *United States v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1464-72 (1988) (interpreting the Anti-Terrorism Act of 1987 to ensure consistency with the United Nations Headquarters Agreement, thus denying the injunction sought by the government); *The Over the Top Schroeder v. Bissell*, 5 F.2d 838, 842-44 (1925) (dismissing a libel suit in part because the government's interpretation of the statute may violate a treaty between the United States and Great Britain).

[101] Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 340-43 (Mar. 2005).

[102] Sloss, *supra* note 97, at 29.

[103] Isaac Unah, Kristen Rosano, & K. Dawn Milam, *U.S. Supreme Court Justices and Public Mood*, 30 J. L. & POL. 293, 340 (Winter 2015).

[104] John Wihbey, *The Supreme Court, public opinion and decision-making: Research roundup*, (June 28, 2013), http://journalistsresource.org/studies/politics/polarization/research-roundup-supreme-court-public-opinion.

[105] Unah, Rosano, & Milam, *supra* note 103, at 340.

[106] Wihbey, *supra* note 104.

significant effect on the voting behavior of individual Justices even though Supreme Court Justices are unelected and therefore unaccountable to the people."[107] Isaac Unah, Kristen Rosano, and K. Dawn Milam qualitatively analyzed the abortion case *Planned Parenthood v. Danforth* to determine the motivations behind the courts' decision to "[strike] down several of the statute's [from Missouri's abortion statute] provisions, including the imposition of criminal and civil liability on physicians performing abortions."[108] The scholars looked at previously gathered data and determined that "[Justice] Blackmun's concern for the Court's relevance on the issue of abortion access indicates that he was indeed attentive to public opinion."[109]

Public opinion is not the only extralegal source that motivates the decisions of justices and judges.[110] Empirical studies suggest that in specific cases the way justices vote may be a function of their ideological preferences.[111] The research suggests that this idea is limited to "decisions in civil rights and liberties cases and, to a lesser extent, economic policy cases."[112] Scholars Segal and Spaeth, while focusing on Fourth Amendment search and seizure cases, found that the ideologies of the justices greatly influence how the justices will vote.[113] During Segal and Sparth's research, when only ideologies were taken into account they were able to accurately predict seventy-one percent of the justices' decisions in all search and seizure cases

[107] Unah, Rosano, & Milam, *supra* note 103, at 295.
[108] *Id.* at 330-331.
[109] *Id.* at 336.
[110] Tracy Lightcap, *Crucial and Routine Decisions: Why Ideology U.S. Supreme Court Decision-Making the Way it Does*, 84 TULANE L. REV. 1491, 1491 (2010).
[111] *Id.*
[112] *Id.*
[113] Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 325 (2002).

from 1962-1998.[114] Recent research suggests the same underlying idea: judges are influenced by their political ideologies.[115]

Miles and Sustein researched ideology influence of panels[116] at the appellate court level "and found panels composed of all Republican judges are more likely to support a conservative pro-employer outcome in cases of labor issues."[117] The same outcome was found when analyzing Democratic panels deciding outcomes liberally.[118] Furthermore, "judges occasionally respond to political pressure from external power centers, such as Congress, the President, state governments, and the general public."[119]

Other extralegal factors have also been shown to influence judges' behaviors.[120] In particular cases, research suggests that a judge's religion is a factor that determines and predicts that judge's decision.[121] For example, Sisk's[122] study concluded "that Muslims, far outside the American religious mainstream, 'may be significantly disadvantaged in asserting free exercise/accommodation claims.'"[123] Additionally, the study found that Catholic and Baptist

[114] *Id.* at 324.
[115] Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347, 377 (2008).
[116] Berdego researched more than 62,000 circuit court cases and found that panels with a Democratic majority was more likely to reach a liberal outcome than panels with a Republican majority. Leanne Marie Hutson, *Non-Legal Factors Influencing Judging in the United States Courts of Appeal in Higher Education Sec Discrimination in Employment Cases*, The University of Texas, 1, 57 (May 2014).
[117] *Id.*
[118] *Id.*
[119] Joondeph, *supra* note 115, at 377-278.
[120] Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 THE J. OF THE AM. JUDGE ASS'N 112, 112-13 (Jan. 1, 2009).
[121] *Id.* at 114-15.
[122] Gregory Sisk conducted an empirical study examined the lower federal courts' decisions in cases dealing with religious freedom issues from 1986 through 1995. Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 Wm. & Mary Bill Rts. J. 43, 50 (2006); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).
[123] Feldman, *supra* note 122, at 51; Sisk, *supra* note 122, at 556.

claimants were significantly less likely to succeed on free exercise/accommodation claims than other claimants.[124]

In the 1940s and 1950s it has been said that to be a professional, one must 'bleach' his or her personal distinctions; in fact, 'bleaching' one's personal ideologies and cultural/religious affirmations is what it means to be a professional.[125] However, society and its values have changed. Realistically, a lot of judges and justices (and politicians) are talking about their faith.[126] It was stated in the 1940s that much harm is done by the myth that judges cease to be human and become "passionless thinking machines."[127] Today, even though every justice has stated that they keep their personal convictions separate from their decision-making, that is not the case.[128] A judge's religion has an effect on how they look at cases and life.[129] Religion is just one of many cultural inspirations, among their upbringing, geography of where they grew up, etc., that affect them.[130] In fact, today, justices are very outspoken about their faiths.[131] What justices have said impacts the way advocates speak to them and act toward them. This is exemplified by the 2014 *Hobby Lobby* case.[132] Former Justice Scalia stated that intellectuals have to be "fools for Christ," whereby, simply put, some cases are just about faith.[133]

[124] Feldman, *supra* note 122, at 51; Sisk, *supra* note 122, at 557.
[125] Newseum Institute, *Video: How Does Religion Impact U.S. Supreme Court Decisions?* (Oct. 30, 2014), http://www.newseuminstitute.org/2014/10/30/video-how-does-religion-impact-u-s-supreme-court-decisions/.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Newseum Institute, *Video: How Does Religion Impact U.S. Supreme Court Decisions?* (Oct. 30, 2014), http://www.newseuminstitute.org/2014/10/30/video-how-does-religion-impact-u-s-supreme-court-decisions/.
[132] *Id.*
[133] *Id.*

Another source of extralegal motivation is the suspected consequences of the decision.[134] "Judicial decisions are influenced by judges' anticipation of the reactions of other actors to judicial decisions, particularly the reactions of other governmental institutions."[135] Evidence for this can be seen by the lack of conflict between the three branches.[136] This, as scholars presume, can be explained by judges' tendency to make decisions that are mainstreamed, rather than taking radical positions. When judges do decide to make radical decisions or statements, they tend to moderate their positions in anticipation of conflicts.[137]

Whether or not these methods that judges employ to render their decisions are favorable or unfavorable, studies suggest that it is a reality. The use of interpretative techniques to further international law, specifically treaties, is at the very least a method that judges can use, and which may be more accepted and legally sound than judges' using their own ideologies. Contrary to the public mood, ideologies, etc., the use of interpretative techniques is grounded in law and judicial precedent. The interpretation canons and the research regarding the influence of the public's opinion show that courts have the ability to use non-judicially binding sources to influence and motivate their decisions. A non-self-executing treaty is similar. A non-self-executing treaty, such as the United Nations Convention against Transnational Organized Crime, is not judicially enforceable absent Congressional legislation; however, it is clear that courts are able to use these sources to aid in rendering a decision and/or creating case law.

b. Courts' Ability Today

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[134] Yao Wu & Olga Yevtukhova, *Influences on Judicial Decision-Making in Federal and Bankruptcy Courts*, Soc. L. Library, 1, 11, http://socialaw.com/docs/default-source/slbook/judgeyoung09/16wu-yevtukhova-paper.pdf?sfvrsn=2.
[135] *Id.*; Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* 5, 191 (Princeton University Press, 2008).
[136] Wu & Yevtukhova, *supra* note 134, at 11.
[137] *Id.*

Courts have a long history of using interpretation techniques that focus on sources separate from written domestic law.[138] The use of judges' abilities to further the goals of the TOC Treaty would be a sufficient avenue in promoting the TOC Treaty because other avenues, such as enacting federal or state law, may be inadequate for a variety of reasons, which are discussed below. Most canons of interpretation are judicially created and give judges methods to interpret statutes in a way consistent with international treaties. The fact the TOC Treaty is non-self-executing begs the question of why Congress cannot simply pass legislation to incorporate the TOC Treaty into domestic law and to combat the issue the TOC Treaty is aimed to cure, i.e. legislation aimed at reducing human trafficking and ensuring protection and safety for victims or legislation that simply mirrors the language of the treaty. However, human trafficking is an international issue that needs to be addressed in a timely manner and as effectively as possible; victims need to be guaranteed help more quickly than it would take Congress to pass a law.

There has been extensive research into the inefficiency of Congress. One Washington Post article referred to the 112th Congress, the Congress that sat from 2011 until 2013,[139] as "[…] a very bad, no good, terrible Congress. It is, in fact, one of the very worst Congresses we have ever had."[140] The 112th Congress had passed the least number of public laws, based on data from Congressional sessions from 1947-2012.[141] The inefficiency of Congress is not subsiding. The current 114th Congress[142] has enacted 228 laws, which includes "enacted bills and joint

[138] Bradley, *supra* note 91, at 505-07.
[139] *Congress Profiles*, HISTORY, ART, & ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, http://history.house.gov/Congressional-Overview/Profiles/112th/.
[140] Ezra Klein, *14 reasons why this is the worst Congress ever*, WASHINGTON POST (July 13, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/.
[141] *Id.*
[142] The 114th Congress' session began January 6, 2015 and is set to conclude on January 3, 2017. *Statistics and Historical Comparison*, Civil Impulse, LLC., https://www.govtrack.us/congress/bills/statistics; *Legislative Agenda for the 114th Congress*, American Veterinary Medical Assoc.'s Governmental Relations Division, (Jan. 13, 2016), https://www.avma.org/Advocacy/National/Congress/Documents/AVMA_Legislative_Agenda_114th_Congress.pdf.

resolutions (both bills and joint resolutions can be enacted as law)."[143] Congress is simply not efficient at passing legislation.

One explanation for this inefficiency is the polarization that exists in a divided Congress.[144] Polarization has been found to "lead to more gridlock and less policy innovation during periods of divided government."[145] Additionally, the minority party in Congress has the means to stall legislation and Congressional progress.[146] For example, the Senate filibuster[147] may be used to stall and inhibit Congress from voting on and passing legislation.[148] Alternatively to stalling legislation, preventing legislation also occurs.[149] Stalling techniques, such as the filibuster, have the potential to lead to Congressional gridlocks.[150] Congressional gridlock is a means of preventing legislation and is seen as a "failure by Congress to make substantive policy decisions."[151]

There is no clear-cut answer as to whether courts expressly have the power to implement and promote the goals and rationales of international treaties, particularly when those treaties are explicitly labeled as non-self-executing. A non-self-executing treaty does not become domestic law until an act of Congress implements the treaty and gives it domestic authority. Thus, case law and scholarly research pertains to the implementation and promotion of self-executing

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[143] *Statistics and Historical Comparison*, Civil Impulse, LLC., https://www.govtrack.us/congress/bills/statistics.
[144] Michael Barber and Nolan McCarty, "Causes and Consequences of Polarization", *Solutions to Polarization in America* eds, Cambridge University Press, 19, 35 (2015).
[145] *Id.*
[146] *Id.*
[147] A filibuster allows the delay or blockage of legislative action by lengthening the debate period. *Filibuster and Cloture*, United States Senate, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm. A filibuster requires a two-thirds majority vote to end a debate, a procedure called cloture. *Id.*
[148] *Id.*
[149] Michael J. Teter, *Congressional Gridlock's Threat to Separation of Power*, 2013 WIS. L. REV. 1097, 1102 (2013).
[150] *Id.* at 1107.
[151] *Id.* at 1102.

treaties. Nonetheless, historical and present evidence suggests that courts routinely make decisions and set precedents based on factors other than written, domestic law, i.e. discretionary interpretation canons and public opinion. Non-self-executing treaties could fall into this category of influences external to the law, particularly given many treatises' weight of having both international and domestic support.

The use of external influences is limited, and should be used sparingly in cases where the law is not clear. In the realm of human trafficking, Congress has not sufficiently combatted a recognized issue of international importance. Courts have the ability to provide assistance and should have the leeway to do so. Furthermore, the TOC Treaty and Protocol have been adopted by the President of the United States and ratified by the United States Senate.[152] The Courts' ability to use interpretive techniques to implement treaties would allow beneficial and crucial practices to be implemented.

Section III – Implementation of the TOC Treaty and Protocol to Aid Human Trafficking Victims

Courts have wide discretion to implement procedures and standards and expand current statues while overseeing a case. Judges can interpret existing laws to be consistent with non-self-executing international treaties. In regard to the Protocol, for example, judges should implement a Human Trafficking Privilege, which would operate similarly to established confidentiality privileges that exist for attorneys and clients and doctors and patients. Judges could do this, for

[152] Message from the President of the United States, *supra* note 6, at III; Chapter XVIII Penal Matters, *supra* note 69.

example, by applying the *Charming Betsy* canon to interpret immigration statutes and current confidentiality statutes to ensure the outcome in cases is consistent with the goals of the Protocol.

Such a privilege already exists, by statute, in California, Washington D.C., and Guam.[153] These statutes could serve as inspiration for what judges should implement. California enacted its human trafficking privilege as part of the California Trafficking Victims Protection Act in 2006.[154] California's statute states that:

> "(a) A trafficking victim, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker if the privilege is claimed by any of the following persons:
>
> (1) The holder of the privilege.
> (2) A person who is authorized to claim the privilege by the holder of the privilege.
> (3) The person who was the human trafficking caseworker at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The human trafficking caseworker who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under this section.
>
> (b) A human trafficking caseworker shall inform a trafficking victim of any applicable limitations on confidentiality of communications between the victim and the caseworker. This information may be given orally."[155]

Whereas no known studies have been conducted to test the correlation between California's human trafficking counselor privilege and its effectiveness, there are some statistics that have been compiled regarding the "number of human trafficking victims who received services as

[153] State Confidentiality Statutes, The Women's Legal Defense and Education Fund, at 3-5, http://www.lsc.gov/sites/default/files/LSC/pdfs/8.%20%20Appendix%20VI%20%20Handout%2030%20State%20Confidentiality%20Chart%207-20.pdf.
[154] *Human Trafficking Legislation*, State of California Department of Justice, https://oag.ca.gov/human-trafficking/legislation.
[155] West's Ann. Cal. Evid. Code § 1038.

reported by the Anti-Trafficking Task Forces[156].[157] There is no empirical evidence that shows correlation between the California statute and the number of victims receiving support; however, using data from 2010 through 2012, there has been a steady increase in the number of human trafficking victims who have received services.[158]

The D.C. code is similar, but defines 'human trafficking counselor' and 'confidential communications' in helpful and thorough ways.[159] Under the D.C. statute, a 'human trafficking counsel,' with some limitations, can be almost anyone who assisted or guided a victim of human trafficking.[160] The D.C. law also places limitations on this privilege.[161] Exceptions to the D.C.'s human trafficking privilege include disclosure that is required by law, the victim voluntarily offering the information or authorizing other individuals to disclose confidential information, disclosure to third parties when those parties are necessary to facilitate the aid to law enforcement to the extent necessary to protect the victim, collecting statistical information, excluding the victim's identifying information, and disclosure of information that is relevant to a legal claim or defense if the victim files an action in a court of law.[162]

Third, and lastly, Guam has a codified protection for human trafficking victims, entitled Human Trafficking Victim-Caseworker Privilege.[163] The Bill that contained the human trafficking statute provides a detailed description of the dire situation victims are in, the immense

[156] The Anti-Trafficking Task Forces are funded by California Emergency Management Agency to compile reports regarding individuals who obtain human trafficking training and other human trafficking statistics. *Victim Centered Approach: Protecting & Assisting Victims of Human Trafficking*, 76, 78, https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/chapter5.pdf.
[157] *Id.*
[158] *Id.*
[159] D.C. Code § 14-311 (2016).
[160] *Id.* at § 14-311(a)(2) (2016).
[161] State Confidentiality Statutes, *supra* at 152, at 15.
[162] *Id.* at 15-16.
[163] *Id.* at 5.

help they deserve and the difficulty victims have of actually finding and receiving aid.[164] The Bill argues that there is a need for the contained initiatives, which was later enacted and includes the trafficking privilege, because victims, especially if trafficked from a foreign country, have a profound fear of law enforcement, yet need to seek assistance.[165] Once these victims are able to seek assistance and comfort "many victims step forward voluntarily and without pressure, to become powerful and confident witnesses."[166] Guam's privilege is aimed at human trafficking professionals who have received specialized training and are employed by an organization that renders aid to human trafficking victims.[167] Additionally, even though Guam's privilege is more detailed, California's statute is a part, verbatim, of Guam's.[168]

Guam seeks, as does Washington D.C. and California arguably, to restore the victim's freedom and dignity and to ensure individuals who have been subjected to a "modern-day manifestation of slavery" that help is available to them.[169] Life, liberty and the pursuit of happiness is an inalienable right that every person deserves and it is the responsibility of states and territories to promote this ideal.[170]

Domestic courts can mimic these codified privileges and create a common law of human trafficking privilege. A privilege such as this would aim to increase the number of victims coming forward and receiving help, guidance, and support. Such support may lead to victims being more confident in speaking out against traffickers. Additionally, "victims can share their

[164] *I mina 'trenta Na Lihesla Turan Guahan*, Bill No. 36 (COR), Reg. Ses. 1, 3 (2009).
[165] *Id.*
[166] *Id.* (quoting *Trafficking in Persons Report*, United States of America Department of State, (July 2007), http://www.state.gov/documents/ organization/82902.pdf.)
[167] 9 G.C.A. § 26.40(c) (2009).
[168] 9 G.C.A. § 26.40 (2009); West's Ann. Cal. Evid. Code § 1038.
[169] Bill No. 36 (COR), *supra* note 163, at 2.
[170] *Id.* at 1.

experiences with a caseworker without fear that the information will be used in court proceedings."[171] In fact, even though the Supreme Court has not determined whether the psychotherapist[172] privilege extends to non-licensed counselors, "some lower federal courts have extended the privilege to non-licensed counselors."[173]

Conclusion

Human trafficking is a problem that has plagued the entire globe. International treaties, specifically the United Nations Convention against Transnational Organized Crime, along with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, aim to combat this problem, help victims, and prosecute traffickers. The existence of Congressional statutes has attempted to combat human trafficking: however, more can be done. Judiciaries have unique abilities: they have the power to make judgments and create common law along the way. Judges should promote and facilitate the implementation of international treaties through these means. Judges cannot recognize a non-self-executing treaty as law, in the sense that an individual cannot bring a claim arising from a non-self-executing treaty. However, judges can still use international treaties as inspiration when establishing procedures and standards. Using, for example, the *Charming Betsy* canon, domestic court judges should promote the Protocol by establishing a human trafficking counsel privilege, or something comparable, which would be consistent with the goals of the United States and the rest of the world.

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[171] *Human Trafficking Issue Brief: Victim Assistance*, Polaris, 1, 2 (Fall 2015), https://polarisproject.org/sites/default/files/2015%20Victim%20Assistance%20Issue%20Brief.pdf.

[172] "Psychotherapist is defined as psychiatrist[s], psychologist[s], and clinical social worker[s]." Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Human Trafficking*, 1, 9 (3d ed. Oct. 13, 2008). Whereas a psychotherapist privilege is not the same thing as a specific human trafficking privilege, it is synonymous enough to be a valid comparison.

[173] Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Human Trafficking*, 1, 15 (3d ed. Oct. 13, 2008).